

IN THE SUPREME COURT OF FLORIDA

FLORIDA PAROLE COMMISSION,

Petitioner,

vs.

CASE NUMBER 80,264

JERRY T. LOCKETT,

Respondent.

FILED
SID J. WHITE
SEP 8 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

REPLY TO RESPONSE OF HONORABLE JERRY T. LOCKETT

Petitioner, Florida Parole Commission, through undersigned counsel in reply to Response of Honorable Jerry T. Lockett to Emergency Petition for Writ of Prohibition and/or Mandamus and Motion for Stay states:

Respondent acknowledges and agrees in his response that there is **a** constitutional prohibition against legislative or judicial encroachment upon the executive branch's clemency power, and that the legislature and the judiciary are without authority to prescribe either occasions for exercising the pardon power or the manner and procedure for its exercise. (Emphasis added) Citing Turner v. Wainwright, 379 So.2d 148 (1st DCA 1980), affirmed 389 So.2d 1181 (Fla. 1980). It is clear that sole, unrestricted, unlimited discretion is vested exclusively in the executive in the exercise of the **clemency powder.** Sullivan v. Askew, 348 So.2d 312 (Fla. 1977).

In furtherance of its exercise of the clemency power, the Board of Executive **Clemency** adopted Rules of Executive Clemency providing procedure for the **clemency** process. Rule 15(A) provides as follows:

A. In all cases where the death penalty has been imposed, the Florida Parole Commission shall conduct a thorough and detailed investigation into all factors relevant to the issue of clemency. The investigation shall include (1) an interview with the inmate (who may have legal counsel present) by at least three members of the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; and (3) an interview, if possible, with the victim's family. The investigation shall begin immediately after the Commission receives a written request from the Governor and shall be concluded within 90 days of the written request. After the investigation is concluded, the members of the Commission who personally interviewed the inmate shall prepare and issue a final report on their findings and conclusions. The report shall include any statements and transcripts that were obtained during the investigation. The report shall contain a detailed summary from each member of the Commission who interviewed the inmate on the issues presented at the clemency interview. The report shall be forwarded to all members of the Clemency Board within 120 days of the written request from the Governor for the investigation.

Thus, the Executive in furtherance of its exercise of the clemency power, has provided that the Florida Parole Commission is its investigative arm in the clemency process and therefore, as staff, is clothed with the same constitutional application of the separation of powers doctrine as the executive when the Commission is fulfilling its duties to investigate, report and make recommendations to the Governor and Cabinet regarding an application for clemency.

What Respondent has failed to understand or acknowledge is that the Commission, in effect wears two hats; one when it is performing its function relating to parole, conditional release and

control release, and another when it is acting in its capacity as investigator for the Clemency Board. The distinction between parole functions and clemency and their historical perspective is discussed in Turner, supra. The difference in Turner, and the instant case is that in Turner, the Commission **was** performing **a** parole function (revocation of Turner's parole) and not clemency.

The fact that the Commission was "created by law" does not in and of its self mean that all aspects of its duties are subject to legislative control. The court in Turner stated, "any executive Commission which 'may be created by law' may be created on conditions of obedience to laws not inconsistent with the constitution." Id. at 154. Clearly Chapter 119, in any attempt to require the Commission to produce files and records acquired in the clemency process, would violate the constitutional doctrine of separation of powers.

Respondent cites Locke v. Hawkes, 595 So.2d 32 (Fla. 1992) for the proposition that there is some sort of Chapter 119 blanket coverage for any and all activities undertaken by an "executive branch agency." This is not the case. Coverage depends upon the function which is carried out. The Court in Locke explained:

"the definition [of agency] applies particularly to those entities over which the legislature has some means of legislative control. . ."

595 So,2d at 37. Respondent acknowledges that "the legislature **and** the judiciary are without authority to prescribe either occasions for exercising the pardon power or the manner and procedure for its exercise." (Respondent's Response, **p.2**) The Commission acts as an

arm of the Governor and Cabinet when it operates in its capacity as investigator for the Clemency Board.

In Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), this Court quoted with approval the following excerpt from American Jurisprudence:

. . .no court has the power to review grounds or motives for the action of the executive in granting a pardon, for that would be the exercise of the pardoning power in part, and any attempt of the courts to interfere with the governor in the exercise of the pardoning power would be manifest usurpation of authority. . . ,

348 So.2d at 315. Further, the Court went on to state:

"It may be proper to say here, that the executive, in the proper discharge of his duties under the constitution, is as independent of the courts as he is of the legislature." [Quoting from Cooley on Constitutional Limitation, Vol., (8th Ed.), pp 213-221]

In the exercise of the exclusive power to grant or withhold clemency, the executive has adopted procedures that accord with the specific grant in Article IV, Section 8, Florida Constitution, **and** do not impose constitutionally objectionable conditions.

For the foregoing reasons, this Court will not intrude on the proper execution of the executive power. . . .

348 So.2d at 316. It is quite clear that Chapter 119 applies to executive branch agencies only when they are performing agency functions. When the Commission carries out its clemency function, it is not subject to Chapter 119. Just as Chapter 119 does not apply to unauthorized practice of law investigative files of the

state bar¹, so too, it has no application to clemency investigative files.

The issue here is not, as Respondent contends, an effort to maintain "secret files" in some sort of conspiracy to deny anyone fundamental fairness. Rather, the issue goes to one of the most fundamental of constitutional principles - - the doctrine of separation of powers. The Courts must be ever vigilant in preventing the encroachment of one branch upon another. Rule 16 of the Rules of Executive Clemency states:

16. Confidentiality of Records and Documents. Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except members of the Clemency Board and their staff. The Governor has the sole discretion to allow records and documents to be inspected or copied.

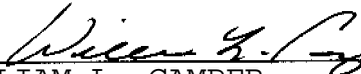
Petitioner is not aware of any attempt on the part of Defendant, Duckett, to request from the Governor that he exercise his sole discretion to allow pertinent records and documents to be inspected. Rather, he has unnecessarily precipitated a constitutional crisis.

Wherefore, Petitioner requests that the Court grant the

¹In The Florida Bar, 398 So.2d 446 (Fla. 1981), the Court held that investigative rules of the state bar, as an official arm of the Supreme Court were subject to control and direction of the court and not to either of the other two branches of state government.

petition for writ of prohibition for the reasons set forth herein.

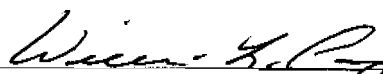
Respectfully submitted,


WILLIAM L. CAMPER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this is a true copy of the foregoing furnished by U.S. mail to Jerry T. Lockett, Circuit Judge of the Fifth Judicial Circuit, Lake County Courthouse, 315 West Main Street, Tavares, Florida 32778, M. Elizabeth Wells, Esq., Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, Albert J. Vidal, Esq., Assistant State Attorney, 19 Northwest Pine Avenue, Ocala, Florida 32670, Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, Room 1502, The Capitol, Tallahassee, Florida 32399, J. Hardin Peterson, Office of the Governor, Legal Office, Room 209, The Capitol, Tallahassee, Florida 32399-0001, Gene Hodges, Chairman, Florida Parole Commission, 1309 Winewood Boulevard, Building 6, Tallahassee, Florida 32399-2450, Ray Howard, Director, Clemency Administration, Florida Parole Commission, 1309 Winewood

Boulevard, Building 6, Tallahassee, Florida 32399-2450 this 8
day of September, 1992.


WILLIAM L. CAMPER
General Counsel
Florida Parole Commission