SC100352

In the Supreme Court of Missouri

State of Missouri ex rel. Governor Michael L. Parson,

Relator,

v.

The Honorable S. Cotton Walker,

Respondent.

Original Proceeding from a Petition for Writ of Prohibition or, in the Alternative, Mandamus

Relator's Reply Brief

ANDREW BAILEY
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar #40704

ANDREW J. CLARKE
Assistant Attorney General
Missouri Bar #71264

ANDREW J. CRANE
Assistant Attorney General
Missouri Bar #68017

GREGORY M. GOODWIN
Assistant Attorney General
Missouri Bar #65929

P.O. Box 899
Jefferson City, MO 65102
(573) 751-1546
(573) 751-2096 Fax
mike.spillane@ago.mo.gov
andrew.clarke@ago.mo.gov
andrew.crane@ago.mo.gov
gregory.goodwin@ago.mo.gov

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Argument

I. Governor Parson's statement of facts correctly states the record before this Court, and Respondent cannot ignore this Court's findings just because Williams makes a conclusory allegation of innocence (replies to Respondent's argument I).

Respondent asks this Court to strike the Governor's statement of facts. This Court should decline Respondent's invitation.

A. Governor Parson's statement of facts complies with Rule 84.04(c).

Respondent complains that Governor Michael L. Parson's statement of facts does not comply with Rule 84.04(c)—which directs, in pertinent part, "The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument"—because Governor Parson's opening brief includes citations to this Court's prior opinions regarding Marcellus Williams's capital conviction. Resp. Br. at 22–23. Specifically, Respondent asserts that, because Williams pleaded that he is innocent in a declaratory judgment action, it is somehow improper for the governor to rely on this Court's opinions and orders to explain the context of case below and to show that this Court has repeatedly rejected Williams's claims of constitutional error and actual innocence. *Id.* Put another way, Respondent argues that because Williams pleaded he is innocent, Respondent is allowed to ignore this Court's direct appeal opinion, this Court's post-

conviction opinion, and this Court's multiple orders denying Williams habeas relief. *See id.*

But this argument only highlights the flaw that pervades Williams's arguments below: Williams is not permitted to ignore the jury verdict finding him guilty or to challenge his guilt by bringing a declaratory judgment action. "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party's pleadings." *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 920 (Mo. App. 2004) (quoting *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. 2000)). "[C]onclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim on which relief can be granted." *Bray v. Mo. Dep't of Corr.*, 498 S.W.3d 514, 518 (Mo. App. 2016) (quoting *Hope Acad. Corp. v. Mo. State Bd. of Educ.*, 462 S.W.3d 870, 874 (Mo. App. 2015)).

Williams cannot plead his way around the fact that he was convicted by a jury, that his conviction and the denial of post-conviction relief were affirmed by this Court, and that this Court twice denied habeas petitions alleging his actual innocence. Williams's assertion that he is innocent is a legal conclusion or, at best, a conclusory allegation of fact. It is not to be accepted as true for purposes of judgment on the pleadings. *See Bray*, 498 S.W.3d at 518. And the fact this Court has already rejected claims of innocence in the proper form of

action, the writ of habeas corpus, is relevant because Williams cannot assert his innocence in a declaratory judgment action to avoid the proper procedure of raising his claim of innocence. *Hicklin v. Schmitt*, 613 S.W.3d 780, 787 (Mo. 2020) ("To the extent [the petitioner] asks this Court to vacate her sentence, however, this Court agrees with the State that habeas corpus—not a declaratory judgment—is the appropriate action."); *Charron v. State*, 257 S.W.3d 147, 153–54 (Mo. App. 2008) (finding circuit court lacked subject-matter jurisdiction to hear declaratory judgment action concerning validity of conviction or sentence); *Kennedy v. Mo. Att'y Gen.*, 920 S.W.2d 619 (Mo. App. 1996) (applying res judicata to find a circuit court was barred from considering a claim attacking final criminal judgment in a declaratory judgment action).

Prior to the underlying proceedings, no state court has ever vacated Williams's conviction or found that Williams is innocent. In fact, this Court has, at least, twice denied Williams's claims of innocence. E160–E162; E166–E168. Nevertheless, in denying Governor Parson's motion for judgment on the pleadings, Respondent simply assumed that Williams is, for the purposes of the motion for judgment on the pleadings, factually innocent of first-degree murder. E3, E9. Respondent's order concerning Williams's due process claims rests nearly exclusively on that unfounded assumption. *See* E9. But Respondent cannot ignore the jury's verdict in adjudicating the declaratory

judgment action. Nor can Respondent decline to follow this Court's prior holdings. Mo. Const. art V, § 2. Therefore, Governor Parson's statement of facts complies with this Court's rules, and this Court should not strike it.

B. Respondent admitted the truth of many of the factual allegations about which he now complains.

Respondent asks this Court to strike Governor Parson's statement of facts in its entirety. Resp. Br. at 22–23. But, in his return, Respondent admitted many of the facts he now asks this Court to strike. *See* Return at 7–12, ¶¶ 23, 27, 31–34, 36, 38–42, 44, 45–48, 49–59, 60–75. Despite admitting these facts, Respondent argues that "the Governor's citations to the writ petition and return are misleading for purposes of the Statement of Facts because the writ petition engaged in the same strategy of disregarding the pleaded facts in favor of allegations outside the trial record." Resp. Br. at 23. While Respondent's complaint seems to be particularly focused on the correctness of the facts alleged in relation to this Court's previous direct appeal opinion, *see id.* at 22–23, the focus of the complaint only reinforces that Williams's petition for declaratory judgment is a prohibited collateral attack on a final criminal judgment. *See Hicklin*, 613 S.W.3d at 787; *see also Charron*, 257 S.W.3d at 153–54; *Kennedy*, 920 S.W.2d at 619.

Respondent's challenge to the facts in the petition holds little weight when Respondent admitted many of those facts as true. Respondent's contention that this Court cannot consider facts he admitted is also incorrect because Rule 84.24(g) states:

> The petition for the writ, together with the suggestions in support thereof, any exhibits accompanying the petition, all suggestions in opposition, the writ and *return of service thereon*, *the answer made to the petition for the writ*, and all other papers, documents, orders, and records filed in the appellate court constitute the record. No record under Rule 81.12 is required.

(emphasis added). Put simply, Respondent admitted many of the facts he now challenges in his answer. Those facts were true then and they remain true now. While Respondent has apparently changed his mind about his previous admissions, the shifting nature of Respondent's admissions does not provide a basis to strike Governor Parson's statement of facts.

C. Respondent's statement of facts does not comply with this Court's rules and further confirms that Williams's suit is a collateral attack on his conviction.

Respondent's statement of facts does not comply with applicable standards of review. For example, the portion of Respondent's statement of facts relating to Williams's underlying criminal conviction is argumentative and does not state the facts in the light most favorable to the jury's verdict. Resp. Br. at 15–16; *see* Rule 84.04(c); *see also State v. Cole*, 71 S.W.3d 163, 169

(Mo. 2002) (stating that in applying the sufficiency standard, "[t]he evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.").[1] Unlike Respondent, Governor Parson does not ask this Court to strike Respondent's statement of facts, but simply notes that Respondent's statement of facts is just another demonstration that Williams's claims below are a collateral attack on his final criminal judgment thinly disguised as a petition for declaratory judgment. But however disguised, this Court should not allow Williams's petition to evade this Court's post-conviction rules simply by styling his petition as one for declaratory judgment relief and by purportedly attacking the Governor's clemency authority.

D. Conclusion

At bottom, Williams cannot plead he is innocent in a petition for declaratory judgment to evade the fact that he has been found guilty of first-degree murder. *See Hicklin*, 613 S.W.3d at 787; *see also Charron*, 257 S.W.3d at 153–54; *Kennedy*, 920 S.W.2d at 619. Regardless of his pleadings before the

[1] While Williams's claim below is not a sufficiency challenge, he cannot attack the truth of his final conviction and sentence in a declaratory judgment action, and the circuit court was required to treat this Court's opinion in *Williams I* as controlling to the factual and legal existence of Williams's guilt. *See Hicklin*, 613 S.W.3d at 787.

circuit court, Williams is guilty of first-degree murder, and Governor Parson's brief is not deficient for recognizing that factual and legal reality. *See Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (explaining the role of a trial in our constitutional tradition); *see also State v. Williams*, 97 S.W.3d 462, 466–67 (Mo. 2003) ("*Williams I*"); *Hicklin*, 613 S.W.3d at 787; *Charron*, 257 S.W.3d at 153–54; *Kennedy*, 920 S.W.2d at 619.

II. Respondent's newly arriving argument—that § 552.070, RSMo 2016, is a provision of law "as to the manner of applying for" a pardon—is a tacit recognition that Respondent's order below is infirm, and the new argument is as unpersuasive as the original basis for Respondent's order (replies to Respondent's argument II).

In response to Governor Parson's opening brief, Respondent asserts that Missouri's governor does not have "'exclusive' constitutional authority over the clemency process," because the General Assembly "requires a report and recommendation before the governor's final decision[.]" Resp. Br. at 24 (capitalization altered). The core of Respondent's argument is based on a construction of Article IV, § 7 of Missouri's constitution that focuses on a misreading of only a portion of the provision's text and assigns the constitutional provision a meaning it does not have.

Specifically, Respondent relies on the portion of Article IV, § 7 that states the governor shall have the power to grant reprieves, commutations and

pardons "subject to provisions of law as to the manner of applying for pardons." *See e.g.*, *id.* at 24 (quoting Mo. Const. art. IV, § 7). According to Respondent, § 552.070, RSMo 2016, is a law "as to the manner of applying for pardons" within the meaning of Article IV, § 7. *Id.* But § 552.070 says nothing about the manner of applying for pardons. Respondent's reading severs the portion of Article IV, § 7 from the greater constitutional and statutory context regarding clemency. That, in turn, leaves Respondent's argument unable to bear the weight of Respondent's position.

A. Williams did not argue, and Respondent did not find, that § 552.070 is a law "as to the manner of applying for pardons."

Throughout the proceedings below and in the briefing before this Court, Williams has advanced ever-shifting legal theories, which, until arriving in this Court, have never included an argument that § 552.070 is a law as to the manner of applying for pardons. *Compare* E100–E115, E185–E223 *with* Resp. Br. at 24–49. Additionally, Respondent did not deny Governor Parson's motion for judgment on the pleadings on the basis that § 552.070 is a law as to the manner of applying for pardons. E1–E12. While Governor Parson is mindful that the circuit court's opinion can be affirmed under any correct theory, even if, as here, the circuit court did not consider that theory, *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. 2014), Respondent's newest, late-arriving argument

should be seen for what it is—a concession that Respondent's order below was infirm. And more importantly, Respondent's new argument fares no better than Respondent's original basis for denying Governor Parson's motion for judgment on the pleadings.

B. Respondent's argument is contrary to this Court's precedent.

During the pendency of this case, this Court decided two habeas petitions filed by another capital offender. *State ex rel. Dorsey v. Vandergriff*, 2024 WL 1194417 at *8 (Mo. March 20, 2024).[2] In a consolidated opinion, this Court, in unanimously denying a claim it found to be "a plea for clemency[]" stated, "The Missouri Constitution grants the governor complete discretion to grant pardons, commutations, and other forms of clemency. Mo. Const. art. IV, sec. 7." *Id.* After citing § 552.070, this Court explained, "[t]he Missouri legislature also acknowledges the governor's power and discretion to grant clemency." *Id.* And in denying the offender's claim in *Dorsey*, this Court held, "Because Dorsey's claim is a plea for clemency, it is beyond this Court's authority *and review*." *Id.* (emphasis added). So, contrary to Respondent's arguments about

[2] This opinion consolidated two cases: *State ex rel. Dorsey v. Vandergriff*, SC100388 (Mo. March 20, 2024), and *In re: Dorsey v. Vandergriff*, SC100486 (Mo. March 20, 2024). Because *Dorsey* is not subject to motions for rehearing, it is a final opinion.

the limits of gubernatorial discretion, *see* Resp. Br. at 24–49, *Dorsey* retraced a bright line drawn in prior cases, holding that Missouri's constitution gives the state's courts *no role* in reviewing the Governor's consideration of an offender's clemency petition. *Dorsey*, 2024 WL 1194417 at *8. Williams's petition below asked the circuit court to force Governor Parson to stay Williams's execution and reappoint a board of inquiry to consider Williams's clemency petition. Respondent had no authority to consider that request and no authority to impose a different form of clemency consideration than the one Governor Parson chose.

Therefore, this Court should grant Governor Parson's first point, which asserts that Governor Parson is entitled to a permanent writ of prohibition "because Respondent exceeded his authority by authorizing any judicial review of [Governor Parson's] exclusive constitutional authority to consider and decide clemency petitions, in that Missouri's constitutional separation of powers leaves the exercise of clemency powers to [Governor Parson] alone." Relator's Br. at 36; *accord Dorsey*, 2024 WL 1194417 at *8 (stating clemency issues are beyond this Court's "authority and review").

C. Section 552.070 is not a "law as to the manner of applying for pardons."

Respondent asserts that § 552.070 is a law as to the manner of applying for pardons. Resp. Br at 24–49. It is not. Section 552.070, by its plain language, says nothing about the manner of applying for a pardon. Instead, § 552.070 states:

> *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.

§ 552.070 (emphasis added). Put another way, the plain language of § 552.070 does not regulate the manner of applying for pardons, as it does not create any application obligations for the capital offender nor does it require anything from the governor except the confidentiality of the information collected by the board. *See id.*

Instead, § 552.070 recognizes the governor's absolute clemency authority, *Dorsey*, 2024 WL 1194417 at *8, before giving the governor the

statutory authority to empanel a board to assist him. § 552.070. The statute does not prescribe the form the board's assistance must take, but it does create an obligation for "all persons and institutions to give information and assistance to the board[.]" *Id.* The statute then creates an obligation for the board to make a report and recommendation to the governor, and the governor *alone*. *Id.*

Unable to find any textual support for the assertion that § 552.070 concerns the manner of applying for a pardon, Respondent discusses the pardon power of the King of England, Resp. Br. at 28–29, the historical use of the pardon and parole powers in Missouri, *id.* at 29, 32–36, and case law from other states. *Id.* at 30–32. These arguments ignore the plain language of § 552.070 and are unavailing.

1. Governor Parson does not exercise the clemency authority of the King of England.

Respondent asserts that Governor Parson's arguments require this Court to find that Governor Parson exercises the clemency power as that power existed in the common law English system. Resp. Br. at 27–28. But the Governor's arguments are based in Missouri's constitution and statutes.

As explained in the governor's opening brief, Missouri's constitution grants the clemency power exclusively to the governor. This Court agrees.

Dorsey, 2024 WL1194417 at *8. While the people have chosen to limit the governor's authority to grant pardons, reprieves, and commutations prior to conviction and in cases of treason or impeachment, outside those restrictions the Governor may grant clemency "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." Mo. Const. art. IV, § 7; *accord* *Dorsey*, 2024 WL1194417 at *8; *State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 435 (Mo. 2007). Contrary to Respondent's argument, § 552.070 is not concerned with the manner of applying for a pardon; § 552.070 merely operates to assist the Governor, at the Governor's discretion.

2. The historical use of the pardon and parole powers in Missouri does not support Respondent's assertion that § 552.070 is a law as to the manner of applying for pardons.

Respondent also appears to argue that, even though § 552.070 does not explicitly include any restriction preventing the governor from exercising clemency authority until a board of inquiry completes and transmits a report, this Court should understand § 552.070 to include that restriction because Missouri's constitution includes restrictions on the governor's power to grant preemptive pardons or to grant pardons in cases of treason and impeachment. *See* Resp. Br. at 29, 32–36. Or put another way, Respondent apparently asserts that, because the state constitution includes *some* restrictions on the

governor's clemency power, this Court should create *another* restriction requiring the governor to wait for a report from the board of inquiry by adding words to § 552.070 that do not appear in the text of the statute.

Respondent attempts to explain his addition of the report restriction in § 552.070, *see e.g.*, Relator's Br. at 57, by discussing the history of the pardon and parole power in Missouri. *See id.* at 29, 32–36. But all that discussion shows is that the General Assembly has not enacted a law requiring the restriction Respondent now reads into § 552.070.[3] *See id.* Missouri's constitution authorizes the General Assembly to enact statutes concerning the manner of applying for a pardon. But, § 557.020 is not such a statute, and § 552.070 does not include the limit on the governor's *consideration* authority created by solely by Respondent's judicial fiat.

---

[3] Nor could it add such a restriction under article IV, § 7. Mo. Const. art. IV, § 7. The necessary implication of Respondent's argument appears to be that the General Assembly could enact any restriction on the Governor's clemency authority as long as it characterized the restriction as a law as to the manner of applying for the pardon. *See* Resp. Br. at 26, 27, 29, 32–36. While this Court need not answer this question here, it is not difficult to imagine legislative restrictions that would make it all but impossible for a governor to exercise the clemency authority conferred by Missouri's constitution. Such restrictions might form the basis for a successful legal challenge to the legislative restrictions under Mo. Const. art. IV, § 7. *Cf. State ex rel. Oliver v. Hunt*, 247 S.W.2d 969, 973 (Mo. 1952) ("Section 549.170 does not take from the governor one whit of the power of pardon vested in him by the Constitution. He may grant pardons as freely now as he did prior to the enactment of Section 549.170.").

3. The foreign cases cited by Respondent do not assist Williams or Respondent.

Unable to locate the restriction Williams reads into § 552.070 in the text of the statute, in Missouri's constitution, or in Missouri's historical tradition, Respondent resorts to cases from foreign jurisdictions. Those cases do not bind this Court, *Dorsey*, 2024 WL 1194417 at *7 (recognizing this Court is not bound by decisions of other states), nor do they assist Williams or Respondent. And, while Respondent's reliance on foreign cases is not persuasive for many of the reasons discussed elsewhere in this reply, two of Respondent's citations on this point warrant further discussion.

First, Respondent relies heavily on *Jamison v. Flanner*, 228 P. 82 (Kan. 1924), for his argument that Governor Parson does not exercise exclusive clemency authority. Resp. Br. at 28–31. Respondent asserts that *Jamison* stands for the proposition that state governors do not have the inherent clemency authority enjoyed by monarchs at English common law. *See id.* But as discussed above, Respondent misunderstands Governor Parson's position. Missouri's constitution grants Governor Parson the power to issue pardons, reprieves, and commutations as a "mere matter of grace[,]" which he may exercise "upon such conditions and with such restrictions and limitations as he may think proper." *Lute*, 218 S.W.3d at 435 (quoting *Ex Parte Reno*, 66 Mo.

266, 269, 273 (1877)). As a result, Missouri's courts cannot review Governor Parson's clemency decisions or the process by which he reaches them. *Dorsey*, 2024 WL 1194417 at *8; *Cooper v. Holden,* 189 S.W.3d 614, 620 (Mo. App. 2006) (holding that court had no jurisdiction to review the Governor's commutation decision).

All Respondent's citation to *Jamison* shows is that the people of Kansas made a different choice in enacting their constitution in 1861. *See* Kan. Const. art. I, § 7. As *Jamison* discussed, the Kansas constitution authorizes the legislature to restrict the Kansas governor's clemency authority in a far more aggressive manner. *See* 228 P. at 83–85, 92–93. This legislative authority sprung, *Jamison* found, from the particular language of Kansas's constitution, which stated, "The pardoning power shall be vested in the Governor, *under regulations and restrictions prescribed by law*." *Id.* at 83; *accord* at 92–93. Particularly important, the *Jamison* court found, was the framers' use of an expansive, Kansas-specific definition of "regulation" coupled with the word "restriction." *Id.* at 93. The use of both, together, meant "that the sweeping pardoning power vested in the Governor [could] be exercised only in accordance with such restrictions and regulations as [were] provided by law." *Id.* This restricted pardoning power allowed for the Kansas legislature to enact, for example, the notice restrictions discussed in *Jamison*, which, if not followed,

would strip the Kansas governor of clemency authority and result in that governor's issuance of a void pardon. *Id.* at 99.

Therefore, *Jamison*'s expansive understanding of legislative authority was the outgrowth of a choice made by the framers of Kansas's constitution, a choice that the framers of Missouri's 1945 constitution did not make. As *Dorsey* recognized, the governor has "complete discretion" to grant pardons. *Dorsey*, 2024 WL 1194417 at *8, (with limitations concerning treason and impeachment), Mo. Const. art. IV, § 7. And, as *Dorsey* also noted, Missouri's choice to grant "absolute discretion over clemency relief" does not make Missouri unique. *Dorsey*, 2024 WL 1194417 at *8 n.12. Put simply, Missouri could have joined Kansas, but it did not. *Compare* Mo. Const. art. IV, § 7 *with* Kan. Const. art. I, § 7; *see Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."). Thus, *Jamison* does not assist Respondent.

Second, Respondent quotes a large portion of *Rich v. Chamberlain*, 62 N.W. 584 (Mich. 1895), to support his argument that § 552.070 is a law concerning the manner of applying for pardons. The *Rich* court considered a legislative enactment creating a board that would investigate the "cases" of "convicts" who petitioned for pardons and transfers from state prisons to houses of correction. 62 N.W. at 447–48. The enactment stated:

> It shall be the duty of said board to investigate the cases of such convicts now or hereafter confined in the state prisons and house or houses of correction as may petition for pardon, or for a license to be at large, and to report to the governor the results of their investigations, with such recommendations as shall in their judgment seem expedient either in respect to pardons, or commutations, or refusal of pardon or commutation. *Upon receiving the result of any such examination*, together with the recommendations aforesaid, the governor may at his discretion upon such conditions, with such restrictions and under such limitations as he may deem proper, grant the desired pardon or commutation, which warrant shall be obeyed and executed instead of the sentence originally awarded.

Id. (emphasis added). Over a two-judge dissent, a three-judge majority of the Michigan Supreme Court found that this law did not unconditionally intrude on the Michigan governor's clemency authority because the report and recommendation was not binding on the Michigan governor, *id.* at 448–49, and the Michigan "law [did] nothing more than to prescribe the methods and regulations for obtaining this information which is so necessary for an intelligent and proper exercise of the pardoning power." *Id.* at 447.

Even if *Rich*'s analysis of a textually different statute enacted in Michigan had any relevance here, the statute at issue in *Rich* included an explicit textual trigger which required the Michigan governor to receive the report before granting relief. *Id.* at 448 ("*Upon receiving the result of any such examination*, together with the recommendations aforesaid, the governor may . . ."") (emphasis added). As discussed above, § 552.070 does not contain any

such trigger or condition language. For this, and the other reasons stated above, *Rich* does not assist Respondent.

D. Respondent concedes that § 552.070 must be read in its greater statutory context but construes the same or similar words in § 552.070 and § 217.800, RSMo 2016, to require different outcomes.

Respondent appears to argue that use of the word "shall" in § 552.070 in relation to the board's report prohibits the governor from considering a capital offender's petition until after the board issues a report, but then Respondent appears to argue that the use of the word shall in § 217.800.2 does not. Resp. Br. at 37–38. Section 217.800, states:

> 1. In all cases in which the governor is authorized by the constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper.
>
> 2. All applications for pardon, commutation of sentence or reprieve shall be referred to the board for investigation. The board shall investigate each such case and submit to the governor a report of its investigation, with all other information the board may have relating to the applicant together with any recommendations the board deems proper to make.
>
> 3. The department of corrections shall notify the central repository, as provided in sections 43.500 to 43.530, of any action of the governor granting a pardon, commutation of sentence, or reprieve.

§ 217.800. Respondent apparently bases this argument on his assertion that § 552.070 requires a recommendation, but § 217.800 does not. Resp. Br. at 38. But § 217.800.2 states that the parole board "shall investigate each such case

and submit to the governor a report of its investigation with all other information the board may have relating to the applicant together *with any recommendations* the board deems proper to make." § 217.800.2 (emphasis added). As Governor Parson argued in his opening brief, this Court should read § 552.070 within the greater statutory framework. *See, e.g.*, Relator's Br. at 59–60. Respondent apparently concedes that this argument is correct, but Respondent can provide no unifying theory for why the use of shall in § 217.800 does not condition the governor's pardon power on first receiving a report but § 552.070 does.

E. Governor Parson has authority to dissolve a board of inquiry at any time.

Respondent asserts that Governor Parson cannot terminate a board of inquiry because § 552.070 does not include a termination or dissolution provision. Resp. Br. at 41–47. But Respondent's argument does not address the fact that *he* must add language to the statute in order to *prohibit* the governor from dissolving the board or lifting the stay. *See id.* Adding such language to the statute is contrary to Missouri's overall clemency system and would create an absurd result by the giving a board veto power over a clemency decision. *See* Relator's Br. at 73–86.

By Respondent's telling, § 552.070 effectively gives a board of inquiry—a board appointed at the discretion of the governor solely to assist the governor in the governor's exercise of discretionary clemency authority—veto power over the governor's authority to ever lift a stay of execution or to grant or deny clemency. *See* E5–E7. A board of inquiry could simply fail to ever provide a report, and thereby hold the governor's clemency power hostage. Granting a discretionary board that veto power is an absurd result, and this Court has made plain that a statute should not be read to require an absurd or unreasonable result. *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 608 (Mo. 2019).

While it appears that he may have abandoned the argument here, Respondent, in his order denying the motion for judgment on the pleadings below, stated that § 552.070 would require the governor to seek a petition for a writ of mandamus directing the board to produce a report in that circumstance. E7–E8. But there is no statutory or constitutional reason that would be true. While the governor could receive a writ of mandamus, he could also just replace the board members or dissolve the board that assists *him* in the exercise of *his* discretionary clemency powers. *See* Mo. Const. art. IV, § 7.

To avoid the result necessitated by Missouri's constitution, Respondent analogizes § 552.070 to statutes that require the governor to obtain the advice

and consent of the senate before appointment. Resp. Br. at 43–46. But this analogy is inapt, since § 552.070 does not include an advice and consent requirement for appointment or removal of board members. § 552.070. Respondent cannot read those requirements into the statute. *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. 2008).

F. Even if § 552.070 constrains the governor's power to grant a clemency petition, § 552.070 does not prevent the governor from denying a clemency petition nor does it require the governor to stay an execution.

Even if Respondent is correct that § 552.070 enacts an unstated prohibition against the governor *granting* a pardon before receiving the report of the board of inquiry, nothing in Missouri's constitution or § 552.070 prevents the governor from *denying* clemency or lifting an executive stay of an execution prior to receiving a report.[4] Indeed, Article IV, § 7 only discusses the "power to grant reprieves, commutations and pardons" and does not include any requirement to impose a stay or otherwise limit the governor's authority to grant or lift an executive stay. *Id.* Nor is similar language found in § 552.070. Therefore, Respondent cannot force Governor Parson to reissue an executive

[4] As stated in his opening brief, § 552.070 requires the Board's investigation, and any report, to be kept in strict confidence, so Governor Parson will neither confirm nor deny whether the Board gave a report.

order granting a stay nor can Respondent vacate Governor Parson's order lifting the previous stay.

III. Governor Parson did not violate Williams's due process rights by dissolving the board of inquiry (replies to Respondent's argument III).

Respondent asserts that Governor Parson violated Williams's due process rights by dissolving the board of inquiry. This assertion is incorrect.

A. Even under Justice O'Connor's concurrence, Williams's claim fails as a matter of law.

The thrust of Respondent's due process argument is that Williams has life and liberty interests that Respondent argues are violated under Justice O'Connor's concurrence in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor J. concurring). Resp. Br. 50–65. Even assuming, for the sake of argument, that Justice O'Connor's concurrence controls, which it does not, Williams's allegations, even if true, are nothing like the hypothetical coin flip that Justice O'Connor opined might violate due process. *Woodard*, 523 U.S. at 289. While Respondent argues the coin-flip language is merely illustrative dicta, Resp. Br. at 54, he attempts to expand even Justice O'Connor's opinion by framing the issue before this Court as "whether State authorities have fulfilled the statutory mandate by providing the process that was 'due' *before* the exercise of clemency authority." *Id.* But Justice O'Connor's

opinion adopted no framework that created any specific process, and instead stated judicial review may be appropriate "in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. at 289.[5] Therefore, Respondent's reliance on *Woodard* is unavailing.

B. Nothing in § 552.070 creates a liberty interest enforceable by Williams.

Respondent asserts that § 552.070 creates life and liberty interests for Williams. Resp. Br. at 60. In support of that argument, Respondent cites *State ex rel. Haley v. Groose*, 873 S.W.2d 221, 223 (Mo. 1994), for the proposition that, "A state statute creates such a liberty interest if it uses 'mandatory language in connection with particularized substantive standards or criteria that significantly guide administrative decisions.'" (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983)). But this proposition does not assist Respondent's argument that § 552.070 creates a protectable due process interest for at least two reasons.

---

[5] While Respondent relies on *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000), for the proposition that an offender can challenge the process governing clemency consideration, the Eighth Circuit has subsequently stated that the relevant inquiry is whether the procedures were arbitrary. *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (en banc). And at least one judge has expressed that *Young* is wrongly decided and at odds with relevant Supreme Court precedent and decisions of its sister circuits. *Winfield*, 755 F.3d at 631–32.

First, § 552.070 does not include "particularized substantive standards or criteria" that guide the governor's clemency decision. *Haley*, 873 S.W.2d at 223 (quoting *Hewitt*, 459 U.S. at 468). And it could not. Mo. Const. art IV, § 7; *Lute*, 218 S.W.3d at 435.

Second, this Court's decision in *Haley* was based on a due process methodology that examined prison regulations[6] "to determine whether mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's conditions of confinement." *Sandin v. Conner*, 515 U.S. 472, 480–81 (1995). The United States Supreme Court noted that "[b]y shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Id.* at 481. But as *Sandin* also stated, "we believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." *Id.* at 483.

[6] While *Haley* concerned a prison regulation, Respondent appears to assert that the creation of a liberty interest in a prison regulation context is no different than the liberty interest he contends was created here. For the sake of argument, the governor assumes, without conceding, that this is true.

Using the appropriate methodology, the *Sandin* Court found "that States may under certain circumstances create liberty interests which are protected by the Due Process Clause[,]" but these liberty interests:

> will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 484; *accord State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. 1995) (discussing the mandatory and discretionary distinction post *Sandin*).

Here, Respondent asserts that the word "shall" in § 552.070, regarding the board's creation of a report, is mandatory and creates his alleged liberty interest. Resp. Br. at 60–61. But that "search for a negative implication from mandatory language" strays "from the real concerns undergirding the liberty protected by the Due Process Clause." *Sandin*, 515 U.S. at 483. As for "the real concerns undergirding the liberty protected by the Due Process Clause," *id.*, Williams, for the reasons discussed in the governor's opening brief, cannot plead or demonstrate that he has a liberty interest under either opinion of *Woodard*. Resp. Br. at 45–72.

IV. Respondent's order permits Williams to engage in an unauthorized collateral attack on his sentence (replies to Respondent's argument IV).

Respondent asserts that Williams's declaratory judgment action is not an unauthorized collateral attack on the judgment of conviction and sentence. Resp. Br. at 62–67. But he is wrong. Respondent argues that this is "an exceptionally rare event" and that he seeks to prevent the governor "from interfering with the board of inquiry process until the board fulfills its statutory obligation." *Id.* at 63. Therefore, Respondent argues, Williams's petition is not a collateral attack on the conviction. *Id.*

However, Respondent's order concerning Williams's due process claims rests nearly exclusively on an unfounded assumption of actual innocence. *See* E9. Respondent stated: "For the purposes of this motion, the Court accepts as true that Plaintiff is factually innocent." E10. Respondent simply assumed that Williams is, for the purposes of the motion for judgment on the pleadings, factually innocent of first-degree murder. E3, E9–E10. This is a collateral attack on the conviction used to argue that Williams innocent and, therefore, is entitled to due process protections preventing the execution of an innocent person. But Williams is not innocent and cannot make himself so by pleading it despite the decisions of this Court to the contrary. *See Hicklin*, 613 S.W.3d at 787; *see also Charron*, 257 S.W.3d at 153–54; *Kennedy*, 920 S.W.2d at 619.

Respondent's arguments concerning the governor's consideration of Williams's claim of innocence are unavailing. Resp. Br. at 64–67. Respondent appears to argue that the board of inquiry process is important because, according to Williams, Governor Parson has stated he will not consider Williams's allegations of innocence. *Id.* at 64. But this contorts the governor's position and ignores the legal theory Williams's advanced in proceedings below. Throughout the proceedings in the circuit court, Williams repeatedly stated that he had a liberty interest in demonstrating his innocence. For example, in response to the motion for judgment on the pleadings, Williams stated his "argument is based on the second kind of asserted liberty interest—an interest in demonstrating his innocence that flows from an expectation created by state law, namely, section 552.070, RSMo., and Executive Order 17-20." E106.

While the governor may consider claims of innocence in granting a pardon or commutation, that does not provide an offender a protected liberty interest to demonstrate his innocence or allow the governor to *find* that the offender is innocent. Instead, a grant of clemency, even where the governor's stated basis for the grant is innocence, does not prove or establish an offender's innocence.

"A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *Hunt*, 247 S.W.2d at 973 (citations and quotations omitted). "In effect, a pardon issues upon ipse dixit of the governor." *Id.* "It is conceived in mercy and is said to be in derogation of law." *Id.* Therefore, even where the governor considers a claim of innocence, clemency does not allow an offender to "prove" his innocence, nor does it allow the governor to "determine" the offender's innocence. It is simply an unproven statement of the governor that authorizes the relief indicated in the clemency instrument. *See id.* Governor Parson will fully and fairly consider any petition for clemency filed by Williams, but neither Williams nor Respondent can supervise the governor's consideration of that same petition.

Conclusion

For these reasons and for the reasons set forth in Governor Parson's opening brief, Governor Parson asks this Court to make its preliminary writ of prohibition directed at Respondent in his official capacity permanent. Governor Parson further requests this Court make any further adjudications and orders therein as right and just.

Respectfully submitted,

ANDREW BAILEY
Attorney General

/s/ Michael J. Spillane
Michael J. Spillane
Assistant Attorney General
Missouri Bar #40704
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1307
(573) 751-2096 Fax
mike.spillane@ago.mo.gov

/s/ Andrew J. Clarke
Andrew J. Clarke
Assistant Attorney General
Missouri Bar #71264
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1546
(573) 751-2096 Fax
andrew.clarke@ago.mo.gov

/s/ Gregory M. Goodwin
Gregory M. Goodwin
Assistant Attorney General
Missouri Bar #65929
P.O. Box 899
Jefferson City, MO 65102
(573) 751-7017
(573) 751-2096 Fax
gregory.goodwin@ago.mo.gov

/s/ Andrew J. Crane
Andrew J. Crane
Assistant Attorney General
Missouri Bar #68017
P.O. Box 899
Jefferson City, MO 65102
(573) 751-0264
(573) 751-2096 Fax
andrew.crane@ago.mo.gov

Attorneys for Relator

Certificates of Service and Compliance

The attached brief complies with the limitations contained in Rule 84.06 as it contains 7,502 words, excluding the cover, signature block, certification, and appendix, as determined by Microsoft Word software.

I further certify that a copy of this document was filed using the Case.net system on March 25, 2024. Pursuant to Rule 103.08, counsel for Respondent will be served a copy of the document by operation of the Case.net system.

/s/ *Andrew J. Clarke*
ANDREW J. CLARKE
Assistant Attorney General