IN THE SUPREME COURT OF FLORIDA

BRYAN FREDRICK JENNINGS,

Appellant,

v. CASE NO. 80,416

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

For purposes of this appeal, appellee relies upon the following facts:

Jennings' conviction and sentence became final on February 22, 1988, when the United States Supreme Court denied certiorari following this court's affirmance of that conviction and sentence. *Jennings v. State,* 512 So. 2d 169 (Fla. 1987); *Jennings v. Florida,* 484 U.S. 1079 (1988). On August 29, 1989, Governor Martinez signed Jennings' death warrant, and on October 23, 1989, Jennings field a motion for post conviction relief. In Claim 2 of that motion, Jennings alleged that he had been denied access to files maintained by the Brevard County Sheriff's Office and the State Attorney's Office in violation of Florida's public records law (RP 139-51). The trial court found that the claim was procedurally barred since Jennings had failed to seek redress through Chapter 119, Florida Statutes (1989) (RP 438). On appeal from denial of that claim, Jennings again argued that he had been denied access to files maintained by the Brevard County Sheriff's Office and the State Attorney's Office in violation of Chapter 119, Florida Statutes (IB 34-35). This court found merit in Jennings' claim that he was entitled to certain portions of the state's files as public records, and remanded with the following instructions:

> Therefore, in accordance with *Provenzano v. Dugger,* 561 So. 2d 541 (Fla. 1990), the two-year time limitation of rule 3.850 shall be extended for sixty days from the date of the disclosure solely for the purpose of providing Jennings with the time to file any new *Brady* claims

> that may arise from the disclosure of the files.

Jennings v. State, 583 So. 2d 316, 319 (Fla. 1991).

This court denied rehearing in that case on August 20, 1991. On September 11, 1991, the state filed a "Motion for *in camera* Review of Records", requesting the trial court to review the materials the state withheld and determine whether they were subject to disclosure as public records (R 20-22). A hearing was held October 31, 1991, and on November 6, 1991, the trial court judge rendered an order designating which records were to be disclosed (R 235-50, 23-25). Such records were to be disclosed by November 17, 1991 (R 25). On or about January 15, 1992, Jennings filed an amended motion to vacate judgment and sentence with special request for leave to amend and supplement (R 26-101). Jennings claimed that the state was continuing to withhold documents since the Sheriff's files had not been disclosed and because he did not receive his files and documents from the Florida Parole Commission (R 32-34). Jennings did not allege that he had ever requested any documents from the Parole Commission, but simply stated:

> On January 29, 1991, the Parole Commission sent CCR a position letter, denying access to all clemency files (App.B).

(R 33). This was the first time Parole Commission records had ever been mentioned in the course of this litigation. (Appellee would also point out that App. B contains the deposition of a Billy Crisco, and nothing from the parole commission R (64-68)).

On March 2, 1992, the state filed a response, noting that while there had been hearings on the matter, Jennings had never mentioned the Sheriff's files, and claimed that his failure to do this constituted a waiver of the issue (R 109-11). The state further argued that since Jennings had never requested the Parole Commission files within the two year period for the filing of a motion for post conviction relief, the claim was procedurally barred (R 110-11). The state also responded to Jennings' supplemental claims. Another hearing was held on June 23, 1992, addressing the supplemental Chapter 119 claims (R 252-308). The court rendered an order on July 10, 1992, ordering the Parole Commission to permit counsel for the defendant to inspect and copy its records (R 169-70).[1] The court gave the Parole Commission until August 3, 1992 to file any written objections (R 169-70). On July 31, 1992, the Parole Commission filed its objections (R 185-209). On August 24, 1992, the trial court rendered a final order on the motion to produce, requiring that all notes furnished to the court be made available to the defendant, that all records of the Parole Commission except the clemency file be made available for the defendant's inspection, and finding that the clemency file was not subject to Chapter 119, Florida Statutes.

On August 27, 1992, Jennings filed a notice of appeal, stating:

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[1] Jennings had sought to further amend his supplemental motion on July 7, 1992, with a claim pursuant to *Espinosa v. Florida,* 112 S.Ct. 2926 (1992) (R 158-68).

> The nature of the order appealed from is the denial of defendant's request for production, pursuant to §119, Fla. Stat., and *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992), of all Florida Parole Commission clemency files on the defendant.

(R 213). On or about September 11, 1992, the state filed a motion to dismiss the appeal, contending that this court was without jurisdiction to review an interlocutory order, that any issue relating to Jennings' clemency file was beyond the scope of this court's remand, and that any claims related to the Parole Commission were successive to the first motion for conviction relief and were brought more than two years after the conviction and sentence became final, so they were procedurally barred. The motion was denied December 7, 1992.

SUMMARY OF ARGUMENTS

POINT 1: The right of appeal from a final judgment is prescribed by statute, and the review of nonfinal orders is controlled by court rule. There is no provision to appeal an interlocutory order entered during the course of a remand proceeding so the instant appeal should be dismissed.

POINT 2: Jennings' claim that he was denied access to Parole Commission records is not cognizable in a 3.850 proceeding and Jennings should be required to pursue his remedies through the methods set forth in the public records law. Further, the claim is now procedurally barred since Jennings never pursued this claim prior to the filing of his first post conviction motion. This court should reject Jennings attempt to present this issue in a successive, time barred motion that is well beyond the scope of this court's original remand.

POINT 3: Materials gathered by the Parole Commission pursuant to the Rules of Executive Clemency in connection with an application for or executive request regarding clemency are not subject to disclosure pursuant to chapter 119, Florida Statutes. The court is prohibited by the separation of powers doctrine from ordering the executive branch to submit to a legislative mandate and any such order would unconstitutionally infringe upon the exclusive power of the Executive.

ARGUMENT

POINT 1

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN AN APPEAL FROM AN INTERLOCUTORY TRIAL COURT ORDER.

The right of appeal from a final judgment is prescribed by statute, and the review of nonfinal orders is controlled by court rule. *State v. Pettis,* 520 So. 2d 250 (Fla. 1988). Florida Rule of Appellate Procedure 9.130 states that review of non-final orders in criminal cases is prescribed by rule 9.140. A review of this rule demonstrates that there is no provision for the appeal of an interlocutory order rendered during the course of a 3.850 remand proceeding. Florida Rule of Criminal Procedure 3.850 states:

> An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus.

The order appealed from in the instant case is not the "order entered on the motion", and since there is no right provided for appeal of this order, either statutory or by court rule, appellee submits that the instant appeal should be dismissed.

POINT 2

JENNINGS' CLAIM THAT HE WAS IMPROPERLY DENIED ACCESS TO RECORDS OF THE FLORIDA PAROLE COMMISSION IS NOT COGNIZABLE IN A 3.850 PROCEEDING; EVEN IF THE CLAIM WERE COGNIZABLE IT IS PROCEDURALLY BARRED IN THE INSTANT PROCEEDING AND PRESENTS AN ISSUE WELL BEYOND THE SCOPE OF THIS COURT'S REMAND.

In its motion to dismiss the instant appeal, appellee requested this court to reconsider its holding in *Mendyk v. State,* 592 So. 2d 1076 (Fla. 1992), and again argued, as it had in *Mendyk,* that aside from State Attorney files, defendants should be required to pursue their records and remedies through Chapter 119, Florida Statutes. While this court denied appellee's motion to dismiss the instant appeal, it rendered an opinion three days later receding from *Mendyk*, specifically stating:

> The State complains that some of Hoffman's public record requests seek records from agencies that have had nothing to do with the judgment and sentence and over whom the state attorney has no control. We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes. Because those requests will be made directly to such agencies, they will be in a position to raise any defenses to the disclosure which they may deem applicable.

Hoffman v. State, 17 Fla. L. Weekly S741, 741-42 (Fla. December 10, 1992). Appellee contends that it is entitled to the benefit of the law at the time of appellate disposition, just as an appellant is entitled to such. *See, State v. Castillo,* 486 So. 2d 565

(Fla. 1986). The Florida Parole Commission is outside the jurisdiction where this case was tried and has no connection whatsoever with the state attorney, so Jennings should be required to pursue the procedures outlined in chapter 119, so that the Florida Parole Commission is in a position to defend its position throughout the course of the proceeding.

Appellee also contends that Jennings' claim that he is entitled to his clemency file is procedurally barred in the instant proceeding. Jennings never requested any records from the Parole Commission prior to the filing of his first motion for post conviction relief. His attempt to do so at this point is time barred and barred as an attempt to file a successive motion. Fla. R. Crim. P. 3.850; *Spaziano v. State,* 570 So. 2d 289 (Fla. 1990); *Agan v. State,* 560 So. 2d 222 (Fla. 1990); *Demps v. State,* 515 So. 2d 196 (Fla. 1987). This court remanded this case to the trial court for a limited purpose, and the state attorney diligently provided his files to Jennings. Jennings has prolonged this proceeding for well over a year with the instant, untimely claim. This court should not permit him to manipulate these proceedings any further, and should find his claim procedurally barred.

POINT 3

CLEMENCY FILES ARE NOT SUBJECT TO THE PUBLIC RECORDS LAW AND ANY JUDICIAL ORDER REQUIRING THEIR DISCLOSURE WOULD VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Jennings claims that the trial court improperly denied his public records request since the Florida Parole Commission's files are not exempt from Chapter 119, Florida Statutes. Appellee contends that such request was properly denied. As set forth in Point 2, *Supra,* the claim is procedurally barred.[2] Even if the claim were cognizable, Jennings would not be entitled the requested files. Materials gathered by the Parole Commission pursuant to the rules of executive clemency in connection with an application for or executive request regarding clemency are not subject to disclosure pursuant to Chapter 119, Florida Statutes. Further, the court is prohibited by the separation of powers doctrine from ordering the executive branch to submit to a legislative mandate and any such order would unconstitutionally infringe upon the exclusive power of the executive.

Article II, Section 3 of the Florida Constitution states:

> SECTION 3. Branches of government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

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[2] Where a trial court reaches the right result, even for the wrong reasons, the order should be affirmed. See Combs v. State, 436 So. 2d 93 (Fla. 1983).

This doctrine of separation of powers was explained in *Singleton v. State*, 38 Fla. 207, 21 So. 21 (1896), as follows:

> The legislative, executive, and judicial powers of the government are co-ordinate, each is independent of the others, and each is limited only by the state and federal constitutions. In the exercise of the powers of government assigned to them severally, the legislature, the executive and the judiciary operate harmoniously but independently each of the others, and the action of any one of them in the lawful exercise of its own powers is not subject to control by either of the others.
>
> In the distribution of the powers of government the framers of the constitution had the right to lodge the pardoning power where they saw proper in the departments of government.

21 So. at 22. The clemency power is described in Article IV, Section 8 of the Florida Constitution, which provides for the creation and authority of a Parole and Probation Commission (now the Florida Parole Commission), and states:

> (a) Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days, and with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.
>
> (b) In cases of treason the governor may grant reprieves until adjournment of the regular session of the legislature convening next after the conviction, at which session the legislature may grant a pardon or further reprieve; otherwise the sentence shall be executed.

> (c) There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime. The qualifications, method of selection and terms, not to exceed six years, of members of the commission shall be prescribed by law.

See also, Sullivan v. Askew, 348 So. 2d 312, 314 (Fla. 1977) ("[t]he clemency power, which is the power to suspend collection of fines and forfeitures, to grant reprieves, to grant full or conditional pardons, restore civil rights, commute punishments, and to remit fines and forfeitures for offenses, reposes exclusively in the Chief Executive"); *Ex Parte White,* 178 So. 876 (Fla. 1938); *Spinkellink v. Wainwright,* 578 F.2d 582 (5th Cir. 1978).

Section 947.13(e), Florida Statutes, provides for the Parole Commission, among other powers and duties, to have the power to perform the duty of:

> (e) Reporting to the Board of Executive Clemency the circumstances, the criminal records, and the social, physical, mental, and psychiatric conditions and histories of persons under consideration by the board for pardon, commutation of sentence, or remission of fine, penalty, or forfeiture.

Based on these provisions, appellee contends that the Parole Commission, in fulfilling its duties to investigate, report and make recommendations to the Governor and Cabinet regarding clemency, acts as staff to and on behalf of the Executive under the constitutionally derived pardon power, and enjoys the same application of the separation of powers doctrine as the Executive. As such, its files pertaining to clemency are

not subject to disclosure under the public records law. Attorney General Opinion 86-50, May 30, 1986, speaks directly on point, providing that:

> Where the Parole and Probation Commission is directed by the Governor and Cabinet, pursuant to Rule 15, Rules of Executive Clemency, to investigate, report and make recommendations to the Governor and Cabinet regarding an application for clemency and is acting on behalf of the executive under the constitutionally derived pardon power rather than the commission's own statutory parole authority, the materials gathered in the court of carrying out the executive directive are not subject to the legislative mandate of Chapter 119, Florida Statutes, as such procedures fall with the ambit of the clemency power which is vested solely in the executive pursuant to Section 8, Article IV, State Constitution.

The opinion cites *Turner v. Wainwright*, 379 So. 2d 148 (Fla. 1st DCA 1980), *affirmed* 389 So. 2d 1181 (Fla. 1980), which held that the distinction between the executive's pardon power and its parole power is that the pardon power rests upon "self-executing constitutional provisions", by which

> . . . the people of this state chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace [*Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977)]

The *Turner* court distinguished the parole power, stating that it is reposed only in "a parole or probation commission which may be created by law," and has been so created, but need not have been, and which is subject to all laws, substantive or procedural, addressed to it by the legislature. *Id.* at 154. The court agreed

with the Commission's argument that the legislative branch is without authority to prescribe either the occasion for exercising the pardon power or the manner and procedure for its exercise, citing *Singleton, supra*, where the court struck down an act which purported to grant a convicted felon clemency by restoring his competency to testify, forfeited in those days by conviction; *Ex parte White,* 131 Fla. 83, 178 So. 876 (1938), which nullified an act which purported to require commutation to a life prison term of any death sentence affirmed by an equally divided Supreme Court; *In re Advisory Opinion of the Governor,* 334 So. 2d 561 (Fla. 1976), which held that the Administrative Procedure Act of 1974 could not lawfully constrict the executive's clemency powers under Article IV, Section 8(a), of the 1968 Constitution; and, *Sullivan v. Askew,* 348 So. 2d 312 (Fla. 1977), which held that the clemency powers prescribed by Section 8(a) and (b) are not subject to constitutional due process strictures as interpreted and enforced by the judicial branch. From this the *Turner* court concluded that the open public meetings law, section 286.011, Florida Statutes, could not constitutionally be held to require compliance with the terms of the Sunshine Law by the Governor (even assuming he could "meet" with someone in the exercise of exclusive gubernatorial responsibilities), or by the Governor and Cabinet, in dispensing pardons and the other forms of clemency authorized by Article IV, Section 8(a), Constitution of Florida (1968). *Turner* at 151.

As noted in *Turner* and AGO 86-50, in *In re Advisory Opinion of the Governor,* 334 So. 2d 561 (Fla. 1976), the court considered the

applicability of the Administrative Procedures Act to gubernatorial grants of executive clemency which, under Section 8(a), Article IV, State Constitution, require the approval of three members of the Cabinet. The opinion of the court was that the requirements of Chapter 120, Florida Statutes, did not apply to the exercise of the clemency powers conferred on the Governor or the members of the Cabinet by Section 8, Article IV of the state constitution. The exclusively constitutional nature of the executive clemency powers formed the basis on which the court relied to support its determination that Chapter 120, Florida Statutes, was not applicable to the exercise of these powers.

> No aspect of clemency powers exists by virtue of a legislative enactment, and none could. These powers are "derived" solely from the Constitution. The exclusivity of the exercise of clemency powers by the executive branch is further buttressed in the area under consideration by the procedural requirements of the Constitution itself. Where that document sufficiently prescribes rules for the manner of exercise, legislative intervention into the manner of exercise is unwarranted. That is the situation here.

In re Advisory Opinion of the Governor, supra at 562. The court went on to conclude that the requirements of chapter 120, Florida Statutes (1975), did not apply to the exercise of the clemency powers conferred on the Governor or members of the Cabinet by Article IV, Section 8 of the florida constitution.

Consequently, the nature of the clemency power is constitutional and vested exclusively in the executive and the legislature is without authority to regulate the procedure or the

exercise of this power. The same principle of separation of powers applies to the judiciary regarding any attempts to intrude into the Executive clemency power. In sum, clemency files are part of the Executive's exercise of its constitutional pardon power and are not subject to legislative or judicial intrusion. The fact that the Commission was "created by law" does not in and of itself mean that all aspects of its duties are subject to legislative control. As the *Turner* court 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. Chapter 119, in any attempt to require the Commission to produce its files acquired during the clemency process would violate the constitutional doctrine of separation of powers.

Further, the Board of Executive Clemency in the exclusive exercise of its constitutional authority has adopted Rules of Executive Clemency, which were most recently amended January 1, 1992. Rule 16 specifically provides:

> 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 copies.

This rule provides for the confidentiality and disclosure of clemency files and documents. Any attempt by the legislature, to

interfere and infringe upon the Executive's exercise of its clemency powers regarding its records would be a violation of the separation of powers doctrine and therefore of no effect and without jurisdiction. As stated in *Sullivan v. Askew,* 348 So. 2d 312, 316 (Fla. 1977),

> This prohibition against legislative encroachment upon the executive's clemency power is equally applicable to the judiciary. Article II, Section 3, Florida Constitution. Declaring a legislative enactment, Chapter 16810, Acts 1935, unconstitutional and void as being in conflict with and in derogation of the constitutionally established execution power of clemency, in *Ex parte White,* 131 Fla. 83, 178 So. 876 (1938), this Court, in analyzing the separation of powers and exclusively of this executive function, quoted the following excerpt from *Cooley on Constitutional Limitations,* Volume 1 (8th Ed.), pp. 213-221).
>
> > "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." (Emphasis supplied).
>
> In the exercise of the exclusive power to grant or withhold clemency, the executive has adopted procedures that accord with the specific constitutional grant in Article IV, Section 8, Florida Constitution, and do not impose constitutionally objectionable conditions.

The courts have a duty to maintain and preserve the separation of the three branches of government. In *Pepper v. Pepper,* 66 So. 2d 280 (Fla. 1953), this court recognized the judiciary's special duty to insure the separation of governmental departments:

> The courts have been diligent in striking down acts of the Legislature which encroached upon the Judiciary or the Executive Departments of the Government. They have been firm in preventing the encroachment by the Executive Department upon the Legislative or Judicial departments of the Government. The Courts should be just as diligent, indeed, more so, to safeguard the powers vested in the Legislative from encroachment by the Judicial Branch of Government.
>
> The separation of governmental power was considered essential in the very beginning of our government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years. Experience has shown the wisdom of this separation. If the Judicial Department of the Government can take over the Legislative powers, there is not reason why it cannot also take over the Executive powers, and in the end all powers of the government would be vested in one body. Recorded history shows that such encroachment ultimately result in tyranny, in despotism, and in destruction of Constitutional processes. . . The tendency to reach out and grasp for power in the sphere of governmental activity; for one Branch of the Government to encroach upon, or absorb, the powers of another, is the means by which free governments are destroyed. For those who read and listen with discernment, examples of such despotism and tyranny immediately appear in the world today. It is the duty of the Judicial Department, more than any other, to maintain and preserve those provisions of the organic law for the separation of the three great departments of governments.

66 So. 2d at 284. (Emphasis supplied). As the First District recognized in *State ex.rel. Second District Court of Appeal v. Lewis,* 550

So. 2d 522 (Fla. 1st DCA 1989), the court may not "poach in [the] power patch" of the executive or legislative branch.

CONCLUSION

Based on the arguments and authorities presented herein, appellee requests this court dismiss the instant appeal, or find that Jennings' claim is procedurally barred. Should this court reach the substantive issue presented in this appeal, appellee requests this court affirm the order of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Martin J. McClain and Susan Hugins Elsass, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 29th day of March, 1993.

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