IN THE SUPREME COURT
OF FLORIDA

CASE NO: 71,104

BENJAMIN U. SANDLIN,

Appellant,

vs.

CRIMINAL JUSTICE STANDARDS AND
TRAINING COMMISSION,

Appellee.

# REPLY BRIEF OF APPELLANT

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The appellant, Benjamin U. Sandlin, will be referred to herein as the "appellant" or "Mr. Sandlin." The appellee, Criminal Justice Standards and Training Commission, will be referred to as "appellee" or the "Commission." References to the Record on Appeal will be designated "R.", followed by the appropriate page numbers set out in brackets.

## POINTS ON APPEAL

I.

SECTION 943.13(4), FLORIDA STATUTES (1985), AS INTERPRETED BY THE FIRST DISTRICT COURT OF APPEAL TO DISQUALIFY A CONVICTED FELON WHO HAS RECEIVED A FULL PARDON FROM LAW ENFORCEMENT CERTIFICATION, VIOLATES ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

II.

SECTION 943.13(4), FLORIDA STATUTES (1985) SHOULD NOT BE INTERPRETED TO BAR A CONVICTED FELON WHO HAS RECEIVED A FULL PARDON FROM CERTIFICATION AS A LAW ENFORCEMENT OFFICER IF HE OTHERWISE ESTABLISHES HIS GOOD MORAL CHARACTER.

## ARGUMENT

### I.

SECTION 943.13(4), FLORIDA STATUTES (1985), AS INTERPRETED BY THE FIRST DISTRICT COURT OF APPEAL TO DISQUALIFY A CONVICTED FELON WHO HAS RECEIVED A FULL PARDON FROM LAW ENFORCEMENT CERTIFICATION, VIOLATES ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

In its answer brief, appellee concedes that any legislative attempt to encroach upon the pardon power of the Governor would represent a violation of the separation of powers doctrine contained in Article II, Section 3 of the Florida Constitution. It argues, however, that since the refusal to grant licensure because of a felony conviction, which has been pardoned, is not a "direct consequence" of such conviction, no violation of this doctrine has occurred. [Appellee's brief at p. 6]. As discussed more fully below, however, this argument has been rejected by the two courts that have considered the issue and ignores the simple fact that but for the pardoned felony conviction, appellant would be entitled to licensure as a law enforcement officer.

Appellee also argues that appellant is requesting this Court to overrule to the reasoning of Page v. Watson, 190 Fla. 536, 192 So. 205 (Fla. 1938). To the contrary, the reasoning of the Page decision supports, rather than conflicts with, appellant's position. In Page, a licensed physician was convicted of a felony and subsequent action was brought by the medical board to revoke his license. Id. at 206. However, prior to the proceedings brought by the board, the physician was granted a full pardon. The physician argued that the pardon was a full and

complete defense which acted as a bar to the proceedings to revoke or annul his license. The Court held that the pardon granted did not act as such a bar to the proceedings filed before the board. Id. at 210.

This is not the argument of appellant in the instant case. First, appellant is not a licensed policeman seeking to halt proceedings to revoke his license. Second, appellant is not arguing that he should be automatically licensed because of his pardon. Rather, appellant is arguing that he should not automatically be refused consideration based on a felony conviction, for which he has been fully pardoned. Appellant submits that the conduct which led to the conviction, may be used in the evaluation of his good moral character. In the present case, however, the Commission itself agreed that appellant is of good moral character [R. 40-45, 96].[1/]

The determination of good character and the board's ability to require it was central to the Page decision. This Court stated:

> The effect of a pardon should not be construed or extended to strike down the statutes of Florida requiring moral

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1/ In this respect, appellant challenges appellee's assertion that if this Court adopts appellant's position, "...the state would be forbidden to refuse employment or licensure on the basis of a pardoned felony conviction." [Appellee's brief, at p. 11-12]. To the contrary, all applicants must establish that they are of good moral character. See, §943.13(7), Fla. Stat. (1985). Thus, in its discretion, the Commission could exclude a pardoned convicted felon on the grounds that he lacks good moral character, with the burden being on the applicant to establish such character. Acceptance of appellant's position, therefore, would not remove any discretion from the Commission's ability to deny licensure.

> qualifications to receive a license to practice medicine in Florida...

Id. at 210. This Court further declared:

> The question is whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion.*** It is not by way of punishment; but the Court in such cases exercise their discretion whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.

Id. at 209. Finally, upon denial of rehearing, the Court held that the felony conviction of the physician showed bad moral character and affected his qualities as a practitioner of medicine. Id. at 211.

In Page, this Court was focusing on the conduct of the physician. The conclusion of this Court was that a full pardon does not mean that the conduct never occurred, and thus, does not place the conduct beyond the reach of the board to effectively prohibit the state from ever revoking the license of a convicted felon who has been pardoned. It is evident throughout the opinion that the court's intention was to keep morally unqualified persons from the practice of medicine.

The Page decision, however, does not authorize or condone the refusal to certify appellant, herein. It is not appellant's intention to use his pardon to take away the power of the state to keep morally unqualified persons from becoming law enforcement officers. Furthermore, a decision in favor of the appellant will not have such an effect. The citizens of this state will be fully protected from morally unqualified law enforcement officers by §943.13(7) Fla. Stat. (1985). The Commission will be free to

consider the conduct of the applicant which resulted in his conviction and then to determine for itself if the applicant has satisfied their requirement of good moral character. This approach is the logical one when the statute is read as a whole.

In addition, although appellee implies Marsh v. Garwood, 65 So.2d 15 (Fla. 1953) supports its restrictive construction of the legal effect of a pardon, Marsh is not so restrictive. While Marsh does refer to the restoration of "customary civil rights, it also states, "...when [a full pardon is] granted after his time of imprisonment has expired, it moves all that is left of the consequences of his conviction - his disabilities, and restores him to customary civil rights." Id. at 19 (emphasis added). Similarly, in Singleton v. State, 38 Fla. 297, 21 So. 21 (Fla. 1896) a seminal case conveniently ignored by appellee, this Court specifically held:

> When the pardon is full, it remits the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense." This has been approved in an opinion of the justices of this court. Advisory Opinion to Governor, 14 Fla. 319. It is settled law that the pardon of an offense not only blots out the crime committed, but removes all disabilities resulting from the conviction. "Imprisonment and hard labor are not the only punishments which the law inflicts upon those who violate its commands. Besides these are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. A pardon is supposed to be granted to one who has been improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effect would only be a halfway relief. The doctrine, now well recognized, upon this subject, is that a pardon gives to the person in whose favor it is granted a new

> character, and makes of him a new man. When extended to him in prison, it relieves him, and removes his disabilities. When given to him after his time of imprisonment has expired, it removes all that is left of the consequences of conviction - his disabilities." State v. Baptiste, 26 La. Ann. 134.

Id. at 22 (emphasis added). Singleton is controlling in this case, yet appellee has made no effort to address it.

Likewise, appellee has failed to address numerous cases cited by appellant which set forth the boundaries of the Governor's pardon power. See e.g., Sullivan v. Askew, 348 So.2d 312, 315 (Fla. 1977);[2/] In Re Advisory Opinion of the Governor, In Re: Administrative Procedure Act, 334 So.2d 561, 562-563 (Fla. 1976); In Re Advisory Opinion of the Governor, Civil Rights, 306 So.2d 520, 521 (Fla. 1975). These cases stand for the proposition that no other branches of government may interfere with the Governor's pardon power. Appellee does not attempt to distinguish these cases because it cannot do so.

Likewise, appellee can offer no valid reason to reject this Court's line of cases which hold that a felony conviction which has been the subject of a full pardon cannot automatically disqualify an applicant seeking admission to the Bar. See e.g., In Re Admission of Previously Convicted Felons, 341 So.2d 503 (Fla. 1976); In Re Florida Board of Bar Examiners, 183 So.2d 688

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2/ Appellee attempts to make much of the fact that the Administrative Procedures Act does not apply to executive clemency. The reason this Act is inapplicable is that its application would represent legislative encroachment upon the Governor's pardon power. Thus, the fact that this Act is inapplicable to the executive clemency process supports, rather than weakens appellant's position herein.

(Fla. 1966). Certainly there is no logical difference between police officers and attorneys - both are officers of the court, placed in positions of trust and responsibility. Appellee's argument that attorneys should be treated differently (and more favorably) merely because this Court regulates attorneys, while the executive regulates licensure,[3/] is nonsensical in light of the fact that the executive also is charged with the responsibility of granting pardons. If the executive both grants pardons and issues licenses as stated by appellee, the legislature should not be permitted to usurp these functions by means of a statute designed to limit the executive power.

Appellee's reliance on Dixon v. McMullen, 527 F.Supp. 711 (N.D. Tex. 1981) is misplaced. In Dixon, a federal district court held that a pardon had no effect on a convicted felon's disqualification as a police officer. Id. at 724. However, at the time of Dixon, Texas law also held that a prior conviction for which a full pardon was granted could be used for purposes of impeachment, habitual offender laws, and to show possession of a firearm by a convicted felon. Essentially, in Texas, a pardon nonetheless subjected the person pardoned to all legal impediments of a convicted felon. Needless to say, Florida law has progressed beyond that point.

Appellee's suggests that because there is no "organic right" to be a policeman, the legislature can enact legislation to

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3/ Appellee's brief, at p. 12.

restrict that right. Similarly, there is no "right" to be a lawyer, a doctor or any other occupation. Once the State, through its licensure provisions, permits individuals to engage in such occupations, however, it cannot withhold licensure of those occupations for unconstitutional reasons. Thus, while there is no right to be an attorney, once attorneys are licensed, they cannot lawfully be excluded because they are black, or are women - or are convicted felons who have received a pardon.

Appellee is correct that the First District Court of Appeals was not legally bound to follow the reasoning of Slater v. Olsen, 230 Iowa 1005, 299 N.W. 879, 881 (Iowa 1941) or Commissioner of the Metropolitan District Commission v. Director of Civil Service, 203 N.E.2d 95 (Mass. 1964). The reasoning of those cases, however, is both persuasive and logical and should be adopted by this Court. As in those cases, this Court should conclude that to interpret §943.13(4), Fla. Stat. (1985) as requested by appellee to exclude from licensure those persons with a full pardon would render it an unconstitutional encroachment upon the exclusive pardon power of the Governor.

II.

SECTION 943.13(4), FLORIDA STATUTES (1985) SHOULD NOT BE INTERPRETED TO BAR A CONVICTED FELON WHO HAS RECEIVED A FULL PARDON FROM CERTIFICATION AS A LAW ENFORCEMENT OFFICER IF HE OTHERWISE ESTABLISHES HIS GOOD MORAL CHARACTER.

Appellee relies upon the case of Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 820 (Fla. 1983) for the proposition that its construction of §943.13(4), Fla. Stat. (1985) must be given "great weight" unless shown to be clearly erroneous. Yet Volusia Hospital also stands for the proposition that, "...when an interpretation upholding the constitutionality of a statute is available to this Court, we must adopt that construction." Id. In the present case, this Court can and should construe §943.13(4), Fla. Stat. (1985) in order to avoid the constitutional problems discussed, infra.

The Commission's legal position is further weakened by the fact that it has previously certified convicted felons who have received full pardons [R. 38]. The Commission should not be permitted to construe the statute differently and arbitrarily from one case to the next. Here, the Commission concluded it had no discretion to consider appellant's eligibility. Yet, it has previously exercised its discretion, which it now claims it does not have, to certify convicted felons who have been fully pardoned. It should not be permitted to take such contradictory positions.

Appellee also cites to an opinion of the Attorney General of the State of Florida to support its argument that the statute precludes certification in this case. 1969-1970 Atty. Gen. Op.

157, p. 388 (1970). The opinion is in no way binding upon this court. Perry v. Larson, 104 F.2d 728 (5th Cir. 1939). The Attorney General, after studying the relevant statutes and contrasting them with his interpretation of the effect of a full pardon, determined that a convicted felon could not qualify as a police officer regardless of a pardon. However, the Attorney General also expressed his strong support for the rehabilitation of those who have broken the law and his desire to advocate programs and policies designed to effectuate such rehabilitation. Id. at 389. It was also pointed out that it is entirely possible that Florida courts will follow the approach of the Massachusetts Supreme Court in Commissioner of The Metropolitan District Commission. Although the Attorney General was constrained by what he felt the law was in 1970, he made it a point to stress that there was another approach which the courts could likely adopt.

The final argument made by appellee is that the legislature's intent was to exclude prior convicted felons automatically from law enforcement service, regardless of whether they have received a full pardon. Section 112.011(1)(b), Florida Statutes (1985) states that a person who, having been convicted of a crime and having their civil rights restored, shall not be disqualified from the practice of a profession for which a state-issued certificate is required unless the crime directly relates to the practice of the profession. Subsection (2)(a) provides that this provision shall not apply to law enforcement agencies. However, the proper intent to be drawn from this

statute is that the Legislature, consistent with the same fears expressed in Page, did not want a pardon to eliminate the agency's ability to require good moral character as a condition of law enforcement certification by acting as an absolute bar to consideration of the facts surrounding the underlying felony conviction. See §943.13(7), Fla. Stat. (1985). The acceptance of appellant's argument will not adversely effect the Legislature's ability to keep good moral character as a requirement by allowing the Commission to consider a felony, which has been the subject of a full pardon, as a fact relevant to an applicant's moral character.

## CONCLUSION

Based upon the facts and legal principles cited herein, the Commission committed reversible error when it concluded that it had no discretion to grant Mr. Sandlin certification as a law enforcement officer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Joseph S. White, Esquire, Assistant General Counsel, Department of Law Enforcement, Post Office Box 1489, Tallahassee, Florida 32302, by mail, this 1st day of December, 1987.

ATTORNEY