IN THE SUPREME COURT OF MISSOURI

Case No. SC100352

STATE OF MISSOURI ex rel.
GOVERNOR MICHAEL L. PARSON,

Relator,

v.

THE HONORABLE S. COTTON WALKER,

Respondent.

Original Writ Proceedings in Prohibition or, in the Alternative, Mandamus
Circuit Court of Cole County, Cause No. 23AC-CC05323

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INTRODUCTION

The Court should quash the preliminary writ because the Governor lacked authority to dissolve the board of inquiry before the board completed its report and clemency recommendation for Plaintiff Marcellus Williams. The circumstances of this case—and the relief sought—are narrow. In 2017, based on Williams' claims of innocence, Governor Greitens accepted Williams' application for clemency and appointed five highly experienced jurists to evaluate his application under § 552.070[1] and make a report and recommendation to the Governor. Williams thus became only the third person for whom a Governor has established a board of inquiry. Last year, Williams became the only person for whom a Governor has sought to abolish such a board. Following several years of investigation by the board of inquiry, Governor Parson issued an executive order that purported to "dissolve" the board *before* the Governor had received the board's report and recommendation.[2]

The Governor did not have the constitutional or statutory right to abolish the board of inquiry. Although the Governor has wide discretion over the *final* clemency decision, the Governor does not exercise plenary control over all stages of the clemency process. Instead, as a matter of longstanding historical precedent, article IV, § 7 of the 1945 Missouri Constitution confers the power to *grant* clemency upon the Governor "subject to

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[1] Unless otherwise noted, all statutory references are to R.S. Mo (2016).

[2] The Governor has refused to answer this allegation. E61, ¶¶ 44-45, 47; Br. 77 n.15. Although not necessary for the standard of review to decide a motion for judgment on the pleadings, the Governor's non-compliance with Rule 55.07 is deemed an admission of this allegation. *State ex rel. Koster v. Bailey*, 493 S.W.3d 423, 432 (Mo. App. 2016).

provisions of law as to the manner of applying for pardons." This legislative check on the Governor's final decision has existed for nearly 160 years, through multiple constitutions.

The Governor's power and the General Assembly's power stand in stark contrast. For more than a century, the General Assembly has exercised its constitutional authority over "the manner of applying for pardons" by enacting a series of laws that direct various boards to investigate clemency applications and deliver reports, along with a clemency recommendation, to governors for their consideration. Resp. A6-7, A9, A12, A15, A17, A20, A24. Thus, although the Governor's *final* clemency decision remains an act of grace, the ripeness of that decision requires the completion of the process envisioned by the legislature. Here, as pleaded by Williams, the Governor purported to halt that process before the board completed its duties. Therefore, the circuit court correctly denied the Governor's motion for judgment on the pleadings. No extraordinary writ is warranted.

The circumstances of this case are narrow because § 552.070 makes the board of inquiry process only available to individuals "condemned to death." The Governor correctly points out that the General Assembly made the decision to *appoint* a board of inquiry a matter of gubernatorial discretion. But the General Assembly did not confer gubernatorial discretion over the *completion of the process*. Rather, upon the board's formation, it became the legal "duty" of the board to gather information on Williams' application for clemency. Second, it became the legal "duty" of the "all persons and institutions" to provide information and assistance to the board. Finally, to complete its work, the board "shall" deliver both a report and a recommendation to the Governor concerning whether to grant or deny Williams' request for clemency.

The Constitution expressly prohibits the Governor from disregarding "provisions of law as to the manner of applying for pardons." It similarly does not grant him the right to invade the General Assembly's authority over the process. The General Assembly did not grant the Governor the right to "dissolve" or "abolish" the board under § 552.070 before the board's completion of its statutory duties. It is a fundamental canon of statutory interpretation, as well as separation of powers, that the Governor may not insert words into the Constitution to confer more power onto the executive department than what the Constitution has conferred. Likewise, the Governor may not insert words into the statute to confer more power onto the executive department than what the General Assembly has delegated.

The purpose motivating the constitutional separation of powers is clear. Establishing a board of inquiry deescalates the politics behind clemency decisions in favor of focusing the Governor's attention on the merits of the clemency request. The completion of the board's information-gathering process ensures that the Governor will have at his fingertips a fully investigated report and recommendation when he makes his final clemency decision. Like all clemency decisions, the Governor still retains final decision-making power after the completion of the board's duties. At the same time, the General Assembly's chosen process promotes fully informed decisions instead of arbitrary ones.

Williams therefore seeks a limited ruling and limited relief from the circuit court, consisting of a declaratory judgment to invalidate the Governor's executive order that purported to abolish the board of inquiry and, to the extent necessary, to restore the board to complete its statutory mandate. The Governor's brief presents a skewed view of the

circuit court's ruling that is inconsistent with the facts of the case, even suggesting the circuit court "found" that Williams is innocent. Therefore, it is important to clarify what this case is *not* about. It is not about creating a novel method of postconviction review. It is not about restricting the Governor's discretion to *establish* a board of inquiry in the future for any other person sentenced to death. It is also not about the Governor's discretion to follow or disregard the board of inquiry's recommendation in Williams' (or any other person's) case. It is certainly not, as the Governor claims, about "forc[ing] Governor Parson to exercise the governor's clemency authority how Williams sees fit." Br. 28.

This case is, however, about the Governor's constitutional and statutory obligation to wait for the completion of the process set forth in § 552.070. This case is also about due process—namely, the denial of the process that is "due" to Williams under Missouri law, which creates an enforceable federal constitutional right. Although Williams is living under a death sentence, he retains a constitutionally protected interest in his life. By virtue of Governor Greitens' invocation of § 552.070, Williams also retains a constitutionally protected interest in his liberty under state law through the completion of the process already begun. In the trial court petition, Williams seeks only the process "due" to protect those interests: the board's completion of its work, including by delivering a report and recommendation for consideration by the Governor, before the Governor renders a final clemency decision.

For all these reasons, the circuit court correctly denied the Governor's motion for judgment on the pleadings, and the Court should quash the preliminary writ.

STATEMENT OF FACTS

I. Williams' Capital Conviction and Claim of Innocence

Williams was convicted and sentenced to death for the murder of Felicia Gayle. E20. In 1998, Ms. Gayle was brutally stabbed with a kitchen knife. E20. At the crime scene, police investigators recovered head and pubic hairs from the carpet around Ms. Gayle's body. E20. Those hairs did not come from Williams. E31. Police investigators also located bloody footprints leading away from Ms. Gayle's body. E20. Those footprints do not match Williams' shoe or size, nor those of Ms. Gayle's husband or any first responders. E25. Police investigators also located bloody fingerprints, which they subsequently lost. E20, E31.

Before Williams' trial, the State used its peremptory strikes to eliminate six of seven Black jurors from the venire. E32. At trial, the prosecutor acknowledged to the jury that he lacked forensic evidence connecting Williams to the crime scene. E31. To convict Williams, the prosecution relied on testimony from a jailhouse snitch and an ex-girlfriend who were both interested in receiving a $10,000 reward from Ms. Gayle's family. E31. Williams' ex-girlfriend also possessed evidence from the crime scene that implicated her in the murder. E29. The jury found Williams guilty and sentenced him to death. E32.

In 2013, Williams completed his state postconviction proceedings and federal habeas corpus review. E32. In 2015, Williams sought habeas corpus relief from this Court, including additional new DNA testing on the knife used in the murder. E32. This Court stayed his execution while a special master oversaw the DNA testing. E32. The DNA testing proved that Williams was not the source of the male DNA on the murder weapon.

E22. Consistent with the special master's limited mandate, the special master did not rule on merits of the petition for habeas corpus. E33. The Court subsequently denied habeas relief and then set an execution date of August 22, 2017. E33.

II. Governor Greitens Establishes a Board of Inquiry.

Just hours before Williams' execution, Governor Eric Greitens issued Executive Order 17-20, which stayed the execution and appointed the board of inquiry to consider Williams' claim of innocence. E172-73.[3] In the past 60 years, only two Governors have exercised this power, and for only three people. E23.

The executive order acknowledged that "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." E172. Governor Greitens' executive order acknowledged that "Williams contends that newly discovered DNA evidence, which was not available to be considered by the jury that convicted him, proves his innocence." E172.

As a result, the Governor "invoke[d] the provisions of Section 552.070," to "establish a Board of Inquiry," which would be "comprised of five members appointed by the Governor." E172. Governor Greitens appointed five retired judges: Judge Booker

[3] Williams attached the Executive Order as an exhibit to the trial court Petition, but the Governor omitted the exhibits to the Petition. Ex. 19. Williams has submitted all exhibits as a supplemental filing with this Court.

Shaw, Judge Michael David, Judge Peggy McGraw Fenner, Judge Carol Jackson, and Judge Paul Spinden. E35.

Executive Order 17-20 further directed that "[t]he 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." E172. The order declared that the board would have subpoena power but "shall close all of its proceedings and hold all collected information in strict confidence." E172. Finally, Governor Greitens' order directed that the board "shall report and make a recommendation to the Governor as to whether or not Williams should be executed or his sentence of death commuted." E173.

III. Following Years of Work, the Governor Purports to Dissolve the Board of Inquiry.

The board of inquiry subsequently began its investigation, which included soliciting significant information from Williams' legal team and the Attorney General's Office. E35.[4] Williams' counsel worked with the board to reinvestigate and examine various aspects of the case. E35. Williams' counsel also made presentations to the board, suggested lines of investigation, requested that the board issue subpoenas, and requested that the board order additional forensic testing. E39. This process lasted several years and,

[4] By statute, the information "gathered by the board shall be received and held by it and the governor in strict confidence." R.S. Mo. § 552.070. Although this provision governs the board of inquiry and the Governor, but not Williams himself, out of respect for the process Williams has not pleaded the full scope of his interactions with the board in public filings. Williams will, however, make materials available to the Court for *in camera* review upon request.

on information and belief, by June 2023, the board still had not issued a report or made its recommendation to the Governor. E21, E35.

On June 29, 2023, instead of waiting for the report and recommendation, Governor Parson purported to "dissolve" the board of inquiry. E36, E175. Namely, under Executive Order 23-06, the Governor purported to "rescind Executive Order 17-20, thereby dissolving the Board of Inquiry established therein." E21, E175. The order continued: "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." E175.

IV. Williams Initiates Proceedings in Circuit Court Seeking Declaratory Relief.

On August 23, 2023, Williams filed a Petition for Declaratory Relief against the Governor[5] in the Circuit Court of Cole County. E18. Relevant here, Williams' Petition brings four counts, alleging that the Governor: (1) violated Williams' right to due process under the Missouri and U.S. Constitutions; (2) violated 42 U.S.C. § 1983; (3) lacked authority to dissolve the board of inquiry under Missouri law; and (4) violated the separation of powers under the Missouri Constitution. E37-45.[6] In the Governor's answer, he refused to admit or deny whether the board ever issued a report and recommendation to

[5] Williams previously named the Attorney General as a co-defendant, but voluntarily dismissed him as a defendant.

[6] The Governor agrees that, based on a misunderstanding, the trial court's ruling indicated that Williams "consented" to judgment on the pleadings in Count IV, concerning separation of powers. *See* Pet., ¶ 74; Return, ¶ 74; Br. 23 n.6. That misunderstanding likely stems from the voluntarily dismissal of the Attorney General at the prior hearing.

him. E61, ¶¶ 44-45, 47; *see also* Br. 77 n.15 ("To be clear, Governor Parson will not disclose whether the board of inquiry made a report.").

Williams' Petition does *not* seek a declaration of his innocence, the setting aside of his death sentence, vacatur of his underlying murder conviction, or a final decision on executive clemency. *See* E37-45. Instead, Williams *alleges* his innocence and the exhaustion of postconviction remedies, and seeks the following relief: (1) a declaration that Executive Order 23-06 is "null and void" because the Governor lacked authority to dissolve the board of inquiry; (2) a declaration that Executive Order 23-06 unconstitutionally violates the Missouri Constitution's Separation of Powers Clause; (3) a declaration that Executive Order 23-06 violated Williams' right to due process; (4) a declaration that the Governor violated 42 U.S.C. § 1983 by issuing Executive Order 23-06 in violation of Williams' right to due process; (5) a declaration that § 552.070 does not permit the Governor to make the board's report and recommendation *wholly* confidential[7]; and (6) reinstatement of Executive Order 17-20 and the board of inquiry, as well as an injunction against further interference with the board's process until the board "complies with its statutory obligation." E47-48.

The Governor moved for judgment on the pleadings. E72-99. Following briefing and oral argument, Respondent denied the Governor's motion. E2-12; Rel. A3-13. In an order dated November 16, 2023, Respondent held that, "[a]ssuming, as the Court must for

[7] The statute provides that "[a]ll *information gathered by* the board shall be received and held by it and the governor in strict confidence," but not the report or recommendation, at least in their entirety. R.S. Mo. § 552.070 (emphasis added).

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." E6; Rel. A7. Respondent further held that, if the board of inquiry has not carried out its statutory mandate, "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." E8; Rel. A9.

Respondent also held that Williams "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." E11; Rel. A12. Therefore, "when Governor Greitens appointed the Board of Inquiry to investigate Plaintiff's innocence, that executive order triggered Plaintiff's due process rights." E11-12; Rel. A12-13. As a result, Respondent held that Williams had asserted viable legal claims for relief. E12; Rel. A13.

STANDARDS OF REVIEW

I. Standard of Review for Motions for Judgment on the Pleadings

"This Court reviews a circuit court's ruling on a motion for judgment on the pleadings *de novo*." *Olofson v. Olofson*, 625 S.W.3d 419, 429 (Mo. banc 2021). "'The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion.'" *Id.* (quoting *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007)). Consequently, judgment is appropriate "only if the facts pleaded by the [plaintiff], together with the benefit of all reasonable inferences drawn therefrom, show that [plaintiff]

could not prevail under any legal theory." *Id.* (quoting *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 12 (Mo. banc 2012)).

II. Standard for Entering a Writ of Prohibition.

A writ of prohibition is appropriate: (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. *State ex rel. Key Ins. Co. v. Roldan*, 587 S.W.3d 638, 641 (Mo. banc 2019). "Prohibition will issue only when the lower court's usurpation of jurisdiction is 'clearly evident.'" *Id.* (quoting *State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604, 606-07 (Mo. banc 2018)).

"The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). "Prohibition is not generally intended as a substitute for correction of alleged or anticipated judicial errors and it cannot be used to adjudicate grievances that may be adequately redressed in the ordinary course of judicial proceedings." *Id.*

III. Standard for Entering a Writ of Mandamus

"Mandamus is a discretionary writ, not a writ of right." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). Mandamus will only lie when there is a clear, unequivocal, and specific right. *Id.* A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. *Id.* The purpose of the writ is to execute, not adjudicate. *Id.*

ARGUMENT

I. The Court Should Strike the Governor's Statement of Facts.

Before addressing the Points Relied On, the Governor's brief does not comply with Rule 84.04(c). "The statement of facts shall be a fair and concise statement of facts relevant to the question presented for determination without argument." Rule 84.04(c). "All statements of facts shall have specific page references to the relevant portion of the record on appeal." *Id.* Based on this rule, "the facts stated in the facts section of an appellate brief submitted to this Court should be limited to the record on appeal." *Cope v. Parson*, 570 S.W.3d 579, 582 n.2 (Mo. banc 2019) (striking portions of Governor's statement of facts for citing news articles outside the record). "[A] brief does not substantially comply with Rule 84.04(c) when it highlights facts that favor the appellant and omits acts supporting the judgment." *Ordinola v. Univ. Physician Assocs.*, 625 S.W.3d 445, 453 n.16 (Mo. banc 2021) (quoting *Prather v. City of Carl Junction, Mo.*, 345 S.W.3d 261, 263 (Mo. App. 2011)); *see, e.g.*, *Exec. Bd. of Mo. Baptist Convention v. Windermere Baptist Conference Ctr., Inc.*, 430 S.W.3d 274, 284 (Mo. App. 2014) (a statement of facts under Rule 84.04(c) in an appeal from summary judgment ruling "should have set forth the material facts established by Rule 74.04(c)(1) and (2)").

The circuit court's ruling comes before this Court on a motion for judgment on the pleadings, which examines the face of Williams' trial court petition. *Olofson*, 625 S.W.3d at 429. The Governor's Statement of Facts, however, disregards the allegations in the petition. Instead, the Statement of Facts injects numerous un-pleaded allegations based on prior court opinions. *See* Br. 11-14. Those prior opinions, moreover, contained factual

background based upon a different standard of review concerning a different evidentiary record than the record before the trial court. *See, e.g.*, *State v. Williams*, 97 S.W.3d 462, 466 (Mo. banc 2003) ("On direct appeal, this Court accepts as true all evidence favorable to the verdict, including all favorable inferences from the evidence."). Even 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. *See* Pet., ¶¶ 3, 6-29; Return, ¶¶ 3, 6-29.

On a motion for judgment on the pleadings, Williams is entitled to "the benefit of all reasonable inferences drawn" from the pleaded facts *within the trial court petition*. *Olofson*, 625 S.W.3d at 429. The Governor acknowledges that "Williams pled he is innocent in his declaratory judgment petition" (Br. 11 n.1), including because of new evidence that did not exist at the time of prior court opinions, but openly asks the Court to disregard the petition and applicable standard of review. The Governor's briefing strategy upends the settled method of how courts analyze motions for judgment on the pleadings. The Governor is free to deny Williams' allegations in the circuit court as he sees fit, but he must also adhere to this Court's briefing rules instead of changing the subject. Therefore, the Court should strike the Statement of Facts to the extent the Governor's Statement of Facts fails to comply with Rule 84.24(c). Alternatively, the Court may dismiss the Governor's appeal, which is already a discretionary writ proceeding. *See Placke v. City of Sunset Hills, Mo.*, 670 S.W.3d 228, 231 (Mo. App. 2023).

II. Respondent Did Not Exceed His Authority by Denying the Governor's Motion for Judgment on the Pleadings Because the Governor Does Not Have "Exclusive" Constitutional Authority Over the Clemency Process, In That the General Assembly Requires a Report and Recommendation Before the Governor's Final Decision (Points I, III, and IV).

Article IV, § 7 of the 1945 Constitution provides that the Governor has "the power grant" clemency with such "conditions," "restrictions," and "limitations" as the Governor deems proper. In the next breath, however, the Constitution provides that these gubernatorial powers remain "subject to provisions of law as to the manner of applying for pardons." MO. CONST. art. IV, § 7. In this fashion, the Constitution draws a line of demarcation between the authority to *grant* clemency, which vests in the Governor, and the authority over the *manner* of applying for pardons, which vests in the General Assembly.

No one disagrees that the Governor has the exclusive power over the final decision whether to grant clemency. But the consistent theme throughout the Governor's brief is an attempt to extend his constitutional authority by taking plenary control over the process that leads up to that decision. The Governor seeks to expand executive power through subtle language, claiming "*exclusive* clemency authority" (Br. 39, 44, 56, 90) without fully separating the different components of the authority as written into the Constitution. The Governor largely ignores article IV, § 7's "subject to" clause—only mentioning those words when necessary for block quotations (Br. 38, 74, 89)—and never explains the meaning of that clause. Yet, "[t]his Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *Pestka v. State*,

493 S.W.3d 405, 409 (Mo. banc 2016) (quoting *State v. Honeycutt*, 421 S.W.3d 410, 415 (Mo. banc 2013)).

Throughout Missouri's history, the framers of the 1820, 1865, 1875, and 1945 Constitutions adjusted the scope of the Governor's clemency authority multiple times, always in the direction of *limiting* that authority. That history casts a spotlight on the separation of powers woven into clemency decisions. *See id.* ("One of the accepted canons of statutory construction permits and often requires an examination of the historical development of the legislation, including changes therein and related statutes.") (quoting *State ex rel. Smith v. Atterbury*, 270 S.W.3d 399, 405 (Mo. banc 1954)). By 1865, the framers had made the deliberate choice to divide clemency authority between the executive and legislative departments. By the early twentieth century, Missouri was one among many states whose Constitutions permitted the legislature to place such procedural limits on the clemency process. By 1913, the General Assembly had exercised that authority through legislation, enacted multiple times. In 1945, when the framers drafted article IV, § 7, they continued to require that the Governor exercise his power "subject to" the General Assembly's ability to regulate the manner of applying for clemency, which, by that time, included more than 30 years of statutory enactments that governed that process. Before and after 1945, those processes contained the same components as the board of inquiry process under § 552.070: an investigation, a report, and a recommendation to the Governor before the Governor makes the final decision.

In sum, the Governor's clemency authority is not "exclusive," as he suggests. Rather, this history explains the structure and reason behind § 552.070. No one disagrees

that the Governor may decide whether to *appoint* a board of inquiry in the first place, but that board must then complete the chosen statutory process. Under § 552.070, the General Assembly has directed that, if a Governor decides to appoint a board of inquiry, that board "shall" make a report and recommendation to the Governor before his decision. The Governor, whose authority to grant or deny clemency remains "subject to" the completion of that process, cannot deviate from the statute after appointing the board. The Governor, in turn, receives the benefits that flow from the board's information-gathering process, which will inform his decision whether to exercise his own "power to grant" clemency.

The Governor calls the action below an "unconstitutional judicial inquiry" and suggests that any legislation related to clemency is *per se* unconstitutional. On the contrary, under separation-of-powers principles, it is the Governor who cannot encroach upon the General Assembly's own constitutional authority over the clemency process by abolishing the board prematurely. Perhaps the General Assembly could have granted the Governor the right to "dissolve" a board of inquiry, but it did not. Neither the Governor nor the courts may insert this word or the authority it represents into § 552.070 to create a new gubernatorial power. As a result, without the board's report and recommendation, the process of applying for clemency remains unfinished, and the Governor cannot issue a final clemency decision for Williams.

To the extent the Governor contends that the judiciary has encroached on his authority, it has not. The judicial department decides what the law "is," which includes the resolution of disputes that require circuit courts—or this Court—to define the extent of the other two departments' constitutional powers.

For the reasons set forth below, the circuit court correctly denied the Governor's motion for judgment on the pleadings. The Court should quash the preliminary writ.

A. Article IV, § 7 of the Missouri Constitution Follows 160 Years of Tradition by Dividing Clemency Authority Between the Governor and the General Assembly.

Article II, § 1 of the Missouri Constitution divides the powers of government between the legislative, executive, and judicial departments. "The legislature represents the plenary power of the people in our three-partite system and may do everything the people have not denied it the power to do in the constitution." *Pestka*, 493 S.W.3d at 408. "Stated differently, the legislature has plenary power to enact legislation on any subject in the absence of a constitutional prohibition." *Id.* Furthermore, "[t]he other branches of the state government are prohibited from exercising any powers belonging to the General Assembly 'except in the instances in this Constitution expressly directed or permitted.'" *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 389 (Mo. banc 1973) (quoting MO. CONST. art. II, § 1 (1945)) (Resp. A5).

Consistent with this principle, the 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, *subject to provisions of law as to the manner of applying for pardons*." MO. CONST. art. IV, § 7 (1945) (emphasis added). "In placing a construction on a constitution, or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the constitution was framed and adopted, in order to ascertain the old law, the mischief and the remedy." *State*

ex rel. O'Connor v. Riedel, 46 S.W.2d 131, 133-34 (Mo. banc 1932). Historically, the pardoning power dates back to pre-Revolutionary War England, where draconian criminal laws "naturally tended to produce unjust results with comparative frequency." *Jamison v. Flanner*, 228 P. 82, 87 (Kan. 1924).[8] Under the English system, "all powers of government emanated from the King," and therefore the King had sole authority over clemency. *Id.* Needless to say, "[w]e have a different theory of government." *Id.*

> When we withdrew from England we established our government upon the principle that all governmental power is inherent in the people. Hence crime is an offense against the people, prosecuted in the name of the people, and the people alone can bestow mercy by pardon. Under our form of government, in which we separate as nearly as can be done the executive, legislative, and judicial branches of government, the pardoning power is neither inherently nor necessarily an executive power, *but is a power of government inherent in the people*, who may by constitutional provision place its exercise in any official, board or department of government they choose.

Id.

Missouri's first Constitution in 1820 established clemency power in the Governor. MO. CONST. art. IV, § 6 (1820) (Resp. A1).[9] But the Governor's clemency power was "absolute and uncontrolled," so that "the governor possesse[d] that prerogative in as ample

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[8] As *Jamison* explained: "In most felonies the punishment was death. The accused was not allowed to have witnesses sworn in his behalf; neither was he allowed counsel on the general issue, but only by permission of the court for the argument of special questions of law. Jurors were subject to fine and imprisonment in case an acquittal was not sanctioned by the judges. No right of new trial was recognized, and there was no appeal save to the clemency of the King. This called for a frequent but considerate use of the pardoning power." 228 P. at 87.

[9] It stated, in relevant part: "The governor shall have power to remit fines and forfeitures, and, except in cases of impeachment, to grant reprieves and pardons." MO. CONST. art. IV, § 6 (1820) (Resp. A1).

manner as it is enjoyed by the kings of England." *State v. Woolery*, 29 Mo. 300, 301 (1860). That "uncontrolled" clemency power allowed, for example, a favored citizen to keep "a pardon in his pocket" in advance of any criminal trial and thereby receive the benefit of the Governor's clemency power *before* his conviction. *Id.*

Shortly after *Woolery*, Missouri ratified a new Constitution and took the opportunity to place new limits on the executive's clemency authority and the possibility of abuse. Therefore, in the wake of *Woolery*, the framers restricted the executive's power by granting the Governor the ability to grant pardons only "after conviction." MO. CONST. art. V, § 6 (1865) (Resp. A2). Second, the framers further narrowed the executive department's authority by making the Governor's ability to grant clemency "subject … to" the General Assembly's ability to regulate the manner of applying for pardons. *Id.* These changes persisted through the 1875 Constitution and remain in the 1945 Constitution, with stylistic changes. *See* MO. CONST. art. V, § 8 (1875) (Resp. A3-4); MO. CONST. art. IV, § 7 (1945). The framers' amended language reflects the purpose behind the separation of powers. *See Hicklin v. Schmitt*, 613 S.W.3d 780, 790 (Mo. banc 2020) ("The constitutional demand that the powers of the departments of government remain separate rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power.") (quoting *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997)).

This legislative check also was not an aberration. For more than 100 years, numerous states have imposed this type of legislative check on the powers of their own governors. *See Jamison*, 228 P. at 87-99 (surveying the history of every state constitution

regarding clemency). In a studious and exhaustive opinion, the Supreme Court of Kansas considered "the loose notion which sometimes prevails that the pardoning power is an executive power, to be exercised by the Governor in his discretion, and that no other official or department of the government can interfere with it." *Id.* at 99. After reviewing state constitutions throughout the United States dating back to the Revolutionary War, *Jamison* explained, "in our country," the pardoning power "is a power inherent in the people, who may place its exercise in any department or official of the government," and "to avoid its improper use the people may restrict and regulate it by constitutional provision or may by their Constitution provide that it may be restricted and regulated from time to by the Legislature." *Id.*; *see also Moore v. City of Newport*, 248 S.W. 847, 848 (Ky. 1923) ("The pardoning power is not, under our system of government, inherent in any officer of the state, or any department of the state, and the people in framing and adopting their Constitution may lodge the power in any department they see fit, or in a board of pardons."); *State v. Nichols*, 26 Ark. 74, 77 (1870) ("[The people] had the right to withhold all pardoning power from any one of the three branches; or, on the other hand, they had the right to vest the pardoning power in either the legislative or judicial branches of government. The executive no more represents the sovereignty of the state than either one of the other branches of the state government.").

In *Jamison*'s nationwide analysis, the court identified Missouri as one of at least 18 states that possessed comparable constitutional provisions that vested clemency power in the governor "subject to" regulation by the state legislature. *See id.* at 89-99 (New York, Indiana, Michigan, Iowa, Wisconsin, California, Oregon, Kansas, Colorado, Florida,

Georgia, Illinois, Missouri, Nebraska, Nevada, New Mexico, North Carolina, and Oklahoma); *see, e.g.*, *Rich v. Chamberlain*, 62 N.W. 584, 587 (Mich. 1895) ("While, however, the Constitution unqualifiedly vests this power in the Governor, it, at the same time and with equal clearness, vests in the Legislature the power to provide, by law, regulations relative to the manner of applying for pardons."); *People v. Bowen*, 43 Cal. 439, 441 (1872) ("It is also true that * * * the pardoning power of the President is unrestrained by legislative control, while that of the Governor is subject, in its exercise, to such regulations as the Legislature may provide in relation to the manner of applying for pardons.").

As far back as 1895, in *Rich*, the Supreme Court of Michigan upheld a legislative act that established a board of pardons to "investigate" and give non-binding "recommendations" to the governor based on the legislature's constitutional authority to regulate "the manner of applying for pardons." *Rich*, 62 N.W. at 587-88. As the court explained:

> The law in question does nothing more than to prescribe the regulations for obtaining the information which must be conceded to be necessary for an intelligent and proper exercise of the pardoning power. No governor ought to pardon without having before him the facts upon which the conviction was based, as well as the conduct of the prisoner after conviction. This law does 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. The section of the act upon which is based the alleged unconstitutionality reads as follows:
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> "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." Laws of 1893, Act No. 150, § 6.
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> It was not the purpose or intention of this act to infringe upon the constitutional prerogatives or power of the governor…. In practice, … the board assumes none of the power of the governor to pardon, but recognizes its sole duty to be to gather information; and for this purpose it conducts its investigation with care and thoroughness, requiring notice to the authorities and proofs to be taken and returned to him for his examination. The fact that such a board is authorized to make recommendation is no infringement upon executive power….

Id.

In turn, Missouri's "First Board of Pardons and Paroles for state prisons was created by Laws Mo. 1913, p. 227." *State v. Brinkley*, 193 S.W.2d 49, 59 (Mo. 1946). Missouri's 1913 statute followed the lead of Michigan by granting the board the ability to "investigate" and present a "report" and "recommendation" to the Governor. That framework continues today, in the board of inquiry process set forth in R.S. Mo. § 552.070. That original statute provided:

> **Board, investigations, reports and recommendations of.**—Said board shall investigate fully the merits of all applications for executive clemency properly coming before the governor, and all applications for such clemency shall be heard and investigated without unnecessary delay. In each and every such case said board shall, for the information of the governor, make a written report of its finding of the facts in such case, together with their recommendation thereon.

Mo. Laws 1913 at 227, § 3 (Resp. A6-7); *cf.* R.S. Mo. § 552.070.

Over the next thirty years, the General Assembly continued to enact new legislation that transitioned this duty to investigate and make recommendations to newly created boards as the legislature modified the correctional system. Each time, the General Assembly kept this mandatory duty to investigate, report, and recommend. *See* Mo. Laws 1917 at 190, § 133 ("The state prison board shall investigate fully the merits of all applications for executive clemency … [and] [i]n each and every such case said board shall, for the information of the governor, make a written report of its finding of the facts in such case, together with their recommendation thereon.") (Resp. A9), *codified as* R.S. 1919, art. 22 § 12540 (Resp. A10); Mo. Laws 1929 at 2355, § 8330 ("With reference to investigating fully the merits of all applications for executive clemency properly coming before the governor the making of a written report for the information of the governor of the finding of facts in such cases, together with recommendations thereon, the commissioners of the department of penal institutions shall have and exercise all the rights and powers, and perform all the duties and functions, heretofore exercised and performed by the state prison board") (Resp. A12); Mo. Laws 1937 at 402, § 5 ("The Board of Probation and Parole shall have authority and it shall be its duty … to provide for applications for paroles, commutations of sentence, and pardons; to investigate the merits of such application; [and] to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons.") (Resp. A15), *codified as* R.S. 1939 art. 7, ch. 48, § 9160.

This Court drove home the importance of this process in an opinion written shortly before the 1945 Constitution. *See State v. Jacobson,* 152 S.W.2d 1061 (Mo. 1941). In *Jacobson*, the defendant came forward with newly discovered evidence while the case

remained on appeal. *Id.* at 1063. Based upon that newly discovered evidence, "the Board of Probation and Parole recommended, and the Governor issued," a pardon because the Governor "was satisfied of the innocence of the accused." *Id.* at 1063, 1064. Indeed, the Governor specifically wrote in the pardon that he had granted it, "[u]pon the attached recommendation of the Board of Probation and Parole, and because of the fact that I am convinced that this man is not guilty." *Id.* at 1064.

Against this backdrop, in 1945, the framers continued to restrict the Governor's clemency authority. Namely, the framers reacted to recent statutes and other case law that interpreted the existing version of the clemency provision to include parole. *State v. Asher*, 246 S.W. 911, 913 (Mo. 1922) ("The power to pardon includes the power to parole."); *see also* Mo. Laws 1937 at 402, § 5 (Resp. A15) (procedure for recommending parole, commutations, and pardons to governor). In direct response to *Asher*, the Constitution now states: "The power to pardon shall not include the power to parole." *See also* R.S. Mo. § 549.200 (1949) (Resp. A21) ("Historical Note: … Under §7, Article IV of the constitution the power to parole was taken from the governor and a 1946 law vested such power in the board of probation and parole.") (citing Mo. Laws 1945 at 723, §§ 35-47).

The constitutional debates reflect that the framers changed the Constitution because the process of making board recommendations had proven *successful*, but acting on those recommendations had become inefficient for the Governor, which is understandable in light of the relative volume and immediacy of parole decisions compared to other clemency decisions. 13 Debates of the 1943-1944 Constitutional Convention of Missouri, at 3983 ("We have a regular parole board now and the governor in most instances relies on them,

but sometimes it takes him some time before he gets to it," because "the governor has so many things to look after, and sometimes it delayed action on paroles when there was no occasion for it."). For the other types of clemency, which impose less of an administrative burden, the framers did not alter the fact that the Governor's pardoning power remains "subject to" provisions of law concerning the manner of applying for pardons—*i.e.*, the board process. MO. CONST. art. IV, § 7 (1945).

After ratification, "[i]n 1945, the Legislature, as part of its monumental task of implementing the portions of the Constitution it considered not to be self-executing," *In re V*, 306 S.W.2d 461, 462 (Mo. banc 1957), enacted new legislation regarding the board of probation and parole. The General Assembly stated, in clear terms, that the new legislation was a "continuation" of the prior system, albeit with the necessary tweak regarding the parole power. *See* Mo. Laws 1945 at 734-35, §§ 35-35A (Resp. A18-19) (General Assembly "hereby abolished" existing board of probation and parole to create a new board that "shall be deemed to be a continuation of the board of probation and parole in existence immediately prior to the effective date of this act"). Because this "new" board no longer had to recommend parole to the governor, the slightly modified statute now provided:

> **Duty.**—The board of probation and parole is hereby authorized and it shall be its duty to recommend to the governor for his consideration such inmates as in the opinion of the board may be eligible for pardon or commutation of sentence; or, on request of the governor, the board shall investigate and report to him with respect to any application for pardon, commutation of sentence, or reprieve.

Id., § 40 (Resp. A20).

The Governor's separation of powers challenge under the 1945 Constitution must be interpreted against this deeply rooted history. *See V*, 306 S.W.2d at 465. The framers of our Constitutions have chosen to limit the Governor's clemency power against the backdrop of state law, beginning with the requirement of requiring pardons to occur *after* conviction, and eliminating the power to parole. *See Pestka*, 493 S.W.3d at 411 ("[P]rovisions retained are regarded as a continuation of the former law, while those omitted are treated as repealed."). On multiple occasions before 1945, and again in the months after framing the new constitution, the General Assembly exercised its authority over the clemency process through a statutory process of investigation culminating in a report and recommendation.

In sum, the Governor does not have "*exclusive* clemency authority," as the Governor's brief suggests. The Constitution separates clemency authority into two components: the process and the decision. The General Assembly's authority over the process has existed since 1865. Thus, although the Governor contends that § 552.070 violates separation-of-powers principles, the Governor has it backward. The Governor's power to make the final clemency decision has been "subject to" the General Assembly's power to regulate the process for nearly 160 years.

B. The Governor's Purported Dissolution of the Board of Inquiry Exceeded His Own Constitutional Authority and Prohibits the Governor From Making a Final Clemency Decision Until the Board Completes Its Statutory Duties (Point IV).

Under its constitutional grant of authority, the General Assembly has enacted two closely related processes that govern the manner of applying for executive clemency,

through two separate institutions: (1) a board of inquiry for death penalty cases, R.S. Mo. § 552.070; and (2) the board of probation and parole for "all" cases, *id.* § 217.800. Consistent with prior statutes going back to 1913, the General Assembly charges both boards with carrying out a process of information-gathering that culminates in a report to the Governor and, for the board of inquiry, a recommendation on clemency. *Id.*

Before the General Assembly enacted § 552.070 in 1963, the manner of applying for executive clemency was:

> **Applications for pardon or commutation to be investigated by board.**—All applications for pardon, commutation of sentence or reprieve *shall* be referred to the board [of probation and parole] 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.

R.S. Mo. § 549.241 (1959) (emphasis added) (Resp. A24). As the Court will observe, this language continues to govern the board of probation and parole today. R.S. Mo. § 217.800.2.

Through § 552.070, however, the General Assembly made available a separate, additional process specific to death penalty cases, which the General Assembly framed in the same mandatory language. Section 552.070 provides:

> **Power of governor to grant reprieves, commutations and pardons.**—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.

(Emphasis added). Thus, the board of probation and parole (like its predecessors) is a general body that must investigate "all" applications, but the Governor may *also* appoint a separate board of inquiry specific to an individual death penalty case "in his discretion," which must gather its own information.

The duties and requirements are similar. The board of probation and parole "shall investigate" each case, § 217.800.2, and the board of inquiry "shall … gather information" bearing upon whether clemency is appropriate., § 552.070. The board of probation and parole "shall … submit … a report" to the Governor, § 217.800.2, and the board of inquiry also "shall make its report" to the Governor, § 552.070.

Given the increased stakes in a capital case, there are differences in the two approaches. First, when the Governor appoints a board of inquiry, the board's focus is directed to a single person compared to the board of probation and parole's broader workload. Second, the General Assembly imposes an additional legal "duty" on all Missourians and our institutions to give that board both "information" and "assistance" in carrying out its duties. § 552.070. Third, unlike the board of probation and parole, the General Assembly *requires* a board of inquiry to issue a recommendation to the Governor.

As pleaded, however, the board of inquiry's statutory work is not complete because the board still has not made its report and recommendation to the Governor. E35-36. Under Executive Order 23-06, Governor Parson purported to "dissolve" the board of inquiry before the board had fulfilled the General Assembly's mandate. By abolishing the board

in that fashion, the Governor acted in excess of his own constitutional authority by inhibiting the General Assembly's chosen process, which requires that the board of inquiry, once formed, "shall make its report and recommendation to the governor" before the governor makes the final decision.[10] As a result, the Governor has not only violated the separation of powers, but created a scenario in which the Governor's own power to make a final clemency decision is not yet ripe because that process is unfinished.

At various points, the Governor halfheartedly suggests that § 552.070 is unconstitutional. Br. 59, 75, 81-82. This argument is unavailing. "An act of the legislature carries a strong presumption of constitutionality." *O'Brien v. Dept. of Public Safety*, 89 S.W.3d 560, 563 (Mo. banc 2019) (quoting *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011)). "The person challenging the validity of the statute has the burden of providing the act clearly and undoubtedly violates the constitution." *Id.* (quoting *Prestige Travel*, 344 S.W.3d at 712). That is not the case here, where § 552.070 falls within in a decades-long line of similar statutes that existed before and after the 1945 Constitution.

Furthermore, none of the Governor's authorities stands for the proposition that the Governor may interrupt, depart from, or skip the General Assembly's statutory processes.

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[10] The Governor points out that the opening clause of § 552.070 references "the exercise of his powers under Article IV, Section 7 … to grant" clemency to argue the statute does not limit the Governor's authority because it refers to his own powers. This is unavailing. The full sentence of article IV, § 7 says that the Governor's "power" is "subject to provisions of law as to the manner of applying for pardons," *i.e.*, § 552.070. This only confirms the General Assembly recognized the bi-partite structure of executive clemency through this tie-in.

Instead, they relate to the finality of his power to *grant* clemency. For example, in *State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431 (Mo. banc 2007), there was no allegation that the *Governor* failed to follow statutory procedures. Instead, after the Governor had commuted the petitioners' sentences to life with the possibility of parole, the board of probation and parole failed to conduct a parole hearing consistent with the terms of the commutation. Thus, the parole board had not carried out the Governor's *final* clemency decision "upon such conditions and with such restrictions and limitations as he may think proper," which is a different clause in article IV, § 7, and a different constitutional issue. *Id.* at 435.

Likewise, in *Ex parte Reno*, the Secretary of State failed to register the Governor's commutation *after the fact*, resulting in the petitioner's continued detention after the completion of his sentence. 66 Mo. 266, 272 (1877). The Court held that the Secretary of State had not honored the Governor's final clemency decision and could not impair a valid commutation *post hoc*. *Id.*

Williams agrees that, following receipt the board's report and recommendation, the Governor's final clemency decision will be an act of "grace." *Lute*, 218 S.W.3d at 435 (quoting *Reno*, 66 Mo. at 269). But reports and recommendations are not meaningless. *See Jacobson,* 152 S.W.2d at 1064. The purpose behind this process is to focus the Governor's attention on the merits of a claim. *Rich*, 62 N.W. at 587-88. Moreover, adherence to statutory law is particularly important because the Constitution not only makes the Governor "subject" to the General Assembly's laws on this topic, but charges the Governor

with ensuring the faithful execution of those laws. MO. CONST. art. IV, § 2. This necessarily includes those laws designed to impact the Governor's own decision-making.

Reports and recommendations are a critical part of the clemency process because it is impossible to predict what information might tip the balance, especially when the Governor's discretion to consider information is wide. *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) ("The exercise of the power of pardon lies in the uncontrolled discretion of the governor, and in determining whether to exercise the power he is not restricted by strict rules of evidence."). Furthermore, unlike the judiciary, the Governor is not bound to the same burden of proof for granting relief based on freestanding claims of actual innocence before a court. *Cf. State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) (clear and convincing evidence). This respects the purpose behind the separation of powers: the General Assembly has chosen to design a method that ensures the Governor has complete information before he invokes his own power to grant or deny clemency.

C. The Governor Did Not Have Statutory Authority to "Dissolve" the Board of Inquiry by Executive Order (Point III).

Notwithstanding the limitations on his own constitutional power, the Governor contends that his dissolution of the board complied with the statute. There is, however, no provision in § 552.070 that granted the Governor authority to dissolve the board of inquiry in this fashion. There is no statutory reference to the right to "dissolve," "abolish," or "terminate" the board of inquiry in § 552.070 before the board carries out its statutory duty to deliver a report and recommendation to the Governor. Indeed, the General

Assembly's decision *not* to grant this additional authority to the Governor only confirms that the Governor must wait for the board to complete its statutory duty.

To locate this purported grant of authority, the Governor necessarily asks the Court to insert one of these words into § 552.070, which is improper. "A court may not add words by implication to a statute that is clear and ambiguous." *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. banc 2008) (quoting *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993)) (cited by the Governor); *see also State ex rel. Bailey v. Fulton*, 659 S.W.3d 909, 913 n.3 (Mo. banc 2023) ("To reach the conclusion that section 547.031 includes a prosecuting attorney with prior authority to prosecute the original case against the defendant when it was pending in that jurisdiction, this Court would have to add words to the statute, which this Court cannot do under the guise of statutory interpretation.") (cited by the Governor).[11]

Unable to point to language in the statute, the Governor seeks to pull his discretion over the *final* clemency decision as a justification for halting the board's work prematurely. But, as a matter of separation-of-powers principles, the Governor's constitutional authority cannot bleed into the General Assembly's. Allowing the Governor to halt the General Assembly's process defeats its purpose. Not unlike a jury, there is a fundamental difference between the Governor's broad discretion in his *final* decision and adherence to the statutory guardrails that funnel information toward that final decision.

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[11] The Governor responds that *Williams'* reading of the statute requires insertion of words and, to make a rhetorical point, proposes an overly cumbersome sentence. No additional language is necessary. The mandatory language in § 552.070 ("shall") makes clear the General Assembly's intent, without the need for additional words.

The Governor also seeks to inflate the meaning of the word "discretion" in § 552.070. By its plain terms and location, the statute's reference to "discretion" is related to the Governor's power to "appoint" a board of inquiry. The Governor argues that the discretion to appoint is the same as the discretion to dissolve. Br. 41. It is not. Ringing and un-ringing the bell are not the same. This should clear from the nature of the Governor's final clemency decision itself. The Governor may grant a pardon, but even he cannot withdraw the pardon once granted. *See Reno*, 66 Mo. at 279 ("Whenever these things are done, the grantee, or done of the favor, 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."). Similarly, by invoking § 552.070 and appointing a board, Governor Greitens set various processes in motion for several years that conferred a benefit on Williams and imposed legal duties on the board and upon "all persons and institutions." The establishment of the board also imposes an ongoing duty on the board and the Governor to hold "[a]ll information gathered … in strict confidence." § 552.070. Notwithstanding the purported dissolution, even the Governor contends that this duty continues to persist.

Furthermore, even the use of the word "discretion" must be viewed in its larger context. No one disputes the Governor's discretion to *appoint* a board of inquiry. That discretion, however, derives from the permissive word "may." Namely, the statute provides that the Governor "may … appoint" a board of inquiry instead of commanding that the Governor "shall … appoint" one in every death penalty case.

Section 552.070's use of the word "may" naturally leads to question why the General Assembly added the subsequent, otherwise unnecessary phrase "in his discretion."

This phrase is not surplusage. The relevant cue is that this phrase sits adjacent to the appointment power. It conveys that the General Assembly did not require Senate approval for appointees to the board of inquiry. Following the lead of the U.S. Constitution,[12] the Missouri Constitution commonly empowers the Governor to appoint various officials "by and with the advice and consent of the senate." MO. CONST. art. IV, § 17 (heads of executive departments), § 22 (director of revenue), § 35 (director of department of agriculture), § 36(a) (director of department of economic development), § 36(b) (director of department of insurance), § 37 (director of department of social services), § 37(a) (director of department of mental health), § 40(a) (members of conservation commission), § 47 (director of department of natural resources), § 48 (director of department of public safety), § 50 (commissioner of administration), § 51 ("All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor.").

The General Assembly also empowers the Governor to appoint officials "by and with the consent of the senate. In a particularly cogent example, the General Assembly requires that members of the board of probation and parole will be "appointed by the governor by and with the advice and consent of the senate." R.S. Mo. § 217.665.1. This is consistent with historical practice. R.S. Mo. § 549.205 (1959) (Resp. A22-23) (three-

[12] U.S. CONST. art. II, § 2 (The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone.").

member board of probation and parole "shall consist of three members appointed by the governor, by and with the advice and consent of the senate"); Mo. Laws 1945, at 734, § 35 (Resp. A18-19) (same); Mo. Laws 1939 at 2414, § 9158 (Resp. A16-17) (governor appointed *two* members of board of probation and parole "by and with the approval and consent of the Senate"); Mo. Laws 1917 at 157, § 4 (three member board of prisons "shall be appointed by the governor with the consent of the senate").

Such approvals occur in other areas of government. *See, e.g.*, R.S. Mo. § 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."); *id.* § 260.020 ("The [environmental improvement] authority shall consist of five members appointed by the governor, by and with the consent of the senate."). The use of the phrase "in his discretion" places these appointees in a separate class of individuals who do not require Senate approval. *See, e.g.*, Mo. Laws 1929 at 2353, § 8317 (Resp. A11) ("The governor may also at his discretion designate or *appoint* the members of said commission or any thereof, as superintendent or superintendents….") (emphasis added); R.S. Mo. § 650.457 ("Two members [of the Missouri Medal of Valor Review Board] shall be *appointed* at the governor's discretion.").

Section 552.070 does not say that the governor "may, in his discretion, *remove*" appointees, much less *dissolve* the board itself. Again, the Governor inserts nonexistent words into the statute. As another example, the Governor argues that the appointees "serve at Governor Parson's pleasure." Br. 40. On the contrary, the General Assembly embeds statutory language that defines the Governor's ability to remove appointees on such terms.

See R.S. Mo. § 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). Sometimes, by comparison, removal requires the advice and consent of the Senate. *See 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."). Here, there is no language at all to guide the "removal" of individual appointees.

Again, § 552.070 should be read against its historical backdrop. The original 1913 legislation creating a board of pardons and paroles provided that the governor "shall have the power to remove any or all of said members from office, whenever, in his opinion, the public interest may require it." Mo. Laws 1913 at 227, § 1 (Resp. A6). Subsequent legislation provided: "The governor may remove any board member for inefficiency, malfeasance, misfeasance, or nonfeasance in office or for any cause which renders him incapable or unfit to discharge his official duties." Mo. Laws 1945 at 734-35, § 35 (Resp. A18-19). In these instances, the removal language is explicit. The General Assembly did not, however, include any such removal language in § 552.070.[13]

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[13] Today, the default provision is § 106.010, which provides that "[t]he governor shall have power and he is hereby authorized to remove from office, without assigning any *other* reason therefor, any appointive state official required by law to be appointed by the governor, whenever in his opinion such removal is *necessary for the betterment of the public service*, but the governor may, at his discretion, in any order of removal which he may make under authority of this section, assign additional and more specific reasons for such removal." Executive Order 23-06 does not claim that any appointees were removed because such removal was "necessary for the betterment of the public service." Such a

Finally, there is a fundamental difference between *removing* appointees and *dissolving* (*i.e.*, abolishing) the board itself as an entity without appointing replacements. When the governor "removes" a board member, the result is a vacancy in the office that now must be refilled. If, for example, the Governor purported to remove all current appointees from the board of probation and parole, that board would not cease to exist—the board would just be vacant. Abolishing *an entity* follows a different process.[14] *Cf. Cason*, 495 S.W.2d at 392 ("The authority of an executive to set aside an enactment of the legislative department is not an inherent power, and can be exercise only when sanctioned by a constitutional provision, and only in the manner and mode prescribed.").

In sum, the General Assembly's did not grant the Governor unilateral authority to "dissolve" or "abolish" the board of inquiry before its work is complete. Therefore, Respondent correctly held that, as pleaded, Williams stated a claim that Executive Order 23-06 is null and void.

D. The Circuit Court's Denial of the Motion for Judgment on the Pleadings Does Not Violate Separation-of-Powers Principles Governing the Judicial Department (Point I).

The Governor also contends that the circuit court's interlocutory ruling "invaded" the Governor's constitutional powers. Br. 36. On the contrary, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Mo. Coalition for*

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result does not make sense, considering that the result would be five unfilled vacancies with no one to carry out that public service.

[14] Even assuming, *arguendo*, that such a process could occur without violating Williams' rights, the Governor would need to follow the general process set forth in R.S. Mo. §§ 26.500–.540 for "abolishing" agencies in the executive branch.

Env. v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 132 (Mo. banc 1997) (quoting *Marbury v. Madison*, 1 Cranch 37 (1803)). Comparing the scope of the Governor's constitutional powers against those of the General Assembly does not exist beyond judicial review. *See, e.g.*, *State ex rel. Oliver v. Hunt*, 247 S.W.2d 969, 973 (Mo. banc 1952) ("Section 549.170 does not take from the governor one whit of the power of pardon vested in him by the Constitution."). Rather, as this Court has done on many occasions, the judicial department is charged with issuing decisions that address the separation of powers between the executive and other departments. *See, e.g.*, *Corvera Abatement Techs., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 857 (Mo. banc 1998).

The Governor also describes this case as an "unconstitutional judicial inquiry" into his clemency decisions, or even as "forc[ing]" an exercise of his clemency power. Br. 28, 39. In making this argument, the Governor misstates the relief sought by Williams and the scope of the circuit court's appealed-from ruling. Contrary to the Governor's brief, Respondent has *not* "decided that a circuit court can … force Governor Parson to exercise the governor's clemency authority how Williams sees fit." Br. 28. Instead, the circuit court did nothing more than issue an interlocutory order that denied the Governor's motion for judgment on the pleadings because, as pleaded, Williams' petition states a claim that Executive Order 23-06 violates state and federal law. Moving forward, Williams has asked the circuit court to enter a judgment that restores the status quo by setting aside Executive Order 23-06 as null and void, reinstates Executive Order 17-20 (to the extent necessary), and enjoins further interference until the board of inquiry carries out its statutory duty. None of this relief is inconsistent with the judicial role.

This case does not involve an excess of authority. Instead, this case illustrates the proper functioning of a three-branch government. The Missouri Constitution expressly contemplates legislative checks on the Governor's power to grant or deny clemency. The General Assembly enacted a statute that imposes such a check upon the Governor by imposing new and special duties on members of the board, the public, and statewide institutions to gather information to assist the Governor's final decision. The Governor however, purported to "dissolve" the board without proper authority. Therefore, Williams asked the circuit court to step in. This is how our system is supposed to work—including, and maybe especially, in capital cases.

E. The Court Should Quash the Preliminary Writ.

No writ is warranted, and the Court should allow the case to proceed. Respondent did not exceed his authority by denying the Governor's motion for judgment on the pleadings. "There has been no showing that the circuit court's usurpation of jurisdiction as 'clearly evident.'" *Key Ins. Co.*, 587 S.W.3d at 641 (quoting *Hawley*, 543 S.W.3d at 606-07). The Governor's lack of constitutional or statutory authority to dissolve the board of inquiry is a dispute squarely within the authority of the circuit court to adjudicate. As a result, the facts of this case do not meet the standard for issuance of a writ. The circuit court properly exercised its authority to declare the constitutional separation of powers regarding clemency, which is a public institution that predates the founding of this country and ensures the protection of all citizens, including those sentenced to death. For these reasons, the writ should be quashed.

III. Respondent Did Not Exceed His Authority by Denying the Governor's Motion for Judgment on the Pleadings Because the Governor's Purported Dissolution of the Board of Inquiry Violated Williams' Due Process Rights by Prematurely Terminating the Process of Delivering a Duly Investigated Report and Recommendation to the Governor (Point II).

The limitations on the Governor's constitutional and statutory authority under Missouri law are dispositive and establish that Respondent properly exercised authority over the case by denying the motion for judgment on the pleadings. As a result, the preliminary writ should be quashed on this basis alone because the case must proceed in the circuit court. If, however, the Court decides to proceed to Williams' due process claims, Williams has also stated a valid claim for relief under federal law.

The Due Process Clause of the Fourteenth Amendment provides that no State "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. In any due process claim, two issues arise: (1) whether the claimant was deprived of a life, liberty, or property interest; and (2) if so, whether the claimant received the process that was "due."

Williams invokes two interests: his life and his liberty. As a living person, Williams retains a protected interest in his own life. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring). Furthermore, "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (internal citation omitted). Williams' due process claim relates to the failure to adhere to the necessary legal procedures *before* the final clemency

decision because those procedures protect Williams against arbitrary final clemency decisions.

A. The Premature Termination of the Board of Inquiry Process Deprives Williams of a Constitutionally Protected Interest in His Own Life Without Due Process.

Williams continues to have a protected interest in his own life, notwithstanding his conviction and sentence. *See Woodard*, 523 U.S. at 288 (O'Connor, J., concurring) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."); *id.* at 289 ("[I]t is incorrect . . . to say that a prisoner has been deprived of all interest in his life before his execution.").[15] As a result, "some minimal procedural safeguards apply to clemency proceedings." *Id.* at 289.

Woodard's facts are critical to the U.S. Supreme Court's holding that Ohio did not violate the applicant's right to due process. Specifically, there was no dispute that the parole authority had *complied* with Ohio statutory law. Under Ohio law, the parole authority "must" conduct a clemency hearing within 45 days of the scheduled execution. *Id.* at 276 (opinion of the Court). The inmate "may" request an interview with members of the parole authority, but the inmate's counsel was not allowed to attend that

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[15] *Woodard* is a fragmented opinion in which a majority of the Court joined Parts I and III of Chief Justice Rehnquist's opinion, but only four justices joined Part II of that opinion. Instead, four justices joined Justice O'Connor's concurring opinion regarding Part II. Because four justices signed onto each opinion with respect to the issues in Part II, Chief Justice Rehnquist's opinion is not even a "plurality" on those issues. As the Governor acknowledges, courts have concluded that Justice O'Connor's four-justice concurrence is the controlling opinion regarding those issues. In any event, the other four justices "agree[d]" with Justice O'Connor and the other concurring justices "that respondent maintains a residual life interest." *Woodard*, 523 U.S. at 281 (opinion of Rehnquist, C.J.). This issue is discussed in more detail *infra*.

interview. *Id.* at 276-77. Finally, the parole authority "must holding the hearing, complete its clemency review, and make a recommendation to the Governor." *Id.* at 277. When the parole authority offered an interview on three days' notice and a clemency hearing on 10 days' notice, the inmate did not exercise his right to the interview. *Id.* at 277; *see also id.* at 289-90 (O'Connor, J., concurring). Instead, the inmate filed suit, arguing that the notice period was inadequate and that his counsel should be permitted to attend the interview, if held.

Thus, although the parole authority had fulfilled every mandatory procedure under Ohio law, the inmate objected that the established procedures were still inadequate. *Id.* at 289. On these facts, Justice O'Connor explained her reasoning succinctly: "The process respondent received, including notice of the hearing and an opportunity to participate in an interview, *comports with Ohio's regulations* and observes whatever limitations the Due Process Clause may impose on clemency proceedings." *Id.* at 290 (emphasis added).

This holding is consistent with the other justices' reasoning, which acknowledged a "residual life interest" but rejected the notion that, under the Due Process Clause, "there is a life interest in clemency *broader* in scope than the 'original' life interest adjudicated at trial and sentencing." *Id.* at 279, 281 (opinion of Rehnquist, C.J.) (emphasis added). The other justices sidestepped the second question of whether Ohio state law created a protected interest by concluding that "Ohio's clemency procedures do not violate due process," *id.* at 282 (opinion of Rehnquist, C.J.), because the Due Process Clause did not require *additional* procedural requirements (*e.g.*, the right to counsel) beyond the procedures that Ohio had already complied with. *See id.* at 281 (respondent cannot "challenge the

clemency determination by requiring *the procedural protections he seeks*.") (emphasis added); *id.* ("[T]he Governor's executive discretion need not be fettered by *the types of procedural protections sought by respondent*.") (emphasis added); *id.* at 285 (rejecting "the sort of procedural requirements *that respondent urges*") (emphasis added).[16]

For this reason, Williams states a valid claim for relief. Williams has not objected that § 552.070's statutory procedures, if followed, are inadequate and requested *additional* procedural protections. Instead, Williams has objected that the State *did not follow* the procedures that already exist. Specifically, the Governor prevented compliance with § 552.070 and Executive Order 17-20 by issuing Executive Order 23-06. On the most fundamental level, an opportunity to be heard "must be granted … in a meaningful manner," meaning that it "is a basic aspect of the duty of government to follow a fair process of decisionmaking." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Because of the Governor's actions, the board of inquiry never completed its investigation and never issued its report and recommendation, despite a statutory command for their completion before the Governor can make a final decision on clemency. It is no matter that the board of inquiry issues a recommendation subject to the Governor's discretion and final authority. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544 (1985). "[T]he right to a hearing does not depend on a demonstration of certain success" in the final decision. *Id.*

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[16] Chief Justice Rehnquist's opinion also rejected the argument that clemency is part of the process of "adjudicating" guilt or innocence and "an integral part of the judicial system." *Woodard*, 523 U.S. at 283 (opinion of Rehnquist, C.J.). Williams does not raise that argument here. Although innocence is *relevant* to clemency, clemency itself is not an adjudication within the framework of the judicial system. This issue is distinct from whether due process require States to comply with their own statutes and laws.

The entire purpose of these procedures is to focus the Governor's final determination on the merits of Williams' claim. As a result, Williams did not receive the process that was "due" to him.

The Governor emphasizes *dictum* from *Woodard* to argue that the Due Process Clause would only bar "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 (O'Connor, J., concurring). Like any example, the *dictum* is illustrative and not exhaustive. Specifically, the *dictum* marked the two extreme poles of the clemency process: initial access and the final decision. The facts in *Woodard*, however, fell in between these poles. Similarly, the other justices wrote that a capital inmate's "residual life interest" included "not being summarily executed by prison guards." *Id.* at 281 (opinion of Rehnquist, C.J.). Surely the other four justices did not consider "summary execution" to be the only imaginable due process violation. Accordingly, contrary to the Governor's brief, this Court cannot confuse colorful illustrations with the U.S. Supreme Court's holding. Rather, the issue is whether State authorities have fulfilled the statutory mandate by providing the process that was "due" *before* the exercise of clemency authority.

Following *Woodard*, the Eighth Circuit has held that a Missouri prisoner stated a claim on this basis under 42 U.S.C. § 1983. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). In *Young*, a prosecutor threatened to fire an attorney if she provided information to the Governor in connection with a clemency application. *Id.* at 851. The Court noted that "Missouri regularly receives evidence from any and all sources in clemency matters,

and the Governor is not restricted as to the nature of the considerations he may entertain or the evidence he may receive." *Id.* at 853; *cf.* R.S. Mo. § 552.070. The court held that the inmate had stated a claim because although the Due Process Clause "does not require that a state have a clemency procedure, . . . it does require that, if such a procedure is created, the state's own officials refrain from frustrating it." *Young*, 218 F.3d at 853. Here, as pleaded, the procedure has been frustrated.

For this reason, the Governor' citation of *Roll v. Carnahan*, 225 F.3d 1016 (8th Cir. 2000), is inapposite. Again, there is no dispute before this Court that the Governor's *initial* decision to appoint a board of inquiry is discretionary. But the Governor did not exercise that discretion in *Roll*, no mandatory procedures attached as a result of the formation of a board of inquiry. The court therefore explicitly distinguished *Young* because the claimant "does not contend the state has deliberately interfered with his efforts to present evidence to the governor." *Id.* at 1018.

Woodard's rule is further confirmed by the Governor's citation to opinions from other federal courts of appeals. *See, e.g.*, *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) ("[T]he minimal application of the Due Process Clause only *ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law*, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.") (emphasis added). In these cases, the courts denied relief because there was no evidence that State officials had failed to follow statutory procedures. *See id.* at 1062 ("[T]he record is devoid of evidence that the Board was prevented from conducting or failed to conduct an impartial

investigation and study of Mr. Duvall's application for clemency."); *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 345 (5th Cir. 1999) (board members "complied with the constitutional minimum set forth in *Woodard*" because board members were able to "review[] the information they believed material to Faulder's request, and each one independently *determined whether clemency ought to be recommended*") (emphasis added). That is not the case here.

Otherwise, the Governor's cited cases relate to invalid due process challenges to the Governor's final decision-making policy instead of a lack of compliance with state regulations. *See, e.g.*, *Anderson v. Davis*, 279 F.3d 674, 675 (9th Cir. 2002) (challenging an alleged "blanket policy vis á vis murderers to deny all applications of executive clemency," but no allegation of that Governor deviated from statutory procedures enacted by legislature).

Moving past cases involving executive clemency, the Governor describes the U.S. Supreme Court's decision in *Olim v. Wakinekona*, 461 U.S. 238 (1983), as controlling. Br. 54. It is not. The question presented in *Olim* was whether the transfer of a prisoner between prisons in different states "implicates a liberty interest" under the Due Process Clause. 461 U.S. at 240. Naturally relying on prior case law that "*intrastate* prison transfer does not directly implicate the Due Process Clause," the Court concluded that "an interstate prison transfer . . . does not deprive an inmate of any liberty interest protected by the Due Process Clause." *Id.* at 244, 248 (emphasis in original). In short, there was *no* protected interest at stake (much less a "life" interest), which is the necessary predicate to any Fourteenth Amendment challenge. It is notable, but far from surprising, that Justice

O'Connor's *Woodard* concurrence never mentions *Olim*—because capital defendants retain their life interest until their execution. It is not difficult to grasp the different interests at stake between transferring prisons and ending an inmate's life.

In this respect, *Olim* also falls within a broader line of cases that concerned "prison management." *See Wilkinson*, 545 U.S. at 222, 227. These cases sought to fashion a methodology for addressing state-created liberty rights of prisoners under prison regulations that govern inter- and interstate transfers, segregated confinement, and placement at super-max facilities—*i.e.*, an inmate's "liberty" within the four walls of a prison. *See id.* at 221-22. *Woodard* did not cite these cases or adopt their principles for *clemency* proceedings.

In sum, by dissolving the board in inquiry, the Governor deprived Williams of his right to due process concerning his most precious interest: his life. If a hearing can serve any purpose, "it must be granted at a time when the deprivation can still be prevented." *Fuentes*, 407 U.S. at 81. Carrying out Williams' death sentence without following clemency procedures is the most permanent of all deprivations. Accordingly, Respondent correctly held that Williams stated a claim.

B. Justice O'Connor's Opinion Is Controlling Under *Marks*.

The Governor seeks to lead this Court into error through a request that the Court should disregard Justice O'Connor's controlling opinion in *Woodard*. Br. 50. Misapplying *Woodard* would place Missouri on an island. *See, e.g.*, *Bacon v. Lee*, 549 S.E.2d 840, 848 (N.C. 2001) ("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."); *see also*

Br. 50 n.10 (collecting federal cases). That split would not only divide Missouri from other state and federal courts throughout the country, but create a split between this Court and the Eighth Circuit that would impact Missouri capital defendants. *See Young*, 218 F.3d at 852-53.

No split, however, is warranted. The Governor misconstrues the U.S. Supreme Court's holding in *Marks v. United States*, 430 U.S. 188 (1977). *Marks* provides the following rule: "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." *Id.* at 193 (internal quotation omitted). As this Court has correctly explained, *Marks* instructs courts to look to see which concurring opinion employs the narrowest "approach" to resolve a case while remaining "consistent with" the other concurring opinion(s). *State v. Gaw*, 285 S.W.3d 318, 323 (Mo. banc 2009). Justice O'Connor's opinion reflects the narrowest approach consistent with the other justices who concurred in the result.

The Governor, however, proposes a different concept altogether. The Governor argues that the "*Marks* requires courts to apply a narrower *constitutional reading* over a competing opinion that takes a more expansive view of *constitutional requirements*." Br. 50-51 (emphasis added). This sleight of hand seeks to transform *Marks* from an understanding of *stare decisis* into an outcome-determinative canon of constitutional interpretation that denies rights to all citizens (not just capital defendants) without a majority opinion. As suggested by the Governor, this new rule would always work to the

favor of the government at the expense of the individual. That is not the holding of *Marks* in any sense.

Marks is not about broader or narrower constitutional "requirements." *Marks* is not even about constitutional cases. *See, e.g.*, *United States v. Santos*, 553 U.S. 507, 523 (2008) (statutory interpretation). Indeed, *Marks* is neutral as to whether the result will favor citizens or the government. *See id.* (overturning federal criminal conviction under rule of lenity in light of *Marks*). Instead, *Marks* simply tends to favor a narrower *holding* (*e.g.*, as-applied rulings), one way or the other, over a broader *holding* that a right always does or does not exist when that broader holding failed to muster five votes. In *Woodard*, eight justices agreed no due process violation occurred. Four other justices recognized a protectable life interest, but carefully restricted their holding and analysis to the facts of the case. Four justices acknowledged a "residual life interest" existed but issued a ruling with broader language and wider discussion, although much of their opinion remains consistent with Justice O'Connor's reasoning. Justice Stevens issued a dissenting opinion on the other end of the spectrum from Chief Justice Rehnquist. In short, "[i]t is clear that a majority of the United States Supreme Court did not adopt" Chief Justice Rehnquist's broader reasoning; "instead, that rationale was rejected explicitly not only by the four [concurring] justices, but also Justice [Stevens]." *Gaw*, 285 S.W.3d at 323.

Therefore, Justice O'Connor's concurring opinion represents the holding of the U.S. Supreme Court in *Woodard*, and Williams has stated a viable claim for relief.

C. The Premature Termination of the Board of Inquiry Process Also Deprives Williams of a State-Created Liberty Interest Without Due Process.

Justice O'Connor's holding in *Woodard* relates to Williams' life interest, which exists in all clemency proceedings involving capital defendants. But Williams also has separate state-created life and liberty interests by virtue of Governor Greitens' invocation of § 552.070 and issuance of Executive Order 17-20

The U.S. Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *see Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."). "The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not the result of [the U.S. Supreme] Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations." *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 461 (1989).

"A state statute creates [] a liberty interest if it uses 'mandatory language in connection with particularized substantive standards or criteria that significantly guide administrative decisions.'" *State ex rel. Haley v. Groose*, 873 S.W.2d 221, 223 (Mo. banc 1994) (quoting *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). Both this Court and the Eighth Circuit have recognized that statutory language can create a protected liberty interest. *See id.* at 224 ("By using the mandatory language 'shall' in § 217.395.2, the General Assembly

has created a right, after a prisoner is transferred to administrative segregation, to a review procedure."); *Williams v. Missouri Bd. of Prob. & Parole*, 661 F.2d 697, 698 (8th Cir. 1981) ("We conclude that inmates of Missouri penal institutions have a protected liberty interest, rooted in state law, in parole release.") (citing R.S. Mo. § 549.261).

Although Governor Parson might not have the same policies, and might not have made the same decision as Governor Greitens in 2017, he cannot constitutionally unwind Williams' state-created liberty interests. Here, § 552.070, as invoked by Governor Greitens, commands that the board of inquiry "shall" make a report and recommendation to the Governor regarding Williams' clemency. Furthermore, Governor Greitens' Executive Order 17-20 directed that the board of inquiry "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"; "shall assess the credibility and weight of all evidence"; and "shall report and make a recommendation to the Governor as to whether or not Williams should be executed or his sentence of death commuted." E172-73. *Cf. Dist. Attorney's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68 (2009) ("Osborne does, however, have a liberty interest in demonstrating his innocence with new evidence under state law.").[17] Executive Order 17-20 further directed that a stay of execution would remain

[17] The Governor misstates the contents of the U.S. Supreme Court's opinion in *Osborne*. The Court did not "specifically reject[] the idea that a protectable due process interest arose from the state's clemency process." Br. 55. On the contrary, the Court (implicitly acknowledging *Woodard*) stated that "[w]e have held that *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." 557 U.S. at 67-68 (final emphasis in original). This statement does not concern *capital* defendants or *life* interests, much less liberty interests when there is a statutory method of clemency proceeding that the State has

in place until the receipt of that report and recommendation. By their plain terms, these are state-created liberty interests tailored specifically to Williams, and the State has not satisfied the requirements of § 552.070 or Executive Order 17-20.

This case is not about whether liberty interests exist in all cases. As Respondent correctly held (E11-12; A12-13), the narrow fact is that Governor Greitens, *in Williams' case*, created these liberty interests by invoking a special statute and issuing a tailored executive order specific to Williams' personal circumstances. When Missouri voluntarily creates such interests, with specific mandatory procedures and directives, Missouri cannot violate them. In other words, Missouri cannot withdraw or violate its clemency procedures midstream. Indeed, *Woodard* shows that *compliance* with existing state law is the pathway to avoid a due process violation. Through undisputed noncompliance with these procedures, Williams has been deprived of the process that is "due" to him. Accordingly, Respondent correctly held that Williams stated a claim.

IV. Respondent Did Not Exceed His Authority by Denying the Governor's Motion for Judgment on the Pleadings Because Williams' Petition Is Not a Collateral Attack on His Conviction, in That Williams Has Not Asked the Judicial Department to Vacate His Conviction or Sentence (Point V).

In his final Point Relied On, the Governor incorrectly contends that Williams' petition is "an unauthorized collateral attack on a final criminal judgment." Br. 97.

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expressly invoked for a particular claimant. Furthermore, *Osborne* is a postconviction DNA case, not an executive clemency case. Yet, just like *Woodard*, the Court then explained that it "s[aw] nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief," but noted the claimant had filed suit "to sidestep state process" by seeking *additional* procedural rights "without ever using these procedures," resulting in no denial of due process with respect to the *actual* state-created liberty interest. *Id.* at 69-71.

Williams, however, does not seek to "attack" his conviction by asking the circuit court to overturn the judgment. Contrary to the Governor's arguments in his brief and writ papers (*see* Br. 97; Sugg. in Supp. at 41), Williams' trial court petition does not request an adjudication of his innocence or guilt, much less his release from confinement or even a vacatur of his sentence of death. Instead, Williams' Prayer for Relief requests a declaration that Executive Order 23-06 violated Williams' federal and state rights and is null and void; the reinstatement of Executive Order 17-20; and an injunction enjoining the Governor from interfering with the board of inquiry's process until the board fulfills its statutory obligation. E47-48. Williams has pleaded his innocence as a material allegation because considering his claim of innocence is a core purpose of the clemency process, *Whitaker*, 451 S.W.2d at 15; *Herrera*, 506 U.S. at 414, and serves as the basis for his request for clemency.

Beyond the limited scope of the Prayer for Relief, there is no danger of unleashing a new vehicle for collateral review upon the lower courts. The allegations in this case arise from an exceptionally rare event, followed by a one-of-a-kind event. In the 61 years of § 552.070's existence, only three governors have appointed boards of inquiry: in 1994, 1997, and 2017. E23. Everyone in this case agrees that a Governor's initial appointment is discretionary and cannot be compelled through the judicial system. Of those three occasions, there is only one occasion on which a Governor has purported to "dissolve" the board, once established, before receiving the board's report and recommendation for that applicant: this case. Williams' claims do not request, and do not represent, a new mechanism for obtaining collateral relief. Williams seeks tailored relief in a unique action

that will not, in itself, result in Williams' discharge. It will only facilitate the complete review of Williams' request for clemency in accordance with the purpose of the statutory scheme.

The Governor's conceptual struggle apparently derives from his discomfort with the standard of review that governs motion for judgment on the pleadings. The Governor asserts that the circuit court made a "finding" of Williams' innocence. Br. 30, 98. The order, however, speaks for itself. After setting forth the legal standard for motions for judgment on the pleadings (E2-E3; Rel. A3-4), the order treats "factual allegations from Plaintiff's Petition 'as true *for the purposes of the motion*.'" E3; Rel. A4 (quoting *Cantor v. Union Mut. Life Ins. Co.*, 547 S.W.2d 220, 224 (Mo. App. 1977)) (emphasis added); *see also* E4; Rel. A5 ("Taking those factual assertions as true for the purposes of this motion only, the Court now addresses Plaintiff's claims."). This analysis is appropriate for any judicial opinion, including this Court's opinions, so the Governor's criticism is inapt. *See Olafson*, 625 S.W.3d at 425 n.2 ("Under the standard of review for the circuit court's grant of judgment on the pleadings, the Court assumes the truth of the well-pleaded facts alleged in [the] motion and states the facts accordingly.").

Finally, the Governor's position before this Court about considering claims of innocence underscores the importance of the board of inquiry's report and recommendations. The Governor previously contended that "clemency is not another opportunity for Williams to press his failed claims of innocence." Sugg. in Supp. at 4.[18]

[18] Following the filing of the response to the Court's order to show cause, the Governor no longer advances this position in his brief.

This Court, for one, disagrees. *Wilson v. State*, 813 S.W.2d 833, 834-35 (Mo. banc 1991) ("newly discovered evidence" may be raised "in a request for a pardon from the governor under the Missouri Constitution"); *Whitaker*, 451 S.W.2d at 15 ("The general rule is that a pardon 'may * * * be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made.") (quoting 67 *C.J.S. Pardons* § 6); *Jacobson*, 152 S.W.2d at 1064 ("It is sometimes the case that the only redress open to an innocent man is through a pardon. Here the Governor deemed defendant a fit subject for executive clemency because he thought him not guilty.").

The United States Supreme Court also disagrees. *See Harbison v. Bell*, 556 U.S. 180, 192 (2009) ("Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'") (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)); *Herrera*, 506 U.S. at 514 ("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.") (internal footnote omitted); *Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.").

In fact, the Missouri Department of Corrections' form Application for Clemency disagrees. *See* Dept. of Corrections, State of Missouri, Application for Executive Clemency – Confined Applicant, *available at* https://doc.mo.gov/media/pdf/application-executive-clemency-confined-applicant (last visited Mar. 14, 2024) ("ELIGIBILITY CRITERIA: ( ) CLAIMS INNOCENCE … (ALL JUDICIAL REMEDIES MUST BE

EXHAUSTED TO MEET ELIGIBILITY CRITERIA)"); *see also* Dept. of Corrections, State of Missouri – Executive Clemency Process, *available at* https://doc.mo.gov/divisions/probation-parole/executive-clemency (last visited Mar. 14, 2024) ("Any individual confined in the Division of Adult Institutions (DAI) has the right to petition the governor for Executive Clemency if they meet the following eligibility criteria: . . . *Claims innocence*; . . . and [a]ll judicial remedies (i.e. expungement, post-conviction relief, appeals, habeas corpus, etc.) have been exhausted.").

Consistent with these principles, Executive Order 17-20 directed the board of inquiry to "consider all evidence presented to the jury, in addition to newly discovered DNA evidence, and any other relevant evidence not available to the jury." E172. Refusing to consider Williams' claim of innocence is inconsistent with the purpose of the Governor's power. *See Jacobson*, 152 S.W.2d at 1064. As Chief Justice Rehnquist explained in *Herrera*:

> Executive clemency has provided the "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.

506 U.S. at 414. The board of inquiry process ensures that critical information, including an evaluation of Williams' claim of innocence, will be placed on the Governor's desk, along with a recommendation from gubernatorial appointees—here, highly experienced jurists. The Governor need only wait for the statutory process to run its course and then

consider, in good faith, the board's report and recommendation before he makes his final decision.

"Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out." *Kansas v. Marsh*, 548 U.S. 163, 193 (2006) (Scalia, J., concurring). The clemency power exists for the public good, and the board of inquiry serves the public interest. The General Assembly has decided that the board of inquiry's work is not complete until the board makes its report and recommendation to the Governor. *See* R.S. Mo. § 552.070. This separation of powers ensures the proper functioning of the system by promoting just results and avoiding miscarriages of justice. Accordingly, the Court should quash the preliminary writ.

CONCLUSION

The Court should quash the preliminary writ.

Dated this 14th of March, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) that the Brief of Respondent complies with the limitations contained in Rule 84.06(b). I further certify that this brief contains 18,098 words, excluding the cover, any certificate required by Rule 84.06(c), signature block, and appendix, and as determined by the Microsoft Word 2010 word-counting system.

/s/ Jonathan B. Potts

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2024, I electronically filed the foregoing Brief of Respondent with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Jonathan B. Potts