

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,416

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of a circuit court interlocutory order denying Mr. Jennings' request for public records disclosure from the Florida Parole Commission. The order was entered during the pendency of Mr. Jennings' Fla. R. Crim. P. 3.850 motion.

Citations in this brief shall be as follows: the record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the Rule 3.850 proceedings shall be referred to as "PC-R. ___." The supplemental record on appeal from the Rule 3.850 proceedings shall be referred to as "PC-S. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Jennings has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE AND THE FACTS

The Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, entered the judgment of conviction and sentence in this matter. Mr. Jennings was indicted on May 16, 1979, for first degree murder and related charges. A jury trial commenced before the Honorable Tom Waddell, Jr., on February 4, 1980, and concluded on February 11, 1980. Mr. Jennings was convicted of first degree murder and sentenced to death. On direct appeal, this Court vacated the judgment of conviction and sentence and ordered a new trial. Jennings v. State, 413 So. 2d 24 (Fla. 1982).

Mr. Jennings' second jury trial began before the Honorable Clarence T. Johnson, Jr., on July 13, 1982, and concluded on July 16, 1982. Mr. Jennings was convicted of first degree murder and sentenced to death. This Court affirmed the conviction and sentence. Jennings v. State, 453 So. 2d 1109 (Fla. 1984). On petition for writ of certiorari, the Supreme Court of the United States vacated the judgment and remanded the case to the Supreme Court of Florida. Jennings v. Florida, 470 U.S. 1002 (1985). This Court, in turn, remanded the case to the circuit court for a new trial. Jennings v. State, 473 So. 2d 204 (Fla. 1985).

Pursuant to a change of venue, Mr. Jennings' third jury trial began in Bay County, Florida, before the Honorable Charles M. Harris, on March 24, 1986, and concluded on March 27, 1986. Mr. Jennings was convicted of first degree murder and sentenced to death. On direct appeal, this Court affirmed. Jennings v.

State, 512 So. 2d 169 (Fla. 1987). Mr. Jennings' petition for writ of certiorari to the Supreme Court of the United States was denied on February 22, 1988. Jennings v. Florida, 484 U.S. 1079 (1988).

On May 11, 1988, Mr. Jennings applied for clemency. Clemency was denied and a death warrant was signed on August 29, 1989. Mr. Jennings filed a post-conviction motion to vacate on October 3, 1989. A state habeas corpus petition was also filed before this Court. The Honorable Charles M. Harris heard oral argument from the parties regarding the motion to vacate. At that time, the state conceded a discovery violation, but argued it was harmless. Judge Harris denied relief. Meanwhile, this Court had stayed the execution on the basis of the habeas petition. Mr. Jennings' motion for rehearing was denied January 24, 1990; on February 21, 1990, he appealed to this Court from the denial of his motion to vacate. On June 13, 1991, this Court denied Mr. Jennings' petition for state habeas and affirmed the denial of his motion to vacate, but remanded the case to the circuit court for public records disclosure. The Court also extended the Fla. R. Crim. P. 3.850 two-year time limit so that Mr. Jennings would have the opportunity to file an amended motion if necessary. Jennings v. State, 583 So. 2d 316 (Fla. 1991).

In response to a state motion for in camera review of previously-withheld state attorney documents, the Honorable Charles M. Harris held a hearing on October 31, 1991 (PC-S. 235-251).; on November 18, 1991, some of the documents were disclosed

to Mr. Jennings' counsel. Mr. Jennings timely filed an amended motion to vacate on January 16, 1992. On March 5, 1992, the Honorable John Antoon, II, chief judge of the eighteenth judicial circuit, notified the parties that the Honorable Charles M. Harris would no longer be presiding in this cause (PC-S. 310-11). On March 20, 1992, the deputy clerk notified the parties that the Honorable Clarence T. Johnson, Jr., had been assigned to this case (PC-S. 312).

Judge Johnson held a hearing on June 23, 1992, on the public records issues, including still-withheld sheriff's files and files and records of the Florida Parole Commission (PC-S. 252-308). At that hearing, the court granted a motion for in camera review of the sheriff's files (PC-S. 275). On July 10, 1992, Judge Johnson entered his "Order Requiring Production," (PC-R. 169-170) directing the Parole Commission to 1) provide access to all of its files, or 2) object in writing no later than August 3, 1992. On July 21, 1992, the Parole Commission filed its "Response to Order Dated July 10, 1992," (PC-R. 185-203), stating that it had no objection to providing access and copies to files other than clemency files. On August 21, 1992, Judge Johnson entered his "Final Order on Motion to Produce," (PC-R. 210-212), ordering the Parole Commission to provide access to Mr. Jennings' counsel for all the documents in its possession that were not

clemency files, and denying access to clemency files.¹ Judge Johnson's August 21, 1992, order is the subject of this appeal.

INTRODUCTION

In the course of his post-conviction litigation, Mr. Jennings has sought access to and copies of public records that state agencies have used in his case. This Court returned his case to the circuit court specifically for public records disclosure. To date, Mr. Jennings has been given copies of certain documents, but he has not been provided access to the originals nor an opportunity to argue against claimed exemptions of other (unidentified) documents withheld by the Court.

Mr. Jennings is most concerned about the Parole Commission files for two reasons:

1) Documents in the possession of the Parole Commission have, in the past, been indispensable to the proper resolution of post-conviction claims. Recently, in Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court's order to vacate Mr. Scott's sentence was based upon a letter from the Honorable Susan Schaeffer to the Parole Commission. In Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), the Honorable Richard Tombrink, Jr., wrote a letter to the Parole Commission stating that Mr. Mendyk was "an animal" and should be executed. Subsequently, as administrative judge, the court assigned himself to preside over Mr. Mendyk's

¹When Mr. Jennings' counsel attempted to comply with the court's order regarding all Parole Commission files that did not relate to clemency, she was advised--contrary to the representations made to and relied upon by the court--that the Parole Commission had no such files. (See Appendix A).

post-conviction proceedings, but recused himself on Mr. Mendyk's motion to disqualify when the letter was located and placed in the record.

2) In Mr. Jennings' case, documents in the file of the Department of Corrections indicate that the Honorable Charles M. Harris sent a letter, which Mr. Jennings is most anxious to see, to the Parole Commission. As of this date, Mr. Jennings has been unable to procure this letter.

At the hearing before the Honorable Clarence T. Johnson, Jr., on June 23, 1992, the State Attorney conceded that Mr. Jennings has a right to the Parole Commission files. (PC-S. 282; 284).

SUMMARY OF ARGUMENT

The circuit court erred in ordering that Florida Parole Commission clemency files are not governed by The Public Records Act. The Florida Parole Commission is a state agency, established by the legislature, and subject to the laws of Florida. State of Florida policy is that the public shall have access to all public records--unless specifically exempted by statute. The governor does not have authority to exempt Parole Commission records from Chapter 119. At any rate, disclosure of the Parole Commission files does not infringe upon the pardon power. Finally, the Rules of Executive Clemency were adopted in violation of the due process clause of the Florida Constitution.

ARGUMENT I

THE CIRCUIT COURT IMPROPERLY DENIED MR. JENNINGS' PUBLIC RECORDS REQUEST TO THE FLORIDA PAROLE COMMISSION. THE COMMISSION'S FILES ARE NOT EXEMPT FROM CHAPTER 119, FLA. STAT.

The order on appeal in this cause directs:

That all records of the Florida Parole Commission except the clemency file shall be made available for inspection by defendant within ten (10) days of the date of this Order.

and further directs that Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), does not mandate disclosure of Parole Commission clemency files. (PC-R. 210). However, in Mendyk, the same counsel made the same request to the Parole Commission (See Appendix B), and this Court ordered disclosure under Chapter 119. 592 So. 2d at 1081.

This case presents the question: May an executive agency, established by and subject to law, ignore the tenets of Chapter 119, Fla. Stat., by relying upon discretionary executive branch rules, or is legal precedent directing that only the legislature make exemptions to the Public Records Act binding in this state?

There is no provision in Florida law exempting the Parole Commission from the requirements of Chapter 119, The Public Records Act. Yet, the Parole Commission has declared itself to be in a special position in Florida--a position in which it can sometimes be above the law (also known as "wearing two hats"). The Commission claims that it can avoid the requirements of Chapter 119 when it is assisting the governor in clemency

matters; however, the laws of Florida do not authorize such evasion. Chapter 119 contains no exemption for files related to clemency.

The Parole Commission argued to the circuit court that clemency is different, and therefore anything relating to clemency is not affected by Florida law (PC-R. 185-212). The Parole Commission is arguing for an implicit exemption to be read into an otherwise unambiguous statute. Mr. Jennings argues the requirements of Chapter 119 apply to the Parole Commission unless and until the legislature creates a specific exemption to that law; in other words, clemency is not the issue--public records are the issue. Currently, Chapter 119 does not exempt the legislatively created Parole Commission, nor the files of the Parole Commission relating to clemency, from the scope of Chapter 119. Mr. Jennings further argues neither the Parole Commission nor the Governor (or the Clemency Board) is above the law, and, even if clemency were the issue, Mr. Jennings is still entitled to all Parole Commission files.

A. CHAPTER 119--"A ROSE IS A ROSE IS A ROSE."

1. Public records are defined as:

[A]ll documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

sec. 119.011, Fla. Stat. (1991).

This Court has clarified the definition of public records
as:

any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type....Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990) (citing Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So. 2d 633, 640 (Fla. 1980)).

Pursuant to these definitions, all Parole Commission files are public records.

2. There is no provision of Florida law that permits exemptions to be made to the Public Records Act by any branch of government other than by the legislature.

Several provisions of Chapter 119 substantiate Mr. Jennings' argument that only the legislature may establish exemptions to Chapter 119:

- a. It is the policy of this state that all state, county and municipal records shall at all times be open for a personal inspection by any person.

sec. 119.01, Fla. Stat. (1991).

- b. A person who has custody of a public record and who asserts that an exemption provided in subsection (3) or in a general or special law applies to a particular public record or part of such

record shall delete or excise from the record only that portion of the record with respect to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and examination. If the person who has custody of a public record contends that the record or part of it is exempt from inspection and examination, he shall state the basis of the exemption which he contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute, and if requested by the person seeking the right under this subsection to inspect, examine, or copy the record, he shall state in writing and with particularity the reasons for his conclusion that the record is exempt.

Sec. 119.07(2)(a), Fla. Stat. (1992 Supp).

- c. An "exemption" is defined as a provision of the Florida Statutes which creates an exception to s. 119.01, s. 119.07(1), or s. 286.011 and which applies to the executive branch of state government or to local government, but shall not include any provision of a special or local law.

sec. 119.14(3)(c), Fla. Stat. (1991).

This Court has repeatedly held that Chapter 119 exemptions must be made by statute. See Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984); Rose v. D'Alessandro, 380 So. 2d 419 (Fla. 1980). See also Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979) ("If the common law privileges are to be included as exemptions [to Chapter 119], it is up to the legislature, and not this Court, to amend the statute [and]...public policy considerations....should be addressed to the legislature.").

B. THE PAROLE COMMISSION.

Art. IV, sec. 8(c), Fla. Const. (1968) authorizes the legislature to create a parole commission; this provision is not self-executing. By its terms, Art. IV, sec. 8(c) does not authorize the legislature to give the parole commission any clemency duties.² The provision states:

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.

Id.

Because it is a state agency, the Florida Parole Commission is subject to legislative control. The terms of Chapter 119 specify this conclusion; and, this Court, construing the terms of Chapter 119, has said:

We find that the definition of agency in section 119.01, while not intended to apply to the legislature, was intended to apply to executive branch agencies and their officers and to local governmental entities and their officers; the definition applies particularly to those entities over which the legislature has some means of legislative control,

²Despite the lack of specific constitutional authority, the legislature has passed several laws directing the Parole Commission to assist the Governor and Cabinet in clemency matters. Specifically, the statutes authorize the commission to **report** to the Clemency Board and to **appoint** a clemency coordinator. sec. 947.04(2)(d); 947.13(e). Notwithstanding appellee's contrary claims to the circuit court (PC-R. 187, 191), it has no duty to recommend clemency. Sec. 947.25, Fla. Stat., which authorized the commission to **make recommendations** on clemency to the Governor, was repealed by Ch. 88-122, sec. 66, Laws of Florida, eff. July 1, 1988.

including counties, municipalities, and school boards, and state agencies, bureaus, and commissions, and private business entities working for any of these public entities and officials.

Locke v. Hawkes, 595 So. 2d 32, 36 (Fla. 1992) (emphasis added).

Clearly then, the legislature created the Parole Commission and thus has "means of legislative control" by virtue of its power to define and/or limit the Parole Commission's authority. Under Locke, Chapter 119 applies to the Parole Commission. However, Chapter 119 contains no exemption for clemency files held by the Parole Commission.

C. CLEMENCY VS. CHAPTER 119.

The Parole Commission argued to the circuit court that because the clemency process is an executive branch function, it is outside the parameters of law, and any action taken in furtherance of the clemency process by a state agency (created by the legislature) is, likewise, outside the law. This Court has already ruled otherwise in Dugger v. Williams, 593 So. 2d 180 (Fla. 1991).

In Williams, the Court considered a similar matter, in the context of the ex post facto provision of the Florida Constitution. The Court held a statute directing the Department of Corrections to recommend a commutation of sentence, was not "a nullity because it impinges upon the executive clemency power," but was "entirely within the legislative prerogative, since DOC was created by the legislature." Dugger v. Williams, 593 So. 2d at 183 (citation omitted) (emphasis added). In other words, when

the legislature creates the agency (as it did the Parole Commission) that agency is required to follow Florida law--in this case, Chapter 119. Further, in Williams, the Court noted that although "clemency falls peculiarly within the prerogative of the executive branch....even the executive must exercise that power in a manner that comports with Florida's Declaration of Rights." Williams, 593 So. 2d at 183.³ Moreover, disclosure of the clemency files gathered by the Parole Commission does not infringe upon the executive's clemency discretion. As noted in Williams, "[t]he executive still retains full discretion, subject only to its own Rules of Executive Clemency and the State Constitution, to accept or reject [clemency]." 593 So. 2d at 183.

Mr. Jennings believes the intent of Florida's Public Records Act, and the recently-passed constitutional amendment,⁴ goes far beyond the constitutional fact that clemency is a prerogative of the executive branch. The notion that the executive may maintain

³Although this Court has adopted "an extremely cautious approach in analyzing [clemency] questions," Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986), it has not hesitated to perform its constitutional duties in interpreting clemency matters. Art. V., sec. 3, Fla. Const.

⁴To the extent that the new constitutional amendment conflicts with Article IV, sec. 8(a), the latter is supplanted.

When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions.

Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337, 341 (Fla. 1978).

a secret file regarding someone set to be executed cannot be squared with the commitment by the people of Florida to openness of government records.

D. ARTICLE II, SEC. 3, FLA. CONST.

Because Florida law does not permit any exemptions to Chapter 119 except by statute, Mr. Jennings believes that Fla. R. Executive Clemency 15. E. is an unconstitutional attempt by the executive branch to thwart adoption by the legislative branch of the Public Records Act. That Act can be amended; however, the legislature must amend it.

Further, because the Parole Commission is a state agency, subject to Florida law, the Governor has no authority to exercise any powers over the Parole Commission absent specific constitutional provision. Art. II, sec. 3, Fla. Const.⁵ No constitutional provision exists which gives the Governor authority to override the provisions of the legislature regarding the Parole Commission--in clemency matters or in any other

⁵A new law went into effect January 1, 1993, which amends sec. 20.32, Fla. Stat., as follows:

(1) The Parole Commission, authorized by s.8(c), Art. IV, State Constitution of 1968, is continued and renamed the Parole Commission. The commission retains its powers, duties, and functions with respect to the granting and revoking of parole and shall exercise powers, duties, and functions relating to investigations of applications for clemency as directed by the Governor and the Cabinet.

This statutory provision, of course, does not apply to Mr. Jennings case, and, at any rate, does not provide any exemption from Chapter 119, nor authority under Art. II, sec. 3.

regard. The Governor does not have constitutional authority to direct the Parole Commission to withhold public records, regardless of their form or content. If the Governor wishes to do so, he must obtain the appropriate legislation from the legislative branch.

Pursuant to Art. II, sec. 3, Fla. Const., neither this Court nor the legislature may interfere with the executive's constitutional clemency power. See Sandlin v. Cr. Just. Standards & Tr. Com'n., 531 So. 2d 1344 (Fla. 1988). Mr. Jennings is not seeking such a result. Requiring the Parole Commission to comply with the Chapter 119 can in no way prevent the executive branch from making a decision on clemency. The executive branch has recognized as much in its former Rules-- which shared the confidential materials with counsel. (See Appendix G). The new Rules as read by the Parole Commission are clearly an effort by the Governor to amend Chapter 119 by executive order.

Mr. Jennings has no idea why the Rules were changed to deny access. Certainly, many concerns regarding confidentiality of names, addresses and the like exist in clemency proceedings; however, the very same concerns exist in criminal investigative processes, and the same ethical and legal burden is placed upon counsel and others to honor these concerns.⁶

⁶When the Supreme Court of the United States considered the need to protect "sensitive disclosures," in Gardner v. Florida, 430 U.S. 349, 358 (1977), it reminded us that reliability is always an issue because of "[t]he risk that some of the

(continued...)

E. DUE PROCESS VIOLATION; FUNDAMENTAL UNFAIRNESS.

Mr. Jennings has been denied due process by the arbitrary, optional, discretionary revision of the Fla. R. Executive Clemency -- revision which has been used to amend Chapter 119.

In January, 1991, the Florida Parole Commission advised CCR that no Parole Commission files would be disclosed under the provisions of Chapter 119. (See Appendix C). This issue was raised on appeal to this Court in Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); on January 2, 1992, this Court directed the Parole Commission to comply with the provisions of Chapter 119 and provide access to review and copy all of its files. Immediately thereafter, on January 8, 1992, Mr. Jennings' counsel sought Chapter 119 disclosure from the Florida Parole Commission. (See Appendix D). Access was denied based upon the pre-Mendyk position letter. (See Appendix E). Not long after the Parole Commission refused to comply with this Court's direction, on January 29, 1992, general counsel for the Commission sent a letter to Larry Helm Spalding, Capital Collateral Representative, informing him that the rules had changed. (See Appendix F).

The Rules of Executive Clemency in effect during the pendency of Mendyk authorized release of confidential material gathered and compiled by the Parole Commission to the Governor and Cabinet "and to the attorneys for each side." Fla. R. Executive Clemency 7.B. (See Appendix G). The new Rules in

⁶(...continued)
information accepted in confidence may be erroneous, or may be misinterpreted." Id. at 359.

effect as of January 1, 1992, direct that only the Clemency Board may have access to these materials. Fla. R. Executive Clemency 15.E. (See Appendix H). These rules were amended on December 18, 1992, by the office of executive clemency, secretly and without notice to interested parties.

The Rules of Executive Clemency are not governed by law. According to Fla. R. Executive Clemency 2 (eff. 01/01/92), they do not bind anyone to do anything. They are created, revised, amended at the whim and caprice of the Governor and the Cabinet. The Administrative Procedures Act does not apply to the Rules of Executive Clemency. In re Advisory Opinion of the Governor, 334 So. 2d 561 (Fla. 1976).

Mr. Jennings (and all other capital defendants) had no notice or opportunity to be heard on the revision of the Rules that resulted in his counsel being denied access to "confidential materials." As far as he knew, once the question was answered in Mendyk, he had every right to see those materials; unbeknownst to Mr. Jennings, however, the Rules were secretly amended in December, 1991.

This Court has already determined, however, that the Rules of Executive Clemency are limited by Florida's Declaration of Rights. Dugger v. Williams, 593 So. 2d 180 (Fla. 1991). Art. I, sec. 9, Fla. Const., mandates due process of law in Florida. Since the executive branch has created a process for handling clemency, that process must comport with the Declaration of Rights, or it is fundamentally unfair. Sullivan v. Askew, 348

So. 2d 312 (Fla. 1977). Secret amendment of the Rules in December, 1991, was fundamentally unfair to Mr. Jennings (and all other capital defendants). Without warning, files previously available (although the availability was not established until this Court so ordered in Mendyk) became unavailable.

F. BRADY V. MARYLAND, 373 U.S. 83 (1963).

The State of Florida has an affirmative due process duty under the Fourteenth Amendment to reveal to Mr. Jennings any material in the state's possession that is favorable to the accused and "'material either to guilt or punishment,' regardless of the good or bad faith of the state." Brady v. Maryland, 373 U.S. 83, 87 (1963). See United States v. Bagley, 473 U.S. 667, 674 (1985); United States v. Agurs, 427 U.S. 97 (1976); United States v. Spagnuolo, 960 F.2d 990 (11th Cir. 1992). This duty of disclosure does not end at the conclusion of the trial. Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) (state obligated under Brady to disclose exculpatory evidence during post-conviction proceedings).

Where the state suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to: a substantive issue, Alcorta v. Texas, 355 U.S. 28 (1957); the credibility of a state witness, Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); or the interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967). When the withheld evidence goes to the credibility and impeachability of a state

witness, the accused's Sixth Amendment right to confront and cross-examine witnesses against him is violated as well.

Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991); cf., Chambers v. Mississippi, 410 U.S. 284 (1973). It is of no constitutional significance whether the prosecutor, law enforcement or other state agent is responsible for the improper concealment.

Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984).

Of course, Mr. Jennings does not know if the State of Florida has violated Brady. What he does know is 1) material evidence was withheld in Mendyk; 2) the Parole Commission has been refusing to disclose its files since requested in Mendyk; and 3) it continues to do so. Under Thomas v. Goldsmith, there is an ongoing duty to disclose.⁷

CONCLUSION

On the basis of the argument and authority presented herein, Mr. Jennings respectfully submits that he is entitled to receive from the Florida Parole Commission access to review and copy all files in the commission's possession relating to him. Mr. Jennings respectfully urges this Honorable Court to set aside the order of the circuit court and enter an order directing the Florida Parole Commission to fully comply with the Public Records Act, sec. 119.01, et seq., Fla. Stat.

⁷Of course, the Parole Commission may not be in a position to know what constitutes exculpatory evidence in any given case. Therefore, if this Court accepts the Parole Commission's claim that the Governor by executive order successfully amended Chapter 119, then there must be an in camera review in order to assure that the clemency file does not contain exculpatory evidence.

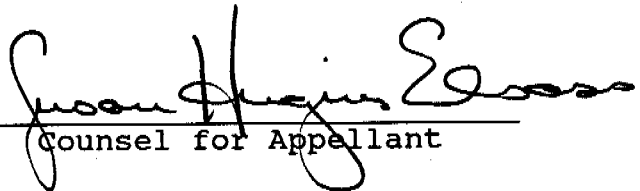
I HEREBY CERTIFY that a true copy of the foregoing amended initial brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 16, 1993.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

SUSAN HUGINS ELSASS
Assistant CCR
Florida Bar No. 0854573

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: 
Counsel for Appellant

Copies furnished to:

Kellie Nielan
Assistant Attorney General
Department of Legal Affairs
210 North Palmetto Avenue, Suite 447
Daytona Beach, FL 32114

CCR

State of Florida

533 South Monroe Street
Tallahassee Florida 32301
904) 487-4376
(SC) 277-4376
FAX) 904) 487-1682
FAX) (SC) 277-1682



Larry Helm Spalding
Capital Collateral Representative

August 31, 1992

William L. Camper
Office of the General Counsel
Florida Parole Commission
1309 Winewood Boulevard
Building 6, Room 338
Tallahassee, FL 32399

Re: State v. Jennings
Circuit Ct. No. 79-773-CFA

Dear Mr. Camper:

This will confirm our conversation of today's date wherein you advised me that the only documents or records pertaining to Bryan Fredrick Jennings in the possession of the Florida Parole Commission are clemency documents.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Susan Hugins Elsass".

Susan Hugins Elsass
Assistant CCR

APPENDIX B

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
(SC) 277-4376
(FAX) (904) 487-1682
(FAX) (SC) 277-1682



Larry Helm Spalding
Capital Collateral Representative

January 24, 1991

HAND DELIVERED

Ms. Carolyn Tibbets
Capital Punishment Research Specialist
Clemency Department
FLORIDA PAROLE COMMISSION
1309 Winewood Boulevard
Building 6 - Third Floor
Tallahassee, Florida 32399-2450

Dear Ms. Tibbets:

As you know, the Office of Capital Collateral Representative represents Todd Michael Mendyk in post-conviction matters. When I spoke with you by telephone on January 3, you advised me that I would have to seek your files in this matter through the Governor's Office. I have yesterday been advised by the Governor's counsel that they do not have your files. Therefore, I am again requesting access to public records pursuant to Section 119.01 et seq., Florida Statutes (1989).

We ask that you provide a representative or representatives of our office immediate access to inspect and copy any and all files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) relating to Mr. Mendyk. He was convicted for the homicide of Lee Ann Larmon of Hernando County on April 9, 1987.

Our interest is in, but not limited to, the following:

1. Case reports.
2. Investigation reports, including any and all memoranda prepared during the course of the investigation of this matter.
3. All handwritten and typed notes of investigators, and other personnel.

Ms. Carolyn Tibbets
January 24, 1990
Page Two

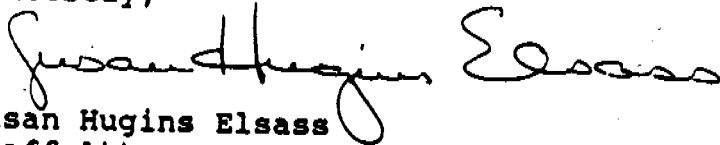
4. Any and all statements made and given to the Commission.
5. All correspondence relating to Mr. Mendyk.

This request is made for purposes of our preparation of Mr. Mendyk's post-conviction proceedings. The Florida Supreme Court in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), made it clear that post-conviction proceedings do not constitute a "pending appeal" for purposes of determining whether criminal investigative files are exempt from public disclosure pursuant to the provisions of Sections 119.011(3)(d)2 and 119.07(3)(d), Florida Statutes (1989). This request specifically includes the files and notes of any Parole Commission personnel who participated in the investigation of this matter.

Due to the exigencies of capital litigation, we are laboring under severe time restrictions and would therefore appreciate your prompt attention to these matters. Please contact me upon receipt of this request so that appropriate arrangements can be made for our review of the records.

Thank you for your attention and assistance in this matter.

Sincerely,



Susan Hugins Elsass
Staff Attorney

/pc

APPENDIX C

A. M. "TONY" FONTANA
COMMISSIONER CHAIRMAN

JUDITH A. WOLSON
COMMISSIONER VICE CHAIRMAN

GENE HODGES
COMMISSIONER SECRETARY



MAURICE CROCKETT
COMMISSIONER

CHARLES H. LAWSON
COMMISSIONER

E. GUY REVELL, Jr.
COMMISSIONER

KENNETH W. SIMMONS
COMMISSIONER

FLORIDA PAROLE COMMISSION

1309 WINEWOOD BOULEVARD, BUILDING 8, THIRD FLOOR, TALLAHASSEE, FLORIDA 32399-2450 • (904) 488-1653

January 29, 1991

Susan Hugins Elsass
Staff Attorney
Capital Collateral Representative
533 South Monroe Street
Tallahassee, FL 32301

RE: Public Records Request
Todd Michael Mendyk

Dear Ms. Elsass:

This will acknowledge receipt of your public records request dated January 24, 1991, directed to Ms. Carolyn Tibbets, Capital Punishment Research Specialist, Clemency Department. Your request asks for access to inspect and copy and any all files and records relating to your client, Todd Michael Mendyk.

Please be advised that with regard to an inmate's files and records, the proper custodian is the Department of Corrections. The Parole Commission only shares use of these files and records jointly with the Department of Corrections. See 20.315(20), Fla.Stat. Any public records requests for any documents or records in these files should be made to the Department of Corrections.

However, since your request is directed to Ms. Tibbets in the Clemency Department, it appears you are requesting clemency files and records regarding Mr. Mendyk which are in our custody. The only clemency files of which we are the custodian, are "investigative" files which are prepared at the direction of the Governor and Cabinet as the Board of Clemency.

It is the position of the Parole Commission, which position is concurred with by the Governor's legal counsel that

materials gathered by the Commission when directed by the Governor and Cabinet, are not subject to the legislative mandate of Chapter 119, Fla.Stat. Such procedures fall within the ambit of the clemency power which is vested solely in the executive pursuant to Section 8, Article IV, State Constitution. See AGO 86-50, May 30, 1986; In re Advisory Opinion of the Governor, 334 So.2d 561 (Fla. 1976); Sullivan v. Askew, 348 So.2d 312 (Fla. 1977); Turner v. Wainwright, 379 So.2d 148 (1st DCA 1980).

Therefore, your public records request regarding clemency files is respectfully declined.

Sincerely,


William L. Camper
General Counsel

WLC:jm

APPENDIX D

CCR

State of Florida

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
(SC) 277-4376
(FAX) (904) 487-1682
(FAX) (SC) 277-1682



Larry Helm Spalding
Capital Collateral Representative

January 8, 1992

Ms. Carolyn Tibbets
Capital Punishment Research Specialist
Clemency Department
FLORIDA PAROLE COMMISSION
1309 Winewood Boulevard
Building 6 - Third Floor
Tallahassee, FL 32399-2450

RE: Gregory Scott Engle
Bryan Frederick Jennings
Gregory Alan Kokal

Dear Ms. Tibbets:

The Office of Capital Collateral Representative represents Messrs. Engle, Jennings, and Kokal in post-conviction matters. By this letter we request access to all Parole Commission records (specifically including clemency records) relating to these individuals. This requests is made pursuant to § 119.01, et. seq., Fla. Stat. and Mendyk v. State, Nos. 77,865 and 76,906 (Fla. Jan. 2, 1992).

We ask that you provide a representative or representatives of our office access to inspect and copy any and all files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) relating to Messrs. Engle, Jennings, and Kokal. They were sentenced to death on August 17, 1979; May 7, 1980; and November 14, 1984, respectively.

Our interest is in, but not limited to, the following:

1. Case reports.
2. Investigation reports, including any and all memoranda prepared during the course of the investigation of these matters.

Ms. Carolyn Tibbets
January 8, 1992
Page Two

3. All handwritten and typed notes of investigators, and other personnel.
4. Any and all statements made and given to the Commission.
5. All correspondence relating to Messrs. Engle, Jennings, and Kokal.

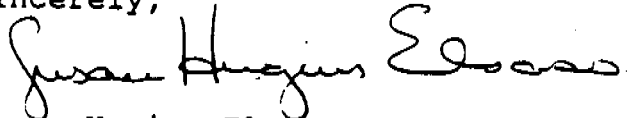
Please note also that this request specifically includes the files and notes of any Parole Commission personnel who participated in the investigation of these matters.

The Florida Supreme Court in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), determined that a post-conviction proceeding does not constitute a "pending appeal" for purposes of exempting criminal investigative files from public disclosure pursuant to the provisions of § 119.011(3)(d)2 and § 119.07(3)(d), Fla. Stat.

Due to the exigencies of capital litigation, we are laboring under time restrictions and would therefore appreciate your prompt attention to these matters. All three cases have looming deadlines. Please contact me upon receipt of this request so that appropriate arrangements can be made for our review of the records.

Thank you for your attention and assistance in this matter.

Sincerely,



Susan Hugins Elsass
Staff Attorney

/le

APPENDIX E

A.M. "TONY" FONTANA
COMMISSIONER CHAIRMAN

JUDITH A. WOLSON
COMMISSIONER VICE CHAIRMAN

E. GUY REVELL, Jr.
COMMISSIONER SECRETARY



MAURICE G. CROCKETT
COMMISSIONER

GENE H. HODGES
COMMISSIONER

KENNETH W. SIMMONS
COMMISSIONER

EDWARD M. SPOONER
COMMISSIONER

FLORIDA PAROLE COMMISSION

1309 WINEWOOD BOULEVARD, BUILDING 6, THIRD FLOOR, TALLAHASSEE, FLORIDA 32399-2450 • (904) 488-1653

January 10, 1992

Ms. Susan Hugins Elsass
Staff Attorney
Capital Collateral Representative
1533 South Monroe Street
Tallahassee, FL 32301

RE: Clemency Records Request
Gregory Scott Engle
Bryan Fredrick Jennings
Gregory Alan Kokal

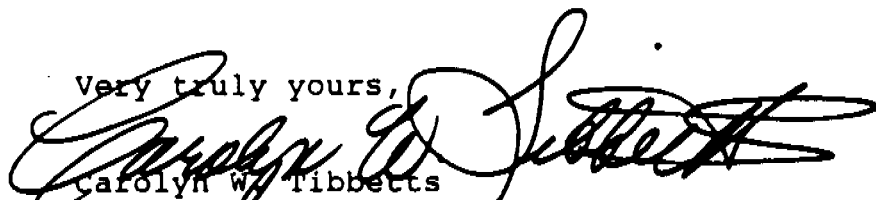
Dear Ms. Elsass:

This will acknowledge receipt of your letter dated January 8, 1992 requesting "access to inspect and copy any and all files and records" of Gregory Scott Engle, Bryan Fredrick Jennings, and Gregory Alan Kokal.

In response to a previous letter from you dated January 24, 1991, our General Counsel, William L. Camper, provided you this Commission's position in this matter.

Therefore, your request for Clemency records is respectfully denied.

Very truly yours,



Carolyn W. Tibbetts
Capital Punishment Research Specialist
Clemency Department

CWT/mls

APPENDIX F



A.M. "TONY" FONTANA
COMMISSIONER CHAIRMAN

JUDITH A. WOLSON
COMMISSIONER VICE CHAIRMAN

E. GUY REVELL, JR.
COMMISSIONER SECRETARY

MAURICE CROCKETT
COMMISSIONER

GENE H. HODGES
COMMISSIONER

CHARLES H. LAWSON
COMMISSIONER

KENNETH W. SIMMONS
COMMISSIONER

FLORIDA PAROLE COMMISSION

1309 WINEWOOD BOULEVARD, BUILDING 6, THIRD FLOOR, TALLAHASSEE, FLORIDA 32399-2450 • (904) 488-1653

January 29, 1992

Larry Helm Spalding
Capital Collateral Representative
1533 South Monroe Street
Tallahassee, FL 32301

RE: Public Records Request

Dear Mr. Spalding:

As you may be aware, periodically your office, on behalf of different clients, makes a public records request for access to all Parole Commission files and records (specifically including clemency records) relating to that inmate client.

The purpose of this letter is to advise you of our legal position regarding these and any similar future request.

With regard to an inmate's files and records, the proper custodian is the Department of Corrections. The Parole Commission only shares use of these files and records jointly with the Department of Corrections. See 20.315(20), Fla.Stat. Any public records requests for any documents or records in these files should be made to the Department of Corrections, the statutory custodian of the records.

With regard to clemency files and records, the only clemency files that are in our possession are "investigative" files which are prepared at the direction of the Governor and Cabinet as the Board of Clemency. Rule 16 of the Rules of Executive Clemency 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

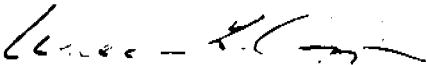
Page Two
Larry Helm Spalding
January 29, 1992

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 all records and documents to be inspected or copied.

Additionally, it is the position of the Parole Commission, which position is concurred with by the Governor's legal counsel that materials gathered by the Commission when directed by the Governor and Cabinet, are not subject to the legislative mandate of Chapter 119, Fla.Stat. Such procedures fall within the ambit of the clemency power which is vested solely in the executive pursuant to Section 8, Article IV, State Constitution. See AGO 86-50, May 30, 1986; In re Advisory Opinion of the Governor, 334 So.2d 561 (Fla. 1976); Sullivan v. Askew, 348 So.2d 312 (Fla. 1977); Turner v. Wainwright, 379 So.2d 148 (1st DCA 1980).

Thus, any and all future requests of this kind will be denied for the reasons stated herein.

Sincerely,

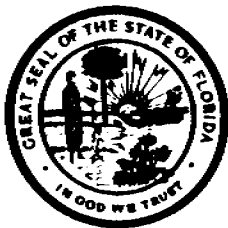

William L. Camper
General Counsel

WLC:jm

cc: Bobby Brochin, Governor's Office
Carolyn Tibbetts
Ray Howard

APPENDIX G

**RULES
OF
EXECUTIVE CLEMENCY
OF
FLORIDA**



This public document was promulgated at an annual cost of \$0.143 per copy for information regarding Executive Clemency.

EXECUTIVE CLEMENCY

1. Statement of Policy

Executive Clemency is a power vested in the Governor by the Florida Constitution of 1968. Article IV, Section 8 (a) of the Constitution provides:

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.

Clemency is an act of grace proceeding from the power entrusted with the execution of the laws and exempts the individual upon whom it is bestowed from all or any part of the punishment the law inflicts for a crime committed.

2. Office of Executive Clemency

In order to assist in the orderly and expeditious exercise of this executive power, the Office of Executive Clemency is created to process those matters of Executive Clemency requiring approval of the Governor and three members of the Cabinet. These rules are created by mutual consent of the Governor and Cabinet and nothing contained herein can or is intended to limit the authority given to the Governor or the Cabinet in the exercise of this constitutional prerogative.

The Governor with the approval of three members of the Cabinet shall appoint a Coordinator who shall appoint all assistants. The Coordinator

and assistants shall comprise the Office of Executive Clemency. The Coordinator shall keep a proper record of all proceedings, and shall be the custodian of all records.

3. Parole and Probation

The Governor and Cabinet have no jurisdiction to grant or revoke parole or probation, and such matters will not be entertained by the Governor and Cabinet.

4. Persons Ineligible to Apply

Persons incarcerated, or otherwise ineligible to file an application under Rule 11 will not be considered for any form of Executive Clemency, unless a waiver is granted in accordance with Rule 14 or Clemency is recommended by the Secretary of the Department of Corrections or by the Parole and Probation Commission. Those sentenced to death will be considered for clemency in accordance with Rule 7.

5. Clemency

At the discretion of the Governor, if a case merits consideration of Executive Clemency for any reason, the Governor with the approval of three Cabinet members may bestow the following acts of grace:

A. FULL PARDON

A Full Pardon unconditionally releases from punishment, forgives guilt and entitles an applicant to all of the rights of citizenship enjoyed by him before his conviction. It freely and unconditionally absolves the offender from all legal conse-

quences of the conviction of an offense under Florida Law.

B. CONDITIONAL PARDON

A Conditional Pardon releases from punishment, only so long as the applicant fulfills certain conditions, precedent or subsequent, which are specified by the Governor with the approval of three Cabinet members. A violation or breach of the conditions may remove the conditional pardon and return the recipient to his status prior to receiving the same.

C. COMMUTATION OF SENTENCE

Commutation of Sentence changes the applicant's penalty to one less severe, but does not restore civil rights. See Rule 7 on commutation of death sentences.

D. REMISSION OF FINES AND FORFEITURES

Remission of Fines and Forfeitures suspends or removes fines or forfeitures.

E. SPECIFIC AUTHORITY TO OWN, POSSESS OR USE FIREARMS

Specific Authority to Own, Possess or Use Firearms restores to the applicant the right to own, possess or use firearms after the applicant's civil rights or residence rights have been restored, or when adjudication of guilt has been withheld on a felony charge and probation satisfactorily completed, but only when a verifiable need exists. Pursuant to the Federal Gun Control Act of 1968, a person who has been convicted of a felony and has been granted restoration of civil rights with specific authority to own, possess or use a firearm, must apply to the Assistant Director, Criminal

Enforcement, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 784, Ben Franklin Station, Washington, D.C., 20044, in order to meet federal requirements.

F. RESTORATION OF CIVIL OR RESIDENCE RIGHTS

(1) RESTORATION OF CIVIL RIGHTS restores to the applicant all or some of the rights of citizenship enjoyed before felony conviction(s) in the State of Florida.

(2) RESTORATION OF CIVIL RIGHTS IN THE STATE OF FLORIDA is granted to an applicant convicted of a felony in another jurisdiction, including another state, federal or military court. The applicant must have been a bona fide resident of the State of Florida for at least one year next prior to applying for restoration of civil rights in the State of Florida.

Restoration of civil rights in the State of Florida is only good as long as the applicant lives in Florida. If applicant moves to another State, that State must also grant applicant restoration of civil rights until the applicant is granted a full pardon by the President for federal or military convictions or the Executive Clemency Board of the State in which applicant was convicted of a State conviction grants a pardon. Full pardons by the State in which applicant was convicted or a pardon from the President are usually recognized by all States as restoring applicant full civil rights, except the specific authority to own, possess or use firearms.

(3) RESTORATION OF RESIDENCE RIGHTS restores to the applicant, who is not a citizen of the United States, any and all rights enjoyed by him as a resident of Florida

which were lost as a result of a felony conviction under the laws of the State of Florida, any other state, or the federal government. The applicant must have been a bona fide resident of the State of Florida for at least one year next prior to applying for restoration of residence rights. To be eligible under this subsection, an applicant must be a person as defined in Section 1.01(3), Florida Statutes.

6. Restoration of Civil and Residence Rights

A. When a person has been convicted in a Florida State court and has completed service of all sentences imposed or has terminated from parole, probation, or adult community control, his civil rights may be reinstated, without the case being considered at an executive clemency meeting in the absence of the filing of an objection as provided in Subsection E of this rule. The records of each person receiving such final release shall be reviewed by the Florida Parole and Probation Commission to determine eligibility under these rules. The rights restored under this provision shall exclude the specific authority to own, possess or use a firearm.

B. Any person whose name was not submitted upon release from prison, parole or probation, or released prior to the effective date of this rule, November 1, 1975, and who otherwise qualifies, may upon application have his civil rights reinstated, except for the specific authority to own, possess or use a firearm. The application of each person under this section shall be reviewed by the Florida Parole and Probation Commission to determine eligibility under these rules.

C. This rule shall not apply to a person who has an outstanding detainer, a pending charge or pecuniary penalty based upon a state, out-of-state,

or federal charge, indictment, information, or conviction.

D. When a person has been convicted in a Federal court and has completed the term of Federal supervision in the State of Florida, and has been a bona fide resident of the State of Florida for at least one year, the applicant may be reinstated automatically if the Federal authorities certify that he otherwise qualifies under Rule 6C, and there are no objections from the Governor or any two or more members of the Cabinet. The restoration of civil rights in Florida under this provision shall exclude the specific authority to own, possess or use a firearm.

E. Each applicant for restoration of residence rights or restoration of civil rights in the State of Florida who does not meet the requirements of Rule 6D, must be reviewed by the Florida Parole and Probation Commission to determine eligibility under these rules. The report of the Commission must be provided to the Governor and members of the Cabinet. Within twenty days of receiving the report, the Governor or any two or more Cabinet members may file an objection with the Coordinator of the Office of Executive Clemency. In absence of an objection, the Coordinator shall issue a certificate granting restoration of civil rights in the State of Florida or residence rights without the specific authority to own, possess or use a firearm. Should the requisite objection(s) be received, the Coordinator shall place the case on the agenda for consideration at the next executive clemency meeting of the Governor and Cabinet members.

7. Commutation of Death Sentences

All Rules of Executive Clemency are inapplicable to cases of inmates sentenced to death, except Rules 1, 2, 3 and 17.

A. In capital punishment cases, the Clerk of the Court shall prepare and send, pursuant to Section 922.09, Florida Statutes, a certified copy of the conviction and sentence to the Governor within thirty (30) days after the Circuit Court's receipt of the Florida Supreme Court's mandate or the dissolution of any stay of the mandate. The Governor or any member of the Cabinet, after reviewing a certified copy of the conviction and sentence, may request the Florida Parole and Probation Commission to make an appropriate investigation, inquiring into any factors relevant to commutation. The Commission shall designate a person to receive the written or oral statements of testimony from any interested persons who wish to make their views on the inmate's commutation known to the Governor and Cabinet and from the inmate who may have legal counsel present. Statements or testimony shall be taken in a non-adversary proceeding, without interrogation of witnesses, except for the limited purposes of identifying witnesses and clarifying statements. A report of the Commission's investigation, including a transcript of the statements or testimony, shall be provided to the Governor and members of the Cabinet within 120 days after request for investigation. Along with the report, the Governor or any member of the Cabinet may request a recommendation from the Commission. Any report submitted by the Secretary of the Department of Corrections shall be included in the Commission's report.

B. Due to the nature of the information presented to the Governor and Cabinet by the Florida Parole and Probation Commission during review of capital cases for the purpose of consideration of Executive Clemency, the confidentiality of certain portions of the material must be maintained. The report of the Commission, similar to a pre-

sentence investigation report, will contain a portion which is public and a portion which shall remain confidential. The portion of the report designated confidential by the Commission shall include those documents as required to be so by law, by agency or court rule, or by the source. The confidential portion shall not be made public and shall be available only to the Governor and Cabinet members to assist in determining the Clemency request and to the attorneys for each side.

C. After the Commission's report is received by the Governor and Cabinet, the Coordinator shall place the name of the inmate on the agenda for the next Executive Clemency meeting or a specially called meeting of the Governor and members of the Cabinet, but not sooner than thirty (30) days after receiving the Commission's report including the transcript of statements or testimony. The Coordinator shall also give immediate notice of the time, date and place of the meeting to the appropriate State Attorney and the Attorney for the inmate, advising each of the availability of the Commission's report including the transcript of the statements or testimony. Each Attorney may file with the Coordinator, for distribution to the Governor and Cabinet members, any written exceptions, briefs or memoranda on the case up to ten (10) days prior to the date of the meeting.

D. At the meeting to consider Executive Clemency, the Attorneys may present oral arguments not exceeding thirty (30) minutes for each side.

E. After the meeting, no arguments for or against commutation shall be presented to the Governor and Cabinet members individually. Any person with relevant information or comments must submit ten (10) copies of the same to the Office of

APPENDIX H



RULES
of
Executive
Clemency
of
Florida

RULES OF EXECUTIVE CLEMENCY

1. Statement of Policy

Executive Clemency is a power vested in the Governor by the Florida Constitution of 1968. Article IV, Section 2(a) of the Constitution provides:

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.

Clemency is an act of grace proceeding from the power entrusted with the execution of the laws and exempts the individual upon whom it is bestowed from all or any part of the punishment the law inflicts for a crime committed.

The Governor and members of the Cabinet collectively are the Clemency Board.

2. Office of Executive Clemency

In order to assist in the orderly and expeditious exercise of this executive power, the Office of Executive Clemency is created to process those matters of Executive Clemency requiring approval of the Governor and three members of the Cabinet. These rules are created by mutual consent of the Clemency Board to assist persons in applying for clemency and to provide guidance to the members of the Clemency Board; however nothing contained herein can or is intended to limit the authority given to the Clemency Board in the exercise of its constitutional prerogative.

The Governor with the approval of three members of the Cabinet shall appoint a Coordinator who shall appoint all assistants. The Coordinator and assistants shall comprise the Office of Executive Clemency. The Coordinator shall keep a proper record of all proceedings, and shall be the custodian of all records.

3. Parole and Probation

The Clemency Board will not grant or revoke parole or probation, and such matters will not be entertained by the Clemency Board.

4. Clemency

The Governor has the unfettered discretion to deny for any reason any request for clemency. The Governor, with the approval of three Cabinet members, has the unfettered discretion to grant, for any reason, the following acts of grace:

A. Full Pardon

A Full Pardon unconditionally releases the person from punishment and forgives guilt. It entitles an applicant to all of the rights of citizenship enjoyed by the person before his or her conviction, including the right to own, possess, or use firearms.

B. Conditional Pardon

A Conditional Pardon releases the person from punishment and forgives guilt, if the applicant fulfills the conditions specified by the Governor with the approval of three Cabinet members. If the conditions of the pardon are violated or breached, the conditional pardon may be revoked and the applicant may be returned to his or her status prior to receiving the conditional pardon.

C. Commutation of Sentence

A Commutation of Sentence may adjust the applicant's penalty to one less severe, but does not restore any civil rights and it does not restore the authority to own, possess or use firearms. See Rule 15 on commutation of death sentences.

D. Remission of Fines and Forfeitures

A Remission of Fines and Forfeitures suspends or removes fines or forfeitures.

E. Specific Authority To Own, Possess, or Use Firearms

The Specific Authority to Own, Possess or Use Firearms restores to the applicant the right to own, possess or use firearms. Pursuant to the Federal Gun Control Act of 1968, a person who has been convicted of a felony in a court other than a court of the State of Florida and has been granted restoration of civil rights with specific authority to own, possess or use firearms, must apply to the Assistant Director, Criminal Enforcement, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 784, Ben Franklin Station, Washington, D.C., 20044, in order to meet federal requirements.

F. Restoration of Civil Rights in Florida

The Restoration of Civil Rights restores to the applicant all or some of the rights of citizenship in the State of Florida enjoyed before the felony conviction(s).

G. Restoration of Residence Rights in Florida

The Restoration of Residence Rights restores to the applicant, who is not a citizen of the United States, any and all rights enjoyed by him or her as a resident of Florida which were lost as a result of a felony conviction under the laws of the State of Florida, any other state, or the federal government.

5. Persons Eligible to Apply for Clemency

A. Pardons

A person may not apply for a pardon unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release for at least 10 years.

B. Commutation of Sentence

A person may not apply for a commutation of sentence unless he or she has been granted a waiver pursuant to Rule 8.

C. Specific Authority To Own, Possess, or Use Firearms

A person may not apply for the specific authority to own, possess, or use firearms unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release for at least 8 years. The person must be a legal resident in the State of Florida at the time the application is filed, considered, and decided.

D. Restoration of Civil or Residence Rights

A person may not apply for the restoration of his or her civil rights unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release. If the person was convicted in a court other than a court of the State of Florida, he or she must be a legal resident of the State of Florida at the time the application is filed, considered, and acted upon. If the person is applying for restoration of residence rights, he or she must be domiciled in the State of Florida at the time the application is filed, considered, and acted upon.

E. Outstanding Detainers

To be eligible for clemency, no applicant may have any outstanding detainers and must have paid any and all pecuniary penalties resulting from any criminal convictions. This provision does not apply to persons applying for a remission of fines and forfeitures.

6. Application for Clemency Forms

A. All correspondence regarding an application for clemency should be addressed to Coordinator, Office of Executive Clemency, 2737 Centerview Drive, Knight Building, Suite 308, Tallahassee, Florida, 32399-0950. All persons who seek Clemency shall complete an application and submit it to the Office of Executive Clemency. Application forms to be used in making application for Clemency will be furnished by the Coordinator upon request.

All applications for Clemency under these rules must be filed with the Coordinator on the standard form provided by the Office of Executive Clemency.

B. Each application for clemency shall have attached to it a certified copy of the charging instrument (indictment, information or warrant with supporting affidavit) for each felony conviction and a certified copy of the judgement and sentence of each and every felony conviction including those that occurred within the State of Florida, outside the State of Florida and federal convictions. Each application for clemency may include character references, letters of support, or any other documents that are relevant to the application for clemency.

C. Once the application is filed, the Coordinator shall inform the victims, if possible, of the applicant's request.

D. It is the responsibility of the applicant to keep the Office of Executive Clemency advised of any change in the information provided in the application.

E. If any application does not meet the requirements of the Rules of Executive Clemency, it may be returned by the Office of Executive Clemency to the applicant.

7. Applications Referred to the Florida Parole Commission

Every application which meets the requirements of these Rules may be referred to the Florida Parole Commission for an investigation, report and recommendation. All persons who submit applications shall comply with the reasonable requests of the Florida Parole Commission in order to facilitate and expedite investigation of their case.

8. Waiver of the Rules of Eligibility to Apply for Clemency

A. If an applicant cannot meet the requirements of Rule 5, he or she may seek a waiver of the rules. Any person who seeks a waiver of the rules may obtain a "Request for Waiver" form from the Office of Executive Clemency. Upon receipt of the original and 8 copies of the Request for Waiver form and any other material to be considered, the Coordinator shall forward copies of the documents to the Clemency Board and the Florida Parole Commission. The Commission shall review the documents and make a recommendation to the Clemency Board. A waiver of the rules may only be granted by the Governor with the approval of two members of the Cabinet.

B. Upon receipt by the Coordinator of written notification from the Governor and two members of the Cabinet, the Coordinator shall place the case on the agenda to be heard by the Clemency Board.

9. Restoration of Civil and Residence Rights Without a Hearing

A. Except as provided in paragraph D, an applicant shall have his or her civil or residence rights (excluding the specific authority to own, possess, or use firearms) restored without a hearing, if the applicant meets all of the following requirements:

1. The applicant has completed service of all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release.

2. The applicant does not have an outstanding detainer or any pending criminal charges.

3. The applicant does not have any outstanding pecuniary penalty resulting from a criminal conviction or traffic infraction, including but not limited to, fines, court costs, restitution pursuant to a Court Order, restitution pursuant to Section 960.17(1) of the Florida Statutes, and unpaid costs of supervision pursuant to Section 945.30 of the Florida Statutes.

4. The applicant has not been convicted of a capital or life felony.

5. The applicant has not previously had his or her civil rights restored in the State of Florida.

6. The applicant does not have more than two felony convictions. For the purpose of the requirement contained in this subsection only, each felony conviction shall include all related offenses which are those triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions.

7. The applicant is a citizen of the United States, if he or she is requesting restoration of civil rights.

8. The applicant must be a legal resident of the State of Florida, if he or she was convicted in a court other than a Florida state court and is requesting a restoration of civil rights.

9. The applicant must be domiciled in the State of Florida, if he or she is requesting restoration of residence rights.

10. The applicant was not a public official who during his or her term of office committed a criminal offense for which he or she was subsequently convicted.

B. The records of each person convicted in a Court of the state of Florida shall be automatically reviewed by the Florida Parole Commission upon his or her final release to determine if the requirements under Subsection A are met. If the Commission certifies that all of the requirements in Subsection A are met, the Coordinator shall, pursuant to an Executive Order, issue a certificate that would grant restoration of civil rights or residence rights in the State of Florida without the specific authority to own, possess or use firearms.

C. If the person has been convicted in a court other than a Court of the State of Florida, an application for the restoration of civil or residence rights must be submitted in accordance with Rule 6. Such application shall be reviewed by the Florida Parole Commission to determine if the requirements under Subsection A are met. If the Commission certifies that all of the requirements in Subsection A are met, the Coordinator, pursuant to an Executive Order, shall issue a certificate granting restoration of civil or residence rights in the State of Florida without the specific authority to own, possess or use firearms.

D. Any member of the Clemency Board may object to the restoration of civil or residence rights without a hearing at any time prior to the Coordinator issuing the certificate restoring such rights. Such objection will automatically cause the request for restoration of civil or residence rights to not be considered pursuant to Rule 9.

10. Hearings by the Clemency Board on Pending Applications

A. The Coordinator shall place upon the agenda for consideration by the Clemency Board at its next scheduled meeting:

1. Timely completed applications that meet the eligibility requirements under Rule 5 for which any investigation, report, and recommendation, if any, conducted under Rule 7 is completed;

2. Cases in which an applicant has obtained a waiver pursuant to Rule 3;

3. Cases of exceptional merit that the Florida Parole Commission has brought on its own motion after it has made a thorough investigation and study of the case and made a favorable recommendation to the Clemency Board, fully advising of the facts upon which such recommendation is based or when it has investigated an inmate who is sentenced to life imprisonment, who has actually served at least 10 years, has sustained no charge of misconduct, and has a good institutional record; or

4. Cases of exceptional merit of inmates that the Secretary of the Department of Corrections has presented to the Florida Parole Commission.

B. The Coordinator shall prepare an agenda which shall include all cases that qualify for a hearing under Subsection A of this Rule. The agenda shall be distributed to the Clemency Board at least 20 days before the next scheduled meeting.

C. The applicant's failure to comply with any rule of executive clemency will be sufficient cause for refusal, without notice, to place an application on the agenda.

11. Procedure at Hearings Before the Clemency Board

A. The Clemency Board will meet in the months of March, June, September and December of each year, or at such times as set by the Clemency Board.

B. An applicant is not required to attend his or her hearing for clemency and the failure to attend the hearing will not be weighed against the applicant. The applicant or any other person shall not be permitted to make an oral presentation to the Clemency Board, unless the applicant or the other person first advises the Office of Executive Clemency no later than 20 days prior to the next scheduled meeting of the Clemency Board, that he or she intends to make an oral presentation. Any member of the Clemency Board or the Coordinator for the Office of Executive Clemency may waive this 20 day requirement.

C. Any person making an oral presentation to the Clemency Board, will be allowed not more than 5 minutes. All persons making oral presentations in favor of an application shall be allowed cumulatively no more than 20 minutes. All persons making oral presentations against an application shall be allowed cumulatively no more than 20 minutes. Any member of the Clemency Board may extend the time allotted for an oral presentation.

D. Subsequent to the hearings of the Clemency Board, the Coordinator shall prepare Executive Orders granting clemency as directed and circulate them to the members of the Clemency Board. After the Executive Orders are fully executed, the Coordinator shall certify and mail a copy to the applicant. The original Executive Order shall be filed with the Secretary of State. The Coordinator shall send a letter to each applicant officially stating the disposition of his or her application. A seal is not used by the Office of Executive Clemency.

12. Continuance of Cases

An interested party may apply for a continuance of a case if the continuance is based on good cause. The Governor will decide if the case will be continued. Cases held under advisement for further information desired by the Governor will be marked "continued" and noted on each subsequent agenda until the case is decided.

13. Withdrawal of Cases

The applicant may withdraw his or her application by notifying the Office of Executive Clemency at least 20 days prior to the next scheduled meeting of the Clemency Board. A request to withdraw a case made within 20 days of the hearing on the application will be allowed if the Governor or the Coordinator for the Office of Executive Clemency determines that there is good cause. Cases that are withdrawn from the agenda will not be considered again until the application is refiled.

14. Reapplication for Clemency

Any person who has been granted or denied any form of executive clemency may not reapply for further executive clemency for at least one year. Any person who has been denied a waiver under Rule 8 may not apply for another waiver for at least one year from the date the waiver was denied. Any person who (i) has been convicted of a capital or life felony (ii) has been denied a waiver pursuant to Rule 8 after seeking a commutation of sentence and (iii) is incarcerated, may not apply for another waiver for at least three years from the date the waiver was denied.

15. Commutation of Death Sentences

This Rule applies to all cases where the sentence of death has been imposed. The Rules of Executive Clemency are inapplicable to cases where inmates are sentenced to death, except Rules 1, 2, 3, 15 and 16.

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.

B. After the report is received by the Clemency Board, the Coordinator shall place the case on the agenda for the next scheduled meeting or at a specially called meeting of the Clemency Board, if, as a result of the investigation, any member of the Clemency Board requests a hearing within 30 days of receiving the report. Once the hearing is set, notice shall be given to the appropriate state attorney, attorney for the inmate, and the victim's family.

C. Notwithstanding any provision to the contrary in the Rules of Executive Clemency, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board.

D. Upon request, a copy of the actual transcript of any statements or testimony of the inmate that are made part of the report shall be provided to the state attorney, attorney for the inmate, or victim's family. The attorney for the state or the inmate, the victim's family, the inmate, or any other interested person may file a written statement, brief or memorandum on the case up to 10 days prior to the clemency hearing, copies of which will be distributed to the members of the Clemency Board. The person filing such written information should provide 10 copies to the Coordinator of the Office of Executive Clemency.

E. Due to the sensitive nature of the information contained in the report, it shall be confidential. The report shall not be made available for public inspection or distribution and shall be made available only to the members of the Clemency Board and their staff to assist in determining the request for clemency.

F. At the clemency hearing for capital punishment cases, the attorneys for the state and the inmate may present oral argument each not to exceed 15 minutes. A representative of the victim's family may make an oral statement not to exceed 5 minutes.

G. If a commutation of the death sentence is ordered by the Governor with the approval of three members of the Clemency Board, the original order shall be filed with the Secretary of State, and a copy of the order shall be sent to the inmate, the attorneys for each side, a representative of the victim's family, the Secretary of the Department of Corrections and the sentencing judge.

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.

17. Cases Proposed by the Governor or Members of the Cabinet

In cases of exceptional merit, the Governor or any member of the Cabinet may propose a case for Executive Clemency. Any such case may be acted upon by the Governor with the approval of three members of the Cabinet and nothing contained herein shall limit the exercise of that power.

18. Effective Dates

History - Adopted September 10, 1975, Rule 6 (formerly Rule 9) effective November 1, 1975; Rule 7 adopted December 8, 1976; Rule 6 amended December 8, 1976, effective July 1, 1977; revised September 14, 1977; Rule 12 amended October 7, 1981; revised December 12, 1984; amended January 8, 1985; amended July 2, 1985; Rule 12 amended September 18, 1986; Rules amended December 18, 1991, effective January 1, 1992.