

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, <i>ex rel.</i>)	
JAMES E. RYAN, Attorney General of the State)	
of Illinois,)	Opposition To Motion For
)	Leave To File Complaint
Petitioner,)	For <i>Mandamus</i>
)	
v.)	
)	
GEORGE H. RYAN, Governor of the State of)	
Illinois; and THE ILLINOIS PRISONER REVIEW)	
BOARD, as well as its members:)	Oral Argument Requested
ANNE R. TAYLOR (Chairperson), ANTHONY)	
AGEE, ARVIN BODDIE, NANCY BRIDGES-)	
MICKELSON, VICTOR BROOKS, JAMES)	
DONAHUE, ROBERT L. DUNNE, CRAIG)	
FINDLEY, SUSAN FINLEY, WILLIAM HARRIS,)	
BARBARA HUBBARD, MILTON MAXWELL,)	
JORGE MONTES and NORMAN SULA)	
)	
Respondents.)	

RESPONDENTS' OPPOSITION TO
MOTION FOR LEAVE TO FILE COMPLAINT FOR MANDAMUS

The Honorable George H. Ryan, Governor of the State of Illinois, The Illinois Prisoner Review Board ("IPRB"), and its individual members acting in their official capacities, by their Special State Counsels James R. Thompson and Kimball R. Anderson, hereby oppose Attorney General James Ryan's Motion for Leave To File A Complaint for *Mandamus*.

The Attorney General's proposed Complaint violates this State's historic separation of powers doctrine, fails to state a claim upon which *mandamus* can be granted, and is premised on a fundamental misunderstanding of the Governor's constitutional powers to grant clemency. Indeed, Attorney General Ryan's argument that the Governor's clemency power does

not attach until the prisoner's sentence is final has been squarely rejected in a formal, published opinion issued by a former Illinois Attorney General. Moreover, Attorney General Ryan's argument that the legislation governing the form and method of presenting clemency petitions creates a condition precedent to the exercise of the Governor's clemency powers already has been rejected by this Court. See People ex rel. Smith v. Jenkins, 325 Ill. 372 (1927). As explained herein, Attorney General Ryan's Motion is not well-founded and it should be denied.

ARGUMENT

I. The Attorney General's Proposed Complaint Violates This State's Historic Separation of Powers Doctrine.

A. This Court Cannot *Mandamus* The Governor Over His Objection.

In the history of our great State, this Court occasionally been asked to issue writs of *mandamus* against a Governor. On every occasion, this Court has refused to issue such a writ over the objection of the Governor. The reason is that the separation of powers doctrine prohibits this Court from exercising its *mandamus* authority against the Governor.

This Court first considered this issue in People ex rel. Billings v. Bissell, 19 Ill. 229 (1857). Billings, a holder of state bonds, asked this Court to issue a writ of *mandamus* against Governor Bissell, compelling him to reissue new bonds that reflected the interest accrued on the instruments. This Court characterized the issue of whether it could *mandamus* the Governor as a "grave question" and it ultimately refused to do so. Id. at 230-31. This Court explained that:

[n]either of the three great departments into which our government is, by the constitution, divided, is subordinate to, or may exercise any control over, another, except as is provided in the constitution.

Id. at 231. To be sure, this Court has a responsibility to construe the constitution and laws of the State. This authority, however, has its limits as explained by the Bissell Court.

We cannot restrain the Governor from issuing the bonds of the State, contrary to law, but when the question is properly presented before us, we can declare such bonds void; and so of a patent for the public land, which he might issue. And so, if he should step beyond his constitutional sphere, and unlawfully imprison a party, we could discharge such party on *habeas corpus*. But we have no power to compel either of the other departments of the government to perform any duty which the constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duties. The Governor is, and must be, as independent of us as is the legislature, or as we are of either of them.

Id. at 231-32. The historic principles articulated so well in Bissell have been reaffirmed by the Illinois Supreme Court many times. See, e.g., People ex rel. Harless v. Yates, 40 Ill. 126 (1863); People ex rel. Harless v. Hatch, 33 Ill. 9 (1863); People ex rel. Bacon v. Cullom, 100 Ill. 474 (1881); People ex rel. Bruce v. Dunne, 258 Ill. 441 (1913).

For example, in People ex rel. Harless v. Yates, 40 Ill. 126, this Court cited Bissell and flatly refused to issue a writ of *mandamus* against the Governor to compel him to do a ministerial act, stating: "It cannot be objected that the writ will not lie against the Governor." Id. Similarly, in People ex rel. Harless v. Hatch, 33 Ill. 9, the state legislature was disbanded pursuant to a proclamation issued by the Governor. The Court refused to use its *mandamus* authority to void the Governor's action, noting that "this case does not come within the reach of a *mandamus*." Id. at 28 (Breese, J. concurring). Likewise, in People ex rel. Bacon v. Cullom, 100 Ill. 472, a request for writ of *mandamus* was sought to require the Governor to hold a special election regarding an unexpected vacancy on the county court bench. The Governor instead appointed a successor. Relying on the reasoning of Bissell, the Court held that any *mandamus* action against the Governor was improper. Id. Again, in People ex rel. Bruce v. Dunne, 258 Ill. 441, the Court refused on separation of powers grounds to issue a writ of *mandamus* compelling

the Governor to certify state election returns regarding two disputed seats in the General Assembly. Id. at 450; cf. Rock v. Thompson, 85 Ill. 2d 410 (1981).¹

Remarkably, the Attorney General, in his Motion and proposed Complaint for *Mandamus*, completely ignores the separation of powers doctrine and the unbroken line of decisions of this Court refusing to *mandamus* the Governor over his objection. Equally remarkable, the Attorney General, in his proposed Complaint For *Mandamus*, cites Orenic v. Illinois State Labor Relations Bd., 127 Ill. 2d 453 (1989); People ex rel. Fullenweider v. Jenkins, 322 Ill. 33 (1926); and People ex rel. Smith v. Jenkins, 325 Ill. 372 (1927), for the proposition that a writ of *mandamus* in this case would be "appropriate." (Complaint at 5). These cases are inapposite, and the Attorney General's reliance on them is completely misplaced.

None of the cases relied upon by the Attorney General involved issuing a writ of *mandamus* to the Governor of the State of Illinois. In Orenic, this Court issued a writ of prohibition² (and not a writ of *mandamus*) to the Illinois State Labor Relations Board in a collective bargaining dispute. The Orenic decision provides no support for the Attorney

¹ In Rock, a plurality of justices approved the issuance of a writ of *mandamus*, but only because Governor Thompson voluntarily submitted to this Court's jurisdiction and did not object to the issuance of the writ on separation of powers grounds. Rock v. Thompson, 85 Ill. 2d 410, 430-31 (Simon, J., concurring). Instead, Governor Thompson "concluded that the unresolved continuation of the controversy over the Senate presidency would be chaotic and stated that he was willing to have this court tell him if there is some constitutional duty he had left undone." Id.

² *Mandamus* and prohibition are both extraordinary writs. *Mandamus* is discretionary and is appropriate only where there is a clear right to the requested relief, a clear duty of the respondent to act, and clear authority in the respondent to comply with the writ. League of Women Voters v. County of Peoria, 121 Ill. 2d 236 (1987). For a writ of prohibition to be issued, the action to be prohibited must be judicial or quasi-judicial in nature; the jurisdiction of the tribunal against which the writ is sought must be inferior to that of the issuing court; the action to be prohibited must be either outside the tribunal's jurisdiction or, if within its jurisdiction, beyond its legitimate authority; and the petitioner must be without any other adequate remedy. People ex rel. No. 3 J. & E. Discount, Inc. v. Whitler, 81 Ill. 2d 473 (1980).

General's position here and, if anything, demonstrates why issuing a writ of prohibition to Governor Ryan and the IPRB would be entirely improper. Similarly, People ex rel. Fullenweider v. Jenkins did not involve the issuance of a writ of *mandamus* against the Governor.

The third case relied on by the Attorney General, People ex rel. Smith v. Jenkins, merits greater attention because it clearly demonstrates why a writ of *mandamus* in this case would be improper. In that case, Ignatz Potz had been convicted of murder and sentenced to be hanged on June 16, 1922. The Governor commuted his punishment to life imprisonment and later commuted his sentence to a term of eight years. The State's Attorney of Lake County petitioned for a writ of *mandamus*, not against the Governor, but against a variety of state officials (the Director of Public Welfare, the Warden of the Illinois State Penitentiary, etc.) compelling them to expunge from their records the Governor's commutation. The State's Attorney of Lake County, just like Attorney General Ryan in this case, argued that the Governor's commutation interfered with the exclusive right of the judicial branch to impose sentence. Compare Complaint at 5, with People ex rel. Smith v. Jenkins, 325 Ill. at 374. The State's Attorney, just like the Attorney General in this case, also argued that the Governor's commutation of Mr. Potz was "improper" because Mr. Potz's clemency petition was not in proper form. Indeed, by statute (Smith-Hurd Rev. St. 1925, c. 104 ½) all clemency petitions had to be made in writing and accompanied by statements of the sentencing judge and prosecuting attorney regarding the merits of the petition. Because Potz's petition had not been in the proper form required by statute, the State's Attorney contended that the Governor had no authority to hear or grant Potz's clemency petition.

This Court forcefully rejected the State's Attorney's contentions as follows:

The [Illinois] Constitution has given him [the Governor of the State of Illinois] [the] power over judgments of conviction for all

criminal offenses by section 13 of article 5. . . . Having this power by the Constitution, his use of it cannot be controlled by either the courts or the Legislature. His acts in the exercise of the power can be controlled only by his conscience and his sense of public duty.

325 Ill. at 374. As for the fact that Potz's clemency petition was not in proper form, this Court explained that although the legislature could regulate the manner of applying for reprieves, commutations, and pardons,

[t]he giving of statements or opinions by the judge or prosecuting attorney is not made a condition precedent to the Governor's action, and the requirement of them does not hamper his freedom of action in any way, for the Governor may act without such statements for any reason satisfactory to him. The publication of notice may also be dispensed with by the Governor when, in his judgment justice or humanity requires.

Id. at 375-76. Accordingly, this Court denied the requested writ of *mandamus*.

Therefore, under settled precedent, the Attorney General's petition for writ of *mandamus* against Governor George H. Ryan cannot be sustained.

B. This Court Cannot *Mandamus* The IPRB In Clemency Matters Over The Governor's Objection.

The power of clemency belongs solely to the chief of the executive branch, the Governor. Ill. Const. art. V, § 12; see also People ex rel. Smith v. Jenkins, 325 Ill. at 375; People ex rel. Brundage v. La Buy, 285 Ill. 141, 144 (1918). When each branch of government is "acting within the limits assigned to each, neither can control or dictate to the other. The presumption is, that one is as likely to be right, or as liable to err, as the other." Bissell, 9 Ill. at 233. The Court reiterated these principles in Dunne, *supra*, noting that it is not the function of the courts "to pass upon the wisdom" of the acts of the chief executive. Dunne, 258 Ill. at 454. Accordingly, in those areas where the final authority to act is reposed by the Illinois Constitution

to the discretion of the Governor, he is ultimately accountable only "to the high tribunals of his own conscience and the public judgment." Bissell, 29 Ill. at 234.

The IPRB has no power to grant clemency. On clemency matters, the role of the IPRB is to review petitions and make confidential recommendations to the Governor. 730 ILCS 5/3-3-1(a)(3). The Governor appoints all fifteen members to the IPRB and designates its Chairman. 730 ILCS 5/3-3-1(b). When it hears applications for executive clemency, the IPRB acts only as the Governor's agent by submitting recommendations to the Governor that he is free to accept or reject. People ex rel. Abner v. Kinney, 30 Ill. 2d 201, 206 (1964).

Because in clemency matters the IPRB acts solely on behalf of the Governor, the separation of powers doctrine applies with equal force to the Attorney General's attempt to *mandamus* the IPRB. Moreover, this Court has held that when a writ of *mandamus* is sought against two persons, it must be properly allowable against both, or the writ cannot issue at all. People ex rel. Harless v. Yates, 40 Ill. 126. In Yates, a writ of *mandamus* was sought against the Governor and the Lieutenant Governor of the State of Illinois. The writ sought to compel them to file with the Secretary of State a bill passed by the legislature. This Court held:

The case of The People ex rel. Billings v. Bissell, Governor, 19 Ill. 229, is decisive of this motion. A writ of *mandamus* will not lie against the governor for the purpose indicated in the petition. And the petition being against two, as it cannot be sustained as to one of them, it must necessarily be denied as to both.

40 Ill. 126. Therefore, under settled precedent, the Attorney General's petition for writ of *mandamus* against the IPRB cannot be sustained.

II. The Attorney General Has Failed To Allege The Essential Elements Of An Action For *Mandamus*.

A. *Mandamus* Is Appropriate Only Where There Is A Clear Duty To Act, A Clear Right To The Requested Relief, And Clear Authority To Comply With The Writ.

Mandamus is an extraordinary remedy. It is discretionary and is appropriate only where there is a clear duty of the respondent to act, a clear right to the requested relief, and clear authority in the respondent to comply with the writ. League of Women Voters v. County of Peoria, 121 Ill. 2d 236 (1987); People ex rel. Sanitary Dist. of Chicago v. Schlaeger, 391 Ill. 314, 331-32 (1945). *Mandamus* is not proper where the duty of the officer sought to be coerced must first be determined. People ex rel. Council 19 of Am. Fed'n of State, County & Mun. Employees v. Egan, 52 Ill. App. 3d 1042, 1045 (1st Dist. 1977). Here, the Attorney General's proposed Complaint For *Mandamus* fails to allege any of the essential elements for issuance of a writ of *mandamus*. There is no duty of the respondents to act; there is no clear right to relief; and there is no clear obligation of the respondents to comply with the writ.

The Illinois Constitution imposes no "duty" on the Governor in regard to commutations. The constitution only grants to the Governor discretionary authority to "grant reprieves, commutations and pardons, after conviction for all offenses on such terms as he thinks proper." Ill. Const. art. V § 12. The drafters of the Illinois Constitution intended for the Governor to have "full and untrammelled discretion" in his ability to grant pardons and commute sentences. People ex rel. Symonds v. Gualano, 124 Ill. App. 2d 208, 220 (1st Dist. 1970). The only constraint on the Governor's decision to commute a sentence is "his conscience and his sense of public duty." People ex rel. Smith v. Jenkins, 325 Ill. at 374. As stated during the Sixth Illinois Constitutional Convention by Delegate Friedrich, "[t]he governor could now and can pardon everyone in Stateville, including those on death row, and can continue to do it under [the Illinois

Constitutional statute giving the Governor clemency power]. He has complete authority in this area." 58 Record of Proceedings, Sixth Illinois Constitutional Convention 1332.

Without acknowledging either the separation of powers doctrine or the precedent governing the essential elements of a writ of *mandamus*, the Attorney General asks this Court to restrict the Governor's discretionary power under the Illinois Constitution to grant clemency to two classes of prisoners – even though no such restrictions can be found in the constitutional grant of clemency power to the Governor and even though the Governor has yet to exercise his discretion. The first class is comprised of prisoners who have not signed petitions on their own behalf. The second class is comprised of prisoners who have been convicted and sentenced, had their sentences overturned, and are now awaiting new sentencing hearings. The Attorney General cannot establish that the Governor has a clear duty to refrain from commuting the death sentences of these prisoners.

B. No Clear Duty Exists To Refrain From Pardoning Persons Who Have Not Signed, Or Who Cannot Sign, A Petition For Clemency.

For over a century, the Illinois Constitution has permitted the legislature to regulate the manner, or form, in which an application for clemency can be made to the IPRB and its predecessor boards. The 1870 Illinois Constitution provided that "the governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor." Ill. Const. of 1870, art. V § 13. When this constitutional provision was debated at the 1870 Constitutional Convention, it was stated that the purpose of the language was to "leave the Legislature full power to prescribe that notice should be given, or that certain persons who have acted as officers to hear and pass upon the case should sign the petition; but it would not

authorize the Legislature in any way to cut off the right of the executive to use his discretion." 1 Debates and Proceedings of the Constitutional Convention of the State of Illinois 785 (1870).

The 1970 Illinois Constitution grants to the Governor the authority to grant clemency in essentially the same manner: "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law." Ill. Const. art. V, § 12. When the delegates to the 1970 Constitutional Convention debated this provision, they made it clear that they did not give the Legislature the ability to restrict the Governor's clemency power.

[T]he legislature only has the authority to set up the procedure for applying for a pardon. The legislature does not have any authority to grant pardons or direct when a governor shall exercise his discretion or how he shall exercise it. . . . [The Governor] could grant a pardon to anybody, no matter what the offense or what the General Assembly would say.

58 Record of Proceedings, Sixth Illinois Constitutional Convention 1331-32.

The legislature has regulated the manner in which petitions can be submitted by requiring that petitions "shall be . . . signed by the person under conviction," 730 ILCS 5/3-3-13(a), and that petitions "may not be commenced on behalf of a person who has been sentenced to death without the written consent of the defendant, unless the defendant, because of a mental or physical condition, is incapable of asserting his or her own claim." 730 ILCS 5/3-3-13(c).³ This legislation, however, was not intended to, does not, and constitutionally could not, limit the Governor's power to commute the sentence of persons who have not signed a petition on their own behalf. The Illinois Constitution does not make such formalities a condition precedent to

³ The Attorney General states that he is unaware that any inmates are incapable of deciding for themselves and, therefore, asks that all unsigned petitions be disregarded. (Compl. at 8). The IPRB, however, is aware of at least seven cases where the inmates may be incapable of deciding whether to sign their petitions.

the exercise for the Governor's clemency power. Instead, it only allows the legislature to regulate the form and manner of filing petitions by those persons who wish to have formal petitions considered by the IPRB or the Governor.

This conclusion is inescapable from the history of the 1870 and 1970 constitutions and from the legislation that added the "signature" requirement for petitions. When asked to sign the "signature" legislative amendment in 1996, Governor Jim Edgar was concerned that it might be incorrectly construed to limit the Governor's clemency powers. Thus, he inserted clarifying language in his amendatory veto. This language, which was accepted by the legislature, provides that "nothing in this Section shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon." 730 ILCS 5/3-3-13(e).

The conclusion that there are no legislative conditions precedent on the Governor's clemency powers also is compelled by this Court's decisions. As explained above, this Court in People ex rel. Smith v. Jenkins, 325 Ill. 372, expressly rejected the argument that the legislature could impose conditions precedent on the Governor's clemency powers. This Court held that a petitioner's failure to comply with the then-existing statutory conditions for applying for clemency (requiring that applications had to contain statements from the judge and prosecuting attorney regarding their positions on the application) did not deprive the Governor of his constitutional authority to grant clemency or a pardon. Indeed, the legislature could not "hamper [the Governor's] freedom of action in any way, for the Governor may act without such statements for any reason satisfactory to him." Id. at 375. The Court further held that the Governor's action was still valid even if it violated the Parole Act. "If an act of the Governor, in the exercise of his constitutional authority to commute a sentence, is inconsistent with the Parole

Act, then the Parole Act, so far as its enforcement would impose a limitation upon the Governor's constitutional power, must give way to the Constitution." Id. at 377.

In a lengthy footnote to his proposed Complaint For *Mandamus*, the Attorney General attempts to distinguish Jenkins by arguing that the Jenkins Court refused to grant the writ of *mandamus* because the statute at issue "would essentially have provided a recalcitrant prosecutor or judge with a veto over the governor's clemency power." (Complaint at 10, fn. 5). The Attorney General, however, has completely misread the Jenkins decision. The statutory provision at issue in Jenkins did not give a prosecutor or judge veto power over clemency. On the contrary, the statute provided that if the petitioner failed to submit the statements of the prosecutor or judge, the petitioner could explain the reason for the absence of statements. Jenkins 325 Ill. at 375. The prisoner in Jenkins had failed to provide either the statements or a reason why the statements were not obtained. This Court nevertheless held that the Governor's grant of a pardon was valid and did not give any credence to the arguments that Attorney General Ryan now attempts to recycle. Thus, it is settled that the legislature can neither restrict nor usurp the Governor's power to grant clemency. See also People ex rel. Brundage v. La Buy, 285 Ill. 141, 143 (1918) ("It is the fundamental law and no act of the Legislature in contravention of [the Governor's constitutional clemency power] can be valid.").

The Attorney General's argument, which lacks support from the plain language of the Illinois Constitution, the constitutional debates, the statutes, the legislative history, and this Court's decisions, also lacks common sense. Carried to its logical extreme, the Attorney General's argument would deny the Governor the power to act in situations where any civilized country would expect its chief executive officer to act. In light of this State's recent history of

putting thirteen innocent men on death row,⁴ some of whom came perilously close to being executed for crimes they did not commit, it is not difficult to imagine a situation where an innocent death row inmate is strapped to the gurney, on his way to the death chamber, and new DNA evidence emerges that completely exonerates the inmate and conclusively indicts another person (who has now confessed). If that innocent person, for whatever reason (an intent to commit suicide, a refusal to sign anything that might detract from his claim of innocence, etc.), had failed to sign a clemency petition, the Governor would be helpless to act under the Attorney General's interpretation of this State's Constitution.

C. No Clear Duty Exists To Deny Clemency To Persons Convicted, But Not Yet Finally Sentenced.

The Illinois Constitution empowers the Governor to "grant reprieves, pardons, and commutations, *after conviction*, for all offenses on such terms as he thinks proper." Ill. Const. art. V. § 12 (emphasis added). The words "after conviction" as used in this context mean that the Governor's power attaches immediately upon entry of a guilty verdict after a trial or upon a plea of guilty by the defendant.

⁴ The Illinois death penalty statutes have been revised over the years. See generally Moore v. Illinois, 408 U.S. 786 (1972) (invalidated Illinois scheme); Rice v. Cunningham, 62 Ill. 2d 353 (1974) (death penalty statute unconstitutional). In 1977, the Illinois Legislature enacted a new death penalty statute. Since that time, more than 275 individuals have been sentenced to death. Approximately 160 persons are presently on death row. Twelve death row inmates have been executed under the current scheme. Thirteen wrongfully convicted death row inmates have been released from custody. In response to the startling number of innocent people on death row, Governor George H. Ryan declared a moratorium and created a commission to recommend improvements to Illinois' flawed death penalty scheme. The Governor's Commission researched the cases of the thirteen death row inmates released from custody. In its Report released April 2002, the Commission concluded that: "All 13 cases were characterized by relatively little solid evidence connecting the charged defendants to the crimes." Report of the Governor's Comm'n On Capital Punishment, at 7 (April 15, 2002). The Rolando Cruz case was cited as an example.

1. **Attorney General Ryan's Argument Contravenes A Well-Reasoned Published Opinion By His Predecessor.**

Attorney General Ryan argues that, contrary to the plain language of the Illinois Constitution, the Governor's power to grant reprieves, pardons, and commutations does not attach upon a finding of guilt, but must instead wait until final sentencing. Remarkably, he fails to even acknowledge a well-reasoned published opinion by his predecessor to the contrary.

William Stead, Attorney General of Illinois, examined the language in the Illinois Constitution giving the Governor the power to grant clemency "after conviction." After carefully considering the matter, he issued a published opinion that the Governor's power to pardon begins after a plea of guilty or a finding of guilt by a jury. 1912 Ill. Att'y Gen. Biennial Rep. at 109-115. In the opinion, Attorney General Stead considered a pending bill that would have given the courts the power to withhold the imposition of sentence, to order probation, and to discharge the defendant if probation were successfully completed. The Governor had requested that Attorney General Stead consider whether the bill would unconstitutionally confer on the courts the power to pardon.

Attorney General Stead framed the issue as follows: "If the pardoning power of the Governor attaches when a defendant has pleaded guilty or has been found guilty by verdict, it is difficult to escape the conclusion that this bill confers that power upon a coordinate branch of the government." Id. at 113. Attorney General Stead noted that both Virginia's and Massachusetts' constitutions give their governors the power to pardon after conviction, and courts in these states have held that the governor's power to pardon begins after a finding of

guilt. Id. at 113-14.⁵ In Blair v. Commonwealth, 66 Va. 850 (1874), for example, the Virginia court stated:

Why is it required that conviction shall precede pardon? It can only be that before an offense is pardoned it shall be legally ascertained that there is an offense and who is the offender. Both of these matters are fully ascertained by the verdict of a jury, upon the plea of not guilty to an indictment charging the offense in such circumstantial detail as to place its identity beyond all question.

1912 Ill. Att'y Gen. Biennial Rep. at 114. Attorney General Stead concluded that the Governor's power to pardon begins after a finding of guilt "when an accused person has pleaded guilty or has been found guilty by verdict, the pardoning power of the Governor then attaches and by no legislative action could this pardoning power be transferred to any other department of the government." Id. at 115.

Attorney General Stead also found authoritative this Court's decision in People v. Allen, 155 Ill. 61 (1895). In Allen, the Court held that the trial court invaded the Governor's pardoning power by indefinitely suspending the sentencing of an individual found guilty of a crime. Id. at 64. Thus, Allen also supports the conclusion that the Governor's power to grant reprieves, pardons and clemency attaches after a finding of guilt or the entry of a guilty plea.

Attorney General Stead's reasoning and conclusion remain valid today. His opinion should be followed by this Court.⁶

⁵ Other states, besides Massachusetts and Virginia, have interpreted constitutional pardoning provisions to include the pardoning of individuals found guilty but not sentenced. See In re Anderson, 34 Cal. App. 2d 48 (1939); Snodgrass v. State 150 S.W. 162, 172-74 (Tex. 1912); People v. Marsh, 84 N.W. 472, 473 (Mich. 1900); Parker v. Tennessee, 53 S.W. 1092 (Tenn. 1899); State v. Butler, 18 So. 943, 949 (La. 1895); State v. Alexander, 76 N.C. 231 (N.C. 1877).

⁶ Although not binding on the courts, a well-reasoned opinion of the Attorney General is entitled to "considerable weight," especially in a matter of first impression in Illinois. Bonaguro v. County Officers Electoral Bd., 158 Ill. 2d 391, 399 (1994) ("We agree with the Attorney General's reasoning and conclusions on this issue."); see also Harris County Comm'r's Ct. v.

2. Attorney General Ryan's Reliance on Faunce v. People Is Misplaced.

Attorney General Ryan relies heavily on Faunce v. People, 51 Ill. 311 (1869), for the proposition that a finding of guilt is not a "conviction," as that term is used in the Illinois Constitution. The Attorney General's reliance on this decision is misplaced.

Whether a governor could pardon someone before sentencing was not the issue in Faunce. Instead, the issue was whether, under a statute that rendered certain convicts incompetent to testify, a witness was competent who had been convicted, but was not yet sentenced. The Faunce Court held that such a witness was not incompetent to testify. In justifying its decision, the Court cited the pardon provision of the Constitution of 1848, Ill. Const. of 1848, art. IV, § 8, which:

[a]fter conferring upon the governor the power to grant reprieves, commutations and pardons after conviction . . . declares that "he shall, biennially, communicate to the general assembly each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence and its date, and the date of commutation, pardon or reprieve."

51 Ill. at 313. The Faunce Court observed that this provision of the 1848 Constitution "manifestly contemplates a judgment or sentence as necessary to a conviction, or why require, in each case of conviction and reprieve, commutation or pardon, to report the sentence and its date?" Id. This observation was *dictum* and, in any event, was based on a reporting requirement present in the Illinois Constitution of 1848, but omitted from the pardon provisions of the Illinois Constitutions of 1870 and 1970.

For these reasons, Attorney General Stead, in issuing his formal opinion of 1912 undoubtedly found Faunce neither controlling nor persuasive.

Moore, 420 U.S. 77, 87 n.10 (1975) ("Opinions of the Attorney General are entitled to careful consideration by the courts, and quite generally regarded as highly persuasive.").

3. **Attorney General Ryan's Strange Interpretation Of The Word "Conviction" Is Inconsistent With Its Plain Meaning In Other Parts Of The Constitution.**

"It is a rule of interpretation that, where a word is used more than once in a statute or instrument, it will be presumed to have been used with the same meaning throughout." Board of Educ. v. Morgan, 316 Ill. 143, 147 (1925).

Attorney General Ryan has overlooked that the word "conviction" is used in the Illinois Constitution of 1970, not only in connection with the clemency powers of the Governor, but also in various other constitutional provisions. Some provisions refer to both a "conviction" and a "sentence" in the same breath. To give meaning to the word "sentence" in these instances, and avoid making the word mere surplusage, the word "conviction" must be interpreted to mean a finding of guilt without a sentence. See Hirschfield v. Barrett, 40 Ill. 2d 224 (1968) (The presence of surplusage is not to be presumed in constitutional construction.). In other instances, the word conviction can only be interpreted to mean a finding of guilt, since the constitutional provision discusses the consequences and penalties imposed after a conviction including a sentence.

For example, the Illinois Constitution provides that crime victims shall have a right to "information about the conviction, sentence, imprisonment and release of the accused." Ill. Const. art. I, § 8.1(a)(5). If "conviction" was defined in the constitution to mean both a finding of guilt and a sentence, the word "sentence" in this provision would be meaningless. Since all words in constitutional provisions should be construed to have meaning, conviction should be defined as a finding of guilt, not a finding of guilt and the imposition of a sentence.

The Illinois Constitution also guarantees that persons accused of crimes are entitled to bail except for "offenses for which a sentence of life imprisonment may be imposed as

a consequence of conviction; and felony offenses for which a sentence of imprisonment . . . shall be imposed by law as a consequence of conviction" when the accused poses a threat to other people's safety. Ill. Const. art. I, § 9. In this constitutional provision, the term sentence is not used as an integral part of the term conviction. Instead, the word sentence is used to describe a separate consequence of a conviction.

Another section of the Illinois Constitution is entitled "Limitation of Penalties After Conviction" and provides that "[n]o conviction shall work corruption of the blood or forfeiture of estate." Ill. Const. art. I, § 11. This provision similarly distinguishes between "conviction" and the punishment imposed as a consequence of the conviction. Indeed, the very title of this section makes that distinction. Because this provision limits the penalties that may be imposed as a consequence of the "conviction," it is beyond dispute that that a "penalty" is not part of "conviction." The plain meaning of this constitutional provision is that the conviction precedes the imposed penalty or sentence.

The Illinois Constitution also refers to grounds for losing voting rights. "A person convicted of a felony *or* otherwise under sentence in a correctional institution or jail . . ." Ill. Const. art. III, § 2 (emphasis added). The disjunctive wording in this provision indicates that the terms on either side of the disjunctive "or" are alternative grounds of disqualification, rather than synonyms. See People v. Franklin, 135 Ill. 2d 78, 106 (1990) ("material to either side of the disjunctive 'or' must be viewed separately").

In summary, the word "conviction" as used in the Illinois Constitution consistently refers to a finding of guilt, and not to the final imposition of sentence.

4. Attorney General Ryan's Strange Interpretation Of The Word "Conviction" Would Result In Irrational, Absurd, and Unjust Consequences.

When interpreting the terms in the Illinois Constitution, "the constitution should wherever possible be construed to avoid irrational, absurd, or unjust consequences." People ex rel. Engle v. Kerner, 32 Ill. 2d 212, 219 (1965); see also Deal v. United States, 508 U.S. 129, 132-33 (1993) (J. Scalia) (when construing the word "conviction," the court must do so in a manner that avoids "strange consequences" or an "absurd result."). The construction advanced by the Attorney General produces an irrational result, namely it would be impossible for wrongfully convicted persons in Illinois to collect compensation under the Court of Claims Act because they would be ineligible for a pardon which is necessary for compensation.

The Illinois Court of Claims Act provides for the compensation of persons who have been wrongfully incarcerated. 705 ILCS 505/8. After these persons are exonerated and released from prison, they must obtain a pardon based on innocence from the Governor before compensation is available under the statute. Id. In Kelly v. State, 36 Ill. Ct. Cl. 187 (1983), the Court of Claims admonished that "[a] pardon from the Governor based on innocence is a condition precedent to recovering in the State of Illinois for time served in the penitentiary unjustly."

In Illinois, many men have been wrongfully adjudicated guilty, sentenced to prison, and had their convictions reversed by the courts. These men then received pardons from various Governors of the State of Illinois, sometimes with the Attorney General's Office joining in their efforts to secure a pardon. Even though none of these men had a sentence pending against them at the time of the pardon, these pardons were valid. The pardons allowed all of these wrongly convicted men to obtain compensation in the Court of Claims. See e.g., Newsome

v. State, 50 Ill. Ct. Cl. 389 (1997) (Attorney General Ryan's Office agreeing Newsome was entitled to award); Horton v. Illinois, 34 Ill. Ct. Cl. 80 (1980); Harling v. Illinois, 32 Ill. Ct. Cl. 177 (1977); Coffey v. Illinois, 31 Ill. Ct. Cl. 350 (1977); Pirovolos v. Illinois, 31 Ill. Ct. Cl. 82 (1976); Mostafa v. Illinois, 30 Ill. Ct. Cl. 567 (1975).

Under the definition of "conviction" now proposed by the Attorney General, it would be impossible for an exonerated person to receive remuneration for a wrongful conviction. According to the Attorney General, if an exonerated person's sentence has been overturned, he is ineligible for a pardon. Thus, he could never receive remuneration under the Court of Claims Act. Clearly this is an absurd proposition that the Attorney General apparently has not considered in taking the positions set forth in his proposed Complaint For *Mandamus*.

III. The Attorney General's Request For A Writ of Prohibition Is Devoid of Merit.

The Attorney General requests, in the alternative, that this Court issue a writ of prohibition directing the Governor not to consider the clemency petitions at issue. (Complaint at 13-14, n. 7). Like a writ of *mandamus*, a writ of prohibition is an extraordinary writ. Orenic v. Illinois St. Labor Rels. Bd., 127 Ill. 2d 453, 467 (1989). For a writ of prohibition to issue,

the action to be prohibited must be judicial or quasi-judicial in nature; the jurisdiction of the tribunal against which the writ is sought must be inferior to that of the issuing court; the action to be prohibited must be either outside the tribunal's jurisdiction or, if within its jurisdiction, beyond its legitimate authority; and the petitioner must be without any other adequate remedy.

Id. at 468. From these basic requirements, it is obvious that the Attorney General's request for a writ of prohibition must fail for several reasons.

First, the Governor's grant of clemency is not judicial or quasi-judicial in nature. Executive clemency is a power vested entirely with the Governor. The judiciary has no power to grant clemency. Moreover, the Governor's discretionary grant of clemency can hardly be

considered a "judicial act" when, according to this Court's decisions, his discretion is limited only by his "conscience and sense of public duty." People ex rel. Smith v. Jenkins, 325 Ill. at 374. Similarly, the IPRB, in hearing applications for executive clemency, acts only "as the Governor's agent," and not in a judicial or administrative capacity. People ex rel. Abner v. Kinney, 30 Ill. 2d 201, 206 (1964). Indeed, this Court has squarely held that the "[p]owers granted under this act [to review and make recommendations regarding clemency petitions] to [the IPRB] are not judicial in character." People v. Joyce, 246 Ill. 124, 136 (1910).

Second, neither the Governor nor the IPRB are in any sense "inferior to that of the issuing court." Orenic, 127 Ill. 2d at 467. The Governor, as head of the executive branch, and the Illinois Supreme Court, as head of the judicial branch, are separate yet equal to each other. As stated in the Illinois Constitution: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. art. II, § 1. "The [separation of powers] doctrine, with respect to the relationship between the executive and judicial branches of government, is violated when . . . one branch usurps the authority of another branch." People v. Inghram, 118 Ill. 2d 140, 146-47 (1987) (citations omitted). None of the three branches of our State's government is subordinate to, or may exercise control over, another branch, except as provided by the constitution. See Bissell 19 Ill. at 231. Because the Governor obtains his clemency power from the constitution, "his use of it cannot be controlled by either the courts or the Legislature." People ex rel. Smith v. Jenkins, 325 Ill. at 374.

Third, for the reasons discussed herein, the actions sought to be prohibited by the Attorney General are well within the constitutional powers of the Governor and his agent, the IPRB.

Fourth, the Attorney General does not lack an "adequate remedy" within the meaning of the Orenic decision. Here, neither the Governor nor the IPRB have even considered any clemency petitions, let alone granted them. If either the Governor or the IPRB in the future should overstep their constitutional or statutory authority, neither the Attorney General nor this Court are powerless to act. As this Court made clear in People ex rel. Billings v. Bissell, 19 Ill. 229, although it cannot *mandamus* or enjoin the Governor, or the Governor's agents, "from doing an unconstitutional act," it can refuse "to give effect to such act, or relieve[] against it, when properly and judicially applied for" 19 Ill. at 232. By way of example, the Billings Court stated that if the Governor should

step beyond his constitutional sphere, and unlawfully imprison a party, we could discharge such party on *habeas corpus*. But we have no power to compel either of the other departments of government to perform any duty which the constitution or the law may impose on them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duties.

Id.

In summary, the Attorney General has failed to plead any of the essential elements for issuance of a writ of prohibition.

CONCLUSION

The Attorney General's Motion For Leave To File A Complaint For *Mandamus*, although accompanied with much political fanfare, is not a well-founded pleading. "A proceeding for a writ of *mandamus* is an action at law. The pleadings are governed by the same rules as apply to other actions at law" Osborne v. Bradford, 346 Ill. 464, 467 (1931). A petition or motion for leave to file complaint for *mandamus* should be denied unless it sets forth specific facts establishing the essential elements of a *mandamus* action. Id. Here, the Attorney

General has not met his burden. The relief requested by the Attorney General cannot be granted without violence to the Illinois Constitution, 150 years of settled Illinois Supreme Court precedent, and good public policy.

Dated: October 1, 2002

GEORGE H. RYAN, THE ILLINOIS PRISONER
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