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OPINION NO. 85-14

The Honorable Irma Hunter Brown
State Representative, District 64
1920 Summit Street
Little Rock, Arkansas 72201

Dear Representative Brown:

I am in receipt of your opinion request concerning Ark. Stat. Ann. §43-2623 (Repl. 1977). This provision concerns the setting of execution dates by the governor. By implication from §43-2623 the first date of execution is set by the trial court in which the death penalty was imposed. After that date has passed for whatever reason -- usually because of a stay of execution pending appeal -- the governor is then charged with setting dates of execution by this section.

Your first two questions are as follows:

- (1) Can a Governor grant a reprieve by failing to set an execution date.
- (2) Does Arkansas Statute 43-2623 require the Governor to set an execution date or is it merely directory.

They can be read as one question, to wit, whether §43-2623 is mandatory or directory? As you correctly stated in your letter, the word, shall, used in the section, is not always mandatory. See Huff v. Bruce, 261 Ark. 498, 549 S.W.2d 282 (1977); Arkansas State Highway Commission v. Mabry, 229 Ark. 261, 315 S.W.2d 900 (1958); Fort Smith Gas Company v. Kincannon, Judge, 202 Ark. 216, 150 S.W.2d 968 (1941). Pertinent to the question at hand is the following quotation from Townsend v. McDonald, 184 Ark. 273, 277, 42 S.W.2d 410 (1930);

In determining whether the words of a statute shall have a mandatory or directory effect ascribed to them, the purposes of the act, the end to be accomplished, the consequences that may result from one meaning or the other, and the context are to be considered.

In the case at hand it is easy to see that the purpose of §43-2623 is to have execution dates set for persons sentenced to death, the end to be accomplished the execution of those persons and the consequences that may result in a construction of the section as merely directory a complete thwarting of the sentences set for persons on death row. When this last consideration is taken into account, it is clear that §43-2623 is mandatory.

More to the point is the following language of the Arkansas Supreme Court in Martin v. State, 79 Ark. 236, 240, 96 S.W. 372 (1906):

Where directions in a statute reach to the very essence of the thing to be done, and where a failure to observe them prejudices rights sought to be preserved by these directions, then they are mandatory, and not merely directory.

Were the governor simply to disregard the section and not set execution dates, the rights of the State to the execution of the sentence would certainly be prejudiced.

Your second question is:

If the statute is mandatory, does it conflict with the power of the Governor, set by the Arkansas Constitution?

This question undoubtedly refers to the governor's power to pardon, commute and grant reprieves, granted by ARK. CONST. art. 6, §18. The simple answer to the question is no. If the governor decides not to grant some sort of clemency, the setting of an execution date pursuant to §43-2623 is mandatory. That section does not purport to regulate or limit the governor's clemency powers, only to provide a method for carrying out death sentences.

Your fourth and last question was:

- (4) If a Governor refuses to set an execution, is he subject to any penalty and can he be forced to act.

There seems to be no penalty to which the governor might be subject for failing to set an execution date, but he might be subject to a writ of mandamus. Mandamus is an order of a court granted upon the petition of an aggrieved party, commanding an executive, judicial or ministerial officer to perform an act, or to omit to do an act, the performance or

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omission of which is enjoined by law. Ark. Stat. Ann. §33-102 (Repl. 1962). Mandamus cannot be used to control the discretion of an executive officer and will not lie when a question of fact is presented. Mears v. Hall, 263 Ark. 827, 569 S.W.2d 91 (1978); Massey v. Enfield, 259 Ark. 85, 531 S.W.2d 706 (1976).

One seeking a writ of mandamus, under Arkansas law, must show a clear, certain and specific legal right and the absence of any other specific, adequate legal remedy. Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100 (1979). Significantly, however, even if those requirements are met it is important to remember that mandamus is not a writ of right, but is directed to the sound discretion of the trial court. Bunting v. Tedford, 261 Ark. 638, 550 S.W.2d 459 (1979); See, Girley v. Wood, 258 Ark. 408, 525 S.W.2d 454 (1975).

In the case at hand it is likely that one seeking the writ to force the governor to set an execution date (probably a Prosecuting Attorney or my office) could easily establish a clear, certain and specific right in the State or the public to have an execution date set. Because no other official has the authority to set these dates, there would be no other adequate remedy than mandamus. The petitioner in such a suit could not be assured of success, however, because, as noted above, the issuance of a writ of mandamus is discretionary with the court in which the petition is filed.

Hoping this opinion has adequately answered your questions, I remain,

Very truly yours,


STEVE CLARK
Attorney General

JSC:eac