

No. 00-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

PHILIP RAY WORKMAN,
Petitioner

v

PAUL SUMMERS, et al.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While the Constitution precludes the execution of the innocent, Herrera v. Collins, 506 U.S. 390 (1993), in clemency proceedings, an inmate is entitled to due process of law. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998). Where Philip Workman has compelling, late-arising proof of actual innocence but clemency as his only available remedy, this case presents the intersection of Herrera and Woodard and presents the following questions:

1. When clemency provides the "fail safe" against execution of the innocent, does it violate the Eighth and/or Fourteenth Amendments for the state to present, in clemency proceedings, perjured testimony on the question of actual innocence?
2. In clemency proceedings, where a death-sentenced inmate has never had a due process hearing on his claims of actual innocence, did it violate the Eighth and/or Fourteenth Amendments for the attorney general (who has publicly demanded execution and defended the death sentence in court) to play triple roles, viz.: (a) organizer of the presentation against clemency; (b) counsel to the Parole Board, and (c) counsel and advisor to the Governor?
3. In clemency proceedings, did it violate the Eighth and Fourteenth Amendments for the state to present surprise, unreliable testimony going directly to the question of innocence, especially when state rules specifically required that Workman receive notice of the evidence to be presented to the Board?
4. When a death-sentenced inmate has claims of innocence which have never been heard by any court, is he entitled in clemency proceedings to cross-examine witnesses who claim that he is not innocent?

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OPINIONS BELOW

The District Court opinion is unreported. Workman v. Summers, No. 3:01-0290 (M.D. Tenn. Mar. 28, 2003). The decision of the Court of Appeals is also unreported. Workman v. Summers, 6th Cir. No. 01-____ (6th Cir. Mar. 29, 2003).

JURISDICTION

This Court has jurisdiction to review the judgment below under 28 U.S.C. §§1254 & 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV: "[No] State (shall) deprive any person of life, liberty, or property, without due process of law"

INTRODUCTION

The federal courts closed their doors to Workman's claims demonstrating that his conviction is based on perjured testimony, that he did not shoot Memphis Police Lieutenant Ronald Oliver, and that he is therefore innocent of capital murder. In refusing to hear Workman's claims on his initial habeas proceedings, the United States Court of Appeals for the Sixth Circuit specifically commended Workman to seek clemency through Tennessee's clemency process. At that process, however, the State then again presented perjured testimony. Workman asks that this Court take this case to establish that when clemency offers an innocent, condemned man his only hope of avoiding execution, the due process clause prevents the State from presenting perjured testimony against him.

STATEMENT OF FACTS

This cases comes to the Court on the presumption that Workman has in his possession

late-arising evidence that conclusively proves his innocence; that the state prosecuting authorities presented perjured testimony at trial and at clemency; that the parole board was biased against Workman; that the parole board violated established procedure for the conduct of clemency hearings; and that the State Attorney General improperly acted as advisor to the parole board, counsel to the Governor, and advocate against clemency all at the same time. Incredibly, the lower courts have held that, presuming all of these facts to be true, Workman is not entitled to relief.

The frightening result is the impending execution of one who is actually innocent but who can get no relief because the state successfully hid the evidence of innocence. It was not until it was too late for Workman to bring that evidence to court that Workman uncovered the state's misdeeds. Denied access to the courts, Workman was forced to turn to executive clemency. There the state unabashedly presented perjury in its concerted effort to seek Workman's execution. If this Court allows the execution to go forward, it will be tantamount to agreeing with the state prosecutor in this case who today pronounced in open court that the constitution does not prevent the execution of one who is innocent. This cannot be the true in the United States of America.

REASONS FOR GRANTING THE WRIT

I. THE PETITION PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

While the people of the Nation are gravely concerned about the execution of the innocent, the AEDPA has limited death-sentenced inmate's access to the federal courts for late-arising evidence of innocence (28 U.S. C. §2244). The passage of the AEDPA has thus left us in the precarious position that those who have late-arising evidence of innocence are forced to present

their claims of innocence in clemency proceedings, the traditional "fail safe" to prevent the execution of the innocent. Herrera v. Collins, 506 U.S. 390 (1993).

As a general matter, ordinary clemency proceedings do not require much due process. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (O'Connor, J., concurring). Yet if innocents with conclusive evidence of innocence cannot be heard in federal court and are instead forced into clemency proceedings to avoid execution, the innocent will be executed if clemency proceedings lack substantial due process guarantees to allow a fair consideration of claims of innocence. This terrifying prospect is all too real in this case.

This case thus presents the compelling intersection of two cases: Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) and Herrera v. Collins, 506 U.S. 390 (1993). With the execution of the innocent being unconstitutional, if Herrera is to have any meaning, clemency proceedings in cases involving late-arising evidence of innocence cannot be bound by the "minimal" due process requirements discussed in Woodard. For if an actually innocent inmate is entitled to just a hair more than a "coin flip" as held in Woodard (523 U.S. at 289), the innocent will in fact be executed.

That is the situation here. Philip Workman was convicted based upon the perjured testimony of Harold Davis. Through no fault of his own, he was unable to establish Davis' perjury during his initial habeas proceedings, which were similarly tainted by state officials withholding an x-ray with which he could have proven his innocence. Thus denied habeas relief and forced into clemency proceedings, Workman has now been subjected to sham proceedings in which the state has once again presented false information concerning his innocence. Also, the process for seeking clemency has been tainted by the triple role of the attorney general who has

publicly sought Workman's death, presented the case against him before the Board, and simultaneously whispered into the ears of the Parole Board and Governor by acting as their counsel.

In addition, the witnesses who Workman has said are not telling the truth about the shooting have merely made speeches in clemency claiming that they did not shoot Oliver. Yet their stories have never been subjected to any meaningful adversarial testing through cross-examination.

The final result is that Philip Workman has been convicted based upon perjured testimony. He has been denied habeas relief and then subjected to a clemency hearing at which witnesses have yet again presented false testimony in what amounts to little more than a show trial. If the Constitution means anything, and if Herrera means anything, Philip Workman cannot be executed under such a regime, which lacks any meaningful protection for the actually innocent who cannot get into court.

In Woodard, the Court never discussed the due process guarantees which attach when a Herrera claim of innocence is presented in clemency, for that issue was not before the Court. That issue is squarely presented here, and the resolution of that question is vital not only to Philip Workman, but to all condemned persons with late-arising proof of innocence, as well as to the people of this Nation who cannot accept the prospect that an innocent person will be executed - but only because the system has not allowed him or her to fairly establish innocence. As this is an issue of exceptional importance, the petition for writ of certiorari should be granted.

II. THE JUDGMENT BELOW IS INCONSISTENT WITH HERRERA, WOODARD, AND MOONEY.

While the issue before the court is of exceptional importance, the judgment below likewise cannot be reconciled with this Court's holdings in Mooney v. Holohan, 294 U.S. 850 (1935), Herrera and Woodard. This court has never countenanced state-sponsored perjury in any context. Mooney makes this clear. It cannot do so now, especially with Philip Workman's life on the line. Moreover, as noted *supra*, Herrera means nothing if the innocent can be executed without meaningful due process on the question of innocence in *some forum*. Yet Philip Workman has not been given a due process hearing on his claims of innocence *anywhere*. Woodard demands such due process, and it does not include perjury. See Woodard, 323 U.S. at 296, 118 S.Ct. at 1254 (Stevens, J., dissenting) (condemning "the deliberate fabrication of false evidence" in clemency proceedings).

By allowing the state to convict an innocent man based upon perjury, closing the courthouse doors to him and then denying him a meaningful opportunity to present his claims of innocence with guarantees of due process in clemency, the court of appeals has violated both the spirit and the principle of Mooney, Herrera, and Woodard. The petition for writ of certiorari should be granted.

III. THE JUDGMENT BELOW CONFLICTS WITH THE JUDGMENT OF THE EIGHTH CIRCUIT

Lastly, the judgment below simply cannot be squared with the Eighth Circuit's judgment in Young v. Hayes, 218 F.3d 850 (8th Cir. 2000). In Young, the Eighth Circuit held that due process does not countenance state actors deliberately interfering with the presentation of the truth in clemency process, especially where the interference very well may be a criminal offense.

See Young, 218 F.3d at 853 (unconstitutional clemency hearing where there is reason to think that what state actor did "amounts to the crime of tampering with a witness"), and compare Tenn. Code Ann. §39-16-702 (perjury statute); §39-16-703 (aggravated perjury statute) (perjury made during or in connection with official proceeding).

Deliberate tampering with the evidence in clemency was not tolerated in Young, and it cannot be tolerated here. Because the Sixth Circuit's judgment cannot be reconciled with the Eighth Circuit's decision in Young, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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