IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
O'Connell, PJ, and Cavanaugh and Donofrio, JJ

MATTHEW MAKOWSKI (MDOC #198702),

Plaintiff-Appellant,

vs.

RICHARD DALE SNYDER, in his official capacity as Governor of the State of Michigan; RUTH JOHNSON, in her official capacity as Secretary of State of Michigan;

Defendants-Appellees.

Supreme Court File No. 146867

Court of Appeals File No. 307402

30th Circuit Court No. 11-579-CZ

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES A CLAIM THAT A STATE GOVERNMENTAL ACTION IS INVALID

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Dated: August 28, 2013

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The Executive Clemency Clause reads in its entirety:

> Sec. 14. The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating reasons therefor. [Const 1963, art V, § 14.]

Other Legal Authorities

INTRODUCTION

This case asks whether Governor Granholm exceeded her constitutional authority under Article V, Section 14 of the 1963 Michigan Constitution when she tried to revoke or rescind Mr. Makowski's commutation of sentence. The Governor changed her mind after she had signed the commutation on December 22, 2010, and after the commutation had been countersigned, affixed with the Great Seal, and filed by the Secretary of State, and delivered to the Department of Corrections (MDOC) the same day.

Matthew Makowski contends that his original sentence of mandatory life was commuted to parolable life on December 22, 2010. As a parolable lifer, he became subject to the jurisdiction of the parole board pursuant to MCL 791.234. Mr. Makowski contends that the commutation of his sentence on December 22, and the then vested right to be subject to the jurisdiction of the parole board, could not be revoked or rescinded for two reasons:

(1) because Const 1963, art V, § 14, confers on the Governor only the power to "grant" a commutation, and does not, expressly or by implication, also confer on the Governor the power to revoke or rescind a commutation; and

(2) because the commutation had become a completed act of Michigan state government on December 22, 2010, when the commutation was signed by the Governor and the Secretary of State and affixed with the Great Seal pursuant to MCL 2.44 (1964), as authorized by Const 1963, art III, § 3.

The Court of Appeals, in an opinion published at 299 Mich App 166; 829 NW2d 291 (2012), held that the case presents a non-justiciable political question beyond the reach of any court. Mr. Makowski asks this Court to reverse the judgment of the Court of Appeals, and to hold that his commutation was and is effective.

JURISDICTIONAL STATEMENT

The Court of Appeals issued its opinion and order on December 27, 2012. Mr. Makowski filed a timely motion for reconsideration on January 16, 2013. The Court of Appeals denied that motion on February 7, 2013. Mr. Makowski filed a timely application for leave on April 30, 2013, which this Court granted on July 5, 2013. Jurisdiction in this Court is proper under Const 1963, art 6, § 4; MCL 600.215(1)-(3); and MCR 7.301(A)(2).

QUESTIONS PRESENTED

1. Do Michigan courts have the power to decide whether former Governor Granholm exceeded her constitutional authority when she sought to revoke or rescind Mr. Makowski's signed commutation, after it had been countersigned, sealed, and filed by the Secretary of State, and delivered to the Michigan Department of Corrections?

   The Court of Appeals said no.
   Mr. Makowski says yes.
   The state defendants say no.

2. Does Article V, Section 14 of the 1963 Michigan Constitution grant the Governor the power to revoke or rescind a signed commutation, after it has been countersigned, sealed, and filed by the Secretary of State, and delivered to the Michigan Department of Corrections?

   The Court of Appeals did not answer the question.
   Mr. Makowski says no.
   The state defendants say yes.

STANDARD OF REVIEW

This case presents only questions of law. The standard of review for questions of law is de novo. *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co,* 274 Mich App 584, 588; 735 NW 2d 644 (2007) citing *Lee v Macomb County Bd of Com'rs,* 464 Mich 726, 734; 629 NW 2d 900 (2001)). Constitutional issues are also reviewed de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Issues of statutory interpretation are also reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). Accordingly, de novo review applies to all issues presented by this appeal.

STATEMENT OF MATERIAL FACTS

The Crime: The facts of the crime are not in dispute. In 1988 Mr. Makowski was 20 years old. He had no criminal history. He worked as a manager at a Dearborn health club. He had two young employees who, like him, were also bodybuilders and athletes. Mr. Makowski gave cash from the club to one of the employees and sent him out to get a money order. Mr. Makowski conspired with the second employee and that employee's roommate (whom the first employee did not know by sight) to intercept the courier and steal the money. Mr. Makowski said he would share the proceeds with the second worker and his roommate-robber.

Everything went wrong. What was supposed to be an unarmed robbery became a murder committed during a robbery when the courier got the better of the roommate-robber and threw him down. The robber pulled a small folding jackknife, stabbed the courier twice, and fled with the cash ($300 of which went to Mr. Makoswki). The courier – Pete Puma – died later that night at the hospital.

Mr. Makowski was charged with first-degree murder and armed robbery. At trial the second employee testified that, to his knowledge, Mr. Makowski never knew that the roommate-robber had a knife. (8a-10a, Criminal Trial Transcript, Vol. IV.) The robber confirmed that testimony:

Q. Did you ever tell [Mr. Makowski] that you were carrying a knife?
A. No.
Q. Did he ever tell you to use that knife?
A. No.
Q. As far as you knew did Matt Makowski ever know that you had a knife?
A. No, no one knew I had a knife.

(13a, Trial Transcript, Vol. V.) The jury nonetheless convicted Mr. Makowski of first-degree (felony) murder and armed robbery. He was sentenced to mandatory life in prison under MCL 750.316. (123a, Offender Tracking Information System [OTIS] Report.)

The Commutation: In his 25 years in prison Mr. Makowski has compiled a near-perfect record. He was issued only two misconduct tickets – one for possessing "contraband" (a piece of cheese), and the other for "dissent" (a disagreement with staff while serving as a cellblock representative). Mr. Makowski could only be released via executive clemency. He knew that to have any chance for release he would have to be a model inmate, which he was. (125a, Verification.)

In January 2010, Mr. Makowski filed an application for commutation. (14a.) He was one of a small number of people serving mandatory life (without the possibility of parole) for a homicide that occurred outside their presence, and without their knowledge, and that they did not foresee, intend, or condone. His application was supported by numerous MDOC officials. Under the commutation statute,[1] an application goes first to the parole board. If the board views the application favorably, the board will hold a public hearing, and then make a recommendation to the Governor. In August 2010 the board reviewed Mr. Makowski's application and recommended that his case go forward to public hearing. The board sent notice of the public hearing to the Wayne County prosecutor and to the successor Wayne County circuit judge. (73a, Admission #6.) The board did not send notice to the victim's family because the family members failed to register with the board or the prosecutor. (73a, Admissions #6-7.) Notice to victims or their families is not required if they fail to register or keep their registration up to date. *Id.,* 74a, Admission #8.

[1] MCL 791.244 sets out the procedure for persons seeking gubernatorial commutation of a sentence. It provides that there shall be a public hearing conducted by the parole board after an investigation by the board of an application that the board finds has merit. It provides that at least 30 days before conducting the public hearing, the board shall provide written notice of the hearing by mail to the Attorney General, the successor trial judge, and the prosecuting attorney, "and each victim *who requests notice* pursuant to the Crime Victims' Rights Act [1987 PA 87; MCL 780.751-834]." The board is also obliged to "transmit its formal recommendation to the Governor," and, except for certain medical records, "the files of the parole board ... shall be matters of public record." MCL 791.244. (In this case the statute was followed to the letter.)

In September 2010 the board sent Mr. Makowski notice that the public hearing on his application for commutation would be held on October 21, 2010. In early October the MDOC gave public notice of the hearing via a press release posted to its website. (74a, Admission #10; 18a, Press Release.) The public hearing was held on October 21, 2010. At the hearing, neither the prosecutor nor any member of the victim's family appeared or opposed the proposed commutation. After the public hearing, the parole board sent the commutation application to the Governor with a favorable recommendation. (69a, Admission #12.)

On Wednesday, December 22, 2010, Governor Granholm signed the formal commutation document. It read as follows:

> To the Michigan Department of Corrections
> Whereas, in the Circuit Court for the County of Wayne, Matthew Makowski was convicted of the crime of First Degree Murder. He was sentenced on February 2, 1989, to imprisonment in the Michigan Department of Corrections for a term of life;
> And Whereas, application has been made for commutation of sentence of Matthew Makowski;
> And Whereas, the Michigan Parole Board has recommended to me that his sentence be commuted and the reasons given appear to be satisfactory;
> Now Therefore, I, Jennifer Granholm, Governor of the State of Michigan, do hereby commute the sentence of Matthew Makowski, to [time served in years, months, and days as calculated by the MDOC] minimum to life maximum, thereby making him eligible for parole on [a date some months earlier].
> You are hereby required to make your records conform to this commutation.
> Given under my hand, and the Great Seal of the State of Michigan this 22nd day of December in the year of our Lord, two thousand ten.
>
> s/ Jennifer M. Granholm
> Governor
>
> By the Governor
> s/ Teri L. Land
> Secretary of State

(118a-121a, Sample Commutations.) [2]

[2] The defendants failed to produce the commutation in discovery because they had destroyed all copies. The MDOC produced all other comparable commutations in similar first-degree murder

On the same afternoon, the Governor's office sent the signed commutation to the Secretary of State's office. (69a, Admission #15.) The Secretary of State's office affixed a gold-foil Great Seal and auto-penned the Secretary of State's signature to the commutation. (69a, Admission #16; 78a, Houston Dep.) The original was returned to the Governor for delivery to the MDOC. All the documents were accepted by the Secretary of State for filing. *Id.*

On December 22, 2010, at 1:52 p.m., the Governor's deputy legal counsel sent an e-mail announcing that "The Governor has approved the commutation request of Matthew Makowski #198702." (34a, E-mails.)[3] The email announcing the commutation went to ten state officials, including the chief legal counsel, the chair of the parole board, and the director of the MDOC. (34a, E-Mails; 104a-106a, Moore Dep.) The Governor's legal counsel does not announce a commutation unless or until the office knows that the signed commutation has been signed, sealed, and filed by the Secretary of State, and also delivered to the MDOC. (88a-90a, Sonneborn Dep.) *"[T]he e-mail notification piece is the final piece in our office." Id.*, 90a (emphasis added). In this case, the commutation was not only delivered to the MDOC's front desk, but it was sent upstairs to the Michigan parole board's lifer commutation unit, which processes the approved commutations. (109a-111a, Moore Dep.)

Following the official e-mail announcement, word of the commutation spread quickly. Mr. Makowski's lawyer and his family both knew of the commutation within hours. (122a,

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cases. The 38 commutations are all identical, except for the prisoner's name, the date of the crime, the court, the time served, and the parole-eligibility date. The defendants do not dispute that Mr. Makowski's commutation matched all the others.

[3] The Governor's office, the office of legal counsel, and the MDOC do not announce commutations publicly (presumably because commutations are controversial and carry political costs). Officials respond to outside inquiries once the information is in the public domain, but they do not disseminate information about the commutation. (91a-92a, Sonneborn Dep.; 75a, Parole Board Admission #17.)

Patricia Makowski Affidavit.) At 4:25 p.m., Wood TV-8 posted an AP wire story that the commutation had been approved. (44a, Press Reports.) At 8:00 p.m. on Wednesday, Mr. Makowski's family spoke to him by phone and confirmed the good news. (122a, Pat Makowski Aff.) Other newspapers also published or web-posted news of the commutation. (45a-46a, Press Reports.) At the prison, on Thursday, December 23, nearly every staff member who knew Mr. Makowski congratulated him and wished him well on the outside. (125a, Verification.)

The Attempted Rescission: Early on Thursday, December 23, the Governor's legal counsel received a call from a lawyer who had represented the victim's family in a civil action (against the health club and Mr. Makowski) more than two decades earlier. The lawyer expressed the Puma family's opposition to the commutation and its unhappiness with the lack of notice about the process. In response, the Governor, her legal counsel, and the parole board exchanged a flurry of emails and phone calls to figure out how to deal with the irate family.[4]

At 8:33 a.m. on Thursday, the deputy legal counsel checked with the parole board chair to find out if the family had registered with the MDOC or the prosecutor, so as to qualify for notice. (They had not.) By 10:57 a.m. the parole board was offering to meet with the family after Christmas. By noon the Governor was looking for a way to slow things down, and the board was considering an emergency executive session. (35a-36a, E-mails.) At some point the Governor herself spoke to the family or their lawyer. (93a, Sonneborn Dep.) Reading between the lines, it is clear from all the e-mails that the Puma family and their lawyer were threatening a storm of publicity if the Governor did not accommodate their wishes. (35a-37a, E-mails.)

By Friday morning (the next day) at 8:58 a.m., the office of legal counsel was indicating

[4] The commutation was signed, sealed, filed by the Secretary of State, and delivered to the MDOC on Wednesday, December 22. The next day, Thursday, December 23, was a state furlough day and all state offices were closed. Friday, December 24, was the Christmas Eve holiday, making a four-day weekend for state employees – hence the e-mails and phone calls.

that the Governor wanted a "broader course of action." *Id.*, 36a. At 10:12 a.m., the MDOC's public information officer e-mailed the parole board chair as follows: "I just got off the phone with the Governor's Office. They will be announcing that they're pulling back this commutation." *Id.*, 38a. At 10:14 a.m., the parole board chair e-mailed the board administrator that the office of legal counsel would submit "an official document withdrawing the commutation next week" and that "the pull-back will satisfy [the family] for now." (38a, E-mails.)

The Justification: Once that decision was made, the next set of e-mails revealed the board's concerns about the legitimacy of the Governor's action. At 10:27 a.m., the board administrator asked the board chair, "Had the Governor already granted a commutation on this case or was it still in the consideration phase?" The board chair replied with remarkable candor:

> *Granted and certificates delivered. Gov. [g]ranted this on Wednesday.* I asked [deputy legal counsel] to provide us with an official document withdrawing this action *as protection for both the MDOC and the Board....*
> *Not sure what happens to the cert[ificate] filed at the Secretary of State's office.*

(38a-39a, E-mails, emphasis added.)

Around mid-day on Friday, Mr. Makowski was called out of his cell and told that his commutation had been revoked. On Monday, December 27, the deputy legal counsel sent a hand-delivered letter from the Governor to the board chair. *Id.*, 41a. The letter read:

> This letter is to confirm in writing my prior verbal direction to: (1) immediately halt all commutation proceedings for Matthew Makowski; (2) prohibit the release of Mr. Makowski by the Department of Corrections based upon any steps taken toward commutation; and (3) rescind any and all certificates relating to the commutation of Mr. Makowski. Because the Parole and Commutation Board's decision to recommend a commutation for Mr. Makowski was made without hearing objections from the victim's family or the objections of the Wayne County Prosecutor, it is my intention, as previously communicated, to revoke the commutation of Mr. Makowski's sentence before fully effectuated. The Board should schedule a new hearing to assure that the objections of the victim's family, and the Wayne County Prosecutor, and any other member of the public are fully heard.
>
> Please take the necessary action to implement this direction, including, but not limited

to, a return of any outstanding certificates of commutation to my office. Thank you for your prompt attention to this matter.

(47a, Governor's Letter of 12/27/10.)

Also on Monday, December 27, the deputy legal counsel went to the Secretary of State's office and demanded the return of all copies of the commutation and anything else that had been filed with it. (95a-98a, Sonneborn Dep.) She brought with her a copy of the letter from the Governor. (81a, Houston Dep.) The supervisor at the Secretary of State's office said that in all the years she had worked in the Office of the Great Seal, *no signed, sealed, and filed document had ever been "unfiled" and returned to the filer.* (79a, Houston Dep.)

The parole board did not schedule a new hearing. Governor Snyder took office on January 1, 2011. On February 7, 2011, the Governor issued an executive order abolishing the old parole board (effective April 15, 2011), with a new board to be appointed by that date. *See* Executive Order No. 2011-3. On March 25, 2011, the old parole board – without scheduling or holding a new public hearing – voted not to recommend Mr. Makowski for commutation. (55a.) On April 14, 2011 (the last day it was in office), the board notified the Governor of its negative recommendation. (56a.) On April 15, 2011, Governor Snyder denied Mr. Makowski's commutation application. (67a.) Mr. Makowski remains incarcerated. The MDOC and the parole board regard him as serving a mandatory life sentence.

PROCEEDINGS BELOW

Mr. Makowski commenced this action in the 30th Circuit Court in Lansing on May 19, 2011. He alleged that the Governor's commutation of his sentence was final on Wednesday, December 22, 2010, the date when it was signed, filed, sealed, delivered to the MDOC, and announced by the Governor's legal counsel. He claimed (1) that Governor Granholm lacked the power to revoke a completed commutation; (2) that increasing his sentence from parolable life

back to mandatory life violated both separation of powers and the double jeopardy clause of the Michigan and U.S. Constitutions; and (3) that the manner in which his commutation was revoked violated due process.

The case was assigned to district judge Richard Ball because the sitting circuit judge was on medical leave. After discovery, the defendants moved for summary disposition. Because no material facts were in dispute, the court treated the motion (without objection) as cross-motions for summary disposition. (129a-130a, Motion Hearing.) [5]

On November 15, 2011, Judge Ball granted the defendants' motion, finding that the court had "no authority, *i.e.,* no jurisdiction, to examine and/or approve the exercise by the Governor of her constitutional authority to commute a prison sentence." (167a, Opinion & Order.) The court viewed the question as one of separation of powers. Neither party had briefed this issue, and the judge had never requested supplemental briefs.

Mr. Makowski timely appealed. The Court of Appeals issued a published decision on December 27, 2012, affirming the trial court. *Makowski v Governor,* 299 Mich App 166 (2012); 829 NW2d 291 (2012). The Court of Appeals held that the scope of the Governor's commutation power is a non-justiciable political question. (177a-181a.) Mr. Makowski's timely motion for reconsideration was denied on February 7, 2013. He timely sought leave to appeal to this Court, which granted leave on July 5, 2013.

ARGUMENT

I. COURTS HAVE THE AUTHORITY AND THE DUTY TO DECIDE THE SCOPE OF EXECUTIVE POWER, INCLUDING THE CLEMENCY POWER

The opinion of the Court of Appeals ignores one of the bedrock principles of American

[5] Not all of Mr. Makowski's claims were addressed in the motion, so technically the defendants' motion was for partial summary disposition.

law: that *courts* decide the meaning of constitutional text and the scope of constitutional power. In *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), Chief Justice Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. The same concept of judicial review applies in the State of Michigan. *See Charles Reinhart Co v Winiemko*, 444 Mich 579, 591; 513 NW2d 773 (1994) ("the judicial power includes the exclusive power to determine and apply the law.") The source of that power is Const 1963, art VI, § 1, which vests the "judicial power of the state ... *exclusively* in one court of justice." (Emphasis added.) [5]

Marbury is remarkably similar to Mr. Makowski's case. The President had exercised his constitutional power to make an appointment by granting a commission. Here the Governor exercised her power to grant Mr. Makowski a commutation. In *Marbury* federal law required the Secretary of State to affix the seal to commissions signed by the President. In *Makowski* state law required the Secretary of State to affix the seal to commutations signed by the Governor. *See* MCL 2.44 ("an impression of the Great Seal shall be placed" on "commutations of sentences"). In *Marbury,* one defense was that the executive order never took effect for lack of delivery to the appointee. In *Makowski,* the state defendants argued in the courts below that the commutation never took effect for lack of delivery to the prisoner.

In *Marbury,* as here, the question before the Court was *when* an executive act becomes final and irrevocable. The High Court addressed that issue at length, stating that the presidential appointment was a completed executive act when it was signed by the President and sealed and

[5] The "judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish. . . ." Const 1963, Art VI, § 1.

filed by the Secretary of State.[6] But what matters here – on the question of justiciability – is that the Court made clear that *if it had jurisdiction* it would be duty-bound to reach the merits. Justice Marshall held for a unanimous Court that the Constitution limits the acts of the branches of government, and that the courts – not the legislature or the executive – decide what the constitutional limits are. The Court pointedly did *not* dismiss Marbury's case as presenting a non-justiciable political question or a separation of powers question, but instead fulfilled its own mandate "to say what the law is." *Marbury, supra* at 177.

One might argue that the clemency power is different from other core executive powers – that it is something sacrosanct, beyond the reach of *Marbury*. But if the clemency power *were* different, then one would expect to see U.S. Supreme Court decisions establishing such a principle, and holding that judicial review of the exercise of the clemency power poses a non-justiciable political question or is barred by separation of powers. But since *Marbury* the High Court has repeatedly decided clemency cases that address the scope of the executive clemency power or the point at which the exercise of that power becomes final or effective.

For example, in *Biddle v Perovich,* 274 US 480, 47 S Ct 664 (1927), the Court had to decide whether a presidential commutation was effective for lack of acceptance or consent by the prisoner. On the merits, the Court found the commutation to be effective.[7] But what matters on the question of justiciability is that the Court – through no less a figure than Justice Oliver Wen-

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[6] Of course what the Court said about the merits in *Marbury* was *obiter dicta* because in the end the Court held that it lacked jurisdiction to hear the case; the Court found that Congress had acted unconstitutionally in expanding the Supreme Court's jurisdiction (by statute) to include original (as opposed to appellate) jurisdiction beyond what the Constitution itself provided. *See Marbury, supra* at 175-180.

[7] *Biddle, supra* at 488. In *Biddle*, the High Court distinguished earlier cases and held that in the U.S. executive clemency is not a "gift" from the sovereign as it was in England; therefore the prisoner's acceptance or consent cannot be required (and therefore delivery is irrelevant). *Id.* at 486-87; *see* Part V, below.

dell Holmes – unanimously decided the case on the merits without a hint that it posed a non-justiciable question beyond the reach of the courts. The *Biddle* Court cited precedent in which it had addressed and decided the validity or finality of earlier acts of executive clemency. *Id.* at 487.

For example, in *Burdick v United States,* 236 US 79, 35 S Ct 267 (1915), a newspaper editor refused to testify about his sources before a grand jury. *Id.* at 85. The President pardoned him to force him to testify. *Id.* The editor declined to accept the pardon, and was then held in contempt when he again refused to testify. *Id.* at 86-87. Far from declining to review the legitimacy of the executive's act on political question or separation of powers grounds – or leaving it to the executive to make the call – the Court reached the merits, held the pardon to be ineffective, and dismissed the judgment of contempt. *Id.* at 91, 95. The High Court has made similar decisions on the merits in clemency cases before and since. *See e.g., Ex Parte Garland,* 71 US 333; 18 L Ed 366 (1866) (reaching the merits and holding that Congress could not override a presidential pardon of a Confederate legislator by requiring that in order to practice law in federal courts, he must take an oath that he had not participated in the Rebellion); *United States v Klein,* 80 US 128, 143-148; 20 L Ed 519 (1871) (throwing out an 1870 act of Congress requiring proof of loyalty to recover property sold by the government during the Civil War, notwithstanding a grant of executive clemency or amnesty; the Court held that Congress could not change the effect of a pardon "any more than the executive can change a law"); *Schick v Reed,* 419 US 256, 95 S Ct 379 (1974) (reaching the merits and holding that a conditional commutation was within the presidential clemency power). So the clemency power cannot and does not occupy a special space beyond the reach of *Marbury.*

One might also argue that the *state* clemency power should be read more broadly than the

federal clemency power. But *Spafford v Benzie Circuit Judge*, 136 Mich 25; 98 NW 741 (1904), definitively answers that question in Mr. Makowski's favor. In *Spafford* this Court had to decide if a gubernatorial pardon was valid despite numerous defects, including that the pardon lacked an address, did not state the date of the conviction, and erroneously said that the prisoner had been sentenced when he was actually pardoned before sentencing. *Spafford*, *supra* at 26-27. Again, what matters for the justiciability question is not the outcome on the merits, but rather that this Court reached the merits and ruled that "[n]one of these things should be held to have the effect of rendering the pardon invalid." *Id.* at 27. This Court, like the U.S. Supreme Court in *Marbury* and *Biddle* and *Burdick* and *Garland* and *Klein* and *Schick,* did not find the question to be non-justiciable, but "said what the law is."

Finally, one might argue that the clemency power in Michigan has expanded since this Court decided *Spafford* (in 1904), so that even though the clemency power was subject to judicial review then, it is not now. Again, exactly the opposite is true. In 1904, when this Court decided *Spafford*, the 1850 Constitution limited the Governor's clemency authority (making it "subject to regulations provided by law"), but only "as to the *manner of applying for pardons.*" Const 1850, art V, § 11 (emphasis added).

That text remained unchanged when the 1908 Michigan Constitution was ratified. The text of the 1963 Michigan Constitution, however, included a significant change. It removed the phrase "as to the manner of applying for pardons" and instead made the clemency power itself *"subject to procedures and regulations prescribed by law...."* Const 1963, art V, § 14 (emphasis added).[8] Making the Governor's clemency power itself "subject to procedures and regulations

[8] Records of the 1961-62 Constitutional Convention show that the change created a restriction on the clemency power that did not exist previously. The Executive Committee sent a proposal to delete the qualifying phrase "manner of applying for pardons" to the Convention for debate.

prescribed by law" necessarily means that the power is more circumscribed than it was in 1904, when this Court exercised its power of judicial review and decided *Spafford* on the merits. If this Court could review the legitimacy of an act of executive clemency in 1904, under a Constitution that gave the Governor broader clemency power, this Court surely can review the legitimacy of Governor Granholm's revocation of an act of clemency in 2010, under a Constitution that has since narrowed the Governor's power.

II. JUDICIAL REVIEW OF THE GOVERNOR'S ACTION IS NOT BARRED BY THE POLITICAL QUESTION DOCTRINE

Whether a case is non-justiciable because it involves a political question is determined by a three-part inquiry:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
>
> (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?
>
> (iii) Do prudential considerations [for maintaining respect among the three branches] counsel against judicial intervention?

House Speaker v Governor, 443 Mich 560, 574; 506 NW2d 190 (1993), quoting *Goldwater v Carter*, 444 US 996, 998; 100 S Ct 533 (1979) (Powell, J, concurring), citing *Baker v Carr*, 369 US 186, 211, 82 S Ct 691 (1962).

In *House Speaker*, the question was whether former Governor Engler had the power to promulgate executive orders reorganizing the Department of Natural Resources. *Id.* at 564. This Court rejected the claim that the question was non-justiciable. *Id.* The unanimous Court stressed at the outset that dubbing an issue "political" does not justify a court's refusal to address "a bona

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See Proposal 16, 1 Official Record, Constitutional Convention 1961-62, p 579. Some members expressed concern that the change could be read to limit the clemency power. Official Record, *supra* at 585-587. The convention delegates were aware that the proposed change would have just that effect, yet they approved the amendment to § 14 nonetheless. *Id.* at 583-587.

fide controversy as to whether some action ... *exceeds constitutional authority.*" *Id.* at 574 (emphasis added). That, however, describes precisely the circuit court's and the Court of Appeals' error in failing to reach the merits of the scope of the Governor's authority (namely whether the constitutional power to "grant" a commutation includes the power to revoke a commutation, and whether the statute providing that a commutation shall be filed with the Secretary of State and the Great Seal affixed means that when those things are done, the commutation becomes a completed act of state beyond the power of the Governor to revoke). *See* MCL 2.44.

In *House Speaker,* this Court proceeded through the three-part inquiry. *Id.* at 574-585. As to (i) – whether the issue involved questions committed by the text of the Constitution to a coordinate branch of Government – the Court said that it "must apply the rules of constitutional construction to the express language." *Id.* at 574. It found that the "language of the constitution alone [could] not resolve the issues" presented because "the state constitution does not mention gubernatorial authority to completely abolish the existing DNR and create a new department, nor does it commit to one branch of government the power to determine the scope of such authority." *Id.* at 574. The same is true here: the clemency clause says only that the Governor has the power to "grant" a commutation, not to revoke one, and it certainly does not commit to the executive the power to determine the scope of its own authority.

As to (ii) – whether the issue was beyond judicial expertise – this Court said that deciding whether the action of another "branch of government exceeds whatever authority has been committed" is especially within judicial expertise, and is the responsibility of this Court as the "ultimate interpreter of the Constitution." *Id.* at 575; *see also Baker, supra* at 211.

As to (iii) – whether prudential considerations would counsel against judicial intervention – the Court said "*there are no prudential considerations* that keep us from resolving the issues"

because "[i]nterpreting the Constitution does not imply a lack of respect for another branch of government even when that interpretation differs from that of the other branch." *House Speaker*, *supra* at 575 (emphasis added).

This Court concluded that "no court, including this Court, is hesitant to render its interpretation of a *constitutional or statutory* provision, even though another branch of government has already issued a contrary interpretation." *Id.* at 575 (emphasis added). The Court held that issues of constitutional interpretation and construction concerning the scope of the Governor's constitutional authority are "*justiciable* political questions." *Id.* at 576 (emphasis added).

The Court of Appeals' analysis below differs markedly from this Court's analysis in *House Speaker*. As to (i) – the text of the constitution – the court said, "By the plain language of the constitutional grant, the *subject* of commutations is committed *expressly* to the Governor" (178a, emphasis added), and that "there was *no identifiable textual limit* on the power committed to the Governor ... and there are *no statutory provisions* which govern the commutation decision process." *Id.* at 179a (emphasis added). The court below ignores that the "plain language" of Const 1963, art V, § 14, *"expressly"* limits the Governor's commutation power to the power to "grant" commutations, and that MCL 2.44 *"expressly"* provides that commutations are to be filed with the Secretary of State and impressed with the Great Seal (as authorized and contemplated by the Const 1963, art III, § 3.) [9]

As to (ii) – the issue of judicial expertise – the court below stated that deciding whether Governor Granholm "exceeded her constitutional power" when she rescinded the commutation

[9] If the executive can undo her acts by retrieving duly filed and sealed documents, then it is hard to understand what function the Office of the Great Seal serves. Indeed, the act of the Governor's deputy legal counsel on Monday, December 27, 2010, in ordering the Secretary of State to return the commutation documents as if they had never been signed, sealed, and filed (and then destroying the documents) appears to be a unique event in Michigan history.

"would constitute mere guess and speculation, not the application of judicial expertise." [10] (179a.) The Court of Appeals cannot be right, because ever since *Marbury* courts have routinely reviewed the legitimacy, finality, and constitutionality of executive and legislative acts. As the U.S. Supreme Court has made clear, that is a job that courts are uniquely capable of doing. *See United States v Munoz-Flores*, 495 US 385, 395-396; 110 S Ct 1964 (1990) ("The general nature of the inquiry, which involves the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function."). The *Munoz-Flores* Court observed:

> To be sure, the courts must develop standards for making [such] determinations, but [there is] no reason that developing such standards will be more difficult in this context than in any other. Surely, a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of [constitutional] challenges." [*Id.*]

As to (iii) – prudential considerations – the court below simply stated, without analysis, that it was so persuaded by the "Governor's clear and exclusive constitutional power in the matters of commutation" that the case must be non-justiciable. [11] (178a.) But that would be equally

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[10] The Court of Appeals' "mere guesswork and speculation" characterization again ignored the actual language of Const 1963, art V, § 14 and MCL 2.44, and that courts have judicial expertise in and responsibility to interpret and construe the Constitution and the statutes. The Court of Appeals erred again when it stated that the "procedures and regulations prescribed by law," adverted to in Const 1963, art V, § 14, are those set forth in MCL 791.243 and 791.244, concerning applications, and processing of applications, for commutations. The Court of Appeals overlooked and failed to recognize that the 1964 statute (MCL 2.44) – a statutory provision contemplated by the 1963 Constitution and enacted shortly after its adoption, providing that commutations shall be filed with the Secretary of State and the Great Seal impressed thereon – also sets forth "procedures and regulations prescribed by law" *pertinent to commutations*, and when a commutation becomes a final and completed act of Michigan state government within the meaning of Const 1963, art V, § 14.

[11] The Court of Appeals' statement again ignored that the Governor's power is limited to the power to "grant" a commutation. *See* Part IV. The Court of Appeals also did not recognize that its substitution of "power in the matters of commutation" for "power to grant a commutation" was an interpretation and construction of the Michigan Constitution by the Court of Appeals,

true of all executive and legislative powers. The root power itself is rarely contested; the challenge comes when the executive or the legislature is alleged to have exceeded the constitutional limits of a designated power. Moreover, as we know from Part I, *supra*, the fact that the constitution grants a power has not stopped courts from exercising judicial review and deciding the legitimacy of the exercise of that power (including the clemency power), as this Court did in *House Speaker* and in *Spafford*.

As to "prudential considerations," the court below failed to differentiate between impermissible judicial interference (which displays disrespect for the other branches) and permissible judicial review (which does not). (180a-181a.) The political question doctrine is only "designed to restrain the judiciary from *inappropriate* interference in the business of the other branches of Government." *Wilkins v Gagliardi*, 219 Mich App 260, 266-267; 556 NW2d 171 (1996) (quoting *Munoz-Flores*, *supra* at 394) (emphasis in original). *See also Nixon v United States*, 506 US 224 253; 113 S Ct 732 (1993), (Souter, J, concurring) (observing that not all judicial review is inappropriate or disrespectful).

The Court of Appeals' conception of inappropriate judicial interference (179a) – which boils down to any judicial review of the Governor's action – is at odds with this Court's and the U.S. Supreme Court's cases. As the U.S. Supreme Court observed in *Powell v McCormack*, 395 US 486, 89 S Ct 1944 (1969), when determination of a claim would "require no more than an interpretation of the Constitution, … [s]uch a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government.'" *Id.* at 548 (quoting *Baker v Carr*, 369 US at 217); *see also House*

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despite its holding that the constitutional interpretation and construction issues were non-justiciable.

Speaker, *supra* at 575 (same).

A judicial finding that a coordinate branch of government has acted unconstitutionally "might in some sense be said to 'entail a lack of respect' for [that branch's] judgment." *Munoz-Florez*, *supra* at 390. But disrespect, in this sense of the term, "cannot be sufficient to create a political question." *Id.* "If it were, *every* judicial resolution of a constitutional challenge to [a coordinate branch's action] would be impermissible." *Id.* As the *Powell* Court observed, "Our system of government requires that [] courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell, supra* at 549.

The decision below also creates a conflict with *Wilkins v Gagliardi*, 219 Mich App 260; 556 NW2d 171 (1996). In *Wilkins,* a House committee chair raised a non-justiciable political-question defense in an Open Meetings Act case. *Id.* The Court of Appeals followed the lead of this Court in *House Speaker* and carefully performed the three-part inquiry. *Id.* at 265-270. The case required the court to address the interplay between constitutional provisions and the Open Meetings Act. The *Wilkins* court concluded (1) that its responsibility was precisely to interpret and construe the constitution, and (2) that the issue before it was justiciable. *Id.* at 267.

The Court of Appeals' analysis in the present case conflicts with *Wilkins.* Indeed, the published *Makowski* opinion is the only reported Michigan decision holding that state courts are barred from deciding a straightforward question of constitutional law, namely the finality of an executive order. Determining the limit of the constitutional power of the other branches is the singular role of the judiciary. *See e.g., Baker v Carr*, *supra* at 211; *Biddle*, *supra*; *Kent Co Prosecutor v Kent Co Sheriff*, 428 Mich 314, 409 NW2d 202 (1987) (deciding that releasing

prisoners under the Prison Overcrowding Act did not infringe on the Governor's clemency power); *Smith v Thompson*, 584 SW2d 253 (Tenn Crim App, 1979) (holding that a signed, sealed, and filed commutation is irrevocable either by the Governor who issued it or by his successor in office).

The Attorney General, in his brief in opposition to the application for leave to appeal, did not cite, discuss, or attempt to distinguish *House Speaker*. There this Court acknowledged that while issues of constitutional construction and interpretation concerning the scope of the Governor's powers may well be "political questions" in the colloquial sense, they are nonetheless justiciable. This Court's reasoning applies with equal force to the scope of the Governor's authority under the clemency clause, which likewise presents a justiciable question. *Id.* at 576.

The instant case only requires this Court to do what the courts did in all the cases cited above – to decide whether an action by another branch of government exceeded the limits of its constitutional power. Regardless of the answer to that question on the merits, this Court clearly has the *power* to decide whether or not Governor Granholm exceeded her authority in rescinding a commutation after it had been signed, filed with the Secretary of State, sealed, announced to senior state officials, and delivered to the MDOC for processing. Viewed through the lens of history and precedent, this issue is not only within this Court's expertise, but it *is* the Court's expertise.

III. Judicial Review of the Governor's Action Is Not Barred By the Separation of Powers Doctrine

While the constitution seeks to preserve the independence of the three branches of government, the court below (177a) ignores that an equally crucial feature of the constitution is its system of checks and balances. To mistake judicial review – which serves as the ultimate check

on the other branches – for inappropriate judicial interference would itself violate the principle of separation of powers.

The U.S. Supreme Court and this Court have made clear that separation of powers should not be used to block judicial review. In *Nixon v Administrator of General Services,* 433 US 425, 443; 97 S Ct 2777 (1977), the Court said:

> [A]ppellant's argument rests upon an 'archaic view of the separation of powers as requiring three airtight departments of government.' Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, *the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.* Only where the *potential for disruption* is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. (Emphasis added).

In Mr. Makowski's case, the "potential for disruption" is nonexistent. Governor Granholm used her clemency power exactly as she saw fit. She decided whose sentence to commute, and when to commute it, and on what terms, without any interference from another branch. The only question to be decided here is *when* her executive order became final, which since *Marbury* has been the quintessential role of the courts.

In *Kent Co Prosecutor v Kent Co Sheriff,* 428 Mich 314; 409 NW2d 202 (1987), this Court expressed the same view of judicial review as the U.S. Supreme Court in *Nixon v AGS.* The *Kent County* case challenged the County Jail Overcrowding Act, MCL 801.51. The act authorized the early release of prisoners whenever an overcrowding emergency was declared. The plaintiffs argued that the law was an unconstitutional usurpation of the Governor's exclusive power to shorten sentences by commutation. *Id.* at 323. This Court disagreed:

> [I]t is not necessarily fatal to this legislation that, when considered in a vacuum, it appears to interfere with the Governor's executive powers. In *State, County & Municipal Workers v Dearborn,* 311 Mich 674, 677, 19 NW2d 140 (1945), we explained this point, quoting from Story, Constitutional Law (4th ed), p 380:
>
> When we speak of a separation of the three great departments of government, and main-

> tain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution. [*Id.* at 321-322; citations and internal quotation marks omitted.]

This Court found the question to be justiciable. On the merits, it upheld the statute, finding that the legislature can authorize the release of prisoners to prevent a violation of their Eighth or Fourteenth Amendment rights, or to avert the state's liability from suit. *Id.* at 328.

Likewise, in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 644-645; 684 NW2d 800 (2004),[12] this Court said:

> The separate and distinct constitutional powers of two branches may be focused on the same subject areas and the operations of state government may occasionally involve a blending of governmental operations.... But this is distinct from a blending of powers or functions.... While the exercise of such separated powers may often overlap – this being understood generally as the realm of checks and balances – there is no "sharing" of the legislative or executive powers. There is only a sharing of the sum of all governmental power.

A contrary understanding would be "confused." *Id.* at 644. Yet a contrary understanding of separation of powers is precisely what drives the decision below.

Nor would judicial review encroach upon the executive clemency power. True encroachment requires an actual exercise by a court of the clemency power, for example, through a judicial order that is the functional equivalent of clemency (like the vacation or reduction of a sentence). *See e.g.*, *People v Erwin*, 212 Mich App 55, 63; 536 NW2d 818 (1995) (holding that a trial court order amounting to "total forgiveness" of the crime violates separation of powers by infringing on the Governor's exclusive clemency power); *People v Freleigh*, 334 Mich 306, 308-

[12] Overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 352; 792 NW2d 686 (2010).

310; 54 NW2d 599 (1952) (holding a statute unconstitutional because it constructively authorized the trial court to grant the functional equivalent of a reprieve).

But judicial review of Mr. Makowski's commutation does not involve the courts in doing any of those things.[13] Here, judicial review does not threaten separation of powers because the executive's power had been fully discharged pursuant to the prescribed procedures for approving and filing a commutation. While judicial review might touch on the "same subject areas" as the clemency power, it will not involve any impermissible "blending of powers or functions." *Nat'l Wildlife*, *supra* at 645.

In fact the opposite is true: relying on separation of powers to justify dismissal of Mr. Makowski's claim would be the subversion of that doctrine. As this Court observed in *Scholle v Hare*, 360 Mich 1, 64; 104 NW2d 63 (1960), *judgment vacated on other grounds by* 369 US 429 (1962), "[i]t is equally offensive to good government that one branch refuse to exercise powers committed to it." *See also Nixon*, *supra* at 244 (White, J., concurring) (improper failure to conduct judicial review on erroneous non-justiciability grounds "is what truly upsets the Framers' constitutional design"). When this occurs, the doctrine of separation of powers itself "brings the wheels of government ... to a complete stop, for under the doctrine no other branch can properly assume that which has been abandoned by its rightful guardian." *Scholle*, *supra* at 64. For this reason, "the doctrine of separation of powers as a deterrent to corrective action must be exercised with the utmost caution," and should not stand "in the way of [] condemnation of improper Gubernatorial ... exercise of power." *Id.*

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[13] For this reason, the Court of Appeals' citations to *Erwin* and *Freleigh* for their prohibitions on judicial actions attempting to commandeer the clemency power (177a), and to *Kyser v Township*, 486 Mich 514; 786 NW2d 543 (2010), and *Roosevelt Oil Co v Alger*, 339 Mich 679, 694; 64 NW2d 582 (1954), for their prohibitions on judicial legislation (179a), are inapposite.

a. The Cases Relied upon by the Court Below Undermine Its Conclusion that the Questions Presented Are Non-Justiciable

The Court of Appeals cited a host of authority in support of its conclusion that this case is non-justiciable either on political question or separation of powers grounds. But in most of those cases the courts *reached the merits.*[14] In fact, the Court of Appeals cited only *two* cases in which the courts did not reach the merits: *In re Fraser's Estate*, 288 Mich 392, 394; 285 NW 1 (1939), and *Nixon v United States*, 506 US 224; 113 S Ct 732 (1993), both of which are easily distinguishable from Mr. Makowski's case.

In *Fraser's Estate*, this Court held (in a two-page decision) that a probate court exceeded its special statutory jurisdiction. *Fraser's Estate*, at 394. The probate court lacked authority to hear the case not because it involved a political question or implicated separation of powers, but simply because the court lacked jurisdiction over the subject matter. *Id.*

Nixon v United States was an impeachment case. In *Nixon*, the U.S. Supreme Court had to decide if the Senate's delegation of an evidentiary hearing to a Senate committee violated the

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[14] *See Strauss v Governor*, 459 Mich 526, 545, 536; 592 NW2d 53 (1999) (deciding that executive orders infringed on Board of Education's powers under Const 1963, art 8, § 3); *Kyser v Township*, 486 Mich 514, 517; 876 NW2d 543 (2010) (deciding whether zoning ordinance rule violated separation of powers, and whether the rule was superseded by enactment of an exclusionary zoning provision); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co.*, 471 Mich 608, 613; 684 NW2d 800 (2004), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 352; 792 NW2d 686 (2010) (deciding whether conservation group had standing to sue under state EPA); *Munoz-Flores*, *supra* at 394 (holding that special assessment statute did not present a non-justiciable political question and that special assessment statute did not qualify as a revenue-raising bill within the meaning of the origination clause); *Baker, supra* (holding that a state apportionment statute violated equal protection and did not present a non-justiciable political question); *Wilkins v Gagliardi*, 219 Mich App 260, 556 NW2d 171 (1996) (holding that whether chair could be held liable for violation of Open Meetings Act was not a non-justiciable political question); *House Speaker, supra* (holding that the legitimacy of executive order abolishing the DNR and establishing a new department was a not a non-justiciable political question); *Goldwater v Carter*, 444 US 996; 100 S Ct 533 (1979) (granting certiorari on question of whether President could unilaterally nullify a defense treaty, finding that the case did not present a non-justiciable political question).

constitutional duty to "try" all impeachments before the entire Senate. *Nixon*, *supra* at 224. *Nixon* is one of the rare cases (outside the realm of foreign policy) where the Court declined to reach the merits on the grounds that the case presented a non-justiciable political question. *Id.*

Nixon is easy to understand. First, the question went to the heart of how the legislative branch conducts its business at the highest level (on the floor of the Senate), in the rare event where it is putting the chief of the executive branch on trial, in a process that uniquely excludes or supplants the judicial branch. Second, the impeachment clause contains unusually specific language, stating that "[t]he Senate shall have the *sole* power to try all impeachments." US Const, art I, § 3, cl 6 (emphasis added). Third, the *Nixon* Court noted that the Framers had debated whether to vest the impeachment power in the Supreme Court, as opposed to the Senate, but ultimately decided not to – for fear that the small number of Justices could introduce the risk of bias into the impeachment proceedings. *Id.* at 233-234. The Supreme Court concluded that permitting judicial review of Senate impeachment trials would reintroduce the same risk, and therefore would be inconsistent with the Framers' manifest intent. *Id.*

Nixon is a classic example of the rare use of the non-justiciability doctrine. The question presented here, on the other hand, requires only the sort of routine decision that courts have been making all the way back to *Marbury*. As the U.S. Supreme Court observed in *Baker v Carr* (when it formulated the modern political-question doctrine), where challenges "have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim." *Baker*, *supra* at 229. Mr. Makowski's case falls squarely within *Baker*, and thus is a proper subject for judicial review.

In finding the case non-justiciable, the Court of Appeals may have been led astray by the circuit court. At the trial level the question of justiciability was not briefed by the parties. Rather

the court raised that issue on its own, citing ubiquitous boilerplate language in a raft of cases about the deference due to the executive on matters of clemency. (169a-174a, Circuit Court Opinion.) A reading of those cases, however, reveals that the courts routinely *reached the merits*. (2a, Ct Apps R16, Plaintiff's Brief, at 28-34 (distinguishing cases).)

The Court of Appeals apparently recognized the analytical weakness of those cases – it ignored nearly all of them – but it nevertheless made much the same mistake. It, too, cited "quotable quotes" about the exclusivity of the clemency power, but from cases (a) where the court in fact engaged in the very judicial review sought here, or (b) where the action being reviewed did not involve the direct exercise of the clemency power. *See* n14, *supra.*

A good example is *Rich v Chamberlain,* 104 Mich 436, 62 NW 584 (1895). The court below cited *Chamberlain* for the proposition that the Governor's discretion with regard to commutation decisions is "absolute." (179a.) Mr. Makowski does not dispute that the Governor's discretion – when it comes to *making* commutation decisions – should be given the greatest deference. But giving the Governor great deference – even absolute deference – at the front end of a clemency decision is a different question from whether or not the Governor has the power to revoke such a decision once it is made.

In sum, no Michigan case supports the Court of Appeals' conclusion that Mr. Makowski's case is non-justiciable. On the federal side, *Nixon* involved the nuts and bolts of the impeachment process on the floor of the Senate; *Nixon* is an exceedingly unusual case that goes against all of the cases cited above, for good reason. It cannot control here.

IV. The Power to "Grant" Clemency Does Not Include the Power to Revoke, Rescind, or Overturn a Decision to Grant Clemency

The clemency clause of the Michigan Constitution confers on the executive the power to "grant" pardons, reprieves, and commutations. In the Court of Appeals, the Attorney General

"massaged" the language of Const 1963, art V, § 14 to avoid addressing whether it includes by implication the power to revoke a commutation. He asserted that the "plain language of the Constitution grants the *subject* of commutation to the Governor" (2a, Ct Apps R19, Defs' Response Brief, at 7-8), and confers on the Governor, variously, the power of "executive clemency," the "clemency power," the "clemency authority," the "power of commutation," and the "commutation power." *Id.* at 1, 5, 7, 8, 9, 11, 12, 13, 17, and 20-25.

The text of Const 1963, art V, § 14 does *not*, however, confer such expansive or ill-defined power. The clemency clause confers on the Governor the power to *"grant"* a commutation, and only the power to *"grant"* a commutation – nothing more.

The Attorney General similarly put the cart before the horse when he cited cases holding that the Governor has absolute discretion to determine whether and to whom to grant a commutation. The issue here is *not* the scope of the Governor's discretion to "grant" a commutation, but rather whether Governor Granholm had the authority under the Constitution to revoke Mr. Makowski's signed, countersigned, sealed, and filed commutation. The Attorney General did not cite any case where a state supreme court recognized a power in its governor to unilaterally rescind or revoke a pardon or commutation that had become a completed act of state, absent fraud or significant procedural irregularities (*see* Part V(d), *below*).

Michigan courts apply three rules when interpreting the state Constitution. *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) (citing *M'Culloch v Maryland*, 17 US (4 Wheat) 316 (1819)). First, the text should be interpreted with a "common understanding" so that its meaning is "the one that reasonable minds, the great mass of people themselves, would give it." *Id.* Second, where clarification is required, the Court should look to the circumstances leading to the adoption of the text and the purpose it sought to accomplish. *Id.*

(citing *Kearney v Board of State Auditors*, 189 Mich 666, 673; 155 NW 10 (1915).) Third, where there are multiple interpretations, an interpretation that does not create constitutional invalidity is preferred to one that does. *Id.*

These rules of statutory construction support Mr. Makowski's contention that the clemency clause, empowering the Governor to "grant" a commutation, does not imply a power to revoke a commutation. A plain reading of the text – "[t]he governor shall have power to *grant* reprieves, commutations and pardons" – permits no other conclusion. No additional executive clemency authority is contemplated by the clemency clause; no other verbs join "to grant" to indicate any expansion of executive power. The text's meaning can be none other than exactly what it says: that the power to *grant* a commutation is reserved to the executive.

The "intention" of the clemency clause also suggests that the Governor has the authority to grant, but not to revoke, a commutation. The clemency clause allocates only the power to "grant." Disregarding this "deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation." *See Wright v United States*, 302 US 583, 588; 58 S Ct 395 (1938); *Nat'l Pride at Work, Inc v Governor of Michigan*, 481 Mich 56, 67; 748 NW2d 524 (2008) (same).

It is logically inconsistent to assert that when the drafters of the clemency clause chose the word "grant" to describe the power allocated to the executive, they also intended to include the power to revoke, rescind, and modify. *See Pine Grove Twp v Talcott*, 86 US 666, 675, 22 L Ed 227 (1873) (holding that the expression of one thing in a constitution is to the exclusion of another). To read into "grant" the power to "revoke" seems especially unsupportable because the latter is the exact opposite of the former.

In *People v Holder*, 483 Mich 168; 767 NW2d 423 (2009), this Court rejected the gov-

ernment's argument that the authority to revoke a parole discharge order is "necessarily implied" in the MDOC's authority to grant parole discharge orders. The Court specifically declined the Attorney General's invitation to hold that the MDOC has the "implied authority to rescind a final order of discharge." *Id.* at 175.[15] This Court should reach the same conclusion regarding commutations: the Governor can no more revoke or rescind a commutation that has become final than she can revoke or rescind her signature on legislation that has become law.

Finally, consistent with the third rule, excluding the power to *revoke* a commutation makes perfect constitutional sense and avoids a "constitutional infirmity." Under the Attorney General's view, there would literally be no limit to the executive's power: a sitting Governor could revoke or rescind all acts of clemency for the past four (or 40) years, reinstating convictions and sentences at will, and returning hundreds of people to prison. There is no logical or jurisprudential reason why the Governor would have to limit revocation only to his or her own pardons or commutations, since the entire power of the executive rests with the Governor in office. But the rule is just the opposite. *See e.g., People ex rel Madigan v Snyder,* 208 Ill 2d 457; 804 NE2d 546 (2004) (upholding Illinois Governor Ryan's blanket amnesty of all prisoners sentenced to death, over the objections of his successor, who sought to retract it.)

"Revocation" is impermissible for other constitutional reasons as well. No one maintains that the Governor has the power to *increase* a prisoner's sentence. Yet that is exactly what would happen if a commutation were "revoked." The prisoner's sentence has already been re-

[15] The Court did so even though the statute required that a paroled prisoner shall have "faithfully performed" all the conditions and obligations of parole before the parole board is obliged to enter a final order of discharge, and there was compelling new information that the parolee had not faithfully performed the conditions and obligations of his parole. *Holder, supra* at 171-173. A police investigation had been commenced before the final parole discharge was entered, which had resulted in his conviction of multiple narcotics offenses. *Id.* The Court nevertheless upheld his discharge as a completed act of state. *Id.* at 177.

duced by the commutation. For the Governor to then re-sentence the prisoner to a new harsher term violates separation of powers because only courts have the authority to impose a sentence. Const 1963, art VI, § 1; MCL 791.1 ("A judge of a court having jurisdiction is ... empowered to pass sentence upon a person convicted in [that] court....")

The revocation would also violate double jeopardy, because the prisoner has already been once tried and sentenced for the crime. *See In re Bradley*, 318 U.S. 50, 52; 63 S Ct 470 (1943), citing *Ex parte Lange*, 85 US 163, 173; 21 L Ed 872 (1874) (double jeopardy was violated by increasing the sentence after punishment; "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?"); *United States v. Bynoe*, 562 F.2d 126, 128 (1st Cir. 1977) ("The general rule is that an increase in sentence after the defendant has commenced serving his punishment is a violation of [the] right not to be subject to double jeopardy.").

The Attorney General also argued below that when Governor Granholm revoked Mr. Makowski's commutation she acted on "new information." (2a, Ct Apps R19, Defs' Response Brief, at 34.) The record does not support that claim. Governor Granholm's letter of December 27, 2010, said that she was rescinding and revoking Mr. Makowski's commutation because the parole board's decision to recommend commutation "was made without hearing objections from the victim's family or the objections of the ... Prosecutor." (47a, Governor's Recall Letter.)

That the board had recommended the commutation without hearing objections from the victim's family or the Wayne County prosecutor was old information, not new information. The board sent notice of the public hearing to the Wayne County prosecutor but not to the victim's family because no family member had registered with the board as required by MCL 791.244. That neither the prosecutor nor a family member had appeared at the public hearing was a matter

of public record. The circuit court found that "[n]one of the parties assert[s] any defects [regarding] the procedures undertaken by the ... Board with respect to its consideration of Makowski's application for commutation." (166a, Opinion & Order.)

Accordingly, this Court should reject the invitation of the Attorney General to confer on the Governor an "implied power" (to revoke a commutation) beyond that specifically granted in Const 1963, art V, § 14 – which is the power to "grant" a commutation.

V. THE COMMUTATION WAS FINAL WHEN IT WAS SIGNED BY THE GOVERNOR, AND SIGNED, SEALED, AND FILED BY THE SECRETARY OF STATE

A. The Michigan constitution and a statute are determinative of when a commutation becomes a completed official act of state

Two provisions of the Michigan constitution, together with a state statute enacted in 1964 (right after the adoption of the 1963 Constitution), provide the "procedures and regulations prescribed by law" determinative of when a commutation becomes a completed official act of state beyond the power of the Governor to revoke. Const 1963, art V, § 14.

- The 1963 Constitution provides that the Governor "shall have the power to grant reprieves, commutations and pardons upon such conditions and limitations as he may direct, *subject to procedures and regulations prescribed by law*." [*Id.* (emphasis added).]

- The 1963 Constitution also provides that "there shall be a Great Seal of the State of Michigan and its use shall be provided by law." [Const 1963, art III, § 3 (emphasis added).][16]

- The 1964 statute provides "that an impression of the Great Seal shall be placed" on pardons and "commutations of sentences." [MCL 2.44 (emphasis added).]

[16] Constitutions preceding the 1963 Constitution provided in detail for the use of the Great Seal of Michigan. In the Address to the People concerning the 1963 Constitution, the framers said that § 11 and § 12 of art VI of the 1908 Constitution provided "in detail for the use of the Great Seal of Michigan" and were "mandatory in their provisions as to the use of the Seal," and "that the Legislature can and will provide for the use of the Great Seal in a proper manner." 2 Official Records, Constitutional Convention 1961-62, p 3368.

No statute, regulation, or procedure enacted or promulgated by the legislature, the Governor, or the MDOC requires anything more. Nor is there an appellate court decision requiring delivery to or acceptance by the prisoner. Perforce, the 1964 statute governs: a commutation is final when it is signed, sealed, and filed by the Secretary of State.

The commutation itself contains no other "condition or limitation" within the meaning of Const 1963, art V, § 14. Delivery does not appear to have been considered by the Governor (or the MDOC, or the parole board) until *after* the victim's family voiced its objections or threatened public protests. Delivery was an afterthought, to provide cover for the revocation of an executive act that the Governor regretted. (38a-39a, *"Granted and certificates delivered. Governor granted this on Wednesday* [December 22, 2010]." Board Chair E-mail 12/23/10 (emphasis added).)

Marbury v Madison is again instructive:

> Some point of time must be taken when the power of the executive ... must cease. That point of time must be when the constitutional power ... has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature....
>
> * * * * * *
>
> He has then acted.... The time for deliberation has then passed. He has decided. His judgment ... has been made.... This ... is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of it being ... an inchoate and incomplete transaction.

Marbury, 5 U.S. 137 at 157-158 (1803). The High Court also weighed in on the duties of the Secretary of State:

> The [document] being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the [executive]. [The secretary] is to affix the seal ... to the [document], and is to record it.
>
> * * * * * *
>
> This is not a proceeding which may be varied, ... but is a precise course ... marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer ... bound to obey the laws. He acts, in this respect ... under the authority of law, and not by the instructions of the [executive]. It is a minister-

ial act which the law enjoins on a particular officer for a particular purpose.

* * * * * *

It is therefore decidedly the opinion of the court, that when a commission has been signed by the [executive], the appointment is made; and that the commission is complete, when the seal ... has been affixed to it by the secretary of state.

Marbury, supra at 162.

In *Smith v Thompson*, 584 SW2d 253 (Tenn Crim App, 1979) – a case on all fours with Mr. Makowski's – the Tennessee court held that a commutation could not be rescinded once it was signed, sealed, and filed (and delivered to the DOC for processing). In *Smith*, a departing governor had issued commutations to three prisoners, reducing their sentences to time served. *Id.* at 254. The text of the *Smith* commutations was nearly identical to Mr. Makowski's commutation, including the use of the word "hereby." *Id.* at 256. In *Smith*, as here, the commutations were signed by the Governor, sealed by the Secretary of State, and forwarded to the DOC for processing. *Id.* at 254-255.

A new Governor took office two days later and immediately revoked the commutations. The *Smith* court held that the new Governor could not revoke them because they had already become final while the old Governor was still in office:

> We hold that the actions of the [former Governor] in reducing the sentences in these cases to time served was a *valid and binding act, made so by his signing the commutations, having that act attested to by the Secretary of State, and then having them delivered to the records division of the [DOC] for the purpose of processing.* [*Id.* at 256-257 (emphasis added).]

At that point, neither the outgoing Governor (who issued the commutations) nor the incoming Governor could revoke them.[17]

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[17] The opinion below tries to distinguish *Smith,* saying that it stands for the narrow proposition that "actions ... of the commuting governor's subordinate officials or of a new governor could not negate issued commutations 'contrary to [the commuting Governor's] obvious wishes.'" (178a, quoting *Smith, supra* at 256-257.) But the language quoted in the text above makes clear that *Smith* draws the line between the "obvious wishes" of the sitting Governor *at the time that*

South Dakota presents another modern example. In December 2010, the outgoing Governor issued a commutation reducing an inmate's sentence from mandatory life to the equivalent of parolable life. There, as here, when news of the commutation hit the press, the victim's family complained bitterly – both of the commutation and of their lack of notice. The Governor wanted to rescind the commutation, but it had already been signed, sealed, and filed with the Secretary of State. As the South Dakota press reported:

> [The] Governor ... cannot rescind his decision to reduce the life sentence of [the convicted killer]. ...*Once the commutation is filed with the Secretary of State's office, it cannot be rescinded.* [The] state Attorney General ... says the governor has no legal authority to take back the order. [48a, S.D. Press Report (emphasis added).]

The South Dakota AG got it right. This Court, too, should find that the commutation was final.

B. The text of the commutation makes it immediately effective

Review of a commutation must start with its plain meaning. *Ex Parte Grossman*, 267 US 87, 115; 45 S Ct 332 (1925) (construing the plain meaning of a presidential pardon to determine its effect). The operative parts of Mr. Makowski's commutation read as follows:

> *To the Michigan Department of Corrections:*
>
> Now Therefore, I, Jennifer Granholm, Governor of the State of Michigan, do *hereby commute the sentence of Matthew Makowski,* to [time served as calculated by the MDOC] minimum to life maximum, *thereby making him eligible for parole* on [a date some months earlier].
>
> You [the MDOC] are *hereby* required to make your records conform to this commutation.

(118a-121a, Sample Commutations (emphasis added).)

Two notable features jump out of the text. The first is the salutation: the commutation is addressed not to the prisoner but rather to the MDOC. *Id.* Thus, to the extent that the commuta-

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the commutation was signed and those that may arise afterward (*either* by the sitting Governor or his successor). The court's bottom line in *Smith* is that once a commutation is signed and sealed (and the DOC has notice), it cannot be constitutionally revoked, regardless of whether it is the outgoing or incoming Governor who wishes to pull it back.

tion is an executive order requiring anyone to do anything, it is the MDOC, and only the MDOC, which must act. The document is pointedly *not* addressed to Mr. Makowski. *Id.* Moreover, the only act required of the MDOC is to "conform" its records to the commutation, which means that the commutation must already be effective for the MDOC records to be conformed to it.

The second notable feature is that both operative clauses use the word "hereby." *Id.* "Hereby" is a performative word customarily used in proclamations and orders to mean "by means of" or "as a result of." *Collins English Dictionary – Complete and Unabridged Edition* (HarperCollins Publishers 2009). The *Random House Dictionary of the English Language: College Edition*, p 619, states that "hereby" means "by this" – by this it is done. The executive order thus takes effect *by means of* the document itself. Nothing further is required.

The text of the commutation also makes explicit that it becomes complete and takes effect once it is signed by the Governor *and* affixed with the Great Seal, which requires the additional signature of the Secretary of State. The last line of the commutation reads:

> *Given under my hand, and the Great Seal* of the State of Michigan this 22nd day of December in the year of our Lord, two thousand ten. [119a (emphasis added).]

By signing, sealing, and filing the commutation, the Secretary of State made it a completed official act of state as of December 22, 2010.

In *Spafford v Benzie Circuit Judge*, 136 Mich 25; 98 NW 741 (1904), as here, this Court had to decide the validity of a gubernatorial pardon. The pardon was signed with the Governor's initials and stamped by the Secretary of State. *Id.* at 27. A unanimous Court held that the Governor's initials and the State Seal were enough to make the pardon effective because it left "no doubt of the validity of the instrument when signed by the Governor," as attested to "by the signature of the Secretary of State and the great seal of the state." *Id.*

In *McDonald v Thomas*, 202 Ariz 35; 40 P3d 819 (2002), the Arizona Supreme Court

reached a similar conclusion. In Arizona, a unanimous clemency board could grant commutations, which the Governor could then revoke within 90 days. *Id.* at 39. The board granted a commutation. Ninety days later the board got a letter from the Governor revoking it. *Id.* A unanimous Arizona Supreme Court held that the letter was not an official executive act because it lacked the elements required by this Court in *Spafford* – a signature and the state seal affixed by the Secretary of State. *Id.* at 45-46. The Arizona court said that the Governor's signature indicates the will to act, and the state seal ensures the validity of the Governor's actions (both by verifying that the act came from the Governor, and confirming that the Governor had the power to act). *Id.*

Governor Granholm clearly intended to commute Mr. Makowski's sentence when she signed the commutation on December 22. The Secretary of State ratified that intention by affixing the Great Seal and signing and filing the document. At that moment, the commutation became an official executive order under *Spafford* and the cases cited above. Mr. Makowski's sentence was commuted.

C. A commutation is not a gift that requires delivery or acceptance

The defendants nevertheless argued below that a commutation is not complete until it is delivered to and accepted by the prisoner. The Attorney General cites *People v Eddinger*, 236 Mich 668, 211 NW 54 (1926), in support of this argument. In *Eddinger,* this Court likened an absolute discharge from parole to a pardon, saying that "it is a gift from the executive, and, like any other gift, it does not become effective until it is delivered and accepted." *Id.* at 670. That language from *Eddinger* was later quoted in *People v Holder*, 483 Mich 168, 767 NW2d 423 (2009) (discussed in Part IV, *supra*).

But both *Eddinger* and *Holder* construed a statute providing that when a parolee success-

fully completes parole, the parole board "shall enter a final order of discharge *and issue the paroled prisoner a certificate of discharge.*" MCL 791.242(1) (emphasis added). The courts held that the language of the statute requires a copy of the discharge to be delivered (that is, "issued") to the parolee. Neither the 1963 Constitution nor any state statute concerning the commutation process, in contrast, requires that a copy of a *commutation* be "issued" (or delivered) to the prisoner. In sum, *Eddinger* and *Holder* do not adjudicate whether delivery to, or acceptance by, a prisoner is required for a commutation, nor do they address whether the Governor can revoke a commutation once it is granted.[18]

The notion that a pardon is not final unless it is delivered to and accepted by the prisoner is a relic of English law concerning the pardoning power of the Crown. It had entered American jurisprudence in *United States v Wilson*, 32 US 150 (1833), where the Court said that a pardon was "an act of grace" and "a deed, to the validity of which, delivery is essential, and the delivery is not complete, without acceptance." *Id.* at 160-161. These statements were *obiter dicta*, however, because *Wilson* itself "turned on the necessity that the pardons should be pleaded." [19]

In *Burdick v United States*, 236 US 79 (1915), the High Court adopted the *Wilson dicta*. As noted above, *Burdick* involved an editor who refused to testify before a grand jury about his sources and was pardoned to compel his testimony. *Id.* at 85. The Court held the pardon to be ineffective for lack of acceptance. *Id.* at 91, 95.

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[18] What the two courts said in passing about pardons (in cases concerning discharge from parole) was plainly *obiter dicta,* not binding on any court. *See Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n3, 713 NW2d 750 (2006) (statements that "are not essential to determination of the case ... lack the force of an adjudication"); *People v Lown,* 488 Mich 242, 267 n46; 794 NW 2d 9 (2011).

[19] The *Wilson* Court held only: "This court is of the opinion, that the pardon in the proceedings mentioned, not having been brought judicially before the court, by plea, motion or otherwise, cannot be noticed by the judges." *Id.* at 163.

But *Burdick* was short-lived. Just a dozen years later, in *Biddle v Perovich*, 274 US 480; 47 S Ct 664 (1927), the Court held that the President *could* commute a sentence (from death to life imprisonment) without the prisoner's consent. *Id.* at 486. In *Biddle,* the Court specifically said that executive clemency is not *an act of grace* and the prisoner's acceptance or consent is not required. *Id.* at 486-487. The unanimous Court held:

> We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days *is not a private act of grace* from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the *public welfare will be better served by inflicting less than what the judgment fixed.* Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, *the public welfare, not his consent determines what shall be done.* So far as a pardon legitimately cuts down a penalty it affects the judgment imposing it. No one doubts ... that the convict's consent is not required.... The considerations that led to the modification had nothing to do with [the defendant's] will. The only question is whether the substituted punishment was authorized by law – here, whether the change is within the scope of the ... Constitution.... [*Id.* (emphasis added) (internal quotations omitted).]

Although the quote refers to "pardons," it is clear from the Court's discussion that it is talking about all forms of executive clemency – pardons, commutations, and reprieves – because *Biddle* itself was a *commutation* case. *Id.*

The *Biddle* Court disavowed *Burdick* and held that its reasoning "is not to be extended to the present case." *Id.* at 487-488. In so holding, *Biddle* rejected *sub silentio* the *Wilson obiter dicta*, and in particular, that "delivery is essential, and the delivery is not complete, without acceptance." *Wilson, supra* at 160-161.[20] *Biddle* was decided in 1927, one year after *Eddinger,* which means the quoted language that the defendants relied upon from *Eddinger* has not been

[20] The Attorney General's 1926 brief in *Eddinger, supra,* argued that "a discharge of a paroled prisoner is so similar to a pardon that the same rules should apply to both. The rule seems to be well settled that a pardon is a deed, to the validity of which, delivery is essential and that delivery is not complete without acceptance." This language is a paraphrase of the *Wilson dicta* adopted in *Burdick* and overruled by *Biddle.*

good law for 85+ years.[21] Now, 85 years after *Biddle*, there is no reason to incorporate into the law of Michigan the outdated, formalistic, and discredited *Wilson obiter dicta* (concerning delivery and acceptance of a pardon), based on the power of the British throne more than 300 years ago. In short, *Biddle* is correct and should control, making acceptance or delivery irrelevant.

The Tennessee court in *Smith v Thompson, supra* – the case on all fours with *Makowski* – also rejected the argument that delivery had to be made to the warden or the prisoner for the commutation to be final. The *Smith* court said "it would be hyper-technical to the point of absurdity" to hold that the commutations signed by the Governor and sealed by the Secretary of State were deficient because "the warden had not then seen the commutations or because the prisoners had not received copies." *Id.* at 257.

The Governor's own deputy legal counsel supports this view. Her office does not send the email announcing the "approved" commutation until the commutation has been signed by the Governor, sealed and filed by the Secretary of State, and delivered to the MDOC. (88a-90a, Sonneborn Dep.) As she put it, "[T]he e-mail notification piece is the final piece in our office." *Id.* Delivery to the prisoner is not required because the commutation has already become a completed executive act.[22]

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[21] The *Wilson obiter dicta* still crops up in American cases (mostly in *dicta* in cases like *Eddinger* and *Holder, supra*), and in legal encyclopedias. *See e.g.*, 59 Am Jur 2nd, Pardon and Parole, § 42, p 43 (stating that delivery and acceptance of a pardon are required), and § 47, p 46 (stating that a pardon is like a private deed requiring tender and acceptance). The cited sections from Am Jur 2nd are essentially verbatim quotations of 24 American and English Encyclopedia of Law (2nd Ed), p 595, which is quoted at length in *Ex Parte Alvarez*, 50 Fla 24; 39 S 481 (1905), the only authority cited by Am Jur 2d, § 42, p 43, for that content. The language in *Alvarez* was itself *obiter dicta,* because the only issue in that case was the procedure to be followed when a prisoner was charged with violating a condition of his release.

[22] The argument for delivery and acceptance might have more force if the commutation were conditional. A conditional pardon or commutation is now a historical relic, but before Michi-

D. The Governor could not revoke the commutation without violating due process

The Court of Appeals found that Mr. Makowski had no protected liberty interest and therefore could not make out a due process claim. (180a.) The court cited *Connecticut Bd of Pardons v Dumschat*, 452 US 458, 465, 101 S Ct 2460 (1981), for the proposition that the "unilateral hope" of a commutation cannot be transformed into an "entitlement." *Id.* The Court of Appeals misapprehends the nature of Mr. Makowski's due process claim. His claim is not that he had a liberty or property interest in *obtaining* a commutation, but rather that once the commutation was granted, it could not be revoked, except for limited substantive reasons, and then only with due process protections.

The well-established rule is that once a commutation becomes final, it cannot be undone unless it was fraudulently procured or the commutation process was fatally flawed. For example, in *Ex Parte Rice,* 162 SW 891 (Tex Ct Crim Apps, 1913), the Texas court found due process and separation of powers violations where the Governor revoked a pardon three days after it was granted (based solely on after-acquired evidence that caused the Governor to change his mind). As the *Rice* court noted, even when fraud is claimed, the person granted the commutation has the right to a full due process hearing on that issue before the commutation can be rescinded. *Id.* at 900-902.

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gan's modern lifer statute came into being in 1942, executive clemency was the only way that people who committed serious felonies and were sentenced to life could win their release. (5a, MDOC Biennial Report, 1941-42.) In those days, a *conditional* grant of executive clemency served much the same function as parole (which is always granted with conditions and includes the risk of re-imprisonment if the conditions are violated). In such a system, where the pardon or commutation has explicit conditions attached to it, there is a plausible argument that the prisoner must learn of them and have the chance to accept or reject them. *See, e.g., Ex Parte Rice,* 72 Tex Crim 587; 162 SW 891 (Tex Crim App, 1913). In the 19th century and early part of the 20th century, states may have required that *conditional* pardons or commutations be delivered and accepted for this reason. But here the commutation was unconditional, so there was nothing for Mr. Makowski to accept or reject. *See Biddle, supra.*

A similar case is *Kelch v Director, Nevada Dep't of Prisons,* 10 F3d 684 (9th Cir 1993). In *Kelch,* the court found that the board's commutation was complete, and that therefore:

> Kelch had a legitimate expectation of commutation of his sentence – not merely a unilateral hope. The Board created this expectation when it issued its order stating: "It is *hereby* ordered that effective this date appellant's sentence be commuted from 20 years to five years of imprisonment...."
> ... Kelch's sentence *was commuted* by formal order of the Board.
> We reject the [state's] argument that Kelch could not have a legitimate liberty interest in the commutation of his sentence until he was actually released.
> * * * * *
> *We conclude that Kelch obtained a liberty interest when the Board issued the order commuting his sentence.* [*Kelch, supra* at 688 (emphasis added).] [23]

Here, no one claimed fraud, and the requirements of the statutes were followed to the letter. (103a, Moore Dep.; 85a, Sonneborn Dep.) The Governor had ample opportunity to reflect on the case before making up her mind and signing the commutation. The only "errors" were the failure of the victim's family to keep its registration up to date, and the failure of the prosecutor to object (despite timely notice). In these circumstances, Governor Granholm's rescission of the completed commutation violated due process. *Id.*

In the on-point Tennessee case, *Smith, supra,* a concurring judge reached the same conclusion as to the commutations revoked by the incoming Governor:

> I fully concur with the lead opinion in this case. I feel it essential to add, finding as we do, "the actions of [the former Governor] in reducing the sentences in these cases ... was

[23] The court still ruled against the prisoner (and denied habeas relief), but only because both the prisoner and the DOC had failed to follow the statutory notice requirements before the hearing. Both had a duty to serve the district attorney, and failed to do so. As a result, the DA did not get timely notice, and failed to appear at the commutation hearing. *Id.* at 689. Where the statutory requirements were not fulfilled, the state had no chance to rebut the prisoner's testimony (which was eminently rebuttable). In that narrow situation, the court held that it was not a due process violation to allow a new hearing, and then – based on the state's evidence – to deny the commutation. *Id.* But here all statutory procedures were followed and all required notices were given. To be clear, in the instant case, Mr. Makowski is not seeking a new public hearing on his commutation because he does not need one: his commutation was a completed, final act of state. But if anyone were to attempt to take away his commutation (for a legally recognized reason), under *Kelch* a due process hearing would be required before that could occur.

> a valid and binding act," that neither [the former Governor] nor [the] incoming Governor ... could rescind or revoke the commutations ... by utilization of any procedure short of a due process hearing as set out in *Morrissey v Brewer*, 498 US 471 (1972); *Gagnon v Scarpelli*, 411 US 778 (1974). [*Smith*, *supra* at 257 (O'Brien, J concurring) (parallel citations omitted).]

For the same reason, in the present case Governor Granholm's revocation of Mr. Makowski's commutation violated his due process rights.[24]

Summary

1. This Court has the authority to review the Governor's revocation of Mr. Makowski's commutation, pursuant to (a) Const 1963, art VI, § 1, which vests the "judicial power of the state ... exclusively in one court of justice," and (b) *Marbury* and *Spafford.*

2. The political question and separation of powers doctrines impose no limitation on this Court's authority to review the Governor's decision to "revoke" a commutation, and in fact both doctrines support (or require) this Court's review of the Governor's decision, pursuant to *House Speaker*.

3. The commutation was completed before the Governor tried to revoke it, both under the clemency clause itself and under the "procedures and regulations prescribed by law," which include the affixing of the Great Seal. This Court can address the finality of the commutation for the reasons set forth in #1 and #2 above.

4. The power to grant a commutation does not include the power rescind, revoke, or otherwise overturn a commutation because the text of Const 1963, art V, § 14 limits the Governor's power only to "grant" a commutation; perforce the opposite would violate the rules of constitutional construction, and would raise serious constitutional issues as to judicial review, the limits of gubernatorial power, due process, and double jeopardy.

5. Governor Granholm exceeded her power by revoking the commutation after she had signed it, and the Secretary of State had signed, sealed, and filed it, and it had been delivered to the MDOC.

Conclusion

For the above reasons, Matthew Makowski asks this Court (1) to reverse the decision of the Court of Appeals, (2) to hold that former Governor Granholm exceeded her authority when

[24] There is, of course, no need to reach this question, if the Court concludes that Governor Granholm exceeded her authority under the Michigan Constitution when she sought to revoke Mr. Makowski's commutation after it had been signed, sealed, and filed by the Secretary of State.

she sought to revoke his commutation after it was signed, sealed, and filed with the Secretary of State, and (3) to hold that his commutation was and is valid.

Respectfully submitted,

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Dated: August 28, 2013

PROOF OF SERVICE

Today the plaintiff-appellant's brief on appeal and the parties' joint appendix were served on First Assistant Attorney General Peter Govorchin at his address in the case caption, by pre-paid first-class U.S. mail.

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Dated: August 28, 2013