IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

State of Iowa, ex. rel. Gary R. Allison as County Attorney for Muscatine County, Iowa,	)	
Plaintiff,	)	No. EQCV016165
vs.	)	MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Thomas J. Vilsack, Governor of the State of Iowa, 99AG10350	)	
Defendant.	)	

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INTRODUCTION

Under the Constitution of the State of Iowa, a person convicted of an infamous crime[1] loses certain rights and privileges of citizenship, namely, the right to vote and hold public office. See Iowa Const. art. II, § 5 ("No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector"). The Constitution and Code of Iowa place in the Governor the power to issue a form of clemency known as a "restoration of citizenship rights," which restores an offender to the same position in which he or she was prior to the conviction. See Iowa Const. art. IV, § 16; Iowa Code ch. 914; see also State v. Haubrich, 248 Iowa 978, 83 N.W.2d 451 (1957). Since taking office in 1999, Governor Vilsack has allowed offenders to apply for a restoration of citizenship rights. (Vilsack Aff. at 1, App.at 1). Applications received by the Governor's Officer are forwarded to the Board of Parole for review and recommendation after which time the Governor makes a decision. (Hardt Aff. at 1-2, App. at 4-5). The processing time for a restoration of citizenship application can take as long as six months, depending on the volume of applications. (Hardt Aff. at 2, App. at5).

On March 11, 2005, Representatives Scott Raecker, Jeff Elgin, and Vickie Lensing sent a letter to Governor Vilsack asking him to do what was in his power to expedite the restoration of citizenship rights process. (Ex. B., App. at 10). In response to this letter, Governor Vilsack issued Executive Order No. 42, which restored the rights of citizenship to all offenders that were completely discharged from criminal sentence, including any accompanying term of probation, parole, or supervised release, as of July 4, 2005, but had not made an application pursuant to Iowa Code Chapter 914. (Ex. A, App. at 8) The executive order also established a process going forward by which Governor Vilsack would consider offenders for restoration of citizenship rights at the time of discharge. This litigation ensued.

In challenging the Governor's authority to issue Executive Order No. 42 through a Petition for Order of Mandamus, the Muscatine County Attorney collides with fundamental

[1] "Infamous crime" means any crime that is punishable by imprisonment in the penitentiary. Blodgett v. Clarke, 177 Iowa 575, 159 N.W. 243 (1916).

principles governing this form of action. A petition in mandamus filed by a county attorney in the name of the "State of Iowa" to protect the "public interest" must conform to the limitations on mandamus actions. Iowa Code §§ 661.1, 661.8 (2005). See State v. Allen, 569 N.W.2d 143, 145 (Iowa 1997). A plaintiff who invokes mandamus, therefore, must come into court to enforce rights that have already been established. Bellon v. Monroe County, 577 N.W.2d 877, 879 (Iowa Ct. App. 1998). This court must apply the principles governing mandamus actions in order to determine whether the County Attorney is entitled to relief in mandamus on the merits.[2] Application of mandamus principles forecloses adjudication of the legal validity of Executive Order No. 42 in this proceeding.

Should this court decide to reach the underlying merits of the County Attorney's petition, the determinative issue is whether Chapters 914 and 915 of the Iowa Code impose conditions on the Governor's clemency authority that must be satisfied before he can act. Well-established principles of statutory construction demonstrate that these chapters do not impose any of the limitations on the Governor's clemency power urged by the County Attorney. Executive Order No. 42 is a proper exercise of the Governor's constitutional clemency authority. Accordingly, the County Attorney's Petition must be dismissed.

ARGUMENT

I. THE PETITION FAILS TO ASSERT ANY DUTY THAT IS "ALREADY ESTABLISHED" AND IS "CLEAR AND UNDISPUTABLE," OR "FREE FROM THE POSSIBILITY OF ANY REASONABLE CONTROVERSY," WHICH COULD BE ENFORCED BY AN ORDER IN MANDAMUS.

The use of mandamus to challenge the Governor's constitutional authority to restore rights of citizenship to disenfranchised electors through Executive Order No. 42 is contrary to decades of law on the limited nature of the mandamus remedy. The core statutory language defining mandamus dates back as far as 1860. Iowa Code Ch. 153, § 3761 (1860) ("[a]n order . . . commanding an inferior tribunal, corporation, board or person to do or not to do, an act, the

[2] A motion to dismiss the Petition for Order of Mandamus was overruled on August 3, 2005, without any reasons stated in the written order.

performance or omission of which the law specially enjoins as a duty, resulting from an office, trust, or station. . . ."). For more than a century, courts have recognized that mandamus actions are limited to matters "where the duty sought to be enforced is clear and undisputable. . . . " Riggs v. Johnson County, 73 U.S. 166, 193 (1867). In modern times, Iowa courts have described the limitations on mandamus as follows:

> The writ will not issue in doubtful cases, but only where the right involved and the duty sought to be enforced are clear and certain and where no other specific and adequate mode of relief is available to the complaining party. . . Plaintiff's right to the performance of the act he seeks to compel must be clear, certain and free from the possibility of any reasonable controversy.

Headid v. Rodman, 179 N.W.2d 767, 770 (Iowa 1970) (citations omitted and emphasis added). Because the remedy is limited to enforcement of rights that are "clear, certain and free from the possibility of any reasonable controversy," mandamus is fairly characterized as "a drastic remedy to be applied only in exceptional circumstances" which "is not to be used to establish rights but to enforce rights that have already been established." Bellon, 577 N.W.2d at 879.

Case law illustrates the impossibility of using a mandamus action to challenge the legality of Executive Order No. 42 in this case. Mandamus cannot be used to challenge the legal validity of actions that have already been taken. In Woodbury County v. Talley, 147 Iowa 498, 123 N.W. 746 (1909), for example, plaintiffs sued in mandamus to challenge a decision by a county treasurer who had declined to tax certain property previously assessed by the county assessor as nontaxable. The Iowa Supreme Court explained the plaintiff sought a court order to "to command the treasurer to act again, to reverse and set aside the decision made by him, and to make another which shall accord with appellant's view of the law." Even if the decision were wrong, "the wrong is not to be righted by a writ of mandamus." "Certainly," the Court declared, "this is not the office of mandamus." Id. at 505, 123 N.W. at 749.

The Iowa Supreme Court has refused to allow plaintiffs to use mandamus to litigate the meaning of the very statutes under which a duty is alleged to be enforceable. Accordingly, in Stith v. Civil Serv. Comm'n, 159 N.W.2d 806 (Iowa 1968), the plaintiff was prohibited from using mandamus to require a civil service commission to reinstate him and award him compensation when he was terminated on reaching mandatory retirement age. The Iowa Supreme Court explained the underlying question posed in the case was "strictly one of law," i.e., whether a statute imposing a mandatory retirement age of 70 under the Public Employees' Retirement System prevails over a statute providing for termination only for cause under the civil service system. Because the plaintiff had not come into court with his rights under the statutes already established, mandamus was not a proper remedy. Accordingly, the case was remanded for further proceedings in certiorari. Id. at 808-09.

The requirement that a plaintiff come into court with rights already established similarly thwarts the use of mandamus in this case. See Bellon, 577 N.W.2d at 879; Hewitt, 356 N.W.2d at 233. It is bootstrapping to first litigate the legal validity of the Executive Order under the Iowa Constitution and Iowa Code Chapter 914 and then invoke mandamus to enforce the decision on the merits.

By contrast, mandamus is proper when the rights of the plaintiff have already been established, for example, by a court proceeding. In Burlington N. R.R. Co. v. Bd. of Supervisors et al., 418 N.W.2d 72 (Iowa 1988), a railroad had prevailed in federal court in a challenge to the state tax laws on personal property. When the railroad brought a mandamus action in state court to compel tax refunds from several Iowa counties, the Iowa Supreme Court held that a writ of mandamus should have issued directing payment of the refunds. Id. at 73-75. See Hewitt, 356

N.W.2d at 233-34 (mandamus proper to prohibit further proceedings in district court where the rights of the parties had been fully adjudicated).

Certainly mandamus can be used to enforce rights established under statutes that actually impose a duty which is "clear, certain and free from the possibility of any reasonable controversy." See Headid, 179 N.W.2d at 770. The statutory duty presented in Graham v. Baker, 447 N.W.2d 397 (Iowa 1989), for example, meets this requirement. In Graham, creditors used mandamus to require a mediation service to issue a release needed as a prerequisite to forfeiture on a real estate contract following unsuccessful mediation. See Iowa Code § 654A.11(3)(1987) ("The mediator shall issue a mediation release unless the creditor fails to personally attend and participate in all mediation meetings"). Because the statute "commands that the mediator shall sign the release if one of the parties refuses to attach his or her signature to it," the Iowa Supreme Court reasoned, the mediator's duty was ministerial allowing him "no discretion to refuse." Id. at 401 (emphasis in original). Thus, mandamus was proper to compel issuance of the release.

No such statutory duty can be characterized as "clear, certain and free from the possibility of any reasonable controversy" under Iowa Code Chapter 914. The statutory duty sought to be enforced under Chapter 661 must be sufficiently clear that the plaintiff can demand performance, the refusal or neglect of which entitles the plaintiff to an order "commanding the defendant to fulfill such duty." Iowa Code § 661.9 (2005). If the duty sought to be compelled does not result directly from an "office, trust or station," it must be a duty "for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance." Iowa Code § 661.6 (2005). Although the County Attorney argues that the statutory application procedure for

restoration of rights is mandatory and exclusive, the statutes do not support this construction. See Division II, infra. The County Attorney mounts legal arguments in support of his construction of the state statutes, but legal arguments fall far short of "established rights" that are enforceable in mandamus. Like the plaintiff in Stith, the County Attorney cannot use mandamus to litigate the construction of the statutes and then obtain a writ of mandamus to enforce rights established under that construction. Having failed to come into court with rights already established, the County Attorney is precluded from litigating the merits of this action by mandamus.

Long-standing legal principles would have to be completely upended in order for the County Attorney to obtain an adjudication of the authority of the Governor to issue Executive Order No. 42 in a mandamus action. Mandamus can only be used to command the Governor "to do or not to do an act the performance or omission of which the law enjoins as a duty resulting from office. . . ." Iowa Code § 661.1 (2005). Because the remedy cannot be invoked to determine the legality of Executive Order No. 42, or to control discretion, it cannot be used to command the Governor to rescind, to revise, or to draft another executive order in its place.[3] The County Attorney is not in court to "enforce rights that have already been established" and has not asserted any statutory duty that is "clear, certain and free from the possibility of any reasonable controversy."

[3] Executive Order No. 42 actually directs two actions only one of which is challenged in the petition. Paragraph I restores rights of citizenship to certain offenders effective July 4, 2005. Paragraph II establishes a prospective process effective August 1, 2005, for review on a monthly basis of offenders who meet criteria in the Executive Order for restoration of rights. This monthly review will include recommendations from the court on those persons discharged from probation. Because mandamus cannot be used to test the legal validity of this process or to control the discretion to restore rights of citizenship to persons on each monthly list, a Petition for Order of Mandamus would be improper to challenge Executive Order No. 42 on this ground as well.

II. EXECUTIVE ORDER NO. 42 IS A PROPER EXERCISE OF THE GOVERNOR'S CONSTITUTIONAL CLEMENCY AUTHORITY AND COMPLIES WITH CHAPTERS 914 AND 915 OF THE CODE OF IOWA.

The Constitution of Iowa confers the power to grant clemency to the Governor. Specifically, the Constitution provides, "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law." Iowa Const. art. IV, § 16. By its terms, section 16 places only two limitations on the Governor's exercise of this authority. First, the Governor may grant clemency only after conviction. Secondly, the Governor may not grant clemency for the offense of treason and cases of impeachment.

While the clemency provision in the constitution is self-executing, it does allow for the Governor's authority to be "regulated as to implementation, but not as to inherent power, by legislative enactments." Haubrich, 248 Iowa at 986, 83 N.W.2d at 455-56. Accepting this constitutional invitation, the General Assembly enacted legislation to assist the Governor in the performance of his clemency power. The County Attorney asserts that these regulations individually and jointly serve to place substantial limitations on the Governor's authority to grant executive clemency. See Pet. for Mandamus at 2. Broadly construing the County Attorney's petition, it would appear that he claims that the Governor may not grant clemency without (1) receiving an application; (2) review and recommendation by the board of parole; (3) setting forth specific reasons for the grant or denial; and (4) notifying registered victims of violent crime and allowing them an opportunity to be heard. Id. at 3. Considering each one of his claims in turn, it is illustrated below that the provisions upon which Plaintiff relies are not prerequisites to the Governor's exercise of his clemency power. Rather, the plain language and legislative history of Iowa's clemency statutes, as well as case law from other jurisdictions, confirm that Executive

order No. 42 is a proper exercise of the Governor's clemency authority and fully complies with Chapters 914 and 915 of the Code of Iowa.

A. The Filing of An Application Is Not a Condition Precedent to the Governor's Grant of a Restoration of Citizenship Rights.

The first proposition advanced by the County Attorney is that Executive Order No. 42 does not comply with Chapter 914 of the Iowa Code because it restored citizenship rights to offenders that have not submitted an application. The premise of this claim is that the filing of an application a condition precedent to the exercise of the Governor's clemency authority. A careful examination of the relevant statutory provisions, however, reveals that County Attorney's inventive interpretation of Chapter 914 is contrary to the plain language of the statute and refuted by the legislative history.

As with all questions of statutory construction, our examination must begin with the text of the statute. The provisions at issue in this case are found in Chapter 914, which provides a statutory framework by which persons may apply for clemency. See Iowa Code § 914.1 (2005) et seq. It is worth noting at the outset that only three provisions in the entire chapter make reference at all to filing an application. The first is section 914.2 which states:

> Except as otherwise provided in section 902.2[4] a person convicted of a criminal offense has the right to make application to the board of parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of rights of citizenship at any time following the conviction.

Iowa Code § 914.2 (2005) (emphasis added). Chapter 914 further provides:

> 1. Except as otherwise provided in section 902.2, the board of parole shall periodically review all applications by persons convicted of criminal offenses and shall recommend to the governor the reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of the rights of citizenship for persons who have by their conduct given satisfactory evidence that they will

[4] Section 902.2 limits the frequency with which a person convicted of a class A felony may make application for commutation to once every ten years.

become or continue to be law-abiding citizens.

> 2. The board of parole shall, upon request of the governor, take charge of all correspondence in reference to an application filed with the governor and shall, after careful investigation, provide the governor with the board's advice and recommendation concerning any person for whom the board has not previously issued a recommendation.

Id. § 914.3(1),(2) (emphasis added). Finally, with respect to applications for clemency, Chapter 914 reads:

> 1. When an application or recommendation is made to the governor for a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of rights of citizenship, the governor may require the judge or clerk of the appropriate court, or the county attorney or attorney general by whom the action was prosecuted, to furnish the governor without delay a copy of the minutes of evidence taken on the trial, and any other facts having reference to the propriety of the governor's exercise of the governor's powers in the premises.
>
> 2. The governor may take testimony as the governor deems advisable relating to any application or recommendation. A person who provides written or oral testimony pursuant to this subsection is subject to chapter 720.
>
> 3. With regard to an application for the restoration of the rights of citizenship, the warden or superintendent, upon request of the governor, shall furnish the governor with a statement of the person's deportment during the period of imprisonment and a recommendation as to the propriety of restoration.

Id. § 914.5 (emphasis added).

Even the most cursory inspection of Chapter 914 reveals that it is wholly devoid of any language that restricts the Governor's power to grant clemency. Indeed, County Attorney cannot point to a single word or clause in entire chapter that requires the filing an application as a condition precedent to a grant of clemency. Instead, the County Attorney insists that such requirement must somehow be implied from the legislative intent. County Attorney's assertion, wholly unsupported by case law, flatly misreads Chapter 914. We need only look at the plain language of the statutory scheme to conclude that it exists to assist rather than limit the Governor in the exercise his clemency power. Significantly, the Iowa legislature went out of its way to

ensure that no one would construe the regulations of Chapter 914 to limit the Governor's power to act:

> The power of the governor under the constitution to grant a reprieve, pardon, commutation of sentence, remission of fines and forfeitures, or restoration of the rights of citizenship shall not be impaired.

Id. § 914.1.

Moreover, the statutes that reference the application process are not even directed at the Governor. Section 914.2, for example, confers upon a person convicted of a criminal offense "the right to make application." Id. at 914.2. The intent behind this provision is obvious. It provides an offender the means by which to initiate the clemency process. This forecloses a Governor from refusing to entertain requests for clemency. There is nothing in this section suggesting that the Governor's power is contingent upon an application being made by some other person. Likewise, section 914.3 applies only to Board of Parole's procedures for processing applications. Id. at 914.3. As is noted below, the Board of Parole's involvement is not required in every clemency decision. See Division II.B infra. It would be anomalous, therefore, for the Board of Parole procedures for processing an application to impose a condition on the Governor's clemency authority. Finally, far from restriction the Governor's clemency power, section 914.5 actually expands his authority in clemency matters by vesting him with what is in effect subpoena power. Id. at 914.5.

The County Attorney more than just ignores the plain language of Chapter 914 in an attempt to restrict the Governor's clemency authority, he also ignores the legislative history of the chapter. Prior to 1986, the regulations related to the Governor's clemency authority were found in Chapter 248 of the Iowa Code. See Iowa Code § 248.1 et seq. (1985) (App. at 30-33). During the 1986 legislative session, the General Assembly repealed the entire chapter in favor of

the current framework found in Chapter 914. See 1986 Iowa Acts Ch. 1112 (S.F. 2108) (App. at 34-37). Several important aspects of this legislative change stand out. The first is that under the old clemency statute, the legislature expressly provided that advice of the Board of Parole was a condition precedent to the Governor's authority to act:

> **248.6 Conditions prerequisite to a pardon**
> After conviction for a felony, no pardon or commutation of sentence shall be granted by the governor until the governor shall have presented the matter to, and obtained the advice of, the board of parole.

Iowa Code § 248.6 (1985) (App. at 32). From this language, it is clear that if the General Assembly intended an application to be a condition precedent to the Governor's authority grant clemency, it knew how to do so. The fact that the legislature did not provide any statutory language in the 1986 amendment that requires the filing of an application wholly undermines the County Attorney's suggestion that such prerequisite must be implied.

Secondly, the pre-1986 restriction on the Governor's clemency power found in section 248.6 applied only to cases involving pardons or commutations of sentence. No such restriction was placed on the Governor's power to issue a restoration of citizenship rights. Indeed, never in the history of the statute has the General Assembly made the Governor's authority to issue a restoration of citizenship rights contingent upon an application or recommendation by the Board of Parole. To the contrary, with respect to the restoration of citizenship rights the former statute provided:

> The governor shall have the right to grant any convict, whom the governor shall think worthy thereof, a certificate of restoration to all the convict's rights of citizenship. The warden or superintendent, upon request of the governor, shall, in case of application for such restoration, furnish the governor with a statement of the convict's deportment during the convict's imprisonment, and may at all times make such recommendations to the governor as the warden or superintendent shall think proper respecting such restoration.

Id. § 248.12 (emphasis added) (App. at 32).

The County Attorney's suggestion that the legislature intended to limit the Governor's authority to grant clemency absent an application is not a view shared by today's legislative leaders. On June 27, 2005, the Iowa Legislative Council rejected a proposed resolution requesting the Governor to refrain from issuing Executive Order No. 42. (Ex. C, App. at 11-13). Additionally, Senator Jeff Lamberti, Co-President of the Senate and a practicing member of the Iowa Bar, indicated in a public interview that a legal challenge to the issuance of Executive Order No. 42 would not likely be successful. (Ex. F, App. at 25-26). Moreover, the County Attorney's view of the Governor's clemency authority is not consistent with the historical practices of other Iowa Governors. For example, Governor Harold Hughes instituted a strikingly similar policy of restoring the rights to offenders upon discharge from state penitentiary. See James A. Stout, Civil Consequences of Conviction for a Felony, 13 Drake L. Rev. 141, 143-44 n.28 (June 1963) ("In the future, therefore, I will restore the rights of citizenship to persons discharged from prisons or parole at the time of their discharge") (emphasis added) (App. at 40-41). Governor Hughes left the application process in place for those offenders that discharged in the two years prior to the time in which he instituted this policy. Id. (App. at 41).

It is also important to note that the premise of the County Attorney's Petition for Mandamus finds no support in any reported opinion from a single Iowa court. Courts of other jurisdictions that have interpreted similar statutory frameworks, however, agree that such provisions are not mandatory conditions precedent to the exercise of the Governor's clemency authority. See People ex rel. Smith v. Jenkins, 156 N.E. 290, 291 (Ill. 1927); In re Moore, 31 P. 980 (Wyo. 1893); see also Madigan v. Snyder, 804 N.E.2d 546 (Ill. 2004). In Jenkins, for example, the prosecuting attorney challenged the Illinois Governor's issuance of a commutation

where not application or recommendation had been made. Jenkins, 156 N.E. at 291. In rejecting this claim, the Illinois Supreme Court held:

> The only restriction which the Legislature may impose upon the Governor's power refers to the regulations relative to the manner of applying for reprieves, commutations, and pardons, and the act on that subject does not purport to, and does not, restrict the Governor's authority except to that extent. The 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.

Id. The Wyoming Supreme Court reached the same result in In re Moore. In that case, the Governor of Wyoming granted a pardon, but the warden refused to release the prisoner because there had not been compliance with the clemency statute as to publication of notice of the application. In re Moore, 31 P. at 981. The court ruled:

> These provisions were directory to applicants for pardons, and those moving in their behalf, prescribing a method by which they could procure a hearing before the governor. But the governor might give them a hearing without such preliminary procedure, or might grant a pardon upon his own knowledge, and upon his own motion, without any application or any hearing.

Id. (emphasis added). Finally, in Madigan, the Illinois Supreme Court again rejected the notion that statutes regulating the application process made the Governor's clemency authority condition on the receipt of an application. Madigan, 804 N.E.2d at 550. Madigan involved a challenge to the Illinois Governor's blanket commutation of death row inmates on the ground, inter alia, that the inmates had not signed or consented to the filing of petitions on their behalf. Id. at 550-51. In upholding the blanket commutations, the court relied upon a statutory provision strikingly similar to section 914.1 of the Iowa Code and held that the regulations regarding the application process did not constitute a limitation on the Governor's power. Id. at 553-54 ("Thus, in this instance, the failure of certain inmates to consent to their petitions was irrelevant to the Governor").

In the court proceedings up to this point, County Attorney has relied heavily upon Maurer v. Sheward, 644 N.E.2d 369 (Ohio 1994), to support his strained interpretation of Chapter 914. A close reading of Maurer, however, reveals that the County Attorney's reliance on this case is misplaced. The Maurer case began when John Salim, who was serving a sentence of six to twenty-one years, filed an application with the Ohio Adult Parole Authority ("APA") in December of 1990.[5] Id. at 371. On January 9, 1991, a representative from the governor's office contacted the APA to request that it expedite the review of Salim's application. Id. The APA responded that it could not complete the review process in the time requested. Id. Nonetheless, two days before Governor Richard Celeste left office, he granted Salim a full pardon. Id. at 370. The relevant statute at issue in Maurer provided:

> All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefore and the records or minutes relating to the case.

Ohio Rev. Code Ann. 2967.07. The precise issue before the court was "whether the Governor is required to await the APA investigation and recommendation before he may grant a pardon." Maurer, 644 N.E.2d at 378. Unlike Chapter 914 of the Iowa Code, the Ohio statute required that "all applications for pardons shall be made to the APA." Id. The court held that when the application process is initiated, "R.C. 2967.07 mandates that the APA investigation report and recommendation must be presented to the Governor before he may grant a pardon." Id. The court did not rule, however, that the Governor may grant clemency only if an application is filed

[5] Maurer also involved a challenge to commutations issued by the Governor of Ohio. The court held that the Ohio legislature's attempt to regulate the application process for commutations was unconstitutional. The facts and discussion of that portion of the court's decision is not germane to the issues in this litigation.

and a recommendation received from the APA, which is the question at issue in this litigation. Ironically for the County Attorney, Executive Order No. 42 is fully consistent with the Maurer court's holding that once an application is made to the Board of Parole, the Governor must await a recommendation before acting. The order specifically states:

> Notwithstanding this executive order, offenders still may make application for a restoration of citizenship rights pursuant to Iowa Code Chapter 914. All applications, unless withdrawn, will be processed according to the procedures set forth in Chapter 914 of the Code of Iowa.

(Ex. A, App. at 9) (emphasis added). In fact, the Governor's Office notified all individuals with pending applications that they would not be covered by Executive Order No. 42 unless they chose to withdraw their application. (Ex. D, App. at 14).

While there is no dispute that the legislature has the constitutional authority to regulate the Governor's clemency power, it has chosen not to limit the Governor from granting clemency on his own initiative. Accordingly, the County Attorney is not entitled to relief on this ground, and summary judgment, therefore, is appropriate on this claim.

B. An Investigation and Recommendation from the Board of Parole is Not a Condition Precedent to the Governor's Grant of a Restoration of Citizenship Rights.

The County Attorney next asserts that the Governor may not exercise his clemency authority unless the Board of Parole first conducts an investigation and then makes a recommendation to the Governor. He again attempts to read into the statute a limitation on the Governor's clemency authority that is not supported by the plain language of the statute. To construct this interpretation, the County Attorney focuses in on the language of Chapter 914.3(1), which provides that "the board of parole shall periodically review all applications . . . and shall recommend to the governor . . . the restoration of the rights of citizenship for persons who have by their conduct given satisfactory evidence that they will become or continue to be law-abiding

citizens." Iowa Code § 914.3 (2005). Taking this provision out of the context of Chapter 914, the County Attorney reasons that Board of Parole involvement is a condition precedent to the Governor's exercise of clemency authority.

A thorough examination of Chapter 914 reveals that the statutes related to the Board of Parole's involvement are intended to assist the Governor in the exercise of his clemency authority rather than limiting it. Under section 914.2, there are two ways in which a person convicted of a crime can initiate the clemency process—by filing an application with the Board of Parole or submitting one directly to the Governor. Iowa Code § 914.2 (2005). The place with which an offender applies affects how the application will be processed. Applications filed with the Board of Parole are covered by section 914.3(1) which requires the board to conduct and investigation and provide the Governor with a recommendation. Applications filed directly with the Governor, however, are covered by 914.3(2) which provides that the board "shall upon the request of the governor, take charge of all correspondence in reference to an application filed with the governor and shall, after careful investigation, provide the governor with the board's advice and recommendation . . . ." Id. (emphasis added). In other words, the Board of Parole becomes involved only when one of two events occurs: (1) an application for clemency is filed with the Board; or (2) the Governor requests the Board's involvement in the clemency process. Without one of these to triggering events, the Board of Parole has no authority or reason to intervene in the clemency process.

The purpose of this dual system is to allow the Governor the aid of the Board of Parole to review unfamiliar clemency requests in an organized way. Implicit in this statutory process is the recognition that there may be instances in which the Governor is able to reach a conclusion on his own, and the assistance of the Board of Parole is unnecessary. This can occur when a

person files an application directly with the Governor, or as in the case of Executive Order No. 42, when the Governor grants clemency on his own initiative. The Board of Parole is brought into the process only in circumstances in which the Governor may not be aware of the application (because it was filed with the Board of Parole) or at the Governor's request. Rather than restricting the Governor's clemency power, therefore, section 914.3 is intended for his benefit.

Nothing in the language Chapter 914 requires the Board of Parole to become involved in every clemency matter as the County Attorney suggest. If taken literally, County Attorney's reading of Chapter 914 would require a Board of Parole investigation and recommendation in every case without exception; even those applications that the Governor denies. For example, an investigation and recommendation would be required before the Governor could deny an incomplete application for clemency. Such a situation would render the Governor a passive participant in the clemency process, having what amounts to only a veto power over the parole board's recommendations. Surely the legislature could not have intended such an absurd result. See Gen. Elec. Co. v. Iowa State Bd. of Tax Rev., 492 N.W.2d 417, 420 (Iowa 1992) (observing that courts should avoid strained, impractical or absurd results when interpreting statutes). Accordingly, summary judgment is appropriate on this ground**.**

C. Executive Order No. 42 Provides Specific Reasons for the Governor's Restoration of Citizenship Rights to Discharged Offenders

The County Attorney next seeks mandamus to compel the Governor to set out the reasons for the restorations of citizenship rights in Executive Order No. 42 as required in section 914.4 of the Iowa Code. The County Attorney's reliance on this statutory provision is misplaced for two reasons. First, the requirement that the Governor explain the reason for his clemency decision only applies when he acts pursuant to a Board of Parole recommendation. As explained above, a

Board of Parole recommendation is not a condition precedent to a Governor's grant of clemency. In the case of Executive Order No. 42, where the Governor acted on his own initiative, justification for his clemency decisions is not required. Secondly, even assuming that section 914.4 somehow applies, Executive Order No. 42 satisfies the statutory requirements. In the order, Governor Vilsack specifically sets out the reasons for granting restoration of citizenship to discharged offenders in the preamble:

> **WHEREAS,** the right to vote is the foundation of a representative government; and
>
> **WHEREAS,** under the Constitution of the State of Iowa, an individual convicted of a felony or aggravated misdemeanor is denied the right to vote, which may continue long after a sentence has been served; and
>
> **WHEREAS,** tens of thousands of Iowans who are living, working, and paying taxes in the state are denied the right to vote as a result of a prior conviction; and
>
> **WHEREAS,** disenfranchisement of offenders has a disproportionate racial impact thereby diminishing the representation of minority populations; and
>
> **WHEREAS,** research indicates ex-offenders that vote are less likely to re-offend; and
>
> **WHEREAS,** restoration of the right to vote is an important aspect of reintegrating offenders in society to become law-abiding and productive citizens; and
>
> **WHEREAS,** Iowa is one of only five states that does not currently provide a process for automatically restoring voting rights for offenders upon discharge of their sentences; and
>
> **WHEREAS,** the current means by which offenders seek to have their rights restored is unnecessarily time consuming and not used by all offenders that are eligible; and
>
> **WHEREAS,** Article IV, section 16 of the Constitution of the State of Iowa authorizes the Governor of Iowa to restore the rights of citizenship that were forfeited by reason of conviction.

(Ex. A, App. at 8). While the County Attorney may disagree with the reasons provided, there can be no question that Executive Order No. 42 meets any applicable requirements of section 914.4. Mandamus, therefore, is not an appropriate remedy on this ground, and Defendant is entitled to judgment as a matter of law.

D. The Registered Victim Notification and Comment Provisions of Chapter 915 Do Not Apply to Restorations of Citizenship Rights.

Finally, the County Attorney requests mandamus on the grounds that the Governor has not provided notice to registered victims of violent crimes as required by section 915.19. Once again, the proper starting point is the plain language of the statute, which provides:

> Prior to the governor granting a reprieve, pardon, or commutation to an offender convicted of a violent crime, the governor shall notify a registered victim that the victim's offender has applied for a reprieve, pardon, or commutation. The governor shall notify a registered victim regarding the application not less than forty-five days prior to issuing a decision on the application. The governor shall inform the victim that the victim may submit a written opinion concerning the application.

Iowa Code § 915.19 (2005) (emphasis added). By its own terms, section 915.19 applies only to reprieves, pardons, and commutations. The statute is silent as to restorations of citizenship rights. Under the well-founded statutory construction principle of expressio unius est exclusio alterius, restorations of citizenship rights must therefore be deemed excluded from the requirements of section 915.19. See Williams v. State, 421 N.W.2d 890, 894 (Iowa 1988) ("the expression of one thing is the exclusion of another").

Moreover, the Iowa Supreme Court has long recognized that a restoration of citizenship rights is a distinct form of clemency. See Haubrich, 248 Iowa 978, 83 N.W.2d 451. While a restoration of citizenship is based on what is commonly referred to as the "pardoning power" of

the Governor, it is not technically a pardon. Id. at 984-85. Indeed, Executive Order No. 42 specifically states that it is not a pardon:

> This executive order, and all future restorations of citizenship rights, shall not be construed as a pardon or as a remission of guilt or forgiveness of the offense and shall not operate as a bar to greater penalties for second offenses or a subsequent conviction as a habitual criminal.

(Ex. A, App. at 9).

This distinction was not lost on the General Assembly as it listed the term "restoration of citizenship rights" in the same sequence as reprieve, pardon, and commutation three separate times in Chapter 914. Compare § 914.1 with § 914.2 and § 914.3. Consequently, any assertion that 915.19 contemplated restorations of citizenship rights would render the term superfluous as used in Chapter 914. See State v. Comried, 693 N.W.2d 773, 775 (Iowa 2005) (noting that statutes are to be interpreted in a manner to avoid rendering any part of the enactment superfluous). Defendant, therefore, is entitled to judgment as a matter of law on this issue as well.

CONCLUSION

Mandamus is a drastic remedy reserved for extraordinary circumstances and, therefore, is limited to the narrow purpose of enforcing rights that have already been clearly established. The County Attorney seeks turns this proposition on its head by attempting to use mandamus to obtain in essence a declaratory judgment to subsequently be enforced. Such use of mandamus is contrary section 661.1 and long-standing legal authority. For this reason, mandamus is not the proper cause of action for the County Attorney to challenge Executive Order No. 42.

With respect to the legal merits of the Petition, it is clear that the County Attorney's view of the Governor's clemency authority is based not on what the Constitution or the Code of Iowa says, but instead on his view of what these texts should say. The courts of this state have never

held that there are any statutory prerequisites to the exercise of the Governor's clemency power. Accordingly, the County Attorney has not met his burden of showing a clearly established right that would entitle him to mandamus relief. Defendant, therefore, respectfully requests this court grant summary judgment in his favor and dismiss the County Attorney's mandamus petition.

Respectfully submitted,

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