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.

End of Document

EXECUTIVE ORDER
17-20

WHEREAS, Marcellus Williams stands convicted of first degree murder and is currently awaiting execution of a sentence of death, which is scheduled to occur on August 22, 2017; and

WHEREAS, Williams contends that newly discovered DNA evidence, which was not available to be considered by the jury that convicted him, proves his innocence, and

WHEREAS, Article IV, Section 7 of the Missouri Constitution provides that "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 ."; and

WHEREAS, the General Assembly, in furtherance of these constitutional powers, has given the Governor the discretion to 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 . whether the person's sentence should be commuted," § 552.070 RSMo , and

WHEREAS, Williams has submitted an application for clemency and requested the appointment of a Board of Inquiry pursuant to Section 552.070, RSMo , to review evidence and provide the Governor with a recommendation on Williams' claim of innocence and application for clemency

NOW THEREFORE, I, ERIC R GREITENS, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and laws of the State of Missouri, hereby invoke the provisions of Section 552 070, RSMo , and establish a Board of Inquiry in the matter of Marcellus Williams, an inmate condemned to death, and hereby order a stay of execution for Williams until such time as the Governor makes a final determination as to whether or not he should be granted clemency

In furtherance of this Order, I hereby direct the following:

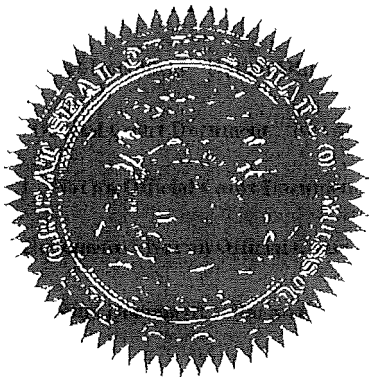
1 The Board will be comprised of five members appointed by the Governor

2 The Board shall consider all evidence presented to the jury, in addition to newly discovered DNA evidence, and any other relevant evidence not available to the jury The Board shall assess the credibility and weight of all evidence.

3 Pursuant to Section 552.070, RSMo., the Board shall have subpoena power over persons and things The Board may apply to the Circuit Court of Cole County, or any other court of competent jurisdiction, for a subpoena.

4. Pursuant to Section 552 070, RSMo., the Board shall close all of its proceedings and hold all collected information in strict confidence.

5. Pursuant to Section 552.070, RSMo., the Board of Inquiry shall report and make a recommendation to the Governor as to whether or not Williams should be executed or his sentence of death commuted.



IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, on this 22nd day of August 2017

Eric R. Greitens
Governor

ATTEST

John R. Ashcroft
Secretary of State

EXHIBIT 1

EXECUTIVE ORDER
23-06

WHEREAS, Executive Order 17-20 was issued on August 22, 2017, establishing a Board of Inquiry (Board) to assist the Governor in determining if Marcellus Williams should receive clemency from his sentence of death, and

WHEREAS, under Section 552.070, RSMo, the Board shall make a report and recommendation to the Governor, and

WHEREAS, under Section 552.070, RSMo, all information gathered by the Board, and any report or recommendation to the Governor, shall be held by the Governor in strict confidence

NOW, THEREFORE, I, MICHAEL L PARSON, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and the laws of the State of Missouri, specifically Article IV, Section 7 of the Constitution of the State of Missouri and Section 552 070, RSMo, do hereby rescind Executive Order 17-20, thereby dissolving the Board of Inquiry established therein With this Executive Order, I remove any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, on this 29th day of June, 2023

MICHAEL L PARSON
GOVERNOR

ATTEST

JOHN R ASHCROFT
SECRETARY OF STATE

IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT

MARCELLUS WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	Case Number _____
	)	
vs.	)	
	)	
MICHAEL L. PARSON, in his official capacity as Governor of Missouri,	)	
	)	
AND	)	
	)	
ANDREW BAILEY, in his official capacity as Attorney General of Missouri,	)	
	)	
Defendants.	)	

PETITION FOR DECLARATORY RELIEF

When Felicia Gayle was murdered in 1998, her killer left the murder weapon, a kitchen knife, lodged in her neck. The handle of the knife contained a partial male DNA profile that almost certainly belongs to the person responsible for Ms. Gayle's murder. Ms. Gayle's killer is also very likely responsible for the bloody footprints leading away from her body; for the bloody fingerprints that law enforcement lost decades ago; and for the head and pubic hairs that investigators recovered from the carpet on which she was found.

Modern testing proves that Marcellus Williams's DNA is not the DNA on the murder weapon; his shoes did not make the bloody impressions at the crime scene; and the hairs recovered from around Ms. Gayle's body did not come from Mr. Williams. Nevertheless, absent judicial intervention, Mr. Williams will be executed for Ms. Gayle's murder.

Presented with these facts, former Governor Eric Greitens invoked Missouri Revised Statutes section 552.070 and, for only the third time in the history of the state, convened a Board of Inquiry ("the Board"). Governor Greitens's order specifically instructed the Board to investigate Mr. Williams's claim "that newly discovered DNA evidence, which was not available to be considered by the jury that convicted him, proves his innocence." Exec. Order No. 17-20 (Aug. 22, 2017), attached as Exhibit 1. Under the Order, Governor Greitens also issued "a stay of execution for Williams until such time as the Governor makes a final determination as to whether or not he should be granted clemency." *Id.* The Board began its investigation and solicited a wide range of information from Mr. Williams and the State as recently as 2020. On information and belief, the State never submitted a reply in response to the Board's most recent solicitation for information.[1]

While the investigation was ongoing, Governor Greitens resigned and Defendant Michael L. Parson became the 57th governor of Missouri. On information and belief, by 2023, the Board still had not issued a report or made final a recommendation to the Governor. Nevertheless, on June 29, 2023, Governor Parson issued Executive Order 23-06, which, for the first time in the Missouri's history, purported to "rescind Executive Order 17-20, thereby dissolving the Board of Inquiry established therein." Exec. Order No. 23-06 (June 29, 2023), attached as Exhibit 2. Governor Parson also "remove[d] any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution." *Id.* The

[1] In the course of communicating with the Board of Inquiry, counsel provided various documents and other materials to the members of the Board and Defendant Bailey under a representation of confidentiality. Accordingly, to honor that representation, counsel have not included the details of those communications in this Petition or any of the exhibits attached hereto. However, undersigned counsel have prepared those communications in the form of a sealed exhibit and, at the Court's order, will file them in connection with this litigation.

next day, Defendant Andrew Bailey moved the Supreme Court for a new execution date. Renewed Mot. to Set Execution Date, *State v. Williams*, Case No. SC83934 (June 30, 2023), attached as Exhibit 3.

This Petition for Declaratory Judgment seeks to invalidate Executive Order 23-06 and to declare that Missouri Revised Statutes section 552.070 does not grant the Governor the authority to disband an established Board of Inquiry in the midst of its investigation, before it has satisfied its statutory obligation to produce a report and recommendation. Specifically, this Petition seeks declarations that Executive Order 23-06 violated Mr. Williams's right to the due process of law guaranteed under the Missouri and United States Constitutions; violated 42 U.S.C. Section 1983 by depriving Mr. Williams of his federal due process rights; and exceeded the Governor's authority under the statute and therefore violated Mr. Williams's rights, and that it would be a violation of Mr. William's right to the due process of law guaranteed under the Missouri and United States Constitutions and a violation of the open courts provision of the Missouri Constitution to execute Mr. Williams before he can challenge the dissolution of the Board of Inquiry. Additionally, Mr. Williams seeks to enjoin Defendant Bailey from pursuing an execution warrant unless and until Executive Order 17-20 is reinstated and the Board is permitted to satisfy its obligation to produce a report and recommendation to the Governor.

Parties

1. Plaintiff Marcellus Williams is a death-sentenced inmate who has been housed at Potosi Correction Center, Missouri Division of Adult Institutions, in Washington County, Missouri since 2001. He has always maintained his innocence.

2. Defendant Michael L. Parson is the duly elected and acting Governor of the State of Missouri. Governor Parson is named is his official capacity.

3. Defendant Andrew Bailey is the Attorney General of the State of Missouri. Mr. Bailey is named in his official capacity.

Jurisdiction and Venue

4. Mr. Williams brings this action for declaratory and injunctive relief pursuant to Missouri Revised Statutes sections 527.010, and 552.070, and Missouri Rules of Civil Procedure 87 and 92.02(c).

5. This Court has jurisdiction and venue is proper in this Court pursuant to section 508.010 RSMo. because the office of the Governor of Missouri and the Attorney General of Missouri are located in Cole County, Missouri, where they perform their official duties.

History of Section 552.070, RSMo.

6. Section 552.070, RSMo., was enacted in 1963, along with a host of other changes to the statutory scheme governing individuals sentenced to death. *See* S.B. 143 § A(7), 1963 Mo. Laws 674, enacted at 552.070, RSMo. Since 1963, the Legislature has made no changes to section 552.070, RSMo.

7. The statute was enacted against a backdrop of increasing national scrutiny of the death penalty generally and specifically, concerns that innocent people and those undeserving of death were being wrongfully executed. *See e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Rudolph v. Alabama*, 375 U.S. 889, 890 (1963) (Goldberg, J., dissenting from denial of certiorari).

8. Since 1963, the governors of Missouri have invoked the power to empanel a board of inquiry under section 552.070, RSMo., just three times, and each time, the governor also stayed the condemned man's execution pending a report and recommendation from the board. Those three men are:

a. Lloyd Schlup (1994). Governor Carnahan stayed Mr. Schlup's execution and convened a board of inquiry "to review and provide a recommendation on [Mr. Schlup's] claim of innocence." Exec. Order (Jan. 12, 1994), attached as Exhibit 4. Mr. Schlup's case involved a prison murder with conflicting eyewitness accounts and limited physical evidence for testing, and Mr. Schlup maintained his innocence. His attorneys submitted a clemency application to Governor Carnahan, who stayed the execution and empaneled a board of inquiry just hours before Mr. Schlup was scheduled to be executed. *See generally*, Sean O'Brien, *Mothers and Sons: The Lloyd Schlup Story*, 77 UMKC L. REV. 1021 (2009). Although Governor Carnahan expressed doubt about the veracity of newly discovered evidence (including a videotape from the prison cafeteria showing Mr. Schlup mere moments after the murder), he empaneled a board because the new evidence had "not been tested in court." *Execution Is Stayed in Missouri*, N.Y. TIMES, Nov. 19, 1993, at A28. Before the board reached a final decision, the Supreme Court of the United States took up Mr. Schlup's case and ordered a hearing on his claim of innocence. *See Schlup v. Delo*, 513 U.S. 298 (1995). In November of 1996, the district court judge who had previously denied Mr. Schlup relief based on a cold record alone held a hearing at which witnesses testified to Mr. Schlup's innocence. Based on the live testimony, she granted Mr. Schlup relief and in May of 1996, she issued an order granting Mr. Schlup a new trial. *See Schlup v. Bowersox*, No. 92:CV00443 JCH (E.D. Mo. May 6, 1996).

b. William Theodore Boliek, Jr. (1997). Governor Carnahan stayed Mr. Boliek's execution and convened a board of inquiry to investigate whether to act on Mr. Boliek's clemency application, which was based largely on a (meritorious) claim of ineffective assistance of counsel that he was procedurally barred from presenting in state court. *See* Exec. Order 97-10 (Aug. 25, 1997), attached as Exhibit 5; *In re: William T. Boliek*, Pet. for Clemency. Before the governor could fully empanel the board, however, he was killed in a plane crash. *See* Burnett, *Petitions for Life*, 6 RICH. J.L. & PUB. INT. at 6 & n.27. Although Governor Carnahan died before he selected board members, a court later determined that only he could overturn the stay, and Boliek will therefore never be executed.

c. Marcellus Williams (2017). Governor Greitens stayed Mr. Williams's execution "until such time as the Governor makes a final determination as to whether or not he should be granted clemency" and convened a board of inquiry using language very similar to that used the 1994 order: "The Board shall consider all evidence presented to the jury, in addition to newly discovered DNA evidence, and any other relevant evidence not available to the jury." Ex. 1. The details of the stay, Executive Order 17-20, and the current status of the case are described in greater detail below.

9. No condemned person in Missouri whose case has been stayed pending a decision from a board of inquiry has ever been executed.

10. Until now, no court has ever interpreted section 552.070, RSMo. or clarified the scope of the governor's power pursuant to it.

Marcellus Williams Is Sentenced to Death

11. In early August of 1998, Felicia Gayle's husband found her murdered in the hallway of their home in University City, Missouri. She had been stabbed 43 times with a kitchen knife, which the assailant left in her neck. Police collected physical evidence from the crime scene, including the knife, the victim's clothing, hair that was inconsistent with the victim and her husband, and bloody finger and footprints that could not be linked to the victim's husband or any first responders.

12. At the outset, investigators "suspect[ed] the killing [was] linked to three other burglaries on the street," but on information and belief, those burglaries were never solved. *See* Michael D. Sorkin, *Police still chase clues in three unsolved area slayings*, ST. LOUIS POST-DISPATCH, Aug. 11, 1999. Additionally, the medical examiner who performed Ms. Gayle's autopsy, Dr. Mary Case, alerted detectives to the possibility that Ms. Gayle's murder was linked to another home invasion stabbing of a white woman in the St. Louis area. As a police report noted, "Dr. Case was especially concerned with the unusual factor of the victim being found stabbed with the knife still in her body. She noted this aspect of a stabbing death is extremely rare." *See* University City Police Department, Supp. Investigative Disposition Rep. 1 (Aug. 26, 1998), attached as Exhibit 6.

13. Despite the wealth of physical evidence and the apparent links between Ms. Gayle's murder and other crimes, the case went unsolved for more than a year.

14. During that year, the murder was widely publicized, in part because it appeared to be part of a pattern of related offenses; in part because Ms. Gayle had worked for the *St. Louis Dispatch*; and in part because her husband, frustrated with the lack of progress on the investigation, offered a $10,000 reward for information. Coverage of the murder in the local news included, among other details, highly specific information about property that was missing from Ms. Gayle's home.

15. Only after news of the reward and details of the crime became public did investigators identify any substantial leads. Specifically, in early February of 1999, a man named Henry Cole was arrested for violating his probation, and a court ordered he return to the Missouri County Workhouse, a city jail facility that doubled as an annex for substance abuse treatment. Mr. Cole was no stranger to the criminal legal system; his arrest in February of 1999 was his fifth in the previous four years, and he had been in and out of jails and prisons across the United States constantly since the 1960s for crimes that included armed robbery and homicide.

16. On information and belief, by the 1990s, Mr. Cole had worked out a system to avoid serving long prison sentences, even for very serious crimes: he acted as an informant for the police in exchange for favorable plea negotiations and sentencing outcomes.

17. On information and belief, Mr. Cole was particularly desperate in February of 1999. He had contracted HIV and wrote to prosecutors that "[i]f I go to prison I will surly [sic] die." *See* Letter from Henry Cole (Feb. 17, 1999), attached as Exhibit 7. Moreover, for the first time in his life, he was facing the real prospect of substantial prison time. In 1995, after Mr. Cole robbed a bank, the State had filed notice of its intention to charge Mr. Cole as a persistent and prior offender and to seek a fifteen-year prison term; after receiving ten years' probation for that crime, he violated his probation repeatedly, including by committing another robbery. *See* Mem. From

Kellee Koncki RE: *State of Missouri v. Henry Lee Cole*, Cause No. 941-4190 (July 25, 1995), attached as Exhibit 8.

18. On information and belief, while Mr. Cole was searching for a way to avoid serving a long prison term and leave St. Louis for good, he saw news of the $10,000 reward for information related to Ms. Gayle's murder and began to gather information about the crime.

19. Then, in late August of 1998, Mr. Williams was arrested for an unrelated burglary, and in April of 1999, he was placed in the same jail cell as Mr. Cole. The two men shared a cell for nearly two months. During that time, Mr. Cole told his son that "he had 'something big coming,'" which the son later realized was "the $10,000 reward money offered by the victim's family." *See* Aff. of Johnifer La'Royce Griffin at ¶ 31, *Williams v. State*, No. CR695-1441FX, Ex. 4 (Aug. 14, 2003), attached as Exhibit 9. Notably, although Mr. Williams had a prior record and had spent significant time in jail, he had never before confessed to a cellmate, nor had he ever been accused of a crime similar to the attack on Ms. Gayle. Moreover, even with the promise of reward money, no other inmate came forward to report that Mr. Williams had confessed.

20. Nevertheless, in June of 1999, that is the story that Mr. Cole fed to police. Despite the fact that he was facing substantial prison time, and despite the fact that he had a long track record of violating probation and parole and walking away from jails, on June 4, 1999, Mr. Cole was once again released from the workhouse. Within an hour of his release, Mr. Cole called police and, after receiving reassurance that he would receive favorable treatment and that police were "gonna pay me fast" if he helped secure a conviction, he told them that Mr. Williams had confessed in excruciating detail at the workhouse.[2] *See* Recorded Police Interview of Henry Cole (June 4,

[2] Even in his first conversation with the police, Mr. Cole's story included elements that were both internally inconsistent and inconsistent with aspects of the crime scene. For example, in a recorded interview with the police, Mr. Cole insisted that Mr. Williams confessed to taking Ms. Gayle's

1999), *State v. Williams*, No. 99CR-5297, State's Ex. 6. Mr. Cole also told police to contact Mr. Williams's former girlfriend, Laura Asaro, because, Mr. Cole insisted, Mr. Williams had also likely confessed to her.

21. In November of 1999, officers met with Ms. Asaro, who initially assumed that they were there to arrest her on outstanding warrants for drug possession and prostitution. Notes in the investigative file described the tactics police used to extract information from Ms. Asaro:

For L.A.:

Interviewer must be "low-key".

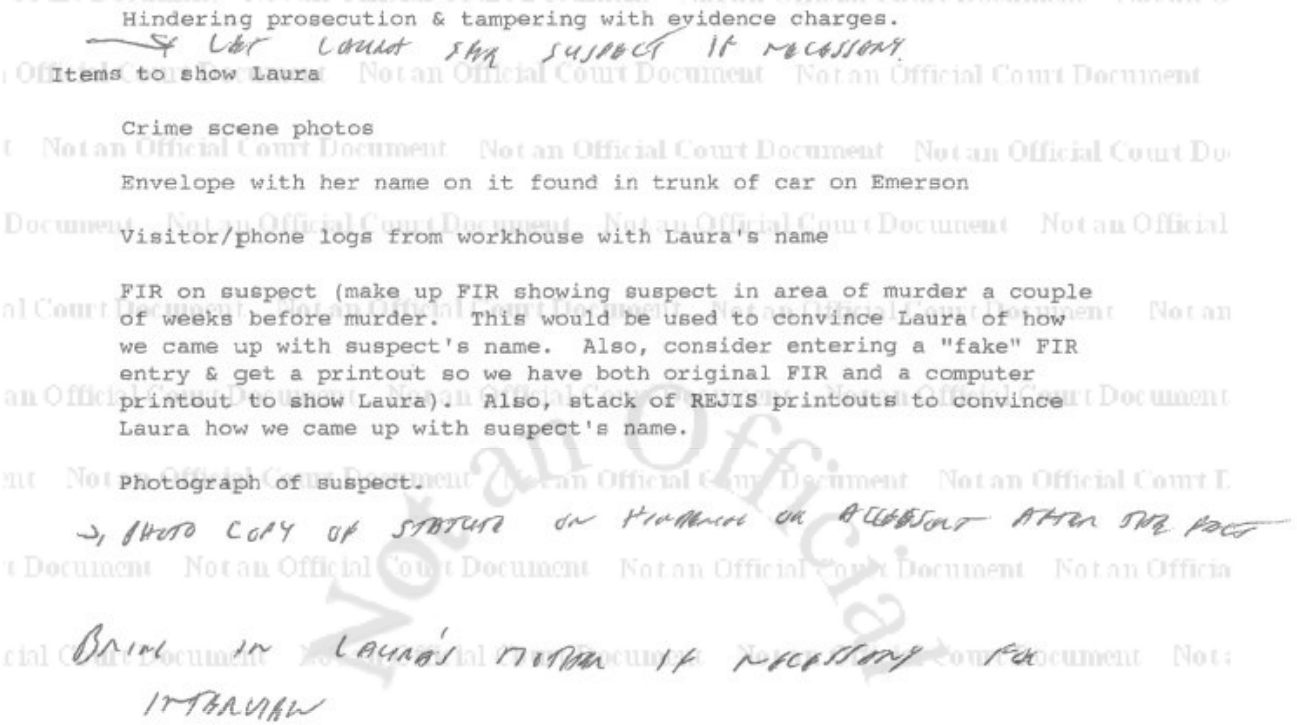
Despite her arrest history, she will be afraid of legal ramifications.

Interviewer should be an "obvious detective" wearing a shoulder holster. He believed I should be involved in this interview.

If her mother can be persuaded to assist, she should be brought unexpectedly into the interview and should be loving and encouraging of her daughter.

Note: Dr. Rabun has high regard of the power of mothers over their grown children. Even if the mother is/was abusive and uncaring, the child still craves the approval and attention of her.

purse from upstairs, but Mr. Picus told police that she always kept her purse in the kitchen. *See id.* Mr. Cole also told police that Mr. Williams confessed to stealing "some jewelry" but Mr. Picus confirmed that no jewelry was missing from the house. *Id.* Similarly, Mr. Cole told police that Mr. Williams confessed to choosing the Gayle/Picus neighborhood because "it looked like a lot of houses was deserted," when in reality nearly all of the homes in the neighborhood were well kept and occupied. Additionally, Mr. Cole's story evolved each time he talked to police. For example, in his first conversation with police, Mr. Cole repeatedly told them that Mr. Williams "confessed" to him by "rapping about it," but in a later deposition, he testified that Mr. Williams confessed in the course of a "general conversation." *Compare id. with* Dep. of Henry Cole, *State v. Williams*, No. 99CR-5297 (Apr. 2, 2001). In his first conversation with police, Mr. Cole never mentioned Mr. Williams wearing gloves (and he had to be prompted by police to describe Mr. Williams supposedly cleaning up after the murder), whereas in his testimony at trial, Mr. Cole described Mr. Williams wearing gloves and cleaning up in detail. *Compare* Recorded Police Interview of Henry Cole (June 4, 1999) *State v. Williams*, No. 99CR-5297, State's Ex. 6, *with State v. Williams*, No. 99CR-5297, Tr. 2400 (June 12, 2001).



Hindering prosecution & tampering with evidence charges.

Items to show Laura

Crime scene photos

Envelope with her name on it found in trunk of car on Emerson

Visitor/phone logs from workhouse with Laura's name

FIR on suspect (make up FIR showing suspect in area of murder a couple of weeks before murder. This would be used to convince Laura of how we came up with suspect's name. Also, consider entering a "fake" FIR entry & get a printout so we have both original FIR and a computer printout to show Laura). Also, stack of REJIS printouts to convince Laura how we came up with suspect's name.

Photograph of suspect.

City of University City, Inter-Office Communication, Interview Laura Asaro & Mem. to Capt. Keller from Det. Dunn (Nov. 5, 1999), attached as Exhibit 10.

22. Like Mr. Cole, Ms. Asaro eventually cooperated with police, but only after they reassured her she would be entitled to favorable treatment and reward money. After prolonged questioning, Ms. Asaro told the police that Mr. Williams had confessed to her, although the details she recalled were inconsistent with Mr. Cole's story; inconsistent with the crime scene evidence; and inconsistent with various details in police reports. Like Mr. Cole's story, Ms. Asaro's story to the police changed over time. Ms. Asaro also led police to a pawn broker who in turn led them to the laptop stolen from the Gayle/Picus house; the pawn broker later testified, by affidavit, that he got the laptop from Mr. Williams, but that Mr. Williams also "told [him] that the computer belonged to a girlfriend, Laura Asaro," and that Ms. Asaro had given Mr. Williams the computer to sell. Aff. of Glenn Roberts, Board of Inquiry ¶ 12, 18 (Sept. 9, 2020), attached as Exhibit 11.

23. Based on the self-serving accusations by Mr. Cole and Ms. Asaro, police arrested Mr. Williams for Ms. Gayle's murder on November 29, 1999. Later, Mr. Cole and Ms. Asaro were in fact paid for their testimony and both received favorable resolutions of their pending criminal charges.

24. As was the case with Ms. Asaro, police documented their tactics for investigating and interrogating Mr. Williams, who is Black:

> For M.W.:
> We want to raise his anxiety level, make him sweat.
>
> Use a young W/M officer for the prisoner pick-up, the officer cannot be "cocky" or confrontational. If Detectives have to do some paperwork for the release, they should stay out of sight of the suspect, however, the suspect should be clear he is being taken to U. City. When asked why he is being taken to U. City, the officer should respond, "You'll have to talk to the detectives." He should use a police car so the suspect can talk to the officer. Hoysik came to mind and was coming out of the booking room when I was taking Dr. Rabun out and I grabbed him and he was thought to be an excellent choice.
>
> After arrival at the station, the officer should place the suspect in a holdover cell by himself, as the first floor. He should be made to wait as long as possible, with people opening the door and looking at him, but not talking, perhaps whispering to each other. Maybe taking his mugshot into the cell and looking at the photo comparing to him. There should be a flurry of activity and suppressed excitement in the air. (This shouldn't be too hard to convey!)
>
> The interview room must have no window and no distractions.
>
> All detectives should wear shoulder holsters so it is obvious who the detectives are and provide more anxiety.
>
> Rabun thinks a young B/M detective is the best choice for the interview. I grabbed Larry Hampton, and Dr. Rabun approved, saying he should "loose the tie". He remarked that older B/M police are perceived to be "Uncle Toms" to this type of suspect. He also approved of Sgt. Coleman.

See Ex. 10.

25. Following Mr. Williams's arrest in November 1999, the court appointed public defenders to represent him. Recognizing the importance of the physical evidence collected from the crime scene, counsel repeatedly moved for DNA and other forensic testing and sought continuances to allow testing to take place. The trial court denied these motions.

26. Specifically, trial counsel sought to retain experts to examine hairs, bloody footprints, and bloody fingerprints from the crime scene—all of which were foreign to the victim, her husband, and first responders at the crime scene—as well as any DNA on the murder weapon. This evidence was highly probative of the guilt of the actual perpetrator, but none of it implicated Mr. Williams:

a. Pubic hairs at the scene were inconsistent with Mr. Williams;

b. Head hairs at the scene were inconsistent with Mr. Williams; and

c. Bloody footprints were inconsistent and not made by any of Mr. Williams's shoes, which were of a different size than the footprints.

27. The government lost the bloody fingerprints from the scene before they could be tested against Mr. Williams or any other potential suspects.

28. On information and belief, until 2015, no DNA testing was conducted on the murder weapon.

29. Accordingly, at the 2001 trial, the State had no choice but to base its case on testimony from Mr. Cole and Ms. Asaro, because, as the prosecutor told the jury, "I don't have to have forensic evidence" connecting Mr. Williams to the crime scene. *See State v. Williams,* No. 99CR-5297, Tr. 3061 (June 15, 2001).

30. As noted above, Mr. Cole and Ms. Asaro had multiple incentives to help the State convict Mr. Williams: financially, they understood they would be entitled to a portion of the $10,000 reward; legally, they both had reason to believe they could avoid serious consequences in their open cases, and Ms. Asaro in particular understood that implicating Mr. Williams would help her avoid prosecution for her own involvement in Ms. Gayle's murder. *See* Ex. 10 (typed and handwritten notes that police interviewing Ms. Asaro should remind her of the potential for

"[h]indering prosecution & tampering with evidence charges" and to tell Ms. Asaro that "she's [a] suspect if necessary").

31. At the jury selection stage, the State used peremptory strikes to remove six of the seven eligible Black venire people. *See id.*, No. 99CR-5297, Tr. 1569-70 (June 7, 2001). The jury convicted Mr. Williams and, after deliberating for less than two hours, sentenced him to death.

Post-Conviction DNA Testing of the Murder Weapon Excludes Mr. Williams

32. In 2005, Mr. Williams completed his state post-conviction proceedings, *Williams v. State*, 168 S.W.3d 433 (Mo. 2005) (en banc), and filed a federal habeas petition in the Eastern District of Missouri the year after, *Williams v. Roper*, No. 4:05-CV-01474-RWS (Aug. 29, 2006). In 2010, the district court granted Mr. Williams penalty-phase relief under *Wiggins v. Smith*, 539 U.S. 510 (2003). In 2012, a divided panel of the Eighth Circuit reversed and reinstated Mr. Williams's death sentence. *Williams v. Roper*, 695 F.3d 825 (8th Cir. 2012). Mr. Williams exhausted the normal course of state and federal review in 2013, *Williams v. Steele*, 571 U.S. 839 (2013) (denying certiorari), and the Missouri Supreme Court scheduled his first execution date for January 28, 2015.

33. On January 9, 2015, Mr. Williams filed a renewed petition for writ of habeas corpus in the Missouri Supreme Court, along with a motion to stay his execution; both raised the issue of Mr. Williams's innocence and sought additional DNA testing on the knife that killed Ms. Gayle. On January 22, the Supreme Court stayed Mr. Williams's execution, pending the disposition of his habeas petition, and in May of 2015, it ordered DNA testing and appointed a special master to "ensure DNA testing of appropriate items at issue in this cause and to report to this Court the results of such testing." Order Appointing Special Master, *Williams v. Larkin*, No. SC94720 (May 26, 2015), attached as Exhibit 12.

34. The DNA testing proved conclusively—and three independent, blind experts agreed—that Mr. Williams was not the source of the DNA on the knife used to kill Ms. Gayle. Specifically, Y-STR testing—a form of testing that examines only male DNA and that is commonly used in cases, like here, where the majority of the DNA recovered is female—produced a partial male DNA profile based on 14 locations on the DNA strand. As the experts' affidavits made clear, "Mr. Williams is not the DNA contributor if from a single individual and not one of the two contributors if the data are from two contributors." Aff. of Charlotte Word ¶ 6 (May 31, 2018), attached as Exhibit 13. *See also* DNA Report of Greg Hampikian, Ph.D., *State ex rel. Williams v. Larkins*, No. SC96625 (Mo. Aug. 14, 2017), Ex. 10, at 1 ("Marcellus Williams is excluded as a possible contributor of the DNA profiles obtained from the knife handle swabs [taken from the murder weapon]."), attached as Exhibit 14; DNA report of Norah Rudin, Ph.D., at 1, Pet'r's Post-DNA Testing Br., Ex. B, *State ex rel. Williams v. Steele*, No. 15BA-CV01828 (St. Louis Cty., Dec. 28, 2016), Ex. 4, ("Marcellus Williams could not have contributed the detected profile on . . . the knife."), attached as Exhibit 15.

35. The special master received the results of the DNA testing along with post-testing briefs and other materials but never held a hearing on the matter or issued any formal opinion. On information and belief, the special master did not consider or give weight to the expert reports described in paragraph 36, *supra*.

36. On January 5, 2017, the special master sent a file to the Missouri Supreme Court. Less than a month later, the Supreme Court dismissed Mr. Williams's habeas petition in a summary order and in April, set an August 22, 2017, execution date. *See* Order & Warrant of Execution, *State v. Williams*, No. SC83934 (Mo. Apr. 26, 2017) (per curiam), attached as Exhibit 16. To date, no court has ever given evidentiary consideration to the newly discovered DNA evidence.

Governor Eric Greitens Stays Mr. Williams's Execution and Convenes a Board of Inquiry

37. With a second execution date pending and having exhausted all judicial remedies, Mr. Williams turned to the governor in a final effort to have his case—and his innocence—adequately considered. Then-Governor Greitens took Mr. Williams's clemency application under advisement, and on August 22, 2017—the day of Mr. Williams's scheduled execution—issued Executive Order 17-20.

38. Executive Order 17-20 reads, in relevant part, as follows:

> WHEREAS, Williams contends that newly discovered DNA evidence, which was not available to be considered by the jury that convicted him, proves his innocence; and
>
> . . .
>
> WHEREAS, Williams has submitted an application for clemency and requested the appointment of a Board of Inquiry pursuant to Section 552.070, RSMo., to review evidence and provide the Governor with a recommendation on Williams' claim of innocence and application for clemency.
>
> NOW THEREFORE, I, ERIC R. GREITENS, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and laws of the State of Missouri, hereby invoke the provisions of Section 552.070, RSMo., and establish a Board of Inquiry in the matter of Marcellus Williams, an inmate condemned to death, and hereby order a stay of execution for Williams until such time as the Governor makes a final determination as to whether or not he should be granted clemency.

Ex. 1.

39. In addition, the order dictated that the Board "will be comprised of five members appointed by the Governor," that it "shall consider all evidence presented to the jury, in addition to newly discovered DNA evidence, and any other relevant evidence not available to the jury [and it] . . . shall assess the credibility and weight of all evidence," that it "shall have subpoena power

over persons and things," and that it "shall report and make a recommendation to the Governor as to whether or not Williams should be executed or his sentence of death commuted." *Id.*

40. Executive Order 17-20 was only the third time in the history of the state that a governor had invoked a board of inquiry, and it was the second of those occasions in which the basis for the investigation was a claim of actual innocence.

41. On information and belief, Governor Greitens appointed five retired judges to serve on the board on September 12, 2017: Judge Booker Shaw[3]; Judge Michael David; Judge Peggy McGraw Fenner; Judge Carol Jackson; and Judge Paul Spinden. *Press Release: Greitens Appoints 5 Retired Judges to Serve on Board of Inquiry in Marcellus Williams Case*, MISSOURIAN TIMES, Sept. 12, 2017, available at https://themissouritimes.com/greitens-appoints-5-retired-judges-serve-board-inquiry-marcellus-williams-case/.

42. On information and belief, the Board began to investigate as required by Executive Order 17-20, including soliciting significant information from Mr. Williams's legal team and from the State, who was represented by Defendant Bailey. On information and belief, both parties promptly complied.[4]

43. On June 1, 2018, Governor Greitens resigned from office and his lieutenant governor, Defendant Parsons, assumed office. In 2020, Governor Parson won reelection.

44. On information and belief, the Board's investigation was ongoing as of June 2023.

45. On information and belief, the Board never issued a report, as required by law. *See* RSMo. § 552.070, RSMo. ("Such board shall make its report and recommendations to the

[3] On information and belief, Judge Jackson replaced Judge Shaw as the Chair of the Board, and Governor Greitens appointed a replacement in 2017.

[4] As is described in footnote 1, *supra*, undersigned counsel have compiled the multiple rounds of written communications between counsel and the Board. Should this Court so order, counsel are prepared to file those documents under seal.

governor."); Ex. 1 ("[T]he Board of Inquiry shall report and make a recommendation to the Governor.").

Governor Parson Dissolves the Board of Inquiry

46. On June 29, 2023, Governor Parson issued Executive Order 23-06. That order reads as follows:

> WHEREAS, Executive Order 17-20 was issued on August 22, 2017, establishing a Board of Inquiry (Board) to assist the Governor in determining if Marcellus Williams should receive clemency from his sentence of death; and
>
> WHEREAS, under Section 552.070, RSMo, the Board shall make a report and recommendation to the Governor; and
>
> WHEREAS, under Section 552.070, RSMo, all information gathered by the Board, and any report or recommendation to the Governor, shall be held by the Governor in strict confidence.
>
> NOW, THEREFORE, I, MICHAEL L. PARSON, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and the laws of the State of Missouri, specifically Article IV, Section 7 of the Constitution of the State of Missouri and Section 552.070, RSMo, do hereby rescind Executive Order 17-20, thereby dissolving the Board of Inquiry established therein. With this Executive Order, I remove any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution.

Ex. 2.

47. On information and belief, Governor Parson issued Executive Order before receiving a report or recommendation from the Board.

48. The next day, Defendant Bailey moved the Supreme Court to set an execution date for Mr. Williams. Ex. 3.

COUNT I

THE BOARD OF INQUIRY PROCESS PROVIDED TO MR. WILLIAMS VIOLATES HIS RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS

49. Plaintiff incorporates by reference the preceding paragraphs and allegations.

50. "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, Dep't Soc. Servs., Div. Family Servs.*, 218 S.W.3d 399, 405 (Mo. 2007) (en banc) (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)).

51. 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.*

52. 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.

The Private Interest That Will Be Affected by the Official Action

53. Although a state need not establish procedures for preventing wrongful executions, once it does, the state creates a liberty interest in "demonstrating his innocence" using those established procedures. *Dist. Att'y Office for Third J. Dist. v. Osborne*, 557 U.S. 52, 68 (2009). "This state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Id.* (internal quotation marks omitted).

54. Courts in other jurisdictions have recognized state-created liberty interests under closely analogous circumstances where incarcerated petitioners sought to prove their innocence. *E.g.*, *Howard v. City of Durham*, 68 F.4th 937, 947-48 (4th Cir. 2023); *Armstrong v. Daily*, 786 F.3d 529, 551-52 (7th Cir. 2015); *Newton v. City of New York*, 779 F.3d 140, 146-151 (2d Cir. 2015).

55. In Missouri, the Legislature created the board of inquiry process in part to give condemned people a final vehicle through which they might establish evidence of their innocence. *E.g.*, Ex. 4. Mr. Williams, in turn, has an interest in not being executed as an innocent man and in the "procedures essential to the realization of [that] parent right." *Osborne*, 557 U.S. at 68. This interest, needless to say, is extremely compelling and must be given great weight in the context of his procedural due process challenge.

The Risk of an Erroneous Deprivation Through the Existing Procedures and the Probable Value of Additional or Substitute Procedural Safeguard

56. The current procedure creates a grave risk of a wrongful deprivation of life and liberty by failing to give Mr. Williams a final opportunity to establish his factual innocence. As described above, one of the purposes of section 552.070, RSMo., is to serve as a backstop in cases like Mr. Williams's, where the judicial process has failed to give him a full and complete

opportunity to have his innocence considered. By truncating the process and making secret the results (if any) of that process, Executive Order 23-06 took away from Mr. Williams a right created by Executive Order 17-20. Even if the Board were to issue a report that does not completely exonerate Mr. Williams, that report could "beget yet other rights to [other] procedures," including additional court filings, political pressure on Defendant Parson to commute his sentence, and potential action by other members of the executive branch. *See Osborne*, 557 U.S. at 68 (internal quotation marks omitted); RSMo. § 547.031(1).

57. Indeed, as indicated in footnotes 1 and 4, *supra*, during the course of the Board's work, counsel for Mr. Williams worked with the Board to reinvestigate and examine various aspects of the case. Specifically, among other things, counsel made presentations to the Board, suggested lines of investigation, requested that the Board issue subpoenas, and requested that it order additional forensic testing be performed. [5]

58. On the other hand, a proper inquiry by the Board, consistent with the Legislature's vision and Executive Order 17-20 and its predecessors, would provide a robust safeguard against a wrongful execution because it would give Mr. Williams, the voters, the politically responsive branches, and the media an opportunity to accurately assess his innocence and to consider the propriety of his execution.

[5] Again, the communications between counsel, the Board, and the Attorney General's office were conducted on a confidential basis, but undersigned counsel are prepared to provide this Court with copies of the written communications at the Court's request. Since the time the Board began its work, there have been dramatic new developments in the forensic sciences, including in the fields of forensic DNA testing and forensic genetic genealogy. If the Board had been permitted to continue its investigation, it could have requested new forms of forensic analysis on various pieces of evidence that could, in turn, have confirmed Mr. Williams's innocence and potentially revealed the identity of the real assailant.

The Government's Interest in the Existing Procedure

59. Defendant Parson has no interest in executing an innocent man, and any interest Defendants might articulate cannot outweigh the extraordinarily weighty interest Mr. Williams has in not being executed as an innocent person.

WHEREFORE, Mr. Williams prays that this Court enter an Order: (1) declaring that Executive Order 23-06 violates Mr. Williams's right to due process by circumventing his right to a complete review of his claim of innocence; (2) invalidating Executive Order 23-06 on that basis; (3) reinstating Executive Order 17-20; and (4) enjoining Defendant Bailey from pursuing an execution warrant unless and until the Board is permitted to satisfy its obligation to produce a report and recommendation to the Governor; and for such further relief as is just and proper.

COUNT II
EXECUTIVE ORDER 23-06 VIOLATES 42 U.S.C. SECTION 1983 BECAUSE IT DEPRIVED MR. WILLIAMS OF HIS FEDERAL DUE PROCESS RIGHTS UNDER COLOR OF STATE LAW

60. Plaintiff incorporates by reference the preceding paragraphs and allegations.

61. A petition for relief based on 42 U.S.C. section 1983 must allege facts in support of two elements: (1) a deprivation of rights secured by the Constitution or laws of the United States, (2) "under color of" state law or custom. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

62. One of the main purposes of section 1983 was to protect federal rights where "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyments of rights, privileges and immunities guaranteed by the Fourteenth Amendment might by denied by state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

63. Nevertheless, "claims under [section] 1983 are properly cognizable in the courts of Missouri." *Stafford v. Muster*, 582 S.W.2d 670, 681 (Mo. 1979) (en banc).

64. Count I, *supra*, alleges that the dissolution of the Board of Inquiry deprived Mr. Williams of his rights secured by the Due Process Clause of the United States Constitution.

65. Defendant Parson deprived Mr. Williams of these federal rights "under color of" Missouri law when he enacted Executive Order 23-06 in his role as Governor of the State of Missouri.

WHEREFORE, Mr. Williams prays that this Court enter an Order: (1) declaring that Executive Order 23-06 violates Mr. Williams's federal due process rights as alleged in Counts I and II, *supra*; (2) declaring that Defendant Parson acted under color of state law when he enacted Executive Order 23-06; (3) invalidating Executive Order 23-06 on those bases; (4) reinstating Executive Order 17-20; and (5) enjoining Defendant Bailey from pursuing an execution warrant unless and until the Board is permitted to satisfy its obligation to produce a report and recommendation to the Governor; and for such further relief as is just and proper.

COUNT III
EXECUTIVE ORDER 23-06 IS NULL AND VOID BECAUSE GOVERNOR PARSON LACKED THE STATUTORY AUTHORITY TO UNILATERALLY DISSOLVE THE BOARD OF INQUIRY BEFORE IT SATISFIED ITS STATUTORY OBLIGATION

66. Plaintiff incorporates by reference the preceding paragraphs and allegations.

67. In the state of Missouri, there are, broadly speaking, three categories of executive orders: (1) judicially unenforceable proclamations declaring "some special day or week in honor of or in commemoration of some special thing or event," *Kinder v. Holden*, 92 S.W.3d 793, 806 (Mo. Ct. App. 2002); (2) judicially unenforceable "communications to subordinate executive branch officials regarding the execution of their executive branch duties," *id.*; and (3) "orders

which implement or supplement the state's constitution or statutes," which "have the force of law," *id.*

68. "[E]xecutive orders must be within the grant of authority from the General Assembly." *Id.* (cleaned up).

69. Where an executive order exceeds the legislative grant of authority, the order is invalid. Accordingly, to determine whether an executive order is within the scope of the legislative grant of authority, the first step is examining the language of the statute in question.

70. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

71. "Where the statute at issue is one that confers authority upon [an executive branch official], that inquiry must be shaped, at least in some measure, by the nature of the question presented—whether [the legislature] in fact meant to confer the power the [executive branch official] has asserted." *West Virginia v. Envt'l Protection Agency,* 142 S.Ct. 2587, 2607-08 (2022) (cleaned up).

72. Missouri Revised Statutes 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.

73. Although the legislative history is silent as to the purpose of the law, it is clear in context and based on historical practice that section 552.070 was intended to serve as a backstop in capital cases, where the judicial process has failed to prevent a wrongful execution. *See* S.B. 143 § A(7), 1963 Mo. Laws 674-81 (enacting RSMo. § 552.070, along with a host of other provisions, in a section of the code "relating to the commitment, acquittal, release and discharge of the mentally ill in criminal cases"); Exec. Order (Jan. 12, 1994) (invoking RSMo. § 552.070 for the first time to convene a board of inquiry to investigate a claim of innocence); Exec. Order 97-10 (invoking RSMo. § 552.070 to investigate a claim that the condemned was wrongfully sentenced to death). *See also FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941) (Frankfurter, J.) ("[J]ust as established practice may shed some light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.").

74. In part for this reason, the statute authorizes the governor, "in his discretion, to appoint a board of inquiry," but it says nothing about the governor's authority to dissolve a board of inquiry, once convened. *See* RSMo. § 552.070.

75. Instead, the statute, in its plain language, contemplates that once a governor has convened a board of inquiry, he or she may not interfere with the actions of the board unless and until the board produces a report and recommendations. *See id.*

76. This is because when a statute regulating the conduct of a government actor or body uses the word "shall," it creates an affirmative obligation on the government to perform the action described therein. *See Frye v. Levy*, 440 S.W.3d 405, 409 (Mo. 2014) (en banc).

77. In such a case, a court's interpretive duty is to determine whether the statute is "mandatory" or "directory." *Id.* 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.*

78. If 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. 1995) (en banc).

79. Section 552.070, RSMo., is a directory statute because it provides that the Board "shall" issue a report and make recommendations to the Governor, but it provides no remedy for the Board's failure to do so. *See id.*

80. Accordingly, the exclusive remedy, under the statute, for the Board's failure to satisfy its statutory obligation is "an action for mandamus . . . to compel a decision." *Farmers*, 896 S.W.2d at 33. Because the Governor did not pursue this remedy and instead sought to dissolve the Board entirely, Executive Order 23-06 exceeded the Governor's authority under the statute.

81. Additionally, Executive Order 23-06 misrepresents and misquotes the enabling statute. Specifically, Executive Order 23-06 states that "under Section 552.070, RSMo, all information gathered by the Board, *and any report or recommendation to the Governor*, shall be held by the Governor in strict confidence." Exec. Order 23-06 (emphasis added). But this is not what the statute says. Instead, the statute requires that "information gathered by the board . . . be received and held by it and the governor in strict confidence." RSMo. § 552.070.

82. The statute does not give Governor Parson the unilateral authority to dissolve the Board, nor does it give him the unilateral authority to classify as confidential the Board's report or recommendation.

83. In Missouri, a statute's silence about its scope does not grant the executive branch the authority to assume power that the legislature has reserved. Because Executive Order 23-06

exceeds the scope of and is inconsistent with the statute that authorized its creation, the order is null and void.

WHEREFORE, Mr. Williams prays that this Court enter an Order: (1) declaring that the Governor lacked the statutory authority to dissolve the Board of Inquiry; (2) invalidating Executive Order 23-06 on that basis; (3) reinstating Executive Order 17-20; and(4) enjoining Defendant Bailey from pursuing an execution warrant unless and until the Board is permitted to satisfy its obligation to produce a report and recommendation to the Governor; and for such further relief as is just and proper.

COUNT IV
EXECUTIVE ORDER 23-06 VIOLATES THE MISSOURI CONSTITUTION'S SEPARATION OF POWERS CLAUSE

84. Plaintiff incorporates by reference the preceding paragraphs and allegations.

85. The Missouri Constitution dictates that "[t]he powers of government shall be divided into three distinct departments," namely, legislative, executive, and judicial, and "no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others." Mo. Const. art II § 1.

86. These "structural constraints," which are inherent in a system of separated powers, are "designed in part to ensure political accountability." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S.Ct. 1649, 1657 (2020).

87. "The power of the legislature to make laws is plenary," while "the power to administer and enforce the law lies solely with the executive branch." *State Auditor v. Joint Comm. Leg. Res.*, 956 S.W.2d 228, 231 (Mo. 1997) (en banc). When the executive branch encroaches on the legislative branch by "perform[ing] a duty reserved expressly to the

[legislative] department's authority," the actions of the executive violate the separation of powers. *See id.*

88. Here, Defendant Parson did just that. The legislature granted the governor the authority to empanel of board of inquiry, but it does not follow that that delegation also included the authority to "dissolve" or terminate a board once convened. By issuing Executive Order 23-06, Defendant Parson intruded on the legislative power and granted himself the unilateral authority to terminate the work of the Board.

89. This encroachment did not take place in a vacuum. "Our system of government becomes basically flawed when our governors are permitted to assume direction of the lives of the governed without accountability to them." *Menorah Med. Cntr. V. Health & Ed. Facilities Auth.*, 584 S.W.2d 73, 88 (Mo. 1979) (en banc) (Donnelly, J., dissenting).

90. A rough analogy in the federal system is the appointment and removal of special counsel. Once the president (or his attorney general) has appointed special counsel, that attorney's investigation cannot be unilaterally halted nor the attorney removed from the appointment except for good cause, out of concern that a president might attempt to dissolve a special counsel investigation for political reasons or because he does not otherwise like the direction of the investigation. *See* 28 U.S.C. §§ 596(a)(1) (for cause removal), (b)(1) (termination of action by independent counsel occurs only when the attorney completes their investigation or they file a final report).

91. In this case, a previous Governor accepted the responsibility for staying Mr. Williams's execution and empaneling a Board to investigate his claim of innocence. The results of the Board's investigation could have yielded a conclusion that Mr. Williams is factually innocent and therefore deserving of clemency or that he is not factually innocent or otherwise

deserving of clemency. *See* Exec. Order 17-20. Either way, the political burden of the Board's investigation is for the executive branch—and specifically, the governor—to bear, and the governor may not dissolve the Board simply because he disagrees with or dislikes the information it has uncovered. *Cf.* 28 U.S.C. § 596(b)(1) (termination of an action by special counsel is only permissible when the investigation is complete or the special counsel files a final report).

92. From a separation of powers perspective, Executive Order 23-06 represents an effort by the current officeholder—Defendant Parson—to evade accountability for the outcome of the Board's investigation. This is made even more clear by the fact that Defendant Parson has attempted to conceal the Board's work by stretching the confidentiality provision of the statute to include the Board's report and recommendations. *Compare* RSMo. § 552.070 ("All information gathered by the board shall be received and held by it and the governor strict confidence.") *with* Exec. Order 23-06 ("[A]ny report or recommendation to the Governor, shall be held by the Governor in strict confidence.").

WHEREFORE, Mr. Williams prays that this Court enter an Order: (1) declaring that the Governor lacked the constitutional authority to dissolve the Board of Inquiry; (2) invalidating Executive Order 23-06 on that basis; (3) reinstating Executive Order 17-20; and (4) enjoining Defendant Bailey from pursuing an execution warrant unless and until the Board is permitted to satisfy its obligation to produce a report and recommendation to the Governor; and for such further relief as is just and proper.

PRAYER FOR RELIEF

WHEREFORE, Mr. Williams prays that this Court: (1) declare that Executive Order 23-06 violated Mr. Williams's rights to due process under the Missouri and United States Constitutions; (2) declare that Governor Parson violated 42 U.S.C. section 1983 by enacting

Executive Order 23-06 in violation of Mr. Williams's rights secured by the Fourteenth Amendment to the United States Constitution; (3) declare that Executive Order 23-06 is null and void because Governor Parson lacked the statutory authority to dissolve the Board of Inquiry; (4) declare that Executive Order 23-06 is unconstitutional because it violates the Separation of Powers Clause of the Missouri Constitution; (5) declare that section 552.070, RSMo. does not permit the Governor to make the Board's report and recommendation wholly confidential and enjoin Defendant Parson from withholding the outcome of the Board's investigation; (6) reinstate Executive Order 17-20 and the Board of Inquiry and enjoin Defendant Parson from interfering in its process unless and until it complies with its statutory obligation; (7) enjoin Defendant Bailey from seeking an execution date until the Board of Inquiry satisfies its statutory obligation to produce a report and recommendations to Governor Parson; (8) grant declaratory relief consistent with this Petition; and (9) grant such further relief as is just and proper.

[Signature Block Appears on Following Page]

Dated this 23rd of August 2023.

Respectfully submitted,

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[6] Pursuant to Rules 6.01(n) and 9.03, Mo. S. Ct. R., Attorneys Scheck, Sultan, Gumkowski, and Freedman are submitting motions for *pro hac vice* admission.

SUPREME COURT OF MISSOURI
en banc

June 4, 2024

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC83934
	)	
MARCELLUS WILLIAMS,	)	
	)	
Appellant	)	

PER CURIAM

BE IT REMEMBERED, that on August 27, 2001, the Circuit Court for St. Louis County entered its judgment finding Marcellus Williams guilty of murder in the first degree and fixing punishment at death; and

Thereafter, on September 10, 2001, Marcellus Williams's notice of appeal from said judgment of conviction and sentence was filed in this Court, and

Thereafter, on January 14, 2003, this Court affirmed the judgment; and

Thereafter, on March 4, 2003, this Court overruled his motion for rehearing, and

Thereafter, on July 6, 2004, Marcellus Williams's notice of appeal from the judgment overruling his postconviction relief motion was filed in this Court; and

Thereafter, on June 21, 2005, this Court affirmed the overruling of his postconviction motion, and

Thereafter, on August 30, 2005 this Court overruled his motion for rehearing and

Thereafter, Marcellus Williams sought relief in various federal courts and

Thereafter, on April 26, 2017, this Court set Marcellus Williams's date of execution for August 22, 2017, and

Thereafter, on August 22, 2017, Governor Eric Greitens issued an executive order staying Marcellus Williams's execution and appointing a board of inquiry pursuant to § 552.070, RSMo 2016, to consider clemency, and

Thereafter on June 29, 2023, Governor Michael Parson issued an executive order dissolving the board of inquiry and lifting the stay of execution, and

Thereafter, on June 30, 2023, the state filed a renewed motion to set execution date and, on September 14, 2023 Marcellus Williams filed a response thereto

NOW, THEREFORE, it is ordered that Marcellus Williams s sentence be executed during the twenty-four hour period beginning at 6:00 p.m. on September 24, 2024

STATE OF MISSOURI-Set.

I, Betsy AuBuchon Clerk of the Supreme Court of the State of Missouri certify that the forgoing is a full true and complete transcript of the order of said Supreme Court entered of record at the May Session thereof, 2024, and on the 4th day of June, 2024 in the above entitled cause

Given under my hand and seal of said Court at the City of Jefferson this 4th day of June 2024

Clerk

Deputy Clerk

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC83934
	)	
MARCELLUS WILLIAMS,	)	
	)	
Appellant.	)	

OPINION OVERRULING MOTION TO WITHDRAW WARRANT OF EXECUTION

Marcellus Williams filed a motion to withdraw this Court's June 4, 2024, warrant of execution setting a September 24, 2024, execution date. Williams claims the warrant is premature because on January 26, 2024, the St. Louis County prosecutor ("Prosecutor") filed a motion to vacate Williams' first-degree murder conviction and death sentence pursuant to § 547.031, RSMo Supp. 2021. The motion is overruled.[1]

---

[1] Once this Court sets an execution date, the only appropriate procedure is to file a motion to stay the execution, which is ancillary to a pending matter, rather than a motion to "withdraw" the warrant of execution. As a request for equitable, injunctive relief, the motion to stay would be analyzed by assessing: "(1) the movant's probability of success on the merits; (2) the threat of irreparable harm absent a stay; (3) the balance between harm to the movant absent the stay and the injury inflicted on other interested parties if the stay is granted; and (4) the public interest." *State v. Johnson*, 654 S.W.3d 883, 891 (Mo. banc 2022); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (explaining, "like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits")

Facts and Procedural History

Following a jury trial, the circuit court sentenced Marcellus Williams to death for first-degree murder. This Court affirmed Williams' convictions, *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), and affirmed the judgment denying postconviction relief. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005).

In December 2014, this Court issued a warrant of execution setting a January 28, 2015, execution date. Williams then filed a petition for a writ of habeas corpus in this Court alleging he was entitled to additional DNA testing to demonstrate actual innocence. This Court vacated Williams' execution date and appointed a special master to ensure complete DNA testing and to report the results of the additional DNA testing.

The special master provided this Court with the results of additional DNA testing conducted on hair and fingernail samples from the crime scene and of the knife used in the murder. The parties fully briefed their arguments to the master. After reviewing the master's files, this Court denied Williams' habeas petition because the additional DNA testing did not demonstrate Williams' actual innocence. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele*, 582 U.S. 937, 137 S.Ct. 2307, 198 L.Ed.2d 737 (2017).

In 2017, Williams filed another petition for writ of habeas corpus, again alleging DNA testing demonstrated his actual innocence by excluding him as a contributor of DNA found on the knife used in the murder. This Court denied relief. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Larkins*, 583 U.S. 902, 138 S.Ct. 279, 199 L.Ed.2d 179 (2017).

In 2023, Williams filed a petition for a declaratory judgment alleging the governor lacked authority to rescind an executive order appointing a board of inquiry pursuant to § 552.070 and staying Williams' execution until the final clemency determination. On June 4, 2024, this Court issued a permanent writ of prohibition barring the circuit court from taking further action other than granting the governor's motion for judgment on the pleadings and denying Williams' petition for declaratory judgment *State ex rel Parson v Walker*, No. SC100352, ___ S.W.3d ___ at 2-3. (Mo. banc June 4, 2024). This Court then issued the June 4, 2024, order setting an execution date and warrant of execution.

Prior to this Court's order and warrant, Prosecutor filed a motion to vacate Williams' first-degree murder conviction and death sentence pursuant to § 547.031. Section 547.031.1 authorizes a prosecuting or circuit attorney to file a motion to vacate or set aside the judgment "at any time" upon information "the convicted person may be innocent or may have been erroneously convicted." The statute further provides the circuit court "shall issue findings of fact and conclusions of law on all issues presented" and shall "vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment." Section 547.031.2-.3. Prosecutor alleged: (1) Williams may be actually innocent because DNA testing excludes him as a contributor of DNA recovered from the knife used in the murder;[2] (2) trial counsel was ineffective for failing to impeach the State's witnesses and for failing to provide different mitigation evidence regarding

[2] As set forth above, after reviewing the results of the DNA testing, this Court has twice rejected Williams' claim that DNA evidence excludes him as contributor of DNA recovered from the knife

Williams' background: and (3) the State exercised peremptory strikes of jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Prosecutor's motion remains pending in the circuit court.

Williams filed the underlying motion to withdraw the warrant of execution, arguing Prosecutor's § 547.031 motion is a "state postconviction motion" barring this Court from setting an execution date pursuant to Rule 30.30(c). The State filed suggestions in opposition to this motion, and Williams filed supplemental suggestions in support.

Analysis

Rule 30.30(c) establishes the procedure for setting a new execution date following a stay of execution. The rule provides:

> If an execution is stayed, the Court shall set a new date of execution upon motion of the state or upon its own motion. No such motion shall be considered prior to exhaustion of the defendant's right to seek relief in the Supreme Court of the United States following review of the defendant's direct appeal, state post-conviction motion, and federal habeas corpus decision unless the defendant fails to pursue such remedy.

As a procedural rule, Rule 30.30(c) has "the force and effect of law." Mo. Const. art. V, § 5. Like the law established by statutory text, the text of Rule 30.30(c) establishes the law governing this Court's authority to set a new execution date. It follows that this Court's interpretation of Rule 30.30(c) is governed by "principles similar to those employed in interpreting statutes, with the difference being that this Court is attempting to give effect to its own intent." *Olofson v. Olofson*, 625 S.W.3d 419, 434 (Mo. banc 2021) (internal quotation omitted). "If intent is clear based solely on this principle, this Court adopts the

plain and ordinary meaning of the rule without resorting to other methods of construction." *State ex rel. Vacation Mgmt. Sols., LLC v. Moriarty*, 610 S.W.3d 700, 702 (Mo. banc 2020).

The plain language of Rule 30.30(c) refutes Williams' claim that this Court's June 4, 2024, order is premature. Rule 30.30(c) provides this Court shall not consider a motion to set an execution date prior to the final "review of ***the defendant's*** direct appeal, state post-conviction motion, and federal habeas corpus decision unless the defendant fails to pursue such remedy." (Emphasis added). Rule 30.30(c) clearly refers to a single state postconviction filed by "the defendant," not the prosecutor. Further, the reference to a single state postconviction motion is consistent with the fact Rule 29.15 is "designed to provide a single unitary, postconviction remedy, to be used in place of other remedies including the writ of habeas corpus." *State ex rel. Laughlin v. Bowerson*, 318 S.W.3d 695, 701 (Mo. banc 2010) (internal quotation omitted); *see also* Rule 29.15(a), *State ex rel. Dorsey v. Vandergriff*, 685 S.W.3d 18, 27 (Mo. banc 2024) (explaining "Rule 29.15 provides the exclusive procedure" for litigating the enumerated claims).

Prosecutor's pending § 547.031 action is not a state postconviction motion filed by the defendant. In this case, the pertinent state postconviction motion was Williams' unsuccessful Rule 29.15 motion for postconviction relief adjudicated nearly 20 years ago. *Williams*, 168 S.W.3d 433. This Court's June 4, 2024, order setting Williams' execution date and warrant of execution are authorized by Rule 30.30(c).

The fact a prosecutor files a § 547.031 motion is not an automatic basis for a stay.[3] Instead, as in any other case, the offender must show the four factors governing equitable injunctive relief warrant a stay. *See Johnson*, 654 S.W.3d at 892 (holding a motion to stay an execution was unwarranted because the "new or re-packaged versions of ... oft-rejected claims" showed the prosecut]or's § 547.031 motion lacked merit).[4]

Conclusion

Williams' motion to withdraw the warrant of execution is overruled

Zel M. Fischer

Z. M. Fischer, Judge

All concur.

[3] This Court is aware the circuit court scheduled Prosecutor's motion for an August 21, 2021, evidentiary hearing. This Court is equally aware Prosecutor's motion is based on claims this Court previously rejected in Williams' unsuccessful direct appeal, unsuccessful Rule 29.15 motion for postconviction relief, and his unsuccessful petitions for a writ of habeas corpus. Moreover, there is no allegation additional DNA testing has been conducted since the master oversaw DNA testing and this Court denied Williams' habeas petitions.

[4] Additionally, § 546.710, RSMo 2000, provides that, in a death penalty case, this Court "shall issue a warrant" if no legal reason exists "against the execution of sentence." Prosecutor's unresolved § 547.031 motion provides no legal reason not to set the execution of Williams' sentence, and he has exhausted his rights to seek relief from the Supreme Court of the United States following review of his direct appeal, state postconviction motion, and federal habeas decision as required by Rule 30.30(c).

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F Hilton, Presiding

IN RE:	)
PROSECUTING ATTORNEY,	)
21ST JUDICIAL CIRCUIT,	)
ex rel. MARCELLUS WILLIAMS,	)
	)
MOVANT/PETITIONER,	)
	)
vs.	)CAUSE NO. 24SL-CC00422
	)
STATE OF MISSOURI,	)
	)
RESPONDENT.	)

ON BEHALF OF STATE OF MISSOURI:
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SPECIAL COUNSEL FOR INNOCENCE OF ST. LOUIS COUNTY PROSECUTING ATTORNEY'S OFFICE:
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ON BEHALF OF MARCELLUS WILLIAMS:
MS. ALANA MCMULLIN
4731 Wyoming Street
Kansas City, MO 64112

TRANSCRIPT OF HEARING

AUGUST 21, 2024

Reported By:
Rhonda J. Laurentius, CCR, RPR
Official Court Reporter
Twenty-First Judicial Circuit

THE COURT: We're on the record in Cause Number 24SL-CC00422, in re: The Prosecuting Attorney for the Twenty-First Judicial Circuit, ex rel. Marcellus Williams vs State of Missouri.

Let the record reflect this matter was set for an evidentiary hearing this date, August 21, 2024.

On or about January 26, 2024, the Prosecuting Attorney's Office filed a motion to vacate or set aside judgment and suggestions in support pursuant to Section 547.031 RSMo.

Let the record further reflect that the Court's interpretation of the statute is that there must be a hearing on this matter, and the Court scheduled this for a hearing this date.

Is there an announcement?

MR. JACOBER: Good afternoon, Your Honor. Matthew Jacober. I, along with my colleagues, Alana McMullin and Teresa Hurla, are special counsel for Innocence for St. Louis County's Prosecuting Attorney's Office. In addition, Jessica Hathaway from the St. Louis County Prosecuting Attorney's Office is with us.

There is an announcement, Your Honor. There has been a resolution of the case. The Court

has been presented with a consent order and judgment signed by Mr. Williams. And I would like to make a record at this time, after all counsel have entered their appearance for the record, regarding the circumstances of this consent order and judgment.

THE COURT: Thank you. And that's an oversight on my part.

Let the record further reflect that the Attorney General is here and represented by Michael Spillane. And if there are any other attorneys that want to be acknowledged on the record I'll so note that.

MR. CLARK: Your Honor, I will be arguing today. Andrew Clark, assistant attorney general on behalf of the State of Missouri.

THE COURT: Thank you.

The Court has been presented with a consent order and judgment purportedly signed by Mr. Williams as relator to resolve all issues pertaining to this motion, which the Court actually has very little direction due to the fact that it's only been in existence since 2021. And this consent order and judgment has been furnished to the Court by the Prosecuting Attorney's Office and

by Mr. Williams. It's my understanding that the Attorney General believes that I don't have jurisdiction to enter this consent order and judgment and appropriate remedies will be pursued in obviously a different proceeding.

Let the record further reflect that in anticipation of this hearing today the following facts are not disputed. Following a jury trial the Circuit Court sentenced Mr. Williams to death for first degree murder. The Court affirmed Mr. Williams' conviction and affirmed the judgment, denying any post-conviction relief.

In December of 2014 the Court issued a warrant of execution setting a January 28, 2015, execution date. Mr. Williams then filed a petition for writ of habeas corpus in the Court alleging that he was entitled to initial DNA testing to demonstrate actual innocence. The Court vacated Mr. Williams' execution date and appointed a Special Master to ensure complete DNA testing and report the results of the additional DNA testing. The Special Master provided the Supreme Court with the results of additional DNA testing conducted on hair and fingernail samples from the crime scene and the knife used in the murder.

The parties fully briefed their arguments to the Special Master. After reviewing the Master's files, the Court denied Mr. Williams' habeas petition because the additional DNA testing did not demonstrate Mr. Williams' actual innocence.

In 2017 Mr. Williams filed another petition for writ of habeas corpus again alleging DNA testing demonstrated his actual innocence by excluding him as a contributor of DNA found on the knife used in the murder. The Court denied said relief.

In 2023 Mr. Williams filed a petition for declaratory judgment alleging that the governor lacked authority to rescind an execution order appointing a board of inquiry pursuant to Section 552.070 and staying Mr. Williams' execution until a final clemency determination.

On June 4, 2024, the Supreme Court issued a permanent writ of prohibition barring the Circuit Court from taking further action other than granting the governor's motion for judgment on the pleadings and denying Mr. Williams' petition for declaratory judgment.

Prior to the Court's order and warrant, the Prosecuting Attorney for the Twenty-First

Judicial Circuit filed a motion to vacate Mr. Williams' first degree murder conviction and death sentence pursuant to Section 547.031 authorizing the Prosecuting Attorney or Circuit Attorney to file a motion to vacate or set aside the judgment at any time upon information the convicted person may be innocent or may have been erroneously convicted.

This Court has reviewed probably close to 8,000 pages, which I am guided to do so under the statute, including the original trial transcript which lasted some 14 days, the post-conviction relief proceedings, and all the cases that have been decided previously by courts that are higher than this.

The Court finds that this statute is civil in nature. It is not post-conviction relief. The Court has been provided no authority to suggest that I cannot enter this consent order and judgment. And the Court is going to enter this consent order and judgment.

And further, Mr. Jacober, you may make a record with respect to this consent order and judgment.

MR. JACOBER: Thank you, Your Honor.

Is it okay if I stand here?

THE COURT: You can stand, sit, whatever is your preference.

MR. JACOBER: I'll stand.

Your Honor, just by way of record, again Matthew Jacober on behalf of the St. Louis County Prosecuting Attorney's Office.

The DNA evidence developed did not fully support our initial conclusions. Additional investigation and testing demonstrated the evidence was not handled in accordance with proper procedures at the time of Mr. Williams' charge and conviction. As a result, the additional testing was inconclusive and did not allow the St. Louis County Prosecuting Attorney's Office to rely on its theory Mr. Williams' exclusion as a contributor to the DNA on the murder weapon as a significant factor supporting his innocence.

It is clear, based on testing, Mr. Williams' DNA is not on the murder weapon which was tested in 2016, long after the crime occurred, and long after the trial was concluded. The murder weapon was handled without proper procedures then in place. As a result DNA was likely removed and added during the investigation and prosecution of

Mr. Williams during the time span of 1998 through 2001. The St. Louis County Prosecuting Attorney's Office regrets its failure to maintain proper protocols surrounding the key physical evidence in this heinous crime, the murder weapon.

The majority of the additional investigation was conducted in the last 60 days and promptly provided to Mr. Williams and the Attorney General's Office. As a result of this evidence and concerns regarding the investigation and trial of Mr. Williams impacting his rights as a charged individual, St. Louis County Prosecuting Attorney determined there were constitutional errors undermining our confidence in the judgment.

St. Louis County Prosecuting Attorney's Office engaged in settlement discussions with Mr. Williams and his counsel. These discussions began on August 20, 2024, and culminated on August 21, 2024, in which Mr. Williams is agreeing to plead pursuant to North Carolina vs. Alford in exchange for a sentence of life without the possibility of parole.

We have discussed with the victim's husband, Dr. Daniel Picus, who has indicated he does not support the application of the death

penalty to Mr. Williams. As the Court is aware, Dr. Picus expressed this sentiment to the Court and all counsel in chambers during a telephone call earlier today. Mr. Williams is further waiving all appellate and post-conviction remedies except those afforded via newly discovered evidence or a retroactively adopted and applied law. This brings much needed and deserved finality to this case and Mrs. Gayle's family.

Despite the above, it's our understanding the Attorney General's Office objects to this resolution. Taking the above record and everything that the Court has reviewed to date, which includes all of the documents in this matter and all of Mr. Williams' direct and indirect appeals to his conviction, the St. Louis County Prosecuting Attorney's Office requests the Court accept the consent order and judgment, accept Mr. Williams' plea pursuant to North Carolina vs Alford, and resentence Mr. Williams on Count II of the underlying indictment to life without the possibility of parole.

Ms. Hathaway will proceed forward with the allocution and the plea proceedings.

THE COURT: Thank you.

MR. JACOBER: Thank you, Your Honor.

THE COURT: Mr. Williams.

MARCELLUS WILLIAMS: Yes, sir.

THE COURT: Can you rise and raise your right hand.

MARCELLUS WILLIAMS,

having been sworn, testified as follows:

THE COURT: You may.

MS. HATHAWAY: Your Honor, as a preliminary matter, I prepared a memorandum that would withdraw the State of Missouri's previously filed notice of intent to seek the death penalty.

THE COURT: Thank you.

Mr. Williams, I have before me, which I guess we can mark as Circuit Attorney's Exhibit 1, a consent order and judgment. Circuit Attorney's Exhibit 1 references a signature signed by Marcellus Williams, relator. Did you sign this document?

MARCELLUS WILLIAMS: I did.

THE COURT: I'm going to ask you a series of questions. If at any time you don't understand any of my questions please get my attention and I'll rephrase.

MARCELLUS WILLIAMS: (Nods head.)

THE COURT: Can you please state your full legal name for the record?

MARCELLUS WILLIAMS: Marcellus Scott Williams.

THE COURT: Thank you. And how young a man are you?

MARCELLUS WILLIAMS: Fifty-five.

THE COURT: Highest level of education you've achieved?

MARCELLUS WILLIAMS: GED.

THE COURT: With that GED you're capable of reading, writing, and understanding the English language?

MARCELLUS WILLIAMS: I am.

THE COURT: You just heard the Circuit Attorney announce that you would like to enter an Alford plea with respect to the agreement that has been reached between you and the Circuit Attorney, is that accurate?

MARCELLUS WILLIAMS: Yes.

THE COURT: Any problems with your hearing today?

MARCELLUS WILLIAMS: None.

THE COURT: You are a U.S. citizen?

MARCELLUS WILLIAMS: Yes.

THE COURT: Are you under the influence of any drugs or alcohol today?

MARCELLUS WILLIAMS: No.

THE COURT: You understand that pursuant to this consent order and judgment you are agreeing to plead guilty to the charge of first degree murder pursuant to North Carolina vs Alford with the negotiated sentence of life without the possibility of parole?

MARCELLUS WILLIAMS: I understand.

THE COURT: Did you have enough time to review this consent order and judgment before you signed it?

MARCELLUS WILLIAMS: Yes.

THE COURT: Have any threats or promises been made to you to get you to go ahead and sign this?

MARCELLUS WILLIAMS: No.

THE COURT: Have any threats or promises been made to your family to entice you or intimidate you into signing this agreement?

MARCELLUS WILLIAMS: No.

THE COURT: You understand, Mr. Williams, that your agreement with the Prosecuting Attorney's Office will become the

sentence and judgment of the Court if I accept this consent order and judgment?

MARCELLUS WILLIAMS: I do.

THE COURT: You heard the prosecutor's statement regarding the issue of the sentence ordering the death penalty is being withdrawn by the Prosecuting Attorney --

MARCELLUS WILLIAMS: Yes.

THE COURT: -- in exchange for your agreement to plead under North Carolina vs. Alford to life without parole?

MARCELLUS WILLIAMS: Yes.

THE COURT: The additional counts remain unchanged.

MARCELLUS WILLIAMS: Yes.

THE COURT: Based upon the prosecutor's statement, do you believe that you will be found guilty by a jury or the trial court if you went to trial since you've already been found guilty?

MARCELLUS WILLIAMS: State that again, Your Honor.

THE COURT: You've already been found guilty, correct?

MARCELLUS WILLIAMS: Right.

THE COURT: And this was back in

2000 --

MARCELLUS WILLIAMS: -- 1.

THE COURT: 2001. And you've exhausted all of your remedies available under the law --

MARCELLUS WILLIAMS: Yes.

THE COURT: -- correct?

MARCELLUS WILLIAMS: (Nods head.)

THE COURT: Do you believe that it's in your best interest, given the evidence, to enter a plea of guilty pursuant to the case of North Carolina vs Alford?

MARCELLUS WILLIAMS: Yes, I do.

THE COURT: Have your attorneys explained to you the effect of your plea of guilty pursuant to the case of North Carolina vs. Alford?

MARCELLUS WILLIAMS: Yes.

THE COURT: What is your understanding of that case?

MARCELLUS WILLIAMS: My understanding of the case is that it's a no contest, I plead to no contest to the charge.

THE COURT: You understand that it has the same legal effect as a guilty plea?

MARCELLUS WILLIAMS: Yes.

THE COURT: Is the consent order and

judgment part of your reason for the Alford plea?

MARCELLUS WILLIAMS: Yes.

THE COURT: Do you have any questions about your Alford plea before we proceed?

MARCELLUS WILLIAMS: I don't.

THE COURT: Is it your desire under the effect of the Alford plea to continue this proceeding and accept the agreement -- the consent order and the agreement contained within the consent order and judgment?

MARCELLUS WILLIAMS: Yes.

THE COURT: You heard the Prosecuting Attorney through Mr. Jacober, that you understand that there is no DNA evidence that affects your claim of innocence?

MARCELLUS WILLIAMS: Yes.

THE COURT: Knowing all that do you wish to continue?

MARCELLUS WILLIAMS: Yes.

THE COURT: Mr. Williams, how do you plead to Count II, the charge of first degree murder?

MR. CLARK: Your Honor, sorry. At this point we would object that this Court has no authority in its civil case, in the 547 case to

take this plea. And in the criminal case it has no authority or jurisdiction to unsettle the previous conviction. These are the same arguments we raised in chambers.

Just for the record, Your Honor, as to the civil case, State ex rel. Bailey vs. Sengheiser, 2024, Westlaw 358 8726, indicates this Court has no authority in this case to resentence anyone. That in the criminal case, State ex rel. Zahnd vs. Van Amburg, 533 S.W.3d 227 Mo. 2017, State ex rel. Fike vs. Johnson, 530 S.W.3d 508, and State ex rel. Poucher vs. Vincent, 258 S.W.3d 62. Those are all Missouri Supreme Court cases that indicate that when a criminal court sentences someone like Mr. Williams for the first time in 2001 it's exhausted of its jurisdiction and authority to act over the criminal judgment.

Here that jurisdictional authority has not been reinvigorated. This Court does not have the authority to first - These are wrapped together - to first to enter the consent judgment in this case and then to use that consent judgment to unravel the sentencing of the first case, of the criminal case.

As for whether the civil case, the

post-conviction remedy, State ex rel. Bailey vs. Fulton, 659 S.W.3d 909, says that 547 actions are civil remedies in the nature of post-conviction and that this Court has the obligation and responsibility to enforce the post-conviction rules, the mandatory post-conviction rules to enforce the finality and the orderly administration of justice.

Now I have a record about the consent judgment. I don't know if you want me to make it now or make it later.

THE COURT: You can.

MR. CLARK: All right, Your Honor.

THE COURT: This goes to your issue that I raised earlier as to whether or not you even have standing to object, correct?

MR. CLARK: Well both. I think, Your Honor, we'd like to make a record about the DNA evidence and to make a record about who the parties are, which I think is the standing question. So with the Court's indulgence...

THE COURT: You may proceed.

MR. CLARK: As to the party question, civil cases are litigated by the parties in interest. No matter how they're captioned, no

matter how they're titled, no matter what the parties think they are, they are governed by the parties in interest, who has an interest in the case. And here it's clear who has an interest in the case; Marcellus Williams and the State of Missouri.

Now in enacting 547.031 the legislature gave the Prosecuting Attorney the authority to the representational capacity of Marcellus Williams to raise claims as he saw fit. It does not give him the authority to raise that claim and then concede it on the other side. 547 does not allow that. And in fact in the case of State vs. Planned Parenthood of Kansas, 66 S.W.3d 16, it says for one attorney to give instruction to both sides of litigation as to the claims and the remedies in the case may ensure a predictable outcome but it will not ensure a just outcome. And the Supreme Court said, to put it bluntly, the Attorney General there but here the Prosecuting Attorney, must choose a side regarding the legality of the contracts there - Here Marcellus Williams' conviction - and act consistently with that position in the Courts.

So here the Prosecuting Attorney cannot raise a claim on behalf of Marcellus Williams and

then put its prosecutor hat on and concede the claim. He's on both sides of the V at that point. So it is our position that the 547 action the parties are Marcellus Williams represented by the Prosecuting Attorney, not as his friend, not as, you know, his attorney, but he's been given representational capacity. Like I told you in chambers, under Randall Aluminum, that used to occur in employment discrimination cases.

Now the question is who is the judgment against. The State of Missouri. It has to be. Because this Court could not vacate a conviction if it wasn't -- or vacate the conviction if the judgment wasn't entered against the State. And here the Prosecuting Attorney can't represent both sides of the V. So that falls to the Attorney General. So whether this Court can enter a consent judgment or not, it can't under 547.031 both on authority here and jurisdiction and authority in the criminal case.

Now as for the DNA evidence, just to be clear about what happened in this case, what's been marked as Respondent's Exhibit FF is a supplemental DNA case report from BODE Technology dated August 19, 2024. And in that report provided by

Mr. Williams' counsel BODE was asked to consider an analysis of Short Tandem Repeat loci on the Y chromosome - Y-STR - for two individuals, Keith Larner, the individual who prosecuted this case, and Edward Magee, the chief investigator at the time. And they returned that, those standards with the information, and when I believe the parties compared that BODE Technology report to the reports of Fienup from the Special Master report and from Dr. Rudin, which was the Prosecuting Attorney's witness both in this action and Marcellus Williams' witness in other actions. When he compared there, Dr. Fienup, 15 of 15 loci are Edward Magee, the chief investigator. And when you compare it to Dr. Rudin's it's even worse; 21.

So what happened here is the Prosecuting Attorney made an allegation about the DNA evidence. They made an allegation that the DNA evidence exonerated or may exonerate Marcellus Williams. After investigating that they found out that the DNA on the knife swab is consistent with Edward Magee. And rather than do the right thing and dismiss the case they asked this Court to do something by consent that it can't do by consent and couldn't do after a hearing.

As the Missouri Supreme Court said in its opinion on the motion to recall the mandate -- or recall the warrant filed by Mr. Williams, it said this Court is equally aware prosecutor's motion is based on claims this Court previously rejected in Williams' unsuccessful direct appeal, unsuccessful Rule 29.15 motion for post-conviction relief, and its unsuccessful petitions for writ of habeas corpus. Moreover, there is no allegation of additional DNA testing conducted since the Master oversaw DNA testing and this Court denied Williams' habeas petitions.

What happened here is that the Prosecuting Attorney's raised claims have been denied many times, again and again and again. And they raised a DNA claim that upon further investigation didn't pan out, and rather than dismiss it because it didn't exonerate Mr. Williams they asked this Court to do it by consent. It can't. And it violates Article 5, Section 2 of the Missouri Constitution which makes the Supreme Court the Supreme Court of Missouri. That court has denied these claims many times.

And on that, Your Honor, we'd ask both that the consent judgment not be entered and that

Mr. Williams not be resentenced because this Court lacks authority in the civil case, authority and jurisdiction - I'm sorry - authority in the civil case, authority and jurisdiction in the criminal case, and the actions of this Court violate Article 5, Section 2 of Missouri's constitution.

THE COURT: Thank you, Mr. Clark. You're not suggesting the Court upon a hearing and obviously by stipulation of counsel couldn't make a finding that there may be error in the original trial?

MR. CLARK: Yes, well, the Court could by stipulation find an error. Well, not by stipulation of two parties on the same side of the V.

THE COURT: Okay. Thank you. Any response?

MS. HATHAWAY: State of Missouri would take issue with the characterization that we do not represent the interest of the State of Missouri in this matter.

I would also suggest to the Court that the consent order has the effect of reopening the original criminal case. So for purposes of the record the Court might want to at least -- or note

that. And when we proceed with the plea the State of Missouri is prepared to make a factual basis for the plea as would, you know, happen normally in a plea.

THE COURT: So it's my understanding that, and pursuant to the consent judgment, you are asking me to make findings that the Prosecuting Attorney concedes that constitutional errors did occur in the original trial that undermine confidence in the original judgment?

MS. HATHAWAY: Yes, Your Honor.

THE COURT: The Court also finds, following discussions between representatives of the victim's family both with the Prosecuting Attorney's Office and the Attorney General's Office regarding this consent judgment, the Court held a telephonic conference in chambers with that representative on August 21, 2024, wherein the representation expressed to the Court the family's desire that the death penalty not be carried out in this case, as well as the family's desire for finality.

The Court having been informed that Mr. Williams acknowledges, understands, and agrees that being resentenced pursuant to this judgment he

voluntarily waives the right to appeal or collaterally attack the judgment sentencing him following the entry of this judgment except on grounds of newly discovered evidence or changes in the law made retroactive to the cases on collateral review.

The Court further finds that the State of Missouri through the St. Louis County Prosecuting Attorney and Mr. Williams are the proper parties to this negotiated settlement of this matter pursuant to Section 547.031, noting your objection for the record. The Court finds the consent judgment is a proper remedy in this case.

The Court further finds in accordance with Section 547.031(2) the Attorney General has been given notice of the motion to vacate previously filed and enters their appearance and has participated in all proceedings to date, including providing its objections to the consent order and judgment.

The Court has taken judicial notice of the entire consents of its files and notes that the Attorney General filed a very well written and argued motion to dismiss which the Court took with this case.

The Court, after taking judicial notice of the motion to vacate the evidence presented in the original trial, direct appeal, and post-conviction proceedings, including all state or federal habeas actions, finds the consent order and judgment is supported by the record.

The Court further finds that other pending matters or motions before the Court in this proceeding are hereby denied.

The Court will defer sentencing of Mr. Williams until 8:30 a.m. tomorrow so we can hear from the victim's family.

Any additional record need to be made?

MR. CLARK: For the record, Your Honor, as discussed in your chambers, I request at this time a stay of the consent judgment. The Attorney General demonstrated all four database factors that a stay is necessary and needed; namely, that the likelihood of success on any appeal or writ is high and that this Court should issue a stay.

THE COURT: The Court will grant your request. Obviously the dilemma the Court has been under since the inception of this matter being assigned to me is the timing of all of this. So that's why I'll grant your stay. And I hope this

is expedited by the Supreme Court.

It's also this Court's opinion that the Supreme Court should have original jurisdiction on all these matters. But of course that's not what the statute says. Subject to anything further?

MS. HATHAWAY: Your Honor, was it Your Honor's intention that Mr. Williams plead guilty to murder in the first degree?

THE COURT: It is.

MS. HATHAWAY: Do you believe there needs to be an additional record made more like a standard plea of guilty since the original conviction and sentence has been vacated?

THE COURT: Well I think in order to make the record clear and Mr. Williams' rights are protected I believe that he's already indicated to the Court that he does plead guilty.

MS. HATHAWAY: Your Honor, some of the other lawyers are mentioning that we think it could have been interrupted by an objection.

THE COURT: Oh.

MS. HATHAWAY: Maybe just to make the record extra clear.

MS. HURLA: Your Honor, if I may, I believe also in addition to what the Attorney

General is arguing, at this moment in this proceeding, in the civil proceeding the Court is vacating the conviction, but I believe we may then have to end this proceeding and call up the original criminal case in order to take a plea.

THE COURT: That's my understanding.

MS. HURLA: So we are not currently in the criminal case so the plea would have to be taken.

THE COURT: In that case, that's correct.

MR. CLARK: Just procedurally, Your Honor - I'm sorry - you granted the stay. The effect of granting the stay would mean that the Court cannot take up the plea because the civil consent judgment doesn't take effect under the stay, unless that's not the intent of the stay.

THE COURT: That's not the intent of the stay.

MR. CLARK: Okay. Just so the record is clear, the stay is denied as to resentencing and conviction?

THE COURT: Correct. So I guess with that said, I guess you'll present to me tomorrow the criminal file so that I can resentence and take

the plea? Or you want to do that now?

MS. HATHAWAY: I think what we envisioned is we would do the guilty plea today and defer sentencing until tomorrow.

THE COURT: All right.

MS. HURLA: Your Honor, I do just want to clarify that we been hearing the words guilty plea but this is an Alford plea, a no contest plea, and that is what Mr. Williams has agreed to.

THE COURT: Right. Let me pull that up.

In Cause 99CR-5297 - Again I'll remind you, Mr. Williams, you're under oath - how do you plead to the charge of first degree murder under North Carolina vs. Alford.

MARCELLUS WILLIAMS: No contest.

THE COURT: Anything further?

MR. CLARK: Your Honor, we've switched case numbers here. The Attorney General would just reassert its prior objection in full. I won't restate it, but the prior objection in the civil case and stipulate this Court has no jurisdiction or authority in the criminal case.

THE COURT: I appreciate that, Mr. Clark. We'll go ahead and do sentencing first

thing in the morning after I hear from the victim. At that time I'll also do my examination under Rule 24.035.

MS. HATHAWAY: Thank you, Your Honor.

THE COURT: Anything further from anyone?

MR. CLARK: Your Honor, just to make the record clear, I would ask that Exhibit FF be admitted in these proceedings.

THE COURT: Any objection?

MS. HATHAWAY: No, Your Honor.

THE COURT: Exhibit FF will be received. Any objection to I guess Exhibit 1 being received, which is the consent?

MR. CLARK: Other than the objection we raised, no.

THE COURT: Thank you. That will also be received. That will conclude the record. Anything further? Thank you. Court will be in recess until tomorrow morning at 8:30.

***

REPORTER'S CERTIFICATE

I, Rhonda J. Laurentius, a Certified Court Reporter and Registered Professional Reporter, hereby certify that I am the official court reporter for Division 13 of the Circuit Court of the County of St. Louis, State of Missouri; that on the 21st day of August, 2024, I was present and reported all the proceedings had in the case of IN RE: PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT, ex rel. MARCELLUS WILLIAMS, MOVANT/PETITIONER, VS. STATE OF MISSOURI, RESPONDENT, CAUSE NO. 24SL-CC00422.

I further certify that the foregoing pages contain a true and accurate reproduction of the proceedings had that day.

I further certify that this transcript contains pages 1 through 30 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

/s/ Rhonda J. Laurentius, CCR #0419
Official Court Reporter
Twenty-First Judicial Circuit
(314) 615-8070

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F. Hilton, Presiding

IN RE: PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT, ex rel. MARCELLUS WILLIAMS, MOVANT/PETITIONER, vs. STATE OF MISSOURI, RESPONDENT.	))))))))CAUSE NO. 24SL-CC00422))))

TRANSCRIPT OF HEARING

Volume 1 of 2

AUGUST 28, 2024

Reported By:
Rhonda J. Laurentius, CCR, RPR
Official Court Reporter
Twenty-First Judicial Circuit

against touching items of evidence that had blood on them?

A. Well certainly in the early 90's the discovery of the HIV virus and its resulting AIDS epidemic put everyone on note about touching items that had blood on them. And, you know, by the very early 90's all law enforcement, hospitals, first responders, medical individuals --

MS. PRYDE: Objection, Your Honor. Lack of foundation. We're talking about something --

THE COURT: How is this helping me, Mr. Jacober?

MR. JACOBER: I'll move forward, Judge.

THE COURT: Thank you.

BY MR. JACOBER:

Q. We've learned in this case that the prosecutor and the special investigator for the prosecutor's office have now testified to or have signed an affidavit indicating that they touched the murder weapon in this case without any evidence preservation techniques, is that correct?

A. That's -- I been informed of that, yes.

Q. And further DNA testing has shown that the DNA that was left on the knife could be matched

to either of those two gentlemen, is that correct?

A. The results can be explained by their profiles, yes.

Q. Based on the results that you reviewed are you able to determine if Mr. Williams -- Marcellus Williams' DNA is on that knife?

A. He's excluded as the DNA that was detected from the knife. He cannot be a source.

Q. Because of what we've learned now can you make a definitive determination though as to Mr. Williams and the DNA that's on that knife?

A. For the DNA that was recovered it is not his DNA. No DNA recovered and tested includes him as a possible source. He's excluded as either of the two sources.

Q. You don't know though if that means his DNA was never on the knife because of what we've now learned, is that correct?

A. That's correct.

MR. JACOBER: And, Your Honor, in support of that I would -- Your Honor, I misspoke earlier. I didn't realize that the August 19, 2024 test results from BODE Technology were also part of Exhibit 1, and we would move for that to be admitted into evidence as well. That's Exhibit B

for keeping evidence?

A. I don't recall. I don't believe so.

MS. PRYDE: No further questions, Your Honor.

THE COURT: Thank you. You may inquire.

MR. POTTS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. POTTS:

Q. Good afternoon, Dr. Word.

A. Good afternoon.

Q. Quick reset. The DNA profiles that were just found on the knife can be explained by two people - Keith Larner and Ed Magee, right?

A. That's correct.

Q. When you were -- I don't want to close the loop on this. When you were speaking with Mr. Jacober a few minutes ago I think one of the concepts that came out was that we don't know if Mr. Williams' DNA was on the knife because it may have been removed by those men handling the knife without gloves, right?

A. I don't know anything about whose DNA was on it. I can only tell you who might be the sources based on the data that were obtained by

BODE.

Q. And I think you're jumping right in front of me. And here's all I want to ask. Whoever committed this murder we don't know if their DNA was on the knife because it may have gotten removed by their handling of the evidence, right?

A. That's certainly a possibility. I don't know.

Q. Thank you.

MR. JACOBER: No redirect, Your Honor.

THE COURT: Thank you.

MS. PRYDE: Nothing.

THE COURT: Thank you. Can this witness stand down?

MR. JACOBER: Yes, Your Honor.

THE COURT: Safe travels.

MR. JACOBER: Your Honor, I'm going to step out to see if one of the witnesses is available.

(Pause.)

MR. JACOBER: Judge McGraugh is parking right now, so we expect him to be here momentarily.

THE COURT: We're switching out court reporters, so we'll be in temporary recess.

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F. Hilton, Presiding

IN RE:		
PROSECUTING ATTORNEY,	)	
21ST JUDICIAL CIRCUIT	)	
ex rel, MARCELLUS WILLIAMS	)	**Cause #24SL-CC00422**
	)	
	)	
MOVANT/PETITIONER,	)	
	)	
vs.	)	
STATE OF MISSOURI,		
RESPONDENT.		

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TRANSCRIPT OF HEARING

Volume 2 of 2

AUGUST 28, 2024

Susan Lucht, CCR#332
Official Court Reporter
Twenty-First Judicial Circuit
St. Louis, Missouri

Office, right? Talked about that in your affidavit?

A. Well, I know I didn't get it from U City. I believe it was Mr. Magee.

Q. And you were truthful in your affidavit, correct?

A. With regard to what point? I made a mistake in there, and I'm willing to admit it right now. Let's talk about it.

Q. Are you aware of any subsequent DNA testing on the knife?

A. Yes. I think testing was done by, I don't know, the defendant's -- I say, the defendant. I mean Mr. Williams, his attorneys, in around 2015.

Q. Okay.

A. Approximately.

Q. Are you aware of additional testing that came out last week?

A. I was told that Mr. Magee's DNA is on the knife handle, and that's all I know.

Q. What did you learn about your DNA?

A. I don't know if my DNA is on there or not. I would like to know. Was it? I'd love to know. I touched the knife. I touched the knife

at some point before two thousand -- before the trial.

Q. And when you touched the knife before trial, you touched it without gloves?

A. Yes.

Q. How many times before trial did you touch the knife without gloves?

A. I touched it when I put the Exhibit 90 sticker on there. I touched it when I showed it to State's witnesses before they testified. That's about all I can recall, touching it twice -- or not twice, but there were many witnesses that I showed it to and touched it in preparation for their testimony a month or two before trial.

Q. Okay. So you're saying that there are two different categories of occasions when you were handling the murder weapon without gloves. The first is when you were affixing the exhibit sticker, and the second is when you were discussing the weapon with witnesses. Correct?

A. Yes.

Q. And that process started approximately two months before the trial?

A. Hard to say. I just don't want to be so

definite. I know I met with witnesses before trial. Several times I met with each witness, I would say, in the case. I would have showed the knife to Detective Krull. I would have shown it to Dr. Picus. I would have shown it to Detective Wunderlich, and I would have showed it to Dr. Nanduri, the medical examiner. I would have showed it to them. Whether I handed it to them at that time, I can't say for sure. I know I touched it at that time, and I'm sitting across the table from them, and I'm holding the knife. Did I hand it to them at that time? I do not recall.

Q. So I want to make sure I got this list correct. So I heard that you handled the knife without gloves when you were with Detective Krull, Dr. Picus, Detective Wunderlich, and Dr. Nanduri. Is that right, those four people?

A. That's right.

Q. All right. How many times did you meet with Detective Krull when you were handling the knife?

A. Just the one time to show him the knife. I met with him several times about his testimony.

Q. How many times did you meet with

Dr. Picus when you were handling the knife without gloves?

A. One time, and I did not have him touch the knife. It would have been too painful to have him touch his wife's murder weapon. I showed it to him because I wanted him to identify it in court, if he could.

Q. And how many times when you met with Detective Wunderlich did you handle the knife without gloves?

A. Once. Again, with Krull and Wunderlich I was going to have them identify it if they could at court in trial. So I wanted to show it to them before they testified.

Q. And then how many times did you meet with Dr. Nanduri when you were handling the knife without gloves?

A. One time.

Q. So I want you to --

A. She also identified the knife in court. I wanted her to be able to do that. And so I met with her and showed her the knife. I don't remember if I handed it to her or not.

Q. Okay. So I just want to make sure I got this right. I've got five different occasions

where you handled the knife without gloves. Once with Detective Krull, once with Dr. Picus, once with Detective Wunderlich, once with Dr. Nanduri, and once when you were affixing the exhibit sticker. Is that correct?

A. Yes.

Q. Can you think of any other times when you were handling the knife without gloves?

A. Not until the trial.

Q. Okay.

A. Again, the defense attorneys at that point had said they didn't want any testing on the knife. The knife was fully tested. I also knew at that time that the killer wore gloves. So whether -- I knew the killer's DNA and the killer's fingerprints would never be found on the knife because the killer wore gloves. And I knew the killer wore gloves before I touched the knife. So I knew that that knife was irrelevant in that regard.

Q. That's really interesting.

A. In my opinion. In my opinion.

Q. So you knew or it was your opinion that the killer wore gloves?

A. Oh, I knew because I had talked to

Detective Creach. He laid it out in his trial testimony. And I met with him before trial. On Page 2001, 2002, 2003, and 2004 of the trial transcript Detective Creach tells you exactly how he knew that the person that broke into the house wore gloves. And you let me know when you want me to tell you what he said.

Q. So you say you knew --

A. I also knew --

Q. Excuse me.

A. -- for other reasons.

Q. Excuse me one second. We'll get there.

A. Okay.

Q. You weren't an eyewitness to the murder?

A. I beg your pardon?

Q. You were not an eyewitness to the murder, correct?

A. Correct.

Q. You did not see what happened inside that house? Correct?

A. No. Not when it happened I didn't. No.

Q. So what you're saying is, you just decided that your opinion gave you the right to handle the knife?

A. You know --

MR. SPILLANE: I'm going to object to that. That's misstating his testimony.

A. Detective Creach --

Q. (By Mr. Potts) Fair question --

THE COURT: Hold on. Hold on. Let me rule. Overruled.

A. Detective Creach is the one that told me that the killer wore gloves. He was a crime scene investigator for the St. Louis County Police Department. On the day of the crime he did the crime scene investigation on this case along with other crime scene investigators. But he looked at the window that was broken out, the glass pane of window, which was the point of entry. He looked at the glass that was broken, and he found no fingerprints on the glass whatsoever.

He did find two clear marks on -- if this phone was a piece of glass. There was a piece of glass -- you mind if I go into this now?

Q. (By Mr. Potts) Let's stop right there.

MR. SPILLANE: Your Honor, can he answer the question?

MR. POTTS: It was not responsive.

MR. SPILLANE: He's been stopped twice from explaining why he believed that the killer

wore gloves. Each time he tries to answer he's stopped.

MR. POTTS: That wasn't the question.

THE COURT: You can rehabilitate him. Next question.

Q. (By Mr. Potts) I want to go back to when you were handling the knife without gloves prior to trial.

Now, I can tell you the knife is right there. I'm not going to get it out because I don't think we need to do that.

What I'm interested in is --

MR. POTTS: You mind if I -- may I approach the witness? May I approach the witness, Your Honor?

THE COURT: For what purpose?

MR. POTTS: I was going to have him show how he was handling the knife.

THE COURT: I'm sorry?

MR. POTTS: I was going to have him show us how he handled the knife.

THE COURT: All right.

Q. (By Mr. Potts) Just, will you show me, when you were handling -- I'm just going to hand you this.

A. I touched the knife handle. I did not touch the knife blade.

Q. Okay.

A. How did I touch it? I don't even have any idea how I touched it. But I touched it enough to be able to hold it.

Q. Did you lift it up?

A. To show, yes.

Q. How long would you hold it for in your hand?

A. Well, when I took it to put the State's Exhibit 90 sticker on there, I pulled it out of the box. That would have been the first time I took it out of the box.

Q. Okay.

A. And I probably set it down on the table.

Q. Okay.

A. I got out State's Exhibit Number 90, wrote the word -- numbers 90 on it, and I stuck that sticker onto the knife handle. And I did see the knife this morning. I know exactly what it looks like just from today.

Q. And what about with Detective Krull, would you hold it up again?

A. About the same.

Q. Yeah. Hold it up? With Dr. Picus did you hold it up?
A. That's correct.
Q. With Detective Wunderlich you picked it up, held it in your hand by the handle?
A. Correct, before he testified at trial.
Q. With Dr. Nanduri, picked it up, held it in your hands with the handle?
A. Same way, same place, on the end, on the handle end.
Q. And for each of those people you were also open to them handling the knife if they wanted to?
A. At that point in time, yes, I was open to it. I didn't give it to Dr. Picus for the reason I stated. I didn't let him touch it.
Q. You didn't make them wear gloves?
A. Not that I recall.
Q. Did you ever see anyone handle the knife with gloves?
A. I did handle it with gloves with a witness during the trial.
Q. During trial?
A. During the trial. One of the witnesses I did. That would have been Dr. -- I'm sorry,

A. To my view, he also to my view looked very similar to the defendant. That is a sentence I said.

Q. Okay. And so these were both young black men, right?

MR. SPILLANE: I'm going to object again. He said he was going to get there. He didn't get there. He started talking about both young black men.

MR. POTTS: How can I not explore what he meant by that statement, Your Honor?

THE COURT: We can't have a stipulation that they were both young black men at the time of the trial?

MR. SPILLANE: Yeah, I think that's fine.

THE COURT: I mean, I don't know how it's relevant but --

MR. SPILLANE: Yeah.

THE COURT: Okay. So why are we objecting? You may answer.

MR. SPILLANE: He's saying that's the reason why he struck him, and he's never said that.

A. So he did look very similar to the

defendant, yes.

Q. (By Mr. Potts) And by that, they were both young black men; right?

A. They were both young black men.

Q. Okay.

A. But that's not necessarily the full reason that I thought they were so similar. Not because he was black and the defendant was black. I mean, if the juror, potential juror was black and the defendant was black and I struck him, that would have been kicked out by the Supreme Court in a second. That would have come back for a complete retrial.

Q. They both wore glasses?

A. Similar type glasses. Not just glasses. They looked to me like they were identical. They were similar type glasses, yes. That was the second reason.

Q. So they liked the same brand of glasses potentially. Is that right?

A. I don't know what they liked. All I know is the glasses were very similar. And I said something more about their similarities, several things.

Q. And they both had goatees, is that

right?

A. I don't know what page you're referring to on that. I said he reminded me of the defendant. Had similar type glasses. He had the same piercing eyes as the defendant. I said that juror had piercing eyes, and so did the defendant. I thought they looked like they were brothers.

Q. They looked like brothers?

A. Familial brothers.

Q. Okay.

A. I don't mean black people. I mean, like, you know, you got the same mother, you got the same father. You know, you're brothers, you're both men, you're brothers.

Q. So you struck them because they were both young black men with glasses?

A. Wrong. That's part of the reason. And not just glasses. I said the same type glasses. And I said they had the same piercing eyes.

Q. So part of the reason was that they had piercing eyes, right?

A. The same piercing eyes.

Q. Same piercing eyes. Part of the reason was they had the same piercing eyes? Right?

A. Yes, part of the reason.

8

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. **83934**
	)	
MARCELLUS WILLIAMS,	)	
	)	
	)	
Appellant.	)	

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION NUMBER 11
HON. EMMETT M. O'BRIEN, Judge

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. **99CR-5297**
	)	
MARCELLUS WILLIAMS,	)	
	)	
	)	
Defendants.	)	

TRANSCRIPT ON APPEAL

VOLUME VIII

Appearances:

Mr. Keith Larner
and Mr. Mark Bishop
Assist. Prosecuting Atty.
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Mr. Christopher McGraugh
and Mr. Joseph Green
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Rebecca J. Dickler, CCR, RMR
Certified Court Reporter
St. Louis County Circuit Court

only has one eye.

MR. GREEN: I can tell you right now, Judge, I had us up to 75 before those two strikes.

THE COURT: She's 111, I think.

MR. GREEN: Right. She's 111.

MR. BISHOP: There's no way we're getting to her.

THE COURT: Is there any problem with my excusing her?

MR. BISHOP: No. Do you want to have Mike bring her in?

THE COURT: Yeah, would you? And then I'll have Carol check her out.

(Court stood in temporary recess, after which the following was had in chambers:)

THE COURT: Let the record reflect that this conference is taking place chambers with the attorneys present, and that the State has submitted it's nine peremptory strikes, which were furnished to me as being Juror Number 8, 14, 18, 53, 58, 64, 65, 69, and 72. Is that correct?

MR. McGRAUGH: That is correct, Judge.

THE COURT: Okay. Defense counsel has indicated to the Court that they wish to make a record. Mr. McGraugh, you may proceed.

MR. McGRAUGH: I think actually Mr. Green is going to do it.

THE COURT: I'm sorry, Mr. Green.

MR. GREEN: Judge, at this time we make a record on the Batson issues. For the record, I will state that our client is African-American, and that the nine peremptory strikes that were handed to us by the State contain six strikes of people, from my own observation in voir dire, who are of African-American descent. Six of those nine strikes have been used to strike that minority.

In addition, I'd note for the record the following: That Juror Number 8, according to my observation, appeared to be a minority, African-American. Juror Number 12, from my observation, appeared to be African-American. Juror Number 58, also a minority, African-American. Juror 64, minority, African-American. Juror 65, minority, African-American. Juror 69, minority, African-American. And Juror Number 72, minority, African-American.

That gave us, from the first thirty from which the State could use those peremptory challenges, seven minorities of African-American descent on the panel. And the State used six of its nine peremptory

strikes to get rid of six of the seven.

At this point, I believe we've made a prima facie case, and ask the Court to instruct the prosecutor to provide us race neutral reasons for the strikes.

THE COURT: First of all, is there any disagreement that Jurors 8, 12, 58, 64, 65, 69, and 72 appear to be of African-American descent? Those are the ones you listed.

MR. GREEN: That is correct, your Honor.

THE COURT: Is there any disagreement?

MR. LARNER: No, your Honor.

THE COURT: Okay. Juror 87, which would be outside the thirty, which would be within the alternate pool --

MR. GREEN: That is correct, Judge.

THE COURT: -- also appears to be of African-American descent?

MR. GREEN: Judge, I agree. I didn't go into the alternate pool. I also acknowledge that Juror 87, from my own observation, is a minority of African-American descent.

THE COURT: And you're making a Batson

IN THE 21ST JUDICIAL CIRCUIT, COUNTY OF ST. LOUIS
STATE OF MISSOURI, FAMILY COURT

In re the matter of:

Prosecuting Attorney, 21st Judicial Circuit, ex rel. Marcellus Williams	
Movant/Petitioner,	**Cause No. 24SL-CC00422**
v.	
State of Missouri	**Division 13**
Respondent.	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

The Court having called this matter for hearing on August 28, 2024, Movant Prosecuting Attorney appears through counsel, Matthew Jacober, Realtor; Marcellus Williams appears in person and with special counsel, Tricia J. Rojo Bushnell and Jonathan Pott;, State of Missouri appears through Assistant Attorneys General, Michael Spillane, Kelly Snyder, Andrew Clarke, Katherine Griesbach and Kirsten Pryde.

The Court having considered the record consisting of over 12,000 pages; heard the evidence presented by the Prosecuting Attorney, Attorneys General, and Relator; given proper weight and credibility to the evidence, admitted exhibits and heard arguments; reviewed Proposed Findings of Fact and Conclusions of Law submitted by the parties; None of the parties requested specific Findings of Fact and Conclusions of Law. All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the results reached. Rule 73.01(c). Any finding of fact herein equally applicable as a conclusion of law is adopted as such and any conclusion of law herein equally applicable as a finding of fact is adopted as such. The Court now being fully advised in the premises, hereby makes the following Findings of Facts, Conclusions of Law, Order and Judgment pursuant to § 547.031.2 R.S.Mo.

PROCEDURAL HISTORY

Following a 14-day jury trial, the Circuit Court for St. Louis County on August 27, 2001 entered its judgment finding Marcellus Williams guilty of first-degree murder for the August 11, 1998 killing of F.G., as well as first-degree burglary, two counts of armed criminal action, and robbery and fixing punishment at death. The Missouri Supreme Court affirmed Williams' conviction, *State v. Williams,* 97 S.W.3d 462 (Mo. banc 2003), and affirmed the judgment denying 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 8th Circuit 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).

In December of 2014, The Missouri Supreme Court issued a warrant of execution setting a January 28, 2015 execution date. Williams then filed a petition for a writ of habeas corpus in the Missouri Supreme Court alleging he was entitled to additional DNA testing to demonstrate actual innocence. That same Court vacated Williams' execution date and appointed a special master to ensure complete DNA testing and to report the results of the additional DNA testing.

The special master provided the Missouri Supreme Court with the results of additional DNA testing conducted on hair and fingernail samples from the crime scene and of the knife used in the murder. The parties fully briefed their arguments to the master. The Missouri Supreme Court, after reviewing the master's files, denied Williams' habeas petition because the additional DNA testing did not demonstrate Williams' actual innocence. The United States Supreme Court denied Williams' petition for a writ of certiorari. *Williams v. Steele,* 582 U.S. 937, 137 S.Ct. 2307, 198 L.Ed.2d 737 (2017).

In 2017, Williams filed another petition for writ of habeas corpus, again alleging DNA testing demonstrated his actual innocence by excluding him as a contributor of DNA found on the knife used in the murder. The Missouri Supreme Court denied relief. The United States Supreme Court denied Williams' petition for writ of certiorari. *Williams v. Larkin,* 583 U.S. 902, 138 S.Ct. 279, 199 L.Ed.2d 179 (2017).

In 2023, Williams filed a petition for a declaratory judgment alleging Governor Parson lacked authority to rescind an executive order issued by Governor Greitens on August 22, 2017 appointing a board of inquiry pursuant to § 552.070 RSMo and staying execution until the final clemency determination. On June 29, 2023 Governor Parsons rescinded said executive order, thereby dissolving the Board of Inquiry established therein. On June 4, 2024, the Missouri

Supreme Court issued a permanent writ of prohibition barring the Circuit Court from taking further action other than granting the governor's motion for judgment on the pleadings and denying Williams' petition for declaratory judgment. *State ex rel. Parson v. Walker,* No. SC100352, ___S.W.3d ___ at 2-3. (Mo. banc June 4, 2024).

On June 4, 2024 The Missouri Supreme Court issued its order and warrant for execution setting a September 24, 2024 execution date for Williams.

Williams filed a motion to withdraw the Missouri Supreme Court's June 4, 2024 warrant of execution setting the September 24, 2024 execution date, claiming the warrant was premature because on January 26, 2024 the St. Louis County Prosecutor filed a motion to vacate Williams' first-degree murder conviction and death sentence pursuant to § 547.031, R.S.Mo. Supp. 2021. The Missouri Supreme Court overruled said motion. *State of Missouri v. Marcellus Williams,* No. SC83984 (Mo. banc July 12, 2024).

LEGAL STANDARD

Does this Court have jurisdiction or authority to hear a Motion to Vacate or Set Aside Judgment pursuant to §547.031.1 R.S.Mo (2021), if the Supreme Court issues its order and warrant for execution before the motion is heard and ruled on?

The Legislature has expressly provided that a § 547.031 R.S.Mo (2021) motion collaterally attacking a judgment may be filed at any time in circuit court, and the statute likely does not impermissibly conflict with controlling Supreme Court rules pertaining to capital crimes for which a sentence of death has been imposed.

In 2021, due in part to Judge Draper's concurrence in *State v. Johnson,* 617 S.W.3d 439, 446 (Mo. banc 2021), the Legislature enacted § 547.031 R.S.Mo (2021) which provides:

1. A prosecuting or circuit attorney, in the jurisdiction in which the person was convicted of the offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.

2. Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented. The attorney general shall be given notice of hearing of such motion by the circuit clerk and shall be permitted to

appear, question witnesses, and make arguments in a hearing of such motion.

3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea, the evidence presented at any direct appeal or post-conviction proceeding, including state or federal habeas action; and the information and evidence presented at the hearing on the motion.

4. The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such motion. The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

By its express terms, this statute not only authorizes the appropriate circuit court to decide the motion, but also requires said court to hold a hearing and to issue findings of fact and conclusions of law. Nothing in the statute excepts capital death sentence cases from the circuit court's authority, even those for which the defendant has exhausted all right to seek relief before both the Missouri State Supreme Court and United States Supreme Court. Thus, in order for the Circuit Court to dismiss for lack of authority in the instant case, it would have to find that a conflict exists between the statute and Supreme Court rules requiring exclusive Supreme Court jurisdiction, and that the Supreme Court rules prevail over the statute. *See, Brick v. Koeppen,*672 S.W.3d 62, 65-66 Mo. App. 2023).

Only three cases have interpreted this statute and none addresses a circuit court's authority to hear the motion under the facts presented in the instant case. In *State v. Johnson,* 654 S.W.3d 883 (Mo. banc 2022), none of the parties raised the issue in what was an arguably more compelling case for restraining the circuit court's authority. In *Johnson,* unlike in the case at bar, the Supreme Court's warrant for execution was issued well before the § 547.031 motion was filed in the circuit court. Ultimately, the circuit court denied the last-minute motion on the grounds that it had insufficient time to conduct a meaningful hearing on the merits. However, rather than addressing the circuit court's authority to act after issuance of its warrant for execution, the Supreme Court denied the motion for stay of execution on the grounds that even if remanded for hearing, defendant could not make the required showing of likely success on the merits under the injunctive relief analysis also applicable when a stay is sought. *Id.* at 892-93. But in doing

so, a majority of the Supreme Court appears to have given at least tacit approval for a circuit court to proceed with such a motion, notwithstanding the high court's prior issuance of warrant for execution in that case. Judge Breckenridge wrote in dissent that the circuit court in her view was in error in not scheduling the § 547.031 hearing as required by statute. *Id.* at 903. Defendant Williams likely titled his Supreme Court filing as a "Motion to Withdraw Warrant of Execution" in his direct appeal case to avoid confronting the uphill "likelihood of success on the merits" argument faced when filing a motion to stay execution.

In its Motion to Dismiss the § 547.031 motion, the Attorney General submits three colorable, but far from definitive, citations of authority in support of its contention that the Supreme Court has exclusive jurisdiction over this matter. Although not directly argued, the brief implicitly makes the argument that the Supreme Court rules cited prevail over the conflicting statute, requiring the motion to be heard by the Supreme Court.

The first is **Article V, § 2** of the Missouri Constitution. However, that section simply states that the decision of the Supreme Court shall be controlling in all other courts. The second citation is Supreme Court Rule 30.03(b), which provides:

> (b) A date of execution set pursuant to Rule 30.30(a) shall be stayed upon the receipt in this Court of proof of filing of a timely appeal or petition for writ of certiorari in the Supreme Court of the United States. No other filing in this or any other Court shall operate to stay an execution date without further order of this Court or other competent authority.

However, none of the parties have requested that the Circuit Court stay the execution, as it is conceded that it lacks authority to do so. Accordingly, this rule does not expressly preclude a circuit court from hearing a § 547.031 motion.

Next, the Attorney General cites **Supreme Court Rule 91.02(b)**, which provides that, in capital convictions involving a sentence of death, any habeas corpus petition may be filed in the Supreme Court in the first instance and, if first filed in another court, shall be deemed to have been filed in the Supreme Court. Although akin to a habeas petition, a § 547.031 motion is made pursuant to specific legislative enactment to prevent a prosecutor or circuit attorney to seek relief in addition to, or apart from, the convicted defendant's right to seek post-conviction and habeas relief. Thus, the statute does not directly conflict with the mandate contained in Rule 91.02(b), requiring a capital defendant to file his or her habeas petition exclusively in the Supreme Court.

Finally, the Attorney General cites the following **two cases**, neither of which directly supports its contention of exclusive Supreme Court jurisdiction in

this matter. *State ex rel. Nixon v. Daugherty,* 186 S.W.3d 253 (Mo. banc 2008) involved a defendant's unprecedented use of a Supreme Court civil practice rule, Rule 74.06(d), to collaterally attack the judgment denying his Rule 24.035 post-conviction relief motion. In that case, the court held that Rule 74.06(d) applied solely to civil actions and that permitting such a motion would eviscerate a post-conviction relief motion's purpose of promptly and finally adjudicating claims concerning the legality of the conviction or sentence of a defendant. In particular the court stated:

> In a death penalty case, a Rule 74.06(d) motion also frustrates the purpose of Rule 91.02(b), Rule 29.08(d), and the Court's order of June 16, 1988. All of these make clear that matters affecting a sentence of death, once it is affirmed on direct appeal and except for a motion filed under Rule 24.035 or Rule 29.15, are to be filed in this Court and not another state court.

Id. at 254.

As an initial matter, it should be noted that the above quote expressly exempts post-conviction relief motions from having to be filed directly in the Supreme Court. Moreover, glaringly absent from the Attorney General's brief is any mention that *Daugherty*, which was decided long before enactment of § 547.031, permits **only** (emphasis added) prosecuting attorneys to file a motion to vacate/set aside a conviction if the defendant may be innocent or that constitutional error at trial undermines the confidence in the judgment. Also of significance is the provision in § 547.031 for appellate review of a circuit court's determination, meaning that the Supreme Court would have the last word in a capital death sentence case in any event.

The second case cited is *State ex rel. Amrine v. Roper,* 102 S.W.3d 541 (Mo. banc 2003), which allowed capital offenders to raise free-standing claims of actual innocence via habeas corpus. The *Amrine* court pointed to the death penalty statute § 565.035.2 R.S.Mo., as charging it with exclusive authority to review the sentence as well as any errors enumerated by way of appeal. The Attorney General argues that *Amrine* and § 565.035 provide for exclusive Supreme Court review in death penalty cases.

However, the statute does not give the Supreme Court exclusive authority to hear collateral attacks on the judgment and sentence, such as those filed under Rule 29.15 or 24.035. *See, e.g. Anderson v. State,*190 S.W.3d 28(Mo. banc 2006)(Post-conviction relief motion filed pursuant to Rule 29.15 in death sentence case overruled by circuit court and reversed and remanded by supreme court for re-trial of penalty phase.) And, in *State ex rel. Bailey v. Fulton,* 659 S.W.3d 909 (Mo. banc 2023), the Supreme Court recently held, "As previously stated,

however, like motions filed under Rules 29.15 and 24.035, a motion to vacate or set aside a conviction under '§ 547.031 is a new civil action' representing a 'collateral attack on the conviction and sentence'" (*quoting*, *State v. Johnson,* supra 654 S.W.3d at 891 n.10).

Accordingly, § 547.031 does not conflict with any of the Supreme Court rules cited by the Attorney General (24.035; 29.15; 29.08(d); 30.30(b); or 91.02(b)), because it is a legislatively created additional means for a prosecutor to collaterally attack the judgment and sentence under a narrow set of circumstances.

For the foregoing reasons Attorney General's Motion to Dismiss is hereby **DENIED.**

FINDINGS OF FACT

1. More than twenty-six years ago, on August 11, 1998, Williams murdered F.G.. *State v. Williams,* 97 S.W.3d 462, 466 (Mo. banc 2003).

2. After a 14-day trial, a jury convicted Williams of one count each of first-degree murder, first-degree burglary, and first-degree robbery, and two counts of armed criminal action. *Id.* This Court sentenced Williams to death for the first-degree murder conviction. *Id.*

3. While the Court has reviewed all of the relevant court records, the principle cases affirming Williams' convictions and sentences are as follows:

   Trial:
   State v. Williams, 99CR-005297 (Judge Emmett O'Brien St. Louis County Circuit Court 21st Judicial Circuit);

   Direct Appeal:
   State v. Williams, 97 S.W.3d 462 (Mo. banc 2023);

   Direct Appeal Petition of Certiorari:
   Williams v. Missouri, 539 U.S. 944 (2013);

   Post-Conviction Motion Court Proceedings:
   Williams v. State, 03CC-2254 (Judge Emmett O'Brien St. Louis County Circuit 21st Judicial Circuit);

   Post-Conviction Appeal:
   Williams v. State, 168 S.W.3d 433, 438 (Mo. banc 2005);

   2015 State Petition for Writ of Habeas Corpus:

Williams v. Steele, SC94720 (Mo.);

2017 State Petition for Writ of Habeas Corpus:
Williams v. Larkin, SC96625 (Mo.);

Declaratory Judgment Action:
State ex rel. Parson v. Walker, 690 S.W.3d 477 (Mo. banc 2024).

4. Following the unanimous opinion denying Williams' appeal and affirming this Court's judgment of conviction, *Williams,* at 466, 475, Williams petitioned the United Supreme Court for a writ of certiorari to review the decision of the Supreme Court of Missouri affirming the circuit court's judgment of conviction. *Williams,* 539 U.S. at 944. The petition was denied. *Id.*

5. Williams then filed a motion for post-conviction relief under Supreme Court Rule 29.15. *Williams,* 168 S.W.3d at 139. In his amended motion Williams asserted in excess of thirteen claims for post-conviction relief. *Id.* at 438-47. The motion court denied Williams' motion for post-conviction relief. *Id.* at 439. The Missouri Supreme Court, in a unanimous opinion, affirmed the circuit court's denial of Williams' post-conviction motion. *Id.* at 447.

6. Williams then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. Resp. Ex.2.

7. After the federal District Court initially granted Williams' habeas relief, the United States Court of Appeals for the Eighth Circuit reversed the District Court's judgment and denied Williams' federal habeas relief. *Williams v. Roper,* 695 F.3d 825, 839 (8th Cir. 2012).

8. Williams petitioned the United States Supreme Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit denying his petition for a writ of habeas corpus. *Williams v. Steele,* 571 U.S. 839 (2013).

9. On December 17, 2014, the Missouri Supreme Court issued an execution warrant scheduling Williams to be executed on January 28, 2015.

10. On January 9, 2015, Williams filed a petition for a writ of habeas corpus in the Missouri Supreme Court. Resp. Ex. I-1. Williams alleged that further DNA testing could demonstrate that he was innocent of the murder of F.G..

11. The Missouri Supreme Court appointed a special master to "insure DNA testing of appropriate items at issue in this cause and to report to this Court the results of such testing." Res. Ex. I-14 at 2.

12. On January 31, 2017, after reviewing the special master's report, the Supreme Court of Missouri denied Williams' petition for a writ of habeas corpus. Resp. Ex. I-15 at 1.

13. On April 20, 2017, the Supreme Court of Missouri issued an execution warrant scheduling Williams to be executed on August 22, 2017. Resp. Ex. K3 at 2.

14. Williams sought review of the Supreme Court of Missouri's denial by filing a petition for a writ of certiorari with the United States Supreme Court. On June 26, 2017, the petition was denied. *Williams v. Steele,* 582 U.S. 937 (2017).

15. On August 14, 2017, Williams filed another petition for a writ of habeas corpus in the Supreme Court of Missouri. Resp. Ex. N-1.

16. On August 15, 2017, the Supreme Court of Missouri denied Williams' petition for a writ of habeas corpus. Resp. Ex. N-5.

17. William again sought review of the Supreme Court of Missouri's denial by filing for a writ of certiorari with the United States Supreme Court. *Williams v. Larkin,* 583 U.S. 902 (2017). On October 2, 2017, the petition was denied. *Id.*

18. On August 22, 2017, former Governor Eric Greitens issued Executive Order 17-20, which included an executive stay of Williams' execution and created a board of inquiry to investigate Williams' conviction. It is unknown whether the Board of Inquiry reached a conclusion or issued a report or recommendation.

19. On June 29, 2023, some 5 years and 10 months after former Governor Greitens issued his executive order, Governor Michael L. Parson issued Executive Order 23-06, which dissolved the board and lifted the executive stay of Williams' execution.

20. On June 30, 2023, the Attorney General filed a renewed motion to set Williams' execution date in the Supreme Court of Missouri. Resp. Ex. P-1.

21. On August 23, 2023, Williams filed a petition for declaratory judgment in the Cole County Circuit Court, naming Governor Parson and the Attorney General as defendants. Resp. Ex. Q-1.

22. After the Cole County Circuit Court denied Governor Parson's motion for judgment on the pleadings, Governor Parson sought a permanent writ of prohibition or, in the alternative, a permanent writ of mandamus from the Supreme Court of Missouri directing Judge S. Cotton Walker, Circuit Judge of Cole County Circuit Court, to grant the motion for judgment on the pleadings. Resp. Ex. Q-14.02.

23. After briefing and argument, the Supreme Court of Missouri made its preliminary writ of prohibition permanent on June 4, 2024, and directed Judge Walker to grant Governor Parson's motion for judgment on the pleadings. Resp. Ex. Q-14.17.

24. Clemency gives the Governor the power to extend mercy to prisoners, but it is not another round of judicial review. *See Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 284 (1998). Missouri's Constitution gives Governor Parson the sole power to decide how he will consider clemency applications and whether he will grant them. Governor Parson can grant clemency "for whatever reason or for no reason at all." *Olim v. Wakinekona,* 461 U.S. 238, 250 (1983).

25. On January 26, 2024, Movant filed a motion under § 547.031 R.S.Mo. 2021, to vacate the first-degree murder conviction and death sentence of Marcellus Williams.

26. Four claims were raised: (1) that Williams may be actually innocent of first-degree murder; (2) that Williams' trial counsel provided ineffective assistance in failing to better impeach two witnesses for the State who testified that Williams confessed to them; (3) that Williams' trial counsel provided ineffective assistance in failing to present different mitigating evidence "contextualizing" Williams '"troubled background"; and (4) that the State committed *Baston v. Kentucky,* 476 U.S. 79 (1986) violations by allegedly exercising preemptory strikes of jurors on the basis of race.

27. It is of utmost importance to this Court, that in denying Williams' motion to withdraw the most recently issued execution warrant, the Missouri Supreme Court held that it has already considered and rejected these four claims. *State of Missouri v. Williams,*2024 WL 3402597 at 3 n.3.

28. During the pendency of this case, the parties received a DNA report dated August 19, 2024, from Bode Technology. Resp. Ex. FF. That report

indicated that Bode Technology had developed DNA profiles from Keith Larner (the assistant prosecuting attorney now retired who prosecuted Williams' criminal case), and Edward Magee (a former investigator for the St. Louis County Prosecuting Attorney's office). The August 19, 2024 report, when reviewed in conjunction with the previous DNA reports from the handle of the knife used in the murder of F.G., indicated that the DNA material on the knife handle was consistent with Investigator Magee (matching 15 of 15 loci found by Fienup, who did the DNA testing on the knife handle), and 21 of 21 loci found by Dr. Norah Rudin in her subsequent review of Fienup's results. Resp. Ex. I-13.27 at 4 & Resp. Ex. I-13.29 at 20-23. Rudin and Fienup were Williams' retained experts. Resp. Ex. I-13.25 at 1; Resp. Ex I-13.29 at 2.

29. This new evidence is not consistent with the Movant's theory that the results found by testing the knife handle for Y-STR "touch DNA" in 2015 matched or could match an unknown person or that the results could exculpate Williams.

30. In addition, the report is consistent with trial testimony by a crime scene investigator, who indicated that the suspect wore gloves.

31. On August 21, 2024, the date on which the evidentiary hearing was originally scheduled, Movant and Williams entered into a consent judgment vacating Williams' first-degree murder conviction and death sentence in exchange for a *North Carolina v. Alford* 400 U.S. 25 (1970) plea to first-degree murder in exchange for a sentence of life without parole.

32. The Attorney General objected after participating in discussions with this Court, which included a phone conversation with a member of F.G.'s family.

33. The Missouri Supreme Court issued a preliminary writ of prohibition overturning the consent agreement and *Alford* plea and directing this Court to conduct a hearing in this matter.

34. On August 25, 2024, Movant filed a motion for leave to amend the motion to vacate or set aside in an attempt to advance two additional claims. Claim 5 alleged a claim of bad-faith evidence destruction under *Arizona v. Youngblood,* 488 U.S. 51 (1998). Claim 6 asserted a claim that the original trial judge's denial of a motion for a continuance violated Williams' right to due process.

35. Over the State's objection, this Court granted Movant leave to amend the motion to advance the *Youngblood* claim (Claim 5) of bad-faith destruction

of fingerprints and bad-faith destruction of DNA evidence on the handle of the knife that was used in the murder of F.G.. This Court denied Movant's motion for leave to amend as to the claim of a violation of due process through the denial of a continuance (Claim 6). The Missouri Supreme Court held that the trial court did not abuse its discretion in denying the continuance. *Williams v. State,* 168 S.W.3d 433, 444-45. Under the law of the case doctrine, the decision of a court is the law of the case for all points presented and decided. *State v. Graham,* 13 S.W.3d 290 (Mo. banc 2000).

AUGUST 28, 2024 HEARING FINDINGS

36. The Prosecuting Attorney called six witnesses in support of its Motion to vacate, including expert David Thompson; Judge Joseph L. Green, Williams' lead penalty phase counsel at his original trial; Dr. Charlotte Word, an expert witness in DNA testing; Judge Christopher E. McGraugh, Williams' lead guilt phase counsel at his original criminal trial; Prosecutor Keith Larner, the prosecuting attorney at Williams' original criminal trial; and Patrick Henson, an investigator for Movant's Conviction and Incident Review Unit.

DAVID THOMPSON

37. Thompson testified over the State's objection concerning the reliability of witnesses H.C. and L.A. Hrg. Tr. At 25-64.

38. Thompson concluded, based upon evidence-based standards, that H.C. and L.A. gave unreliable information to investigating officers. *Id.*

39. Thompson acknowledges that he did not review the trial transcript, which included the trial testimony of the officers who interviewed H.C. or L.A., or the trial testimony of H.C. or L.A. themselves. *Id.* 53-55. Had he done so he would have had the opportunity to confirm trial counsels' exemplary efforts to discredit the testimony of H.C. and L.A in the presence of the jury. Despite trial counsels' efforts the jury found the testimony of H.C. and L.A. credible.

40. Thompson's testimony does not aide in deciding the issues currently before this Court.

The Hon. Joseph L. Green

41. Judge Green testified that roughly one month before the Williams' trial, he was co-counsel in another capital case representing Ken Baumruk, who was also tried in the 21st Judicial Circuit. *Id.* at 69. He participated in a half-day

sentencing proceeding in the Baumruk capital case during Williams' trial. *Id.* at 69-70.

42. Judge Green testified, which is supported in the record from the trial, his complaints about the prosecutor's purported failure to disclose information and evidence in a timely manner, including witness notes and the mental history of H.C and Williams' MDOC records that were used by the State in the penalty phase. These issues were memorialized in a Verified Motion for Continuance and a Supplemental Motion for a continuance filed and argued on the record and denied by the trial court. *Id.* at 78-79.

43. Judge Green testified that he did not recall one way or the other whether anyone touched the knife without gloves during trial. *Id.* at 82-83.

44. This Court finds that Judge Green testified earnestly, compassionately, honestly, and to the best of his recollection, but as he admitted his memory was better at the time he testified in Williams' post-conviction relief case in 2004.

45. Despite Judge Green's testimony that he believes Williams "did not get our best". *Id.* at 82, this Court disagrees. Based upon review of the trial transcript, PCR transcript, and Judge Green's affidavit, Judge Green without reservation performed his duties as trial counsel in an exemplary fashion.

46. Judge Green's testimony before this Court does not support either of the claims of ineffective assistance of counsel raised in Movant's motion to vacate, which were already rejected by the Supreme Court of Missouri. *Williams,* 168 S.W.3d at 440-42 (rejecting claim that counsel was ineffective for not better investigating and impeaching H.C. and L.A.), 443 (rejecting claim that counsel was ineffective for not presenting more or different mitigation evidence).

47. With respect to Movant's motion to amend his motion regarding the trial court's denial of the motion for continuance which this Court denied, the Missouri Supreme Court has already found that the trial court did not abuse its discretion in denying a continuance. *Id.*

Dr. Charlotte Word

48. Dr. Word, an expert witness in DNA testing, testified for Movant, Hrg. Tr. At 98-152. This Court finds that Dr. Word's testimony established three important facts, none of which were helpful to Movant.

49. First, the DNA material found on the knife handle likely belongs to Investigator Magee (and also possibly Larner), and not to some other yet identified individual alleged by Williams and Movant to actually be responsible for the murder of F.G.. *Id.* at 152.

50. Second, if DNA material from the murderer was ever present on the knife handle, any such material could have been removed by individuals subsequently touching the knife handle without gloves. *Id.* at 152-53.

51. Third, Dr. Word has no idea what the procedures for evidence handling were in the St. Louis Prosecuting Attorney's Office, or in any crime lab for any St. Louis law enforcement entity at the time of the investigation into F.G.'s murder or at the time of Williams' trial. *Id.* at 151.

52. This Court finds that Dr. Word's testimony did not bolster Movant's claim of actual innocence.

53. Movant claimed that the DNA material of the "actual" killer was on the knife handle. This theory was clearly refuted by Dr. Word's testimony. In addition, Dr. Word's testimony provides no support for the theory of bad-faith destruction of evidence. *State v. Deroy,* 623 S.W.3d 778, 791 (Mo. App. E.D. 2021).

Judge Christopher E. McGraugh

54. Judge Christopher E. McGraugh is a circuit judge for the City of St. Louis and was Williams' lead guilt-phase counsel along with the Hon. Joseph Green. Hrg. Tr. at 158-66.

55. Judge McGraugh testified he does not remember anyone touching the evidence "outside the evidence bag" without gloves. *Id.* at 162.

56. Judge McGraugh testified that he was not told prior to trial that an "investigator" had been handling the knife without gloves. *Id.* at 164.

57. This Court finds that Judge McGraugh testified credibly as to his recollection of events. But the Court notes that he had difficulty remembering the events of the trial in 2001, roughly twenty-three years ago. Resp. Ex. D-1 at 47-48, 50, 59, 63, 67, 71, 83. This Court also finds that his memory, that no one handled the knife without gloves, is not consistent with the record and the evidence before this Court, including the fact that he was present in the courtroom when the knife handle was held without gloves. Resp. Ex. A at 2262-64, 2314.

Keith Larner

58. Keith Larner was the lead prosecutor in the Marcellus Williams case. Hrg. Tr. at 166-67. Larner testified that the two- informant witnesses, H.C and L.A., were the "strongest" witnesses he ever had in a murder case. *Id.* at 172. Larner testified that H.C. knew things that only the killer could know. *Id.* at 239. Larner testified that H.C. knew the knife was jammed into F.G.'s neck, that the knife was twisted, and that the knife was left in F.G.'s neck when the murderer left the scene, details which were not public knowledge. *Id.*

59. Larner testified that L.A. was "amazing." *Id.* Larner testified that she led police to where Williams pawned the computer taken from the residence of the murder scene, and that the person there identified Williams as the person who pawned it. *Id.* at 240. Larner testified that L.A. also led police to items stolen in the burglary in the car Williams was driving at the time of the murder. *Id.* at 240-41.

60. Larner testified that he knew from talking to Detective Vaughn Creach that the killer wore gloves. *Id.* at 183-85.

61. Larner testified that he believed it was appropriate to handle the knife without gloves after the crime laboratory had completed their testing, after he was informed that no one wanted any more testing on the knife, and after he was informed the laboratory found there were no fingerprints and nothing to link any individual to the crime. *Id.* at 192-93.

62. Larner testified he handled the knife without gloves at least five times prior to trial. *Id.* at 180-87. He showed the knife to four witnesses (two detectives, F.G.'s husband, and the medical examiner) and affixed an exhibit sticker on the knife for use at trial. *Id.* at 180-81.

63. Larner testified credibly that he had never heard of touch DNA in 2001 and probably did not hear of it until 2015. *Id.* at 241. Larner testified that the standard procedure in the St. Louis Prosecuting Attorney's Office at the time of Williams' trial was not to wear gloves when handling fully tested evidence because there was no reason to. *Id.*

64. Larner testified that he did not open untested fingernail clippings at trial without gloves because he did not want to contaminate them. *Id.* at 246.

65. Larner recalled that he had used three peremptory challenges on African Americans because the Missouri Supreme Court opinion listed three *Baston* challenges addressed in Williams' direct appeal. *Id.* at 220. The additional

3 preemptory strikes of Black jurors were not challenged in Williams' direct appeal. *State v. Williams,* 97 S.W.3d 462, 471-72 (Mo. banc 2003).

66. Larner denied systematically striking potential Black jurors or asking Black jurors more isolating questions than White jurors.

67. This Court finds that Larner had a good faith basis and reasons for handling the knife without gloves, despite Dr. Word's testimony that agencies that collected evidence at or near the time of this murder knew about the importance of properly collecting evidence to preserve any biological substance. (PA's Ex.80).

Patrick Henson

68. This Court heard testimony from Patrick Henson, an investigator for Movant's Conviction and Incident Review Unit. Hrg. Tr. at 263-71.

69. Henson testified that he did not find Larner's notes from jury selection in the file retained by the St. Louis Prosecuting Attorney's Office during his review of the file sometime in 2024. *Id.* at 266.

70. Henson testified he had no knowledge of where or how long the file was stored, nor what the file did, or did not contain, at anytime prior to 2024. *Id.* at 268.

71. Henson reviewed the Williams file and did not find any notes from the prosecutor pertaining to voir dire. *Id.* at 265-66.

72. Henson also testified that he never reviewed the State's trial exhibits, which were in the possession of the Missouri Supreme Court, and that no attorney from Movant's office ever asked him to retrieve those exhibits. *Id.* at 270-72.

73. This Court finds that Henson testified credibly and to the best of his ability, but that his limited knowledge of relevant facts with what procedures were in place for file retention during the years in question, undercuts the probative value of his testimony as to any issue presently before this Court.

CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

74. In his first claim on behalf of Williams, Movant asserts that Williams' "may be" actually innocent of first-degree murder. Mot. at 29-36.

75. Generally, in support of his claim that Williams is innocent, Movant alleged that DNA testing excludes Williams as the person whose DNA was found on the knife used in the murder. Mot. 22-24; that members of H.C.'s family would provide testimony that H.C. is a liar and "known" informant, Mot. at 24; that L.A.'s friends would provide testimony that she is a liar and "known informant [,]" *Id.*; and that G.R., to whom the stolen laptop was sold, was prevented "from testifying about where he learned Mr. Williams obtained the laptop." *Id* at 35.

76. Prior to the enactment of § 547.031, offenders who were sentenced to death could raise a freestanding claim of innocence in the Supreme Court of Missouri. *State ex rel. Armine v. Roper,* 102 S.W.3d 541, 547 (Mo. banc 2003). Williams asserted such a claim before the Supreme Court of Missouri. *Williams v. Steele,* SC94720 (Mo. 2017), Resp. Ex. I-1 at 6. The Supreme Court of Missouri has heard the majority of the DNA evidence Movant now asks this Court to consider, with the exception of the recent DNA results that weakens Movant's claim and demonstrates that Investigator Magee is the likely source of the DNA on the knife. Further, the Supreme Court has already denied that claim. *Williams* 2024 WL 3402597 at 3 n.3. Further, the Supreme Court of Missouri has already determined that the other evidence underpinning Movant's first claim allegations of the existence of impeachment material concerning H.C. and L.A. was at least in part not admissible at Williams' trial. *Williams v. State,* 168 S.W.3d 433, 439-42 (Mo. banc 2005). The same is true about the self-serving hearsay concerning the location of the laptop. *Williams v. State,* 97 S.W.3d 462, 468-69 (Mo. banc 2003).

77. In his second claim on behalf of Williams, Movant asserted that Williams' trial counsel provided ineffective assistance of counsel by failing to investigate and impeach witnesses H.C and L.A.. Mot. at 41-43. Williams has raised these claims before. The Supreme Court of Missouri rejected Williams' claims that his counsel provided ineffective assistance regarding investigating and impeaching H.C. and L.A.. *Id.* at 440-43. After considering the entire record, the Supreme Court of Missouri denied each of these claims. *Id.*

78. In his third claim, Movant alleges on behalf of Williams that penalty-phase counsel provided ineffective assistance by not presenting a penalty-phase defense based on Williams' allegations that he experienced an abusive childhood. Mot. at 44-53.

79. At the post-conviction hearing, Judge Green testified that it was the trial team's defense strategy to present Williams in a positive light as a person who had good qualities and was a positive influence on his children, rather

than an "inhuman beast," and to combine that strategy with a residual doubt strategy. Resp. Ex. D-1 at 122-23.

80. Once again Williams presented this claim to the Supreme Court of Missouri during his Rule 29.15 post-conviction proceedings. *Williams v. State,* 168. S.W.3d 433, 443 (Mo. banc 2005). And, as with the other claims, the Supreme Court of Missouri denied Williams' claim of ineffective assistance and affirmed the motion court's decision that presenting an abusive childhood strategy would have been contrary to the chosen defense strategy and would not have changed the outcome. *Id.* The Court went on to hold that the motion court did not clearly err in denying this claim without an evidentiary hearing. *Id.*

81. In relation to claims two and three, the Missouri Supreme Court has already rejected these claims when it considered them under *Strickland v. Washington,* 466 U.S. 668 (1984). Movant cannot repackage these claims into actual innocence claims to receive relief for Williams, especially when the actual innocence standard is much harder to meet than the *Strickland* prejudice standard. *Id.* at 703.

82. In his fourth claim, Movant alleges two *Baston* challenges on behalf of Williams. Mot. at 53-63. Specifically, Movant alleges that the State exercised discriminatory peremptory strikes of two members of the venire. Venireperson 64 and Venireperson 65. Mot. at 53-62.

83. The Supreme Court of Missouri rejected Williams' *Baston* challenges to these same venirepersons on direct appeal. *State v. Williams,* 97 S.W.3d 462, 471-72. The Supreme Court of Missouri found that the State had provided race neutral reasons to support its strikes of Venireperson 64, *Id.,* and Venireperson 65. *Id.* at 472.

84. Our Missouri Constitution vests the State's judicial power in "a supreme court, a court of appeals…and circuit courts." Mo. Const. art. V, § 1. It further provides, "The supreme court shall be the highest court in the state…. Its decisions shall be controlling in all other courts." Mo. Const. art. V, § 2; *see also State ex rel. Strong v. Griffith,* 462 S.W.3d 732, 734 (Mo. 2015) (stating that it is not appropriate to raise a post-conviction claim in habeas corpus that the court has already rejected in ordinary course). This Court, therefore, cannot reverse, overrule, or otherwise decline to follow the previous decisions of the Supreme Court of Missouri that populate the long procedural history in Williams' case. *See* Mo. Const. rt. V. § 2; *see also Strong,* 462 S.W.3d at 734.

85. Because Movant's first, second, third, and fourth claims before this Court have previously been denied by the Supreme Court of Missouri when the very same claims were raised by Williams in his § 547.031 motion, this Court must now deny them. *See State v. Williams,* 2024 WL 3402597 at 3 n.3; *see also State v. Johnson,* 654 S.W.3d 883, 891-95 (Mo. 2023).

86. Movant's fifth claim in his amended motion which this Court granted leave to file shortly before the hearing, over the States objection, alleged that the State had engaged in bad-faith destruction of evidence under *Arizona v. Youngblood,* 488 U.S. 1051 (1988).

87. Movant alleged that the bad faith destruction of evidence occurred when police destroyed fingerprint lifts determined to be without evidentiary value, and when the prosecutor and his investigator touched the handle of the murder weapon without wearing gloves.

88. The United States Supreme Court has "held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fischer,* 540 U.S. 544, 547 (2004). "[I]n *Youngblood,* by contrast, [the Court] recognized that the Due Process Clause 'requires a different result when [a court] deal[s] with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subject to tests, the results of which might have exonerated the defendant." *Id. quoting Youngblood,* 488 U.S. at 57). The Court stated that the "failure to preserve this potentially useful evidence does not violate due process '*unless a criminal defendant can show bad faith on the part of the police.*'" *Id.* at 547-48.

89. Our state courts have similarly applied *Youngblood,* finding that when the State fails to preserve evidence that "might have exonerated the defendant [,]" a defendant must show that the State acted in "bad faith" in order to establish a due process violation. *State v. Deroy,* 623 S.W.3d 778, 790 (Mo. App. 2021). When the State acts in good faith in accordance with its normal practice, no due process violation lies when potentially useful evidence is destroyed. *Id.* at 791. The requirement to show that bad faith has no exceptions. *See Id.* (citing cases from the Missouri Supreme Court holding that there is a bad faith requirement and holding that those cases must be followed).

90. Movant and Williams have made arguments before this Court indicating that the knife handle was central to the State's case or that, without additional unblemished testing, Williams has no avenue to prove his actual innocence. The United States Supreme Court has specifically refuted

similar arguments that have also attempted to change or remove the bad faith requirement of *Youngblood. See Illinois v. Fisher,* 540 U.S. at 547.

91. Here, neither Movant nor Williams presented any evidence from which this Court could find that the State destroyed potentially useful evidence in bad-faith, let alone clear and convincing evidence of the same.

92. The record before this Court refutes the allegation of bad-faith destruction of latent fingerprints. Indeed, the trial transcript indicates that latent fingerprints of insufficient quality for comparison were destroyed. Resp. Ex. A at 95-96, 3241. Specifically, Detective Thomas Krull testified that he received fingerprint lifts that were of insufficient quality to be used for comparison and those were destroyed after it was determined that the lifts were useless. *Id.* at 2324, 2340-41. No evidence was presented that this was done in bad faith. Because Movant has failed to met his burden of proof, this Court finds the claim of bad-faith destruction of fingerprint evidence to be without merit.

93. In addition, Movant did not carry his burden to demonstrate bad-faith destruction of whatever genetic material, if any, was present on the handle of the murder weapon prior to the knife handle being touched by Larner, Investigator Magee, and any other individuals.

94. Larner testified that he believed it was appropriate to handle the knife without gloves after the crime laboratory had completed their testing, he was informed that no one wanted any more testing on the knife, and the laboratory found there were no fingerprints and nothing on the knife to link any individual to the crime. *Id.* at 192-93. Larner stated that this belief was bolstered by the information provided by Detective Creach indicating that the killer had worn gloves, which, in turn was supported by the testimony of H.C. *Id.* at 192-93.

95. Larner testified that he carried the knife around without gloves during Williams' trial and handed it to a witness who was not wearing gloves and "[n]o one said anything." *Id.* at 247.

96. This Court finds that Larner testified credibly concerning the touching of the knife and that his testimony, as well as the other evidence in the state court record, refutes a claim that he, or any other State-actor, acted in bad faith by touching the knife handle without gloves and Movant's theory has no probative value.

97. Because Movant failed to prove his claim by clear and convincing evidence, this Court finds Movant's fifth claim to be without legal merit.

See Fisher, 540 U.S. at 547-48; *see also Youngblood,* 488 U.S. at 57-58; *Deroy,* 623 S.W.3d at 790. Movant's fifth claim is denied.

98. The State argues that Movant is judicially estopped from proceeding on Movant's first claim, which alleges Williams may be actually innocent of first-degree murder. This Court rejects this argument as the State has failed to show that Movant's position is clearly inconsistent with his earlier position. In addition, Movant's attempt to enter an *Alford* plea did not create an unfair advantage or impose an unfair detriment on the State if not estopped. *Vacca v. Mo. Dep't of Labor & Ind. Rels.,* 575 S.W.3d 233, 236-37 (Mo. 2019).

99. "To make a free-standing claim of actual innocence, [Movant] must make a clear and convincing showing of [Williams'] innocence. *State ex rel. Dorsey v. Vandergriff,* 685 S.W.3d 18, 25 (Mo. 2024). Clear and convincing evidence "instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id.* (*quoting Armine,* 102 S.W.3d at 548). In *Dorsey,* the Supreme Court of Missouri found that new expert opinions that Dorsey could not deliberate did not meet this test in light of the facts of the crime. *Id.* at 25-26.

100. The Supreme Court of Missouri has emphasized that the first step in actual innocence analysis is considering whether the "new" evidence is new in the sense that it was "not available at trial." *State ex rel. Barton v. Stange,*597 S.W.3d. 661 n.4 (Mo. 2020); *accord Dorsey,* 685 S.W.3d at 24-25 (Both gateway and freestanding claims of actual innocence require "new evidence to support the claim that was not available at trial…."). Other appellate courts have expressed a similar requirement. *State ex rel. Nixon v. Sheffield,* 272 S.w.3d 277, 284-85 (Mo. App. 2008) (stating evidence is only "new" if not available at trial and could not have been discovered through the exercise of due diligence.) Additionally, when considering whether excluded evidence supports innocence only, evidence "tenably claimed to have been wrongfully excluded" may be considered in a claim of innocence. *Schlup v. Delo,* 513 U.S. 298, 328 (1995).

101. A claim that cannot meet the gateway standard of showing by a preponderance of the evidence that no reasonable juror would convict in light of new evidence, necessarily cannot meet the higher freestanding innocence standard of proof by clear and convincing evidence. *Barton,* 597 S.W.3d 661, 665 (Mo. 2020) ("Because the evidence is insufficient to make a gateway claim of actual innocence by a preponderance of the evidence, it necessarily is also insufficient to support a freestanding claim of actual innocence, which requires clear and convincing evidence of actual

innocence."); *State ex rel. McKim v. Cassady,* 457 S.W.3d 831, 843 (Mo. App. 2015).

102. Here, Movant's evidence regarding Williams' freestanding innocence claim fails.

103. As herein above described, the freestanding innocence claim pled in Movant's original motion unraveled during the pendency of this case, when the parties received a DNA report, dated August 19, 2024, from Bode Technology. Resp. Ex. FF.

104. In light of this report, Movant cannot demonstrate that the genetic material on the knife handle can form a basis for "a clear and convincing showing" of Williams' innocence. *Dorsey,* 685 S.W.3d at 25. Movant failed to present "clear and convincing evidence of actual innocence…that undermines the confidence in the judgment [,] and his claim must be denied. § 547.031.3 R.S.Mo.

105. Movant's remaining evidence amounts to nothing more than re-packaged arguments about evidence that was available at trial and involved in Williams' unsuccessful direct appeal and post-conviction challenges. That repackaged material cannot form the basis for relief under § 547.031.3 or the *Armine* standard. *See Johnson,* 554 S.W.3d at 895 (denying a stay for claims that were "largely just re-packaged versions of claims [the convicted individual] ha[d] brought (and seen rejected) many times before"); *see also Barton,* 597 S.W.3d at 664 n.4 (describing the required threshold showing that the proffered evidence is new).

106. As stated above, in support of his claim of innocence on behalf of Williams, Movant alleged that members of H.C.'s family would provide testimony that H.C. is a liar and "known informant." Mot. at 24. Movant alleges that L.A.'s friends would provide testimony that she is a liar and "known informant." *Id.* Movant further alleged that G.R., to whom the stolen laptop was pawned, was prevented by objection "from testifying about where he learned Mr. Williams obtained the laptop." *Id.* at 35. Movant asserted that Williams "had not himself secured the laptop, but rather had gotten it from his 'girl'[L.A.]." *Id.* Movant alleges that this information makes a clear and convincing showing of actual innocence. It does not.

107. None of this evidence is "new" as it was available at trial. And, in relation to the evidence found to be inadmissible by the Missouri Supreme Court, Movant cannot now claim that the purported evidence was wrongfully excluded under Missouri law because the Missouri Supreme Court, the

highest authority on Missouri law, has held that the evidence was properly excluded. Mo. Const. art. V, § 2; *Schlup,* 513 U.S. at 328.

108. Movant alleged in his motion that Williams' trial counsel provided ineffective assistance in not presenting the evidence he inconsistently alleged was new. *See* Mot. at 29-36, 36-43. But setting that aside, the record demonstrates that the evidence allegedly impeaching H.C. and L.A. was available at the time of trial. *See Williams v. State,* 168 S.w.3d at 440-42. And Movant's assertions that L.A.'s purported unreliability, "was similarly not presented to the jury [,]" Mot. at 34, is summarily refuted by the Supreme Court of Missouri. *See Williams v. State,* 168 S.W.3d at 441. In denying Williams' ineffective-assistance-of-counsel, the Supreme Court of Missouri stated: "As the motion court correctly found, this testimony would have been cumulative to the evidence at trial because the record contained evidence of [L.A.]'s drug addiction, prostitution, and that she might receive reward money for testifying at trial. Counsel will not be found ineffective for deciding not to introduce cumulative evidence." *Id.*

109. As for G.R.'s laptop testimony, the Supreme Court of Missouri found the circuit court properly excluded the evidence as self-serving hearsay. *State v. Williams,* 97 S.W.3d at 468. Movant has not explained why this Court should now consider evidence that remains inadmissible in considering whether Williams has made a showing of innocence, and this Court may not second-guess the Supreme Court of Missouri's ruling on the issue of admissibility. *See* Mo. Const. art. V, § 2; *see also Strong,* 462 S.W.3d at 734.

110. Further, contrary to Movant's argument that the jury did not hear this evidence, the Missouri Supreme Court, in discussing the rule of completeness objection from Williams, found that, "Williams was not precluded from showing that [L.A.] once had possession of the laptop. He introduced evidence from two witnesses who said they saw [L.A.] with the laptop during the summer of 1998." *State v. Williams,* 97 S.W.3d at 468-69. The substance of the evidence concerning G.R. was before the jury in Williams' trial and they nevertheless found him guilty. *Id.* Thus Movant cannot now use that same evidence to mount a freestanding innocence challenge. *Barton,* 597 S.W.3d at 664 n. 4; *Sheffield,* 272 S.W.3d at 284-85.

111. Movant's remaining evidence in support of Williams' claim of freestanding innocence amounts to nothing more than old evidence, self-serving hearsay, and evidence the jury could never hear. The evidence presented fails under the standard enumerated in § 547.031.3 or in *Amrine.* Movant has failed to demonstrate any basis for this Court to find Williams actually innocent of first-degree murder.

112. As the Supreme Court of the United States recognized nearly fifty years ago, the trial occupies a special role in our constitutional tradition:

> A defendant has been accused of a serious crime and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.

Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

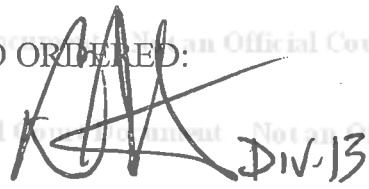
113. Every claim of error Williams has asserted on direct appeal, post-conviction review, and habeas review has been rejected by Missouri's courts.

114. There is no basis for a court to find that Williams is innocent, and no court has made such a finding. Williams is guilty of first-degree murder, and has been sentenced to death.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

Movant's motion to vacate or set aside Williams' conviction and sentence is hereby **DENIED.**

SO ORDERED:



Honorable Bruce F. Hilton
Circuit Judge, Division 13
September 12, 2024

Cc: Attorneys of record e-filed pursuant to Rule 103