

No. _____

Capital Case

Underwood's Execution is set for December 19, 2024, at 10:00AM.

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN UNDERWOOD,

Applicant,

v.

Oklahoma Pardon and Parole Board; Tom Bates, in his official capacity as Director of the Pardon and Parole Board; and Richard Miller, in his official capacity as Chairperson of the Pardon and Parole Board,

Respondents.

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit

**APPENDIX TO EMERGENCY APPLICATION FOR
STAY OF EXECUTION**

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|-------------------------------|
| KEVIN UNDERWOOD, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. CIV-24-1266-G |
| |) | |
| OKLAHOMA PARDON AND PAROLE BOARD et al., |) | |
| |) | |
| Defendants. |) | |

ORDER

In 2008, an Oklahoma jury convicted Plaintiff Kevin Underwood of first-degree murder and recommended a death sentence, which the trial court imposed. *Underwood v. Royal*, 894 F.3d 1154, 1160-61 (10th Cir. 2018). Following unsuccessful efforts on direct appeal, postconviction proceedings, and federal habeas corpus, Plaintiff is now scheduled for execution on December 19, 2024. *See id.*; Compl. ¶ 7 (Doc. No. 1).

On December 4, 2024, Plaintiff filed the instant lawsuit, seeking relief pursuant to 42 U.S.C. § 1983 against Defendants Oklahoma Pardon and Parole Board (“OPPB” or “the Board”), Tom Bates, in his official capacity as OPPB Director, and Richard Miller, in his official capacity as OPPB Chairperson. *See* Compl. ¶¶ 8-10. Now before the Court is Plaintiff’s Motion to Stay (Doc. No. 3), to which Defendants have submitted a Response (Doc. No. 10), and Plaintiff has replied (Doc. No. 12). The Court heard argument on the Motion on December 6, 2024. As requested by the Court at that hearing, Defendants and Plaintiff have also filed Supplemental Briefs (Doc. Nos. 14, 15).

For the reasons set forth herein, Plaintiff’s Motion to Stay is denied.

APPENDIX A

I. *Threshold Matters*

Plaintiff's claims are asserted under 42 U.S.C. § 1983, which the Court assumes for purposes of the Motion is the proper vehicle for asserting a challenge to a state clemency proceeding. *See Gardner v. Garner*, 383 F. App'x 722, 725 (10th Cir. 2010). To establish Defendants' liability under § 1983, Plaintiff must show "the violation of a right secured by the Constitution and laws of the United States" and "that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988).

Although unnoted by the parties, Plaintiff's claims implicate immunity issues under the Eleventh Amendment. *See* U.S. Const. amend. XI. "The Eleventh Amendment grants states immunity from suits brought pursuant to § 1983 unless such immunity is specifically waived or overridden by Congress." *Littlejohn v. Quick*, No. CIV-24-996-SLP, 2021 WL 4314973, at *3 (W.D. Okla. Sept. 25, 2024). "Congress did not abrogate the states' Eleventh Amendment immunity through the enactment of 42 U.S.C. § 1983," and the State of Oklahoma has not generally waived its Eleventh Amendment immunity. *Id.* "A claim against [state officials] in their official capacities is essentially a claim against the State of Oklahoma and therefore, the Amendment's proscription applies to them." *Id.* at *4.

The Court concludes that its jurisdiction over this matter is not defeated by the Eleventh Amendment, however. Pursuant to *Ex parte Young*, 209 U.S. 123 (1908), "a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). Having

considered the well-pleaded allegations of the Complaint, including its request for declaratory and injunctive relief, the Court finds that Plaintiff is suing state officials for “an ongoing violation of federal law” and is “seeking prospective relief.” *Id.* at 1167; *see* Compl. ¶¶ 1, 8-10, 46, 55-57. These allegations are sufficient to satisfy the *Ex parte Young* exception and permit consideration of Plaintiff’s § 1983 claims.

II. Findings and Conclusions

Based upon the undisputed aspects of the record and the parties’ representations at the hearing of December 6, 2024, the Court finds and concludes as follows:

Article VI, section 10 of the Oklahoma Constitution creates “a Pardon and Parole Board to be composed of five members.” Okla. Const. art. VI, § 10. Three members are to be appointed by the Governor, one member by the Chief Justice of the Oklahoma Supreme Court, and one member by the Presiding Judge of the Oklahoma Court of Criminal Appeals (“OCCA”). *Id.* It is “the duty of the Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.” *Id.* The Governor then makes “the ultimate decision whether to grant clemency.” *Duvall v. Keating*, 162 F.3d 1058, 1060 (10th Cir. 1998); *see* Okla. Const. art. VI, § 10 (“The Governor shall have the power to grant, . . . after favorable recommendation by a majority vote of the Pardon and Parole Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as the Governor may deem proper, subject to such regulations as may be prescribed by law.”).

A “clemency hearing” is “a hearing before the Board requested by an [inmate] on death row who has been scheduled for execution by the [OCCA].” Okla. Admin. Code § 515:10-1-2. The Oklahoma Statutes and Oklahoma Administrative Code set forth various requirements and criteria concerning the Board’s makeup and its proceedings, including clemency hearings. *See* Okla. Stat. tit. 57, §§ 332.1 et seq.; Okla. Admin. Code tit. 515. In addition, the Board has established its own Policies, “which direct the actions of the [OPPBB] in administering . . . clemency hearings.” OPPB Policy 100, *available at* <https://oklahoma.gov/ppb/about/policy-procedures.html> (last visited Dec. 7, 2024). These Policies are “proposed by the Executive Director or a designee” and “approved . . . by a majority vote of the Board.” *Id.*

On October 1, 2024, the OCCA set Plaintiff’s execution for December 19, 2024. Compl. ¶ 12. On October 2, 2024, General Counsel for the Board emailed Plaintiff’s legal team to inform them that Plaintiff’s clemency hearing before the Board was scheduled for December 4, 2024, at 9:00 a.m. *Id.* ¶ 13.

Based upon that hearing setting, Plaintiff’s retained expert psychologist, Dr. Kim Spence, made travel arrangements to attend the clemency hearing and present testimony to the Board. *Id.* ¶ 14. Hunter Labovitz, one of Plaintiff’s attorneys, requested that an ongoing evidentiary hearing in a separate matter in the U.S. District Court for the Eastern District of Oklahoma recommence after the date of the clemency hearing. *Id.* ¶ 15.

On December 2, 2024, the Board’s General Counsel informed Plaintiff’s counsel that “the December 4 hearing was cancelled due to unexpected resignations.” *Id.* ¶ 16. That same date, the Board set Plaintiff’s clemency hearing as a “special meeting” on

December 9, 2024, at 9:00 a.m. *Id.*; *id.* Ex. 1, OPPB Email (Doc. No. 1-1); Defs.’ Suppl. Br. Ex. 4, OPPB Meeting Notice Confirmation (Doc. No. 14-4). The Board’s General Counsel also informed Plaintiff’s counsel that the clemency hearing will go forward with only three Board members. Compl. ¶ 20.

As a result of two Board member resignations in November of 2024, when the meeting was rescheduled on December 2, 2024, and when this lawsuit was filed on December 4, 2024, the Board comprised three members. *See id.* ¶¶ 1, 16, 20. Plaintiff alleges that only one of these members was appointed by the Governor, with the other two appointed by the Chief Justice and the Presiding Judge. *See id.* ¶ 34.

On December 5, 2024, Governor J. Kevin Stitt appointed a fourth member to the OPPB. *See* Defs.’ Resp. Ex. 1, Stava Appointment Order (Doc. No. 14-1). This new member intends to participate and to vote on Plaintiff’s clemency request at the hearing on December 9, 2024. *See* Defs.’ Resp. Ex. 2, Stava Aff. ¶¶ 5-9 (Doc. No. 14-2).

If the hearing takes place as scheduled on that date, Plaintiff’s expert Dr. Spence will not be able to attend in person, but she will be able to appear and present testimony via videoconference. Plaintiff’s attorney Mr. Labovitz is still scheduled to attend the Eastern District of Oklahoma hearing and has not requested relief from that Court with respect to the scheduling conflict.

III. Plaintiff’s Due Process Claim

Pursuant to the Fourteenth Amendment, no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The Tenth Circuit Court of Appeals, and thus this Court, “assume[s] that some minimal level of

procedural due process applies to clemency proceedings.” *Duvall*, 162 F.3d at 1061; *see Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring). This “minimal application of the Due Process Clause only ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.” *Duvall*, 162 F.3d at 1061 (citing *Woodard*, 523 U.S. at 289-90 (O’Connor, J., concurring) (concluding that no due process violation occurred where “[t]he process [the inmate] received . . . comports with Ohio’s regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings”)). The Court limits its review “to analyzing the procedures used during the clemency proceedings and not the substantive merits of the clemency decision.” *Id.*; *accord Gardner*, 383 F. App’x at 726.

Plaintiff contends that Defendants’ conducting of the clemency hearing as it is contemplated to occur on December 9, 2024, will violate his due process rights under the Fourteenth Amendment in several respects. *See* Compl. ¶¶ 29-46, 51-58.¹ Plaintiff’s claim implicates both aspects of the standard set forth in *Duvall*. First, Plaintiff alleges that he is not “receiv[ing] the clemency procedures explicitly set forth by state law” because (1) his hearing will not be conducted before a Board composed of five members, as prescribed by

¹ The Complaint also asserts that the inability of Plaintiff’s psychological expert and more experienced attorney to attend the hearing violates his right to representation of counsel in that proceeding guaranteed by 18 U.S.C. § 3599(e). *See* Compl. ¶¶ 47-50. Because Plaintiff’s Motion relies upon his due process claim as the basis for entry of a stay, however, the Court examines only that claim herein.

article VI, section 10 of the Oklahoma Constitution, and (2) the setting of the rescheduled hearing violated Oklahoma’s Open Meeting Act, Okla. Stat. tit. 25, §§ 301 et seq. *Duvall*, 162 F.3d at 1061; *see* Compl. ¶¶ 29-46.² Second, Plaintiff complains that his rescheduled proceedings are wholly arbitrary and capricious, due to: the date of the hearing not being changed until December 2, 2024; the change in his burden of proof with a Board of fewer than five members; and his expert’s and attorney’s scheduling conflicts. *See* Compl. ¶¶ 51-58.

Plaintiff requests that the Court enter a declaratory judgment “declaring that Oklahoma must comply with the state law’s five-member Board requirement” and enjoin the State from executing Plaintiff “until the completion of clemency proceedings that comply with state and federal laws and procedures.” Compl. at 16-17.

IV. Plaintiff’s Motion to Stay

Based upon Defendants’ alleged due process violation, Plaintiff asks that his clemency hearing and his execution be stayed “to allow him to litigate his [action] in the ordinary course.” Pl.’s Mot. to Stay at 11.³

² Plaintiff additionally cited as an additional deviation from state law the fact that the hearing would be conducted with only one Board member having five years of training or experience in mental health services, substance abuse services, or social work, despite Oklahoma law requiring the Board to have two such members. *See* Compl. ¶¶ 43-45; Okla. Stat. tit. 57, § 332.1B(B). Plaintiff conceded at the hearing that the December 5, 2024 appointment of the fourth OPPB member renders that objection moot.

³ In support, Plaintiff cites the All Writs Act, which establishes that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). The Court assumes without deciding that this statute would permit the requested relief to issue. But invocation of § 1651(a) “does not absolve [Plaintiff] of

Plaintiff's request is the functional equivalent of a motion for a preliminary injunction. *See Gardner*, 383 F. App'x at 725.

Ordinarily, a movant seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) irreparable injury to the movant if the injunction is denied; (3) the threatened injury to the movant outweighs the injury to the party opposing the preliminary injunction; and (4) the injunction would not be adverse to the public interest.

Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir. 2001); *see also* Fed. R. Civ. P. 65(a). A showing on “[e]ach of these elements is a prerequisite for obtaining” injunctive relief. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

An application for injunctive relief “is addressed to the sound judicial discretion of the district court.” *Goodpaster v. Okla. Gas & Elec. Co.*, 291 F.2d 276, 278 (10th Cir. 1961); *accord Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). “Because a preliminary injunction is an extraordinary remedy, the movant’s right to relief must be clear and unequivocal.” *Dominion Video Satellite*, 269 F.3d at 1154.

A. Substantial Likelihood of Success on the Merits

The Court begins by considering whether Plaintiff has established a substantial likelihood of success on the merits of his due process claim—i.e., whether Plaintiff is substantially likely to succeed in showing that, in conducting the clemency hearing on December 9, 2024, Defendants will “subject[]” Plaintiff, “or cause[] [Plaintiff] to be subjected,” “to a deprivation of his . . . lawful rights.” *Porro v. Barnes*, 624 F.3d 1322,

his responsibility to make the showing necessary to obtain a stay.” *Littlejohn*, 2024 WL 4314973, at *5.

1327 (10th Cir. 2010) (first and second alterations in original) (internal quotation marks omitted).

As shaped by the current record before the Court, the primary basis for Plaintiff's claim is that Defendants are failing to comply with "procedures explicitly set forth by state law" by conducting his clemency hearing before a Board comprising only four members. *Duvall*, 162 F.3d at 1061. As noted, the Oklahoma Constitution creates a Board "to be composed of five members" and prescribes that the Board has a duty to, "by a majority vote," make its favorable clemency recommendations to the Governor. Okla. Const. art. VI, § 10. Plaintiff argues that, based upon that constitutional requirement, he is entitled to a clemency hearing conducted by a Board that consists of five members.⁴

Defendants emphasize, however, that the Board's own policies define a quorum for its meetings as "three (3) members." Defs.' Resp. Ex. 3, OPPB Policy 101 (Doc. No. 10-3); *cf. Gardner*, 383 F. App'x at 726 (noting that the court must focus upon the board's "compliance with its own rules"). In addition, it is undisputed that the Board's past practice has been to conduct votes regarding pardons and other forms of clemency with fewer than five members, for reasons including vacancies and disqualifications. *See, e.g., Simmons v. Allbaugh*, No. CIV-18-232-SLP, 2019 WL 3302820, at *2 (W.D. Okla. July 23, 2019); *see also* Okla. Stat. tit. 57, § 332.15. Indeed, such was the case in *Duvall*, where "the Board

⁴ The Complaint also alleged that the hearing would fail to comply with the Oklahoma Constitution because it will not be conducted before a Board having three members appointed by the Governor, as prescribed by article VI, section 10. Neither the Motion nor the Reply offers any basis to find that the identity of the appointee of an individual Board member is material to the due process claim. Further, the recent addition of a second Governor-appointed member significantly undermines the argument's factual premise.

deadlocked on whether to recommend clemency by a two-two vote, with one member of the five-person Board abstaining due to a conflict of interest.” *Duvall*, 162 F.3d at 1060. Although the issue of the constitutional five-member requirement was not squarely before the appellate court, the Tenth Circuit, in upholding the clemency proceedings against a due process challenge, held that the Oklahoma Constitution “clearly contemplates” such a tie vote. *Id.* at 1061 n.2. And all parties have represented to the Court that with the currently contemplated four-member hearing, they understand the requisite “majority vote” to be three votes in favor of clemency, which is the same numerical count (although not the same percentage share) of votes as would be required if five members participated.

Plaintiff also argues that the rescheduling of his hearing did not comport with state law because the new hearing was set only seven days in advance, in violation of Oklahoma’s Open Meeting Act (“OMA”).⁵ Pursuant to the OMA, notice of regularly scheduled meetings must be given by December 15 of each calendar for the following year, and changes to the date or time of a regularly scheduled meeting require at least 10 days’ notice. *See* Okla. Stat. tit. 25, § 311(A)(1), (8). But Defendants have presented evidence reflecting that the December 9, 2024 clemency hearing was set and will be held as a “special meeting” rather than a regular meeting. *See* OPPB Meeting Notice Confirmation at 1; Defs.’ Suppl. Br. Ex. 5, OPPB Special Meeting Agenda (Doc. No. 14-5). Pursuant to

⁵ The OMA applies to the Board’s clemency hearings pursuant to both title 57, section 332.1(P) of the Oklahoma Statutes and Oklahoma Administrative Code § 515:10-5-2.

the OMA, special meetings require only 48 hours' prior notice; that requirement was complied with here. *See* Okla. Stat. tit. 25, § 311(A)(12); Compl. ¶ 16.⁶

Moving on to the second aspect of the pertinent due process standard, Plaintiff argues that a variety of factors render his rescheduled clemency hearing “wholly arbitrary or capricious” in nature. *Gardner*, 383 F. App'x at 727. But the rescheduling of his original hearing date, besides complying with the OMA, actually provided Plaintiff with five additional days to prepare and is permitting the attendance of a fourth Board member. Plaintiff's expert psychologist already has submitted opinions to the Board via videotape, and there has been no showing that she is unable to adequately participate in the hearing through the use of video conferencing. While one of Plaintiff's attorneys may not be available, Plaintiff will be represented by at least one other attorney. Finally, Plaintiff's conclusory briefing allegations of a lack of impartiality on the part of the Board are unfounded in the record and inconsistent with the *Gardner* decision's rejection of similar allegations. *See* Pl.'s Reply at 4-6; *Gardner*, 383 F. App'x at 726 n.1.

Having carefully considered all of the above, the Court concludes that while the Board's handling of the rescheduling was irregular with respect to state notice procedures, and caused inconvenience to any person planning to attend the hearing, the Board's

⁶ It appears that the December 2, 2024 cancellation of the December 4, 2024 regular Board meeting may have violated the OMA, as the Court is not persuaded by Defendants' unsupported argument that a cancellation is not a “change to the date, time or place” of a meeting. Okla. Stat. tit. 25, § 311(A)(8); *see* Defs.' Suppl. Br. at 2-3. The gist of Plaintiff's claim is that the December 9, 2024 hearing is violative of due process, however. Beyond serving as an example of the Board's allegedly arbitrary actions, the cancellation of the first hearing does not reflect a failure to follow state law in any sense material to that claim.

proceedings are in “compliance with its own rules” and do not “reflect action that could be characterized as wholly arbitrary or capricious.” *Gardner*, 383 F. App’x at 726-27; *cf. Sellers v. State*, 973 P.2d 894, 896 (Okla. Crim. App. 1999) (rejecting due process claim under *Woodard* where, despite noting “some irregularities in the notice process” and that the court “would not necessarily have prescribed the procedure that was followed,” the inmate received the “minimal procedural safeguards” that apply to clemency proceedings). There is no suggestion in the record that Plaintiff has lacked sufficient notice of the composition of the hearing panel or that he will be denied an opportunity to be heard according to the Board’s established procedures. Nor has there been any showing that the Board will be “prevented from conducting . . . an impartial investigation and study of [Plaintiff’s] application for clemency.” *Duvall*, 162 F.3d at 1062. Plaintiff’s contentions and the relevant record therefore do not show that he is substantially likely to succeed on the merits of his due process claim.

B. Remaining Elements

Because Plaintiff cannot satisfy his burden to show that he is substantially likely to succeed on the merits, the Court need not reach the other three elements necessary for a preliminary injunction to issue. *See Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1299 (10th Cir. 2006); *Diné Citizens*, 839 F.3d at 1285.

C. Summary

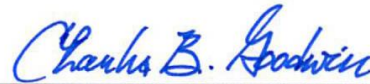
The Court concludes that Plaintiff has not shown a substantial likelihood of success on his claim that the clemency hearing scheduled for December 9, 2024, fails to provide him the minimal due process to which he is entitled under governing Tenth Circuit and

Supreme Court precedent. It follows that he has not made a clear and unequivocal showing of entitlement to the “drastic relief” of an extraordinary interim remedy. *Schrier*, 427 F.3d at 1258 (internal quotation marks omitted) (noting that a preliminary injunction is “to be provided with caution” and “only in cases where the necessity for it is clearly established” (internal quotation marks omitted)). Issuance of a stay of that clemency hearing is unwarranted. As Plaintiff’s accompanying request to stay his December 19, 2024 execution is premised upon the alleged due process violations associated with the December 9, 2024 hearing, that relief is likewise not merited.

CONCLUSION

For the foregoing reasons, Plaintiff’s Motion to Stay (Doc. No. 3) is DENIED.

IT IS SO ORDERED this 8th day of December, 2024.



CHARLES B. GOODWIN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

December 8, 2024

Christopher M. Wolpert
Clerk of Court

KEVIN UNDERWOOD,
Plaintiff - Appellant,

v.

OKLAHOMA PARDON AND PAROLE
BOARD, et al.,
Defendants - Appellees.

Appeal Number Pending*
(D.C. No. 5:24-CV-1266-G)
(W.D. Okla.)

ORDER

Before **MATHESON, BACHARACH,** and **ROSSMAN,** Circuit Judges.

Plaintiff Kevin Underwood has filed a *Request for a Stay of Clemency Proceedings and Execution*. The court has determined that it would be helpful to obtain a response regarding the portion seeking a stay pending appeal of the clemency hearing. On or before 4:00 p.m. Central Standard Time on December 9, 2024, the defendants shall file a response to the plaintiff’s request for a stay of the clemency proceedings. On or before 4:00 p.m. Central Standard Time on December 10, 2024, Plaintiff may file a reply. To facilitate the court’s consideration of the motion, response, and optional reply, the

*Mr. Underwood filed a notice of appeal at 2:12 p.m. MST on Sunday, December 8, 2024. At this time, the electronic docket for this appeal has not yet been created.

court enters a temporary stay of the clemency proceedings scheduled for December 9, 2024.

Entered for the Court,

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal flourish extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

December 11, 2024

Christopher M. Wolpert
Clerk of Court

KEVIN UNDERWOOD,

Plaintiff - Appellant,

v.

OKLAHOMA PARDON AND PAROLE
BOARD, et al.,

Defendants - Appellees.

No. 24-6259
(D.C. No. 5:24-CV-01266-G)
(W.D. Okla.)

ORDER

Before **MATHESON, BACHARACH, and ROSSMAN**, Circuit Judges.

Plaintiff Kevin Underwood has filed a *Request for a Stay of Clemency Proceedings and Execution*. We entered a temporary stay to facilitate our consideration of the motion and ordered the defendants to file a response, which they have done. Mr. Underwood has also filed a reply. After briefing was complete, the defendants filed a *Notice of Scheduling of New Clemency Hearing Date and Assurance of Compliance*, which advised the court that the Oklahoma Pardon and Parole Board has rescheduled Mr. Underwood's clemency hearing for December 13, 2024, at 9:00 a.m. CST. Mr. Underwood then filed a *Notice that the Pardon and Parole Board Has Changed the Facts Relied on By the District Court*, and the defendants filed a response to that notice.

Although framed as a request for a stay, Mr. Underwood effectively moves for an injunction pending appeal. We evaluate such motions under Federal Rule of Appellate Procedure 8(a)(2) using the preliminary injunction standard. *See Warner v. Gross*, 776 F.3d 721, 728 (10th Cir.), *aff'd sub nom. Glossip v. Gross*, 576 U.S. 863 (2015). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

We have carefully considered these factors, and we conclude Mr. Underwood has not satisfied them. We therefore lift the temporary stay entered on December 8, 2024, and we deny the motion.

Judge Rossman would grant the motion.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Chris Wolpert', written over a horizontal line.

CHRISTOPHER M. WOLPERT, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

Kevin Underwood,)
)
 Plaintiff,)
)
 v.)
)
 Oklahoma Pardon and Parole)
 Board; Tom Bates, in his official)
 capacity as Director of the)
 Pardon and Parole Board; Richard)
 Miller, in his official capacity as)
 Chairperson of the Pardon and)
 Parole Board,)
)
 Defendants.)

**Execution Date:
December 19, 2024 at 10:00AM**

Case No. CIV-24-1266-G

Introduction

1. The Oklahoma Constitution guarantees Kevin Underwood a meaningful opportunity to present his case for clemency to an impartial, five-member parole board. But after two resignations, the Pardon and Parole Board is hastily moving forward with Underwood’s clemency hearing before a three-member board. Removing two potential votes for clemency at this late hour violates Underwood’s rights to due process and a fair clemency proceeding. And the Board’s last-minute change of the hearing date has prevented Underwood’s expert and one of his lawyers from presenting at his clemency hearing, again violating Underwood’s due process rights and his right to counsel under 18 U.S.C. § 3599(e).

2. The Board's actions significantly and arbitrarily weaken Underwood's opportunity to be heard and his chances of obtaining a favorable clemency recommendation. This Court should declare Underwood is entitled to full, fair, and nonarbitrary access to Oklahoma's clemency proceedings before a five-member board with meaningful representation. At a minimum, this Court should recognize the last-minute changes violate Underwood's "opportunity to be heard at a meaningful time and in a meaningful manner." *McDonald v. Wise*, 769 F.3d 1202, 1212-13 (10th Cir. 2014) (citations and internal quotation marks omitted).

3. A man's life is on the line. Underwood's interest in a fair clemency proceeding far outweighs the Board's interest in having the clemency hearing on December 9, 2024, as opposed to another time in the near future.

Jurisdiction and Venue

4. Underwood invokes this Court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. His claims are brought under 42 U.S.C. § 1983.

5. Venue is proper in the Western District of Oklahoma pursuant to 28 U.S.C. § 1391(b).

6. The Oklahoma Pardon and Parole Board (PPB) and its officials are headquartered in Oklahoma City, Oklahoma. All events alleged herein occurred within the State of Oklahoma.

Parties

7. Underwood is housed at the Oklahoma State Penitentiary in McAlester, Oklahoma. He is under a sentence of death. His execution is scheduled for December 19, 2024, at 10AM.

8. The Oklahoma Constitution created the Pardon and Parole Board. Okla. Const. Art. VI, § 10. It is the “duty of the Board to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.” *Id.*

9. Defendant Richard Miller is the chairperson of the Board. He is charged with scheduling clemency hearings, and he presides over the hearing. Okla. Admin. Code §§ 515:10-3-1, 515:10-5-2. The chairperson is also charged with ensuring clemency materials are properly submitted. *Id.* at § 515:10-5-1.

10. Defendant Tom Bates is the executive director of the Board. He is charged with ensuring the relevant parties are notified of an upcoming clemency hearing. *Id.* at § 515:10-3-2. He also oversees the day-to-day operations of the Board.

Relevant Facts

11. Oklahoma is unique among death-penalty states because it provides robust clemency hearings for death row prisoners. These hearings generally last

around three hours, and experts and witnesses are routinely presented. The Board votes on whether to recommend clemency at the end of the hearing.

12. On October 1, 2024, the Oklahoma Court of Criminal Appeals set Underwood's execution for December 19, 2024. Order, *Underwood v. State*, D-2008-319 (Okla. Crim. App. Oct. 1, 2024).

13. On October 2, 2024, General Counsel for the Board emailed Underwood's legal team informing them that Underwood's clemency hearing was scheduled for December 4, 2024, at 9AM. Att. 1.

14. Relying on the notice, Underwood's legal team made travel arrangements for Underwood's expert psychologist Dr. Kim Spence to attend the hearing. She is a psychologist and expert in autism spectrum disorder, which is one of Underwood's disabilities. Dr. Spence has met with Underwood on multiple occasions, digested thousands of pages of records, and interviewed three of Underwood's family members. Her testimony alone is anticipated to amount to more than half of Underwood's clemency presentation.

15. Also relying on the December 4 notice, Hunter Labovitz, one of Underwood's lawyers, committed to represent another one of his capital clients at a federal evidentiary hearing scheduled to start December 5, 2024, and run through December 11, 2024. See Minute Order, *United States v. Edward Fields*, No. 03-cr-73 (E.D. Okla. Oct. 23, 2024), ECF No. 418 (Oct. 23, 2024); Minute Order, *United*

States v. Edward Fields, No. 03-cr-73 (E.D. Okla. Nov. 6, 2024), ECF No. 424. Labovitz specifically requested to the federal court that the evidentiary hearing begin after Underwood's clemency hearing.

16. On December 2, 2024, two days before Underwood's scheduled hearing, the Board's General Counsel informed Underwood's legal team that the December 4 hearing was cancelled due to unexpected resignations. The hearing was rescheduled for December 9, 2024, at 9AM.

17. With so little notice, Underwood's lawyer Hunter Labovitz and his expert Kim Spence cannot attend the December 9 hearing. Underwood's legal team planned for most of his clemency presentation to be presented by these two people. Dr. Spence did not prepare a report, and she always planned to offer her opinion to the Board in person. Underwood's remaining lawyer is unqualified to present her expert opinion. The remaining lawyer also graduated law school in 2020 and has far less experience than Labovitz, who has been a death penalty defense lawyer since 1996.

18. Labovitz cannot attend the December 9 clemency hearing because the federal evidentiary hearing in *Edward Fields* continues through December 11, and on December 9, the hearing starts at 9AM and will last all day. Dr. Spence is currently booked that day, but she is trying to make arrangements to appear via Zoom. In any

event, the late and arbitrary change to Underwood’s clemency hearing ensures he will lack live and effective testimony from his expert.

19. Before the hearing was rescheduled, the Oklahoma Attorney General sought mandamus in the Oklahoma Court of Criminal Appeals. Emergency Petition for Writ of Mandamus, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). The Attorney General argued he had a clear legal right to have Underwood’s clemency hearing on December 4, 2024. The Court of Criminal Appeals dismissed the petition on December 4, 2024. Order, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 4, 2024).

20. On December 2, 2024, General Counsel for the Board also informed Underwood’s legal team that the clemency hearing will go forward with only three members: Acting Chairperson Richard Miller, Kevin Buchanan, and Robert Reavis. Att. 2.

Applicable Law

21. The Supreme Court has stressed that “capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all.” *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

22. To ensure that the most fundamental right—the right to life—is not unfairly or arbitrarily extinguished, the State of Oklahoma has provided an additional safeguard by providing robust clemency proceedings. *See Ford v.*

Wainwright, 477 U.S. 399, 409 (1986) (plurality opinion) (recognizing the “fundamental right to life”).

23. “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.” *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). “Executive clemency has provided the ‘fail safe’ in our criminal justice system.” *Id.* at 415.

24. “In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the ‘fail-safe’ of our justice system.” *Harbison v. Bell*, 556 U.S. 180, 194 (2009).

25. Recognizing this historic remedy, the Oklahoma Constitution “created a Pardon and Parole Board to be composed of five members.” Okla. Const. Art. VI, § 10.

26. Board members have a constitutional duty to “make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.” *Id.*

27. At the same time, the federal constitution requires “the minimal application of the Due Process Clause [which] only ensures a death row prisoner that

he or she will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.” *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir.1998) (citing *Ohio Parole Authority v. Woodard*, 523 U.S. 272, 289 (O’Connor, J., concurring)).

28. Although the “minimal due process constraints on clemency proceedings are far more limited,” this Court focuses “solely on the Board’s compliance with its own rules and its avoidance of wholly arbitrary or capricious action.” *Gardner v. Garner*, 383 F. App’x 722, 726 (10th Cir. 2010).

Claim One
Due Process Violation Under the
Fourteenth Amendment to the Constitution of the United States

29. All statements of fact contained in this Complaint are hereby incorporated into this paragraph as though set forth fully herein.

30. To establish a due process violation, Underwood must show “a constitutionally cognizable liberty or property interest with which the state has interfered.” *Steffey v. Orman*, 461 F.3d 1218, 1221 (10th Cir. 2006).

31. Underwood has a protected due process interest ensuring he “will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.” *Duvall v. Keating*,

162 F.3d 1058, 1061 (10th Cir.1998) (citing *Ohio Parole Authority v. Woodard*, 523 U.S. 272, 289 (O’Connor, J., concurring)).

32. Because the five-member board is explicitly set out in Oklahoma’s Constitution, Underwood has a liberty and property interest in having a five-member board vote on his clemency petition. More than a statute, the Oklahoma Constitution guarantees Underwood a five-member board. Okla. Const. Art. VI, § 10.

33. In other words, Oklahoma’s clemency procedures, which are “explicitly set forth by state law,” require a five-member board and an impartial investigation. *Duvall*, 162 F.3d at 1061; Okla. Const. Art. VI, § 10. That explicit guarantee creates a due process interest for Underwood. *Id.*

34. The Oklahoma Constitution also guarantees that of the five members, “three [are] to be appointed by the Governor; one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals or its successor.” *Id.* This distribution established a balance between the Governor and the Judiciary. Moving forward without two of the Governor’s picks upsets this constitutionally established balance.

35. Additionally, as the Attorney General has admitted, the Board’s abrupt “cancellation of the clemency hearing did not comply with [Oklahoma’s] Open Meeting Act.” Petitioner’s Brief in Support of Emergency Petition for Writ of

Mandamus at 5-7, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024).

36. Oklahoma’s Open Meetings Act regulates how and when meeting may be scheduled or rescheduled:

All meetings of public bodies, as defined hereinafter, shall be held at specified times and places which are convenient to the public and shall be open to the public, except as hereinafter specifically provided. All meetings of such public bodies, except for executive sessions of the State Banking Board and Oklahoma Savings and Loan Board, shall be preceded by advance public notice specifying the time and place of each such meeting to be convened as well as the subject matter or matters to be considered at such meeting, as hereinafter provided.

Okla. Stat. tit 25, § 303.

37. The Act continues,

If any change is to be made of the date, time or place of regularly scheduled meetings of public bodies, then notice in writing shall be given to the Secretary of State or county clerk or municipal clerk, as required herein, not less than ten (10) days prior to the implementation of any such change.

Id. at § 311(A)(B).

38. The Board cancelled the December 4 clemency hearing with only two days’ notice, far less time than the ten days required by the Open Meetings Act. It then rescheduled the hearing to take place in seven days, again less than the required ten days. As the Attorney General argued, “even assuming the Open Meetings Act allows for cancelations with less notice in emergency situations, no such emergency exists here where the Board has a quorum and could proceed on the scheduled

hearing date.” Petitioner’s Brief in Support of Emergency Petition for Writ of Mandamus at 6, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024).

39. The Attorney General went on to claim, “on information and belief, the Board was aware as of November 6, 2024 (the last day of the Board's regular November meeting) that Chairman Konieczny would not participate in the December meeting (to include Underwood's clemency hearing). Thus, the Board has planned for weeks to hold Underwood's hearing with less than the full complement of members. It is unclear why the loss of an additional member is relevant so long as there remains a quorum.” *Id.* at 7.

40. Underwood agrees with the Attorney General. The Board flagrantly violated Oklahoma’s Open Meeting Act. By doing so, it violated Underwood’s due process rights by ignoring “procedures explicitly set forth by state law.” *Duvall*, 162 F.3d at 1061.

41. As the Attorney General notes, the Board’s policies do permit Board meetings with a quorum of three members. Policy 101, <https://oklahoma.gov/ppb/about/policy-procedures.html>. But a clemency hearing is not a Board meeting, and the Oklahoma Administrative Code governing clemency hearings says nothing about proceeding with less than five members. *See* Okla. Admin. Code § 515. Rather, the relevant Code says that “‘Clemency hearing’ means

a hearing before the Board for an Inmate on death row who has been scheduled for execution by the Court of Criminal Appeals,” and “‘Board’ means the Pardon and Parole Board.” Okla. Admin. Code § 515:1-1-2. Most importantly, the state constitution explicitly states, “a Pardon and Parole Board to be composed of five members.” Okla. Const. Art. VI, § 10. Board policy cannot overrule the relevant clemency guidelines of the Oklahoma Administrative Code and the Oklahoma Constitution.

42. *Duvall*’s suggestion that a board comprised of fewer than five members passes constitutional muster is not controlling here. 162 F.3d at 1062 n.2. In *Duvall*, the plaintiff only raised a claim based on the Board’s tie vote. *Id.* The Attorney General has admitted as much. Unlike Underwood, Duvall did not challenge the Board’s actions based on the Oklahoma Constitution’s guarantee of a five-member board. *Id.* Thus, Underwood’s claim has never been squarely addressed by the Tenth Circuit.

43. Moreover, by statute, “at least two members of the Pardon and Parole Board shall have five (5) years of training or experience in mental health services, substance abuse services, or social work.” Okla. Stat. tit. 57, §332.1B. Chairperson Miller is listed on the website for the Board as one of the two members with mental health experience and training. But the other two members’ qualifications do not

include this requirement. *See* Board Members, Oklahoma Pardon and Parole Board, <https://oklahoma.gov/ppb/about/board-members.html>.

44. Former member Prince, who unexpectedly resigned last week, was the Board's second member to satisfy the mental health requirement. *See* Att. 3. Currently, the Board only has one member of a required two who have mental health training or experience. Again, the Board is trying to move forward with Underwood's clemency hearing despite clear violations of state law and the Board's own rules.

45. The Board's lack of two members trained in mental health is especially damaging to Underwood because his clemency case is fundamentally about his serious mental health problems. Underwood had never been in trouble before his crime, and he has never received any disciplinary infractions while in prison. His crime came out of a mental health break, and Underwood is entitled to present this information to a Board with two members with mental health experience.

46. Simply put, the Board must follow the rules and procedures that govern clemency hearings, and it must follow the Oklahoma Constitution and Oklahoma Law. It has failed to do so, and Underwood is now expected to pay the price. Rescheduling Underwood's clemency hearing is a minimal inconvenience to the Board, but it is life or death for Underwood. *See McDonald v. Wise*, 769 F.3d 1202, 1212 (10th Cir. 2014).

Claim Two
Violation Under 18 U.S.C. § 3599(e).

47. All statements of fact contained in this Complaint are hereby incorporated into this paragraph as though set forth fully herein.

48. Federal law guarantees Underwood the assistance of counsel during the clemency process. 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180, 183-85 (2009); *Hain v. Mullin*, 436 F.3d 1168, 1172-75 (10th Cir. 2006) (en banc).

49. The Board's abrupt postponing and rescheduling of Underwood's clemency hearing amount to a denial of a fair hearing and the meaningful assistance of counsel during the clemency process. The last-minute change has ensured one member of Underwood's legal team cannot attend the hearing at all and his only expert cannot attend the hearing in person, as originally planned.

50. Moreover, not only does the Board expect Underwood to move forward without one of his lawyers, but it expects him to move forward with his far less experienced lawyer. Just two days ago, Underwood's legal team included decades of experience in capital litigation and clemency presentations. Now, Underwood's legal team has only four years of experience.

Claim Three
Due Process Violation Under the
Fourteenth Amendment to the Constitution of the United States

51. All statements of fact contained in this Complaint are hereby incorporated into this paragraph as though set forth fully herein.

52. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *McDonald v. Wise*, 769 F.3d 1202, 1212-13 (10th Cir. 2014) (citations and internal quotation marks omitted).

53. Even if Underwood is not entitled to a five-member Board, removing two members at this late hour still violates Underwood’s due process rights because the burden of proof has been changed.

54. The number of board members is not meaningless. To recommend clemency, the petitioner must receive a majority of the board members. Obtaining three votes of five is easier than obtaining two of three. In other words, the last-minute change to the number of board members has made it more unlikely that Underwood would receive clemency.

55. With last-minute changes to the Board and rescheduling the hearing, Underwood must now present to a Board missing two members and with a legal team missing at least one member and potentially two. These last-minute changes significantly and arbitrarily impact Underwood’s right to be heard in a meaningful way.

56. Underwood must get a majority of the Board’s votes. With five members, he needed three votes or 60%. Now with three members, he needs two votes or 66% of the vote. One of the missing votes is also one of the members with

mental health experience. So not only has Underwood's burden changed, but he is presenting to a Board that is less experienced and may not fully understand his mental health arguments.

57. Underwood's clemency hearing should not go forward with only one of his three team members and only three of the five board members. Hastily moving forward with Underwood's clemency hearing will significantly harm his right to full, fair, and nonarbitrary access to Oklahoma's clemency proceedings, and his chances of obtaining a favorable clemency recommendation. At the same time, the Board will be minimally harmed by rescheduling the clemency hearing, something it has already done once this week. Nor will the Board be harmed if it is required to follow state law and its own rules.

58. The Board's last-minute scheduling violates due process because the hearing, with half a board and half a legal team, will be "wholly arbitrary, capricious or based upon whim, for example, flipping a coin." *Duvall*, 162 F.3d at 1061.

Relief Requested

Plaintiff respectfully request the following relief:

- A. That a declaratory judgment be awarded declaring that Oklahoma must comply with the state law's five-member Board requirement, otherwise proceeding with a three-member board will violate the Fourteenth Amendment to the United States Constitution.

- B. That the State of Oklahoma be enjoined from executing Underwood until the completion of clemency proceedings that comply with state and federal laws and procedures.
- C. Such other relief to which the Plaintiff may be entitled.

Respectfully submitted on December 4, 2024.

s/ Hunter Labovitz

Hunter Labovitz, NJ Bar 010942006
Brendan Van Winkle, SC Bar 104768
Assistant Federal Public Defenders
Capital Habeas Unit
Office of the Federal Public Defender
Western District of Oklahoma
405-609-5975
Hunter_Labovitz@fd.org
Brendan_VanWinkle@fd.org

Counsel for Kevin Underwood

From: Kyle Counts <Kyle.Counts@ppb.ok.gov>
Sent: Monday, December 2, 2024 1:57 PM
To: Jennifer Crabb <jennifer.crabb@oag.ok.gov>; Caroline Hunt <caroline.hunt@oag.ok.gov>; Brendan Van Winkle <Brendan_VanWinkle@fd.org>
Cc: Tom Bates <Tom.Bates@ppb.ok.gov>; Melinda Romero <Melinda.Romero@ppb.ok.gov>
Subject: PPB Special Meeting - December 9, 2024

Good afternoon,

Please see the following notice regarding a special meeting of the Pardon and Parole Board:

[OKLAHOMA PARDON AND PAROLE BOARD](#)

As you are aware, Kevin Underwood's clemency hearing was previously scheduled to occur this week on the final day of the Pardon and Parole Board's regular December 2024 meeting. That meeting was canceled due to unforeseen circumstances that occurred within the 10-day window to make changes to a regular meeting and after the posting of the Board's agenda. Specifically, last Friday, the Board received the resignation letter of its acting Chair and only remaining member in an elected leadership position—Calvin Prince—after its previous Chair, Ed Konieczny, resigned effective at the conclusion of the November 2024 meeting.

The Board—through its new and current acting Chair, Judge Richard Miller, and pursuant to 57 O.S. § 332.2(A)—has called for a special meeting of the Pardon and Parole Board on **Monday, December 9th, at 9:00 am**, to consider clemency for Mr. Underwood.

The Pardon and Parole Board's rules permit scheduling a clemency hearing within twenty-one days of a scheduled execution date at the direction of the Chairperson. Upon receiving a request from Mr. Underwood's counsel, the Board's previous Chair Ed Konieczny directed the Board to schedule a clemency hearing within that 21-day period, and the current acting Chair's only option is to likewise schedule within the 21-day period.

I will update you on any developments, and please let me know if there are questions or issues I need to raise with the Board's leadership.

Respectfully,

Kyle Counts

General Counsel

Oklahoma Pardon and Parole Board

Phone 405-521-2373 Fax 405-602-6437

Web www.ok.gov/ppb Email kyle.counts@ppb.ok.gov

4345 N. Lincoln Blvd., Suite 1082, Oklahoma City, OK 73105

From: Kyle Counts <Kyle.Counts@ppb.ok.gov>
Sent: Monday, December 2, 2024 2:37 PM
To: Brendan Van Winkle <Brendan_VanWinkle@fd.org>; Jennifer Crabb <jennifer.crabb@oag.ok.gov>; Caroline Hunt <caroline.hunt@oag.ok.gov>
Cc: Tom Bates <Tom.Bates@ppb.ok.gov>; Melinda Romero <Melinda.Romero@ppb.ok.gov>
Subject: RE: PPB Special Meeting - December 9, 2024

There are currently three Board members -- Richard Miller, Kevin Buchanan, and Robert Reavis (in order of seniority).

Kyle Counts

*General Counsel
OK Pardon and Parole Board*

From: Brendan Van Winkle <Brendan_VanWinkle@fd.org>
Sent: Monday, December 2, 2024 2:25 PM
To: Kyle Counts <Kyle.Counts@ppb.ok.gov>; Jennifer Crabb <jennifer.crabb@oag.ok.gov>; Caroline Hunt <caroline.hunt@oag.ok.gov>
Cc: Tom Bates <Tom.Bates@ppb.ok.gov>; Melinda Romero <Melinda.Romero@ppb.ok.gov>
Subject: [EXTERNAL] RE: PPB Special Meeting - December 9, 2024

Thank you. Can you please confirm how many and the identity of the Board Members that will be there for the December 9th hearing.

From: Kyle Counts <Kyle.Counts@ppb.ok.gov>
Sent: Monday, December 2, 2024 2:22 PM
To: Jennifer Crabb <jennifer.crabb@oag.ok.gov>; Caroline Hunt <caroline.hunt@oag.ok.gov>; Brendan Van Winkle <Brendan_VanWinkle@fd.org>
Cc: Tom Bates <Tom.Bates@ppb.ok.gov>; Melinda Romero <Melinda.Romero@ppb.ok.gov>
Subject: RE: PPB Special Meeting - December 9, 2024

We will get the Zoom information to everyone as soon as possible. I'll make sure Judge Miller receives the updated information on hearing attendance as well.

Kyle Counts

*General Counsel
OK Pardon and Parole Board*

From: Jennifer Crabb <jennifer.crabb@oag.ok.gov>
Sent: Monday, December 2, 2024 2:16 PM
To: Kyle Counts <Kyle.Counts@ppb.ok.gov>; Caroline Hunt <caroline.hunt@oag.ok.gov>; Brendan Van Winkle <Brendan_VanWinkle@fd.org>
Cc: Tom Bates <Tom.Bates@ppb.ok.gov>; Melinda Romero <Melinda.Romero@ppb.ok.gov>
Subject: RE: PPB Special Meeting - December 9, 2024

Thank you, Kyle. We appreciate the Board getting the hearing back on the calendar.

Attorney General Drummond, First Assistant Amie Ely, and lead counsel on Underwood Aspen Layman will all be out of state next Monday. We would like permission for Ms. Layman to present via Zoom, with myself and second chair Sheri Johnson present and ready should there be technical difficulties.

Jennifer

From: Kyle Counts <Kyle.Counts@ppb.ok.gov>
Sent: Monday, December 2, 2024 1:57 PM
To: Jennifer Crabb <jennifer.crabb@oag.ok.gov>; Caroline Hunt <caroline.hunt@oag.ok.gov>; Brendan Van Winkle <Brendan_VanWinkle@fd.org>
Cc: Tom Bates <Tom.Bates@ppb.ok.gov>; Melinda Romero <Melinda.Romero@ppb.ok.gov>
Subject: PPB Special Meeting - December 9, 2024

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I will update you on any developments, and please let me know if there are questions or issues I need to raise with the Board's leadership.

Respectfully,

Kyle Counts

General Counsel

Oklahoma Pardon and Parole Board

Phone 405-521-2373 **Fax** 405-602-6437

Web www.ok.gov/ppb **Email** kyle.counts@ppb.ok.gov

4345 N. Lincoln Blvd., Suite 1082, Oklahoma City, OK 73105



Pardon and Parole Board

The Pardon and Parole Board (PPB) is established through Article VI, Section 10 of the Oklahoma Constitution. The five-member, part-time board is charged with making impartial investigations and reviews of applicants for commutations, pardons, paroles and clemencies. The PPB may grant parole for non-violent offenses, including specific restrictions, limitations, and services as deemed proper. In addition, the PPB may make recommendations to the Governor regarding commutations, pardons, and paroles for violent offenses, including suggestions regarding restrictions, limitations, and services as deemed appropriate. Members of the Board are appointed. Three (3) are appointed by the Governor, one (1) by the Chief Justice of the Supreme Court, and one (1) by the presiding Judge of the Court of Criminal Appeals. The Board holds office coterminous with the Governor.

QUALIFICATIONS

To be eligible for appointment as a Pardon and Parole Board member, a person shall possess:

- A bachelor's degree from an accredited college or university and have at least five (5) years experience in one or more of the following fields:
 1. Criminal justice;
 2. Parole;
 3. Probation;
 4. Corrections;
 5. Criminal law;
 6. Law enforcement;
 7. Mental health services;
 8. Substance abuse services; or
 9. Social work.

At least two members of the Pardon and Parole Board shall have five (5) years of training or experience in mental health services, substance abuse services, or social work.

BOARD MEMBERS

Hon. Richard A. Miller

Judge Richard A. Miller served as Associate District Judge for Marshall County in the 20th Judicial District for 26 years. While on the bench, he also served on the Emergency Division of the Court of Criminal Appeals, and was a member of the Oklahoma Criminal Justice System Task Force. Judge Miller's legal service also includes eleven years as a prosecutor in the 20th Judicial District and numerous years as an Active Retired Judge, by appointment of the Oklahoma Supreme Court. Since 2018, Miller has served as Municipal Judge for the cities of Tishomingo and Madill. Judge Miller has been on the Board of Directors of Lighthouse Behavioral Wellness Centers for the past 17 years and served as the board's president. Judge Miller is a 1978 graduate of the Oklahoma University City School of Law, where he was a member of the O.C.U. Law Review. His legal education also includes training at the National Judicial College. Judge Miller fills one of the positions that requires experience or training in mental health services, substance abuse services or social work on the Pardon and Parole Board.

Judge Miller was appointed to the Pardon and Parole Board by the Presiding Judge of the Court of Criminal Appeals on January 4, 2023, and his first term will expire in January 2027.

Dr. Edward Konieczny

Dr. Konieczny retired at the end of 2021 as CEO/President/Bishop of the Episcopal Diocese of Oklahoma where he oversaw all Episcopal Institutions, Schools, and Churches throughout the state of Oklahoma. Prior to becoming a Priest and Bishop, Dr. Konieczny served as a Police Officer in Southern California. As a Police Officer he worked Uniform Patrol/Field Supervisor; Child Abuse/Sexual Assault Investigations; a Crime Task Force; Vice/Narcotics; taught the D.A.R.E. Program in local schools, and was cited for Meritorious Service on two occasions. Dr. Konieczny holds an AA Degree in Administration of Justice; a Bachelor's Degree in Criminal Justice; a Masters of Divinity Degree; a Doctor of Ministry; and two Doctor of Divinity Degrees, *Honoris Causa*.

Dr. Konieczny was appointed to the Pardon and Parole Board by Governor J. Kevin Stitt on January 14, 2022. Governor Stitt reappointed Dr. Konieczny to a second term on January 20, 2023, and his term will expire January 2027.

H. Calvin Prince III

Calvin Prince holds both a bachelor's degree and master's degree in Human Resources Counseling from East Central University in Ada, Oklahoma. In 2012, Calvin began working as an administrator of the Pontotoc County Specialty Courts program for the 22nd Judicial District of Oklahoma. This includes adult drug court, juvenile drug court, mental health court, and misdemeanor court. He also administers court-mandated parent education classes on divorce. Before his appointment to

ATTACHMENT 3

the Oklahoma Pardon and Parole Board, Calvin served on the board for the Department of Corrections as vice-chair. He served as vice-chair for the City of Ada Public Transit Services board, and is a former chairman of the board for Mercy hospital Ada. Mr. Prince fills one of the positions that requires experience or training in mental health services, substance abuse services or social work on the Pardon and Parole Board.

Mr. Prince was appointed to the Pardon and Parole Board on January 20, 2023, and his term will expire in January 2027.

Mr. Richard Smothermon

Mr. Smothermon served as the elected District Attorney for the 23rd Judicial District, which covers Pottawatomie and Lincoln Counties, a position he held for 16 years. In 2007, he received the honor of being selected Outstanding District Attorney for the State of Oklahoma.

Upon leaving the District Attorney's office, Mr. Smothermon served as General Counsel for the Oklahoma State Bureau of Investigation before retiring from state service in 2018. He holds a B.A. (1988) and a Juris Doctorate degree (1991) from Oklahoma City University.

Mr. Smothermon was appointed to the Pardon and Parole Board by the Supreme Court of Oklahoma on July 8, 2021. The Oklahoma Supreme Court reappointed Mr. Smothermon to a second term on December 13, 2022, and his second term will expire in January 2027.

Mrs. Cathy Stocker

Mrs. Stocker retired at the end of 2010 after serving 28 years as the elected District Attorney for District 4 comprised of Blaine, Canadian, Garfield, Grant and Kingfisher Counties.

She was appointed by Attorney General Scott Pruitt in July 2012 to serve a five-year term on the 5-member Ethics Commission for the state of Oklahoma and was appointed to a second five-year term by Attorney General Mike Hunter in 2017. Cathy served as the chair of the Oklahoma Ethics Commission in 2014-2015, 2016-2017 and in 2020-2021.

Her educational background includes a B.A. in 1972 from the University of Oklahoma and a Juris Doctor degree from the University of Oklahoma in 1975.

Ms. Stocker was appointed to the Pardon and Parole Board by Governor J. Kevin Stitt on March 31, 2022. Governor Stitt reappointed Ms. Stocker to a second term on January 20, 2023, and her term will expire January 2027.

CONTACT

Board members may be contacted via email at Boardmembers@ppb.ok.gov or by leaving a voice mail message at 405/522-9227.



CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS KEVIN UNDERWOOD (b) County of Residence of First Listed Plaintiff PITTSBURG (c) Attorneys (Firm Name, Address, and Telephone Number) Brendan VanWinkle, AFPD, Office of the Federal Public Defender, 215 Dean A. McGee, Ste 707, OKC, 73102 DEFENDANTS Oklahoma Pardon & Parole Board; Tom Bates, Director, in his official capacity to the Oklahoma Pardon and Parole County of Residence of First Listed Defendant OKLAHOMA NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in one Box Only) 1 U.S. Government Plaintiff 2 U.S. Government Defendant 3 Federal Question (U.S. Government Not a Party) 4 Diversity (Indicate Citizenship of Parties in Item III) III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in one Box for Plaintiff and one Box for Defendant) Citizen of This State Citizen of Another State Citizen or Subject of a Foreign Country PTF DEF 1 1 2 2 3 3 4 4 5 5 6 6

IV. NATURE OF SUIT (Place an "X" in one Box Only) CONTRACT 110 Insurance 120 Marine 130 Miller Act 140 Negotiable Instrument 150 Recovery of Overpayment & Enforcement of Judgment 151 Medicare Act 152 Recovery of Defaulted Student Loans (Excludes Veterans) 153 Recovery of Overpayment of Veteran's Benefits 160 Stockholders' Suits 190 Other Contract 195 Contract Product Liability 196 Franchise REAL PROPERTY 210 Land Condemnation 220 Foreclosure 230 Rent Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property TORTS PERSONAL INJURY 310 Airplane 315 Airplane Product Liability 320 Assault, Libel & Slander 330 Federal Employers' Liability 340 Marine 345 Marine Product Liability 350 Motor Vehicle 355 Motor Vehicle Product Liability 360 Other Personal Injury 362 Personal Injury - Medical Malpractice 365 Personal Injury - Product Liability 367 Health Care/Pharmaceutical Personal Injury Product Liability 368 Asbestos Personal Injury Product Liability 370 Other Fraud 371 Truth in Lending 380 Other Personal Property Damage 385 Property Damage Product Liability CIVIL RIGHTS 440 Other Civil Rights 441 Voting 442 Employment 443 Housing/Accommodations 445 Amer. w/Disabilities - Employment 446 Amer. w/Disabilities - Other 448 Education PRISONER PETITIONS Habeas Corpus: 463 Alien Detainee 510 Motions to Vacate Sentence 530 General 535 Death Penalty Other: 540 Mandamus & Other 550 Civil Rights 555 Prison Condition 560 Civil Detainee - Conditions of Confinement FORFEITURE/PENALTY 625 Drug Related Seizure of Property 21 USC 881 690 Other LABOR 710 Fair Labor Standards Act 720 Labor/Management Relations 740 Railway Labor Act 751 Family and Medical Leave Act 790 Other Labor Litigation 791 Employee Retirement Income Security Act IMMIGRATION 462 Naturalization Application 465 Other Immigration Actions BANKRUPTCY 422 Appeal 28 USC 158 423 Withdrawal 28 USC 157 INTELLECTUAL PROPERTY RIGHTS 820 Copyrights 830 Patent 835 Patent - Abbreviated New Drug Application 840 Trademark 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY 861 HIA (1395ff) 862 Black Lung (923) 863 DIWC/DIWW (405(g)) 864 SSID Title XVI 865 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS—Third Party 26 USC 7609 OTHER STATUTES 375 False Claims Act 376 Qui Tam (31 USC 3729(a)) 400 State Reapportionment 410 Antitrust 430 Banks and Banking 450 Commerce 460 Deportation 470 Racketeer Influenced and Corrupt Organizations 480 Consumer Credit (15 USC 1681 or 1692) 485 Telephone Consumer Protection Act 490 Cable/Sat TV 850 Securities/Commodities/Exchange 890 Other Statutory Actions 891 Agricultural Acts 893 Environmental Matters 895 Freedom of Information Act 896 Arbitration 899 Administrative Procedure Act/Review or Appeal of Agency Decision 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in one Box Only) 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Brief description of cause:

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 12/04/2024 SIGNATURE OF ATTORNEY OF RECORD s/ Hunter Labovitz

FOR OFFICE USE ONLY RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

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- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
- PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related cases, if any. If there are related cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.