

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

Emergency Application for Stay of Execution

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Question Presented

Whether the due process clause provides any protection for petitioners in state clemency proceedings that are explicitly required by state law.

Application for Stay of Execution

Petitioner Kevin Underwood respectfully petitions for a stay of his execution, which is currently scheduled for December 19, 2024, at 10:00AM. To obtain a stay of execution, Underwood “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).

I. Underwood is likely to succeed on the merits.

In *Ohio Parole Authority*, five members of this Court said a clemency petitioner has a due process interest in clemency proceedings. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). Four of the eight justices who found no due process violation under the circumstances presented there also found that judicial review of clemency proceedings is appropriate. Specifically, Justice O’Connor disagreed with Chief Justice’s contention that a death row inmate has no life or liberty interests in clemency proceedings cognizable under the Due Process Clause. *Id.* at 289 (O’Connor, J., concurring in part and concurring in judgment). Three other justices joined her opinion.

Writing for himself, Justice Stevens framed the issue as “[w]hen a parole board conducts a hearing to determine whether the State shall actually execute one of its death row inmates—in other words, whether the State shall deprive that person of life—does it have an obligation to comply with the Due Process Clause of the Fourteenth Amendment?” *Id.* at 290. He answered, “the text of the Clause provides the answer to that question. It expressly provides that no State has the power to ‘deprive any person of life, liberty, or property, without due process of law.’” *Id.* “Thus, it is abundantly clear that [a clemency petitioner] possesses a life interest protected by the Due Process Clause.” *Id.* at 292. So, Justice Stevens plus the four justices who joined Justice O’Connor’s opinion reasoned that clemency petitioners do have a due process interest in clemency proceedings.

Based on the Supreme Court’s holding in *Woodard*, the Tenth Circuit recognized that “the minimal application of the Due Process Clause” ensures “a death row prisoner that he or she will receive the clemency procedures set forth by state law.” *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir.1998). The court has continued to follow that principle, as have other circuits. *Gardner v. Garner*, 383 F. App’x 722, 726 (10th Cir. 2010) (“We must focus solely on the Board's compliance with its own rules and its avoidance of wholly

arbitrary or capricious action.”); *Tamayo v. Perry*, 553 Fed.Appx. 395, 402 (5th Cir. 2014) (“We conclude that he has failed to show a substantial likelihood that he could demonstrate the Board violated its policies.”); *Mann v. Palmer*, 713 F.3d 1306, 1316 (11th Cir. 2013) (holding due process claim would be futile because “Florida law did not obligate the Governor to grant Mann a second clemency hearing before he signed Mann’s current death warrant”).

This is unsurprising considering due process cases outside the context of a clemency hearing. For instance, when a state creates good time credits for its prisoners, “the prisoner’s interest has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to ensure that the state-created right is not arbitrarily abrogated.” *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Similarly, the Supreme Court has explained that “the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.” *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 429 (1982). “The hallmark of property,” the Court stressed, “is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’” *Id.* at 430. Another example

from the Tenth Circuit includes its holding that there is a due process interest in a state-created cause of action. *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1310 (10th Cir. 2018).

II. Absent a stay, Underwood will be irreparably injured.

Denying a stay risks “foreclos[ing] . . . review,” which constitutes “irreparable harm.” *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984). Allowing the state to execute Underwood without providing him a clemency hearing that complies with state and federal law before the present proceedings have concluded will “effectively deprive this Court of jurisdiction.” *Id.* A stay is generally warranted when, as here, mootness is likely to arise during the pendency of the litigation—as it will if Mr. Underwood is executed without having had a clemency hearing that complies with state and federal law. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013). The harm is clear, serious, and irreversible. *See, e.g. Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (stating that the requirement of irreparable harm if stay is not granted “is necessarily present in capital cases”). And without a stay of execution, it is likely that the state will execute Underwood before the Board provides him with a fair and lawful clemency hearing.

III. Underwood’s interest in a fair hearing outweighs the Board interest in avoiding another hearing.

Moreover, a stay until the Oklahoma Pardon and Parole Board can provide a clemency hearing in compliance with state and federal law will not substantially harm the Board. At no fault of Underwood's, the Board capriciously and arbitrarily rescheduled the date of Underwood's clemency hearing with only two days' notice. It then rescheduled his hearing again with only two days' notice. The Board cannot now in good faith argue that waiting the additional time to comply with Oklahoma state law and procedures before holding Mr. Underwood's clemency hearing detrimentally affects the Board.

Further, there have been many delays, some lasting years and attributable to the State, on the road to Underwood's execution. The several years the State waited to establish a new execution protocol undermines any argument regarding the purported urgency in proceeding with an unlawful clemency hearing and execution before the Court has had an opportunity to evaluate Underwood's claims. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018). The short stay sought here will ensure the Board could conduct a lawful clemency hearing.

IV. The public interest lies with Underwood.

The public interest is not served by executing someone before they have had the opportunity to avail themselves of the clemency process guaranteed by

state law and procedure, as well as federal law. The public interest lies in ensuring agencies act in accordance with the Constitution and federal law. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). This interest is only heightened in the context of executions. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). Indeed, “the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate’s constitutional rights.” *In re Ohio Execution Protocol Litig.*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012) (citation omitted).

A stay is in the interest of the public because all citizens have an interest in ensuring that their state and federal constitutional rights are upheld. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). Here, Underwood’s due process and right to counsel claims have newly originated, and he has not had the benefit of their adjudication. The execution of a person without the Board’s compliance with state laws and procedures governing the clemency process should not be countenanced. The citizens of Oklahoma have an interest in ensuring that such offense does not occur.

V. Underwood’s request is not dilatory.

“Last-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant’s attempt at manipulation, may be grounds for denial of a stay.” *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) (quotations omitted). Here, Underwood has been diligent. Within two days of learning about the Board’s rescheduling of Underwood’s hearing, he filed the present lawsuit. In those two days, Underwood tried to make arrangements for his legal team to attend the new hearing date. A day after the rescheduling, Underwood learned the last-minute rescheduling would have a substantial impact on his ability to be heard at his clemency proceeding. Underwood filed suit the following day.

Underwood sought expedited hearings and appealed to the court of appeals on the same day that the district court denied his motion. Underwood is now before this Court days after being in the court of appeals. He has done all he can to move this lawsuit along. Moreover, if a petitioner is in clemency proceedings, an execution date is near. At least in Oklahoma, challenging clemency hearings will always entail filing that challenge while the clemency petitioner is under a death warrant. Okla. Admin. Code § 515:10-3-1 (requiring a clemency hearing be scheduled within three days of an execution date being set).

Conclusion

Underwood, by and through his counsel, respectfully asks the Court to stay his execution unless and until the Oklahoma Pardon and Parole Board provides a clemency hearing that complies with state law and procedure, as well as federal law, and allow him to litigate his complaint in the ordinary course.

Respectfully Submitted,

s/ EMMA V. ROLLS

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Certificate of Service

A copy of this application was served by email to the counsel listed below in accordance with Supreme Court Rules 22.2 and 29.3.

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