IN THE SUPREME COURT OF FLORIDA

THE FLORIDA SENATE, and TONI JENNINGS, in her official capacity as a Member of and as the President of the Florida Senate and as a citizen and taxpayer of the State of Florida,

Petitioners,

v. Case No. 95,960

KATHERINE HARRIS, in her official capacity as Secretary of the State of Florida, and ROBERT MILLIGAN, in his official capacity as Comptroller of the State of Florida,

Respondents / Counterrespondents,

and

JEB BUSH, in his official capacity as Governor of the State of Florida, and as a citizen and taxpayer of the State of Florida,

Intervenor-Respondent / Counterpetitioner.
_____/

THE FLORIDA SENATE'S REPLY TO GOVERNOR BUSH'S RESPONSE

The Florida Senate and Toni Jennings, in her official capacity as a member of and as the President of the Florida Senate, and as a citizen and taxpayer of the State of Florida, reply to Governor Bush's Response.

For convenience, both Petitioners will be referred to collectively as "the Senate."

The Governor's Response (omitting his Counterpetition for the moment) in a nutshell says:

(a) Send this case to a Circuit Court or dismiss it outright because there are material issues of fact in dispute,

or in the alternative,

b) the veto is constitutional because the $16,140,000 was calculable, identifiable, and for a specific purpose.

DISCERNING THE APPLICABLE TEST

The decisional law relating to the constitutionality of veto actions lines up on a continuum.

1) At the constitutional end, a Governor clearly can veto any "specific appropriation" and can veto any qualification or restriction and its related appropriation. See *Brown v. Firestone*, 382 So.2d 654 (Fla. 1980). For example, the Governor constitutionally vetoed the 8th and final paragraph of the proviso to Line Item 117C, the 1999-2000 extended school year program, in which he nullified a $500,000 "specific appropriation" and the summer training program related to it.

2) Also located at the constitutional end of the continuum, a Governor may use a calculator as in Veto number 2 addressed in *Florida House of Representatives v. Martinez*, 555 So.2d 839, 840, 844 (Fla. 1990) ("*Martinez II*").

This Court allowed the Governor to subtract the *explicitly specified amount* of $100,000 from the *explicitly specified amount* of $4,000,000 to get the calculated amount of $3,900,000. That was simple arithmetic. The Governor didn't have to make any assumptions, or search through and use any legislative working papers, or rely on any other information that wasn't explicitly stated within the four corners of the enacted budget.

The case law also enumerates the opposite (unconstitutional) end of the continuum.

1) The Governor cannot veto an unidentified portion of a line item appropriation. See *Martinez II* at 840, 844. There, Specific Appropriation 5 in Chapter 89-253, Laws of Florida, was a lump sum for an across-the-board state employee salary increase. Appropriation 5 was followed by a proviso authorizing the Attorney General, out of the $104 million line item, to reward up to eight attorneys in the Department of Legal Affairs with additional salary, above the maximum for their pay grade. Governor Martinez, citing what he saw as the unfairness of giving certain employees extra benefits, unilaterally assigned a value of $361,070 to that proviso.

This Court, in a refinement to the rule in *Brown*, said:

> At the other extreme, however, is proviso language that does not identify a sum of money at all, but merely specifies that some *un*identified portion of the line item

> shall or may be used for particular purposes. Such proviso language lies at the very heart of the legislative power to appropriate funds, as representatives of the people, and to attach qualifications to the use of those funds. Permitting the Governor to veto language of this type would rob the legislature of its authority.

Martinez II at 844.

This Court invalidated the veto because the proviso, *on its face,* did not create an exact amount of money allocated for a specific purpose. While the salaries and benefits of the targeted employees might well have been determined with adequate reference to extraneous materials, such reference was and is prohibited. All information beyond the four corners of the General Appropriations Act would have been, and remains, irrelevant under the law. The veto that is sought to be invalidated in the instant case is identical to the veto invalidated in *Martinez II*, because the proviso language does not enumerate an identifiable sum of money subject to veto.

2) In *Martinez v. Florida Legislature*, 542 So. 2d (Fla. 1989) ("*Martinez I*"), the Governor first vetoed more than 150 "specific appropriations" contained in the General Appropriations Act of 1988. In addition, "[H]e vetoed five portions of specific appropriations." *Martinez I* at 359.

As the basis of his calculations for these five vetoes, the opinion continues, Governor Martinez relied on so-called intent documents including a Summary

Statement of Intent and computerized legislative working papers. This Court determined the obvious: that the intent documents were not enacted into law and were not part of the General Appropriations Bill. Consequently, Governor Martinez's veto of specific dollar amounts of funds identified only in the legislative intent documents (but not on the face of the enactment itself) failed.

From the foregoing decisional law, the following test can be deduced: If a Governor vetoes a specific identifiable sum of money that is contained within the four corners of the enactment, or can be calculated within the four corners of the enactment, then his veto should and will be sustained. If the $16,140,000 had been stated within the four corners of the General Appropriations Act, it would have been vetoable, just as was the $500,000 in the final paragraph of the same line item. If a Governor, however, goes beyond "four corners and a calculator" to consult legislative intent documents (identified in *Martinez I* as D3-A's and the Summary Statement of Intent signed by the legislative budget committee chairmen), the veto will not be sustained.

APPLYING THE TEST

This case presents an even more egregious circumstance than *Martinez I*. In order to ascertain the sum to be vetoed in this case, the Governor used a Senate employee's charts and figures. These figures may or may not have been considered or relied upon by the Legislature during the budget enactment process.

Since the Governor here admits reliance on documents outside the four corners of the Appropriations Act to determine the amount of money vetoed, the veto cannot be sustained.

When preparing to wield his veto pen, the Governor made an educated guesstimate in calculating the $16,140,000.[1] Whether his method was similar to or even exactly the same method used by one or more legislative budget analysts, or

---

[1]The Governor's Response, at p. 7, describes generally, but not fully, how he determined the $16,140,000 amount to veto. The Governor had to calculate a total allocation for extended school year planning grants. This calculation required two data elements, which were: (1) a list of all schools which would qualify to receive planning grants, and (2) the student enrollment of each school. The Governor's Appendix Tab 3 shows that this information was culled by the Governor from a Senate Subcommittee working paper dated April 23, 1999; and/or a Department of Education undated survey, Governor's Appendix pp 31-35. The Legislature established 234 as the maximum number of schools that could receive planning grants. The Governor assumed that all 234 "eligible" schools would decide to commit to the program. The Governor also apparently determined school size using *unweighted* enrollment (student head count) rather than *weighted* enrollment (head count converted to a full-time-equivalent enrollment and adjusted for the cost of education programs to which students are assigned) which the Legislature specified for determination of operational grant amounts. Then, even though he had just nullified and removed the cap of 234 schools from the proviso and opened the program to all of Florida's public schools, he nevertheless based his calculations on the 234 schools listed in his Appendix Tabs 3 and 4. Governor Bush determined that 42 schools would qualify for $120,000 planning grants, 148 schools would qualify for $100,000 planning grants and 44 schools would qualify for $80,000 planning grants, the product of which is $23,360,000. Based on these charts and surveys, the Governor subtracted $23,360,000 from the $39,500,000 left after the legal veto of $500,000 for the summer training program and calculated the $16,140,000 difference, which he vetoed.

by one or more members of the Legislature is not relevant. Once the Governor departed from the four corners of the enactment, the veto was invalid.[2]

JURISDICTIONAL ISSUE RAISED BY GOVERNOR

The essential facts necessary for the Court to decide this case are undisputed. The Petition seeks the application of well-accepted legal principles to an incontrovertible set of facts. This case involves application of rules laid down by this Court, since at least 1980, to the plain text of the enactment and the veto actions of the Governor.

In asking this Court to dismiss this Petition, or to send it to a Circuit Court for fact finding, Governor Bush has submitted a Counterstatement of the Facts in which he has set out a factual dispute where one does not exist, or if it does, it is over facts that are not material.

For example, it makes no material difference whether initially there was $100 million proposed for the extended school year program when first suggested [not in dispute, but not material]; whether the Florida House of Representatives

---

[2]In his motion to extend the time to file his response from July 28, 1999, to August 4, 1999, the Governor cited as his reason that he wanted to have available the August 1st list referred to in the proviso. August 1st was the deadline for each public school, that in February 1999 had indicated an interest in the extended school year program, to have its commitment filed with the Department of Education, along with the approval of its respective school board. August 1st has passed and the Governor has yet to confirm whether his guess as to the veto amount was correct.

rejected the Senate's proposal in its entirety [as stated in the Governor's Response at page 6, not in dispute, but not material]; which house "slashed" it [reference in Governor's Response at page 8--again not material]; in which round of negotiations, or why, or how, or where, or by whom, or when this concept crystallized into the line item amount enacted [not material]; who, where, when, or why the proviso language that was finally enacted came from, or which house's employee made a miscalculation [referenced in Governor's Response at page 8 but not material]; and who did or didn't fix it [referred to in Governor's Response at page 9 but not material]; or what the Senate staff work papers contained or didn't contain [not material]. There are no additional material issues of fact necessary to be found in order to resolve the question of law presented to this Court.

The Governor, on pages 5 and 6 of his Response, offers the legislative history of negotiations leading up to the appropriation as evidence that the appropriation does not say what it says on its face--and he suggests that a fact finder must determine what the words mean. The words of this proviso are not so unclear that a court has to delve into legislative history to interpret them. The ONLY relevant language passed by the Legislature is the proviso that appears in the enactment.

On the issue of jurisdiction, in support of his request that this Court transfer the Senate's Mandamus Petition to a Circuit Judge, Governor Bush, on pages 4

and 13 of his Response, invokes what is apparently the most recent expression of this Court on the issue of discretionary Writ transfer: the case of *Harvard v. Singletary*, 24 Fla. L. Weekly S209 (Fla. May 6, 1999).

Harvard, a state prisoner, filed a pro se Habeas petition after being assigned to a heightened level of confinement at Martin Correctional Institution. Such a case is obviously factually intensive, raising fact questions on what the inmate did and said to whom and when, in order to end up in Close Management. This Court declined to exercise its concurrent jurisdiction and elected to transfer Harvard's Habeas petition to the Circuit Court in Martin County.

Harvard is a Habeas case concerning an issue important to inmate Harvard, but one nevertheless relatively individualized to him, namely, what type of cell or room to which he is confined. In *Harvard*, this Court reaffirmed its "policy of declining to exercise jurisdiction over Writ petitions that do not raise issues which require resolution by this State's highest Court" *Id.* at 210. The instant case does.

More importantly, this Court listed two specific examples of circumstances where it would take jurisdiction; one of which was "*Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980), finding unconstitutional questions surrounding the governor's veto to be an important issue justifying the Court's exercise of discretion. . . ." *Id.* at 210, fn. 3. The *Harvard* Court specifically confirmed, just

three months ago, that a veto challenge by Petition for Mandamus is the type of case that will be heard by this Court.

Accordingly, the Senate requests that this Court retain this case, now briefed and scheduled to be argued in 27 days, and issue its Writ of Mandamus as requested in the Senate's Petition.

Respectfully submitted,

ALAN C. SUNDBERG
Florida Bar No. 097381
211 Wescott Building
Tallahassee, Florida 32306
(850) 644-3300
(850) 644-0172 (facsimile)

CYNTHIA S. TUNNICLIFF
Florida Bar No. 134939
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095
(850) 222-3533
(850) 222-2126 (facsimile)

D. STEPHEN KAHN
Florida Bar No. 99740
408 The Capitol
Tallahassee, Florida 32399-1100
(850) 487-5237 / 487-5800 (fax)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Senate's Reply to Governor Bush's Response has been furnished by hand delivery to counsel listed below, this 12th day of August 1999:

Carol A. Licko
General Counsel
Executive Office of the Governor
Room 209, The Capitol
Tallahassee, FL 32399-0001

Deborah K. Kearney
General Counsel
Office of the Secretary of State
PL-02, The Capitol
Tallahassee, FL 32399-0250

Harry L. Hooper
General Counsel
Department of Banking and Finance
PL-09, The Capitol
Tallahassee, FL 32399-0350

_____
D. Stephen Kahn