IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP RAY WORKMAN,)
)
Plaintiff,)
)
v.) **No. ________________**
)
PAUL SUMMERS, JOHN CAMPBELL,)
RAY MAPLES, CHARLES TRAUGHBER,)
BILL DALTON, DON DILLS,)
TOWNSEND ANDERSON, SHEILA)
SWEARINGEN, LARRY HASSELL and)
RICKY BELL, in their official capacity,)
and JOHN DOES 1- 100,)
)
Defendants.)

RESPONSE IN OPPOSITION TO MOTION FOR STAY
OF EXECUTION

INTRODUCTION

Plaintiff, Philip Ray Workman ("Workman"), once again moves this Court for a stay of execution of his March 30, 2001, execution date. This time he bases his motion on the denial of his motion for a temporary restraining order by the United States District Court for the Middle District of Tennessee. That motion for a temporary restraining order was based on the above-styled complaint, filed under 42 U.S.C. §§ 1983, 1985, in which he accuses several state officials of depriving him of his constitutional rights in connection with his request for commutation of his death sentence by the Governor of Tennessee. The district court denied his motion, concluding that Workman had not shown a strong or substantial likelihood of succes on the merits of his complaint. Specifically, the court concluded that he had not shown a violation of

any constitutional rights.[1] Indeed, as discussed below, Workman's complaint fails to state any claim for relief under §§ 1983 or 1985. The district court did not err is so concluding. It certainly did not abuse its discretion in declining to enter injunctive relief. This Court, in fact, has previously had occasion to consider the allegations on which Workman's complaint is based, albeit in a different context. *See Workman v. Bell*, __ F.3d __, 2001 WL ________ (6th Cir. March 23, 2001). App. 2-6. There, this Court drew similar conclusions about the propriety of judicial intervention in Tennessee's clemency process. Accordingly, and in light of the paramount importance of the State's interest in protecting the finality of its judgments, Workman's current motion for a stay of execution should be denied.

STANDARD OF REVIEW

This Court reviews a challenge to the denial of preliminary injunctive relief under an abuse of discretion standard and accords great deference to the district court's decision. That decision will be overturned only if the district court relief upon clearly erronous findings of fact, improperly applied the governing law or used an erroneous legal standard. *Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Assocation*, 110 F.3d 318, 322 (6th Cir. 1997). Workman's motion for a stay of execution is nothing more than an appeal of the denial of his motion for a temporary restraining order in the district court. The above-stated standard of review, therefore, applies to his motion.

The United States Supreme Court has recognized that a judicial stay is highly prejudicial to the state's sovereign interest to enforce its criminal law. In re Blodgett, 112 S.Ct. 674, 676 (1992). "A State's interest in finality are compelling when a federal court of appeals issues a

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[1] *See* copy of district court's order at App. 14-18.

mandate denying federal habeas relief . . . When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension." Calderon v. Thompson, 523 U.S. 538 (1998). Federal courts must ensure that there is an adequate basis for staying an execution. Demosthenes v. Baal, 110 S.Ct. 2223, 2226 (1990). The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983). Stays of execution should not be automatic. Rather, the United States Supreme Court will not grant a stay unless there is a significant possibility of success on the merits. *Barefoot v. Estelle*, 463 U.S. at 888; *Delo v. Stokes*, 110 S.Ct. 1880, 1881 (1990); *Maggio v. Williams*, 464 U.S. 46, 48 (1983). Appellant has failed to satisfy this standard.

STATEMENT OF THE CASE

Workman was convicted by a jury in 1982, after trial, of the first degree felony murder of Memphis Police Lieutenant Ronald Oliver. At a separate sentencing hearing, the same jury sentenced Workman to death pursuant to Tenn. Code Ann. § 39-2-203(g)(1982), finding five statutory aggravating circumstances.[2]

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[2] 1) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered; 2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant; 3) the murder was committed while the defendant was engaged in committing or was fleeing after committing or attempting to commit, the offense of robbery; 4) the murder was committed by the defendant while he was in or during the escape from lawful custody or place of lawful confinement; and 5) the murder was committed against any law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer engaged in the performance of his duties, and the defendant knew, or reasonably should have known, that such person was a law enforcement officer. Tenn. Code Ann. § 39-2-203(i)(3), (6), (7), (8), (9) (1982). The Sixth Circuit subsequently determined that the jury improperly

Following the conclusion of two state post-conviction proceedings in 1986 and 1992, respectively, Workman filed a petition for the writ of habeas corpus in federal district court.[3] The district court denied relief, awarding summary judgment to respondent on all claims and denying Workman's motion for summary judgment. Judgment was entered on November 14, 1996. That judgment was affirmed on appeal. *Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998), *cert. denied*, 120 S.Ct. 264 (1999), *rehearing denied*, 120 S.Ct. 573 (1999). On January 3, 2000, the Tennessee Supreme Court set Workman's execution for April 6, 2000.

On January 27, 2000, Workman filed an Application for Commutation to the Governor of the State of Tennessee. A hearing was scheduled on that application by the Tennessee Board of Probation and Parole ("Parole Board"or "Board") for March 9, 2000. On March 5, 2000, Workman filed a Motion to Reopen his habeas corpus case with the Sixth Circuit Court of Appeals. On March 8, 2000, Workman withdrew his Application for Commutation. On March 24, 2000, Workman also filed a Motion for Leave to File a Second Habeas Corpus Petition and a Motion for Stay of Execution with the Sixth Circuit. On March 31, 2000, a three-judge panel of the Court denied all of Workman's pending motions. On April 3, 2000, Workman filed petitions to rehear and suggestions for rehearing en banc. On the same date, a clemency hearing was held before a representative of the Governor. On April 4, 2000, a majority of the members of the Sixth Circuit granted Workman's petition to rehear en banc and stayed his execution "until further order of the Court."

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considered the felony murder aggravator, but that this error was harmless. *Workman v. Bell*, 178 F.3d 759, 774 (6th Cir 1998).

[3] This was actually Workman's second-in-time petition. His first petition was filed November 18, 1987, and dismissed without prejudice on August 27, 1992.

On September 5, 2000, an equally divided en banc Court of Appeals rejected petitioner's motion to reopen and dissolved the previously-entered stay of execution. *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000). On October 5, 2000, the Tennessee Supreme Court set January 31, 2001, as petitioner's new execution date. Workman subsequently filed another application for commutation and, on January 25, 2001, a hearing was conducted by the Parole Board. At the conclusion of that hearing, the Board voted unanimously to recommend that the Governor deny clemency.

On January 26, 2001, the en banc Court of Appeals granted Workman a stay of execution pending a decision by the United States Supreme Court on his petitions for writ of certiorari and for an original writ of habeas corpus. On February 26, 2001, the Supreme Court denied both petitions, and on February 28, 2001, the Tennessee Supreme Court reset Workman's execution date for March 30, 2001. On March 7, 2001, Workman filed a motion in the Sixth Circuit to declare the previously-entered stay of execution still in effect and the order resetting his execution date void. On March 19, 2000, Workman filed another motion to reopen his habeas corpus case and to stay his execution.[4] On March 21, 2001, the Sixth Circuit en banc Court of Appeals denied the motion to declare the previously-entered stay of execution still in effect. On March 23, 2001, a three-judge panel of the Sixth Circuit denied the motions to reopen and to stay the execution. On March 28, 2001, Workman's petition for rehearing by the full en banc Court was denied.

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[4] In support of that motion, Workman raised essentially the same allegations that he includes in his instant complaint. Workman clearly need not have delayed the filing of this complaint until some sixty hours prior to his scheduled execution. *See West v. Bell*, 242 F.3d 338, __, 2001 WL 194336, *4 (6th Cir. 2001)(published page numbers unavailable).

On March 27, 2001, the Governor of Tennessee determined that executive clemency in Workman's case was not appropriate and denied his clemency application. The Governor based his determination on the following criteria: 1) he was convinced that Workman was guilty of first degree felony murder; 2) the case involved the murder of a law enforcement officer; 3) the punishment was appropriate under law; and 4) he was confident that Workman had had adequate access to the courts. App. at 1.

ARGUMENT

I. WORKMAN HAD NO PROTECTIBLE DUE PROCESS RIGHTS IN THE CLEMENCY PROCEEDINGS CONDUCTED BY THE PAROLE BOARD; HIS CLAIMS OF DEPRIVATION OF RIGHTS UNDER THE DUE PROCESS CLAUSE MUST FAIL.

Workman's § 1983 complaint is wholly comprised of an attack upon the constitutionality of clemency proceedings conducted by the Parole Board upon his application for commutation. As a preliminary matter, defendants assert that Workman has waived his right to mount any such challenge. On March 9, 2000, the Parole Board was poised to conduct a hearing on Workman's first application for commutation. One day before that hearing, on March 8, 2000, Workman voluntarily withdrew his application. At that point, the Governor of Tennessee would have been well within his rights to have denied Workman any further access to the clemency process. Although he did not, and afforded Workman a second opportunity to apply for commutation, Workman should not now be heard to raise complaints about that clemency process.

But assuming Workman has not waived his right to attack the clemency process, each and every count of the instant complaint is without merit and fails to state a claim for relief under 42 U.S.C. §§ 1983 or 1985. "[P]ardon and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review."

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981). The United States Supreme Court has never held otherwise; in fact, it reaffirmed this holding in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 118 S.Ct. 1244, 1253, 140 L.Ed.2d 387 (1998). There, in an opinion delivered with the judgment of the Court, four justices observed that clemency is a matter of grace committed to the discretion of the executive authority. Such proceedings, they continued, "are not an 'integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Id.* at 285, *quoting Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 834, 83 L.Ed.2d 821 (1985). Accordingly, the justices concluded that the Due Process clause does not afford a clemency petitioner *any* due process procedural protection. *Id.*

Workman, however, seizes on the concurring opinion of Justice O'Connor in *Woodard*, in which she was joined by three other justices.[5] These four justices opined that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* at 289 (O'Connor, J., concurring). As examples of what might warrant judicial intervention in state clemency proceedings, however, Justice O'Connor cites a clemency scheme whereby the decision is made by the flip of a coin, or where the petitioner is arbitrarily denied access to the clemency process. *Id.* While these examples are not rules, they "illustrate the severe limits that courts must put upon themselves" when addressing legal challenges to clemency. *Wilson v. U.S. Dist. Ct. N. Dist. California*, 161 F.3d 1185, 1188 (9th Cir. 1998)(Fernandez, J., dissenting). *See also Ohio Adult Parole Authority v. Woodard*, 107 F.3d 1178, 1187 (6th Cir. 1997), *reversed*, 523 U.S. 272 (1998)(due process at

[5] In a dissenting opinion, Justice Stevens opined that clemency proceedings were not exempt from judicial review and that the matter should be remanded to the district court to determine whether the clemency procedures at issue satisfied due process.

the clemency stage will necessarily be "minimal, perhaps even barely perceptible").

Even assuming, based on the views of the concurring justices in *Woodard*, that due process entitled Workman to "minimal procedural safeguards" in connection with his clemency application, none of the various allegations presented in his complaint states a claim for relief. Such minimal application of the due process clause to state clemency proceedings ensures no more than that the prisoner "will receive the clemency procedures *explicitly set forth by state law* and that the procedure followed in reaching the clemency decision will not be wholly arbitrary, capricious or based upon whim. (emphasis added)" *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998). *See Woodard, supra*, 523 U.S. at 289 (judicial intervention might be warranted where prisoner *arbitrarily* denied access to clemency). The substantive merits of the clemency decision, however, are *not* a proper subject for judicial review. *Duvall, supra*, 162 F.3d at 1061. *See Workman v. Bell*, __ F.3d __, 2001 WL _______ (6th Cir. March 23, 2001), *pet. for rehearing and suggestion for rehearing en banc filed* (March 26, 2001)(Nos. 96-6652; 00-5367)(order denying motion to reopen)(copy attached at App. 2-6). The viability of any of Workman's claims for relief on the basis of the Due Process Clause, then, depends entirely upon what clemency procedures are explicitly provided for under Tennessee law. *See In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997), *cert. denied*, 521 U.S. 1130 (1997)(certiorari grant in *Woodard*, in which Supreme Court would consider due process standard where state had instituted specific clemency procedures, was irrelevant to situation where state law had established no specific procedures to control exercise of executive's authority).

Workman begins from the premise that Tennessee state law *does* makes specific provision for clemency proceedings, including provisions for the role of the Parole Board

therein.[6] He is incorrect. Tennessee state law, in fact, establishes *no* specific procedures to control or regulate the governor's authority to grant clemency; nor does it require the involvement of the Parole Board in any clemency decision. Instead, Tennessee's clemency scheme commits the authority to make such determinations, and the process for making them, completely to the unfettered discretion of the Governor.

The Tennessee Constitution vests the Governor with the power to grant reprieves and pardons. Tenn. Const. Art. III, § 6. This constitutional power to grant pardons and reprieves embraces the power to commute sentences. *Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997); *Ricks v. State*, 882 S.W.2d 387, 391 (Tenn.Crim.App. 1994). While the Governor's clemency authority is recognized by statute, *see* Tenn.Code Ann. § 40-27-101, *et seq.*, that authority is limited only by language in the state Constitution. *Carrol v. Raney, supra,* 953 S.W.2d at 659;[7] *see State ex rel. Bedford v. McCorkle*, 40 S.W.2d 1015 (Tenn. 1930)(source of governor's clemency power is constitutional, not statutory). This authority *may not be regulated or controlled* by other branches of government, including the legislature. *Ricks v. State, supra* 882 S.W.2d at 391, *citing, inter alia, State ex rel. Rowe v. Connors*, 61 S.W.2d 471, 472 (Tenn. 1932). Accordingly, Workman's reliance on Tennessee statutory provisions pertaining to any role the Parole Board may play in clemency decisions as the source of his due process protection is severely misplaced.

Moreover, even if the Tennessee legislature *could* lawfully regulate or control the

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[6] *See* Memorandum in Support of Motion for Temporary Restraining Order, pp. 10-11, citing, *inter alia*, Tenn. Code Ann. §§ 40-28-103(a), 40-28-106(c).

[7] Art. III, § 6 restricts the governor's clemency authority only in cases of impeachment.

exercise of the governor's discretion in clemency, it has not done so. The legislature itself has specifically provided that "[n]othing in [Tenn.Code Ann.] §§ 40-28-101 — 40-28-127 shall be construed in any way as intended to modify or abridge the pardoning power of the governor." Tenn.Code Ann. § 40-28-128; *see also* Tenn.Code Ann. § 40-28-101(b)(nothing in Tenn.Code Ann. §§ 40-28-101 — 40-28-104 shall be construed as modifying or abridging clemency powers of the governor). Furthermore, the very statute to which Workman cites for a description of the Board's role in clemency specifically provides that the Board's involvement is only "upon the request" of the Governor. Tenn.Code Ann. § 40-28-106(c). *See also* Tenn.Code Ann. § 40-28-104(a)(10)(Board has duty to make non-binding recommendations to governor on clemency applications *only upon request* of the Governor).[8]

Neither these statutes, nor the formal request that the Governor of Tennessee has made that the Board consider and make non-binding recommendations on applications for clemency, establishes any specific procedures for the making of such recommendations. In fact, the Governor's request of the Board specifically provides that:

> [t]hese guidelines are advisory only and do not create any enforceable rights in the petitioner, nor do they restrict the Governor in the exercise of his powers.
> . . .
>
> While the Governor herein requests the Board to make nonbinding recommendations with respect to executive clemency applications, nothing herein shall be construed to require that the Governor receive or requests(sic) a recommendation from the Board prior to acting upon an application for executive clemency.

Governor's Guidelines for Pardons, Commutations & Reprieves, p. 1, Feb. 1996, as amended Sept. 13, 1999. App. at 7. Even a regulation of the Board that purports to set up procedures for

[8] Even when the Governor makes such request, the statute provides that the Board itself have discretion in the making of its non-binding recommendation. *Id.*

handling clemency applications when the Board is involved makes clear that any hearing on the application is within the Board's discretion. *See* Bd. Parole Reg. 1100-1-1-.15 (b), (c) (Board shall review the application and determine whether the applicant should be scheduled for a hearing). App. 10-11.[9] The State of Tennessee has simply not made clemency an integral part of its adjudicatory process.

This case, then, is controlled by the decision of the Sixth Circuit in *In re Sapp*, *supra*, 118 F.3d 460, where the Court affirmed the district court's denial of a death row prisoner's § 1983 complaint challenging the decision of the Governor of Kentucky to deny him clemency. The Court observed the following about Kentucky's clemency scheme:

> It in no way establishes specific procedures to be followed and imposes no standards, criteria, or factors that the Governor need consider in exercising his power. Thus, in Kentucky, the decision to grant clemency is left to the governor's unfettered discretion and the state has not made the clemency process an integral part of the state's overall adjudicative process.

Id. at 465. The Court distinguished Kentucky's scheme from Ohio's, which was at issue in the Sixth Circuit's, and, later, the Supreme Court's, *Woodard* decision, indicating that due process *may* play a role when the state has instituted specific clemency procedures to control a governor's clemency determination. *Id. Cf. Perry v. Brownlee*, 972 F.Supp. 480, 482 (E.D.Ark. 1997), *reversed*, 122 F.3d 20 (8th Cir. 1997)(distinguishing *Sapp*, district court noted that Arkansas'

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[9] While, for purposes of this motion, defendants assume Workman's allegations to be true, they note that this fact tends to belie his allegations that the Board proceedings were skewed in favor of the State from the beginning. If the defendants had truly sought to ensure the denial of Workman's clemency request, it would seem to have been a far easier course to have simply denied him a hearing, rather than grant the hearing and then go to the elaborate lengths that Workman alleges to "prearrange" the result. It would appear that the only thing truly skewed in this case is Workman's perspective, as he insists on viewing every fact through conspiracy-tinted lenses.

clemency procedures were similar to those in Ohio and granted TRO and stay of execution on §1983 claim challenging denial of clemency).

Tennessee's clemency scheme is like that of Kentucky and unlike that of Ohio. While the Ohio Constitution allows the State legislature to place procedural restrictions on the Governor's pardon power and itself requires the Governor to follow certain procedures, s*ee Woodard, supra,* 107 F.3d at 1185 n. 1, Tennessee's Constitution places no procedural restrictions or requirements on the Governor's clemency power. The Ohio legislature, in turn, has statutorily delegated the clemency review process to the authority of the Ohio Adult Parole Authority. *Woodard, supra*, 523 U.S. at 276. In Tennessee, the Board's involvement is advisory and discretionary with the Governor. Ohio law requires that the Governor must wait for a recommendation from the Parole Authority before making a clemency decision. *Woodard, supra*, 107 F.3d at 1184. In Tennessee, the Governor has specifically provided that, even when he requests the Board's involvement and recommendation, he need not await it before acting. In Ohio, a clemency hearing must be held within 45 days of an execution date. *Woodard, supra*, 523 U.S. at 276. Tennessee law does not make any provision for a hearing. Even when the Board becomes involved, a hearing is not required, but is scheduled at the discretion of the Board.

To reiterate, any involvement of the Parole Board in Tennessee clemency decisions is left to the complete discretion of the Governor and its role is merely advisory when the Governor does involve it. In this case, the Governor could just as easily have asked some member of his staff to conduct an investigation into Workman's offense and to present him with a recommendation. The Governor could also have asked the Attorney General himself, or, for that matter, the State Post-Conviction Defender, to make a presentation directly to him to inform his

clemency decision. Or the Governor could merely have investigated the clemency application himself without any assistance, utilizing *ex parte* interviews with whomever he chose to consult or studying the record of Workman's trial. In none of these scenarios, would Workman have had any due process rights to contest such investigations or presentations. Indeed, insofar as the Due Process Clause is concerned, the Governor would have been free to announce before any application for clemency was filed that he simply declined to consider clemency in any capital murder case. *See In re Sapp, supra*, 118 F.3d at 465. In the face of this reality, the lack of merit to Workman's claims of impropriety in the process that *was* used in his case becomes readily apparent.

In view of Tennessee's clemency scheme, due process protection did not attach to the Parole Board's proceedings on Workman's clemency application. Accordingly, his several allegations that there were procedural infirmities in those proceedings that constitute a deprivation of his due process rights fail to state any cognizable claim for relief.[10] Furthermore, and as the Sixth Circuit has already observed, his allegations that evidence presented to the Board by the State was actually false go only to the substantive merits of the clemency decision, which is beyond even the limited judicial review that might be warranted under *Woodard. See Workman v. Bell, supra*, 20001 WL _________, slip op. p. 5, *citing Duvall v. Keating*, 162 F.3d

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[10] Because due process did not attach to the proceedings conducted by the Parole Board, it is unnecessary to address Workman's claim that he was deprived of substantive, as well as procedural, due process. Suffice to say that the holding and majority view in *Woodard* establish the extent to which the Due Process Clause provides protection in clemency proceedings and make no express distinction between procedural and substantive due process. Both the decision and dissenting opinion on which Workman relies, *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), and *Otey v. Hopkins*, 5 F.3d 1125 (Gibson, J., dissenting) predate *Woodard* and are inconsistent with it in terms of the breadth of such due process protection.

1058, 1061 (10th Cir. 1998)(Workman's attacks on the evidence presented at his clemency proceeding as erroneous or false is an attack on the proceedings' substantive merits, which a federal court is not authorized to review). App. at 6. More specifically for purposes of his motion for a temporary restraining order, none of these claims has any likelihood of success, much less a strong one. *See Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association*, 110 F.3d 318, 322 (6th Cir. 1997).[11]

II. WORKMAN'S ALLEGATIONS UNDER THE EIGHTH AMENDMENT, EQUAL PROTECTION CLAUSE AND THE TENNESSEE CONSTITUTION LIKEWISE FAIL TO STATE ANY COGNIZABLE CLAIM FOR RELIEF.

Workman contends that, because he is a death row inmate seeking to present evidence of actual innocence in support of his clemency application, the Eighth Amendment's prohibition against cruel and unusual punishment entitles him to even "more process" under the Due Process Clause than the typical death row inmate.[12] No support exists for such a proposition,

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[11] Workman's complaint is fairly construed as a challenge to the constitutionality of the clemency proceedings conducted by the Parole Board. Defendants note, though, that his memorandum makes a passing allegation that the Attorney General communicated directly with the Governor and that such contact was improper. Any claim of constitutional deprivation based on such an allegation would likewise necessarily be without merit as a matter of law. *See Roll v. Carnahan*, 225 F.3d 1016, 1017 (8th Cir. 2000)(because decision to grant clemency rests in the discretion of the governor, any allegation that the governor cannot be objective fails to state a claim on which relief may be granted). The Ninth Circuit decision, *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), on which Workman relies held that there was no procedural due process violation. Moreover, in that case Arizona's state laws had established specific procedures controlling the exercise of the clemency authority.

[12] *See* Memorandum in Support of Motion for Temporary Restraining Order, pp. 6-9. Workman suggests that his circumstances are somehow different than those of the prisoner in *Woodard* because he is actually innocent and was not "fairly convicted and sentenced." Workman's conviction and sentence have been affirmed by the courts of Tennessee and his petitions for habeas relief have been denied by the federal courts, including, most recently, the United States Supreme Court. Whatever subjective beliefs he may possess, as a matter of law Workman has been fairly convicted and sentenced.

however. Nothing in *Woodard* event hints that the extent of due process protection afforded a death row inmate in clemency proceedings depends upon the nature of the evidence he seeks to present. While Workman cites *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), in support of his position, he relies only on dicta in that decision. In that dicta, the Court assumes, *arguendo*, that a prisoner would be able to seek federal habeas review of a "truly persuasive" claim of actual innocence in instances where no state avenue, such as clemency, were available to process it. *Id.* at 417. Nothing in that dicta suggests that the Eighth Amendment therefore requires certain procedural protections attend that clemency process when it is available for such claims. Indeed, the court's discussion includes no indication that the adequacy of the clemency process is even a relevant consideration. While clemency may be seen as a traditionally available alternative avenue of relief for capital defendants, this does not mean that it is an essential component of a state's criminal adjudicative process subject to judicial review. *See Woodard, supra*, 523 U.S. at 284, *citing Herrera v. Collins, supra*, 506 U.S. at 411-15. Accordingly, Workman's allegations of constitutional deprivation based on the Eighth Amendment likewise fail to state a cognizable claim for relief. Workman certainly has not shown any degree of likelihood of success on such a claim.

While Workman's complaint also purports to include claims based on equal protection grounds and on the Tennessee Constitution, in support of his bid for a temporary restraining order, he makes no attempt to support any of his claims on these bases. In any event, his complaint alleges no facts to suggest that he has been treated differently than any other clemency applicant or that his clemency was denied based upon his membership in some protected class.

See, e.g., Mercer v. City of Cedar Rapids, 104 F.Supp.2d 1130, 1140 (N.D.Iowa 2000). Accordingly, such claims are likewise devoid of merit. The same result attends to his attempt to invoke the Tennessee Constitution as the source of his allegedly deprived rights. *See Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1995) (no private right of action lies for alleged violation of Tennessee State Constitution).

Workman's clemency application was not subjected to the flip of a coin; he has not been arbitrarily denied access to clemency; and he has not been subjected to an arbitrary or capricious decision. *See Woodard, supra*, 523 U.S. at 289; *Duvall v. Keating, supra*, 162 F.3d at 1061. The allegations that comprise his § 1983 action simply do not warrant judicial intervention in his clemency process. Workman could have lodged his complaints and concerns about the Parole Board's proceedings with the Governor. He did not.[13] In the final analysis, he was afforded an opportunity to apply for clemency -- not once, but twice. The Governor considered his application and denied it on the basis of completely objective criteria. The federal constitution requires no more. Accordingly, no likelihood of success exists on Workman's several claims.

On the other hand, March 30, 2001, marks the third scheduled execution date for Workman within the last year. The State has a compelling interest in protecting the finality of its criminal judgments, particularly after all judicial review provided for by law of the validity of that judgment has been concluded. *See Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct.

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[13] Instead, Workman waited for the Governor's decision and then filed this § 1983 action. Such a choice suggests that he is more interested in delaying his execution than he is in having the Governor consider his allegations. One, therefore, might question the utility of granting the relief Workman requests, even if he were entitled to it.

1489, 1501, 140 L.Ed.2d 728 (1998). Yet another delay in the lawful execution of the sentence handed down against Workman some nineteen years ago would engender significant harm to that interest.

CONCLUSION

For the reasons advanced, the motion for stay of execution should be denied.

Respectfully submitted,

____
MICHAEL E. MOORE
Solicitor General

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the plaintiff by delivering a copy, via facsimile, to Christopher M. Minton and Donald Dawson, Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee, 37243, and George Barrett and Edmund L. Carey, Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201, and Cecil Branstetter and James G. Stranch, III, Branstetter, Kilgore, Stanch & Jennings, 227 Second Avenue North, Nashville, Tennessee, 37201, on this the ___ day of March, 2001.

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JOSEPH F. WHALEN
Assistant Attorney General