IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

PHILIP RAY WORKMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:01-cv-290**
	)	
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 PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, Philip Ray Workman ("Workman"), moves this Court for the issuance of a temporary restraining order and preliminary injunction to stop his execution scheduled for August 31, 2001. As grounds for the motion, he relies on the above-styled complaint, filed under 42 U.S.C. §§ 1981, 1983, in which he accuses certain 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. However, accepting all of Workman's material allegations as true – and indeed as conclusively demonstrated – Workman has no likelihood of success on the merits of his complaint because it fails to state any cognizable claim for relief. Accordingly, and in light of the great interest in promotion of the State's interest in protecting the finality of its judgments,

Workman's motion for a stay pending resolution of his request for preliminary injunctive relief should be denied.

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. In 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.[1]

Following the conclusion of state post-conviction proceedings in 1988 and 1991, respectively, Workman filed a petition for writ of habeas corpus in federal district court.[2] The district court denied relief, awarding summary judgment to respondents on all claims and denying Workman's motion for summary judgment. Judgment was entered on December 14, 1995. That judgment was affirmed on appeal. *Workman v. Bell*, 111 F.3d 751 (6th Cir. 1998),

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[1] (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's bribe or in order to receive money or a promise of anything of pecuniary value; 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 properly considered the felony murder aggravator, but that it was error as to two. *Workman v. Bell*, 111 F.3d 751, 774 (6th Cir. 1998).

[2] This was actually Workman's second-in-time petition. His first petition was filed December 11, 1987, and then stayed without prejudice on August 17, 1988.

cert. denied, 111 S.Ct. 184 (1990), *rehearing denied*, 111 S.Ct. 511 (1990). 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 3, 2000, Workman filed a Motion to Reopen his habeas corpus case with the Sixth Circuit Court of Appeals. On March 6, 2000, Workman withdrew his application for Commutation. On March 14, 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 en banc of the Sixth Circuit granted Workman's petition to rehear en banc and stayed his execution 'until further order of the Court.'

On September 6, 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 November 6, 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 the hearing, the Board voted unanimously to recommend that the Governor deny clemency.

On January 26, 2001, the en banc Court of Appeals granted Workman an 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 27, 2001, the Tennessee Supreme Court entered Workman's execution date for April 24, 2001. On April 7, 2001, Workman filed a motion in the Sixth Circuit to declare the previously-entered stay of execution still in effect and the order preventing his execution from moot. On April 18, 2001, Workman filed another motion to reopen his habeas corpus case and to stay his execution.[3] On April 23, 2001, the Sixth Circuit en banc Court of Appeals denied the motion to declare the previously-entered stay of execution still in effect. On April 23, 2001, a three-judge panel of the Sixth Circuit denied the motions to reopen and to stay the execution. On April 24, 2001, Workman filed a petition for rehearing by the full en banc Court of that denial. That petition remains pending.

On April 17, 2001, the Governor of Tennessee determined that the 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 parish was appropriate under law; and 4) he was confident that Workman had had adequate access to the courts. App. at 1.

ARGUMENT

I. WORKMAN HAS BEEN DENIED HIS PROTECTED LIBERTY INTEREST IN THE EXECUTIVE CLEMENCY PROCESS GUARANTEED BY THE TENNESSEE CONSTITUTION; HIS CLAIM IS NOT

[3] 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 sixty days prior to his scheduled execution. *See West v. Bell*, 242 F.3d 338, ___, 2001 WL 114888, *4 (6th Cir. 2001)(published page numbers not available).

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.[4] 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 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

[4] 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.

(6th Cir. 1999). *See Woodard, supra* 169 F.3d at 1018 (judicial intervention is ripe when executive prisoner *arbitrarily* denied access to clemency). The substantive merits of the clemency decision, however, are *not* a proper subject for judicial review. *Duvall, supra* 161 F.3d at 1311. *See Workman v. Bell*, __ F.3d __, 1998 WL _____ (6th Cir. June 11, 1998), *pet. for rehearing and suggestion for rehearing en banc filed* (June 18, 1998) (No. 96-6551; 96-6552) (urging reversal in respect) (copy attached at pp. 1-6). The viability of any of Harbison's claims for relief on the basis of the Due Process Clause, then, depends entirely upon whether state procedures are explicitly provided for under Tennessee law. *See In re Sapp*, 118 F.3d 460, 465 (6th Cir. 1997), *cert. denied* 522 U.S. 1151 (1998) (certiorari granted in *Woodard* in which Supreme Court will consider due process standard where state has not instituted specific clemency procedures, was inelevant to situation where state has not established no specific procedures to control exercise of executive's authority).

Harbison begins from the premise that Tennessee state law *does* create specific provisions for clemency proceedings, including provisions for the role of the Parole Board therein.[5] 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 vests in the authority to make such determinations, and the process for making them, completely in the unfettered discretion of the Governor.

The Tennessee Constitution vests the Governor with the power to grant reprieves and

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[5] *See* Memorandum in Support of Motion for Temporary Restraining Order, pp. 11-12, citing, *inter alia* Tenn. Code Ann. §§ 40-27-102(a), 40-27-105(c).

pardons. Tenn. Const. Art. III, § 6. This constitutional provision grants pardons and reprieves an broader than the power to commute sentences. *Carroll v. Raney*, 533 S.W.2d 331, 334 (Tenn. 1976); *Ricks v. State*, 813 S.W.2d 117, 119 (Tenn. Crim. App. 1990). 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*, 533 S.W.2d at 334;[6] *see State ex rel. Bedford v. McCorkle*, 41 S.W.2d 1013 (Tenn. 1931)(recognized 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*, 813 S.W.2d at 121, *citing, inter alia, State ex rel. Rowe v. Connors*, 61 S.W.2d 471, 472 (Tenn. 1933). Accordingly, Mr. Coe'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* fully regulate or control the 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 - 40-28-117 shall be construed in any way as intended to unduly restrict or abridge the pardoning power of the governor." Tenn. Code Ann. § 40-28-115; *see also* Tenn. Code Ann. § 40-28-105(b)(nothing in Tenn. Code Ann. §§ 40-28-101 - 40-28-104 shall be construed as unduly restricting or abridging clemency powers of the governor). Further, the very statute to which Mr. Coe 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. § 40-28-116(c). *See also* Tenn. Code Ann. § 40-28-

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

114(a)(1)(B) (Board hearing to make non-binding recommendations to governor on clemency applications *only upon request* of the Governor).[7]

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 adopted only as to create no 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 non-binding recommendations with respect to executive clemency applications, nothing herein shall be construed to require that the Governor receive a request(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, amended Sept. 11, 1998. App. at 7. Even a regulation of the Board that purports to setup procedures for handling clemency applications when the Board is involved makes clear that any hearing on the application is within the Board's discretion. *See* Tenn. Comp. R. & Regs. 1100-1-1-.13 (1), (2) (Board shall review the application and determine whether the applicant should be scheduled for a hearing). App. 11-12.[8] The State of Tennessee has simply not made clemency an integral part of

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

[8] 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

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 is up to each state to establish specific procedures to be followed and to promote 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 vested the clemency process as an integral part of the state's overall adjudicative process.

Id. at 463. 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*, 111 F.Supp. 411, 411 (E.D.Ark. 1991), *reversed*, 111 F.3d 21 (8th Cir. 1997)(distinguishing *Sapp*, district court noted that Arkansas' 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, *see Woodard, supra*, 111 F.3d at 1115 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 Parole Board. *Woodard, supra*

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at

522 U.S. at 274. In Tennessee, the Board's involvement is advisory and discretionary with the Governor. Ohio law requires that the Governor must either secure a recommendation from the Parole Authority before granting a clemency decision. *Woodard, supra* 523 U.S. at 282 n.1. In Tennessee, the Governor has specifically provided that, even when he requests the Board's involvement and receives a recommendation, he need not act on 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 has 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.

In sum, 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 someone on her staff to conduct an investigation into Coe'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 herself without any assistance, utilizing *ex parte* interviews with whomever she chose to consult regarding the record of Coe's trial. In none of these scenarios, would Coe have had any due process rights to counter such investigations or presentations. Indeed, insofar as the Due Process Clause is concerned, the Governor could 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 485. In the face of this reality, the lack of a role for Coe's chair and in propriety in the process that *was* used in his case becomes readily

appeal.

In view of Tennessee's clemency scheme, due process protection did not attach to the Parole Board's proceedings on Coe'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.[9] Furthermore, and as the District Court 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 is permitted under *Woodard*. *See Workman v. Bell*, *supra*, [illegible], slip op. at [illegible], *citing Duvall v. Keating*, [illegible] (10th Cir. 1996)("Coe's attacks on the evidence presented at his clemency proceeding as erroneous or false is directed to the proceedings' substantive merits, which federal courts are not authorized to review"). App. at [illegible]. Coe specifically has proposed his entire four-step remaining order, none of these claims has any likelihood of success, and he has not stayed one. *See Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association*, [illegible] (6th Cir. 1992).[10]

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[9] Because due process did not attach to the proceedings conducted by the Parole Board, it is unnecessary to address Coe's claim that he was deprived of substantive, as well as procedural, due process. Suffice it 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 an express distinction between procedural and substantive due process. Both the decision and dissenting opinions on which Coe relies, *Woratzeck v. Arizona Board of Executive Clemency*, [illegible] (9th Cir. 1997), and *Otey v. Hopkins*, [illegible] (Gibson, J., dissenting) predate *Woodard* and are inconsistent with it in terms of the breadth of such due process protection.

[10] Coe'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 complaint includes a passing allegation that the Attorney General has violated directly or [illegible]

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.[11] No support exists for such a proposition, however. Nothing in *Woodard* even 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,

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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.

[11] *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.

were available to process it. *Id.* at 417. Nothing in that decision suggests that the Eighth Amendment therefore requires certain procedural protections attend that clemency process when it is available for each claim. Indeed, the court's discussion includes an 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, Hudson's allegations of constitutional deprivation based on the Eighth Amendment alone are fatal to state a cognizable claim for relief. Hudson can certainly have no show any degree of likelihood of success on such a claim.

While Hudson's complaint also purports to include claims based on equal protection grounds and on the Tennessee Constitution, in support of his bid for a preliminary 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 any protected class. *See, e.g., Mercer v. City of Cedar Rapids*, 104 F.Supp.2d 1175, 1191 (N.D. Iowa 2000). Accordingly, such claims are likewise devoid of merit. The same is true of 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. 1996) (no private right of action lies for alleged violation of Tennessee State Constitution).

Hudson'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.[12] 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. 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 a temporary restraining order and preliminary injunction should be denied.

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12 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.

Respectfully submitted,

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[redacted]
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 [redacted] and Donald Donovan, Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee, 37243, and George Barrett and Edward L. Carey, Barrett, Johnston & Parsley, 217 Second Avenue North, Nashville, Tennessee 37201, and Cecil Branstetter and James G. Stranch, III, Branstetter, Kilpatrick, Stranch & Jennings, 227 Second Avenue North, Nashville, Tennessee, 37201, on this the ... day of March, 2001.

. . . . . .
[redacted]
Assistant Attorney General