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D/A 2-4-91
FILED
SID J. WHITE
JAN 9 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

Case No. 76,090
(Consolidated with Case No. 76,803)

DICK LOCKE,

Petitioner,

v.

PAUL M. HAWKES,

Respondent.

______________________________/

PETITIONER'S REPLY BRIEF

On Review from the District Court
of Appeal, Fifth District
State of Florida

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Argument	1
1. THE DISTRICT COURT ERRED IN ASSERTING JURISDICTION TO COMPEL THE PRODUCTION OF LEGISLATIVE PAPERS	1
2. THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF STATUTORY INTERPRETATION THAT CHAPTER 119, FLORIDA STATUTES, HAS APPLICATION TO THE FLORIDA LEGISLATURE	8
Conclusion	14
Certificate of Service	15

TABLE OF CITATIONS

Cases | Page

Chappell v. Florida Department of Health and Rehabilitative Services,
391 So.2d 358 (Fla. 5th DCA 1980)............... 6

Coleman v. Austin,
521 So.2d 247 (Fla. 1st DCA 1988)............... 4

Douglas v. Michel,
410 So.2d 936 (Fla. 5th DCA 1982)............... 4

Gay v. Canada Dry Bottling Company of Florida,
59 So.2d 788 (Fla. 1952)........................ 13

General Petroleum Corp of Cal. v. Smith,
62 Ariz. 239, 157 P.2d 356, 360................. 13

Hillsborough County Aviation Authority v. Azarelli Construction Company, Inc.,
436 So.2d 153 (Fla. 2d DCA 1983)................ 4

In Re Advisory Opinion Concerning The Applicability of Chapter 119, Florida Statutes,
398 So.2d 446 (Fla. 1981).................2,5,9,13

Johnson v. State,
336 So.2d 93 (Fla. 1976).......................2,5

Milton v. Leapai,
562 So.2d 804 (Fla. 5th DCA 1990)............... 5

Moffitt v. Willis,
459 So.2d 1018 (Fla. 1984).......2,3,4,6,7,9,12,13

Other Authorities

AGO 75-282... 9
AGO 77-10.. 9
Art. III, sec. 4, Fla. Const..............1,2,3,6,9,12
Art. III, sec. 4, subsection (e), Fla. Const......... 1
Art. III, sec. 4(a), Fla. Const...................... 2
Art. V, sec. 2, Fla. Const...........................12
Art. V, sec. 20, subsection (i), Fla. Const.......... 2
Ch. 27, Part 1, Fla. Stat............................12
Ch. 28, Fla. Stat....................................12
Ch. 30, Fla. Stat....................................12
Ch. 96, Fla. Stat....................................12
Ch. 119, Fla. Stat.............5,6,7,8,9,10,11,12,13,14

Other Authorities Cont.

Ch. 125, Fla. Stat....................................12
Ch. 195, Fla. Stat....................................12
Ch. 197, Fla. Stat....................................12
Ch. 230, Fla. Stat....................................12
Ch. 286, Fla. Stat.................................... 6
Ch. 372, Fla. Stat....................................12
Fla.H.R.R.P. 1.11..............................2,4,8,9
Sec. 119.011(2), Fla. Stat...........................10
Supreme Court Manual of Internal Operating Procedures,
Section I(C)...................................3,9

POINT I

THE DISTRICT COURT ERRED IN ASSERTING JURISDICTION TO COMPEL THE PRODUCTION OF LEGISLATIVE PAPERS.

The Respondent, Paul Hawkes, begins his Answer Brief by misstating the fundamental constitutional issue presented by this case. The question presented is not, as Respondent urges, whether the legislature may enact a statute that applies to the legislature. Such a characterization is a straw man. The constitutional issue presented to the Court is whether, under the separation of powers doctrine, the judiciary may assert jurisdiction to compel legislative papers in the face of a legislative framework which governs the direction and control of such papers. The misunderstanding of the fundamental issue by Respondent highlights his failure to make even a credible argument in favor of judicial intervention to direct the use and disposition of legislative papers.

As to which branch of government should be the judge of the Legislature's internal processes, Respondent misreads the most recent changes to Section 4 of Article III, Florida Constitution. The last sentence of the newly adopted subsection (e) of Section 4 reads:

> Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section. [emphasis added] (Appendix D to Petitioner's Initial Brief).

Respondent seeks to minimize the import of this sentence by arguing that it applies only to subsection (e) (dealing with open meetings) despite the purposeful use of the term "section",

referring to all of Section 4.[1] The title of the constitutional amendment likewise describes this sentence as pertaining to all of Section 4:

> [Providing] that certain constitutional provisions relating to the Legislature be interpreted, implemented, and enforced solely by the Legislature.

The House of Representatives has invoked this constitutional authority by the adoption of its rule pertaining to the control and direction of its papers.

Respondent's argument directed to the doctrine of separation of powers is contained in pages 6 through 12 of the Answer Brief. Nowhere in these pages does the Respondent come to terms with the three Supreme Court decisions which are dispositive of this case: Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984), In Re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes, 398 So.2d 446 (Fla. 1981) and Johnson v. State, 93 (Fla. 1976). Rather, Respondent blurs the jurisdictional issue by mixing in his argument on statutory construction under the heading of separation of powers. Respondent's failure to deal with the threshold constitutional issue must be taken as a failure to refute the proposition that the control of legislative papers is exclusively a legislative function.

The Respondent seems to argue that legislative policy on legislative papers, including House Rule 1.11, is not a matter of procedure within the intendment of Article III, Section 4(a), Fla.

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[1]The terms "section" and "subsection" are used throughout the constitution with precise meaning. See for example subsection (i) of Section 20, Article V, Fla. Const.

Const., granting each house the power to determine their rules of procedure. From there he reasons that since Article III, Section 4, is not implicated there can be no separation of powers problem. (Significantly, his argument ignores the basis of the district court of appeal ruling on separation of powers, i.e.- that an individual legislator's papers are different somehow than the internal papers of the Legislature).

In arguing against the applicability of the separation of powers doctrine, the Respondent misperceives the meaning of Article III, Section 4, as it pertains to the internal functions of the Legislature. In Moffitt v. Willis, this Court quoted Justice J.B. Whitfield who defined the scope of the Legislature's power as:

> ...extend[ing] to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the constitution. [emphasis added] 459 So.2d at 1018.

The broad meaning of the term "procedure" was further explicated in Moffitt:

> As historically interpreted by this court, this provision gives each house the power and prerogative not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desireable so long as constitutional requirements for the enactment of laws are not violated. 459 So.2d at 1018.

If there be any remaining doubt that the control and direction of papers is a "procedural" function, that uncertainty vanishes when considered in light of the Supreme Court Manual of Internal Operating Procedures, Section I(C) which sets forth which categories of court records are open to public inspection and which

are not.

In accordance with the principles enunciated in Moffitt v. Willis, the House of Representatives adopted House Rule 1.11 entitled "Legislative Records". The Respondent cannot validly be heard to argue that no rule of procedure is involved in this case. Yet he urges just such a head-in-the-sand approach upon the Court. The trial court did in fact have House Rule 1.11 before it (R 441-443) and both parties argued the impact of the rule on the court's jurisdiction (R 489-490, 498-499). (Under Moffitt v. Willis it is not material whether the Petitioner, Dick Locke, produced his records under legislative rule or under legislative policy. The significant fact is that the Florida House of Representatives has implemented its constitutional authority to govern its internal procedures.)

Respondent begs the issue in arguing that access to public records is a substantive right which may not be removed by legislative rule. The issue is whether access to the internal affairs of the legislature will be governed through legislative process in accordance with legislative guidelines or by a process external to the legislature,i.e. the courts. Respondent misses the mark in citing Hillsborough County Aviation Authority v. Azarelli Construction Company, Inc. 436 So.2d 153 (Fla. 2d DCA 1983); Coleman v. Austin, 521 So.2d 247 (Fla. 1st DCA 1988); Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982). None of these cases involved encroachment by one branch of government against another relating to internal records or procedures. However, the

Respondent fails to address the import of the dispositive case. This Court, in <u>In Re Advisory Opinion Concerning The Applicability of Chapter 119, Florida Statutes</u>, 398 So.2d 446 (Fla. 1981), determined that the records and papers of one branch of government, in that case the judiciary, were the exclusive province of the judiciary. If the right of public access under Chapter 119 was deemed "substantive" in the sense that Respondent argues, then that right could not be superseded by a judicially created rule or policy governing judicial papers--including the investigative files of the Florida Bar. Indeed, under Respondent's reasoning (and the district court's decision), <u>all</u> of this court's rules and policies on judicial records must be nullified in favor of the application of Chapter 119. (See partial enumeration contained in Consolidated Case No. 76,803, Petition For Writ Of Prohibition, pages 13 and 14).

The substantive rights of the public under Chapter 119 did not nullify the court's power to control and direct the disposition of Florida Bar files and as shown in <u>Johnson v. State</u>, 336 So.2d 93 (Fla. 1976), the substantive rights of individuals under a statutory expungment scheme did not nullify the court's power to control the disposition of judicial records. Neither do the rights of the public under Chapter 119 nullify the constitutional power of the legislature to control and direct its papers. It is axiomatic that when the substantive aspects of a statute infringe upon the court's duties, the statute must fall in favor of the court rule. <u>See e.g.</u> <u>Milton v. Leapai</u>, 562 So.2d 804 (Fla. 5th DCA

1990); Chappell v. Florida Department of Health and Rehabilitative Services, 391 So.2d 358 (Fla. 5th DCA 1980). Likewise, if the substantive aspects of a statute are deemed to be implicated in a way contrary to a rule setting forth the internal procedures of the legislature, the legislative rule must supersede.

The Respondent argues to the contrary. He posits that each house of the legislature, past, present, and future, lost its constitutional power to interpret, implement and enforce its rules of procedure with the passage of Chapter 119. Respondent fails to address the constitutional infirmity of a process which would require the concurrence of the other legislative house and the Governor (as amendments to Chapter 119 would) in order to exercise direction and control of legislative papers. There is no argument which could save such a process or statute from being contrary to the mandate of Article III, Section 4, Florida Constitution.

Finally, with respect to Moffitt v. Willis, Respondent argues strenuously that the principles articulated there simply do not apply because the Court was not confronted with whether a statute applies. It is true that this Court in Moffitt v. Willis did not reach the merits of the case. However, it was not because constitutional provisions, statutes, and rules were not asserted. The Plaintiffs based their claims upon a host of authorities, including Chapter 286, Florida Statutes, the public meetings law. In the end, the case was not remanded. The absence of jurisdiction was complete, extending to all aspects of the case.

The reason that this Court was not confronted with the effect

of a statute was not because it had not been urged. It did not reach beyond the jurisdictional issue because:

> In our view, a judicial determination of this matter hinges on the meaning of legislative committee meeting and what activity constitutes such a meeting. At this point, the judiciary comes into head-to-head conflict with the legislative rule making prerogative. 459 So.2d at 1018.

The operation of the separation of powers doctrine was activated by this Court's knowledge that further inquiry into the matter would involve a judicial interpretation of an activity which was exclusively within the domain of the legislature. At that point, this Court deferred to the legislature and declared an absence of jurisdiction. Similarly, this case hinges on the exclusive authority of the legislature to define, direct and control its papers. Nevertheless, the district court stated:

> ...this case involves the application of the public records act, Chapter 119, Florida Statutes, to the records in the office of a particular member of a particular legislature, and not to the internal records of the legislature itself...

Neither the district court nor the Respondent cited to any authority which would empower the district court to make distinctions between <u>kinds</u> of legislative records and then use those distinctions as a basis to treat some legislative records differently from other legislative records. In sum, the district court intruded on the legislative prerogative where the court in <u>Moffitt</u> deemed such intrusion constitutionally impermissible.

POINT II

THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF STATUTORY INTERPRETATION THAT CHAPTER 119, FLORIDA STATUTES, HAS APPLICATION TO THE FLORIDA LEGISLATURE.

Respondent opens his argument on statutory construction with two pages of polemic declarations that public access to government records is good public policy. The Petitioner agrees as does the House of Representatives. But that is not the point. The issue is whether Chapter 119 governs access to legislative papers or whether that process is governed by House Rule 1.11 and the legislative process. It is instructive that Respondent in this case sought from the outset to invoke the coercive power of the court. At no time did Respondent seek to invoke the legislative process for acquiring that which he ostensibly sought. He made no request to the Legislature or to any legislator on the basis of legislative policy and following Petitioner's delivery of his voluminous office expense records, (R 10-435), Respondent made no complaint to either the House Committee on Administration, the Joint Legislative Management Committee, the Speaker of the House or any legislative entity that Petitioner's production of records was inadequate or incomplete. Thus, Respondent cannot be heard to argue that he has been deprived of access to legislative records. Respondent's real complaint is that he was unable to choose the method by which he would acquire the Petitioner's office expense records, records which all concerned, including Petitioner, agree should be available for public inspection.

Respondent relies heavily on two dated attorney general

opinions in support of his statutory interpretation argument: AGO 75-282 and AGO 77-10. In AGO 75-282, the attorney general specifically conditioned his opinion upon the absence of a "controlling rule" to the contrary. In order to overcome the attorney general's caveat, Respondent is forced in his Answer Brief to argue that House Rule 1.11 is not inconsistent with Chapter 119. He even goes so far as to assert that Rule 1.11 is a restatement of Chapter 119! As shown in Petitioner's Initial Brief, the statutory scheme and the legislative rule are incompatible. They cannot be reconciled. Just as the method chosen by the Court to govern its records under Section I(C) of the Supreme Court Manual of Internal Operating Procedures, Section I(C), is irreconcilable with Chapter 119, so too is House Rule 1.11.

In AGO 75-282, which dealt with both the open meetings statute and the public records act, the attorney general conditioned his opinion upon subsequent judicial clarification. Thereafter, this court in Moffitt v. Willis and In Re Advisory Opinion Concerning The Applicability of Chapter 119, Florida Statutes determined that 1) it had no jurisdiction to regulate legislative meetings, and 2) as between the legislature and judiciary, the control and direction of papers is within the exclusive domain of the respective branch of government. Thereafter, in 1990, Article III, Sec. 4 was amended to reconfirm and strengthen the power of the legislature to be the sole judge of its internal functions. Thus, reliance on the 1975 and 1977 Attorney General opinions is misplaced.

Respondent repetitiously reminds the Court that there is no

"exemption" in Chapter 119 for legislative records and that the act is designed to cover "all" public records. All true. Respondent's assertions in this regard, however, beg the question. That is, what is a public record? Because the defined term "public records" does not include records of the legislative or judicial branches it would be superfluous (and inappropriate) to have an exemption for such records in Chapter 119. Likewise Respondent's references on page 19 of the Answer Brief to "public officials", "elected officials" and "public officers" all assume the issue. These refer to custodial responsibilities and penal sanctions regarding "public records". They do not assist in ascertaining the meaning of "public records". Similarly, incantations of "all means all" do not facilitate a determination of legislative intent. "All" means all public records, which means records generated or received by a state agency.

If the Legislature and the Judiciary are not agencies within the meaning of Section 119.011(2), then Chapter 119 is inapplicable. Respondent argues, however, that any "state officer" is an "agency". He argues that a state officer does not have to be attached to any unit of government. He argues further it does not matter whether the state officer, i.e. "agency", is created by general law or by the constitution.

Only by contortions of the mind and leaps of logic can such a conclusion be accepted. The key phrase in Section 119.011(2) is

as follows:

> "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law...

That the term "agency" means an entity (as opposed to an individual) is vividly shown by the catchall phrase "or other separate unit of government". The choice of the word "other" shows unequivocally that the preceding enumeration is an enumeration of units of government (not "officers" as Respondent suggests). While not a model of draftsmanship, the definition of the term "agency" in Chapter 119, like the meaning of the term in general usage, refers to components of government and not to persons. The individuals acting on behalf of the units of government are covered by the last phrase of the definition:

> ...and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

The issue then is whether the legislature (and the judiciary) are "units of government created or established by law". Respondent would have the phrase construed in such a way to render it superfluous. The term however has definite meaning and purpose. As shown in Petitioner's Initial Brief, "created by law" means created by legislative enactment. Thus, the Legislature and Judiciary do not come within its meaning because they are created by the constitution. But, Respondent argues, there are other governmental units which are created (or at least referenced) in the constitution which are subject to Chapter 119. The trial court

properly declined to rule on the status of any executive agency not before the court since the issue was not properly before it. (R 494). Nonetheless, Respondent fails to grasp that such other governmental units are "agencies" because they are established by general law. "Established" in this sense means being statutorily given the status of a fully functioning unit of the executive branch or of local government. The offices of state attorneys are established by Part 1 Chapter 27, Florida Statutes; sheriffs by Chapter 30; tax collectors and property appraisers by Chapter 195 and 197; supervisors of elections by Chapter 96; clerks of the court by Chapter 28; county commissions by Chapter 125; school boards by Chapter 230; the game and fresh water fish commission by Chapter 372. All of these executive branch agencies are "established" by general law; that is, they are instituted, implemented and regulated by a statutory framework. None of these agencies has the constitutional power to regulate their internal procedures as do the Judiciary under Article V, Section 2 and the Legislature under Article III, Section 4. For these reasons, executive agencies and units of local government are "established by law", while the constitutionally created judicial and legislative branches do not depend upon a statutory scheme for their establishment.

Respondent ignores the significance of the 1985 amendments to Chapter 119 which, following Moffitt v. Willis, added the words "executive branch" in two places in describing the kinds of records to which Chapter 119 applies. In adding these words, the

legislature was guided by the staff analysis which construed Moffitt v. Willis to mean that 1) Chapter 119 is inapplicable to the legislature and 2) the legislature was empowered to regulate its meetings and records by rule. Even though Respondent may beg to differ with the staff analysis, the important point is that the amendments and the analysis constitute expressions of legislative intent which are unambiguous and may not be ignored. Respondent is simply wrong when he asserts that the amendments to Chapter 119 and subsequent legislative rule making should not be considered as a factor in interpretating the statute. As recited by this Court in Gay v. Canada Dry Bottling Company of Florida, 59 So.2d 788 (Fla. 1952):

> The rule seems to be well established the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of the law. The Court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation. 59 So.2d at 790, [quoting General Petroleum Corp of Cal. v. Smith, 62 Ariz. 239, 157 P.2d 356, 360.]

Accordingly, when the plain words of the statute are coupled with its legislative history and due consideration is given to legislative rule making, the conclusion is inescapable that Chapter 119 was not intended to apply to the legislative and judicial branches.

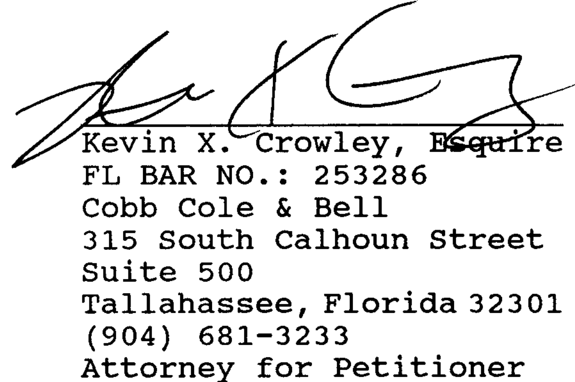
Finally, contrary to Respondent's assertion, this Court in In Re Advisory Opinion Concerning The Applicability of Chapter 119, Florida Statutes, did not hold that Chapter 119 by its terms applies to the Judiciary. Rather, the Court held that if the broad

language contained in Chapter 119 were deemed to include the Judiciary, then the law would be unconstitutional. It is important to note that this Court did not hold that Chapter 119 was unconstitutional as applied. Rather, the Court reasoned that, given its separation of powers analysis, Chapter 119 could not, as a matter of statutory interpretation, be deemed to include the judiciary. Likewise, Chapter 119 may not, as a matter of statutory interpretation, be deemed to include the Legislature.

CONCLUSION

The decision of the District Court of Appeal should be reversed.

Respectfully submitted this 9TH day of January, 1991.



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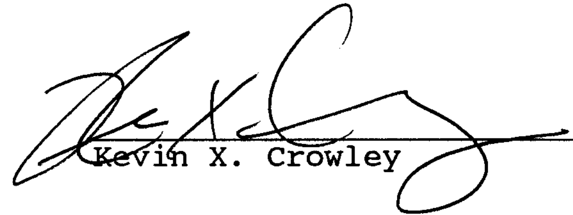
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this 9TH day of January, 1991, to **Charles P. Horn**, Esquire, Hawkes & Horn, 5641 W. Gulf To Lake Highway, Crystal River, Florida 32629; and to **Valerie W. Evans**, Esquire, 1808 Kalurna Court, Orlando, Florida 32806.



Kevin X. Crowley