IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,104

BENJAMIN U. SANDLIN,

Petitioner,

vs.

CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISISON,

Respondent.

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Upon a request dated June 5, 1985, of the Office of the Sheriff, City of Jacksonville, the Petitioner Sandlin applied to the Criminal Justice Standards and Training Commission for certification of a law enforcement officer. R. at 1. The matter of Mr. Sandlin's application was scheduled to be heard before the Commission on July 25, 1985. At the hearing on the matter, the facts were undisputed. Mr. Sandlin was convicted of the felonies of escape and assault by prisoner other than life on January 7, 1963, and was convicted of the felony of assault with intent to commit robbery on October 20, 1964. On December 10, 1968, Mr. Sandlin was granted a full and complete pardon for these convictions. R. at 20, 79. Mr. Sandlin apparently established before the Commission his laudable work as a court bailiff and his rehabilitation since his release from prison. R. at 50-94(a). However, the Commission held that Mr. Sandlin's felony convictions acted as a complete bar, under section 943.13(4), Florida Statutes, to his certification as a law enforcement officer, notwithstanding his pardon. R. at 44-45. The Commission therefore denied Mr. Sandlin's application. R. at 95-96. A final order to that effect was entered on October 7, 1985.

On October 28, 1985, Mr. Sandlin filed his notice of appeal. Upon review of the final agency action, the First District Court of Appeal filed an opinion on August 11, 1987, affirming the order of the Commission. Sandlin v. Criminal Justice Standards and Training Commission, ____ So.2d ____, 12 FLW 1938 (Fla. 1st D.C.A. 1987). The court held that sections 943.13(4) and

112.011, Florida Statutes (1985) establish a complete bar to the certification of a pardoned convicted felon as a law enforcement officer. The court also held that the Legislature's enactment of these statutes did not constitute an unconstitutional encroachment by the Florida Legislature upon the pardon power vested in the executive branch. The court certified the following question to the Florida Supreme Court, pursuant Article V, Section 3(b)(4) of the Florida Constitution, as a question of great public importance:

> Does a full pardon under chapter 940, Florida Statutes (1985), which restores the civil rights of a person convicted of a felony, relieve the pardoned person from the disqualification from certification as a law enforcement officer imposed by section 943.13(4), Florida Statutes (1985), on a person who has been convicted of any felony?

Judge Ervin concurred with the majority's certification of the question to the Florida Supreme Court and the holding that the applicable statutes were correctly applied by the Commission. Judge Ervin opined, however, that the Legislature's enactment of the cited statutes was an unconstitutional exercise of legislative power, because it encroached upon the exercise of the executive branch's power to issue a full pardon. Id.

SUMMARY OF ARGUMENT

The Criminal Justice Standards and Training Commission and the First District Court of Appeal correctly held that Section 943.13(4), Florida Statutes (1985), which bars convicted felons from certification as law enforcement officers, also excludes pardoned felons. This conclusion is supported by section 112.011 which provides for government discretion to grant or deny certification for employment of felons whose civil rights have been restored except in the case of law enforcement or correctional agency employment. These sections when construed in pari materia establish the Legislature's intent that convicted but pardoned felons may not be certified for employment as law enforcement officers by the Criminal Justice Standards and Training Commission.

The First District Court of Appeal correctly held that it is not an encroachment upon the constitutionally conferred pardoning power of the executive branch for the Florida Legislature to preclude convicted felons from certification as law enforcement officers, simply because such legislation affects convicted felons who have been pardoned. A pardon has a limited scope. The grant of a pardon restores the rights of citizenship, but does not confer a right of public employment. No conflict exists between the executive branch's grant of a pardon and the exclusion of pardoned felons from police work by the Legislature because of the judically held view that the pardon power does not extend to the restoration of qualifications for professional licensure.

I. THE CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION WAS NOT CLEARLY ERRONEOUS IN HOLDING THAT A CONVICTED FELON WHO HAD RECEIVED A PARDON WAS INELIGIBLE FOR CERTIFICATION UNDER SECTION 943.13(4), FLORIDA STATUTES, WHICH PRECLUDES A CONVICTED FELON FROM CERTIFICATION AS A LAW ENFORCEMENT OFFICER.

In the case at bar, the Respondent Commission denied a law enforcement officer certification to the Petitioner Sandlin, because of his status as a convicted felon. The Respondent Commission is charged by the Florida Legislature with the duty of the certification of persons qualified to become law enforcement officers. Sections 943.12(3) and 943.1395(1), Florida Statutes (1985). The Respondent Commission applied section 943.13(4) which provides in relevant part: "... any person employed or appointed as an officer shall ... not have been convicted of any felony ..." The Commission held in the instant case that this section excluded convicted felons from certification regardless of the existence of a pardon and the restoration of civil rights.

The Commission's decision was in deference to the expressed intent of the Florida Legislature in such cases. In section 112.011, Florida Statutes (1985), the Legislature set forth its intentions regarding government employment of persons with criminal records. In subsection (1)(a) the Legislature declared that a person shall not be denied public employment solely because of a prior conviction of a crime, but may be denied if the crime was a felony or a first degree misdemeanor which directly related to the position in question. Subsection (1)(b) addresses itself to the eligibility of persons with criminal

convictions for a state-issued professional certification whose civil rights have been restored, where such certification is a legal prerequisite for employment. The subsection provides:

> A person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade,vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person who has had his civil rights restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought. (Emphasis supplied.)

Were the inquiry to end here, the Petitioner Sandlin's argument that the Respondent Commission had the discretion to issue him a certification in spite of his pardoned felony conviction would have merit. However, the following subsection removes from the Commission any discretion in cases such as was presented here. Subsection (2)(a) states:

> This section shall not be applicable to any law enforcement or correctional agency.

A fundamental principle of statutory construction is that statutes in pari materia are to be applied together. Sections 943.13(4) and 112.011, when construed together, lead to the conclusion that a pardoned felon whose civil rights have been restored may not be state-certified as a law enforcement officer.

The Petitioner's reliance in his brief upon certain quoted dicta in Calhoun v. Department of Health and Rehabilitative Services, 500 So.2d 674 (Fla. 3rd DCA 1987) is misplaced. There, the Third District Court of Appeal upheld a refusal by HRS to renew a child day-care operator's licence, because the applicant had been convicted of certain drug-related felonies. The court observed that should the applicant obtain a restoration of her civil rights, section 112.011(1)(b), Florida Statutes (1985) would grant HRS the discretion to consider issuing her a license to operate a day-care center. A reading of section 112.011(2)(a) makes it quite clear that such would not be the case were Ms. Calhoun to apply for certification as a law enforcement officer.

The Petitioner Sandlin pointed out in his brief that section 943.13(4) provided that persons who have pled guilty or nolo contendere or who have been found guilty of a felony are not eligible for certification " ... notwithstanding suspension of sentence or withholding of adjudication." The Petitioner argues that since the Legislature failed to also specify a pardon and the restoration of civil rights as "notwithstanding" as well, the rule of statutory construction expressio unius est exclusio alterius dictates that a convicted, but pardoned felon must be entitled to certification. However, the Petitioner did not consider section 112.011 in his analysis. That provision makes clear that, in the case of law enforcement certification, the restoration of civil rights to a convicted felon has no effect over that person's disqualification for certification. Accord-

ingly, the Petitioner's statutory construction argument must fail.

It is also important to note that the existence of a pardon does not legally erase the fact of a conviction. This court quoted with approval Corpus Juris in Page v. Watson, 192 So. 205 (1938), to establish this rule.

> ... a pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as had been tensely said; it involves forgiveness and not forgetfulness. (Emphasis supplied.)

The Commission correctly applied this principle in holding that, for purposes of section 943.13(4), the Petitioner Sandlin was yet a convicted felon, though pardoned, and therefore per se ineligible for certification. The Commission's predecessor, the Police Standards Council, had been advised in 1970 in an Attorney General Opinion as to the issue at bar:

> ... so long as a conviction stands, the person convicted is not eligible for employment as a police officer, regardless of whether the pardon is granted by Florida or a foreign jurisdiction.

A.G.O. 070-157, Biennial Report of the Attorney General, 1969-1970, p. 388.

This court has previously cited with approval the rule that

> The administrative construction of a statute by the agency charged with its administration is entitled to great weight. We [the Florida Supreme Court] will not overturn an agency's interpretation unless clearly erroneous.

Department of Insurance v. Southeast Volusia Hospital District, et al., 438 So.2d 815, 820 (Fla. 1983).

The First District Court of Appeal, in its opinion below, correctly held that the Commission was not clearly erroneous in its holding. On the contrary, the majority and Judge Ervin in dissent were in full agreement that sections 943.13(4) and 112.011, when viewed together, clearly established a complete bar to the certification of a convicted felon, even if pardoned, and left the Commission no discretion to issue a certification in such a case. Sandlin v. Criminal Justice Standards and Training Commission, ___ So.2d ___, 12 FLW 1938 (Fla. 1st DCA, August 11, 1987).

The Respondent Commission does not quarrel with the Petitioner Sandlin's insistence that the record below demonstrates that he is of good moral character. Indeed, had Mr. Sandlin's conformance to the statutory requirement of good moral character, as provided for in section 943.13(7), Florida Statutes, (1985) been the issue below, a different result might well have been obtained. However, the Petitioner's assertion of his qualification under section 943.13(7) sheds little light on the issue at bar, which is his lack of conformance with section 943.13(4).

For the reasons set out above, this court should also hold that the Commission applied the cited statutes correctly.

II. THE LEGISLATURE'S DISQUALIFICATION OF A PARDONED FELON FOR CERTIFICATION AS A LAW ENFORCEMENT OFFICER, AS REQUIRED BY SECTIONS 943.13(4) AND 112.011, FLORIDA STATUTES (1985), IS NOT AN UNCONSTITUTIONAL ENCROACHMENT UPON THE PARDON POWER VESTED IN THE EXECUTIVE, BECAUSE A PARDON'S EFFECT IS LIMITED AND DOES NOT INCLUDE RESTORATION OF QUALIFICATIONS FOR ADMINISTRATIVE LICENSURE.

At the outset, the Commission agrees with the Petitioner Sandlin that Article IV, Section 8(a) of the Florida Constitution vests pardon powers in the executive branch alone. Furthermore, the Florida Constitution provides in Article II, Section 3, that no branch of government may exercise the powers of another branch and thus establishes a separation of powers. An attempt by the legislature to encroach upon the powers of the executive branch would be a violation of Article II, Section 3, and therefore unconstitutional. In Re Advisory Opinion of the Governor, 306 So.2d 561 (Fla. 1975).

It is upon the precise effect and extent bestowed by a pardon that the parties herein differ. The applicable case law teaches that, while a pardon does have a broad impact to be sure, its effects are limited to those disabilities which are directly tied to a felony conviction. Lack of eligibility for administrative licensure, is not a direct consequence of such a conviction. It is the judicial determination of a limitation upon the scope of a pardon which avoids the conflict between the legislative and executive branches argued by the Petitioner.

In 1938, this court decided the case which remains as the rule of law in issues such as that presented in the case at bar. In Page v. Watson, 192 So. 205 (Fla. 1938), the State Board of

Medical Examiners sought to revoke the license of a physician. The physician, subsequent to his licensing, was convicted of a felony. The Board of Medical Examiners sought revocation under a licensing statute which provided for the revocation of a physician's license for conviction of a felony. However, the physician defended on the argument that he had obtained a full and complete pardon as to the felony conviction and therefore revocation on the basis of the conviction alone was barred.

This court examined the issue of the effect of a pardon upon a convicted felon's non-compliance with a state licensure statute which disqualified convicted felons. The court explained the limited effect of a pardon thusly:

> The modern trend of authorities generally accepted by the courts is that a pardon restores one to the customary civil rights which ordinarily belong to a citizen of the State, which are generally conceded or recognized to be the right to hold office, to vote, to serve on a jury, to be a witness, but it does not restore offices forfeited, nor property or interests vested in others in consequence of conviction.

Id. at 207, 208. The court also examined previous U.S. Supreme Court case law which indicated that regulatory legislation excluding felons from some professions was not viewed as the imposition of an additional penalty upon the convicted person, but as merely prescribing qualifications for the profession. Id. at 209. The court held that the physician's pardon was no defense to a revocation proceeding based upon a statute which provided for license revocation should a physician become a convicted felon.

In denial of a motion for rehearing, this court reiterated its view that a pardon restores the rights of citizenship, but its effect is limited and does not affect eligibility for state-issued professional licensure.

> The rights of citizenship do not include a right to practice medicine. ... The pardon restored petitioner's rights of citizenship, but did not restore or affect his qualifications or his character, or exempt him from the enforcement of the statute authorizing his license to practice medicine be "revoked, suspended, or annulled, or such practitioner reprimanded upon the ... grounds" stated in the statute. (Emphasis supplied.)

Id. at 211. The statutory "grounds" the court referred to were the same as are presented in the case at bar: the conviction of a felony. The court also alluded to the fact that the conviction of a felony, even if pardoned, would produce the same result were the conviction and pardon to have occurred prior to licensure, as was the case with the Petitioner Sandlin. Id. at 211.

Page teaches that, in the opinion of this court, a pardon is not all-encompassing. It is limited in scope to the restoration of the rights of citizenship, which do not include administrative licensure by the state. This court reaffirmed its view of a pardon as the restoration of certain enumerated "customary civil rights" in Marsh v. Garwood, 65 So.2d 15, 19 (Fla. 1953). This court acknowledged that there exists no constitutional right to be hired by the government and no "organic right to be a policeman" in Headley v. Baron, 228 So.2d 281 (Fla. 1969). The Petitioner Sandlin's pardon herein restored his rights as a citizen of the State of Florida. Section 943.13(4)'s exclusion of

convicted felons is not an additional penalty imposed as a consequence of conviction nor is state certification as a law enforcement officer an organic right or a right of citizenship. Therefore, the governor's exercise of the pardon power cannot, as a matter of law, extend to the Petitioner's disqualification under section 943.13(4). Consequently there can be no conflict between the pardon herein and the cited statutes upon which to base a separation of powers violation.

The Petitioner Sandlin relies in his brief upon Rule 5A of the Rules of Executive Clemency of Florida in an effort to demonstrate the broad effect of a full pardon and its argued conflict with section 943.13(4). His reliance upon this rule, however, is perilous at best. An examination of Title 27 of the Florida Administrative Code reveals that the cited rule is to be found in an appendix to the title. The editor prefaces the text of the Rules of Executive Clemency with the caveat that the rules are not regulated by the Administrative Procedure Act, Chapter 120, Florida Statutes. Furthermore, the editor adds, the rules are not binding upon the Governor nor the Cabinet. The reference to the rules as such is apparently somewhat of a misnomer. The editor concluded as much in his comments by stating that the rules appeared in the Administrative Code as "guidelines for applicants." This court expressed its opinion that the Administrative Procedure Act had no applicability to the constitutionally conferred pardon power vested in the executive. In Re Advisory Option of the Governor, 334 So.2d 561 (Fla. 1976).

While the Commission does not suggest that the Rules of Executive Clemency are a complete nullity, their influence in the overall resolution of the case at bar should be de minimis. If the rules do not have the force and effect of duly enacted administrative rules and therefore do not bind the executive branch in the exercise of its clemency power, they should be considered not to be binding upon this court.

The text of Rule 5A, if considered in light of the court's ruling in Page (supra), does little to advance the Petitioner's cause. The rule purports to define a full pardon as the restoration of the rights of citizenship and the absolution from all legal consequences of a conviction. Page makes it clear that administrative licensure is not a right of citizenship and disqualification of convicted felons from consideration is not a penalty for conviction. Such a disqualification could best be described as a collateral consequence of the conviction.

The Petitioner cited the decisions of the Iowa and Massachusetts courts to support his position. This court should hold, as did the First District Court of Appeal below, that the Respondent Commission's decision should not be reversed on the strength of the decisions of the courts of other states. It is worthwhile to note, however, that other persuasive authority exists which supports the conclusion reached by the First District and the Commission. In U.S. v. Matassini, 566 F.2d 1297 (5th Cir. 1978), the court examined the issue of whether a pardoned Florida felon could be prosecuted under a federal criminal law which made it unlawful for a convicted felon to

possess a firearm. The court held that the criminal charge was properly dismissed, however, the court conceded that a Florida pardon might not pave a felon's way toward occupational qualification and licensing. Furthermore, a pardon would not "exempt [Matassini] from the administrative procedure established by Title IV for licensing purposes."

In Dixon v. McMullen, 527 F.Supp.711 (N.D. Texas 1981), the court concluded that a pardoned felon was not eligible under a Texas law enforcement officer certification statute which barred convicted felons. The court recognized that under Texas law a pardon had a limited effect and did not qualify a convicted felon under the statute. See also: Morris v. Hartsfield, 197 S.E. 251 (Ga. 1938), Hugues v. State Board of Medical Examiners, 142 S.E. 285 (Ga. 1928), Eberhart v. Robbins, 25 N.Y.S.2d 336 (1941), Baldi v. Gilchrist, 204 App.Div. 125, 198 N.Y.S. 493 (Sup.Ct.App.Div. 1923), In Re Naturalization of Quintana, 203 F.Supp. 376 (S.D. Fla. 1962). State v. Irby, 81 S.W.2d 419 (Ark. 1935), Hunter v. Port Authority of Allegheny County, 277 Pa. Super.4, 419 A.2d 631 (Pa. Super Ct. 1980).

The Respondent would urge this court not to overrule Page v. Watson and the principles enunciated therein and thereby hold that public employment and government licensure are among the civil rights denied upon conviction and restored upon the issuance of a pardon. Were this court to so hold, the implications of such a view would have broad implications. Contrary to the Petitioner's assertions that the state would have the discretion to consider his application under such a view, the state would be

forbidden to refuse employment or licensure on the basis of a pardoned felony conviction. For the same reasons that the state has no discretion to turn a pardoned felon away at the polls or refuse him jury service, the statutory discretion in section 112.011(1)(b) to deny pardoned felons on the basis of the conviction would be swept away.

The Petitioner Sandlin argued in his brief that pardoned felons have been held previously by this court to be eligible for admission to the Florida Bar. In Re Florida Board of Bar Examiners, 183 So.2d 688 (Fla. 1966), In Re Admission of Previously Convicted Felons, 341 So.2d 503 (Fla. 1976), In Re Florida Board of Bar Examiners, 350 So.2d 1072 (Fla. 1977). The Petitioner suggests that the same result should be obtained in the case of law enforcement officers. This court decided the cited cases under the authority established by Article V, Section 15 of the Florida Constitution to regulate the admission of attorneys to the practice of law. However, the issuance of licenses for the practice of other professions is an executive function under criteria established by the Florida Legislature pursuant the police power. Article IV, Section 6, Florida Constitution. As the First District Court correctly observed below, the wisdom of the Legislature's restrictions upon admission to a profession is not an issue for judicial determination. Sandlin (supra).

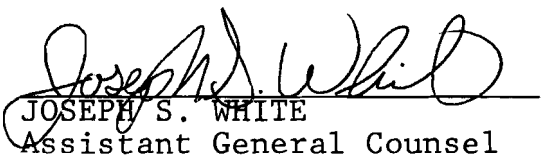
While it is true that the proper application of the law in cases such as was presented here may work a harsh result, the Petitioner Sandlin should not seek relief from the judiciary for his denial of a law enforcement officer certification. The

proper forum to hear Mr. Sandlin's grievance is the Florida Legislature. This court should hold that the record below and the controlling case law dictate a finding that no violation of the separation of powers doctrine occurred by the Legislature's exclusion of pardoned felons from certification as law enforcement officers.

CONCLUSION

The Respondent, Criminal Justice Standards and Training Commission, submits that, based on the foregoing, the opinion of the First District Court of Appeal filed in this cause should be affirmed and the order of the Criminal Justice Standards and Training Commission denying the Petitioner Benjamin U. Sandlin's application for certification as a Florida law enforcement officer should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF RESPONDENT has been furnished by U.S. Mail to ELIZABETH L. WHITE, Esq., and WILLIAM J. SHEPPARD, Esq., Sheppard and White, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 27th day of October, 1987.

JOSEPH S. WHITE