

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP WORKMAN)

Plaintiff-Appellant)

v.)

PAUL SUMMERS, et al.)

Defendants-Appellees)

No. _____

EXECUTION DATE:

MARCH 30, 2001

1:00 a.m.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 3:01-0290

MEMORANDUM OF LAW

ON APPEAL OF DENIAL OF TEMPORARY RESTRAINING ORDER

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ISSUES PRESENTED

1. When clemency provides the "fail safe" against execution of the innocent, did 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?
5. Should the District Court have entered a temporary restraining order (TRO) to allow full consideration of Appellant's challenges to the clemency process?

INTRODUCTION

Philip Workman was convicted of capital murder based on perjured testimony that he shot Lieutenant Oliver. Having been denied a hearing on his perjury claims in federal habeas through no fault of his own, Workman has now been denied clemency in proceedings in which the state has yet again presented perjury on this critical issue. This is outrageous. Though 7 members of this court have found his claims of innocence to be persuasive, absent intervention of this Court, he faces execution because the District Court wholly failed to acknowledge the fundamental, egregious errors which tainted the clemency process.

The District Court wholly failed to address the fact that, in a case of actual innocence where the courthouse doors have been closed, the state cannot proceed to execution by relying *yet again* on perjured testimony. The District Court also wholly failed to address the fundamental substantive due process violation arising from the unprecedented triple role played by the attorney general whose goal has been to get Workman killed. And while the District Court was correct that Woodard provides for some minimal due process in clemency proceedings, the District Court again failed to recognize that whatever minimal due process is required, it *certainly* means that the clemency decision cannot rest on perjured

testimony, particularly where, as here, the perjured testimony was offered to counter evidence that Workman did not shoot Oliver.

This Court must not countenance the execution of a man condemned on the basis of perjury, and then denied clemency - his last available remedy - on still more lies. The effect of the District Court's decision is to hold that due process is not violated even in the face of perjured testimony procured and presented by a prosecuting authority who was simultaneously advising the decisionmakers (who were themselves biased) to deny clemency. This cannot be the law.

The judgment of the District Court should be reversed, and the case remanded for further proceedings including the entry of a TRO. This Court should also enter a stay of execution pending the final resolution of this appeal and/or entry of the TRO.

STATEMENT OF FACTS

I.

PHILIP WORKMAN HAS LATE-ARISING PROOF OF INNOCENCE BUT HAS BEEN SHUT OUT OF COURT

Whether Philip Workman fired the fatal shot that killed Lieutenant Oliver is the question on which this entire case rests. In the federal courts, Philip Workman has never had a due process hearing on all available evidence demonstrating that he

did not shoot Oliver and is therefore innocent. Through no fault of his own, he was unable in habeas proceedings to prove his innocence by showing that he was convicted based on perjured testimony and that Lieutenant Oliver was killed by "friendly fire," not by a bullet from Workman's gun.

Workman was convicted of capital murder based upon the perjured testimony of Harold Davis, who claimed that he saw Workman shoot Memphis Lieutenant Ronald Oliver. It was not until after the conclusion of habeas proceedings that Davis was found and recanted, with his recantation being supported by Vivian Porter.

Based upon Davis' recantation and sworn testimony of independent witness Vivian Porter, we now know that Davis lied and that he was threatened into testifying falsely at trial. See e.g., *Workman v. Bell*, 227 F.3d 331, 335-336 (6th Cir. 2000)(en banc)(Opinion of Merritt, J.). Seven (7) judges of this Court have acknowledged that a judicial determination of that Davis committed perjury would establish Workman's actual innocence of capital murder:

Workman has raised sufficient facts to make a prima facie showing that a reasonable jury would not have found him guilty, or alternatively would not have sentenced him to death, if the new evidence is proved and believed. First, the evidence that Davis was asked to alter his testimony before the jury is especially important given Davis's status as the only witness to testify that he actually saw Workman shoot

Oliver.

Id., 227 F.3d at 337.

In habeas proceedings, Workman also was unable to establish his innocence through forensic evidence, because, during federal habeas proceedings, Shelby County Medical Examiner O.C. Smith violated a subpoena and failed to provide Workman a subpoenaed post-mortem x-ray of Lieutenant Oliver. Seven judges of this Court have also concluded that, had Workman been provided the x-ray, he could have shown the habeas court "that 'no reasonable factfinder would have found Workman guilty of the underlying offense' of first-degree murder. *Id.*, 227 F.3d at 338.

Nevertheless, seven judges of this Court have disagreed with the other seven judges, and voted to deny Workman's motion to reopen his habeas proceedings based upon the newly-discovered evidence. *Workman*, 227 F.3d at 338 (Opinion of Siler, J.). As a result of the 7-7 stalemate in this Court, though no court has ever considered all of the evidence of Workman's innocence - including the late-arising evidence - *Workman has been denied any access to a federal forum to establish his innocence.*

As a result, he has been forced to establish his innocence in the only forum

left to hear his claims: the state clemency process. The United States Supreme Court has made clear that clemency is the appropriate forum for seeking relief on claims of innocence after judicial proceedings are exhausted. Herrera v. Collins, 506 U.S. 390 (1993).

II.
WHILE TRYING TO ESTABLISH HIS INNOCENCE
IN CLEMENCY PROCEEDINGS, PHILIP WORKMAN
HAS BEEN SUBJECTED TO A CLEMENCY
PROCESS WHICH HAS NOT PROVIDED HIM
A FAIR OPPORTUNITY TO ESTABLISH HIS INNOCENCE

Yet as Workman has sought to establish his innocence in the only forum available to consider his claims, he has been subjected to a state clemency process permeated by constitutional errors of the highest magnitude in a case of innocence.

First, with the entire issue in this case being whether it was Workman or Officer Stoddard who shot Oliver, the state presented false testimony on that very issue at the clemency hearing, when it solicited and presented the false testimony of Officer Clyde Keenan and O.C. Smith – the same person who prevented Workman from getting a fair habeas hearing when he withheld the x-ray. In the District Court below, Workman showed the falsity of Keenan's and Smith's testimony -- and none of the appellees even tried to contradict the proof of their lies.

Second, while the state, in clemency proceedings, presented false testimony on the key issue in the whole case – *the very same way the state presented the false testimony of Harold Davis on this issue at trial* – the clemency proceedings were tainted by the attorney general (Paul Summers) playing an unprecedented triple role in seeking the execution of Philip Workman. Summers not only prepared the case against Workman before the Board, *Summers also represented the Board and he has advised the Governor in these clemency proceedings*. Summers and his staff also orchestrated *ex parte* meetings about Workman's case with members of the Parole Board and the Governor's staff relating to Workman's clemency application. Again, the state below never contradicted any of these facts.

Third, Workman was subjected to an unspecified "burden" in the clemency proceedings. Near the end of the hearing itself, Philip Workman was informed about having a "burden" at the hearing. Mr. Traugher stated: "You carry the burden, as you know." Clemency Tr. 462:24, 463:1-5. At the end of the proceeding, Traugher proceeded to inform Philip Workman that he had failed to carry this "burden," though he never identified exactly what that "burden" was. Clemency Tr. 528 (Chairman Traugher: "you have not met that burden."). Though Philip Workman asked for all policies, practices or procedures governing the hearing, he

was never informed about the nature of the "burden" which he bore.

Fourth, although the entire issue is Workman's innocence, the Board precluded Workman from cross-examining the state's witnesses (including Keenan and Smith, who successfully lied or misled the Board at the hearing before their lies were discovered by Workman). Consequently, though the state's witnesses have never been cross-examined about their bald assertions of Workman's guilt *in any forum anywhere*, such witnesses (including Keenan, Smith, Officer Stoddard, and Officer Parker) were able to tell their untested stories with impunity before the Board.

As a result of the false and misleading testimony of Keenan and Smith on the critical issues of innocence, the manipulation of the clemency process by the triple-role-playing attorney general, the placing of an unspecified "burden" on Workman and the denial of cross-examination on the issue of innocence, the Board denied Workman's application for clemency 6-0, and with the political cover of the Board's 6-0 denial, the Governor formally denied Workman clemency - *despite proof which seven judges of this Court acknowledge would establish Workman's innocence if considered under fair procedures comporting with due process.*

SUMMARY OF ARGUMENT

Execution of the innocent is unconstitutional, with clemency being "the historic remedy" for preventing such a miscarriage of justice. Herrera v. Collins, 506 U.S. 390, 411-412 (1993). Yet as Philip Workman has sought clemency, the clemency process has been stacked against him through the use of false testimony, manipulation of the process by agents of the state, and denial of fundamental rights which attach to any due process hearing. He was therefore entitled to a temporary restraining order (TRO) to allow full consideration of his complaint.

A TRO was required because Workman's very life is at stake, the state has no interest in executing an innocent man following the type of sham process provided Workman, and Workman's execution under these circumstances would cause irreparable damage to the public's belief in a system of capital punishment which would allow such a miscarriage of justice. Furthermore, contrary to the District Court's opinion, Philip Workman has made a substantial showing of his entitlement to relief on the merits of his claims.

First, during clemency proceedings, the state unconstitutionally presented false evidence going directly to the heart of his claims of innocence. See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 290 (1998)(Stevens, J., dissenting).

Young v. Hayes, 218 F.3d 850 (8th Cir. 2000)(granting temporary restraining order). The state's deliberate use of perjured testimony violates our Nation's rudimentary notions of justice. Mooney v. Holohan, 294 U.S. 103 (1935)(condemning use of perjury). The District Court, however, never addressed this fundamental defect in the clemency process.

Second, Philip Workman was denied the fundamental right to an unbiased decisionmaker because the attorney general (who has sought his execution) assumed the unprecedented triple role of presenting the case against Workman, while simultaneously being counsel to the Board of Pardons *and* counsel to the Governor. The attorney general's assumption of these conflicting roles shocks the conscience. Once again, the District Court wholly failed to address this violation of substantive due process.

Third, the state violated the Eighth and Fourteenth Amendments by failing to inform him of the nature of a supposed "burden" upon him; by presenting surprise testimony without notice and in violation of the Board of Pardons' own rules; and by denying him the right to cross-examine witnesses on the issue of innocence. See e.g., Wilson v. United States District Court, 161 F.3d 1185, 1186 (9th Cir. 1998)(refusing to vacate temporary restraining order where death-sentenced

inmate misled about substance of matters to be considered in clemency).

While the District Court correctly noted that the Woodard case generally does not require such proceedings, the District Court improperly failed to acknowledge that this case is not just a case about Woodard: it is a case about actual innocence as well, where the courthouse doors have been closed. Under the unique circumstances of this case – where clemency provides the *only* forum for establishing innocence – due process requires more than the minimal standard of Woodard.

For all these reasons, the District Court should have entered a TRO, and this Court should therefore reverse the judgment below, enter a temporary restraining order and stay of execution, and remand the case for further proceedings.

ARGUMENT

THE DISTRICT COURT SHOULD HAVE ENTERED A TEMPORARY RESTRAINING ORDER BECAUSE THE STAY EQUITIES REQUIRE A T.R.O.

The District Court should have entered a temporary restraining order, because the stay equities mandate the entry of a TRO. While Philip Workman would suffer irreparable harm without a restraining order, the state would suffer no harm, and the public interest demands that Workman not be executed under the

circumstances. Fundamentally, Philip Workman's claims for relief are meritorious, and he is therefore entitled to a TRO and further proceedings on his complaint.

I. STANDARDS FOR GRANTING A TRO

When ruling on a request for a TRO, a district court must consider and balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) how the public interest would be affected by issuance of the injunction. Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association, 110 F.3d 318, 322 (6th Cir. 1997). Each of these factors counsel that this Court enjoin defendants from the execution of Philip Workman.

II. THE EQUITIES MANDATE ENTRY OF A TRO

A. Philip Workman Would Suffer Irreparable Harm, The State Would Suffer No Harm, And The Public Interest Demands Entry Of A TRO

First, it is clear that there would indeed be irreparable injury to Philip Workman if the execution is not stayed. Second, there is no irreparable harm to the State in allowing due process to a condemned man who has never had a fair hearing anywhere on his claims of innocence. Third, the public interest also demands that no innocent man be executed without due process consideration of his claims of

innocence, and that no person be executed following the type of procedures given to Workman. The District Court correctly acknowledged that all of these equities weighed in favor of the TRO. See District Court Opinion, p. 5, n. 2.

B. Philip Workman Has Shown A Reasonable Likelihood Of Success On The Merits

The only remaining question therefore, is whether Workman has established – on his undisputed factual showing – a reasonable likelihood of success on the merits. He has, because Philip Workman has been denied fundamental constitutional rights through the presentation of false testimony, having his application decided by a biased decisionmaker, and the denial of notice and cross-examination.

The District Court erroneously concluded otherwise, because the District Court improperly failed to consider the fundamental injustice arising from the use of perjury in clemency; the violation of substantive due process arising from the manipulation of the clemency process by the attorney general (who wants Workman to be executed) playing three roles simultaneously; and the fact that this case presents the intersection of Woodard and Herrera, not just an application of Woodard, as the District Court believed. And contrary to the District Court, this Court's prior March 23, 2001 decision on the issue of fraud on this Court is of no

significance here, because, as the panel there stated, in that action "Workman [did] not allege that his Tennessee clemency proceedings failed to meet the standard set out in Woodard." That is the subject of these current proceedings.

Because the District Court failed to consider these critical issues, its denial of the TRO was erroneous, as Philip Workman has indeed established a reasonable likelihood of prevailing on his claims on the merits. The District Court judgment should therefore be reversed because the district court failed to properly apply the governing law. See Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956)(trial court improperly denies TRO when it "refuses properly to apply the law to conceded or undisputed facts."); Young v. Hayes, 218 F.3d 850 (8th Cir. 2000)(reversing district court's failure to grant TRO challenging execution following unconstitutional clemency process, based on district court's erroneous application of law).

1. In This Case Involving Actual Innocence, Philip Workman Is Entitled To The Guarantees Of The Eighth Amendment, Substantive Due Process, And Procedural Due Process
 - a. Where, As Here, Clemency Provides The "Fail Safe" Remedy Against Execution Of The Innocent, The Eighth And Fourteenth Amendments Entitle A Clemency Applicant To Significant Procedural Protections

In Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993), the Supreme Court

made clear that executive clemency is the traditional and "fail-safe" remedy for claims of innocence based on new evidence. *Id.*, 506 U.S. at 417. "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." *Id.*, 506 U.S. at 411-412. Where clemency is then a "court of last resort" and the only means by which an innocent man – like Philip Workman – can preserve his very life, due process requires the balancing of the interests of the petitioner, the interests of society, the contribution of the requested procedure to accurate truthfinding, and the risk of erroneous deprivation if the procedure is not adopted. *Ake v. Oklahoma*, 470 U.S. 68 (1985); See also *Brock v. Roadway Express*, 481 U.S. 252, 261, 107 S.Ct. 1740, 1747 (1987), citing *Goldberg v. Kelly*, 397 U.S. 254, 266-271, 90 S.Ct. 1011, 1019-1033 (1970) ("Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated.").

Here the balance of interests clearly mandated the procedural protections which were denied to Philip Workman in the clemency process.

First, it is unquestionable that the value of a human life is inestimable and that Philip Workman's right to life – like the right to life possessed by all persons

- is the fundamental human right. This fact alone makes clear that any questions about the fairness of the process must be resolved strictly in favor of Philip Workman.

Second, society has a compelling interest in not executing an innocent person, for this is the quintessential miscarriage of justice. The execution of an innocent person not only serves no legitimate purpose in the particular case at hand, but it undermines any faith the people can possibly have in our justice system. Compare Bush v. Gore, 531 U.S. ___ (2000).

Third, nor can anyone seriously question the fact that the protections of due process, including the right to be free from perjured testimony, and the rights to an unbiased decision-maker, cross-examination, confrontation, and notice, are critical to any meaningful finding of truth. See e.g., Mooney v. Holohan, 294 U.S. 103 (1935)(perjured testimony); Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413 (1959)(right to cross-examination).

Fourth, the risk of an erroneous deprivation is "unacceptable," Brock, 481 U.S. at 65, 107 S.Ct. at 1749, given both Philip Workman's fundamental right to life and the excessive cost to be borne by the judicial system and our society were an innocent man executed without due process on his claims of innocence.

b. Fourteenth Amendment Procedural Due Process Applies To Clemency Proceedings As Well

In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288, 118 S.Ct. 1244, 1255 (1998) (O'Connor, J., concurring), Justice O'Connor held (for a five-person majority) that: "A prisoner under a death sentence remains a living person and consequently has an interest in life" for purposes of the Fourteenth Amendment. For those persons who are "validly convicted" or otherwise "fairly convicted and sentenced," (*Id.*) "Some minimal procedural safeguards apply to the clemency proceedings." *Id.*, 523 U.S. at 289, 118 S.Ct. at 1254. For those "validly convicted" the process due in clemency proceedings is somewhat limited. *See Id.*

In all clemency cases, "Judicial intervention might, for example, be warranted in the face of 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." 523 U.S. at 289, 118 S.Ct. at 1254 (O'Connor, J., concurring).

Similarly, it is clear that procedural due process in all contexts requires that a state follow its own rules. *See e.g., Exmitts v. Lucy*, 469 U.S. 387 (1985); Hicks v. Oklahoma. In the clemency context, therefore, the actions of state actors must "comport[] with [the state's own] regulations." Woodard, 523 U.S. at 250, 118 S.Ct.

at 1254 (O'Connor, J., concurring)(no due process violation where Ohio procedure afforded inmate "comports with Ohio's regulations").

Where state officials have unfairly manipulated the clemency process to deny relief (especially by presenting false testimony in clemency), there is also a violation of due process. As Justice Stevens noted in Woodard, there is a violation of the constitution if an inmate is subjected to "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence." Woodard, 523 U.S. at 290, 118 S.Ct. at 1254 (Stevens, J., dissenting). There is a violation of the constitution where there is "[i]nference by an official of the State with the clemency process." Young v. Hayes, 218 F.3d 850, 851 (8th Cir. 2000).

Accordingly, where a state official "has deliberately interfered with the efforts of the petitioner to present evidence to the Governor," due process is violated. Especially where "there is reason to think that what [a state official] did . . . amounts to [a] crime," it is apparent that the clemency proceedings do not pass constitutional muster. Young, 218 F.3d at 853. "Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created." Young, 218 F.3d at 853.

It must be remembered, however, this is not an ordinary case. Though

Workman has proof of actual innocence, the courthouse doors have been closed to him. Thus, this case presents the compelling intersection of Woodard and Herrera, which declares that it is unconstitutional to execute the innocent. Thus, Philip Workman is entitled to decidedly *more* process than the process due to a person who is validly convicted and lacks a claim of innocence.

c. **In Clemency Proceedings, The State Also May Not Engage In Activity Which "Shocks The Conscience"**

And while procedural due process attaches in clemency, so does substantive due process. Clemency procedures violate substantive due process when the conduct of government officials "shocks the conscience." Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205 (1952); Woratzek v. Arizona Board of Executive Clemency, 117 F.3d 400, 404 (9th Cir. 1997); Orey v. Hopkins, 5 F.3d 1125, 1133 (Gibson, J., dissenting).

2. **Philip Workman Has Made A Substantial Showing That His Constitutional Rights Were Violated In The Clemency Process And That He Is Reasonably Likely To Prevail On The Merits**

Philip Workman has made a substantial showing of entitlement to relief on the merits, because: (a) the state presented false testimony on his claims of innocence; (b) the attorney general engaged in activities which shock the conscience, viz. presenting the case against Workman while acting as counsel for the Board and

the Governor; and, (c) he was denied notice and the right to cross-examine witnesses in this, his only forum for establishing his innocence.

a. Philip Workman Was The Victim Of Perjured And Misleading Testimony In The Clemency Process

Before the Board, Philip Workman was the victim of falsified testimony apparently solicited and presented by state officials. With the issue before the Board being whether Oliver was hit by friendly fire, the state presented the false testimony of officer Clyde Keenan to claim that Workman had to have shot Oliver, because Keenan claimed he was immediately on the scene and had the police weapons checked as quickly as possible, only to find that they had not been fired. Keenan's story was a key link in the state's theory for denying clemency. Keenan's assertions were false. In reality, Keenan did not arrive immediately on the scene, and the supposed check of Officer Stoddard's pistol did not occur until hours after the incident.

The initial suggestion to present Keenan's testimony came from recused board member Ray Maples to John Campbell. Maples had recused himself "[i]n an effort to promote public confidence in the integrity and impartiality of the clemency process." D.Ct. App. 543. Campbell forwarded the suggestion to Asst. Attorney General Glenn Pruden who replied that it would be "good" if there was

nothing in the file from Keenan, then "we could get an affidavit from [Keenan]." D.Ct. App. 546. Keenan did give a sworn statement which was presented at the first clemency proceeding in April of 2000. Later, Attorney General Paul Summers, having already served as counsel to the Governor on the issue of clemency, wrote to John Campbell, urging him to present the live testimony of Keenan.

Keenan's testimony is critical to the State's case rebutting Workman's allegations that other police officers discharged their weapons and that Oliver was killed by "friendly fire."

Similarly, at the clemency proceeding, O.C. Smith sprang upon Philip Workman a claim that there was aluminum in tissue samples which "proved" that Oliver was shot by Workman. A claim which was based on a test that Smith was not qualified to conduct or testify about. Only after the clemency proceeding, when Workman had the opportunity to interview the individuals who actually performed the tests and contact an independent, qualified expert, has Workman learned that Smith failed to disclose that the two previous tests performed on the tissue samples failed to yield positive results for aluminum. Moreover, Smith lied when he told the board that the control used in the experiment validated the results. Further, Smith misled the board about the meaning of the positive reading for aluminum in

the third test. Smith's testimony, which went to the heart of the contested issues, was unreliable and false.

Thus, Philip Workman has made a showing that he has been the victim of an unconstitutional clemency proceeding involving "the deliberate fabrication of false evidence." Woodard, 523 U.S. at 290, 118 S.Ct. at 1254 (Stevens, J., dissenting). He has been the victim of actions which may be a criminal offense. See Young v. Hayes, 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).

He therefore has shown a substantial probability of success on the merits, and the District Court should be reversed.

- b. Philip Workman's Constitutional Rights Were Violated Through The Attorney General's Conflicting Triple Role As Prosecutor, Counsel To The Board, And Counsel To The Governor

"The appearance of even-handed justice is at the core of due process." Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971)(Harlan, J, concurring). Perhaps the most essential requirement of due process is that of an impartial decision-maker. Goldberg, 397 U.S. at 271, 90 S.Ct. at 1022; In re Murchison, 349 U.S. 133, 75 S.Ct.

623 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46, 70 S.Ct. 445, 451 (1950); Tumey v. Ohio, 273 U.S. 510 (1927). Even the appearance of partiality by the decision-maker violates due process. Offutt v. United States, 348 U.S. 11 (1954).

At the clemency stage, Philip Workman was denied his constitutional right to an unbiased decision-maker and to the appearance of impartiality. It appears that the primary decision-makers in the clemency proceeding, the Governor and the Board of Probation and Paroles, were either represented or advised by the Attorney General himself (and/or members of his staff) and that there was *ex parte* contact between the Board and those representing the State during the course of proceedings.

Numerous courts of appeals judges have acknowledged that when decision-makers in the clemency process either are biased or appear to be biased, there is a violation of due process and/or equal protection. Pickens v. Tucker, 23 F.3d 1477, 1478 (8th Cir. 1994)(Arnold, C.J., Arnold, McMillian, Wollman, JJ., dissenting from denial of rehearing en banc)(in clemency, death-sentenced inmate entitled to "unbiased" "sentient and neutral decision-maker." "An impartial decision-maker is a fundamental requirement of due process."); Otey v. Hopkins, 972 F.2d 210 (8th Cir. 1992)(denying motion to vacate stay where district court granted stay based on

Attorney General's representing state in seeking execution while also sitting on clemency board).

In this case, the triple roles of the Attorney General as both party and agent of the decision-makers indicates that Philip Workman's constitutional rights were violated. *Id.* Any gubernatorial contact with the Attorney General is likewise improper. With his very life in the hands of the Governor and the Board, Philip Workman was entitled to the assurance that a clemency decision would be made by an impartial and just decision-maker, who shunned even the appearance of impropriety, recognizing the gravity of the decision before them and the life interest at stake. And the conduct of the hearing itself clearly shows the appearance of bias by Board members and/or actual bias against Philip Workman – as shown most notably by the disparate treatment by the Board toward witnesses called by Workman (accusing one witness of being “coached,” chastising juror Parks for not cross-examining the witnesses himself, grilling them about their views on the death penalty) and those called by the State, and as evidenced by the entire conduct of the hearing. Members of the media and public who attended the hearing later commented that the proceeding appeared “fixed” and that the board members appeared to have made up their minds before the hearing began.

While the state has indicated that they see no problem with the Attorney General's multiple roles, "The State has failed to grasp the judicially shocking nature of these conflicting roles." Orey v. Stenberg, 34 F.3d 635, 642 (8th Cir. 1994)(Gibson, J., dissenting). "The attorney general, having successfully obtained affirmance of [Workman's conviction and] death sentence in [the federal courts] can hardly be expected to oppose the execution of this sentence" when whispering in the Governor's ear as his counsel. Orey, 5 F.3d at 1134 (8th Cir. 1993)(Gibson, J., dissenting). See also Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499 (1971). "The State has created a playing field that is tilted toward denial and is therefore fundamentally unfair." Orey, 5 F.3d at 1134 (Gibson, J., dissenting). Workman has been denied substantive due process "in view of the actual conflicting positions of the attorney general in [his] case." Orey v. Stenberg, 34 F.3d 635, 641 (8th Cir. 1994)(Gibson, J., dissenting).

Here, Summers personally suggested witnesses, discussed litigation strategy, and pondered media strategy, including a post-execution reenactment which would "validate" the governor's decision (presumably to deny clemency, which has occurred). D.Ct. App. 639. At the same time, Summers was purporting to be an impartial advisor to the board and the governor.

The attorney general's conduct is so outrageous as to "shock the conscience," and thus Philip Workman is entitled to the relief requested. The judgment of the District Court should be reversed.

- c. Philip Workman's Constitutional Rights Were Violated Through The Board's Use Of An Unknown "Burden," The Use Of Surprise Evidence, And The Denial Of Cross-Examination Of Critical Witnesses
 - 1) The Board Imposed Upon Philip Workman An Unspecified "Burden" Which It Then Claimed He Had Failed To Meet

The Board's failure to inform Philip Workman of its still as-yet undefined "burden" at the proceeding constitutes a classic violation of due process. Philip Workman had no notice of the nature of this "burden" but was then denied a clemency recommendation because he failed to meet that "burden" - whatever it may be. This is a classic due process violation, as due process mandates that Plaintiff have been given full notice of this "burden" and consequently an opportunity to meet it. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

This claim is meritorious. In the clemency case of Wilson v. United States District Court, 161 F.3d 1185, 1186 (9th Cir. 1998), the United States District Court granted a TRO based on the fact that the inmate (Siripongs) "did not have any actual or constructive knowledge of the grounds upon which the [decisionmaker]

intended to rely in considering . . . the clemency request.” The Ninth Circuit upheld the TRO, noting that he had a substantial likelihood of winning his claim on the merits. *Id.*

As in Wilson, the TRO should have been granted, and the judgment of the District Court should therefore be reversed.

2) The State Presented Surprise Testimony Without Notice, And In Violation Of The Board's Rules

Due process also cannot countenance the state's pathologist (O.C. Smith) springing on Philip Workman purported results of a previously unknown “test,” performed by someone other than Smith, which, again, was not even subject to cross examination. The violation here is even more egregious given that the parties were to provide any such materials before the hearing itself. Violating the letter if not the spirit of pre-proceeding discovery and then introducing new, un-cross-examined materials in a proceeding on a man's life violated due process. Workman's “assertion that the state's communications [the pre-proceeding notice given to Workman] misled his counsel about the issues to be considered in the clemency proceeding states a claim of a violation of due process.” Wilson, 161 F.3d at 1187.

3) The State Denied Philip Workman Cross-Examination Of Critical Witnesses Who Provided Unconfronted Evidence To Support The State's Claim That Philip Workman Must Be Guilty

Finally, there was a denial of due process because in this case of innocence, Philip Workman was denied the most critical element in the truth-determining process - the "greatest legal engine ever invented for the discovery of truth," (5 Wigmore § 1367 (3d ed. 1940); California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935(1970)) - the right to cross-examine and confront key witnesses. The clemency board explicitly prohibited Workman from any cross-examination of the state's witnesses, while the board thoroughly cross-examined Workman's witnesses as if they were hostile witnesses. Such a deprivation is clearly in violation of the right to due process, as Philip Workman was essentially denied the only safeguard for testing the claims (now known to be dubious, if not outright false) made by the state's witnesses.¹

One cannot minimize the critical role that cross-examination plays in accurate fact-finding. This elementary proposition regarding cross-examination

¹ "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." 5 J. Wigmore, Evidence §1367 (J. Chadborn rev. 1974).

bears repetition:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where the government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consist of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413 (1959)(emphasis supplied).

It is well-settled that in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. See e.g., ICC v. Louisville and Nashville Railway Co., 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188 (1913); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181 (1963). Here, the decision before the Board was not merely important, but life-threatening. With such monumental interests at stake, the principles of due process required "an

effective opportunity to defend by confronting any adverse witnesses . . .”
Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020 (1970).

In fact, the courts have continually held that when lesser interests than life are at stake, cross-examination is required as a matter of due process. For example, in Goldberg, the Supreme Court addressed the rights of a welfare recipient in a hearing to determine whether such aid would be terminated. The Goldberg court found that the failure to permit confrontation and cross-examination of adverse witnesses was “fatal to the constitutional adequacy of the procedures.” Goldberg, 397 U.S. at 268, 90 S.Ct. at 268.

In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Supreme Court held that a person facing parole revocation was entitled to *minimum* due process protections, which included the right to cross-examine witnesses crucial to a finding whether, in fact, he had done anything to violate his parole. As the Court explained: “On the request of the parolee, a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.” *Id.*, 408 U.S. at 487, 92 S.Ct. at 2603. See also Adkins v. Parker, 472 U.S. 115 (1985)(food stamp recipient entitled to due process protections, as in Goldberg).

And without cross examination, Philip Workman was not able to demonstrate to the Board the lack of credibility of the State's witnesses, including Stoddard, Parker, Keenan, and O.C. Smith, who made claims about the genesis of the supposed fatal bullet. With cross-examination, Philip Workman would have been able to demonstrate that the officers' stories were not born out by police reports, by the statements of unbiased witnesses, or by the physical evidence. With cross-examination, Philip Workman would have been able to show that the State's pathologist was not credible, because of his lack of expertise on his purported area of expertise, his lack of valid scientific method, and importantly, his bias against Philip Workman in this case itself. And an even more egregious violation of the right to cross-examine was denied by the pathologist springing his new claims at the proceeding.

With Philip Workman's fundamental right to life on the line and no court to hear his evidence, he was entitled to cross-examination. He was denied that most fundamental right, and as a result, the truth has not been fairly determined. If a person who might lose his *entitlement* to welfare benefits is entitled to cross-examination (Goldberg), and if a parolee is entitled to cross-examination (Morrissey), and food stamp recipients are entitled to cross-examination, then

certainly Philip Workman, who has a *fundamental right to life* was entitled to cross-examination to establish his innocence.

Moreover, the very actions of the Board demonstrate the arbitrariness and irrationality of the prohibition against cross-examination in this case. The Board told counsel for Philip Workman that the Board would not allow cross-examination, because the Parole Board proceeding was a "factfinding proceeding." This is wholly irrational and arbitrary and therefore a violation of due process. *The fact that the proceeding is a factfinding proceeding is the reason for requiring cross-examination - not denying it - this is what the Supreme Court has said for decades.* In addition, it is extraordinary that a Board member would challenge juror Wardie Parks because he reviewed materials not subject to cross-examination at a proceeding where cross-examination was not allowed.

The procedures provided by the Board violate due process.

CONCLUSION

"The Constitution of the United States does not require that a state have a clemency procedure, but. . . 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. Philip Workman has been denied a fundamentally fair clemency process, in violation of

the Eighth and Fourteenth Amendments. The temporary restraining order should have been granted. The judgment of the District Court should be reversed. This Court should also enter an immediate stay of execution prohibiting Workman's currently scheduled execution.

Respectfully Submitted,

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