In the Supreme Court of the United States

No. 24-

CAPITAL CASE

MARCELLUS WILLIAMS,

Petitioner,

v.

STATE OF MISSOURI, GOVERNOR MICHAEL L. PARSON,

Respondents.

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

APPLICATION FOR STAY OF EXECUTION

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

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APPLICATION FOR STAY OF EXECUTION

To Associate Justice Brett Kavanaugh of the Supreme Court of the United States, Petitioner Marcellus Williams[1] respectfully requests that the Court issue a stay of Williams' execution, which is currently scheduled for September 24, 2024.

INTRODUCTION

With only hours to spare, former Governor Eric Greitens halted Marcellus Williams' execution. For only the third time in Missouri history, the Governor invoked a special clemency process under Mo. Rev. Stat. §552.070, formed a Board of Inquiry, directed the Board to investigate Williams' case, and ordered the Board to issue a report and recommendation whether to grant Williams clemency. The Governor also stayed Williams' execution "until such time as the Governor makes a final determination" on clemency. The Board investigated Williams' case for the next six years—until Governor Michael Parson abruptly terminated the process. Without ever receiving the report and recommendation, the Governor dissolved the Board and revoked the stay of execution.

In *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), a 4-4-1 decision, this Court held that a capital prisoner retains a protected life interest during State clemency proceedings, which requires minimal procedural safeguards. The Supreme Court of Missouri squarely disagreed. That court held that Williams "retains no

[1] The Hon. S. Cotton Walker was the nominal respondent in the writ proceedings before the Supreme Court of Missouri. By Missouri custom, the trial judge serves as the nominal respondent, represented by counsel for the real party in interest—here, Williams—in defense of the trial court ruling. *See State ex rel. Burtrum v. Smith*, 206 S.W.2d 558, 564 (Mo. 1947). Following denial of rehearing on July 12, Judge Walker subsequently entered judgment in the trial court on September 3.

protectible due process interest within the clemency process." App. 14a. Then, a few hours later, the court scheduled Williams' execution.

The decision below directly conflicts with *Woodard*. Specifically, the Supreme Court of Missouri concluded that the wrong opinion in *Woodard* is controlling: Chief Justice Rehnquist's instead of Justice O'Connor's. The incorrect decision below creates a rift among lower courts regarding the rights of capital prisoners during clemency proceedings. Following *Woodard*, no less than 15 State high courts and federal circuit courts have correctly recognized Justice O'Connor's opinion as controlling and held that capital prisoners retain a life interest protected by the Due Process Clause of the Fourteenth Amendment. What is more, the court wandered away from more than a century of precedent that protects the sanctity of executive clemency by holding that an executive reprieve "creates no rights." App. 7a. On the contrary, other courts unanimously agree that recipients of executive clemency acquire a protected interest that the State cannot revoke without due process.

These are exceptional circumstances, and Williams meets the Court's criteria for a stay of execution. There is a reasonable probability that the Court will grant certiorari on multiple grounds—the direct conflict with *Woodard*, multiple conflicts among lower courts regarding due process rights associated with executive clemency in capital cases, and even the need to clarify *Marks v. United States*, 430 U.S. 188 (1977), concerning how to identify this Court's holding in split decisions. Based on overwhelming authority that disagrees with the Supreme Court of Missouri's

analysis below, there is a substantial likelihood that Williams will succeed on the merits of his claim that Governor Parson violated his right to due process.

Finally, Williams will suffer the most severe form of irreparable harm—death—if the Court does not issue a stay of execution. Earlier this year, the St. Louis County Prosecuting Attorney confessed constitutional error in Williams' original criminal trial. App. 78a-79a. At a hearing held just a few weeks ago, the trial prosecutor admitted under oath that he handled the murder weapon five times without gloves before trial, leaving his own DNA on the murder weapon and potentially destroying preexisting DNA from the assailant. The same prosecutor also testified that he struck at least one of the Black jurors, in part, because of race. These would be key issues for the Board of Inquiry's consideration in whether to recommend clemency instead of execution—if the Governor had not wrongly dissolved the Board. For these reasons, the Court should grant Williams a stay of execution pending disposition of his petition for a writ of certiorari.

STATEMENT OF THE CASE

Williams has always maintained his innocence after receiving a death sentence for first-degree murder in 2001. App. 34a. The assailant brutally stabbed the victim with a kitchen knife. App. 34a. There were no eyewitnesses, and the forensic evidence pointed away from Williams. App. 45a. Bloody footprints leading away from the victim did not match Williams' shoe or size, the victim's husband, or any first responders. App. 34a, 39a. Investigators located bloody fingerprints, but later destroyed them. App. 34a, 45a.

Given the lack of forensic evidence, the prosecution relied on testimony from a jailhouse snitch and Williams' ex-girlfriend. Both witnesses were interested in receiving a $10,000 reward and claimed Williams had confessed. App. 45a. Williams' ex-girlfriend possessed evidence from the crime scene that implicated her in the murder. App. 43a. Before trial, the prosecution exercised peremptory strikes on six of seven potential Black jurors. App. 121a–24a; *cf. Flowers v. Mississippi*, 588 U.S. 284, 288 (2019) (five of six Black jurors stricken); *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (ten of eleven Black jurors stricken). The jury found Williams guilty and sentenced him to death. App. 46a; *see also State v. Williams*, 97 S.W.3d 462 (Mo. 2003).

In 2015, Williams conducted new DNA testing on the kitchen knife used in the murder, which established that Williams was not the source of the male DNA on the knife. App. 36a, 46a. The Supreme Court of Missouri denied habeas corpus relief and set an execution date of August 22, 2017. App. 47a.

Williams applied to then-Governor Eric Greitens for clemency. App. 31a. The Governor halted the execution on August 22, 2017, just a few hours before the State carried out the sentence. App. 31a–32a. The Governor issued an executive order that stayed Williams' execution indefinitely and formed a Board of Inquiry for only the third time in Missouri history. App. 31a, 37a. The Governor instructed the Board to consider Williams' plea for clemency in light of "newly discovered DNA evidence, which was not available to be considered by the jury that convicted him." App. 31a. The Governor directed the Board to "consider all evidence presented to the jury, in

addition to [the] newly discovered DNA evidence, and any other relevant evidence not available to the jury," and ordered that "[t]he Board shall assess the credibility and weight of all evidence." App. 31a. The Governor further ordered 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." App. 32a. The Governor stayed Williams' execution "until such time as the Governor makes a final determination as to whether or not [Williams] should be granted clemency." App. 32a. The instrument imposed no conditions on Williams and reserved no right of revocation for the Governor. App. 32a.

The Board worked for the next six years, soliciting information and lines of reinvestigation from Williams' legal team.[2] App. 49a, 53a. By June 2023, the Board had not yet issued its report or made its recommendation to the Governor. App. 35a, 49a. On June 29, 2023, instead of waiting for the Board to complete the process, Governor Michael Parson abruptly terminated the process. App. 33a, 50a. By executive order, Governor Parson "rescind[ed]" the prior executive order, thereby dissolving the Board of Inquiry established therein," and lifted Williams' stay of execution. App. 33a.

Williams filed suit against the Governor to enforce the original executive order and resume the Board of Inquiry process. App. 34a–62a. In his answer to Williams' petition, the Governor refused to admit or deny whether the Board had issued a

[2] Under §552.070, [a]ll information gathered by the board shall be received and held by it and the governor in strict confidence." Although this provision does not apply to Williams, out of respect for the process, Williams has not pleaded specific details in publicly available court filings.

report and recommendation to him before he issued the executive order.[3] The trial court denied the Governor's motion for judgment on the pleadings, rejecting the Governor's position that Williams, as a capital prisoner, had no due process rights during his clemency proceedings. App. 19a–29a.

The Governor then sought and obtained a writ of prohibition from the Supreme Court of Missouri. App. 1a–16a. The court held that neither Mo. Rev. Stat. §552.070 nor the Governor's executive order invoking that statute "vested Williams with an existing right triggering due process protection." App. 12a. The court further held that "a capital offender retains no protectible due process interest within the clemency process." App. 14a.

With respect to the revoked stay of execution, the court wrote that "a reprieve creates no rights." App. 7a. The court held that the Governor "was free to rescind it at his discretion," and at "any time." App. 7a. As a result, the court held that the Governor's dissolution of the Board and revocation of the stay "in no way denied Williams access to any process to which he was legally entitled." App. 12a.

Later that day, the court scheduled Williams' execution for September 24, 2024. App. 64a–65a. Williams requested a stay of execution, which the court declined on July 12. App. 66a–71a. The court also overruled reconsideration of its writ of prohibition that same day. App. 17a.

[3] This refusal to answer an allegation is an admission under Missouri law. *State ex rel. Koster v. Bailey*, 493 S.W.3d 423, 432 (Mo. Ct. App. 2016). The Governor continued to refuse to answer this allegation before the Supreme Court of Missouri.

While those proceedings were underway, in January 2024, the St. Louis County Prosecuting Attorney filed a motion to vacate or set aside judgment to overturn Williams' conviction and death sentence. During the hearing on that motion, the trial prosecutor made several startling admissions. First, the trial prosecutor admitted that he had mishandled the murder weapon without gloves at least five times before trial. App. 108a–17a. The trial prosecutor made this admission after additional DNA testing found that the newly discovered DNA on the knife was consistent with *his* DNA and the DNA of the trial investigator.

Second, the trial prosecutor testified that he had exercised a peremptory strike on one of the jurors, in part, because he was Black. *See* App. 120a ("Q. So you struck them because they were both young black men with glasses? A. Wrong. *That's part of the reason.* And not just glasses. I said the same type glasses. And I said they had the same piercing eyes.") (emphasis added). According to the trial prosecutor, the defendant and the juror "looked like they were brothers." App. 120a.

In a decision dated September 12, 2024, the trial court denied these claims. App. 125a–48a. The court found no bad faith under *Arizona v. Youngblood*, 488 U.S. 51 (1988), in the trial prosecutor's mishandling the murder weapon. App. 143a–45a. The court refused to consider the *Batson* claim as previously denied in 2003, despite the fact that the trial prosecutor had never previously testified under oath about his basis for exercising his peremptory strikes. App. 142a–43a. Critically, none of this evidence was before the (dissolved) Board of Inquiry so that it could recommend whether these serious issues merited clemency in lieu of execution.

REASONS FOR GRANTING THE STAY

To obtain a stay of execution pending the disposition of a petition for a writ of certiorari, the applicant must show: (1) a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) a "fair prospect" that a majority of the Court will overturn the judgment below; and (3) a "likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Furthermore, in "close" cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and the respondent. *Id.* Williams meets all criteria.

I. There Is a Reasonable Probability the Court Will Grant Certiorari in Light of Multiple Lower-Court Conflicts.

There is a reasonable probability of certiorari on multiple grounds. *First*, the decision below directly conflicts with the Court's holding in *Woodard*. In a 4-4-1 decision, the Court's controlling opinion held that the Due Process Clause requires "minimal procedural safeguards" in State clemency proceedings for death penalty cases. *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court of Missouri concluded, however, that "a capital offender retains *no* protectible due process interest within the clemency process." App. 14a (emphasis added). The court below made the conscious decision not to follow Justice O'Connor's opinion. App. 14a.

Second, the court elected to create a conflict among lower courts. The court noted contrary decisions from four other jurisdictions. App. 14a n.10. Tellingly, the court cited no decision from any other jurisdiction agreeing that Chief Justice

Rehnquist's opinion is controlling. That conflict, however, is more extensive than the court realized. At least 15 state high courts and federal circuit courts have held that Justice O'Connor's concurrence furnished the Court's holding in *Woodard*. *See Creech v. Idaho Comm'n of Pardons & Parole*, 94 F.4th 851, 855 (9th Cir. 2024); *Barwick v. Gov. of Fla.*, 66 F.4th 896, 902 (11th Cir. 2023); *State v. Federal Defender Program, Inc.*, 882 S.E.2d 257, 283 (Ga. 2022); *Hall v. Barr*, 830 Fed. Appx. 8, 10 (D.C. Cir. 2020); *Larson v. Dept. of Corrections, Board of Parole*, 476 P.3d 293, 300 (Alaska 2020); *Davis v. State*, 142 So. 3d 867, 876 (Fla. 2014); *Com. v. Michael*, 56 A.3d 899, 903 (Pa. 2012); *PA Prison Soc. v. Cortes*, 622 F.3d 215, 243 (3d Cir. 2010); *Baze v. Thompson*, 302 S.W.3d 57, 59 (Ky. 2010); *Workman v. Bell*, 245 F.3d 849, 852–53 (6th Cir. 2001); *Bacon v. Lee*, 549 S.E.2d 840, 848 (N.C. 2001); *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000); *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999); *Sellers v. State*, 973 P.2d 894, 896 (Okla. Crim. App. 1999); *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998).[4] Importantly, this conflict includes a conflict between Missouri and the Eighth Circuit. See *Young*, 218 F.3d at 852–53. This substantial division is an exceptionally compelling basis for granting certiorari. *Cf. Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (three-court conflict).

Third, there is a conflict regarding whether the Due Process Clause requires States to comply with their own State-created clemency procedures in death penalty

[4] Williams has only identified a single State high court that reached the contrary conclusion, in unpublished opinions with no *Marks* analysis. *See Moore v. State*, 381 P.3d 643, 2012 WL 3139870, at *6 (Nev. 2012) (table); *Byford v. State*, 367 P.3d 754, 2010 WL 3731121, at *16 (Nev. 2010) (table).

cases. The majority position requires States to comply. *See, e.g.*, *Michael*, 56 A.3d at 903; *Aruanno v. Corzine*, 413 Fed. Appx. 494, 497 (3d Cir. 2011); *Baze*, 302 S.W.3d at 59–60; *Young*, 218 F.3d at 853; *Duvall*, 162 F.3d at 1061; *Sellers*, 973 P.2d at 896; *see also Bryan v. DeSantis*, 343 So. 3d 127, 129 (Fla. DCA 1st 2022). The minority position does not require States to comply. *Garcia v. Jones*, 910 F.3d 188, 191 (5th Cir. 2018); *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015). The Supreme Court of Missouri, without endorsing Justice O'Connor's opinion, indicated that its ruling satisfied the minority rule. App. 16a n.11.

Fourth, the decision below demonstrates that the *Marks* rule, which identifies the holding of the Court in split decisions, continues to confuse lower courts. The Supreme Court of Missouri wrongly concluded that Chief Justice Rehnquist's opinion took the "narrowest" position. App. 14a. Other courts have also introduced Justice Stevens' partial dissent into the analysis. *See, e.g.*, *Foley v. Beshear*, 462 S.W.3d 389, 394 (Ky. 2015); *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009). Clarifying the *Marks* rule is itself a sufficient basis for certiorari. *See Hughes v. United States*, 584 U.S. 675, 679 (2018).

Finally, the decision below departs from an otherwise-uninterrupted line of decisions across the United States that uphold the due process rights of recipients of executive clemency against improper revocation. *In re Bush*, 193 P.3d 103, 106–08 (Wash. 2008); *Kelch v. Director, Nev. Dept. of Prisons*, 10 F.3d 684, 688 (9th Cir. 1993); *Kelch v. Director, Nev. Dept. of Prisons*, 822 P.2d 1094, 1095–97 (Nev. 1991); *Pope v. Chew*, 521 F.2d 400, 404 (4th Cir. 1975); *State ex rel. Murray v. Swenson*, 76 A.2d

150, 154–55 (Md. 1950); *Guy v. Utecht*, 12 N.W.2d 753, 759 (Minn. 1943); *Fleenor v. Hammond*, 116 F.2d 982, 986 (6th Cir. 1941); *Hudson v. Youell*, 17 S.E.2d 403, 408–09 (Va. 1941); *Ex parte Bess*, 150 S.E. 54, 62 (S.C. 1929); *Ex parte Alvarez*, 39 So. 481, 484–85 (Fla. 1905); *People v. Moore*, 29 N.W. 80, 81–84 (Mich. 1886). The black-letter rule is that State officials cannot revoke executive clemency in the absence of fraud or a breach of an express condition; and even then, there is a requirement of a pre-revocation notice and a hearing. *See, e.g.*, *Murray*, 76 A.2d at 154–55; *Fleenor*, 116 F.2d at 986. In its unprecedented holding, the Supreme Court of Missouri declared that an executive reprieve that imposes no conditions on the recipient nevertheless "create[s] no rights" and may be overturned "at any time" in the Governor's discretion. App. 7a. This holding is not supported by prior case law and conflicts with State and federal courts throughout the country.

II. There Is a More than "Fair" Prospect of Reversal.

There is also a substantial likelihood that the Court will overturn the Supreme Court of Missouri's decision. The number of courts that disagree with the decision below speaks for itself. Other than Nevada's unpublished table decisions, there is a 15-to-1 split among State high courts and federal circuit courts that capital prisoners retain a protected life interest in State clemency proceedings. In fact, even Chief Justice Rehnquist and Justice O'Connor agreed on *Woodard*'s holding. *See INS v. St. Cyr*, 533 U.S. 289, 345 (2001) (Scalia, J., dissenting). The court below was unable to articulate why Chief Justice Rehnquist opinion was "narrower" under *Marks*. There is a high likelihood of success for that reason alone.

The majority position among lower courts is that States must comply with their own State-created procedures in death penalty cases, without interference. *See, e.g.*, *Young*, 218 F.3d at 853; *Duvall*, 162 F.3d at 1061; *Sellers*, 973 P.2d at 896; *see also Bryan*, 343 So. 3d at 129. Here, the State did not comply; it interfered. The former Governor issued an executive order that formed a special Board of Inquiry to investigate Williams' case and required the Board to deliver a report and recommendation before the Governor could make a final clemency determination. App. 31a–32a. The current Governor stopped the process entirely. As a result, Williams has not received the process he was due.

Finally, the decision below placed Missouri on an island by restricting the due process rights of recipients of executive reprieves. No known court has held that the exercise of executive clemency "create[s] no rights" for the recipient and may be revoked at "any time" for any reason. App. 7a. This conclusion defies common sense and disregards the language of the executive order that granted Williams' reprieve. The executive order imposed no conditions on Williams and instead imposed conditions *on the State* (*i.e.*, completion of the Board of Inquiry process). App. 31a–32a. The reprieve must stay in place "until" that final determination on clemency. As a result, the only violation of the clemency instrument was committed by the State.

III. Williams Is at Risk of Irreparable Harm.

The risk of irreparable harm is self-apparent. "A prisoner under a death sentence remains a living person and consequently has an interest in his life." *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment). Death is the ultimate deprivation, and no State should carry out a death

sentence in violation of a prisoner's constitutional rights.

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

The balance of the equities also weighs in Williams' favor. Death is irreversible, and the State's position is fractured. The St. Louis County Prosecuting Attorney sought to *vacate* Williams' conviction and death sentence on multiple grounds. *See In re: Prosecuting Attorney, 21st Judicial Circuit v. State of Missouri*, No. 24SL-CC00422. The Missouri Attorney General, however, opposed that relief.

In those proceedings, the St. Louis Prosecuting Attorney confessed error and, with the approval of the victim's family, negotiated an *Alford* plea for Williams to accept a life-without-parole sentence in lieu of the looming execution. App. 79a–80a, 94a. The Missouri Attorney General blocked that plea deal, despite the wishes of the victim's family and the prosecutorial office that prosecuted Williams.

During a subsequent hearing, the trial prosecutor admitted that he handled the murder weapon without gloves five times before trial. App. 108a–17a. An expert testified that the trial prosecutor, in addition to leaving his own DNA, may have removed the DNA of the assailant. App. 103a–04a. The trial prosecutor further admitted that he struck a Black juror, in part, because of race. App. 118a–20a.

Following the August hearing, the trial court declined to reach the *Batson* issue by treating the Supreme Court of Missouri's opinion on direct appeal from 2003 as barred despite the absence of any prior sworn testimony from the trial prosecutor. App. 142a–43a. As a result of that recent decision, the importance of clemency—as the "'fail safe' in our criminal justice system"—becomes even more pressing. *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (quoting K. Moore, Pardons: Justice, Mercy, and

the Public Interest 131 (1989)). Yet, this new and troubling information was never received by the Board of Inquiry, much less addressed in a report and recommendation from the Board to the Governor.

In short, the public interest is not as simple and one-sided as the Governor may suggest. Although the State has an interest in carrying out *lawful* sentences, Williams' claims of innocence, prosecutorial misconduct, and racial discrimination (sidestepped on technical grounds) place him in a different category from other applicants for mercy. There is a "'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Schlup v. Delo*, 513 U.S. 298, 325 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). That value determination is the core purpose of clemency, as reflected in the prior reprieve and creation of the Board of Inquiry. *See Herrera*, 506 U.S. at 415. Furthermore, "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers*, 588 U.S. at 298. The courts have declined to act based on this new evidence. "To afford a remedy, it has always been thought essential in popular governments . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments." *Ex parte Grossman*, 267 U.S. 87, 121 (1925). Therefore, clemency is "a check entrusted to the executive for special cases." *Id.* That check is consistent with the actions of the St. Louis County Prosecuting Attorney's Office, which identified constitutional violations and sought to stop an unjust execution.

Any harm to the public from the stay of execution is minimal, and the victim's family opposes the execution. App. 79a–80a, 94a. The prejudice to the State consists of rescheduling an execution, which is only administrative, requiring 90 days' notice. *See* Mo. Sup. Ct. R. 30.30(f).

CONCLUSION

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

Respectfully submitted,

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