

No. 24-6159

Capital Case

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

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN UNDERWOOD,

Petitioner,

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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TENTH CIRCUIT COURT OF APPEALS

**REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

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ATTORNEYS FOR PETITIONER

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REPLY TO BREIF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Today, the Governor of Oklahoma appointed a fifth member to the Pardon and Parole Board, as is required by the Oklahoma Constitution. Okla. Const. Art. VI, § 10 (creating “a Pardon and Parole Board to be composed of five members”). Last week, Underwood had to present his clemency case to a three-member Board while he was missing the two most important members of his legal team. This last-minute hearing came after the Board had already rescheduled Underwood’s hearing twice in the proceeding eleven days. Unsurprisingly, the last-minute scheduling impacted who could attend the hearing on behalf of Underwood. Initially, the Board understood this and wanted to give Underwood a fair hearing with five members. But the Board was pressured out of doing so by the Oklahoma Attorney General. After that, the Board’s only goal was to conduct Underwood’s hearing as soon as possible, no matter the impact on the integrity of the proceedings. The Board’s arbitrary actions violated Underwood’s right to due process.

Five members of this Court clearly stated that clemency petitioners have a due process interest in clemency proceedings. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-295 (1998) (O’Connor, J., concurring) (Stevens, J., concurring); *see also* Jay Clayton, Comment: *Vindicating the Right to Be*

Heard: Due Process Safeguards against Government Interference in the Clemency Process, 88 U. Chi. L. Rev. 897, 899 (2021). Justice O'Connor, joined by three justices, concluded that "some *minimal* procedural safeguards apply to clemency proceedings." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring) (emphasis in original). Justice Stevens wrote for himself and agreed a clemency petitioner "possesses a life interest." *Id.* at 292 (Stevens, J., concurring). He went on to argue, "if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause." *Id.* "It is, of course, irrelevant that States need not establish clemency proceedings; having established these proceedings, they must comport with due process." *Id.* 293 n. 4.

Justice O'Connor acknowledged a due process interest in clemency proceedings, but she did not find a violation in *Woodard* because THE "process respondent received, including notice of the hearing and an opportunity to participate in an interview, comports with Ohio's regulations." *Id.* at 290 (O'Connor, J., concurring). Here, notice and an opportunity to meaningfully participate in the proceedings is exactly Underwood's complaint. The Board changed Underwood's hearing date multiple times at the last minute which then prevented Underwood's expert and most experienced lawyer from

attending the hearing. This was especially harmful to Underwood because his case for clemency was largely dependent on his mental health struggles, and his legal team had planned for months that his expert psychologist would handle the majority of the clemency presentation.

Underwood's out-of-state legal team is not atypical. Clemency teams are routinely made up of members from all over the country. For example, at the November 1, 2021, clemency hearing for Julius Jones, defense team members came from Arizona, New York, and Oklahoma. Likewise, at the November 8, 2023, clemency hearing for Phillip Hancock, defense team members came from New Jersey and Pennsylvania. And most recently, at the August 7, 2024 clemency hearing for Manuel Littlejohn, defense team members came from Washington, California, and Oklahoma. Had the Board postponed any of these hearings with only two days' notice, the impact on the petitioners' ability to be heard would be substantial, just as it was in Underwood's case. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (quotations omitted)). Indeed, the Board seemingly understands this because it schedules clemency hearings within days of an execution being set. Okla. Admin. Code § 515:10-3-1.

Since *Woodard*, this Court has given no guidance on clemency

proceedings and the due process clause. Lower courts have been left on their own to discern the meaning of *Woodard* and when a petitioner may have a due process interest in clemency proceedings. The courts have conducted multiple tests, all of which favor Underwood's claim. That said, finality on the state of the law is needed, and only this Court can provide it. This Court has granted certiorari before when a splintered opinion led to inconsistent law. *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). It should do so again here.

Courts of appeals, including the Tenth Circuit below, have interpreted *Woodard* to apply a "minimal application of the Due Process Clause" to clemency proceedings, which 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 Tenth Circuit 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). Similarly, the Eleventh Circuit has held that *Woodard* "did recognize a due process interest in the context of state clemency proceedings for death row inmates." *Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015).

The Eleventh Circuit has followed the Tenth Circuit's reasoning, holding that there is no due process violation when the clemency proceedings do not

violate state law. *Mann v. Palmer*, 713 F.3d 1306, 1316 (11th Cir. 2013). The Fifth Circuit has done the same, as have some state courts. *Tamayo v. Perry*, 553 Fed. Appx. 395, 402 (5th Cir. 2014); *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010) (“This minimal application requires only that a death row prisoner receive the clemency procedures explicitly set forth by state law.”). As described in the petition for certiorari, the Board violated state law and Board procedure when it held Underwood’s clemency hearing.

- The Board moved forward with only three members despite the Oklahoma Constitution explicitly requiring a five-member Board. Okla. Const. Art. VI, § 10.
- The Board’s decision to move forward with three members is arbitrary considering it told the Attorney General that it wanted to postpone Underwood’s clemency hearing “until the two vacancies are filled and a full Board will be present.” Emergency Petition for Writ of Mandamus at 2, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024).
- The Board is supposed to be impartial, yet it is changing its positions and arbitrarily aligning with the Attorney General, one of the parties before it. And the Board is also being represented by that same party in these proceedings, which directly touches on Underwood’s clemency hearing.
- The Board’s last-minute rescheduling of Underwood’s clemency hearing deprived him of half his legal team, counsel which he is entitled to under 18 U.S.C. § 3599(e). *Harbison v. Bell*, 556 U.S. 180, 183-85 (2009). It also deprived him of his only expert.
- The Board violated the Oklahoma Open Meetings Act by failing to give notice at least ten days before the rescheduled hearing.

- The Board arbitrarily defined a “majority” of the votes as all three members on the three-member Board, instead of an actual majority of two of the three members.

Each of the Board’s violations on its own supports finding that Underwood is likely to succeed on the merits. Altogether, it is unquestionable.

Additionally, some courts have reasoned that state interference in clemency proceedings can violate the due process clause. For example, the Ninth Circuit found a likely due process violation where the state had misled clemency counsel about the proceedings. *Wilson v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998). The Eighth Circuit reasoned similarly when it reviewed a case where a state actor tried to intimidate witnesses into withholding evidence. *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000); *but see Winfield v. Steele*, 755 F.3d 629 (8th Cir. 2014) (en banc). Underwood is successful under that reasoning as well.

The Attorney General interfered with Underwood’s clemency proceedings by strongarming the Board into changing its positions to ensure that Underwood’s hearing would be completed as quickly as possible. Initially, the Board told the Attorney General it wanted to wait to hold Underwood’s clemency hearing “until the two vacancies are filled and a full Board will be present.” Emergency Petition for Writ of Mandamus at 2, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024).

And the AG initially argued that postponing Underwood's hearing violated state law, and it argued the Board must provide Underwood with at least ten days' notice "[i]f any change is to be made of the date, time or place." *Id.* at 6. But within a couple days, both offices had changed their positions and aligned with the common goal of holding Underwood's hearing no matter the impact on the integrity of the proceedings.

Lastly, it is worth stressing again that Underwood is not at fault for the last-minute nature of these proceedings. Within two days of learning about the Board's rescheduling of the hearing, Underwood 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 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, a pending execution date is no reason to avoid hearing a case that challenges a state's clemency proceedings. 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). At no fault of Underwood's, the Board capriciously and arbitrarily rescheduled his clemency hearing twice in the last couple weeks. The Board cannot now in good faith argue that postponing Underwood's execution to provide him with a lawful clemency hearing detrimentally affects the Board.

Respectfully submitted,

s/ EMMA V. ROLLS

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