In the Supreme Court of the United States

No. 24A274

CAPITAL CASE

MARCELLUS WILLIAMS,

Petitioner,

v.

STATE OF MISSOURI, GOVERNOR MICHAEL L. PARSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

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Execution scheduled for September 24, 2024, at 6:00 p.m. Central

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INTRODUCTION

The Governor's response shows why the Court should stay Marcellus Williams' execution. The Governor does not deny that the Supreme Court of Missouri's decision created a lower court split by holding that capital defendants lack due process rights in connection with clemency proceedings. The Governor also never defends the court's central holding that Chief Justice Rehnquist authored the controlling opinion in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). The Governor's silence on these issues tacitly confirms that there is both a reasonable probability of certiorari and a fair prospect of reversal on the merits. In short, it is unrefuted that Missouri has placed itself on the wrong side of a lower court split.

Instead, the Governor argues that there is an independent and adequate Missouri law ground for the court's decision. Specifically, the Governor points out the obvious—that the Supreme Court of Missouri interpreted Missouri law in upholding the Governor's dissolution of the Board of Inquiry. The same observation holds true, however, for countless constitutional challenges that reach this Court through State court systems. Ultimately, the Governor has the Supremacy Clause backward. Legality under State law does not equate to legality under Federal law. States must interpret their laws in a manner consistent with due process, not the other way around. States cannot skirt the Federal Constitution and this Court's review by shrouding unconstitutional actions underneath the veil of "State law."

There was no undue delay. Williams filed his application and petition after the conclusion of trial court proceedings initiated *by the prosecution* to vacate his conviction and sentence as unconstitutional. There was even a plea deal to remove

Williams' death sentence. Had the prosecutor's motion resulted in a judgment that vacated either his conviction or death sentence, clemency would have been a moot point. Instead, when the prosecution's motion was denied, Williams promptly filed the application for a stay of execution. The Court should grant the stay.

I. There Is a Reasonable Probability the Court Will Grant Certiorari and a Fair Prospect of Reversal Because the Supreme Court of Missouri Is on the Wrong Side of a Lower Court Split.

Throughout 19 pages of legal analysis, the Governor never defends the correctness of the Supreme Court of Missouri's conclusion that Chief Justice Rehnquist authored the controlling opinion in *Woodard*. *See also INS v. St. Cyr*, 533 U.S. 289, 345 (2001) (Scalia, J., dissenting) (Chief Justice Rehnquist and Justice O'Connor agreeing that her opinion constituted the Court's holding). This is telling. The Supreme Court of Missouri did not reach that conclusion *sua sponte*. Instead, the Governor led the Supreme Court of Missouri into error by forcefully advancing this position throughout the lower court proceedings. *See* Sugg. in Supp. of Petition for Writ of Prohibition, at 17–20; Relator's Br. 47–51. Now the Governor is silently backpedaling from that position just days before Williams' execution.

The Governor's response also avoids addressing *any* other decision from *any* non-Missouri lower court in the United States regarding the due process rights of capital prisoners. Addressing those courts' decisions would require the Governor to acknowledge the deep split. Below, the Governor recognized that other courts follow Justice O'Connor's concurrence and asked the Supreme Court of Missouri not to follow them. *See* Sugg. in Supp. of Petition for Writ of Prohibition, at 18–19 ("Some federal circuit courts have read Justice O'Connor's concurrence to control under

Marks, but this Court should not follow those decisions."); Relator's Br. 50 (same). Now the Governor is silent. The end result, however, is that the record before this Court is unrefuted that the Supreme Court of Missouri is on the wrong side of a lower court split regarding the due process rights of capital prisoners in connection with their clemency proceedings.

The Governor tries to argue that it does not matter whether Chief Justice Rehnquist's or Justice O'Connor's opinion is controlling. But the Governor avoids the true issue. Even before the decision below, there was an extant split regarding the scope of rights under Justice O'Connor's opinion. *See Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015) (acknowledging split). The majority rule is that the Due Process Clause requires States to comply with their own State-created clemency procedures in death penalty cases. *See, e.g.*, *Com. v. Michael*, 56 A.3d 899, 903 (Pa. 2012); *Aruanno v. Corzine*, 413 Fed. Appx. 494, 497 (3d Cir. 2011); *Baze v. Thompson*, 302 S.W.3d 57, 59–60 (Ky. 2010); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000); *Sellers v. State*, 973 P.2d 894, 896 (Okla. Crim. App. 1999); *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998); *see also Bryan v. DeSantis*, 343 So. 3d 127, 129 (Fla. DCA 1st 2022). The minority position is that States do not have to comply. *Garcia v. Jones*, 910 F.3d 188, 191 (5th Cir. 2018); *Gissendaner*, 794 F.3d at 1333. The Supreme Court of Missouri's footnote falls into the minority position. App. 14a n.11. But the Governor again refuses to engage with the prevailing majority rule and instead changes the subject by returning to a State law argument. *See* Resp. at 18.

Under the majority view, the Governor's actions violated due process. Governor Greitens invoked a special, rarely used statute unique to capital prisoners and issued an executive order that created rights in favor of Williams protected by the Due Process Clause of the Fourteenth Amendment. Governor Parson interfered with those rights by dismantling the Board of Inquiry so that the State could not fulfill its obligations to Williams and comply with its own clemency procedures.[1] If successful, the result is not only that Mr. Williams would finally receive the process he is due, but also a clemency decision issued by Missouri's *next* Governor, who will take office in January.

The Governor contends that Williams "fails to explain why the *Marks* rule should be 'clarified'" and that Williams argues "that other courts have not applied *Marks* in the way that Petitioner would prefer." Resp. at 20. On the contrary, Williams showed that lower courts deviate from the plain language of the *Marks* rule by counting votes from dissents instead of concurrences to determine the Court's holding. In fact, the Governor recognized this exact problem below. *See* Relator's Br. 51 n.11 ("Some federal courts have added Justice Stevens's dissenting opinion to Justice O'Connor's concurring opinion . . . [b]ut *Marks* requires courts to examine only the opinions of the Justice's [sic] 'who concurred in the judgments.'") (quoting *Marks v. United States*, 340 U.S. 188, 193 (1977)). Furthermore, Williams has no problem with virtually every other court's application of *Marks* to *Woodard* because Justice

[1] In the Governor's Questions Presented, the Governor tries to reframe the issue as being about "pardon and commutation *decisions*" (Resp. at 2) (emphasis added), but Williams' challenge is not about the final decision—it is about the *process* that leads up to that decision.

Stevens' dissent does not impact the outcome. The true problem is that the Governor is unable to defend the Supreme Court of Missouri's application of *Marks* (based on the Governor's prior reading of that case).

Finally, the Governor presents logically inconsistent arguments regarding his revocation of Williams' reprieve. The Governor acknowledges that he lifted Williams' stay of execution. Resp. at 9. He acknowledges that a stay of execution is a reprieve, which is a form of clemency. Resp. at 9. Yet he argues that "[t]his is not a case about the revocation of clemency," "because … 'Executive Order 17-20 [establishing the Board of Inquiry] was a reprieve.'" Resp. at 20 (quoting App. 7a). This makes no sense.

Although the Governor no longer defends the Supreme Court of Missouri's central holding regarding *Woodard*, the Governor does defend the court's holding that a stay of execution "creates no rights." Resp. at 13–14, 20. That position is also plainly wrong. If this were true, it would mean that the State would not violate a capital prisoner's rights by executing him despite a stay of execution. Williams presumes—and hopes—the Governor does not mean what he says.

In any event, the Governor overlooks the plain language of the executive order that granted Williams his stay of execution, which is that the reprieve would remain in place "until such time as the Governor makes a final determination" on clemency (App. 32a)—*i.e.*, after the completion of the Board of Inquiry procedures, including the delivery of a report and recommendation to the Governor. Those conditions have never been fulfilled. This exposes a critical fact in favor of a stay: Williams should *already* be under a stay of execution except for the Governor's unlawful revocation of

that stay.

II. The Court Has Jurisdiction.

The Governor is incorrect that there is an independent and adequate state law ground for the decision below merely because the Supreme Court of Missouri interpreted Mo. Rev. Stat. §552.070. On the contrary, this Court recognizes its "obligation to ensure that state court interpretations" of state law "do not evade federal law." *Moore v. Harper*, 600 U.S. 1, 34 (2023). This Court "temper[s]" its deference to state law "when required by [its] duty to safeguard limits imposed by the Federal Constitution." *Id.* at 35; *see, e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964) ("[T]he South Carolina Supreme Court, in applying its new construction of the statute . . . has deprived petitioners of rights guaranteed to them by the Due Process Clause.").

The Governor offers an unsettling vision of our constitutional system, whereby State courts may interpret away federally protected rights guaranteed by the Federal Constitution by declaring that the court is merely interpreting State law. If the Governor were correct, every unconstitutional State statute, regulation, and evidentiary ruling would be immune from the Federal Constitution and review by this Court. That is not how the Supremacy Clause works. And the Fourteenth Amendment is not constitutional window-dressing. Accordingly, this Court has jurisdiction.

III. Williams Did Not Unduly Delay Filing the Application for Stay of Execution and Petition for Writ of Certiorari.

The Governor argues that Williams has engaged in undue delay. The reasons behind the timing of the application and petition are, however, straightforward. As described in the application, the *State* sought to intervene in favor of overturning Williams' conviction and death sentence. Earlier this year, the St. Louis County Prosecuting Attorney filed a motion to vacate or set aside Williams' conviction and sentence. After the Supreme Court of Missouri scheduled Williams' execution date, the trial court sought to schedule an evidentiary hearing, but was unable to hold the hearing before August 23 (including to accommodate the schedule of the Missouri Attorney General's Office).

Based on a confession of prosecutorial malfeasance, the parties agreed to an *Alford* plea on August 21 that would have resulted in a life-without-parole sentence for Williams. The trial court entered a consent judgment and took Williams' plea, scheduling sentencing for the following day. The Missouri Attorney General, however, sought a writ from the Supreme Court of Missouri that blocked that plea deal, which resulted in a new hearing date of August 28.

If the St. Louis County Prosecuting Attorney's motion had been granted (plea deal or otherwise), the trial court would have vacated the death sentence that qualified Williams for these clemency procedures (because Mo. Rev. Stat. §552.070 is limited to capital cases). More importantly, that ruling would have mooted the execution date. The trial court did not issue a ruling until Thursday, September 12. Williams then filed the application for stay of execution the following Wednesday,

September 18. *See Williams v. Vandergriff*, No. 24-2907, Order dated Sept. 21, 2024 at 4 (8th Cir.) (Kelly, J., concurring) ("In a procedurally complex case such as this one, it would be difficult to conclude that delay is a reason to deny a stay here.").

IV. The Equities Weigh in Favor of Staying Williams' Execution.

The State of Missouri is fractured over this case. *See id.* at 3, 5 ("call[ing] into question the fundamental fairness of Williams' [trial] proceedings," and noting that "[t]hese circumstances do not portray a unified State interest."). Most recently, the St. Louis County Prosecuting Attorney has appealed the trial court's denial of the motion to vacate or set aside Williams' conviction, while the Missouri Attorney General—in that case and this case—takes a different view. Oral argument is scheduled for 9:00 a.m. on Monday, September 23.

Finally, Williams is compelled to correct a misleading argument in the Governor's brief. That brief purports to represent that Williams' execution is consistent with the interests of the victim. Resp. at 22. As the State is aware—because the conversation transpired in the judge's chambers while counsel for all parties was present—on August 21, the victim's husband told the trial court that the victim would not have wanted Williams executed, that he does not want Williams executed, and that the rest of the victim's family does not want Williams executed. App. 79a–80a. The trial court then included those findings in its acceptance of the *Alford* plea (App. 94a)—until the Missouri Attorney General disregarded the wishes of the victim's family and deprived them the finality they actually wanted by blocking that deal. Those statements from the victim's family are the type of critical consideration for clemency that one would expect to find in the Board of Inquiry's

report and recommendation to the Governor, instead of creating the impression that the Governor may not be fully informed of these considerations before allowing the execution to proceed.

CONCLUSION

The Court should grant Marcellus Williams a stay of execution pending disposition of the petition for a writ of certiorari and, if granted, pending a disposition on the merits.

Respectfully submitted,

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