STATE OF MICHIGAN

IN THE SUPREME COURT

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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

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

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Dated: November 6, 2013

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ARGUMENT

The defendants' response is not so much a brief about what the law is as an essay about what the defendants wish the law to be. To wit:

1. The defendants state repeatedly that the Governor has the power to "grant, deny, or rescind" an act of clemency. In so doing the defendants ignore the text of the state Constitution, which explicitly empowers the Governor only to "grant" clemency. The defendants also ignore the text of the commutation, which states that the Governor does "*hereby* commute the sentence ... *under my hand and the Great Seal*" (emphasis added). The defendants address neither the words of the commutation nor the rule that such documents are self-executing.

2. The defendants argue that where the Constitution grants a power to the executive, the courts *have no jurisdiction* to review even the scope of the Governor's authority. This argument would reverse 200+ years of American jurisprudence, would eliminate the constitutional role of the courts, and would make each branch of government the sole arbiter of the constitutionality of its conduct. This is a breathtaking claim, yet the defendants make no attempt to explain the host of cases in which the courts (including this Court) did *not* dismiss clemency cases on grounds of non-justiciability, but decided the questions presented on the merits. The defendants argue that the Court cannot reach the merits, but cite case after case in which courts *reach the merits*.

3. The opening line of the defendants' brief says that executive clemency is "an act of grace." The defendants make this claim repeatedly despite a unanimous U.S. Supreme Court decision holding that "in our days" an act of clemency "is *not a private act of grace* from an individual happening to possess power. It is a part of the Constitutional scheme." *Biddle v Perovich*, 274 US 480, 486-487; 47 S Ct 664 (1927) (emphasis added). The defendants never even cite *Biddle*, let alone distinguish it.

I. The Commutation Could Not Be Revoked After It Was Signed and Filed

There is no dispute that Governor Granholm's decision whether, or to whom, to grant a commutation was confided to her sole discretion. The defendants err, however, in seeking to expand the power to "grant" a commutation (conferred by Const 1963, art V, § 14) to include the power to revoke a commutation that has become final (here because the commutation was signed by the Governor, and countersigned, sealed, and filed by the Secretary of State pursuant to MCL 2.44). The defendants never explain on what basis the power to "grant" a commutation "inherently" includes the power to revoke it once the executive act is complete. (Appellees' Brief, at 11-12.)

The defendants do not cite the decision of any court recognizing a governor's power to revoke an *unconditional* pardon or commutation, except for fraud in the procurement. Governor Granholm did not specify any condition that could affect *when* Mr. Makowski became eligible for parole. His commutation was *unconditional*, making him parole-eligible when it was signed, sealed, and filed by the Secretary of State. Just as a criminal sentence is operative when the judgment of sentence is signed and entered by a court (regardless of what the records of the MDOC might show), so, too, a commutation of sentence is final when it is signed and filed with the Secretary of State, regardless of whether or not the MDOC's records have been "conformed" to reflect the prisoner's commuted status.[1]

The defendants rely on old New York law for the proposition that the power to grant a

[1] If the commutation were not effective until the MDOC's records were "conformed," then the will of the Governor in granting clemency could be easily thwarted by a recalcitrant MDOC or parole board. *See Smith v Thompson,* 584 SW2d 253 (Tenn Crim App 1979) (holding commutations irrevocable despite efforts of DOC officials and the incoming governor to rescind them). Moreover, the board in Mr. Makowski's case clearly understood that his sentence *had been commuted*: "Q. Has the Governor already granted [the] commutation or was it still in the consideration phase? A. *Granted and certificates delivered.*" (38a-39a, Board Chair's E-Mail, 12/24/10.)

commutation includes the power to revoke it any time before the prisoner is released. *See People ex rel Presser v Lawes, Warden of Sing Sing Prison,* 335 NYS 53; 221 AD 692, 693 (1927). But the pardon in *Presser* was a *conditional* pardon that – before the advent of modern parole statutes – functioned like parole, which is always revocable for breach of a condition of the parole (or pardon). Other examples of conditional pardons from that era are *People v Moore*, 62 Mich 496; 29 NW 80 (1886), and *Ex parte Rice*, 72 Tex Crim 587; 162 SW 891 (1914).

In *McLaughlin v Bronson*, 206 Conn 267, 272; 537 A2d 1004 (1988), the Connecticut Supreme Court distinguished *Presser,* noting that in *Presser* the "Governor [was] not informed of [the] prisoner's escape." The *McLaughlin* court viewed *Presser* as a case involving either the breach of a conditional pardon/parole or an example of procurement by fraud (for the failure to report the escape).[2] The *McLaughlin* court noted that it is black-letter law that a conditional or unconditional pardon can be revoked after it is final only in the limited circumstances where it was procured by fraud. *Id* at 271.[3] *Presser* and *McLaughlin* provide no help to the defendants.

The Michigan Constitution neither says nor implies anything about the power of the executive to *revoke or rescind* a commutation *once it has been granted.* Revocation or rescission of a granted commutation is facially inconsistent with the constitutional framework, which empowers the legislature to pass criminal laws, the executive to enforce them, and the judiciary to sen-

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[2] The *McLaughlin* court held that the board of pardons could reconsider its decision granting an absolute commutation when the board learned that the information provided at the hearing was fabricated, so that the "factual basis upon which the commutation was granted prove[d] to be erroneous, and the justification for granting the commutation is thereby abrogated." *Id* at 270.

[3] Similarly, in *Kelch v Director, Nevada Department of Prisons*, 10 F3d 684 (9th Cir 1993), the Nevada board of pardons was found to have plenary authority to set aside a commutation that it had granted where there had been a failure to provide the district attorney the statutorily required notice of the hearing and the state had no opportunity to rebut the prisoner's fraudulent testimony (which was eminently rebuttable). *Id* at 385-86. *Kelch,* like *McLaughlin,* stands for the proposition that when a prisoner is able to procure the commutation by fraud, it can be revoked (but only after a full due process hearing).

tence those who are convicted of violating them. When the executive seeks to re-impose a sentence after reducing the sentence by commutation, the executive encroaches upon the exclusive authority of the judiciary to sentence.

The defendants also assert that the revocation was justified because the parole board's recommendation "was not fully informed" and because the Governor had received "significant new information." (Appellees' Brief, at 1, 32.) But the Governor's revocation letter of 12/27/10 said neither. (47a, Letter.) To the contrary, she said that the board's decision to recommend a commutation was made "without hearing objections from the victim's family or the objections" of the county prosecutor – old information, included as part of the record transmitted to the Governor along with the recommendation that the commutation be granted. Governor Granholm did not assert, nor does the record support a finding, that the board or she had "significant new information" or was "misinformed" in any way.

The county prosecutor had in fact received notice of the public hearing, but chose not to file objections or appear at the hearing. The victim's family did not receive notice of the public hearing only because they had failed to register as required by law to receive notice. The circuit court found that the Attorney General had not voiced a claim that a procedure required by statute was not fully observed in the commutation process. (166a, Circuit Court Opinion.)

Nor is there any substance to the defendants' assertion that the commutation was never "carried out,"[4] or that "there is no legislation describing what will happen after a commutation order is transmitted" to the MDOC or the board. (Appellee's Brief, at 11.) To the contrary, MCL 791.234 gave the board authority to parole a non-mandatory lifer who had served the ten

[4] The commutation only changes the prisoners' sentence and gives the parole board jurisdiction under MCL 791.234(7). As to what the MDOC did or didn't do upon receipt of the commutation, we can never know for sure because all documentary evidence of Mr. Makowski's commutation was destroyed, pursuant to directions from the former Governor's office.

years required to attain parole-eligibility. Mr. Makowski, a first offender, had served 22 years of his sentence with a near-perfect record in prison. This statute constitutes legislation describing "what will happen" when the board was informed of Mr. Makowski's commutation on December 22, 2010. At that point the board had all the authority it needed to parole Mr. Makowski because his sentence *had been commuted,* as the board chair conceded. (*See* note 1, *supra.*)

The Attorney General also errs in again stating that "the statutory provisions regarding commutation only affect the commutation application procedure used to submit a commutation application." (Appellees' Brief, at 10.) The Attorney General persistently ignores the 1964 law enacted pursuant to and shortly after the adoption of the 1963 Constitution, providing that "there shall be a great seal of Michigan and its use shall be provided by law." (Const 1963, art III, § 3.) The 1964 statute provides that "an impression of the Great Seal shall be placed" on pardons and "commutations of sentences." (MCL 2.44.) The Attorney General nowhere explains why MCL 2.44 is not a "statutory provision regarding commutation" "prescribed by law," or how a duly signed, sealed, and filed state document can be "unfiled" and destroyed by the Governor.

II. Judicial Review Is Not Barred by the Doctrine of Non-Justiciability

The defendants ignore the many cases in the appellant's brief in which courts engaged in review of pardons or commutations and decided those cases on the merits. Instead, the defendants rely on a handful of decisions, all of which are distinguishable. In *In re Hooker*, ___ Miss ___; 87 So3d 401 (2012), Governor Haley Barbour had issued pardons to 215 people in the closing days of his administration. Mississippi law required applicants for pardons to publish notice, and many had not done so. The Mississippi Supreme Court held that a facially valid pardon may not be set aside or voided on the ground that a procedural publication requirement

was not met, or that the publication was insufficient.[4] *Id* at 414.

But the court was careful to emphasize that the "doctrine of non-justiciability does not apply when the alleged constitutional defect violates personal or individual property rights." *Id.* at 412.[5] And in *Hooker*, unlike here, "no party [stood] before th[e] Court claiming a violation of his or her personal or private property rights." *Id.* at 411. In the present case there was no defect in the commutation procedures, until the Governor sought to revoke the *completed* commutation. Here, Mr. Makowski's personal rights most assuredly are involved, namely the personal right to apply for a commutation conferred by MCL 791.243, the personal right to have that application considered by the parole board under MCL 791.244, and the personal right, changing his status from mandatory life to parolable life, that brought him within the jurisdiction of the parole board under MCL 791.234.

Cases like *Hooker* and *Moore* shield from judicial inquiry a governor's exercise of the power to *grant* a commutation. They do not address the issue of whether former Governor Gran-

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[4] The court relied on *In re Moore*, 4 Wyo 98; 31 P 980 (1893), where the Wyoming Supreme Court said that similar "notice provisions were directives on the applicant and those moving on his behalf. But the Governor 'might grant a pardon upon his own knowledge, and upon his own motion, without any application'" by the prisoner. In *Moore* the Wyoming Supreme Court had to decide if a pardon granted by an acting Governor was a legitimate act of state. Far from ducking the question based on separation of powers, the court reviewed the statutes at issue, and decided which of two claimants in fact held power on the date the pardon was granted. In short, the court made exactly the sort of constitutional determination that Mr. Makowski seeks here. Contrary to what the defendants suggest by their citation to *Moore*, the court exercised its power of judicial review, found the pardon to be legal, and granted a writ of habeas corpus releasing the prisoner from confinement. *Id* at 985.

[5] "We again state for clarity that this doctrine of non-justiciability does not apply when the ... constitutional defect violates personal or individual property rights. But that distinction has no application here, because the requirement that an applicant for a pardon publish notice to the public in the county where the crime was committed is not any particular individual's personal property right." *Id* at 412. The earlier statement in the opinion was that "no writ of injunction or mandamus or other judicial remedial writ will run against the Governor unless personal or private property rights are interfered with." 87 So3d at 411.

holm exceeded her constitutional authority when she revoked Mr. Makowski's commutation. Or, as the U.S. Supreme Court put it in *Nixon v. United States,* 506 US 224, 238; 113 S Ct 732 (1993), quoted in *Hooker* (in a clause omitted by the defendants), "the judiciary does possess the power to review legislative or executive action exceeding constitutional limits." *Id* at 238.

This Court said much the same thing in *House Speaker v Governor*: "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." 443 Mich 560, 575; 506 NW2d 190 (1993) (emphasis added). This 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 issue here clearly presents a question of interpretation of the constitutional provision conferring on the Governor the power to "grant" a pardon or commutation (Const 1963, art V, § 14) and a question of statutory interpretation concerning the meaning and effect of the statutory provision requiring that "an impression of the Great Seal shall be placed" on "commutations of sentences." MCL 2.44.

The cases cited by the defendants do not support the broad claim that clemency cases are non-justiciable. In *United States v Pollard,* 416 F3d 48 (DC Cir 2005) (Appellees' Brief, at 19), the prisoner had no right to executive clemency, and therefore he could not use discovery to gain access to classified documents in order to support his clemency petition. Nor – even if the documents were produced – could the court order the President to consider them in deciding the clemency petition. The court found only that it lacked "the authority to compel the executive branch to disclose any documents for the purposes of a clemency petition." *Id* at 56. *Pollard* was not about the court's power to review the limits of the President's clemency power *per se*, nor does it

support the proposition that a completed commutation remains "open" (and therefore unreviewable) if the executive happens to have second thoughts about it.

The same is true of the defendants' use of *People v Young,* 220 Mich App 420; 559 NW2d 670 (1996). *Young* involved a prosecutor's right to challenge a decision to discharge a parolee off parole. The court held that a mandamus action will lie where a prisoner is improperly discharged off parole contrary to the authorizing statute. *Id* at 433. In passing – and not as part of the holding – the court said, "In the present case, there is no separation of powers problem. Young was not granted a commutation, reprieve, or pardon, which would not be subject to judicial review." As a general proposition, of course that statement is correct. The discretionary authority of the Governor to decide who shall be granted clemency is not reviewable. But that is a different question from the one presented here, namely: did the Governor have the authority to rescind a commutation that had been filed with the Secretary of State? The answer to that question has nothing to do with the Governor's discretionary decision to *grant* the commutation in the first instance, and everything to do with the scope of the Governor's executive power and when an executive act becomes final.

The defendants cite *Connecticut Bd of Pardons v Dumschat*, 452 US 458 (1981), but that case is entirely consistent with the plaintiff's argument. *Dumschat* holds only that a prisoner has no liberty interest in a commutation before it is granted (because the decision is discretionary). Therefore the board of pardons cannot be compelled to provide reasons for denying a petition.

The defendants rely on *People v Fox,* 312 Mich 577; 20 NW2d 732 (1945). In that case the trial court changed a prisoner's life sentence to a term-of-years sentence for good behavior. This Court held that to allow the judiciary to reduce a sentence, years after it was imposed, and with no showing of judicial error, is beyond the power of the judiciary, because only the execu-

tive has the power to reduce a sentence, by executive clemency. *Fox* is correctly decided, but it does nothing to help the defendants. Indeed, it supports the plaintiff's argument: if the judiciary cannot *decrease* a sentence without encroaching upon the executive's exclusive power to commute, then surely the executive cannot *increase* a sentence (after it has been commuted) without encroaching upon the judiciary's exclusive power to sentence. [6]

III. The Defendants Ignore the U.S. Supreme Court's Holding in *Biddle*

The defendants also continue to refer to a commutation as a matter of "grace" (Appellees' Brief, at 1, 10, 21), citing *United States v Wilson*, 32 US 150 (1833), but without ever citing the U.S. Supreme Court's unanimous opinion to the contrary in *Biddle v Perovich*, 274 US 480 (1927).[7] *Biddle* expressly rejected this outmoded analogy to the power of the British throne. While the grant of Mr. Makowski's commutation might be seen as an act of grace, the revocation of his commutation most assuredly was not.

In *Biddle*, the Court said: "A pardon in our days in *not a private act of grace* from an individual happening to possess power. It is 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." *Id* at 486 (emphasis added). The Court overruled *Burdick v United States*, 236 US 79 (1915), where the Court had adopted *obiter dicta* in *United*

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[6] The defendants' reliance on *People v Freleigh*, 334 Mich 306; 54 NW2d 559 (1952), is similarly misplaced. In *Freleigh*, this Court held that even with legislative authorization (in the form of a statute permitting what *Fox, supra*, had forbidden), courts still could not reduce a sentence without infringing upon executive clemency, as only the executive can shorten a sentence (via commutation). The holding of the case does not mean that courts have no right to review the constitutional limits of the executive's commutation power – the issue presented here – but only that courts cannot "commute a sentence" on their own, even with enabling legislation. *Id.*

[7] The defendants also cite *Herrera v Collins*, 506 US 390, 412; 113 S Ct 853 (1993) where the Court traced the history of executive clemency over hundreds of years, with reference to *United States v Wilson*.

States v Wilson (declaring that a pardon was an "act of grace" and "a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance"). *Id.*[8]

Summary

The state defendants seek to confer on the executive the extraordinary power to decide the limit of its own constitutional authority. If the executive can do it here, then the executive can do it anywhere. The constitutional power to grant a commutation is no different from any other executive power authorized by the Constitution. The Court of Appeals' decision and the AG's arguments here would place the question of the scope of executive power beyond judicial review. Such a decision will forever be cited by the Governor for the proposition that executive decisions made under *any* grant of constitutional authority are unreviewable by the courts. The Court should reject the defendants' argument.

Conclusion

Matthew Makowski asks this Court to reverse the decision of the Court of Appeals, and to hold that former Governor Granholm exceeded her authority when she sought to revoke the commutation of his sentence after it was signed, sealed, and filed with the Secretary of State.

Respectfully submitted,

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[8] The defendants also abandon one of the linch-pins of their argument below, namely that Mr. Makowski's commutation was ineffective for lack of delivery. (Appellees' Brief, at 26-27.) The defendants do not cite any case adjudicating that delivery of a commutation is required, and cannot cite such a case since *Biddle* because *Biddle* makes clear that a commutation is not a "gift" or "deed" that could ever require delivery to the prisoner, or the prisoner's consent.