IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Appellant,

vs.

CASE NO. SC03-260

Circuit Court Case Nos.
CRC77-02173CFANO-I
CRC77-01696CFANO-I

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
FAX (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The statement of the case offered in King's initial brief is so outrageously editorialized that it should be stricken. The statements that evidence has been destroyed which could prove King's innocence and that his conviction "is in serious question," are not only without necessary record support, they are false assertions that are not supported by any evidence and have no place in an appellate brief. King's feeble attempt to discredit victim and state witness James McDonough by offering a 1991 investigative summary printed off of Amos Lee King's informative website has no bearing on any issue before this Court, has never been offered to the circuit court in any legitimate pleading, and also has no place in an appellate brief.

The true facts of this case are outlined in this Court's opinion on direct appeal, King v. State, 390 So. 2d 315, 316-17 (Fla. 1980):

> On March 18, 1976 [sic], the appellant was an inmate at the Tarpon Springs Community Correctional Center, a work release facility, serving a sentence for larceny of a firearm. On this date a routine bed check was made by James McDonough, a prison counselor, at about 3:40 a. m. The appellant King was absent from his room. The counselor began a search of the building grounds and found the appellant outside the building. Appellant was wearing light-colored pants which had the crotch portion covered with blood. The counselor directed King back to the office control

> room inside the building. When the counselor turned to get handcuffs, King attacked him with a knife. A struggle ensued, and the counselor received several cuts and stab wounds. King left the office, then returned and found the counselor talking to his superior on the phone. He stabbed the counselor again and cut the telephone cord.
>
> At approximately 4:05 a. m., the police and fire personnel arrived at the scene of a fire at a house approximately 1500 feet from the correctional center. The police officers discovered the body of Natalie Brady. She had received two stab wounds, bruises over the chin, and burns on the leg. An autopsy revealed other injuries, which included bruises on the back of the head, hemorrhaging of the brain, hemorrhaging of the neck, and broken cartilage in the neck. There was a ragged tear of the vagina, apparently caused by the wooden bloodstained knitting needles which were found at the scene, as well as evidence of forcible intercourse. Appellant's blood type was found in Brady's vaginal washings. The medical examiner attributed Mrs. Brady's death to multiple causes and established the time of death as 3:00 a.m. Arson investigators concluded that the fire was intentionally set at approximately 3:00 to 3:30 a.m.

Defendant King was charged by an indictment filed on April 7, 1977, with first degree murder, sexual battery, burglary, and arson. These charges were ultimately consolidated with charges of attempted first degree murder and escape that had been previously filed based on King's actions at Tarpon Springs Correctional Center. Following a jury trial before the Honorable John S. Andrews, Circuit Court Judge, he was convicted

as charged and sentenced to death. After exhausting his state direct and postconviction appeals, King was awarded a new sentencing proceeding from federal court based on a finding of ineffective assistance of counsel during the penalty phase of his trial. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), previous history, 714 F.2d 1481 (11th Cir. 1983).

The resentencing proceeding commenced on November 4, 1985, before the Honorable Philip J. Federico, Circuit Court Judge. At the conclusion of the resentencing, a twelve person jury unanimously recommended the death penalty. On November 7, 1985, Judge Federico imposed a sentence of death, finding that five aggravating circumstances (murder committed by a defendant under sentence of imprisonment; murder committed by a defendant with prior violent felony convictions; defendant knowingly created a great risk of death to many persons; murder committed during a burglary and sexual battery; and murder committed in an especially heinous, atrocious, or cruel manner), and no mitigating circumstances applied.

On direct appeal, this Court struck reliance on the aggravating factor of great risk of death to many persons, but affirmed the death sentence. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Subsequent collateral challenges to King's convictions and sentences have

been consistently rejected. King v. Dugger, 555 So. 2d 355 (Fla. 1990); King v. State, 597 So. 2d 780 (Fla. 1992); King v. Moore, 196 F.3d 1327 (11th Cir. 1999), cert. denied, 531 U.S. 1039 (2000).

On November 19, 2001, Governor Jeb Bush signed a third death warrant for King and execution was scheduled for January 24, 2002. King litigated a successive postconviction motion, which was denied by the Honorable Susan F. Schaeffer, Circuit Judge, on January 1, 2002. Motions to depose the former medical examiner, Dr. Joan Wood, and several motions for DNA testing were also denied by Judge Schaeffer. These rulings were all upheld by this Court on appeal, and a habeas petition filed by King was also denied. King v. State, 808 So. 2d 1237 (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002); see also King v. Moore, Case No. 02-10317-P (11th Cir. Jan. 22, 2002), reh. denied, Jan. 24, 2002.

The January, 2002, execution was stayed by the United States Supreme Court pending resolution of King's petition for certiorari, which challenged this Court's rejection of King's claim that Florida's death penalty statute is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2001). The stay dissolved when certiorari review was denied after the decision of Ring v. Arizona, 536 U.S. 584 (2002), was released. Execution was rescheduled for July 10, 2002. The July execution

was stayed by this Court for consideration of King's state petition for habeas corpus, which alleged that Ring invalidated Florida's capital sentencing scheme. This Court thereafter denied habeas relief, King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 123 S. Ct. 657 (2002), and the execution was rescheduled for December 2, 2002, at 6:00 p.m.

On November 26, 2002, the Eleventh Circuit Court of Appeals issued a stay of execution to consider a pending appeal King had taken from a federal district court's July 2, 2002, denial of a motion for appointment of counsel to pursue clemency proceedings. Later that day, the United States Supreme Court vacated the stay that had been issued. The Eleventh Circuit thereafter issued an opinion denying relief. King v. Moore, 312 F.3d 1365 (11th Cir.), cert. denied, 123 S. Ct. 662 (2002).

On Friday, November 29, King filed another successive motion to vacate in the circuit court, as well as another motion for DNA testing and a request for public records from the Sixth Circuit Medical Examiner's Office. The State submitted responses on Saturday, November 30, and Judge Schaeffer held a hearing on all three motions on Sunday, December 1. Orders denying relief on all motions were entered on December 2, and, on appeal, this Court affirmed each ruling. King v. State, 833 So. 2d 774 (Fla. 2002).

However, Governor Jeb Bush granted a stay of execution in

order to secure DNA testing as requested by King. On February 5, 2003, Governor Bush issued an Executive Order dissolving the stay and execution is currently scheduled for 6:00 p.m. on February 26, 2003. On February 7, 2003, Judge Schaeffer issued a Case Management Order. That Order directed that any circuit court motions to be considered must be filed by 12:00 noon on Monday, February 10, 2003.[1]

At approximately 1:30 p.m. on February 10, attorneys for King faxed a Motion for Extension of Time to Judge Schaeffer. Judge Schaeffer arranged for a telephonic hearing on Tuesday, February 11, at 8:30 a.m. During the course of that hearing, additional motions were faxed to the court by Mr. Cannon, including a Motion for DNA Testing and a Motion to Compel or in the Alternative Motion to Issue Writ of Mandamus. The court indicated that, should King wish to file any substantive postconviction motion, he needed to do so by 12:00 noon on Tuesday, February 11, and that the status hearing previously scheduled for Friday, February 14, would incorporate any additional motion which was timely filed (T. 2/11/03 pp. 41-42, 46).

Late Wednesday afternoon, February 12, Mr. Cannon faxed public records demands to the Attorney General's Office, the

[1]As the Order indicates, instructions were provided orally as to these directives to Peter Cannon, attorney for Mr. King, on Thursday, February 6, 2003.

Florida Department of Law Enforcement, the Florida Department of Corrections, and the Office of the Governor. Mr. Cannon did not serve copies of the demands to FDLE, DOC, or the Governor's Office on the Attorney General's office or the State Attorney's office. On Thursday, February 13, the State filed a Motion to Strike all public records demands for improper service; individual responses were also served to the demands requested by the Attorney General's Office, FDLE, and the Governor's Office.

On Friday, February 14, 2003, the circuit court conducted a hearing. At the beginning of the hearing, King's attorneys presented the court with a Motion for Counsel to Appear Pro Hac Vice and a Motion to Permit the Defendant to Appear Telephonically. After discussion, the motion for counsel was granted, and the court denied the motion to permit King to appear telephonically, but allowed King's telephonic presence notwithstanding the denial of the motion (T. 2/14/03, pp. 4-12).

Thereafter, King's attorneys presented the court with a Motion to Disqualify. The motion alleged that Judge Susan Schaeffer should be recused from King's case due to allegations of judicial statements which were not specifically identified by time, date, or content. The court took a recess to consider the motion; the motion was subsequently denied.

The court entertained argument from the attorneys on all of

the other pending motions. She denied the motion to compel and denied and struck the public records demands; she took the motion requesting DNA testing under advisement. On Saturday, February 15, the court orally notified attorneys for the parties that she was granting in part, and denying in part, the request for DNA testing. A written order was filed, directing FDLE to conduct an examination for the presence of semen on the victim's nightgown and knitting needles collected from the crime scene. If no semen was detected, no further testing was to be conducted. If semen was detected, further (STR DNA) testing was to be conducted on the semen.[2] King's request for a re-testing of the ambulance sheets (which were examined in December, 2002, pursuant to a request by the Governor) by a lab independent from FDLE was denied.

On Friday, February 14, 2003, this Court issued a briefing schedule. King filed a Notice of Appeal on or about February 17, 2003. This brief is timely offered pursuant to the briefing schedule promulgated by this Court.

[2] On February 18, 2003 FDLE informed the parties that no semen was detected on any of the items tested.

SUMMARY OF THE ARGUMENT

ISSUE I - Judge Schaeffer properly denied King's successive Motion to Disqualify. The motion did not comply with the applicable rules and was legally and procedurally insufficient. In addition, as this was a successive motion, the court properly considered and rejected the merits of the request for her recusal.

ISSUE II - Judge Schaeffer properly denied King's demand for additional public records from the Sixth Circuit Medical Examiner's Office. This request for public records had previously been denied, and the denial was previously upheld by this Court.

ISSUE III - Judge Schaeffer properly denied King's motion to compel the production of clemency records. Her ruling that such records are exempt from public records disclosure and Florida Rule of Criminal Procedure 3.852 is supported by statute and case law. In addition, her determination that the release of some pages of these records did not amount to a waiver is consistent with all applicable law and must be upheld on appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S MOTION TO DISQUALIFY JUDGE SCHAEFFER.

The court below received King's motion to disqualify during the hearing conducted on Friday, February 14, 2003. The motion was presented after other motions had been presented and ruled upon; some of the referenced attachments were missing, and no supporting affidavits were offered. The motion alleged that judicial comments had been made which demonstrated judicial bias, but the dates of the comments, and when they became known to the defense, were not identified. The actual comments were not specifically included in the motion. The court permitted attorneys for King to swear to the allegations,[3] and permitted an affidavit filed later in the afternoon to supplement the motion. After recessing to review the allegations, the court denied the motion to disqualify.

Although the legal sufficiency of an initial motion to disqualify is a question of law which is reviewed de novo, Barnhill v. State, 27 Fla. L. Weekly S850 (Fla. Oct. 10, 2002), a ruling to deny a motion to disqualify a successor judge is reviewed for an abuse of discretion. Quince v. State, 732 So.

[3]Curiously, attorney Peter Cannon was willing to swear to the truth of the allegations in the motion, despite the fact that he did not have any personal knowledge of the allegations (T. 2/14/03 pp. 24-27).

2d 1059, 1062 (Fla. 1999); see also Amato v. Winn Dixie Stores/Sedgwick James, 810 So. 2d 979, 981 (Fla. 1st DCA 2002) (holding ruling as to timeliness of a motion to disqualify involves factual determinations, and must be reviewed for competent substantial evidence). This Court must affirm unless it finds that no reasonable person would take the view adopted by the court below. Quince, 732 So. 2d at 1062.

A review of the motion to disqualify filed below provides ample support for the court's order denying recusal. As noted by the court below, King's motion was untimely, since it was not filed within the ten days required under Rule of Judicial Administration 2.160(e). See Asay v. State, 769 So. 2d 974, 978 (Fla. 2000); Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). In addition, the motion was not sworn, and no supporting affidavits were attached. See Barnhill, 27 Fla. L. Weekly at S852 (motion insufficient where supporting affidavit improperly sworn). The motion was not presented to the court until other matters had been presented, and rulings secured, on unrelated motions. See Rule 2.160(e) (motion must be promptly presented to the court for immediate resolution); Fuster-Escalona v. Wisotsky, 781 So. 2d 1063, 1065 (Fla. 2000) (language of rule to be strictly applied). The court below properly denied the Motion to Disqualify based on each of these facts independently. See Barnhill, 27 Fla. L. Weekly at S852 (proper to deny motion

which fails to comply with technical requirements, even where grounds alleged may be facially sufficient).

In addition, the record in this case reflects that King had previously filed at least two successful motions to disqualify the trial judge. On May 16, 1985, King's attorney, Baya Harrison, filed a motion to disqualify Judge John Andrews, alleging that Judge Andrews harbored a bias against King (RS. V1/83-99, 107-119, 141, 147).[4] The motion was granted on June 19, 1985, and the Honorable Philip Federico was appointed to handle the resentencing in the case (RS. V1/141). In February, 1989, Judge Schaeffer was assigned to the case for postconviction purposes after Judge Federico was successfully disqualified upon motion filed by King's attorneys (PC. V10/1534-61, 1566). In light of this history, the court properly addressed the truth of the allegations in the motion, and concluded that she could remain fair and impartial, mandating denial of the motion (T. 2/14/03, pp. 75-76). Fla. R. Jud. Admin. 2.160(f); Card v. State, 803 So. 2d 613, 619-620 (Fla. 2001) (noting different standard for successor judge); Quince, 732 So. 2d at 1062.

---

[4]Record citations to "RS." refer to the record in King's direct appeal from his 1985 resentencing, Florida Supreme Court Case No. 68,631; citations to "PC." refer to the record on appeal from King's 1989 postconviction proceedings, Florida Supreme Court Case No. 76,537; citations to "T." refer to transcripts prepared in the instant appeal from hearings conducted on February 11, 2003 and February 14, 2003.

King fails to even acknowledge the obvious procedural deficiencies in his motion, and his brief never mentions the fact that this was a successor motion. Instead, he improperly cites the standard for consideration of an initial motion to disqualify (Appellant's Initial Brief, p. 11), and asserts that, because he did not believe Judge Schaeffer could be fair, her disqualification was constitutionally required.

The motion would have been legally insufficient even if presented as an initial motion to disqualify. A sufficient motion demonstrates actual bias or prejudice which creates "a reasonable fear that a fair trial cannot be had." Downs v. Moore, 801 So. 2d 906, 915 (Fla. 2001); Dragovich v. State, 492 So. 2d 350, 353 (Fla. 1986). Conclusory and speculative allegations are insufficient. Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995). As will be seen, this standard was not met on any of the allegations presented below.

Each of King's allegations will be further addressed in turn; however, as the record conclusively establishes, King is not entitled to any relief on this issue.

1. Judge Schaeffer's Comments During a Senate Subcommittee Meeting on January 16, 2003:

King first alleges that comments offered by Judge Schaeffer during a Senate Appropriations Subcommittee on Article V

Implementation and Judiciary on January 16, 2003, required her recusal in this case. King did not specifically identify the allegedly offensive comments in his motion to disqualify, but his brief claims that Judge Schaeffer's comments infer that she believed any claims which King might present would be "old hat" (Appellant's Initial Brief, p. 12). However, a review of the transcript subsequently obtained does not offer any support for a claim of bias or prejudice.

In denying this allegation, Judge Schaeffer ruled:

> As to this court's appearance before the Senate Appropriations Subcommittee on Article V Implementation and Judiciary on January 16, 2003, this court requested that the court reporter transcribe the court's comments, and while she has not yet seen the transcript, she did listen to the CD, and indicated in the hearing what was basically contained on the CD regarding Mr. King. There was nothing that she heard on the CD that suggests she cannot be fair and impartial in her determination of any matter involving Mr. King. The transcript will be available for review of this order.

Order Denying Motion to Disqualify, p. 3.[5] In her comments to the Senate Subcommittee, Judge Schaeffer was relating the need of trial court judges for additional law clerks, particularly to assist with the litigation of capital postconviction cases (T. 2/14/03, pp. 245-246). While she used her experience in this case to emphasize the need for additional clerks, she avoided

[5]Judge Schaeffer's comments are transcribed in the record at the end of transcript from the February 14, 2003 hearing, see Volume 2, pp. 245-256.

discussing any substantive matters about the case and she did not, as represented by King, suggest that she would not or could not seriously consider any claim presented by King (T. 2/14/03, p. 246). To the contrary, she expressly stated that she would "certainly give due consideration to whatever is brought before me" (T. 2/14/03, p. 253). There are no comments provided which support King's claim of bias, and the court below properly denied disqualification on this allegation.

2. Judge Schaeffer's Comments During the January 11, 2002 Hearing in this cause:

King next asserts that the court offered comments during a hearing on January 11, 2002, but again he has not specifically identified the particular comments at issue. During the hearing on February 14, King offered an affidavit from Rose Valdez, an investigator for CCRC-Middle, as to this allegation.[6] According to the affidavit, Ms. Valdez attended a January 11, 2001 [sic] hearing with Richard Kiley and April Haughey and investigator Ralph Rodriguez. Ms. Valdez attests that, at some point during the hearing, "the judge interjected and said that she was not

[6]This affidavit was not produced with the Motion to Disqualify as it was initially presented. After Judge Schaeffer indicated that she needed to know what she had been accused of saying, she directed Mr. Cannon to produce a transcript, as he stated at that time that he could provide the transcript (T. 2/14/03, pp. 24-25). The affidavit was presented later in the afternoon, after King advised the court that the alleged comment had been "edited out of the transcript" (T. 2/14/03, p. 40, 113).

going to accept anymore filings from Mr. King and that this case has been going on and on and you should be dead by now Mr. King." According to Ms. Valdez, attorney Richard Kiley then began to speak.

The transcript of the January 11, 2002 hearing refutes this allegation. In fact, the transcript establishes that Richard Kiley was not even present in court for that hearing. The comment which Ms. Valdez recalls is not reflected anywhere in the transcript.

As to this allegation, Judge Schaeffer noted:

> As to the hearing on January 11, 2002, this court has read every page of that transcript. The statement attributed to this court appears nowhere in the transcript. This court did not make the statement attributed to this court off the record, as this court did not ever request to go off the record at the hearing. It is the practice of this court never to go off the record at a hearing unless she asks first, and all of the lawyers agree to go off the record. This court, when she was chief judge of this circuit, was responsible for making her personal practice a requirement of all judges and court reporters by including this requirement in the court reporters' contract with the Sixth Judicial Circuit. As far as she knows, that contract provision is still present in the current contract. In 21 years on the circuit bench, this court has never asked a reporter to take anything out of any transcript, nor does she have any reason to believe that any court reporter working for her has ever done so. The transcript is the official record. No one has pointed to any such statement in the transcript, and no one has suggested that the court ever went off

> the record at the proceeding. This allegation has not been established, and this court finds it is untrue.

Order Denying Motion to Disqualify, p. 4. The court's findings are supported by the transcript of the January 11, 2002, hearing. No facts demonstrating bias have been presented, and the court properly denied this allegation.

3. Allegations attributed to Richard Kiley, a prior attorney for King:

According to King's motion to disqualify, Judge Schaeffer's recusal was also required by the fact that a prior attorney for Mr. King, Richard Kiley, is alleged to have told King that Judge Schaeffer and Dr. Joan Wood were "an item," and "very good friends." A legally sufficient motion cannot be based on rumors or gossip. See Barwick, 660 So. 2d at 693. Here, King sought disqualification solely on the basis of what one of King's former attorneys allegedly told King about Judge Schaeffer's personal life. Clearly, if this were the standard for disqualification, any defendant could secure a recusal by disseminating false rumors about a judge. Such is not the law.

Judge Schaeffer denied the disqualification on this basis as follows:

> As to the allegation that Mr. Kiley, one of the defendant's previous CCRC-M attorney's made a comment to Mr. King that this court and Dr. Wood had been an "item", and "very good friends," this court explained in the hearing that this was

> untrue. The only way this court ever heard this allegation is because the defendant says in a letter that it occurred. Mr. Kiley has not filed any such affidavit saying he ever told the defendant this. Even if he had, it would be quite remarkable if either a defendant or his lawyer could say something about a judge that was untrue, and then disqualify that judge because of the untrue statement. This is what the defendant's motion suggests when it says, "It has been alleged that an attorney with Capital Collateral Regional Counsel-Middle impugned the integrity of the (sic) Judge Schaeffer. Counsel cannot effectively represent Mr. King before this Court after such allegations have been made to the Court." This is an insufficient allegation to cause this court to be disqualified. As to the actual statement that Dr. Wood and this court were ever an "item" or "very good friends", the statement is untrue.

Order Denying Motion to Disqualify, p. 4. Once again, no facts demonstrating bias have been presented, and the court properly denied disqualification on this basis.

4. Judge Schaeffer's Comments About the Performance of Baya Harrison, a prior attorney for Mr. King:

King's last allegation in seeking Judge Schaeffer's disqualification asserts that the court previously commented that Baya Harrison, a prior attorney for Mr. King, should have secured the assistance of a medical examiner. As the court below noted, any misstatements of fact with regard to the lengthy and complex history of this case do not suggest bias or prejudice. In denying the sufficiency of this allegation, the

court held:

> As to the last allegation, this court has examined the attachments, and sees nothing that suggests that this court cannot be fair and impartial. If I said something erroneous at a hearing about why didn't Mr. Harrison get a medical examiner, when in fact, he had tried to do so, that is simply this court's forgetting something in a case with a long history, not this court intentionally trying to harm the defendant's success in any motion. It does not appear that this court's error was instrumental in any subsequent order of this court, where the court would have been more accurate about any facts that she related, and none was pointed out in either the motion or at the hearing. This is an insufficient allegation to cause this court to be disqualified.

Order Denying Motion to Disqualify, pp. 4-5. Once again, no facts demonstrating bias have been presented, and the court properly denied disqualification on this basis.

Having exhaustively reviewed the Motion to Disqualify, Judge Schaeffer concluded that she can continue to be fair and impartial to all of the parties in this case. King has not provided any basis for the rejection of this conclusion. His motion to disqualify was procedurally and substantively deficient; the weak and unsupported nature of his allegations suggests that the motion was not filed in good faith, but solely for purposes of delay. As the motion did not demonstrate any bias or prejudice, it was properly denied, and this Court must affirm the denial of relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S DEMAND FOR ADDITIONAL PUBLIC RECORDS.

King also challenges the denial of his January 29, 2003, demand for additional public records from the Sixth Circuit Medical Examiner's Office. This ruling is reviewed under an abuse of discretion standard. Mills v. State, 786 So. 2d 547, 552 (Fla. 2001).

It must be noted initially that, to the extent King claims that Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150, 154 (1972), are implicated by his public records requests, this argument was not presented to the court below and therefore is not properly before this Court. Thus, any claim of a federal constitutional right to these documents must be expressly found to be procedurally barred. Finney v. State, 831 So. 2d 651, 661 n. 8 (Fla. 2002); Shere v. State, 742 So. 2d 215, 218 n. 7 (Fla. 1999).

King's request sought documents and case files maintained regarding the autopsy conducted on John Peel, Jr., and Rebecca Long. The court denied this request on several grounds: the request failed to comply with the requirements of Rule 3.852(i); the request was procedurally barred, as this same request was previously denied and that ruling was upheld on appeal; and the documents requested were irrelevant and not reasonably capable

of leading to admissible evidence. Specifically, the court held:

> The Demand for Production of Additional Public Records, was filed January 29, 2003. It expressly stated that it was being filed pursuant to Fla. R. Crim. P. 2.852(i). It sought "any and all autopsy records on John Peel, Jr., and Rebecca Long." At the hearing, CCRC-M indicated that it was requesting the autopsy records to determine if Dr. Joan Wood, the medical examiner in the above-styled case who performed the autopsy of Ms. Natalie Brady, engaged in a "pattern" of misdiagnoses.
>
> Pursuant to 3.852(i)(1), CCRC-M was required to file an affidavit in the trial court that (A) attested that CCRC-M had made a timely and diligent search of the records repository, (B) identified with specificity the public records not at the repository, (C) established that the additional public records were either relevant to a pending postconviction proceeding or were reasonably calculated to lead to the discovery of admissible evidence, and (D) was to be served in accordance with the provisions of 3.852(c)(1). In similar fashion, in order for this court to order the production of records under 3.852(i)(2), the following findings must be made: (A) CCRC-M has made a diligent search of the records repository; (B) CCRC-M's affidavit identifies with specificity the public records not at the repository; (C) the additional public records are either relevant to the subject matter of a pending proceeding under Rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and (D) the additional public records requests are not overly broad or unduly burdensome.
>
> The demand filed January 29, 2003 is facially insufficient. No affidavit was filed with this demand, and although the demand *lists* the factors under Rule 3.852(i)(A)-(D), it makes no attempt to

satisfy those criteria. Since the demand is not facially sufficient, in that it doesn't conform in any respect with the Rule, it must be denied.

Additionally, on November 29, 2002, just 3 days before the defendant's December 2, 2002 scheduled execution, CCRC-M filed Defendant's Motion for Subpoena and Order to Release Any and All Autopsy and Medical Records in Possession of the Medical Examiner's Office Regarding John Peel, Jr. Although there was no request for the records of Rebecca Long included in this Motion, the exhibits attached to the Motion discussed the Long case. There has been no adequate explanation given as to why the autopsy records of Rebecca Long were not included in this prior request. This court held a hearing on the defendant's Motion on December 1, 2002, and denied the motion, finding the motion both untimely and irrelevant. A written Order denying the Motion was executed December 1, 2002. In the written order, this court reasoned that the autopsy records of John Peel, Jr. were not relevant to this case:

> On the merits, even if there were not an execution pending, there is really no reason to allow the Defendant to get records of a Medical Examiner regarding an autopsy of a baby whom two experts believe died of shaken baby syndrome and two experts believe died from an accident. Mrs. Brady did not die from this syndrome, nor from an accident. She died from multiple causes - being stabbed, beaten, choked, raped, and left in a house the killer set on fire, the smoke and fire from which she tried to escape by crawling. She died before she could crawl out of her burning house. None of Mrs. Brady's injuries were alleged to be from "shaken baby syndrome," nor any other such cause... Even if it

> could be conclusively shown that Dr. Wood was wrong in the John Peel, Jr. cause of death, that would not afford the defendant a new trial in his case.

This court's ruling was affirmed by the Florida Supreme Court in an unpublished opinion. King v. State, 833 So. 2d 774 (Fla. 2002). Accordingly, for the reasons stated in this court's prior order, and affirmed by the Florida Supreme Court, the autopsy records of John Peel, Jr. are not relevant because they are not reasonably calculated to lead to the discovery of admissible evidence.

Additionally, Fla. R. Crim. P. 3.852 (a)(2) says that Florida's Public Records Laws are not to be used as a basis for renewing requests previously initiated. Since the prior Motion for Subpoena and Order to Release Any and All Autopsy and Medical Records in Possession of the Medical Examiner's Officer Regarding John Peel, Jr. requested the same thing that is now being requested by the defendant through Fla. R. Crim. P. 3.852 as to John Peel, Jr., the Defendant's Demand for Additional Public Records regarding John Peel, Jr.'s autopsy records must be denied.

Additionally, on or about November 29, 2002, the defendant filed the defendant's third 3.851 Successive Motion to Vacate Judgment and Sentence, and Request for Evidentiary Hearing and Stay of Execution. The first claim for relief was titled by this court "Discredited Medical Examiner." In that claim, the defendant alleged that "Joan Wood has established a pattern of performing flawed, incomplete, contradictory, misleading, and inconsistent autopsies." The basis for this assertion was three cases where the defendant indicated that the defendants in those cases had been given relief from charges that had been filed against them due to inaccurate autopsies conducted by Dr. Wood, the Medical Examiner for Pinellas and Pasco County. The autopsies included in the defendant's Motion

were indicated as follows: (1) Lisa McPherson, (2) Rebecca Long, and (3) John Peel, Jr. The defendants who had been given relief from charges previously filed were indicted as follows: (1) Church of Scientology, (2) David Long, and (3) John Peel.

This court, after holding a *Huff* hearing on December 1, 2002, denied Defendant's Successive 3.851 Motion. A written order was executed on the same date, December 1, 2002. This court found the defendant's "Discredited Medical Examiner" claim to be procedurally barred. The defendant took an appeal to the Florida Supreme Court and alleged as error this court's summary denial of this claim without an evidentiary hearing. The Florida Supreme Court affirmed this court's ruling in an unpublished opinion. *King, Id.*

Since this court has already determined that the defendant is unable to raise any issue of "Discredited Medical Examiner" as being procedurally barred, and since the Florida Supreme Court has affirmed this court's ruling, this matter cannot now be raised again. If this issue were procedurally barred in the defendant's third successive 3.851 motion, it would certainly be procedurally barred in a fourth successive 3.851 motion. Without the ability to challenge this issue, the autopsy records of both Rebecca Long and John Peel, Jr. are irrelevant to any 3.851 claim that can be made by the defendant. Additionally, these autopsy records are not reasonably calculated to lead to the discovery of any admissible evidence. The Peel autopsy dealt with "shaken baby syndrome." The Long autopsy dealt with blunt trauma to the head and neck, which were assigned as the cause of death. It was later determined that the Peel baby may not have died from shaken baby syndrome, and that 7-year old Rebecca Long died from pneumonia. Mrs. Brady was not a baby, or a young child, but an elderly woman who was raped, stabbed, choked and left to die in a burning house. Even the

> defendant's expert, who filed an affidavit in this case never suggested that Mrs. Brady died from anything but homicidal violence. Thus, even if Wood's autopsies in the Long and Peel cases were flawed, that would not afford the defendant any relief in his case.
>
> On July 19, 2002, the defendant requested additional public records from the medical examiner's office of any and all records relative to the employment of Dr. Joan Wood. The state filed an objection on July 25, 2002. On the date set for hearing on the state's objection, August 9, 2002, the defendant filed a pleading withdrawing his public records request. Since the records requested and withdrawn may well have included these autopsy reports, this request cannot be renewed. Fla. R. Crim. P. 3.852 (a)(2).
>
> For any or all of the above reasons, the defendant's Demand for Additional Public Records is denied, and the state's Objection to Demand for Additional Public records is sustained.

Order Denying Defendant's Demand for Additional Public Records and Defendant's Demands for Public Records, pp. 2-5. King has not offered any reason to disturb the well-reasoned holding on this issue below. In fact, he fails to even acknowledge the ruling or attempt to explain any error committed by the court below. He also fails to acknowledge that he had previously requested these records, that his earlier request was denied, and that this Court affirmed the denial of his request.

This Court has recognized that Rule 3.852 is a discovery tool "not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." Sims v. State, 753 So. 2d 66, 70 (Fla.

2000) ("Rule 3.852 is not intended for use by defendants as, in the words of the trial court, 'nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry'"). King's attempt to add constitutional clout to this issue by citing to Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), is unpersuasive. By definition, records created years after King's trial in unrelated actions cannot constitute material, exculpatory evidence or false testimony which existed and should have been disclosed at the time of trial.

The denial of King's unauthorized request for public records is not reasonably subject to challenge, and King's claim must be denied.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING KING'S MOTION TO COMPEL THE PRODUCTION OF CLEMENCY RECORDS.

After the Governor's Office conducted DNA testing as part of its clemency investigation, the Governor informed King's counsel of the results and supplied counsel with three (3) pages of documents detailing the results from Bode Technology Group and FDLE. On February 6, 2003, collateral counsel wrote a letter to the Governor's Deputy General Counsel, Carlos Muniz, indicating that Bode Technology Group would not release any information to them and requested that the Governor's Office allow collateral counsel to obtain the records directly from Bode Technology Group, Inc. The next day, Mr. Muniz responded via letter and indicated that the requested files were "developed in the course of a clemency investigation and are therefore exempt from disclosure under Florida law." Subsequently, on or about February 12, 2003, King filed with the Office of the Governor a formal Demand for Public Records pursuant to Florida Rule of Criminal Procedure 3.852. At the hearing conducted on February 14, 2003, the Governor's Office filed a Response to Request for Production.

King also filed a Motion to Compel or in the Alternative Motion to Issue Writ of Mandamus, seeking the documents

generated by Bode Technology Group.[7] After hearing argument on these motions at the February 14, 2003 proceeding, the trial court determined that such clemency records are exempt from public records disclosure, and that the Governor did not waive this exemption by disseminating some of the clemency records upon request to the defense. The court also granted the State's Motion to Strike Public Records Demands and ruled that the demands currently pending before the court were insufficient.

On appeal to this Court, King asserts that the court erred in not granting his request for records from the Governor's Office and argues that the records are not exempt under Florida Statutes, section 14.28. King also alludes to his argument that he is entitled to the records pursuant to his public records request under Florida Rule of Criminal Procedure 3.852. The trial court addressed each of these claims when ruling on his separate motions. Because different legal standards of review apply to these issues, the State will address the issues separately.

1. King's Public Records Request Pursuant to Rule 3.852

As noted, the trial court granted the State's motion to strike the public records demands, including the demand on the Governor's Office, because the demands were legally insufficient

[7]This motion does not reference any material from FDLE.

and King failed to properly serve the demands. See Order Denying Defendant's Demand for Additional Public Records and Defendant's Demands for Public Records. This Court applies an abuse of discretion standard when reviewing a trial court's determination that a defendant's right to public records was not denied. Moore v. State, 820 So. 2d 199, 204 (Fla. 2002). In the instant case, King has failed to show an abuse of the trial court's discretion in denying his demand for public records.

At the outset, the court noted that King's Demand for Public Records was not properly served. In granting the State's motion to strike, the court ruled:

> At the hearing, CCRC-M was unable to show that it had served all four of the latest public records demands on the state and the assistant attorney general. The court allowed CCRC-M additional time to do so. However, as of the date of this order, CCRC-M has failed to produce any evidence to show that it served these requests on either the state or the assistant attorney general as required by Fla. R. Crim. P. 3.852(c)(1), and (i)(1)(D). The failure to serve these demands on the state and attorney general also violates this court's oral order given at the Hearing on Motion for Extension of Time held February 11, 2003, requiring service to all parties by fax or electronic mail due to the exigencies of the circumstances. Rules and court orders must be followed. CCRC-M has followed neither the rule nor this court's order.

Order Denying Defendant's Demand for Additional Public Records and Defendant's Demands for Public Records at p.5. Despite this finding, the court, in an abundance of caution, addressed King's

demand on other grounds and found that the instant demand was facially insufficient and failed to comply with Rule 3.852.

King's Demand for Public Records was filed pursuant to Rule 3.852, but as the trial court properly found, King made no attempt to comply with the rule. Collateral counsel orally indicated at the hearing that his request was filed pursuant to either Rule 3.852(h)(3) or 3.852(i). Rule 3.852(h)(3) applies "[w]ithin 10 days of the signing of a defendant's death warrant." As Judge Schaeffer noted, any demand under this subsection is insufficient because King's death warrant was signed on November 19, 2001. As to Rule 3.852(i), the trial court properly noted that the demand was facially insufficient because it failed to include an affidavit and because there was no pending rule 3.851 proceeding before the court, nor was the demand reasonably calculated to lead to the discovery of admissible evidence. See Fla. R. Crim. P. 3.852(i) (requiring an affidavit indicating, among other things, that the public records are "either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence"). Here, the court noted that the demand could not lead to the discovery of admissible evidence because the requested records were not public records, but rather were confidential clemency records. Thus, King has failed to demonstrate any abuse of the trial

court's discretion in denying his request for records from the Office of the Governor.

2. The Requested Records Developed or Received by the Governor During a Clemency Investigation are Exempt Records Pursuant to Florida Statutes, Section 14.28.

In filing his Motion to Compel or in the Alternative Motion to Issue Writ of Mandamus, King sought to have the trial court compel the Governor to disclose items deemed by the Governor to be confidential clemency records. In the alternative, King sought a Writ of Mandamus against the Governor forcing him to disclose the information. The trial court's ruling on King's motion presents a legal issue which is reviewed by this Court de novo. Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

In denying the motion to compel, the court held:

> It is axiomatic that records obtained pursuant to clemency proceedings are confidential, and exempt under Fla. Stat. § 14.28, as well as Rule 16 of the Rules of Executive Clemency. The Florida Supreme Court has repeatedly recognized this exemption. *Parole Commission v. Lockett*, 620 So. 2d 153 (Fla. 1993); *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996).
>
> The defendant argues that the exemption crafted by the legislature for clemency records is overly broad. The court finds this argument to be unpersuasive, not only because the defendant has failed to prove this assertion, and has offered little authority in support, but also because a plain reading of section 14.28 convinces this court that the exemption is specific and narrow, and is tailored to achieve its single purpose.

As to the argument that Fla. R. Crim. P. 3.852(f) does not specifically exempt records obtained pursuant to a clemency proceeding, the court finds this argument to also be without merit. Prior to the enactment of Fla. R. Crim. P. 3.852, public records in capital cases were obtained pursuant to chapter 119, Florida Statutes. Under chapter 119, records obtained pursuant to a clemency proceeding are expressly exempt. Fla. Stat. § 14.28; *Roberts*, 668 So. 2d at 582 ("clemency files and records are not subject to disclosure under chapter 119.") It therefore follows that clemency records are exempt under Fla. R. Crim. P. 3.852(f) as well.

As to the defendant's argument that a waiver occurred in this case, this appears to be a case of first impression. In *Roberts*, 668 So. 2d at 582, the Florida Supreme Court declined to address a similar waiver issue as not properly preserved where the governor released clemency records to the assistant attorney general but not to the defendant. The issue has been preserved here, however, and must be decided. After considering the arguments made on this issue, this court finds that the better rule of law is that since the Governor enjoys the discretion to release or not to release clemency records, the exercise of his discretion to release a portion of confidential clemency records does not constitute a waiver of the confidential nature of any other clemency record he elects in his discretion to withhold. Nor does it vitiate any exempt status conferred by law. *See State v. Buenoano*, 707 So. 2d 714, 717-18 (Fla. 1998). Moreover, the last sentence of Rule 16 of the Rules of Executive Clemency states, "Access to such materials, as approved by the Governor, <u>does not constitute a waiver of confidentiality.</u>" Emphasis mine.

The reason why a rule of law that permits the Governor to release a portion of his confidential clemency records, without waiving the confidentiality of other

clemency records is obvious. Holding otherwise would simply cause the Governor to withhold releasing any records. Imagine if that had occurred in this case. No one would know what the tests revealed, and this court, and the Florida Supreme Court would have been trying to rule on various motions filed by the defendant in a vacuum, not knowing what the test results showed or did not show. Imagine how the defendant would feel if he did not know what the tests revealed. How could the public have had any confidence in the process. It was far better for all concerned that the Governor approved the release of the three pages he did. Governor Bush did not, by approving the release of these three pages, waive the confidentiality of anything else in the defendant's clemency file.

The Governor is correct in his additional assertion that the records sought are of no avail to the defendant in this case, as the tests produced no DNA results. It would indeed be harsh to create a rule of law that creates a waiver under the facts and circumstances that exist here. This court has ruled in another order in this case that the defendant cannot even make a case for his public records requests, over objections. Thus, if these documents were public records, and the Governor objected to their release, they would not be provided. When they are clearly not public records, but confidential records, to suggest a waiver because of the Governor's generosity in allowing everyone involved to see the results of the tests he ordered, would seem unduly harsh, and will not be permitted by this court absent a rule of law, or a controlling case to the contrary. There are none.

Aside from the foregoing, the most convincing argument as to why this motion must be denied is that this court does not have the legal authority to compel Governor Bush to act in this instance. To do so would constitute a clear violation of the separation of powers doctrine. *Lockett*, 620

> So. 2d at 153. The Governor's clemency power operates independently of the judiciary, and is beyond the control or even legitimate criticism of the judiciary. *Lockett*, 620 So. 2d at 157 ("This Court has been very clear in construing the Governor's clemency powers and holding that this power is independent of both the legislature and the judiciary."); *Wade v. Singletary*, 696 So. 2d 754 (Fla. 1997). As the Governor noted in his response, and his attorney argued at the hearing, records obtained pursuant to a clemency proceeding are even exempt from the *Brady* prohibition against withholding exculpatory evidence. *Asay v. Florida Parole Commission*, 649 So. 2d 859 (Fla. 1994). One would hope that would not occur, however, and it certainly did not occur in this case, as the DNA tests ordered by the Governor were of no use to the defendant.
>
> Finally, even if the issuance of a writ of mandamus against Governor Bush by this court did not violate the separation of powers doctrine, the extraordinary remedy of mandamus would not be appropriate in this instance. Mandamus lies only when a public official has a clear legal *duty* to perform a ministerial function that he or she refuses to perform. *See Fasenmyer v. Wainwright*, 230 So. 2d 129, 130 (Fla. 1969)("In order to be entitled to a writ of mandamus, the petitioner must show a clear legal right to the performance by the respondent of the particular duty in question."). Mandamus is not proper when a public official enjoys the <u>discretion</u> to act, as is the case here. *Brown v. Pumpian*, 504 So. 2d 481, 483 (Fla. 1st DCA 1987)("[T]here being no <u>mandatory</u> ministerial act to be performed...we must deny the petition for writ of mandamus." Emphasis mine).

Order Denying Motion to Compel or in the Alternative Motion to Issue Writ of Mandamus, pp. 3-5.

The court's ruling is correct. As clemency records, these

documents are exempt from disclosure pursuant to Section 14.28, Florida Statutes, and Rule 16 of the Rules of Executive Clemency, both of which provide that all records and documents generated and gathered in the clemency process, or developed or received by any state entity pursuant to a Board of Executive Clemency investigation, are confidential and exempt from the provisions of Section 119.07, Florida Statutes, and Section 24(a), Article I of the State Constitution. The crux of King's argument is not that the clemency file exemption is invalid but rather, he argues the Governor waived this exemption when he partially disclosed the material by providing King's counsel with the DNA results. Florida Statutes, section 14.28 provides, in pertinent part, that all clemency records "shall be confidential and exempt . . . . [h]owever, such records **may** be released upon approval of the Governor. See § 14.28, Fla. Stat. (2002).[8] To the extent that counsel suggests that the Governor's Office did not claim a valid exemption because his response failed to cite the applicable statute, such an argument is clearly without merit. The Governor's written response of February 7, 2003, to collateral counsel's request for information was simply an informal correspondence and not a formal legal document. When collateral counsel filed their

[8]Collateral counsel repeatedly misquotes the applicable statutory language throughout his brief and claims that the statute mandates that the records be released upon the approval of the Governor.

formal, but legally insufficient, Demand For Public Records to the Office of the Governor, the Governor filed a formal response claiming that the records were exempt under section 14.28.

In addition to constituting exempt and confidential records, the court below also lacked any legal authority to issue an order directing the Governor to release the requested records. In Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993), this Court granted a petition for writ of prohibition filed by the Parole Commission after a circuit court judge issued an order compelling the disclosure of clemency records in a capital postconviction proceeding. This Court expressly held that a judicial order for release of clemency records violates the state constitutional separation of powers doctrine. See also Asay v. Florida Parole Commission, 649 So. 2d 859 (Fla. 1994), cert. denied, 516 U.S. 1017 (1995) (holding that Brady v. Maryland, 373 U.S. 83 (1963), "has no application to clemency proceedings in Florida"); Roberts v. Butterworth, 668 So. 2d 580, 582 (Fla. 1996); Wade v. Singletary, 696 So. 2d 754 (Fla. 1997) (executive clemency decisions are beyond the control, or even legitimate criticism, of judiciary).

This Court has repeatedly emphasized the need for caution by the judiciary when considering claims involving the executive function of clemency. This Court has consistently upheld the constitutionality of Florida's clemency procedures, and has

rejected any alleged right to a second clemency proceeding. King v. State, 808 So. 2d 1237, 1246 (Fla. 2002); Glock v. Moore, 776 So. 2d 243, 252-53 (Fla. 2001); Bryan v. State, 748 So. 2d 1003,, 1008 (Fla. 1999); Provenzano v. State, 739 So. 2d 1150, 1155 (Fla. 1999); Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986). King, having received the benefit of a temporary stay by the Governor, something that was only within the Governor's executive authority to dispense, has no judicial avenue from which to secure further consideration by the Governor in this wholly executive matter.

The Governor, sitting as the head of the Board of Executive Clemency, in the exclusive exercise of its constitutional authority, adopted Rules of Executive Clemency, which were most recently amended June 14, 2001. Rule 16 specifically provides:

> 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. (Emphasis added)

This rule clearly provides for the confidentiality and disclosure provisions of clemency files and documents. Any attempt requiring disclosure, which interferes and infringes 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 any such judicial order would be 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 exclusivity of this executive function, quoted the following excerpt from Cooley on Constitutional Limitations, Volume I (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.

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 Judicial or 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 Legislature 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 no 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 encroachments 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 Government.

Pepper, 66 So. 2d at 284 (Emphasis supplied).

Clearly, the court below properly declined to encroach upon

the exclusive authority of the Executive by attempting to substitute its judgment and order what files and documents of the clemency board are to be produced in violation of the separation of powers clause.[9] As previously shown herein, Rule 16 of the Rules of Executive Clemency and the statute are dispositive in that regard, and the court below was without jurisdiction to enter any order requiring the Governor to either produce or release any clemency files. Of course, King's request to issue a writ of mandamus cannot be used to compel the Governor to take discretionary actions; nor can the writ lie in the absence of a clear and preexisting legal right, which King has not demonstrated. See Federation of Physicians and Dentists v. Chiles, 613 So. 2d 1323 (Fla. 1993); Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992).

King fails to acknowledge any of the abundant case law contrary to his position. His assertion that the Governor's Office has waived all exemptions is refuted by the statute, which grants discretion to the Governor to release any records as he sees fit. As the court found below, King's assertion of an alleged waiver is baseless. In addition, the release of confidential public records does not vitiate the exempt status

[9]In State ex. rel. Second District Court of Appeal v. Lewis, 550 So. 2d 522 (Fla. 1st DCA 1989), the Court recognized that it may not "poach in [the] power patch" of the executive or legislative branch. See also Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992).

conferred by law. See State v. Buenoano, 707 So. 2d 714, 717-718 (Fla. 1998).

Additionally, other sought-after records or information from Bode Technology Group, Inc., could not provide King with any legitimate claim for relief. Any possible issue with regard to the DNA testing conducted by the Governor's office would be procedurally barred. The circuit court previously determined that any DNA results would not provide any basis for relief, and this Court upheld both rulings on appeal. See King v. State, 808 So. 2d 1237 (Fla. 2002) (stating that "[w]e find no error in the trial court's determination that King has not made the required showing, pursuant to rule 3.853, for testing the hairs in this case"); King v. State, 833 So. 2d 774 (Fla. 2002). King has not offered any reason for reconsideration of these prior rulings.

Furthermore, any possible complaints with the adequacy of the DNA testing conducted at the Governor's request cannot provide any basis for relief. Since the courts have previously ruled that any DNA results obtained would not affect the validity of King's convictions, due to evidence presented at trial and the undisputed contamination of the crime scene, any alleged invalidity of the most recent inconclusive results is similarly irrelevant.

King does not provide a reasonable basis to believe that any

relevant postconviction motion will be forthcoming as a result of any further disclosure. He has not demonstrated any statutory or constitutional right to access to this information. A review of the entire record presented herein provides ample support for each of the challenged rulings entered below. Once again, Judge Schaeffer has extensively analyzed the legal claims, factual underpinnings, and procedural history of this case in fully exploring King's eleventh-hour pleas for relief. Her conclusions in rejecting these issues are well-reasoned and consistent with all applicable law. This Court must affirm the orders entered below in all respects.

CONCLUSION

Based on the foregoing arguments and authorities, this Court must affirm the lower court's denial of King's motions.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843

_____
STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
(813) 356-1292 Facsimile

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and by U.S. Regular Mail to Peter J. Cannon, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this _____ day of February, 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

_____

COUNSEL FOR APPELLEE