

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

REPLY BRIEF OF APPELLANT

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, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY TO STATEMENT OF THE CASE AND FACTS	1
ARGUMENT IN REPLY	2
CONCLUSION	5

TABLE OF AUTHORITIES

Brady v. Maryland,
373 U.S. 83 (1963) 4

Cannady v. State,
18 Fla. L. Weekly S___ (Fla. May 6, 1993) 1, 3

Dugger v. Williams,
593 So. 2d 180 (Fla. 1991) 4

Espinosa v. Florida,
112 S. Ct. 2926 (1992) 1

James v. State,
18 Fla. L. Weekly S139 (Fla. 1993) 2

Parole Commission v. Lockett,
18 Fla. L. Weekly S258 (Fla. April 22, 1993) 3

State v. Kokal,
562 So. 2d 324 (Fla. 1990) 2

Thomas v. Goldsmith,
979 F.2d 746 (9th Cir. 1992) 4

REPLY TO STATEMENT OF THE CASE AND FACTS

In its Answer Brief, the State asserts "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." Answer Brief at 3. The State fails to note that the two year period was tolled when Mr. Jennings' prior appeal was pending before this Court. More importantly however, the circuit court ruled against the State; the circuit court concluded that a procedural bar did not apply. The State has not appealed that ruling. As this Court recently explained:

Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. As such, we find that it would be inappropriate, and possibly a violation of due process principles, to remand this cause for resentencing. To do so would allow the State an opportunity to present an additional aggravating circumstance when the State did not initially seek its application, object to its non-inclusion, or seek a cross-appeal on this issue.

Cannady v. State, 18 Fla. L. Weekly S___ (Fla. May 6, 1993) (Slip Op. at 12) (emphasis added). The State's failure to cross-appeal precludes consideration of its contention.

The State also set forth "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)." Answer Brief at 3. However, what the State neglected to note was the fact that Mr. Jennings objected at trial to the standard jury instructions on "heinous, atrocious or cruel" and "cold, calculated and premeditated" (R. 1648-51). Mr. Jennings

submitted proffered instructions defining these aggravators in conformity with the narrowing constructions adopted by this Court (R. 3443-44). Mr. Jennings challenged on direct appeal the circuit court's denial of objections to the standard instructions and refusal to give the proffered instruction. This Court denied Mr. Jennings' direct appeal argument as meritless. Under James v. State, 18 Fla. L. Weekly S139 (Fla. 1993), Mr. Jennings properly sought to amend his motion to vacate in order to obtain reconsideration of his argument.

ARGUMENT IN REPLY

► Point 1.

This Court denied the point 1 argument when it denied the State's Motion to Dismiss on December 7, 1992. Mr. Jennings had responded to that Motion to Dismiss by relying upon State v. Kokal, 562 So. 2d 324 (Fla. 1990). In Kokal, the circuit court ordered disclosure of Chapter 119 material. The state appealed that order even though the judge had not ruled on any other claims contained in the motion to vacate. This Court accepted the state's appeal, saying "We have jurisdiction." 562 So. 2d at 325. Here, as in Kokal, the non-final order concerned a circuit court's public records disclosure order. Here, as in Kokal, this Court has jurisdiction to hear Mr. Jennings' appeal of the order disposing of the Chapter 119 issue.

Further, in LeCroy v. State, No. 79956, a death-sentenced Mr. LeCroy has taken an appeal to this Court on another public records disclosure non-final order, and this Court has set a

briefing schedule. (See Attachment A). The state there agreed the appeal was proper and the evidentiary hearing on the motion to vacate should be held in abeyance until the disclosure issue was resolved on appeal. There is no merit to the State's Point 1.

► Point 2.

The argument contained in point 2 was presented to the circuit court at the June 23, 1992, hearing (PC-S. 284-295). In response, the court entered its Order Requiring Production (PC-R. 169-170) and its Final Order on Motion to Produce (PC-R. 210-212). The State has not cross-appealed. Under Cannady v. State, 18 Fla. L. Weekly S___ (Fla. May 6, 1993), the State is procedurally barred from raising this argument that the circuit court erred.

► Point 3.

The State's Point 3 does not address Mr. Jennings' amended initial brief. The cases cited by the assistant attorney general do not stand for the propositions for which they are offered.

Mr. Jennings would note that Parole Commission v. Lockett, 18 Fla. L. Weekly S258 (Fla. April 22, 1993), recently issued. At this time, it is not final as a rehearing is pending before

this Court.¹ Mr. Jennings maintains that the decision there was in error.

Moreover, Mr. Jennings submits that the decision in Parole Commission does not address Mr. Jennings' contention that he was entitled to access to the clemency file up until the amendment the clemency rules on January 1, 1992. The rule change was adopted without notice and cannot be applied retroactively to a file that was collected under the old rule which provided for access for Mr. Jennings' counsel.² See Dugger v. Williams, 593 So. 2d 180 (Fla. 1991). The clemency investigation occurred during 1989. The material in Mr. Jennings' clemency file was placed in that file when the rule provided Mr. Jennings' counsel had access. However, access to that file has been denied by applying the new rule retroactively.

Further, Parole Commission v. Lockett, does not address Mr. Jennings' request for an in camera inspection to determine whether any exculpatory evidence is contained in the clemency file which must be disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963); Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992).

¹Following oral argument in Parole Commission v. Lockett, CCR wrote the governor's office seeking parole commission investigative files. Two months later, counsel received an ambiguous response. (See Appendix A.) When counsel arrived at the governor's office to view the clemency files counsel were advised that "whatever was confidential remains confidential," and were, thus, again denied access to the files.

²In Parole Commission v. Lockett, the clemency file in question was opened after January 1, 1992.

This case presents a question of first impression to this Court--how can a clemency file previously opened to Mr. Jennings' counsel be closed without notice.

This is, indeed, a separation of powers problem which this Court must resolve. Mr. Jennings believes the Court should follow the intent of the constitution and Florida law (open government in Florida) and provide him access to the parole commission files.

CONCLUSION

Based upon the argument and authority presented herein, and in his amended initial brief, Mr. Jennings respectfully urges this Honorable Court to set aside the order of the circuit court and to enter an order directing the Florida Parole Commission to fully comply with the Public Records Act, and further prays for such other relief as this Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 13, 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