APPENDIX

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SUPREME COURT OF MISSOURI

en banc

FILED

JUN 4 2024

CLERK, SUPREME COURT

STATE OF MISSOURI EX REL. GOVERNOR MICHAEL L. PARSON,

Relator,

v.

THE HONORABLE S. COTTON WALKER,

Respondent.

No. SC100352

ORIGINAL PROCEEDING IN PROHIBITION

Marcellus Williams filed a petition for a declaratory judgment alleging Governor Michael L. Parson lacked authority to rescind an executive order issued by the former governor that stayed Williams' execution and appointed a board of inquiry pursuant to § 552.070.[1] After the circuit court overruled Governor's motion for judgment on the pleadings, Governor filed a petition for a writ of prohibition to bar the circuit court from taking further action other than sustaining the motion for judgment on the pleadings and denying Williams' petition for declaratory judgment. Governor is entitled to judgment on

[1] All statutory citations are to RSMo 2016.

the pleadings as a matter of law because the Missouri Constitution vests the governor with exclusive constitutional authority to grant or deny clemency and Williams has no statutory or due process right to the board of inquiry process. This Court makes permanent its preliminary writ prohibiting the circuit court from taking further action other than sustaining Governor's motion for judgment on the pleadings.

Facts and Procedural History

In 1998, Williams fatally stabbed Felicia Gayle while burglarizing her home. Following a jury trial, the circuit court sentenced him to death for first-degree murder. This Court affirmed Williams' judgment of conviction and sentence, *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), and the judgment overruling postconviction relief. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005).

Williams filed a petition for a writ of habeas corpus in federal court. The federal district court granted relief, but the court of appeals reversed the judgment and denied habeas relief. *Williams v. Roper*, 695 F.3d 825, 839 (8th Cir. 2012). The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele*, 571 U.S. 839 (2013). This Court set a January 28, 2015, execution date.

On January 9, 2015, Williams filed a petition for a writ of habeas corpus in this Court. This Court vacated the execution date for additional DNA testing and habeas proceedings and appointed a special master to ensure complete DNA testing. After receiving the special master's report, this Court denied Williams' habeas petition. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele*, 582 U.S. 937 (2017). This Court set an August 22, 2017, execution date.

On August 14, 2017, Williams filed another petition for writ of habeas corpus, which this Court denied. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Larkins*, 583 U.S. 902 (2017).

On August 22, 2017, the former governor issued Executive Order 17-20 appointing a board of inquiry pursuant to § 552.070 and staying Williams' execution "until such time as the Governor makes a final determination as to whether or not he should be granted clemency." In 2023, Governor issued Executive Order 23-06 rescinding Executive Order 17-20, dissolving the board of inquiry, and removing "any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution."

Williams filed the underlying declaratory judgment action alleging four counts: (1) Executive Order 23-06 violated his due process rights under the state and federal constitutions by denying his right to "a complete review of his claim of innocence" under § 552.070; (2) Executive Order 23-06 violated his federal due process rights under color of state law; (3) Governor lacked authority to dissolve the board of inquiry before the board provided Governor with a report and recommendation; and (4) Executive Order 23-06 violated the constitutional separation of powers.[2] Williams also filed discovery requests with the petition.

[2] In the introduction of his declaratory judgment petition, Williams offers a single, conclusory assertion he is entitled to challenge Governor's dissolution of the board of inquiry under the open courts provision of the Missouri Constitution. The open courts provision is not at issue because none of Williams' four counts allege he is entitled to relief thereunder, the circuit court did not address the open courts provision, and neither party's briefs raise the issue in this Court.

Governor filed a motion for judgment on the pleadings and a motion to stay discovery. Governor's motion for judgment on the pleadings asserted Williams had no protected due process interest in the clemency process. Governor also asserted Executive Order 23-06 did not violate § 552.070 and argues Williams's statutory claim fails as a matter of law.[3]

The circuit court overruled Governor's motion for judgment on the pleadings with respect to Counts I, II, and III, and stayed discovery for two weeks.[4] The circuit court concluded Williams had a due process right to demonstrate his innocence based on the former governor's Executive Order 17-20 appointing the board of inquiry pursuant to §552.070. The circuit court also concluded Governor had no authority to dissolve the board of inquiry. Governor filed a petition for a writ of prohibition or mandamus. This Court issued a preliminary writ of prohibition.

Prohibition

This Court has jurisdiction to issue original remedial writs. Mo. Const. art. V, § 4.1. This Court may issue a writ of prohibition:

> (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted.

[3] Williams also named Attorney General Andrew Bailey as a defendant. The circuit court sustained Attorney General's motion to dismiss and removed him as a defendant.

[4] The circuit court concluded Williams consented to judgment on the pleadings on Count IV and did not address his separation of powers claim. Williams asserts, and Governor agrees, that Williams did not consent to judgment on the pleadings for Count IV. As shown below, Count IV fails because it is premised on Williams' erroneous claim Executive Order 23-06 violated § 552.070.

State ex rel. Tyler Techs., Inc. v. Chamberlain, 679 S.W.3d 474, 477 (Mo. banc 2023).

"Prohibition is an appropriate remedy to avoid irreparable harm when the plaintiff's petition does not state a viable theory of recovery" and the relator is entitled to prevail as a matter of law. *Id.* (internal quotation omitted). A "motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law." *Hicklin v. Schmitt*, 613 S.W.3d 780, 786 (Mo. banc 2020) (internal quotation omitted).

Executive Clemency

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (footnotes omitted). "The Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998). Therefore, "[w]hile traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally been the business of courts." *Id.* at 284 (internal quotation omitted).

The Missouri Constitution enshrines the traditional understanding of clemency by granting "the governor complete discretion to grant pardons, commutations, and other

forms of clemency." *State ex rel. Dorsey v. Vandergriff*, 685 S.W.3d 18, 31 (Mo. banc 2024).[5] Article IV, § 7 provides:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

This constitutional text recognizes the governor's clemency power encompasses three distinct actions: reprieves, commutations, and pardons. A reprieve temporarily stays the execution of a sentence. *Lime v. Blagg*, 131 S.W.2d 583, 585 (Mo. banc 1939). A commutation reduces the severity of a sentence. *Id.* A pardon relieves an offender from the consequences of a specific crime. *Id.*

The distinctly different relief provided by reprieves, commutations, and pardons entails different limitations on the governor's ability to rescind previously granted clemency relief. Like a reprieve, "a pardon or commutation is a mere matter of grace[.]" *Reno*, 66 Mo. at 269. But unlike the temporary stay of the execution of a sentence granted by a reprieve, pardons and commutations permanently annul or alter the sentence itself.

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[5] Since statehood, the Missouri Constitution has vested the governor with exclusive authority to grant or withhold clemency. *See State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 435 (Mo. banc 2007) (quoting *Ex Parte Reno,* 66 Mo. 266, 269, 273 (1877)) (stating clemency "is 'a mere matter of grace' that the governor can exercise 'upon such conditions and with such restrictions and limitations as he may think proper'"); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) (stating "the power of pardon lies in the uncontrolled discretion of the governor"); *State ex rel. Oliver v. Hunt,* 247 S.W.2d 969, 973 (Mo. banc 1952) (stating "a pardon issues upon *ipse dixit* of the governor" and is "conceived in mercy and is said to be in derogation of law"); *Lime*, 131 S.W.2d at 586 (explaining the governor's constitutional power to grant reprieves, commutations, and pardons "is beyond the range of judicial or legislative encroachment"); *State v. Sloss*, 25 Mo. 291, 294 (1857) (stating the Missouri Constitution vests "the power of pardoning in the chief executive officer of the state").

Once the governor grants a pardon or commutation, therefore, the "act of clemency is fully performed[,]" and "the grantee … becomes entitled as a matter of right to all the benefits and immunities it confers, and of which he cannot be deprived by revocation or recall." *Id.* By contrast, because "[a] reprieve does not annul the sentence, but merely delays or keeps back the execution of it[,]" the recipient cannot "complain when such reprieve is revoked." *Lime*, 131 S.W.2d at 585. As a temporary, discretionary respite from a sentence, a reprieve creates no rights and carries only the necessary expectation that the governor may rescind it any time.

Given the governor's article IV, § 7 clemency power, Executive Order 17-20 was a reprieve because it expressly stayed Williams' execution "until such time as the Governor makes a final determination as to whether or not he should be granted clemency." Because Executive Order 17-20 was a reprieve, Governor was free to rescind it at his discretion. *Lime*, 131 S.W.2d at 586 (holding "a mere executive order, in the nature of a reprieve, … was subject to revocation in the Governor's discretion").[6]

Section 552.070

Against this backdrop of the governor's absolute discretion to grant clemency relief and rescind a reprieve, Williams alleged in Count III of his declaratory judgment action that § 552.070 precluded Governor from rescinding Executive Order 17-20 and dissolving

[6] The fact a reprieve was issued by a former governor has no bearing on any successive governor's authority to rescind that reprieve. Irrespective of the individual who momentarily occupies the office, he or she exercises the article IV, § 1 "supreme executive power … vested in a governor." Governor necessarily is free to exercise that supreme executive power to rescind a reprieve issued by himself or any prior governor.

the board of inquiry prior to receiving the board's report and recommendations. Section 552.070 provides:

> In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

"The goal of statutory interpretation is to give effect to the General Assembly's intent as reflected in the plain language of the statute at issue." *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 6 (Mo. banc 2023) (internal quotation omitted). This Court avoids interpretations producing "unreasonable or absurd results." *Id.* (internal quotation omitted).

Williams concedes Governor has exclusive power over the final decision whether to grant clemency but claims Governor lacked authority to make a final clemency decision without the report and recommendations the board "shall" provide to the governor pursuant to § 552.070. Williams' argument rests on an inference that the board's statutory obligation to provide the governor with a report and recommendations limits the governor's constitutional authority to grant or withhold clemency in a death penalty case. This argument lacks merit.

The requirement that the board "shall make its report and recommendations to the governor" imposes an obligation on the board, not the governor. The only obligation

imposed on the governor, in addition to the board, is to hold any information gathered by board in strict confidence.[7] Section 552.070 imposes no other obligation or limitation on the governor and does not limit Governor's absolute discretion over clemency relief and to rescind the former governor's reprieve. Adopting Williams' argument that a governor's appointment of a board pursuant to § 552.070 imposes an indefinite procedural bar to the final clemency decision would be in derogation of the constitutional clemency power. This Court avoids interpreting a statute in a way "that would call into question its constitutional validity." *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 187 (Mo. banc 2011). Section 552.070 does not limit Governor's authority to rescind Executive Order 17-20 and order the execution of Williams' lawfully imposed sentence.

Williams also claims § 552.070 authorized Governor to appoint the board but did not authorize him to dissolve it. Once again, Williams' interpretation of the statute impermissibly limits Governor's exclusive constitutional clemency power. Adopting Williams' interpretation means a board of inquiry appointed by a governor to assist with the exercise of the article IV, § 7 clemency power could prevent that governor, and his or her successors, from exercising that power by failing to produce a report and recommendation. Because the discretionary appointment of a board of inquiry pursuant to § 552.070 merely facilitates the governor's exercise of the exclusive constitutional

[7] In addition to the constitutional reservation of the clemency power to the governor, Williams' declaratory judgment action and proposed discovery are at odds with the statutory confidentiality requirement, further demonstrating the likelihood of irreparable harm and necessity of a writ of prohibition.

clemency power, the governor necessarily retains authority to rescind a reprieve or deny clemency irrespective of the board's action or inaction.

While the General Assembly cannot regulate the governor's ultimate clemency decision, article IV, § 7 authorizes regulation of "the manner of applying for pardons." Williams argues § 552.070 is such a law and precludes Governor's rescission of Executive Order 17-20 and dissolution of the board of inquiry. Construing § 552.070 as a law regulating the manner of applying for pardons yields the absurdly circular conclusion that the governor's appointment of a board of inquiry is a pardon application to himself on behalf of the capital offender. This Court will not construe a statute as requiring an absurd result. *Fitz-James*, 670 S.W.3d at 6. The governor's discretionary appointment of a board of inquiry to gather information to assist his exercise of the article IV, § 7 clemency power is not a provision "of law as to the manner of applying for pardons."[8]

Governor was entitled to judgment on the pleadings with respect to Count III because Williams' allegations fail as a matter of law to show Governor lacked authority to rescind the former governor's reprieve and order the execution of Williams' sentence. Count IV, alleging Executive Order 23-06 violated the separation of powers, fails because it is premised on Williams' erroneous claim Governor lacked authority to dissolve the board and order the execution of Williams' sentence.

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[8] Section 217.800 governs applications for a pardon, commutation, or reprieve. "When prisoners petition the governor for clemency, the [Missouri Board of Probation and Parole] investigates each case and submits a report of its investigation, along with its recommendations, to the governor." *Lute*, 218 S.W.3d at 435. "The Board must follow the governor's orders as he is granted the sole authority to commute sentences at his discretion." *Id.*

Due Process

In Counts I and II, Williams alleged Executive Order 23-06 violated his due process rights under the state and federal constitutions by denying state-created rights under Executive Order 17-20 and § 552.070, preventing a complete review of his claim of innocence during the clemency process. Williams further alleged this state-created right to the board of inquiry process could also create other rights to additional procedures, "including additional court filings, political pressure on [Governor] to commute his sentence, and potential action by other members of the executive branch." The circuit court erroneously declared the law when it concluded Williams alleged a protectible due process interest in demonstrating his innocence pursuant to Executive Order 17-20 and § 552.070.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin* 545 U.S. 209, 221 (2005). While "[a] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right … the underlying right must have come into existence before it can trigger due process protection." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). The expectation of clemency relief from a lawfully imposed sentence is a "unilateral hope" that does not trigger due process protection. *Id.* at 465.

Neither Executive Order 17-20 nor § 552.070 provides a state-created right triggering due process protection. As Executive Order 17-20 illustrates, the board of inquiry process is initiated at the governor's sole discretion. Section 552.070 serves as an

additional, purely discretionary mechanism to assist the executive clemency decision vested constitutionally with the governor alone. Neither the statute nor Executive Order 17-20 vested Williams with an existing right triggering due process protection.[9] Governor's executive order dissolving the board and ordering the completion of Williams' sentence in no way denied Williams access to any process to which he was legally entitled.

Alternatively, Williams argues he alleged a due process interest in his own life under Justice O'Connor's concurring opinion in *Woodard*. *See Woodard*, 523 U.S. at 288 (O'Connor, J., concurring). Williams asserts Justice O'Connor's concurring opinion governs and establishes he is entitled to at least "minimal" due process protection during the clemency process.

In *Woodard*, an inmate sentenced to death challenged Ohio's clemency process. *Id.* at 277 (plurality opinion). Like Missouri, Ohio law provided the governor had discretion to grant or deny clemency. *Id.* at 276. But unlike §552.070, the Ohio law provided capital offenders with the right to request an interview and to have a mandatory clemency hearing. *Id.* at 276 - 77. The inmate did not challenge those procedures. *Id.* at 277. Instead, he claimed Ohio violated due process rights implicit in the state-created procedural rights by providing short notice and limiting the assistance of counsel. *Id.*

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[9] Williams' lack of any existing right under Executive Order 17-20 or § 552.070 disposes of the circuit court's reliance on *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009). In *Osborne*, the Supreme Court held a state law allowing a state court to vacate a conviction based on clear and convincing, newly discovered evidence of innocence triggered some due protections that were satisfied in that case. *Id.* at 68-70.

Unlike the statutory right to seek postconviction relief in state court in *Osborne*, § 552.070 provides Williams with no right to the initiation or continuation of the board of inquiry process.

In a 4-4-1 opinion, the Supreme Court reversed the court of appeals' judgment, and held the inmate did not show a due process violation. Chief Justice Rehnquist, joined by three justices, concluded Ohio's clemency laws did not create any procedural or substantive rights implicating due process. *Id.* at 285. Justice O'Connor, also joined by three justices, reasoned an inmate sentenced to death retained a due process life interest requiring some "minimal" due process protection in the clemency process and decision, but concluded Ohio's process satisfied that minimal standard. *Id.* at 290 (O'Connor, J., concurring). While providing no analytical framework for assessing the contours of minimal due process, Justice O'Connor illustrated her concern by hypothesizing "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289. Finally, writing alone, Justice Stevens filed an opinion concurring in part and dissenting in part, agreeing Ohio's procedures must meet minimum due process requirements, but dissenting because he would have remanded the case to the district court to determine "whether Ohio's procedures meet the minimum requirements of due process." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998) (Stevens, J., concurring in part and dissenting in part).

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*,

428 U.S. 153, 169 n.15 (1976)). Chief Justice Rehnquist's opinion held Ohio's clemency procedures did not implicate due process. Justice O'Connor's opinion concluded those procedures triggered "minimal" due process protections against wholly arbitrary clemency procedures and decision making. A straightforward application of *Marks* shows Chief Justice Rehnquist's opinion controls because it is the position taken by those Justices who concurred in the judgment on the narrowest grounds.[10]

Chief Justice Rehnquist's controlling opinion in *Woodard* acknowledged a capital offender "maintains a residual life interest," but concluded the "interest in not being executed in accord with his sentence" does not trigger due process protections in the executive exercise of clemency authority. *Woodard*, 523 U.S. at 281. Because any expectation the discretionary executive clemency process will result in the commutation of a lawfully imposed death sentence is simply a "unilateral hope[,]" a capital offender retains no protectible due process interest within the clemency process. *Id.* at 282 (internal quotation omitted).

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[10] Some federal and state courts suggest Justice O'Connor's concurring opinion provides the Supreme Court's opinion on the specific issue of whether the Due Process Clause applies to clemency. *See, eg., Barwick v. Governor of Fla.*, 66 F.4th 896, 902 (11th Cir. 2023) (stating "Justice O'Connor's concurring opinion provides the holding in *Woodard*"); *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) (holding Justice O'Connor's concurring opinion was the "narrowest majority holding" and establishes "some minimal level of procedural due process applies to clemency proceedings"); *Foley v. Beshear*, 462 S.W.3d 389, 394 (Ky. 2015) (applying Justice O'Connor's concurring opinion because it is the "narrower holding on the due-process question"); *Bacon v. Lee*, 549 S.E.2d 840, 848 (N.C. 2001) (holding "Justice O'Connor's concurring opinion represents the holding of the Court because it was decided on the narrowest grounds and provided the fifth vote"). This Court is not bound by "decisions of the federal district and intermediate appellate courts and decisions of other state courts[.]" *Doe v. Roman Cath. Diocese of St. Louis*, 311 S.W.3d 818, 823 (Mo. banc 2010). This Court concludes Chief Justice Rehnquist's opinion states the applicable law governing due process in discretionary state clemency proceedings.

Chief Justice Rehnquist also concluded Ohio's clemency process did not trigger additional due process rights. Despite the delegation of some procedural authority to the parole board, the Ohio governor retained "broad discretion" that, "[u]nder any analysis … need not be fettered by the types of procedural protections sought by" the inmate. *Id.* Unlike judicial proceedings to adjudicate guilt, executive clemency does "not determine the guilt or innocence of the defendant" and is "independent of direct appeal and collateral relief proceedings." *Id.* at 284. Because "[p]rocedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked[,]" Ohio's creation of some procedural rights for offenders in the discretionary executive clemency process did not entail additional due process protections. *Id.* at 285. Thus, "the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." *Id.*

Woodard forecloses Williams' argument he retains a protectible due process interest during the clemency process following his lawfully imposed death sentence and the exhaustion of potential state and federal postconviction judicial remedies. Section 552.070 neither creates nor implies any procedural rights for the offender. Williams has nothing more than a "unilateral hope" for discretionary clemency relief from his lawfully imposed death sentence. *Id.* at 280 (quoting *Dumschat*, 452 U.S. at 465). His argument distills to a plea for an act of gubernatorial mercy, not a valid argument for recognizing due process rights in Governor's exercise of the discretionary clemency power. *Id.* at 285; *see also*

Dorsey, 685 S.W.3d at 31 n.12 (recognizing article IV, § 7 vests the governor with "absolute discretion over clemency relief").[11]

Conclusion

Section 552.070 cannot and does not limit Governor's clemency power. Williams alleged no cognizable liberty or life interest triggering due process protections during the clemency process or restraining Governor's absolute discretion to grant or deny clemency. Governor is entitled to judgment on the pleadings. The preliminary writ of prohibition is made permanent.

Zel M. Fischer, Judge

All concur.

[11] Applying Justice O'Connor's "minimal" due process standard does not change the conclusion. Justice O'Connor's minimal due process standard is premised on wholly arbitrary state action in both the clemency decision (flipping a coin) and the clemency process (denial of any access). *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). Williams agrees Governor "has the exclusive power over the final decision whether to grant clemency." His argument focuses on Governor's dissolution of the board of inquiry prior to it providing a report and recommendations. Williams' allegations, however, cannot meet Justice O'Connor's standard because he does not allege facts showing "the State arbitrarily denied a prisoner any access to its clemency process." *Id.* To the contrary, Executive Order 17-20 specifically acknowledges "Williams has submitted an application for clemency and requested appointment of a board of inquiry pursuant to Section 552.070 RSMo[.]" Williams alleges the former governor appointed a board of inquiry and he then presented "significant information" to the board, which had six years to consider the case before Governor exercised his constitutional authority to rescind Williams' reprieve. These allegations do not show an arbitrary denial of "any access" to the clemency process under Justice O'Connor's "minimal" due process standard.

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July 12, 2024

Andrew James Clark (via efiling)
Michael J. Spillane (via efiling)
Andrew J. Crane (via efiling)
Gregory M. Goodwin (via efiling)

In Re: State ex rel. Governor Michael L. Parson, Relator, vs. The Honorable S. Cotton Walker, Respondent.
Missouri Supreme Court No. SC100352

Counsel:

Please be advised the Court issued the following order on this date in the above-entitled cause: "Respondent's motion to modify overruled."

Very truly yours,

Betsy AuBuchon

BETSY AUBUCHON

cc:

Tricia J. Bushnell (via efiling)
Charles A. Weiss (via efiling)
Jonathan B. Potts (via efiling)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI ex rel. GOVERNOR MICHAEL L PARSON.	)	
Relator.	)	
vs.	)	WD86751
HONORABLE COTTON WALKER, CIRCUIT JUDGE	)	
Respondent	)	

ORDER

The Court acknowledges the filing of Relator's Petition for Writ of Prohibition or In The Alternative, Mandamus, and the Suggestions in Support of Petition for Writ of Prohibition, or, In The Alternative, Mandamus, on November 29, 2023. Being fully informed, this Court does hereby DENY this petition for writ.

Dated this 30th day of November 2023

Lisa White Hardwick, Presiding Judge
WRIT DIVISION

Pfeiffer, J., concurs

Cc: Hon. Cotton Walker
Andrew J. Clarke, Esq.
Michael F. Spillane, Esq.
Andrew Crane, Esq.
Gregory M. Goodwin, Esq.
Tricia F. Bushnell, Esq.
Charles A. Weiss, Esq.
Jonathan B. Potts, Esq.

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MARCELLUS WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	Case No. 23AC-CC05323
vs.	)	
	)	
MICHAEL L PARSON, in his official capacity as Governor of Missouri,	)	
	)	
	)	
Defendant	)	
	)	

Order

This matter came before the Court on November 7, 2023. The Court received written briefs in advance and heard argument from the parties. Based on the briefs and the argument, the Court hereby **denies**, in part,[1] Defendant Governor Michael Parson's Motion for Judgment on the Pleadings, for the reasons that follow.

Legal Standards

"There are certain well-established principles relating to a motion for judgment on the pleadings." *Cantor v. Union Mut. Life Ins. Co.*, 547 S.W.2d 220, 224 (Mo. App. St. Louis Dist. 1977). In general, "[a] motion for judgment on the pleadings is not favored" because the granting of a such a motion forecloses any further litigation. *See id.* As a result, "[t]he position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss

[1] Because this Court is denying Defendant Governor Parson's Motion for Judgment on the Pleadings, this Order does not address count IV of Plaintiff's Petition for Declaratory Judgment on which the parties consent to judgment on the pleadings. Plaintiff initially filed the Petition for Declaratory Judgment against Defendants Governor Michael Parson and Attorney General Andrew Bailey. At arguments, Plaintiff orally consented to dismiss Defendant Attorney General Bailey from this lawsuit.

meaning that this Court must treat "[t]he allegations of the petition . .as true for the purposes of the motion." *Id* Additionally, "[t]he facts pleaded in the defending party's responsive pleadings are not admitted and are not self-proving." *In re Marriage of Burch*, 310 S.W 3d 253, 259 (Mo. App. E.D. 2010). Accordingly, in order to evaluate the Defendant's motion in this case this Court considers only the well-pleaded facts as alleged in Plaintiff's Petition and, taking those facts to be true for the purposes of this Order, asks whether the Petition has raised any viable questions of law. *See id*

Factual Allegations

Given the standard described above, the Court treats the following material factual allegations from Plaintiff's Petition "as true for the purposes of the motion." *Cantor*, 547 S W 2d at 224.

1. Mr. Williams was sentenced to death in St. Louis for an August 1998 murder Pet ¶¶ 11, 31. Defendant does not dispute this allegation. Ans. ¶¶ 11, 31
2. Mr. Williams is innocent.[2] *Id* ¶¶ 32-36. Defendant disputes this allegation Ans ¶¶ 32-36.
3. In 2017, on the eve of an execution date, Former Governor Eric Greitens appointed a Board of Inquiry to investigate Mr Williams's claim of innocence. *Id* ¶¶ 37-42 Defendant does not dispute this allegation. Ans. ¶¶ 37-42.

[2] At the hearing on November 7, counsel for the Defendant argued that this is not a factual assertion but a legal conclusion. The Court disagrees. It is axiomatic that the question of a criminal defendant's guilt or non-guilt is a question for the jury, as are assessments of individual pieces of evidence or testimony *See In re Winship*, 397 U.S. 358, 362-63 (1970) ("No man shall be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." (cleaned up) (quoting *Davis v United States*, 160 U.S. 469, 487 (1895))).

4. The Board of Inquiry's investigation was ongoing in June of 2023, when Defendant Governor Michael Parson issued Executive Order 23-06 and dissolved the Board. *Id* ¶ 44. Defendant has declined to answer this allegation.[3] Ans. ¶¶ 44.
5. The Board of Inquiry never produced a report or made a recommendation to Governor Greitens or to Governor Parson. *Id* ¶¶ 44, 45, 47. Defendant has declined to answer this allegation. Ans. ¶¶ 44, 45, 47.

Taking those factual assertions as true for the purposes of this motion only, the Court now addresses Plaintiff's claims

Count III

Plaintiff argues that the language of the statute that authorizes the Governor to appoint a Board of Inquiry prohibits the Governor from dissolving the Board unless and until it has "ma[d]e its report and recommendations to the governor." RSMo. § 552.070. Defendant argues that because the statute addresses the Governor's discretionary powers under Article IV, Section 7, of the Missouri Constitution to "grant reprieves, commutations and pardons after conviction," the Governor also has the power to dissolve the Board at any point. *Id*

The statute reads as follows:

> In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law bearing upon whether or not a person condemned to death should be

[3] Plaintiff alleges that his counsel communicated with the Board of Inquiry during their investigation and that counsel provided the Board with various documents, but those communications were understood to be confidential. Counsel would file those communications under seal if ordered by this Court. This Court had stayed discovery pending resolution of this dispositive motion. Now that this Court has denied Defendant's Motion for Judgment on the Pleadings, Defendant Parson is ordered to respond to Plaintiff's discovery requests by December 1, 2023, consistent with this Order and subject to Protective Order.

> executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

Id.

The Court's objective in interpreting a statute is to ascertain the intent of the legislature. *Pavlica v. Dir. Rev.*, 71 S.W.3d 186, 189 (Mo. App. W.D. 2002). It is axiomatic that to do so, the Court must "consider the words used in their plain and ordinary meaning." *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. banc 2018); *see also Missouri State Conf. of NAACP v. State*, 607 S.W.3d 728 (Mo. banc 2020); *State v. Jones*, 479 S.W.3d 100, 106 (Mo. banc 2016); *Wolff Shoe Co. v. Director of Rev.*, 762 S.W.2d 29, 31 (Mo. banc 1988). "A court may not add words by implication to a statute that is clear and unambiguous." *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993). Moreover, the Court must "presume the legislature intended every word, clause, sentence, and provision of a statute to have effect and did not insert superfluous language into the statute." *Algonquin Golf Club v. State Tax Comm'n*, 220 S.W.3d 415, 421 (Mo. App. E.D. 2007).

At the outset, the Court notes that the meaning of RSMo. section 552.070, in this context, is a question of first impression. Although other courts have addressed the scope of the Governor's authority to *appoint* a Board of Inquiry, no court has ever addressed the question of when and whether the Governor has the authority to *dissolve* a Board of Inquiry. *See Roll v. Carnahan*, 225 F.3d 1016, 1018 (8th Cir. 2000) (per curiam) ("Appointment of a board of inquiry is . . . left to the governor's sole discretion."). Accordingly, the Court focuses its analysis of the statute on two distinct questions: first, is a Board of Inquiry, once appointed, required to produce a report and

make a recommendation to the Governor; and second, what are the consequences if a Board fails to produce a report and make a recommendation to the Governor?

The answer to the first question is dictated by the statute's language. Giving the word "shall" in the statute its plain and ordinary meaning, the Board, once appointed, had an affirmative obligation to produce a report and make recommendations to the Governor. *See Frye v. Levy*, 440 S.W.3d 405, 409 (Mo. banc 2014). The Defendant emphasizes the statutory language "in his discretion," arguing that those words make the ongoing existence of a Board of Inquiry "discretionary" once it has been appointed. The Court is unpersuaded by this argument for two reasons. First, as noted above, "in his discretion" in RSMo. § 552.070 refers to the *appointment* of the Board, not to its dissolution. And second, taken in context, the discretionary appointment of a government body does not imply the authority to remove such a body. To the contrary, the Court notes that the Legislature likely used the language it did intentionally, in order to draw a distinction between circumstances where the Governor's appointment power is wholly discretionary versus where it is constrained by the advice and consent of the Senate. *Compare* § 552.070 ("the governor may, in his discretion, appoint a board of inquiry") *with* § 174.300 ("the governor shall with the advice and consent of the senate, appoint a six-member board of regents to assume the general control and management of Harris-Stowe College"). There is a fundamental difference between the Governor's authority to appoint a Board in his discretion and the Board's ongoing existence being discretionary.

Assuming, as the Court must for the purposes of this motion, that the Board in this case did not produce a report or make recommendations to the Governor, the Board had not satisfied its statutory obligation at the time Governor Parson dissolved it and the dissolution of the Board therefore violated the statute.

This leads directly to the second question: what are the consequences if a Board fails to produce a report and recommendation to the Governor, as required by the statute? Because the statute is silent as to this question, the Court must turn to tools of statutory construction, but the analysis begins, as it must, with the language in the statute *See Pavlica*, 71 S.W.3d at 189 Notably, although the statute expressly grants the Governor the discretionary authority to *appoint* a Board of Inquiry, it says nothing about his authority to dissolve such a Board If the legislature had intended to grant the Governor that power (to dissolve the Board, and to do so expressly before its statutory duty was fulfilled) it would have said so, and the Court lacks the authority to grant the Governor that authority "by implication." *See Asbury*, 846 S.W 2d at 202 n.9. The Legislature knew how to grant the Governor the authority to dissolve the Board or remove its members, as evidenced by other statutes it enacted. *E.g*, RSMo § 172.300 ("The curators may appoint *and remove*, at discretion, the president, deans, professors, instructors and other employees of the university." (emphasis added)), *id* § 620.586 ("The governor may appoint any number of other nonvoting, ex officio members *who shall serve at the pleasure of the governor*." (emphasis added)); *id* § 374.080 ("The director may appoint a deputy, *who shall be subject to removal at pleasure by the director*." (emphasis added)); *id* § 105.955 ("The governor, with the advice and consent of the senate, may remove any member *only for substantial neglect of duty, inability to discharge the powers and duties of office, gross misconduct or conviction of a felony or a crime involving moral turpitude*." (emphasis added)).

Of course, the Legislature could not have intended to create a circumstance in which the Governor appoints a Board of Inquiry, the Board refuses to issue a report and make recommendations, and the Board's refusal has the practical effect of indefinitely stalling the execution of a validly imposed sentence. But under such circumstances, the Governor is not

powerless to compel a decision from the Board. When, as here, a statute regulating the conduct of a government actor or body uses the word "shall" to create an affirmative obligation on the government to perform the action described therein, the Court's interpretive duty is to determine whether the statute is "mandatory" or "directory." *See Frye*, 440 S.W.3d at 409. If the statute provides a remedy for the government's failure to comply with its statutory duty, the statute is mandatory; if it is silent as to remedy, the statute is directory. *Id* Here, the statutory uses the word "shall" but is silent as to remedy, meaning that it is directory. And when the Court determines that a statute is directory, the exclusive remedy is "an action for mandamus . . to compel a decision " *Farmers & Merchants Bank & Trust Co v Dir Rev.*, 896 S W.2d 30, 33 (Mo. banc 1995) Accordingly, the Governor's remedy under the statute in question here was a mandamus action to compel a decision from the Board, but the Governor lacked the authority to dissolve the Board, and the Court therefore denies the Governor's motion as to this count.

While denying the Governor's motion on this point, the Court notes again, as stated during the hearing, that RSMo §552.070 does not compel a governor to follow or reject the Board's report and recommendations once received. Even as the statute specifically references a governor's constitutional powers to "...grant reprieves, commutations and pardons after conviction " (RSMo §552.070), it does not direct a governor *must* do so even if the Board recommends any such action.

Counts I and II

"The due process clauses of the United States and Missouri constitutions prohibit the taking of life, liberty or property without due process of law." *Jamison v. State*, 218 S.W.3d 399, 405 (Mo. banc 2007) (citing U S. Const. amend XIV § 1, Mo Const art I § 10). This prohibition

constrains "governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 322 (1976)).

The Supreme Court of the United States has long held that due process protects individuals against two kinds of government action. Substantive due process prevents the government from engaging in conduct that "shocks the conscience" or interferes with rights that are 'implicit in the concept of ordered liberty." *See Herrera v. Collins*, 506 U.S. 390, 435-36 (1993) (Brennan, J., dissenting) (quotation marks omitted). Even if a governmental action that deprives a person of life, liberty, or property survives substantive due process scrutiny, procedural due process requires that the governmental action "must still be implemented in a fair manner." *Id.*

The familiar formulation for analyzing a procedural due process claim is based on a weighing of three factors:

> (1) First, the private interest that will be affected by the official action; (2) second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 353.

Weighing those three factors in this fact scenario, results in a denial of the Governor's Motion for a Judgment on the Pleadings. Here, Plaintiff asserts that he has a liberty interest in not being executed as an innocent person and in an accurate clemency decision based on the Governor's fair and complete consideration of his application. Those interests, he alleges, trigger procedural due process protections. Defendant responds that because clemency is wholly discretionary, and because the Board of Inquiry statute references clemency, Plaintiff has no protected interest in the proceedings of the Board of Inquiry. For the purposes of this motion, the Court must accept as true Plaintiff's allegation that the Board of Inquiry was prevented from

completing its investigation and producing the report and recommendations required by law. Accordingly, the core dispute between the parties boils down to whether Plaintiff has alleged a sufficiently weighty liberty or life interest to trigger procedural due process protections. For the reasons that follow, the Court holds that he has. To rule otherwise, in any interpretation of Mo Const. art. I § 10, when an individual party's life is quite literally at stake, is constitutionally absurd

Plaintiff's primary contention is that he has a due process interest in not being executed because he is innocent and because Governor Greitens appointed a Board of Inquiry to investigate his innocence, he has a protected interest in the results of that investigation For the purposes of this motion, the Court accepts as true that Plaintiff is factually innocent.

Although a state need not create a process by which a condemned person may "demonstrate[e] his innocence," once the state has done so, a condemned person has a due process interest in availing himself of that process. *Dist. Att'y Office for Third J Dist V Osborne*, 557 U.S. 52, 68 (2009), *Hicks v Oklahoma*, 447 U.S. 343, 346 (1980); *Wolff v McDonnell*, 418 U S 539, 556-57 (1974)

In *Osborne*, for example, the plaintiff identified two "potential" sources of his liberty interest: (1) "the Governor's constitutional authority to 'grant pardons, commutations, and reprieves,'" 557 U S. at 67-68 (quoting Alaska Const., art III § 21), and (2) "demonstrating his innocence with new evidence," pursuant to a state law," *id* at 68 (citing Alaska Stat §§ 12.72.020(b)(2), 12.72 010(4)) The Court "readily disposed" of the first asserted liberty interest, but it acknowledged that Alaska created a liberty interest when it passed the law at issue and then proceeded to address the procedure Osborne was due under state law. *Compare id* at 67-68 ("noncapital defendants do not have a liberty interest in traditional state executive clemency, to

which no particular claimant is *entitled* as a matter of state law") *with id.* at 68 ("Osborne does, however, have a liberty interest in demonstrating his innocence with new evidence under state law.").

The Court acknowledges that Plaintiff was tried, convicted, and sentenced to death, and that he has already availed himself of post-conviction proceedings in state and federal courts. Nevertheless, "[e]ven those in our society who have been lawfully deprived of their freedom retain residual, substantive liberty interests protected by the Fourteenth Amendment." *Harvey v. Horan*, 285 F.3d 298, 312 (4th Cir. 2002) (mem.) (Luttig, J., statement respecting the denial of rehearing en banc) (collecting cases). Thus, "[t]he mere fact that [Plaintiff] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment." *Id.* (quoting *Youngberg v. Romero*, 457 U.S. 307, 315 (1982)). To the contrary, it is a "fundamental legal principle that executing the innocent is inconsistent with the Constitution" and "[r]egardless of the verbal formula employed[,] the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring).

Plaintiff has a liberty and a life interest in demonstrating his innocence that flows from an expectation created by state law, namely, section 552.070, RSMo., and Executive Order 17-20. When the Missouri Legislature enacted section 552.070, RSMo., it created a mechanism by which a prisoner may "demonstrat[e] his innocence." *Id.* The only difference between the Alaska law at issue in *Osborne* and the Missouri law at issue here is that section 552.070 RSMo., does not trigger due process on its own terms. Instead, under 552.070 RSMo., a condemned person obtains a liberty interest once a governor empanels a Board of Inquiry. Accordingly, when Governor Greitens

appointed the Board of Inquiry to investigate Plaintiff's innocence, that executive order triggered Plaintiff's due process rights. Those due process rights must not be deprived

Conclusion

The Court must accept as true Plaintiff's well-pleaded factual allegations. Under that standard, the Court holds that Plaintiff has asserted viable legal claims upon which relief could be granted, and the Court therefore DENIES Defendant's Motion for Judgment on the Pleadings.

The Court having ruled on the Motion for Judgment on the Pleadings, does however continue the stay on discovery until December 1, 2023. Absent superseding authority by that date, the parties shall submit a proposed Protective Order regarding the discovery requests related to the Board of Inquiry and especially any information gathered by that Board which is required by the statute to be held by it and the Governor in strict confidence, but such pending discovery requests served shall be answered subject to said Protective Order once signed by this Court.

SO ORDERED, ADJUDGED, AND DEGREED

On November 16, 2023

Hon. Judge S. Cotton Walker
Division III, Circuit Judge
19th Judicial Circuit, State of Missouri

Vernon's Annotated Missouri Statutes
Title XXXVII. Criminal Procedure [Chs. 540-552]
Chapter 552. Criminal Proceedings Involving Mental Illness (Refs & Annos)

V.A.M.S. 552.070

552.070. Power of governor to grant reprieves, commutations and pardons

Currentness

In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

Credits
(L.1963, p. 674, § A(§ 7).)

Notes of Decisions (2)

V. A. M. S. 552.070, MO ST 552.070
Statutes are current through the end of the 2024 Second Regular Session of the 102nd General Assembly. Constitution is current through the November 8, 2022 General Election.

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