

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
O'Connell, P.J., and Cavanaugh and Donofrio, J.J.

MATTHEW MAKOWSKI (MDOC # 198702),

Plaintiff-Appellant,

v

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 No. 146867

Court of Appeals No.307402

30th Circuit Court No. 11-579-CZ

**The appeal involves a ruling
that a State governmental
action is invalid.**

BRIEF ON APPEAL OF APPELLEES RICHARD DALE SNYDER
AND RUTH JOHNSON

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

A. Peter Govorchin (P31161)
Assistant Attorney General
Attorneys Defendants-Appellees
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

Dated: October 18, 2013

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities	iii
Statement of Jurisdiction	v
Counter-Statement of Questions Presented	vi
Constitutional Provisions, Statutes, Rules Involved.....	viii
Introduction	1
Counter-Statement of Facts	2
Summary of Argument	10
Argument	14
I. The courts of this State do not have authority to review a clemency decision taken by the Governor under Const 1963, art 5, § 14.	14
A. Standard of Review	14
B. Analysis	14
II. The separation of powers doctrine and principle of non-justiciable political questions confirm that the exercise of the Governor's commutation power is not reviewable.....	16
A. Standard of Review	16
B. Analysis	16
1. The issue involves resolution of question(s) committed by the text of the Constitution to a coordinate branch of Government.	17
2. Resolution of the question would demand that a court move beyond areas of judicial expertise.	18
3. Prudential considerations (for maintaining respect between the three branches) counsel against judicial	

	intervention in the Governor’s exercise of the clemency power.....	18
III.	The commutation of Makowski’s sentence was not completed and therefore was not beyond the Governor’s authority to rescind.....	25
	A. Standard of Review	25
	B. Analysis	25
IV.	The Governor’s exclusive authority to exercise executive clemency includes the authority to grant, deny, rescind or revoke a commutation.....	27
	A. Standard of Review	27
	B. Analysis	27
V.	The Governor did not exceed her constitutional authority by rescinding Makowski’s commutation.	34
	A. Standard of Review	34
	B. Analysis	34
	Conclusion and Relief Requested.....	36

INDEX OF AUTHORITIES

Cases

<i>Canizio v State</i> , 8 Misc2d 943, 169 NYS2d 185 (Ct Cl 1957)	26
<i>Connecticut Bd of Pardons v Dumschat</i> , 452 US 458 (1981)	21
<i>Herrera v Collins</i> , 506 US 390 (1993)	21
<i>House Speaker v Governor</i> , 443 Mich 560; 506 NW2d 190 (1993)	16, 34
<i>In re Moore</i> , 31 P 980 (Wyo, 1893)	23
<i>Kelch v Director, Nevada Dep't of Prisons</i> , 10 F3d 684 (CA 9, 1993)	29, 30
<i>Kent Co Prosecutor v Kent Co Sherriff</i> , 428 Mich 314; 409 NW2d 202 (1987)	24
<i>L&T Corp v City of Henderson</i> , 98 Nev 201; 654 P2d 1015 (1982)	29
<i>Marbury v Madison</i> , 5 US (1 Cranch) 137 (1803)	19, 23, 27
<i>Nixon v United States</i> , 506 US 224 (1993)	23
<i>People ex rel Ayres v Bd of State Auditors</i> , 42 Mich 422; 4 NW 274 (1880)	19
<i>People ex rel Presser v Lawes</i> , 225 NYS 53 (2d Dep't 1927)	28
<i>People ex rel Pressor v Lawes</i> , 221 AD 692, 225 NYS 53 (2d Dep't 1927)	26
<i>People v Fox</i> , 312 Mich 577; 20 NW2d 732 (1945)	20

<i>People v Freleigh,</i> 334 Mich 306; 54 NW2d 559 (1952).....	20
<i>People v Young,</i> 220 Mich App 420; 559 NW2d 670 (1996).....	21
<i>Rich v Chamberlain,</i> 104 Mich 436; 62 NW 584 (1895).....	15
<i>Smith v Thompson,</i> 584 SW2d 253 (Tenn Crim App 1979).....	25, 33
<i>Spafford v Benzie Circuit Judge,</i> 136 Mich 25; 98 NW 741 (1904).....	26
<i>Taxpayers of Mich Against Casinos v State of Mich,</i> 78 Mich 99; 732 NW2d 487 (2007).....	19
<i>Trujillo v General Electric Co,</i> 621 F2d 1084 (CA 10, 1980).....	29
<i>United States ex rel Kaloudis v Shaughnessy,</i> 180 F2d 489 (2d Cir 1950).....	20
<i>United States v Wilson,</i> 32 US 150 (1833).....	21
Statutes	
MCL 791.243.....	ix, 15
MCL 791.244(2)(e).....	28
MCL 791.244(e).....	15
Constitutional Provisions	
Conn Const, art 4, § 13.....	31
Const 1963, art 3, § 2.....	passim
Const 1963, art 5, § 14.....	passim
Miss Const 1890, art 5, § 124.....	23

STATEMENT OF JURISDICTION

Appellees, Richard Dale Snyder and Ruth Johnson (hereafter "Governor"),
agree with Plaintiff-Appellant's Statement of Jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do the courts of this State have authority to review commutation actions taken by the Governor under the authority conferred by Const 1963, art 5, § 14?

Appellees' answer: No.

Appellant answers: Yes.

Trial Court answered: No.

Court of Appeals answered: No.

2. Do the separation of powers doctrine and the principle of nonjusticiable political questions prevent the courts from reviewing the exercise of that constitutional authority?

Appellees' answer: Yes.

Appellant answers: No.

Trial Court answered: Yes.

Court of Appeals answered: Yes.

3. Was the commutation of Makowski's sentence completed before the Governor took steps to revoke the commutation and does the Court has the authority to address this question?

Appellees' answer: No and No.

Appellant answers: Yes and Yes.

Trial Court answered: Did not answer.

Court of Appeals answered: No and No.

4. Does the power to grant clemency under the Const 1963, art 5, § 14 also include the power to rescind, revoke, or otherwise overturn a decision to grant clemency?

Appellees' answer: Yes.

Appellant answers: No.

Trial Court answered: Yes.

Court of Appeals answered: Yes.

5. Did the Governor exceed the authority granted by the Constitution by revoking the commutation of sentence after it was signed by the Governor, sealed by and filed with the Secretary of State, and delivered to the Michigan Department of Corrections?

Appellees' answer: No.

Appellant answers: Yes.

Trial Court answered: No.

Court of Appeals answered: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

A. Constitutional Provisions:

1. Const 1963, art 3, § 2

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

2. Const 1963, art 5, § 14

The governor shall have the 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.

B. Statutory Provisions:

1. MCL 791.243

All applications for pardons, reprieves and commutations shall be filed with the parole board upon forms provide therefor by the parole board, and shall contain such information, records and documents as the parole board may by rule require.

2. MCL 791.244

(1) Subject to the constitutional authority of the governor to grant reprieves, commutations, and pardons, 1 member of the parole board shall interview a prisoner serving a sentence for murder in the first degree or a sentence of imprisonment for life without parole at the conclusion of 10 calendar years and thereafter as determined appropriate by the parole board, until such time as the prisoner is granted a reprieve, commutation, or pardon by the governor, or is deceased. The interview schedule prescribed in this subsection applies to all prisoners to whom this section is applicable, regardless of when they were sentenced.

(2) Upon its own initiation of, or upon receipt of any application for, a reprieve, commutation, or pardon, the parole board shall do all of the following, as applicable:

(a) Not more than 60 days after receipt of an application, conduct a review to determine whether the application for a reprieve, commutation, or pardon has merit.

(b) Deliver either the written documentation of the initiation or the original application with the parole board's determination regarding merit, to the governor and retain a copy of each in its file, pending an investigation and hearing.

(c) Within 10 days after initiation, or after determining that an application has merit, forward to the sentencing judge and to the prosecuting attorney of the county having original jurisdiction of the case, or their successors in office, a written notice of the filing of the application or initiation, together with copies of the application or initiation, any supporting affidavits, and a brief summary of the case. Within 30 days after receipt of notice of the filing of any application or initiation, the sentencing judge and the prosecuting attorney, or their successors in office, may file information at their disposal, together with any objections, in writing, which they may desire to interpose. If the sentencing judge and the prosecuting attorney, or their successors in office, do not respond within 30 days, the parole board shall proceed on the application or initiation.

...

(e) Within 270 days after initiation by the parole board or receipt of an application that the parole board has determined to have merit pursuant to subdivision (a), make a full investigation and determination on whether or not to proceed to a public hearing.

(f) Conduct a public hearing not later than 90 days after making a decision to proceed with consideration of a recommendation for the granting of a reprieve, commutation, or pardon. The public hearing shall be held before a formal recommendation is transmitted to the governor. One member of the parole board who will be involved in the formal recommendation may conduct the hearing, and the public shall be represented by the attorney general or a member of the attorney general's staff.

(g) At least 30 days before conducting the public hearing, provide written notice of the public hearing by mail to the attorney general, the sentencing trial judge, and the prosecuting attorney, or their successors in office, and each victim who requests notice pursuant to the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834.

(h) Conduct the public hearing pursuant to the rules promulgated by the department. Except as otherwise provided in this subdivision, any person having information in connection with the pardon, commutation, or reprieve shall be sworn as a witness. A person who is a victim shall be given an opportunity to address and be questioned by the parole board at the hearing or to submit written testimony for the hearing. In hearing testimony, the parole board shall give liberal construction to any technical rules of evidence.

(i) Transmit its formal recommendation to the governor.

(j) Make all data in its files available to the governor if the parole board recommends the granting of a reprieve, commutation, or pardon.

(3) Except for medical records protected by the doctor-patient privilege of confidentiality, the files of the parole board in cases under this section shall be matters of public record.

INTRODUCTION

The power of executive clemency, an act of grace, is a power that the Michigan Constitution vests exclusively in the Governor. How former Governor Granholm chose to exercise that power when deciding to grant, deny, or even rescind a decision to commute is a matter of the Governor's discretion, subject only to the Governor's professional judgment. Makowski asks this Court to interfere with that power by creating criteria to circumscribe executive discretion. But under the separation of powers doctrine, the Court should refrain from interfering with the Governor's exercise of clemency authority.

Former Governor Granholm's decision to rescind the initial commutation decision was based on her recognition that the Parole Board's recommendation, on which the initial commutation decision was based, was not fully informed. The Governor's initial clemency decision was rescinded before it was carried out.

Thus, the decisions and activities Makowski asks this Court to review are those that remained within the sole discretion of the Governor under Const 1963, art 5, § 14. Therefore, Makowski's appeal should be dismissed.

COUNTER-STATEMENT OF FACTS

Matthew Makowski #198702 is a prisoner in the care and custody of the Michigan Department of Corrections (MDOC), and is currently incarcerated at Lakeland Correctional Facility in Coldwater, Michigan. Makowski was convicted of first-degree murder on February 2, 1989, and is currently serving a non-parolable life sentence.

On January 25, 2010, Makowski filed an application for commutation of his sentence. (14a, Commutation Application.) Around May 2010, the Michigan Parole and Commutation Board (Parole Board) concluded that Makowski's commutation application had "no merit." In accordance with standard procedure, the application and negative recommendation were forwarded to the Governor. (72a-73a, ¶¶ 2-3, Moore Response to Admissions Request.) Makowski's application was then referred by the Governor to the Executive Clemency Advisory Council for review and to get the Advisory Council's recommendation to the Parole Board. (73a, ¶ 4, Moore Response to Admissions Request.) In August 2010, the Parole Board sent notice that a public hearing would be held on Makowski's application for commutation. (73a, ¶ 5, Moore Response to Admissions Request.) Notice for the hearing went to the prosecutor and the original trial judge's successor. (73a, ¶ 6, Moore Response to Admissions Request.) Notice was not sent to the victim's family, however, because none of the victim's family members were registered as victims with MDOC. (73a, ¶¶ 6-7, Moore Response to Admissions Request.)

In mid-September 2010, Makowski received notice that a public hearing on his application for commutation would be held on October 21, 2010. (73a, ¶ 9,

Moore Response to Admissions Request.) After the public hearing, the Parole Board voted 8-7 to send its favorable recommendation for commutation along with Makowski's commutation application to Governor Granholm. (30a, Recommendation Summary; 31a-33a, Official Recommendation.)

On December 22, 2010, former Governor Granholm signed the Makowski commutation document and sent it to the Secretary of State's office for filing. (74a, ¶ 13, Moore Response to Admission Request.) On December 22, 2010, the Secretary of State received a cover sheet and the signed commutation document. (69a, ¶ 7, Houston Interrogatory Response.) The Secretary of State affixed the Great Seal to the commutation document and auto-penned the Secretary's signature on it. (69a, ¶ 16, Houston Interrogatory Response.) Then the Secretary of State made a copy of the documents and returned the original commutation document and a copy of the cover sheet to the Governor Granholm's office. (69a-70a, ¶ 16, Houston Interrogatory Response.) The Board also received Commutation Certificates, but they were not mailed to Makowski. (109a-110a, Moore Dep.)

Makowski claims that on or about December 22, 2010, he learned his commutation had been approved from a telephone call from his family. There is no evidence of this in the record. Makowski relies on an unsigned/un-notarized verification form (122a) to support this assertion. Makowski incorrectly claims in his complaint that the MDOC published his approved commutation on its website. (1a, Compl, ¶¶ 34, 38.) Neither the Parole Board nor the MDOC affirmatively

releases information about commutations to the press or on the MDOC website.

(104a-108a, Moore Dep.)

On the morning of December 23, 2010, Governor Granholm's legal counsel informed Parole Board Chairperson Barbara Sampson that the family of Makowski's victim (the Puma family) learned that Makowski may have had his sentence commuted through press reports. In response, the Puma family's attorney sent an email expressing objections to Makowski's possible commutation. (1a, Compl, ¶ 40; 35a, Sonnenborn email.) By the evening of December 23, 2010, Governor Granholm reconsidered her decision to grant a commutation, and her deputy legal counsel informed Chairperson Sampson of this decision. Chairperson Sampson then informed her staff that Governor Granholm was rescinding Makowski's commutation to get the victim's family's input. (35a-36a, Sampson emails.)

The Puma family thereafter submitted objections to Makowski's commutation to Governor Granholm's office on December 27, 2010, and asserted that they had not been notified that commutation for Makowski was under consideration. Because the Parole Board had *not* considered the views of the victim's family, Governor Granholm executed a letter on December 27, 2010, confirming her December 23, 2010 decision to rescind her earlier decision to commute Makowski's sentence. (47a, Revocation Confirmation Letter.)

The Parole Board internally discussed on December 24, 2010, the commutation being withdrawn, and knew by that morning that the Parole Board

would receive a written confirmation of the Governor's December 23, 2010 commutation rescission. (37a-39a, Board emails.) Makowski's victim's family, Larry Puma, and their attorney were also notified the morning of December 24, 2010, that the Makowski commutation had been rescinded. (41a, Board emails.)

On Monday, December 27, 2010, Suzanne Sonnenborn, then Deputy Legal Counsel for the Governor's office, went to the Secretary of State's office and requested that all Makowski commutation documents be returned to the Governor's office. She presented a letter from Governor Granholm that confirmed in writing the verbal revocation of the Makowski commutation referenced in the Parole Board's emails. (86a-88a, Sonnenborn Dep.) The supervisor at the Secretary of State's office, Robin Houston, gave Sonnenborn all of the documents possessed by the Secretary of State's office related to Makowski's commutation. (97c-98a, Sonnenborn Dep.) In addition, on December 27, 2010, the Parole Board returned the Commutation Certificates to the Governor's office. At that time, the Commutation Certificates were still in the possession of the Parole Board and had never been mailed to Makowski, the warden, or anyone else. (42a, Board emails.)

On March 25, 2011, the Parole Board, in an executive session, reviewed Makowski's commutation application again, along with the victim's family's comments. (55a, Parole Board Executive Session Notes.) At this review, Makowski's application for commutation included a letter sent to the Parole Board on March 7, 2011, from Doyle O'Connor, the victim's family lawyer, which had not been part of the file sent to Governor Granholm on November 29, 2010. (50a-54a,

O'Connor Letter.) After reviewing Makowski's application, the Parole Board voted not to recommend commutation by a vote of 10-1. (55a-66a, Parole Board Recommendation.)

On April 15, 2011, Governor Snyder denied Makowski's application for commutation. (67a, April 15, 2011 Commutation Denial Letter sent to Makowski.) Since Makowski's sentence has not been commuted, he has remained incarcerated and continues to serve a life sentence at Lakeland Correctional Facility in Coldwater, Michigan.

PROCEEDINGS BELOW

On May 19, 2011, Makowski commenced this action in the 30th Judicial Circuit for Ingham County. Makowski sought declaratory and injunctive relief against Appellees, Governor Richard Dale Snyder and Secretary of State Ruth Johnson (hereafter "Governor"). Makowski argued that (1) all discretionary acts towards his commutation had been completed when Governor Granholm signed the commutation document and filed it with the Secretary of State's office; (2) it was illegal for Governor Granholm to revoke or rescind Makowski's commutation; and (3) it was illegal for Secretary of State Johnson to accede to Governor Granholm's direction to return to her the copy of the commutation documents. Makowski also requested that the trial court issue an injunction requiring current Governor Snyder to return the commutation order signed by former Governor Granholm to the Secretary of State, so that Secretary of State Johnson could re-file it as a completed executive act and forward the document to the appropriate authorities

for processing. (Discovery disclosed that the original Makowski commutation document was destroyed on or about December 27, 2010.) (98a, Sonnenborn Dep.)

On September 1, 2011, after discovery had been completed, the Governor moved for summary disposition. On September 28, 2011, Judge Richard D. Ball, of the 54-B District Court, sitting by assignment because the sitting circuit court judge, Honorable Joyce Draganchuck, was on medical leave, heard the oral argument. The sole issue presented to the circuit court was whether it was within the Governor's executive clemency power to change her mind after signing and filing the commutation documents before the documents were delivered to Makowski, and thereby revoke or rescind the commutation. The Governor argued that it is within the Governor's authority to revoke or rescind a commutation since executive clemency is an act of grace, completely at the discretion of the Governor. Makowski argued that once the commutation was signed by the Governor, filed with the Secretary of State, and impressed with the Great Seal, the commutation was beyond the authority of the Governor to rescind or revoke. There is no dispute that the commutation document was never delivered to Makowski or otherwise acted on by the Parole Board.

On November 15, 2011, the circuit court issued an opinion and order granting the Governor's motion for summary disposition. (1a, 11/15/11 Op & Order.) The circuit court decided that "because the federal and Michigan Constitutions grant to the executive branch the authority to grant sentencing pardons, reprieves, and commutation ... the courts have no jurisdiction or authority to question the manner

in which reprieves or commutations are granted, or for that matter, rescinded or revoked.” (*Id.* at 5.) Therefore, the circuit court concluded that the Governor’s exercise of executive clemency is not justiciable under the doctrine of separation of powers.

Makowski appealed. The Court of Appeals affirmed on December 27, 2012. The Court of Appeals agreed that Makowski’s claim challenging former Governor Granholm’s exercise of her commutation power was non-justiciable.

The Court of Appeals, observing that the Michigan Constitution reserved the power of commutation to the Governor, recognized that the separation of powers structure of our Constitution required each coordinate branch of government to defer to the other branches when the Constitution reserved a topic or function to that other coordinate branch. The plain language of the Constitution grants the subject of commutations exclusively to the Governor. There are no statutory limits on the Governor’s absolute discretion regarding commutation decisions. The power to grant a commutation necessarily includes the power to revoke the commutation grant.

The Court of Appeals also observed that there are no judicially discoverable and manageable standards of review regarding how or when a commutation decision becomes final and irrevocable. A judicial determination that creates definite procedural requirements regarding the commutation process would amount to improper usurpation of the power to legislate. Neither can the judiciary dictate to the Governor what actions are proper and necessary in the exercise of the

commutation power. (177a-181a, Opinion.) Therefore, the Court of Appeals affirmed the decision of the circuit court dismissing Makowski's complaint for injunctive and declaratory relief.

After the Court of Appeals denied Makowski's timely motion for reconsideration, Makowski filed an application for leave to appeal in this Court, which was granted on July 5, 2013.

SUMMARY OF ARGUMENT

The Court's grant of leave to appeal directed the parties to address five questions.

First, under the separation of powers doctrine, it is beyond the authority of the Court to review the Governor's exercise of executive clemency. Pursuant to the Michigan Constitution, the Governor is vested with the exclusive authority to exercise executive clemency. There are no other constitutional provisions which limit this authority and the statutory provisions regarding commutation only affect the commutation application procedure used to submit a commutation application to the Governor and not the Governor's exercise of executive clemency decision making regarding that commutation application. It follows then that commutation is a decision within the Governor's sole discretion. How the Governor chooses to exercise the commutation power when deciding to grant, deny, or even rescind a commutation is a decision subject only to the Governor's personal and professional judgment. Article 5, § 14 allows the Legislature to establish procedures and regulations, but the Legislature has chosen not to do so.

Judicial review of the commutation decision would infringe on the Governor's exclusive constitutional authority and result, by necessity, in judicially created procedures and regulations being applied to an act of grace reserved solely to the Governor, when the Legislature has declined to do so.

Second, Article 5, § 14 grants the Governor complete authority to grant or deny clemency through commutation, subject only to such procedures and regulations as are prescribed by the Legislature. The Legislature has not prescribed

any procedures for the exercise of the Governor's clemency power. Therefore, the power to grant or deny clemency being reserved to the Governor, the Governor's discretion to grant or deny clemency is not reviewable. Const 1963, art 3, § 2.

The absence of any constitutional or statutory criteria to be considered by the Governor when deciding whether to grant clemency provides a court with nothing to review. Short of a court substituting its own judgment for that of the Governor or creating commutation standards, the exercise of discretion to grant or deny clemency is a purely political question committed by the text of the Constitution to the Governor. Commutation is a question outside the expertise of the courts and review of a commutation decision would usurp the discretion of a co-equal branch of government.

Third, the power to rescind a commutation is included within the clemency authority vested exclusively in the Governor by the Michigan Constitution. The Legislature has enacted a statute describing the actions the Parole Board may take if a prisoner's life sentence is parolable, or the actions needed to transmit a commutation application to the Governor, but there is no legislation describing what will happen after a commutation order is transmitted to the Parole Board. MCL 791.244. No actions were taken on the commutation except to rescind it, as the Parole Board was informed on December 23, 2010, that Governor Granholm was rescinding her decision to commute Makowski's sentence. Therefore, even if some affirmative act was sufficient, short of release from prison, to mark Makowski's change in status from a non-parolable lifer to a parolable lifer, that affirmative act

never happened and Makowski's commutation grant was subject to rescission and was actually rescinded.

Fourth, because the commutation had not taken effect, the commutation decision was well within Governor Granholm's constitutional authority to rescind. For purpose of this case, the question is dependent on when the commutation is effectuated. The Governor contends that the commutation is not effectuated until it is carried out, i.e., serves as the basis for additional affirmative action. There is legal support for that affirmative act needing to be a release from prison. But even if a lesser affirmative act would suffice, no such action occurred.

Fifth and finally, the revocation did not exceed the authority granted to the Governor by Const 1963, art 5, § 14 because revocation or rescission is an inherent part of the complete discretion granted to the Governor for acts of clemency, like commutation. The paperwork declaring the commutation was given to the Parole Board on Wednesday, December 22, 2010. No action of any kind was taken based on that paperwork. The next day, Governor Granholm, through her staff, informed the Parole Board that she was rescinding the commutation. The revocation occurred before any action had been taken to carry out a change in Makowski's sentence status. There being no factual dispute in this appeal, there is no fact question to resolve.

The Court of Appeals' and the lower court's decisions correctly recognized the fundamental conundrum of Makowski's request that a court review the commutation rescission. The parties recognize that there is no right to a

commutation. Const 1963, art 5, § 14, reserves the power of commutation to the Governor upon such conditions and limitations as the Governor may direct, subject to procedures and regulations prescribed by law. The parties also recognize that there are no procedures or regulations prescribed by law that direct how the Governor should carry out a commutation decision, whether it be a denial, a grant, or a rescission of the denial or grant.

There being no right to commutation and no legislative prescription for carrying out the decision of whether to commute or not, Makowski asks this Court to create a standard for determining when the exercise of the Governor's exclusive power to commute a sentence has been carried out. By the very nature of this request, this will require the judiciary to create a standard, some criteria for declaring when the Governor had irrevocably exercised this discretionary authority to grant or deny clemency and allowed the benefit of the act to be enjoyed by the recipient. This judicial legislation would, by its very nature, interfere with and invade the prerogative of the executive by the establishing procedure that, according to Const 1963, art 5, § 14, is a power reserved to the Legislature.

If the separation of powers doctrine is to be honored, and the structure of government as set forth in the Michigan Constitution recognized, then this Court should reject Makowski's invitation to invade the sphere of authority reserved to the Legislature by creating and imposing on the Governor's office criteria by which the exercise of the commutation power must be declared complete.

ARGUMENT

I. The courts of this State do not have authority to review a clemency decision taken by the Governor under Const 1963, art 5, § 14.

A. Standard of Review

The Governor concurs with the statement that the standard of review for each argument in this appeal is *de novo*, as stated in Appellant's brief.

B. Analysis

The Michigan Constitution vests the power of executive clemency exclusively in the sole discretion of the Governor. Since the Governor is granted exclusive clemency authority, the courts have no jurisdiction under the Constitution to review the Governor's exercise of that exclusive authority. In recognition of the separation of powers doctrine, Const 1963, art 3, § 2, this Court should refrain from reviewing how former Governor Granholm chose to exercise that exclusive clemency power when she rescinded the commutation decision for Makowski.

The Governor's exclusive commutation power is part of the Governor's executive clemency authority derived from Const 1963, art 5, § 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.

While commutation power is vested exclusively in the Governor, it is "subject to procedures and regulations prescribed by law." Const 1963, art 5, § 14. There are two statutes that describe how a commutation comes before the Governor, MCL

791.243 and MCL 791.244, but none prescribing how the Governor should exercise the commutation power. The statutory requirements for getting a commutation request to the Governor include: (1) an application filed with the Parole Board; (2) notice provided to the Governor, prosecuting attorney, and sentencing judge; (3) an opportunity for the sentencing judge and prosecutor to object; (4) the Parole Board conducts a public hearing; and (5) a full investigation by the Parole Board. These statutory requirements, however, are “[s]ubject to the constitutional authority of the Governor to grant reprieves, commutations, and pardons....” MCL 791.244(e). It is clear, based on the language of the statutes as well as the language of the Constitution, that the Legislature intended to lay out a commutation application procedure while leaving the power and discretion to grant, deny, or rescind commutation within the exclusive control of the Governor.

With no other statutory or constitutional limitations, Michigan courts have consistently interpreted the Constitution as vesting broad power to exercise executive clemency exclusively in the Governor. As early as 1895, the Michigan Supreme Court stated that “[t]he power conferred by ... the Constitution is practically unrestricted, and the exercise of executive clemency is a matter of discretion....” *Rich v Chamberlain*, 104 Mich 436, 441; 62 NW 584 (1895). Ever since, the courts have recognized that executive clemency is a power exclusively vested in the Governor and, as a result, commutation is a matter of discretion subject only to the personal and professional judgment of the Governor. See *Kent Co Prosecutor v Kent Co Sheriff*, 425 Mich 718, 723; 391 NW2d 341 (1986), (the

Constitution vests commutation power exclusively in the Governor and any law restricting that power is unconstitutional and void), on rehearing, 428 Mich 314; 409 NW2d 202 (1987); *Oakland Co Prosecuting Attorney v Mich Dep't of Corrections*, 411 Mich 183, 191; 305 NW2d 515 (1981) (“[The courts] have jealously guarded the Governor’s prerogative under this [Const 1963, art 5, § 14] provision). Therefore, just as the circuit court and Court of Appeals determined below, Michigan courts unanimously agree that the power to commute a sentence is a matter within the exclusive authority of the Governor and the exercise of the constitutional authority is not subject to judicial review.

II. The separation of powers doctrine and principle of non-justiciable political questions confirm that the exercise of the Governor’s commutation power is not reviewable.

A. Standard of Review

The Governor concurs with the statement that the standard of review for each argument in this appeal is *de novo*, as stated in Appellant’s brief.

B. Analysis

The exercise of clemency, whether through a grant, denial or rescission, is a political question under the criteria this Court established in *House Speaker v Governor*, 443 Mich 560, 574; 506 NW2d 190 (1993). The Court of Appeals properly concluded that the three-part inquiry set forth in the *House Speaker* yielded the conclusion that courts have no jurisdiction to review the Governor’s exercise of executive clemency because the exercise of the clemency power was a political

question and, therefore, non-justiciable. In *House Speaker*, this Court set forth the three-part analysis to be considered when deciding if an issue is justiciable:

- 1) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
- 2) Would resolution of the question demand that a court move beyond areas of judicial expertise?
- 3) Do prudential considerations counsel against judicial intervention?

- 1. The issue involves resolution of question(s) committed by the text of the Constitution to a coordinate branch of Government.**

As explained in Argument I, above, the text of the Michigan Constitution vests commutation power exclusively in the Governor. Furthermore, the division of governmental power between the three branches of government is explicit within the Michigan Constitution. See Const 1963, art 3, § 2. “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution.” The Court of Appeals properly relied on the separation of powers doctrine, as described in the Constitution, when deciding that the question of Makowski’s commutation was committed by the text of the Constitution to a coordinate branch of government. Therefore, the answer to the first *House Speaker* inquiry counsels against judicial review.

2. Resolution of the question would demand that a court move beyond areas of judicial expertise.

Both Michigan and federal courts have repeatedly explained that the exercise of executive clemency is not a proper activity for judicial review. The discretion applicable to consideration of a commutation is not based on legal principles or case law. It is not based on procedural rules that could create a presumption leading to a logical result. Rather, a commutation decision, as an exercise of clemency authority, is the essence of applied personal judgment. It may entail consideration of any of a multitude of factors, each with no pre-ordained weight. An act of clemency could involve factors that may be hard to determine by someone other than the decision maker. It is hard to imagine a decisional act so unlike judicial decision making or one so completely outside of judicial expertise. Answering the second *House Speaker* inquiry yields the conclusion that clemency decision making is a political question beyond judicial review.

3. Prudential considerations (for maintaining respect between the three branches) counsel against judicial intervention in the Governor's exercise of the clemency power.

Under the separation of powers doctrine, courts have no authority under the Constitution to review actions exclusively vested in another branch of government. Const 1963, art 3, § 2. Michigan courts have "recognized that discretionary decisions made by the Governor are not within [the] court's purview to modify." *Taxpayers of Mich Against Casinos v State of Mich*, 78 Mich 99, 108; 732 NW2d 487

(2007). See also *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 426; 4 NW 274 (1880) (The courts “cannot interfere with the discretion of the chief executive of the state or subordinate him to [the judicial] process.”) As a result, how a Governor chooses to exercise the exclusive clemency authority when deciding to grant, deny, rescind, or revoke a commutation, is not reviewable since it is a matter within the Governor’s sole discretion.

While Makowski correctly asserts that judicial review for questions of law was cemented into American Jurisprudence by the Supreme Court of the United States in the landmark decision *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), it must be noted that throughout that opinion the Court also emphasized the importance of separation of powers. The Court cautioned that “[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire *how* the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, *by the Constitution and laws, submitted to the executive, can never be made in this court.*” *Id.* at 170 (emphasis added).

The cases cited in the Court of Appeals’ decision below support the *Marbury* Court’s emphasis on the importance of separation of powers, despite the general rule of judicial review. In *United States v Pollard*, 416 F3d 48, 57 (DC Cir. 2005), the Court considered whether it had the authority to review the exercise of the President’s clemency authority and thereby order the President to consider certain

classified documents in connection with Pollard's clemency petition. The Court held:

Clemency, over which neither Congress nor the courts share any constitutional authority, is more properly the *exclusive* province of the Executive. As stated by Judge Learned Hand, "[i]t is a matter of grace, over which courts have no review[.]" *United States ex rel Kaloudis v Shaughnessy*, 180 F2d 489, 491 (2d Cir 1950). Thus, it is entirely out of our power to compel discovery of or access to documents for the sake of a clemency petition. We therefore remand this final claim for dismissal for lack of jurisdiction. *Id.*

Just as the Court in *Pollard* lacked jurisdiction to review the President's exercise of his clemency authority, the Court here has no jurisdiction to review the Governor's exercise of her commutation power. Such review would essentially void the Governor's discretion and order the Governor not to consider information that came to her attention after her initial commutation decision. Since the order to consider additional information in *Pollard* was outside the Court's jurisdiction, it follows that an order not to consider information in the instant case is also outside this Court's jurisdiction.

The cases cited by the Court of Appeals emphasize that the courts lack jurisdiction to review the Governor's exclusive exercise of executive clemency. See *People v Fox*, 312 Mich 577, 581-582; 20 NW2d 732 (1945) (after sentencing, the court has no further jurisdiction to amend or change a sentence); *People v Freleigh*, 334 Mich 306, 310; 54 NW2d 559 (1952) ("The Constitution by implication forbids the judiciary to commute a sentence"); *Oakland Co*, 411 Mich at 191 ("[The courts] have jealously guarded the Governor's prerogative under this [Const 1963, art 5, § 14] provision").

More recently, but before the Court of Appeals' decision being challenged here, the Court of Appeals explicitly recognized that review of the Governor's commutation power gives rise to a separation of powers problem. See *People v Young*, 220 Mich App 420, 432-33; 559 NW2d 670 (1996) (commutation, reprieves, and pardons are not subject to judicial review). Thus, the Michigan courts have consistently recognized that they have no authority to interfere with how the Governor exercises the exclusive commutation power.

This premise is further supported by the United States Supreme Court, which has repeatedly explained that the exercise of executive clemency is a matter of sovereign grace. See, e.g., *Herrera v Collins*, 506 US 390, 412 (1993); *United States v Wilson*, 32 US 150, 160-61 (1833). As such, the exercise of executive clemency is exclusively the prerogative of the executive, and not a subject fit for judicial review. In *Connecticut Bd of Pardons v Dumschat*, 452 US 458, 464 (1981), where the Court held that a prisoner does not have a right to commutation, the Court once again cited its lack of jurisdiction in regards to the executive's exercise of clemency and stated that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."

Accordingly, former Governor Granholm's decision to rescind her initial decision to commute Makowski's sentence and return the matter to the Parole Board to fully consider the additional information submitted by the victim's family is not a subject appropriate for judicial review.

The review sought by Makowski would essentially result in the Court compelling the Governor to favorably exercise the exclusive commutation power in a particular fashion. This would violate the State's Constitution because such review impinges on the Governor's clemency discretion and intrudes on the Legislature's prerogative to establish procedures and regulations, if the Legislature chose to do so. Const 1963, art 5, § 14.

Additionally, unlike the legislative restrictions on the Parole Board's exclusive executive authority to parole a prisoner in MCL 791.244, the Governor's exclusive commutation power is not limited by any statute or any other provision in the Michigan Constitution. This means that the scope of permissible judicial review as to the Governor's exclusive commutation power is limited to review of the process of applying for commutation, but does not include the process of deciding whether or not to grant the commutation or whether the commutation may be rescinded. Thus, with no statutory or constitutional provisions to circumscribe the Governor's exercise of the exclusive commutation power, judicial review of how former Governor Granholm chose to exercise her exclusive commutation power exceeds the scope of permissible judicial review and improperly infringes on that exclusive authority.

Recently, the Mississippi Supreme Court considered, in *In re Hooker*, 87 So3d 401 (Miss, 2012), whether the courts have the authority under the separation of powers doctrine to void a facially valid pardon issued pursuant to the Governor's exclusive authority. In *Hooker*, the Mississippi Attorney General asked the Court to

void several facially valid pardons issued by the Governor, alleging that the applicants failed to publish notice as required by section 124 of the Mississippi Constitution. *Id.* at 1; See Miss Const 1890, art 5, § 124. The Mississippi Supreme Court considered the precedent set by *Marbury* and *Nixon v United States*, 506 US 224 (1993), and noted that “the court cannot review or interpret a constitutional procedure that has been textually committed to another branch.” *Id.* at 406.

In light of this precedent, the Mississippi Supreme Court examined “precedent regarding separation of powers and the justiciability of such issues before the courts of Mississippi.” *Id.* at 411. The Court found that the Governor’s exercise of pardon power is vested exclusively in the Governor and is a matter within his sole discretion. *Id.* at 412. Consequently, the Court determined that the Governor’s pardon power is a matter of “a purely political nature” and therefore not subject to judicial review. *Id.* at 412. In addition to relying on its own state precedent, the Mississippi Supreme Court also relied on a Wyoming Supreme Court decision on the same issue. *Id.* at 11-12. In particular, the Mississippi Supreme Court relied on the Wyoming Supreme Court’s holding that “[t]he inquiry by a court in a habeas corpus proceeding is merely as to the jurisdiction of the Governor. We cannot inquire whether the pardoning power has been exercised judiciously, or whether the proceedings preliminary to the granting of the pardon were irregular, if any such were necessary.” *Hooker*, 87 So3d at 413, citing *In re Moore*, 31 P 980, 982 (Wyo, 1893).

Based on precedent from the U.S. Supreme Court, its own state decisions, as well as the persuasive authority from the Wyoming Supreme Court, the Mississippi Supreme Court held “that a facially valid pardon, issued by the Governor—in whom [the Mississippi] Constitution vests the chief-executive power...and who is the head of the coequal executive branch of government—may not be set aside or voided by the judicial branch, based solely on a claim that the procedural publication requirement of Section 124 was not met, or that the publication was insufficient.” *Id.* at 414.

While the facts of the *Hooker* case differ from the facts in the instant case, the issue considered was, like here, whether the judiciary has the authority to review the Governor’s exercise of clemency power. The Court in *Hooker* highlights the same principles of non-justiciability that the Michigan courts have repeatedly affirmed. In the instant case, as in *Hooker*, judicial review infringes on the Governor’s exclusive clemency authority. Such review would result in the judiciary, in essence, exercising the Governor’s exclusive authority. Therefore, the Michigan courts have no authority to review whether the Governor’s commutation power has been exercised appropriately.

Makowski asserts that Michigan courts have engaged in the very judicial review that the Courts below decided they lacked the jurisdiction to undertake. However, Makowski’s citation to *Kent Co Prosecutor v Kent Co Sherriff*, 428 Mich 314; 409 NW2d 202 (1987), is misplaced. In that case, the Michigan Supreme Court reviewed whether the Governor’s exclusive clemency authority was infringed upon

by another law, not the Governor's own exercise of that exclusive authority.

Contrary to Makowski's assertions, how a Governor chooses to exercise the exclusive clemency authority is an issue never before engaged in by the Michigan appellate courts.

In *Kent Co*, the Michigan Supreme Court reviewed whether an act allowing the early release of prisoners as a result of an overcrowding emergency, infringed on the commutation power granted exclusively to the Governor by the Constitution. *Kent Co (On Rehearing)*, 428 Mich at 318. The Court held that the overcrowding act did not constitute an unconstitutional infringement on the Governor's exclusive commutation power. *Id.* at 323. There is a clear difference between judicial review of whether a law, enacted by the Legislature, infringes on the Governor's exclusive authority, and judicial review of the Governor's exercise of that exclusive authority.

III. The commutation of Makowski's sentence was not completed and therefore was not beyond the Governor's authority to rescind.

A. Standard of Review

The Governor concurs with the statement that the standard of review for each argument in this appeal is *de novo*, as stated in Appellant's brief.

B. Analysis

The decision to rescind Makowski's commutation remained within the discretionary authority granted by Const 1963, art 5, § 14 as no action had been taken to give the commutation effect. This is not a case where a successor Governor is attempting to undo what a preceding Governor did. *Smith v Thompson*, 584

SW2d 253 (Tenn Crim App, 1979). Nor is this a case where a party is challenging whether a pardon was actually from the sitting Governor, *Spafford v Benzie Circuit Judge*, 136 Mich 25; 98 NW 741 (1904), and where the seal of the Secretary of State was thought to be indicia of the legitimacy of the proffered document. Makowski relies on both of these cases to argue that the initial decision to grant his commutation application was irrevocable. These cases are inapposite. The *Smith* decision makes clear that the Governor granting the commutation may rescind it if the Governor is still in office.

There are two cases from other jurisdictions holding that a commutation may be rescinded any time before the prisoner receiving the commutation is discharged: *Canizio v State*, 8 Misc2d 943, 169 NYS2d 185 (Ct Cl 1957) (Governor may revoke a commutation at any time before the prisoner is discharged); and *People ex rel Pressor v Lawes*, 221 AD 692, 225 NYS 53 (2d Dep't 1927) (the Court held that the Governor could rescind a commutation grant that had been forwarded to the warden where the warden had not taken any action, i.e., release, on the commutation). In *Pressor*, the Court, pointing to New York's state Constitution, noted that the Governor has the exclusive power to grant reprieves and commutations and concluded that the Governor may revoke a commutation at any time before the prisoner is discharged.

Accepting Makowski's argument that gift analysis has no place in this case, then neither the delivery of a commutation document nor a sense of Makowski's alleged reliance on third party disclosures are relevant to determining whether the

initial commutation act was completed and beyond the reach of the Governor to revoke. Therefore, there being no dispute that no action was taken on December 22, 2010 (or thereafter) to implement a change to Makowski's sentence, it is clear that the initial commutation decision was incomplete, and did not remove the Governor's discretion to complete or rescind her initial decision.

IV. The Governor's exclusive authority to exercise executive clemency includes the authority to grant, deny, rescind or revoke a commutation.

A. Standard of Review

The Governor concurs with the statement that the standard of review for each argument in this appeal is *de novo*, as stated in Appellant's brief.

B. Analysis

The Court should not adopt an illogical construction of the Governor's constitutional authority to grant executive clemency. The Michigan Constitution vests the Governor with the exclusive authority to exercise executive clemency; it is an act of grace, which includes the power to grant, deny, rescind, or revoke a commutation.

In *Marbury v Madison*, the Court held that "[w]here an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office." *Marbury*, 5 U.S. at 162.

It was well within the Governor's constitutional authority to reconsider and rescind Makowski's commutation decision, made without full input from the victim's family, to allow proper consideration of the additional victim input by the Parole Board before the Board sent its recommendation to the Governor. This is in fulfillment of MCL 791.244(2)(e), requiring the Parole Board to conduct a full investigation of a commutation application.

Additionally, as explained above, the commutation was not completed. The favorable commutation decision was never acted on by the Parole Board and Makowski was not released.

The New York Appellate Division, Second Department, reached a similar conclusion based on facts comparable to those here. In *People ex rel Presser v Lawes*, 225 NYS 53, 54 (2d Dep't 1927), the Court had to decide "whether the Governor was without authority to revoke or recall the commutation granted to a prisoner after it had been signed and delivered to the warden of the prison." The Court held that the Governor has the power to retract a commutation after granted, "at any time prior to the actual discharge of the prisoner." *Id.* at 54-55. The Court reasoned that because the commutation order was retracted prior to any action being taken under it by the warden, the Governor was not without authority. *Id.*

Accordingly, it was still within former Governor Granholm's power to rescind her decision once she recognized that she had not been provided with the Parole Board's fully informed recommendation. This is consistent with the interpretation of other courts considering whether a grant of authority to exercise discretion carries

within it the power to reconsider. *L&T Corp v City of Henderson*, 98 Nev 201, 504; 654 P2d 1015, 1017 (1982); *Trujillo v General Electric Co*, 621 F2d 1084 (CA 10, 1980).

The United States Court of Appeals for the Ninth Circuit reached the same conclusion based on facts similar to those here. In *Kelch v Director, Nevada Dep't of Prisons*, 10 F3d 684, 686 (CA 9, 1993), the Court held that the Nevada Board of Pardons Commissioners had the jurisdiction to rescind an inmate's commutation based on the power conferred under Article V, section 14 of the Nevada Constitution and a Nevada statute. The wording of Article V, section 14 of the Nevada Constitution is similar to Const 1963, art 5, § 14, which confers commutation power to the Governor, because it states that the Nevada Board of Pardons has the power to commute sentences "upon such conditions and with such limitations and restrictions as they may think proper." Nev Const, art 5, § 14. The *Kelch* Court held that the Nevada Board of Pardons could rescind Kelch's commutation because it is an executive board with commutation power authorized by the legislature and the Nevada Constitution. Makowski ignores this part of the *Kelch* case and instead focuses on a statutory procedure in Nevada that is materially different from the decision-making process in Michigan. In *Kelch*, the Court explained that Kelch's commutation application is presented for hearing before the Nevada Board of Pardons, which conducted a hearing and heard Kelch's presentation without opposition. After that hearing, the Nevada Board commuted Kelch's sentence from twenty years to five years (Kelch had served two years when he filed his

application). The prosecutor had not responded or appeared at the hearing, but after learning of the Nevada Board's decision, the prosecutor filed a request for reconsideration. The Nevada Board considered the arguments opposing commutation and rescinded its earlier commutation decision.

Makowski cites *Kelch*, however, for the Court's determination that the first Nevada Board's hearing decision granting commutation to Kelch created a liberty interest that could only be taken away by due process. That due process was a second consideration of the Kelch commutation application at a hearing before the Nevada Board. That hearing happened and the *Kelch* Court affirmed the Nevada Board's power to rescind its earlier commutation grant.

If this portion of the *Kelch* decision applies here, it supports Governor Granholm's return of the new information to the Parole Board to consider before the Board submitted a new recommendation on Makowski's application.

Similarly, other state courts have stated that it is within the executive's commutation power to rescind or revoke commutation. The Supreme Court of Connecticut held in *McLaughlin v Bronson*, 537 A2d 1004, 1006 (Conn, 1988), that despite the lack of an express statutory provision addressing rescission or revocation of a commutation, the board of pardon's commutation power includes the authority to rescind or revoke an absolute commutation. While *McLaughlin* interpreted a statutory provision that delegates unfettered commutation power to the board of pardons, it is persuasive authority since the Connecticut Governor is also vested with commutation power by Article IV, section 13 of the Connecticut

Constitution. Both the Connecticut Constitution and statutory language are similar to Const 1963, art 5, § 14. See Conn Const, art 4, § 13 (“The Governor shall have the power to grant reprieves after conviction, in all cases except those of impeachment, until the end of the next session of the general assembly, and no longer.”); CGA 54-130a (“Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the Board of Pardons and Paroles.”).

The Supreme Court of Connecticut also considered this issue of when a commutation is outside the Governor’s constitutional authority to rescind. In *McLaughlin v Bronson*, 537 A2d 1004, 1008 (Conn, 1988), the Court held that the board of pardons can revoke an unconditional commutation, prior to the actual release of a prisoner, if the information the board of pardons relied on when granting the commutation is erroneous or new information nullifies the original justification for approval. In *McLaughlin*, when the board of pardons originally granted the commutation, it relied on several factors, including the nature of the crime, time elapsed since the crime was committed, the prisoner’s institutional record, the prisoner’s efforts and results of rehabilitation, the environment to which the prisoner would be released, and the prisoner’s psychiatric profile and behavior. *Id.* at 1008. The board of pardons subsequently revoked the prisoner’s commutation when it learned that it had been misled about the environment to which the prisoner would be released.

In *McLaughlin*, the Court reasoned that it would be illogical to hold that “the board of pardons was bound by its original decision and could not, upon discovery of the misrepresentations, reconsider its decision, reevaluate the factors and modify or revoke the commutation accordingly.” *Id.* Since the new information about the prisoner’s release environment was so significant it warranted reversal and the prisoner was still in custody when the board of pardons learned of the new information, it was within the board of pardons’ commutation power to reconsider the commutation and rescind based on that information.

Like the board of pardons in *McLaughlin*, former Governor Granholm reconsidered Makowski’s commutation after being notified of new information – the objections from the victim’s family. Since Makowski was still in custody of the Department of Corrections and the Governor was presented with significant information that was not originally considered, it was within the Governor’s constitutional authority to reconsider and rescind Makowski’s commutation, regardless of whether she initially decided to grant commutation.

It is within a Governor’s constitutional authority to rescind a commutation, even if the commutation document deliveries are complete, if the prisoner is still in custody. It is also within the Governor’s constitutional authority to rescind a commutation when the Governor receives new information that convinces her that the decision to commute should be reversed and to request another review and recommendation by the Parole Board. As long as the new information is received by

the Governor before the prisoner is released, it is within the Governor's discretion to revoke or rescind a commutation decision that has been affirmatively made.

A case on which Makowski heavily relies to support his argument is *Smith v Thompson*, 584 SW2d 253 (Tenn Crim App 1979). But that case actually goes against Makowski where the Tennessee Court of Appeals held that the Tennessee Governor *can* rescind a commutation so long as it has not passed the point of rescission. According to the Tennessee Court, the point of rescission is when the Governor granting the commutation leaves office. Again, this is persuasive authority since Article 3, section 6 of the Tennessee Constitution confers commutation power on the Governor using language that parallels the Michigan Constitution. See Tenn Const, art 3, § 6 (“[The Governor] shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment.”).

In fact, the Court of Appeals, consistent with the trial court here, interpreted *Smith* to “stand for the proposition that the Governor is authorized by the Constitution to commute a prison sentence, that her authority (at least in Michigan) is unrestricted, and she is free to rescind or revoke a commutation regardless of whether the procedural steps prior to the decision are flawed in some way... *so long as the decision to rescind or revoke is made by the Governor who made the original decision, and the decision to revoke or rescind is made while the decision-maker is still in office.*” (172 a, Op & Order.)

V. The Governor did not exceed her constitutional authority by rescinding Makowski's commutation.

A. Standard of Review

The Governor concurs with the statement that the standard of review for each argument in this appeal is *de novo*, as stated in Appellant's brief.

B. Analysis

There being no factual dispute in this appeal, and the Governor having rescinded the commutation decision while still in office, there is nothing left for this Court to adjudicate. If there were factual disputes at issue here, the Court would properly be involved in adjudicating those facts. Where there is a dispute as to the law governing a particular fact situation, the Court clearly has the role of determining what the law is. This appeal does not present any factual disputes. To the extent there is a question about whether the power to grant commutation includes the power to revoke a commutation, the issue turns on how procedurally the Governor addresses the constitutional grant of clemency authority which, under *House Speaker*, is a political question and not subject to review for the reasons stated in the preceding arguments. For this Court to try to derive procedures for completing a commutation and moving that action beyond the reach of the Governor who has full, unfettered discretion to exercise clemency, would leave the Court to create new procedures or criteria and then decide if the Court-created procedures and criteria were followed. The creation of procedures and regulations being left to

the Legislature, and the discretionary exercise of clemency being left to the Governor, there is nothing in this case for the Court to review.

CONCLUSION AND RELIEF REQUESTED

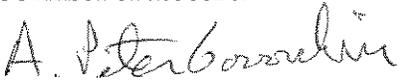
The Court of Appeals properly determined that, under the separation of powers doctrine, Michigan courts lack jurisdiction to review former Governor Granholm's, or any Michigan Governor's, exclusive exercise of executive clemency. That exercise of executive clemency includes the power to deny clemency and to rescind clemency granted but not yet acted upon.

This Court should affirm the decision of the Court of Appeals upholding the lower court's determination that it had no jurisdiction to review the grant or rescission a commutation to Makowski.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record


A. Peter Govorchin (P31161)
Assistant Attorney General
Attorneys Defendants-Appellees
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

Dated: October 18, 2013
2011-0012398-C Makowski\Appellees Brief