

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

U.S. DISTRICT COURT
NASHVILLE, TENNESSEE

PHILIP RAY WORKMAN)
)
 Plaintiff,)
)
 v.)
)
 PAUL SUMMERS,)
 Attorney General Of The State Of)
 Tennessee, In His Official)
 Capacity;)
)
 JOHN CAMPBELL,)
 Assistant District Attorney For)
 The 3rd Judicial District Of Tennessee,)
 in His Official Capacity,)
)
)
)
 RAY MAPLES,)
 Board Member, Tennessee Board)
 Of Probation And Parole, In His)
 Official Capacity;)
)
)
)
 CHARLES TRAUGHBER,)
 Chairperson, Tennessee Board of)
 Probation And Parole, In His)
 Official Capacity;)
)
)
)
 BILL DARTON,)
 Board Member, Tennessee Board)
 Of Probation And Parole, In His)
 Official Capacity;)
)
)
)
 DON DILLON,)
 Board Member, Tennessee Board)
 Of Probation And Parole, In His)
 Official Capacity;)
)
)

No. **3-01 0290**
JURY DEMAND

**CAPITAL CASE
EXECUTION DATE
1 A.M. MARCH 30, 2001**

MEMORANDUM IN
SUPPORT OF MOTION
FOR TEMPORARY
RESTRAINING ORDER

TOWNSHEND ANDERSON,)
 Board Member, Tennessee Board)
 Of Probation And Parole, In His)
 Official Capacity;)
)
 SHEILA SWEARINGEN)
 Board Member, Tennessee Board)
 Of Probation And Parole, In Her)
 Official Capacity;)
)
 LARRY HASSELL,)
 Board Member, Tennessee Board)
 Of Probation And Parole, In His)
 Official Capacity;)
)
 RICKY BELL,)
 Warden, Riverbend Maximum)
 Security Institution, In His Official)
 Capacity; and)
)
 JOHN DOES 1 100)
)
 Defendants)

**MEMORANDUM IN SUPPORT OF MOTION
 FOR TEMPORARY RESTRAINING ORDER**

I. INTRODUCTION

This Court should grant Philip Workman's Motion for a temporary restraining order (TRO) maintaining the status quo, and staying and precluding his execution pending the final determination of the issues in this case on the merits, because, although he is actually innocent of the death-qualifying offense of felony murder, of which he was wrongly convicted, the Tennessee clemency process, as applied has denied him the opportunity to establish his innocence. This further denies him procedural and substantive due process under the Fourteenth Amendment, and denies his right to be free from cruel and unusual punishments under the Eighth Amendment, and other fundamental

Constitutional rights.

That clemency process has been unconstitutionally tainted by numerous egregious errors including: (1) the use of false testimony against him, (2) the attorney general's triple role in the capital clemency process as prosecutor of Philip Workman, counsel to the Parole Board, and counsel to the Governor; (3) decision making by biased decision makers; and (4) denial of fundamental rights to meaningful and promised notice, to a meaningful opportunity to be heard, and to cross-examination, at a minimum, of at least the newly-offered surprise "scientific" hearsay testimony (which was false and misleading in nature) that was offered against him as purported new "100 percent" proof of his guilt for the first time at the Board "hearing." He further was denied cross-examination of the further apparently fabricated testimony of a former officer who claimed (also falsely) that he personally directed the immediate check of weapons of all officers at the crime scene. This testimony was offered against Workman to make the Board members "certain" that Workman must be guilty of firing the fatal shot. Indeed, one Board member criticized Workman for filling short of such (State-achieved) "100 percent" certainty in trying to establish his innocence.

Execution of the innocent is unconstititional, with clemency being "the historic remedy" for preventing such a miscarriage of justice. Hevner v. Collins, 506 U.S. 390, 411-412 (1993). Yet as Philip Workman has sought clemency, the clemency process has been subverted by the use of false testimony, manipulation of the process by agents of the state, and denial of fundamental rights which attach to any due process hearing. In this unique circumstance where Workman's claims of innocence have never been heard in court and clemency provides his only forum for proving his innocence he should have been entitled to nearly impeccable process to prevent a miscarriage of justice, and certainly not the sham proceedings he in fact was provided. Philip Workman is therefore

entitled to the entry of a temporary restraining order.

II STANDARDS FOR GRANTING A TEMPORARY RESTRAINING ORDER

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

First, nothing could be clearer than that there would indeed be irreparable injury to Philip Workman if the execution is not stayed. Second, there is no irreparable harm to the State in allowing due process to a condemned man who has never had a fair hearing anywhere on his claims of innocence. Third, the public interest also demands that no innocent man be executed without due process consideration of his claims of innocence, and that no person be executed following the type of procedure given to Workman. Indeed, it is likely that public confidence in the system of justice in Tennessee will be seriously undermined if Workman is executed without ever having a fair and full hearing at which he is given a fair opportunity to establish his innocence. Five jurors, the daughter of the slain Memphis police officer Workman was convicted of killing, the former district attorney general of the county in which he was prosecuted, one Justice of the Tennessee Supreme Court, and all Sixth Circuit judges from Tennessee who have reviewed his case, all agree he should receive commutation of his sentence to life as clemency, and/or an opportunity to establish his

innocence. Justice Frank Drowota, who has reviewed most of the Tennessee murder cases receiving death or life sentences over the past 20 years, wrote that the circumstances of Workman's offense were less egregious than "most" of these death cases, and even less so than "many of the life-sentence cases." The Justice urged that the Governor take "sufficient time to carefully consider" Workman's case in the clemency process. State v. Workman, 22 S.W.3d 867, 813 (Tenn. 2000)(Drowota, J., concurring opinion). He further pointedly noted that Workman's case had not been reviewed by current standards for Eighth Amendment and statutory proportionality review. Id.

While all three of these factors strongly mandate issuance of the restraining order, it is also apparent that Workman has a reasonable likelihood of success on the merits.

As will be shown *infra*, there is a reasonable likelihood of success on the merits, because Philip Workman has been denied clearly defined and fundamental constitutional rights from the presentation of false testimony against him that he had no right or opportunity to cross-examine or rebut from having his clemency application considered and/or rejected by biased decision makers, and the denial of notice, an opportunity to be heard, and cross-examination of at least the evidence newly offered by the State to attempt to inculcate him further at the clemency "hearing," beyond evidence admitted against him at trial.

III PHILIP WORKMAN DEMONSTRATES THAT HE HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

- A. **In This Case Involving Actual Innocence, Philip Workman Is Entitled To The Guarantees Of The Eighth Amendment, Substantive Due Process, And Procedural Due Process.**

¹The Transcript of the clemency "hearing" before the Board of Pardons and Paroles, held January 25, 2001, is found in the attached Appendix (App.) at 1-530.

In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court made clear that executive clemency is the traditional and "fail-safe" remedy for claims of innocence based on new evidence. Id., 506 U.S. at 417. "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Id., 506 U.S. at 411-412. Where clemency is then a "court of last resort" and the only means by which an innocent man – like Philip Workman – can preserve his very life, due process requires the balancing of the interests of the petitioner, the interests of society, the contribution of the requested procedure to accurate truth finding, and the risk of erroneous deprivation if the procedure is not adopted. Ake v. Oklahoma, 470 U.S. 68 (1985); See also Brooklyn Roadway Express, 481 U.S. 252, 261, 107 S.Ct. 1740, 1747 (1987), citing Goldberg v. Kelly, 397 U.S. 254, 66-271, 90 S.Ct. 1011, 1019-1023 (1970) ("Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated.").

Here, the balance of interests clearly required the procedural protections which were denied to Philip Workman in the clemency process:

First, it is unquestionable that the value of a human life is inestimable and that Philip Workman's right to life – like the right to life possessed by all persons – is *the fundamental human right*. This fact alone makes clear that any questions about the fairness of the process must be resolved strictly in favor of Philip Workman.

Second, society has a compelling interest in ensuring that a capital defendant has a meaningful clemency process in which to establish his innocence, where, as here, evidence of innocence is discovered after the conclusion of judicial process through no fault of the condemned.

To deny this opportunity and thereby execute an innocent man, is the quintessential miscarriage of justice. The execution of an innocent person not only serves no legitimate purpose in the particular case at hand, but it undermines any faith the people can possibly have in our justice system.

Third, the protections of due process and confrontation, including the right to be free from perjured testimony, and the rights to an unbiased decision-maker, to meaningful notice, to a meaningful opportunity to be heard, to cross-examination, and to confrontation, are critical to any meaningful finding of truth. See e.g., Mooney v. Helahan, 294 U.S. 103 (1935) (perjured testimony); Greene v. McElroy, 350 U.S. 474, 496, 79 S.Ct. 1400, 1413 (1959) (right to cross-examination); see generally, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976).

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

In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288, 118 S.Ct. 1244, 1255 (1998) (O'Connor, J., concurring), five justices held that: "[a] prisoner under a death sentence remains a living person and consequently has an interest in life" for purposes of the Fourteenth Amendment.² For those persons who are "validly convicted" or otherwise "fairly convicted and sentenced," *id.*, "[s]ome minimal procedural safeguards apply to the clemency proceedings." *Id.*, 523 U.S. at 289. For those "validly convicted," the process due in clemency proceedings, though

²The holding in any Supreme Court case decided by a five-Justice majority, such as Woodard, is the narrowest ground advanced by a concurring Justice. See Marks v. United States, 439 U.S. 184, 193 (1977).

real, admittedly is not great. See id.

In all clemency cases, however, even those in which actual innocence may not be involved, "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289, 118 S.Ct. at 1254 (O'Connor, J., concurring). Similarly, such an inmate ought to be entitled to relief if, in the clemency process, state action failed to "comport[] with [its own] regulations." See Woodard, 523 U.S. at 290, 118 S.Ct. at 1254 (emphasis added) (O'Connor, J., concurring) (on due process violation where Ohio procedure afforded inmate "comports with Ohio's regulations"); As will be shown below, the State of Tennessee Parole Board officials violated their own rules here, which require independence and autonomy of the Board in its decisionmaking, and required that there be no "surprise" evidence such as was presented against Workman, without notice or the opportunity to cross examine or rebut, as occurred here.

And where state officials have unfairly manipulated the clemency process to deny relief (especially by presenting false testimony to clemency or otherwise corrupting the process, as here), the federal courts do find a violation of fundamental due process. As Justice Stevens noted in Woodard, there is a violation of the Constitution if an inmate is subjected to "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence." Woodard, 523 U.S. at 290-91 (Stevens, J., dissenting).

And as here, there is a violation of the Constitution where there is "[i]nterference by an official of the State with the clemency process." See Young v. Hayes, 218 F.3d 850, 851 (8th Cir. July 11, 2000) (emphasis added). Accordingly, where a state official "has deliberately interfered with

the efforts of the petitioner to present evidence to the Governor," due process is violated. In Young, a district attorney in Missouri threatened to fire an assistant DA if she supported a petitioner's application for clemency. Although Judge Richard Arnold, writing for the Eighth Circuit panel, suggested that "there is reason to think that what [the state official] did . . . amounts to [a] crime," it is also apparent that the court's broader principle was that such improper "interference" with the availability of a fair capital clemency proceeding does not pass Constitutional muster. Young, 218 F.3d at 853. "Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created." Young, 218 F.3d at 853. (The State's motion in the Supreme Court to have the stay of execution entered by the Eighth Circuit vacated was denied the next day by the United States Supreme Court. See Hayes v. Young, ___ U.S. ___, 121 S.Ct. 1 (July 12, 2000).)

It must be remembered further that Workman's frustrated attempt to have a fair clemency hearing is not a garden-variety case, nor even a "garden-variety" capital case such as Woodard, in which "actual innocence" was not at issue. Workman has proof of actual innocence, but the courthouse doors have been closed to him. And there are remaining questions whether Workman has been truly "validly" or "fairly" convicted. Woodard, at 1255 (O'Connor, J., concurring). Thus, this case presents the most compelling infirmation imaginable of Woodard and Hayes, which squarely holds (six Justices) that it is unconstitutional to execute the actually innocent. Thus, Philip Workman is entitled to decidedly even *more* process than the more rudimentary, but nonetheless real, process due to a person under Woodard alone who is "validly convicted" and lacks a claim of innocence.

And while procedural due process attaches in clemency, so does substantive due process. Clemency procedures violate substantive due process when the conduct of government officials

"shocks the conscience." Ruehl v. California, 342 U.S. 165, 172, 72 S.Ct. 205 (1953); Wolston v. Arizona Board of Executive Clemency, 117 F.3d 400, 404 (9th Cir. 1997)(clemency case, but not 'actual innocence' claim); Oley v. Hopkins, 5 F.3d 1125, 1133 (8th Cir. 1983)(Gibson, J., dissenting).

As will be shown *infra*, in this case of "actual innocence," within the meaning of Herrera, supra, Philip Workman has been denied essential procedural and substantive due process through state action. Workman was arbitrarily, unlawfully and unconstitutionally deprived of the process to which he was entitled under State law.

B. The Due Process Clause Protects Workman's Further State-Created Liberty Interests In (1) Having An Autonomous Parole Board Make An Impartial Recommendation To The Governor; and (2) Having No "Surprise" Evidence Offered Against Him, Both in Violation of State Statutes, Regulations and Rules to the Contrary.

In addition to the substantive protections afforded by the Fourteenth Amendment, the Due Process Clause requires that clemency procedures comport with State-created structures placed on the process. Having established these proceedings, a State must comport with due process. See Woodard, *supra*, 525 U.S. at 295 n.4 (Stevens, J., dissenting); Evitts v. Lucy, 469 U.S. 387, 392, 400-01 (1985).

Tennessee law requires that the Parole Board remain an "autonomous" entity which "shall be separate functionally and administratively from any other agency." T.C.A. § 48-28-103(a).³ In addition, when "requested by the governor" of Tennessee, the Board has the statutory

"duty] to . . . collect" the records, mak[e] investigations, and report

³ App. at 531-32.

to the governor the facts, circumstances, criminal records, and the social, physical, mental and psychiatric conditions and histories of prisoners under consideration," as here, for "commutation of sentence."

T.C.A. § 48-28-106(c). The governor's made this "request" explicitly in his "Guidelines" promulgated in 1996 and amended in 1999. See Complaint, ¶ 2, ___.

The Board regulations further specify (as do the statutes) that Board employees, not state prosecutors or the Attorney General, conduct the investigation and gather the facts as to the "circumstances of the offense."⁴ The Attorney General's subversion of these principles of autonomy and independence, and his (successful) attempts to manipulate the process against Workman by simultaneously representing the State prosecution, the Board and the Governor, and his office's orchestration and manipulation of a public relations campaign to prejudice the Board members and the public against Workman, all violated these statutory and regulatory requirements for independence of the Board's decisionmaking, in violation of due process. See *infra* for detailed documentation of these covert subversions, the evidence of which became apparent only after the hearing was over by means of public records requested and obtained by Workman's counsel.

Finally, the specific regulations the Board drew up (apparently in collaboration with and with the advice of the Attorney General, acting as its counsel and as a litigant, see *infra*), required that all "documentation" to be used at the "hearing" be filed with the Board and provided to the opposing counsel 10 days before the hearing.⁵ Yet the Board, despite this rule, and of the Chairman's and Board attorney's further reiteration of the rule to counsel for the State, and despite

⁴ Parole Board Reg. 1160 1-1-15(d)(3). App. at 534.

⁵ Capital Case Hearing Form at ¶3, App. at 527.

a letter filed by the State 10 days before the hearing reciting that the State would present at the hearing only what it had previously given notice of, nevertheless permitted the State to present surprise expert documentary (and false) evidence against Workman, in flagrant violation of its own rules. See Transcript of Clemency Hearing;⁶ Affidavits of Donald B. Dawson;⁷ Letter from Assistant DA John Campbell to Charles Traughbet;⁸ Campbell's Notes of Feb. 15, 2000 (74-Clemency Hearing Meeting).⁹

C. Philip Workman's Constitutional Rights Further Were Violated By The Knowing Presentation Of False And Misleading Testimony.

Before the Board, Philip Workman was the victim of falsified testimony apparently solicited and then presented by state officials. With the issue before the Board being whether Lt. Oliver was hit by one of Workman's bullets or hit by friendly fire, the State presented the false testimony of (1) officer Clyde Keenan that an immediate check of police weapons established no police officer, other than Oliver, fired a weapon, and (2) Dr. O.C. Smith that Oliver's mortal wound contained aluminum residue left by the type of bullets that were in Workman's gun.

i. The Attorney General's Office Was Involved In Taking And Presenting Clyde Keenan's Sworn Statements That No Other Police Officer Fired A Weapon.

⁶ App. at 349-45.

⁷ App. at 538-39.

⁸ App. at 540.

⁹ App. at 541.

On February 25, 2000, supposedly "recused" Parole Board Member Ray Maples¹⁷ contacted the Assistant District Attorney (ADA) who would represent the State at the clemency hearing, John Campbell, with suggestions for investigation. Specifically, Maples suggested that ADA Campbell investigate what time Memphis Police Lieutenant Clyde Keenan and his "Shoot Team" arrived at the scene of the shooting, and when guns possessed by the other officers at the scene were examined.¹⁸

ADA Campbell forwarded these remarkable suggestions from member Maples to Assistant Attorney General (AAG) Pruden in Nashville. Id. AAG Pruden assigned AAG Joseph Whalen the task of reviewing the file to ascertain whether it contained any material addressing Maples's questions, and then contacting ADA Campbell with his findings regarding the "file."¹⁹ AAG Pruden wrote ADA Campbell, "I was just thinking that this would be good if there is nothing in the file. Then we could get an affidavit from this person."²⁰

On March 9, 2000, apparently satisfied that "there is nothing in the file," ADA Campbell

¹⁷ At Workman's request in early 2000, Maples recused himself during February, 2000, because he was a lifetime (but now retired) Memphis policeman. 2/2/00 Communication From Maples, App. at 542; 2/4/00 Letter From Donna Blackburn To Christopher Minton, App. at 543. Later last year, Maples reversed this recusal, without explanation, and once again actively participated in the Workman case, again openly adverse to Workman's application before any hearing. In December 2000, Maples complained he had not received documents concerning Workman's clemency application, and insisted he had not recused himself. 12/14/00 Communication From Maples, App. at 544. Then on December 19, 2000, he again announced recusal. 12/19/00 Communication From Maples, App. at 545. However, he later sent suggested adverse questions to the State to use against Workman at the hearing. See 2/25/00 Communication From John Campbell To Glenn Pruden, App. at 546.

¹⁸ 2/25/00 Communication From John Campbell To Glenn Pruden, App. at 546.

¹⁹ 2/25/00 Communication From Glenn Pruden To John Campbell, App. at 546.

²⁰ Id.

obtained a sworn statement from Keenan at the State Attorney General's Office in Nashville. In that statement, Keenan swore that the night of the Oliver shooting, he was the Commander of the "Shoot Team," a group of officers that perform an investigation any time there was a police use of deadly force. Keenan claimed that he and fellow police officer Rick Wilson were immediately at the scene of the shooting. Keenan proclaimed "We were probably on the scene between a minute and a minute and a half after the time that we heard the officer was down."¹⁴ Keenan made further claims about what he supposedly saw when he arrived.

The first thing that we'd found was two officers down. Both of them were known to me. One of the officers was a former partner of mine by the name of Ronnie Oliver. The other police officer, Officer Stodderd (sic), was an officer I was familiar with. He was down also. Stodderd (sic) had been hit in the arm. Oliver had been hit somewhere in the torso; was badly injured. And at that particular point, we went to try to aid him in any way we could awaiting the arrival of the paramedic crews. ... Officer Parker was ... standing actually between Lt. Oliver and Officer Stodderd (sic).¹⁵

Keenan continued that he went to Oliver's aid, and, after placing him in an ambulance, he began checking the weapons of the other officers that were at the scene:

[W]e needed to ... make sure that any weapons that were there on the scene were not any danger to anybody. So we actually check officers' weapons at that particular point.... So the first thing that I did, the first weapon that I actually checked was Officer Parker's weapon, his service revolver... There was no indication at all that that weapon had been fired.¹⁶

ADA Campbell then asked "What about Officer Stodderd (sic)? Was his

¹⁴ Transcript of 3/9/00 Sworn Statement, App. at 552.

¹⁵ *Id.* at 552-53.

¹⁶ *Id.* at 554-59.

weapon checked also?"¹⁷ Keenan responded:

The weapon was checked, and his was a little bit different situation. It was in his holster, and his weapon really ended up being checked at the hospital. So once he got to the hospital, both his weapon and the weapon for Lt. Oliver were secured. Lt. Oliver's had been fired. Stoddard's had not been fired.¹⁸

The State submitted Keenan's sworn statement at an April 2, 2000, informal clemency proceeding held by a Policy Advisor to the Governor, Justin Wilson.¹⁹ Because the en banc United States Court of Appeals for the Sixth Circuit granted a request that it review the case, the Governor withheld his decision on whether to commute Workman's death sentence.

In the fall of 2000, after the Sixth Circuit announced it was equally divided on whether it would review the case, the Governor announced that Workman would have a second opportunity to present evidence on his claims, this time directly to the Parole Board. A hearing was scheduled for January 25, 2001. In preparation for that proceeding, Attorney General Summers contacted ADA Campbell, the prosecutor, to recommend highly that you call Clyde Keenan to testify at the

¹⁷ Id. at 559.

¹⁸ Id. at 559-60.

¹⁹ Transcript of 1999 Clemency Proceeding, App. at 567-68. The Wilson informal proceeding was held on very short notice because the Parole Board had refused at that time to give Workman any hearing because it claimed it had no time to do so, during a period of about a week that crisscrossed in late March and early April, 2000, after the Tennessee Supreme Court hastily set a date for execution after a Sixth Circuit panel had denied an appeal. The early April execution thus temporarily scheduled shortly was stayed when the en banc Sixth Circuit granted review. Workman's counsel objected at that time to the short notice, and to other procedural problems in that informal proceeding.

hearing."²⁰

At the January 25, 2001, hearing, Keenan reiterated the substance of his prior statement, emphasizing that he was the first officer on the scene - arriving within one minute of hearing the call "shots fired."²¹ Keenan also added that (1) he sent police officer Gary Ball from the crime scene to the hospital to check Stoddard's weapon,²² and (2) to check a gun to ascertain whether it was fired, one must examine it within a couple of hours of the incident.²³

Memphis Police Radio Dispatch Log Cards (Dispatch Cards), a transcript of police radio transmissions (Radio Transcript), and other police documents reveal that Clyde Keenan's sworn statements are false.

Time entries on the back of the Dispatch Cards record that the call "shots fired" went out at 10:35 (10:35 p.m.).²⁴ The Dispatch Cards reveal that, contrary to Keenan's sworn statement and hearing testimony, Keenan (#1012)²⁵ did not arrive at the scene until 10:41 (10:41 p.m.), six minutes

²⁰ 1/3/01 Communication From Summers To Campbell, App. at 569. As discussed more fully below, Summers during this entire period was representing the Payole Board.

²¹ Transcript of 1/25/01 Clemency Hearing, app. 253, 265.

²² *Id.* at 264-65.

²³ *Id.* at 259.

²⁴ Dispatch Card, App. at 571.

²⁵ For purposes of radio communication, each Memphis Police Officer is assigned a number. At the January 25, 2001, hearing, Keenan stated that as Commander of the Shoot Team, he sent Officer Ball to the hospital to check Stoddard's weapon. Transcript of 1/25/01 Clemency Hearing, App. at 253, 265. We therefore know from this and other information that the number assigned to Keenan is 1012. See Radio Transcript, App. at 583 (1012 radios "Advise Sgt. Ball from my unit on the scene to proceed immediately to John Gaston Hospital ..."; 8:46:51 Police Report of Gary Ball, App. at 589 (Lt. Keenan instructs Ball to go to the hospital))

after the "shots fired" call.²⁵ The Dispatch Cards further reveal that Keenan was not, as he claimed, the first officer on the scene - numerous officers arrived before him.²⁶ Indeed, Officer Hayes (#106) had charge of the crime scene prior to Keenan's arrival.²⁷ And, most telling, is that while Keenan claimed that he saw Stoddard lying on the ground with an arm wound, the Dispatch Cards and the Radio Transcript reveal that at the time Keenan actually arrived at the scene, *Stoddard had already left for the hospital.*

Police documents demonstrate that when Officer Harry Larkin (#146)²⁸ arrived at the scene, he put Stoddard in his patrol car and left for the hospital.²⁹ The Radio Transcript reveals that Larkin (#146) left the scene with Stoddard minutes before Keenan (#1012) arrived at the scene.³⁰ The Dispatch Cards confirm that Larkin (#146) left to transport Stoddard to the hospital at 12:39 (10:39 p.m.), and Keenan did not arrive at the scene *until two minutes later.*³¹

Police documents further demonstrate that Keenan fabricated his claim that he immediately sent Officer Ball to the hospital to check Stoddard's weapon, and Stoddard's weapon was therefore secured in scene as Stoddard reached the hospital.

²⁵ Dispatch Card, App. at 571.

²⁶ *Id.*

²⁷ Arrest Reports, App. at 591-92.

²⁸ See Officer Roster, App. at 191.

²⁹ 8/6/81 Statement of Otis W. Stewart, App. at 594.

³⁰ Radio Transcript, App. at 575.

³¹ Dispatch Card, App. at 571.

As noted earlier, the logs show "shots fired" at 22:35 (10:35 p.m.).³¹ While Keenan did thereafter send Ball to the hospital, he did so *an hour and a half later*³² – and then not to have Stoddard's weapon checked but *to see if Ball could get a statement from Workman* who police were transporting to the hospital where Stoddard was being treated.³³ Ball went to the hospital and did as instructed; he attempted to talk to Workman.³⁴

Ball first saw Stoddard's weapon *two hours later*, at 2:00 a.m., which was three and a half hours after the shooting.³⁵ And even then, Ball did not obtain Stoddard's weapon through a search aimed at securing it – officers who had taken custody of Oliver's and Stoddard's possessions approached him with the gun.³⁶ Keenan's story that he immediately sent Ball to the hospital to check Stoddard's weapon is simply false.

2. *The State Presented Dr. O.C. Smith's Fabricated Testimony That Scientific Evidence Establishes That Workman Shot Oliver.*

To attempt to counter Workman's expert evidence that the mortal wound to Oliver was inconsistent with wounds caused by Workman's ammunition, the State presented the Shelby County Medical Examiner, Dr. O.C. Smith. Based on a supposedly sophisticated scientific test, Smith stated

³¹ *Id.*

³² *See* 8/6/91 Police Report, App at 589 (Workman arrested at approximately Midnight – at that point Keenan directs Ball to go to the hospital).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*, App. at 590

³⁶ *Id.*

that he was "100 percent" certain that Workman shot Oliver.³⁷ Because the State provided Workman no notice of Dr. Smith's testimony despite being required by Board rules to do so, *see supra*, and because the Parole Board allowed this to occur over objection from Workman's counsel,³⁸ and further denied Workman the opportunity to cross-examine Smith,³⁹ Workman was unable to challenge Smith's assertions. A subsequent investigation, however, reveals the utter unreliability and manufactured falsity of Smith's testimony.

Because Workman fired aluminum coated hollow-point bullets the night of Oliver's death, Dr. Smith stated that he decided to "investigate" whether Oliver's mortal wound contained aluminum residue. Smith testified that in an effort to establish this fact, he had soft tissue samples of Lieutenant Oliver's mortal wound tested for metals under a scanning electron microscope with energy dispersive x-rays (SEM-EDX). He claimed that (1) before the test he was able to see under a microscope metallic fragments in the tissue samples;⁴⁰ (2) the test demonstrated these metallic fragments were aluminum;⁴¹ and (3) when a similar test was run on a pig's foot which Dr. Smith shot with an aluminum coated bullet, a similar positive result for aluminum occurred.⁴² Based on these tests, Smith confidently asserted that he was 100% certain that Workman shot Oliver.⁴³

³⁷ *Id.*, App. at 340-43, 346.

³⁸ *Id.*, 352-54.

³⁹ Capital Case Hearing Format #6, App. at 537.

⁴⁰ *Id.*, App. at 342.

⁴¹ *Id.*, App. at 343.

⁴² *Id.*, App. at 340.

⁴³ *Id.*, App. at 343, 346.

Smith failed to tell the Parole Board, however, that he had his tissue samples tested earlier and those tests failed to show the aluminum which he claimed was present.⁴⁶ This initial test is apparently accurate because, as an eminent medical examiner subsequently queried about Smith's testimony by Workman's counsel opined, bullets do not leave residue in soft human tissue.

Dr. Werner Spitz, author of the leading pathology treatise *Medicolegal Investigation of Death*, declares that (1) in his forty-eight years as a pathologist he has never heard of metal fragments from a bullet being left in soft human tissue; (2) he has never tested for trace metals in soft human tissue, and (3) he is not aware of any other pathologist who has ever performed such a test.⁴⁷

The "test" supporting Dr. Smith's "100%" certainty (which more than one Board member appeared to rely on) is, accordingly, no test at all. The Board, of course, has no opportunity to hear Spitz's refutation and learn this, because it permitted the State to "surprise" Workman with this "ambush" testimony and documentation, contrary to Board rules, and thus Workman's counsel had no way to know what scientific evidence would be offered, or (without consultation with an expert) know if, or how, it could be rebutted.

Even more troubling (if possible), however, is the fact that Smith left out vital details invalidating the results he obtained, details which indicate that his claims about Workman's guilt are simply not true.

Smith told the Parole Board that he used as a control a pig's foot he shot with an aluminum coated bullet. Dr. Smith testified that the pig's foot tested positive for aluminum, and this fact

⁴⁶ 3/14/01 Affidavit of Lou Boykins, ¶6, App. at 555.

⁴⁷ 3/9/01 Declaration of Werner H. Spitz, M.D., App. at 590.

establishes that when an aluminum bullet travels through soft tissue it leaves aluminum residue.⁴⁶ The lab technician who actually performed the test on the pig's foot, however, declares that it did not test positive for aluminum.⁴⁷

While Dr. Smith had stated that he could see metal fragments in the tissue sample with his naked eye,⁴⁸ when the lab technician put the tissue sample under the electron microscope, she did not see any such claimed aluminum fragments.⁴⁹ Dr. Aaron Puckett, an expert in SEM-EDX, also contacted after the testimony by Workman's counsel, declares that if such fragments actually were in the sample, as Smith claimed, under the electron microscope they would have "lit up like a neon sign on a dark night."⁵⁰ Accordingly, "It is unfathomable to explain how metallic granules could be seen by Dr. Smith with his naked eye, and then not detected with the electron microscope"⁵¹ The lab technician's inspection of the tissue sample under the electron microscope thus eliminates any possibility that the tissue sample contained aluminum fragments. Dr. Smith left out this critical detail in his testimony before the Pirole Board.

Finally, Dr. Puckett declares that under the protocol used by the lab technician to test the tissue samples, background interference could be responsible for any positive aluminum reading.⁵²

⁴⁶ App. at 346.

⁴⁷ 3/14/01 Affidavit of Lou Boykins, ¶5, App. at 597; 3/15/01 Declaration of Dr. Aaron Puckett, ¶73d, ¶8, App. at 621, 624.

⁴⁸ 3/14/01 Affidavit of Lou Boykins, ¶4, App. at 597.

⁴⁹ 3/15/01 Declaration of Dr. Aaron Puckett, ¶3e, App. at 623.

⁵⁰ *Id.*

⁵¹ *Id.* ¶7, App. 623.

⁵² *Id.* ¶¶ 4-6, App. 622-623.

The supposed presence of aluminum could therefore be nothing more than a false positive from the aluminum in the microscope itself.

Based on SEM-EDX testing, Dr. Smith testified that Lieutenant Oliver's moral wound contained aluminum residue, and he was therefore "100% certain" that Workman shot Oliver. The only thing it appears anyone can say about this testimony with 100% certainty, however, is that Dr. Smith's claims were wholly misleading, and apparently simply false.

3. *The State's Presentation Of False Testimony Entices Workman To Relief.*

Workman has made a substantial showing that he has been the victim of an unconstitutional clemency proceeding involving "the deliberate fabrication of false evidence." Woodard, 523 U.S. at 290, 118 S.Ct. at 1254 (Stevens, J., dissenting). He has been the victim of actions which may be a criminal offense. See Young v. Hayes, 218 F.3d at 853 (unconstitutional clemency hearing where there is reason to think that what state actor did "amounts to the crime of tampering with a witness"). See Tenn. Code Ann. §39-16-702 (perjury statute); §39-16-705 (aggravated perjury statute) (perjury made during, or in connection with, official proceeding). Workman's showing that he is likely to prevail in this action requires this Court to enjoin his execution at least until his constitutional rights are vindicated.

D. By Acting As Prosecutor, Counsel To The Parole Board, And Counsel To The Governor, The Attorney General Violated The Constitution And Arbitrarily Deprived Workman Of His Right To An Autonomous And Independent Parole Board, I.e., an Impartial Decisionmaker as Required by the Due Process Clause.

"The appearance of even-handed justice is at the core of due process." Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971)(Harlan, J., concurring). Perhaps the most essential

requirement of due process is that of an impartial decision-maker. *Geldberg v. Kelley*, *supra*, 197 U.S. at 271; *In re Murchison*, 349 U.S. 133, 75 S.Ct. 633 (1955); *Wong Yang Sung v. McGrath*, 359 U.S. 33, 43-46, 70 S.Ct. 445, 451 (1950); *Turney v. Ohio*, 373 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Even the appearance of partiality by the decision-maker violates due process. *Hunt v. United States*, 348 U.S. 11 (1954). Tennessee law recognizes these values - it requires that the Parole Board be "autonomous" and independent. Board members are even forbidden to have outside business or professional employment. T.C.A. § 40-28-103(u). See again the various Tennessee statutes and regulations, cited *supra*. Indeed, Board executive director Donna Blackburn wrote to Workman and the State's counsel on the occasion of Board member Maples' first (but as we know now, not fully effective) recusal that the Board thus promised applicants such as Workman, "integrity and impartiality."²³ Contrary to these commands, the Attorney General and/or his Assistants advised the Parole Board, as well as the Governor, while simultaneously preparing and orchestrating the case against Workman.

1. *Summers And/Or His Assistants (1) Held Closed Meetings With The Governor's Office And Officials Of The Parole Board; (2) Worked With The Shelby County District Attorney's Office In Preparing and Mapping The Case To Be Presented Against Workman In Clemency Proceedings; and (3) Orchestrated a Media and Public Relations Campaign Against Workman That Was Aimed to Prejudice the Board and the Public Against Him.*

Unbeknownst to Workman, around September 20, 1999, Attorney General Pam Sizemore, Michelle Long (then Legal Counsel to the Governor), and Parole Board Chairman Charles Traugher met. Documents indicate the Attorney General supplied the Board and the Governor with the State prosecutors' (contested) version of Workman's offenses at that time. At that meeting, Chairman

²³February 4, 2000 letter from Donna Blackburn, App. at 542.

Traughber inquired what role the Attorney General's Office should play if a formal hearing was held on a clemency petition in a capital case. On September 30, 1999, Summers informed Chairman Traughber that he and his assistants had considered this issue and had determined that their role should be that of "Legal Advisor to the Parole Board."⁸⁶

On January 3, 2000, the Tennessee Supreme Court set an April 6, 2000, execution date. On January 28, 2000, Summers convened a "Capital Punishment Meeting" attended by, among others, Justin Wilson (Policy Deputy to the Governor), Parole Board Chairman Traughber, the Commissioner of the Department of Corrections, and members of the Attorney General's Office.⁸⁷ Summers gave opening remarks, and the attendees discussed the status of the Workman case and clemency procedures that would be employed to process Workman's clemency request.⁸⁸ Workman and his counsel had no knowledge such a meeting was convened.

On the heels of the January 28 meeting, Assistant Attorneys General (AAGs) Glenn Pruden, Amy Turkington, and Joe Whalen met to discuss what recommendations they should make to ADA Campbell.⁸⁹

On February 11, 2000, a second Capital Punishment Meeting was convened and attended by representatives of the Governor's Office, the Parole Board, and the Attorney General's Office. The

⁸⁶ 9/30/99 Letter From Paul Summers to Charles M. Traughber, App. at 625; see 9/20/99 Memo from Attorney General's Office to Charles Traughber, Jay Ballard, Michelle Long, App. at 659-60; Compare Excerpts of Brief of Ricky Bell in *Workman v. Bell*, 6th Cir. No. 96-6552, App. at 662-63 (identical language contained in 9/29/99 memo).

⁸⁷ 1/20/00 Communication From Leigh Ann Apple to Andy Bennett et. al., App. at 626.

⁸⁸ 1/28/00 Capital Punishment Meeting Agenda, App. at 627.

⁸⁹ 2/11/00 Communication From Pruden To Amy L. Turkington, Joe Whalen, App. at 629.

attendees discussed, among other issues, the Workman case and execution procedures.⁶² Thereafter, Parole Board Chairman Traugott told the Parole Board Investigator who had been assigned the task of investigating the Workman case that she did not have to do anything - he had all the facts he needed.⁶³

On February 25, 2000, Summers was involved in a third Capital Punishment Meeting. This meeting was attended by, among others, Jay Ballard (Governor's Legal Counsel), Bettye Stanton (Governor's Administrative Assistant), Sharon Curtis-Fair (Attorney General's Media Advisor), numerous AAGs, and Teresa Thomas (Parole Board Staff Attorney).⁶⁴

At the April 3, 2000, informal proceeding at which ADA Campbell submitted Clyde Keenan's false sworn statement, Summers appeared at the Wilson proceeding "on behalf of the Governor."⁶⁵ Ballard joined him on the Governor's behalf,⁶⁶ establishing that Wilson, Summers, and Ballard were all on the same team working for the Governor. Even AAG Proctor, who was in the most direct contact with ADA Campbell, the State's chief prosecutorial spokesman at the "hearing," to plan the State's strategy against Workman, at the "hearing" stated publicly that he was "with the General." [Summers], and would not be "sitting with" Campbell. After the Wilson proceeding concluded, Summers announced that he was going to discuss the facts of the Workman case and

⁶² 2/13/00 Capital Punishment Meeting Agenda, App. at 629.

⁶³ 2/22/00 Communication Talana Schmitt, App. at 630.

⁶⁴ 2/23/00 Communication From Leigh Ann Apple Jones To Jay Ballard et. al., App. at 631; 2/25/00 Capital Punishment Meeting Agenda, App. at 632.

⁶⁵ Transcript of In Re: Philip Workman, App. at 634-35.

⁶⁶ *Id.*

advise the Governor.⁶⁵

On October 13, 2000, after the Sixth Circuit deadlocked on whether to review the case, *and before* Workman initiated a second clemency proceeding, the Attorney General's Media Advisor (1) sent a news producer a copy of the Wilson hearing transcript; and (2) told the producer that just because Oliver's daughter felt Workman should not be executed did not mean that Workman was innocent.⁶⁶

On October 24, 2000, after the Sixth Circuit deadlocked on whether it would review the case, Workman filed a second request with the Parole Board asking that it recommend to the Governor that he commute Workman's death sentence.

On November 20, 2000, AAG Pruden reviewed a letter Clyde Keenan wrote in a newspaper which restated the false claims he made at the clemency hearings before Justin Wilson and the Parole Board. Pruden suggested Eric Keenan send his letter to additional newspapers for further publication.⁶⁷

On December 11, 2000, Summers wrote AAG Pruden that he assumed ADA Campbell would be presenting the testimony of Shelby County Medical Examiner Dr. O.C. Stahl at the clemency hearing (testimony we now know would be given falsely). This was an apparently knowing reference to a "hearing" that the Parole Board had, at this point, not yet granted. Summers

⁶⁵ Summers made such statements in an interview with the CBS affiliate in Nashville following the Justin Wilson proceeding.

⁶⁶ App. at 626.

⁶⁷ App. at 637.

told Pruden. "I will be there in the capacity that I was last time [as counsel to the governor]."⁶⁸

Also on December 11, 2000, Summers and AAG Pruden discussed the timing of having a re-enactment of events as the State asserted they occurred at the Wendy's Restaurant where Oliver was shot. When Summers questioned AAG Pruden's suggestion that the re-enactment occur after Workman's execution, Pruden wrote Summers that doing it then "would be a validation of the Governor's judgment."⁶⁹

Over the following days, the Governor's Office, the Parole Board, the Attorney General's Office, and ADA Campbell worked to find an agreeable date for the parole hearing. On December 12, 2000, ADA Campbell informed AAG Pruden that January 23, 2001, was a bad date because he and Dr. Smith had a trial scheduled.⁷⁰ Sol. Gen. Michael Moore informed Jay Ballard (Governor's Legal Counsel) of the conflict ADA Campbell and Dr. Smith had on January 23.⁷¹ Ballard responded that he would focus on trying to get the hearing set on January 25.⁷² Two days later, Parole Board Chairman Traugotter told Parole Board Members that he considered January 25, 2001, an appropriate date for a hearing on the Workman case.⁷³ No one contacted Workman's attorneys

⁶⁸ 12/11/00 Communication From Paul Summers To Glenn Pruden, App. at 638. This had to be a reference to the Wilson proceeding in April 2000 (at which Gen. Summers represented the governor), as there was no previous capital clemency proceeding before the Board. Gov.

⁶⁹ App. at 639.

⁷⁰ 12/12/00 Communication From Glenn Pruden To Mike Moore, App. at 640.

⁷¹ 12/12/00 Communication From Mike Moore To Glenn Pruden et. al., App. at 640.

⁷² *Id.*

⁷³ 12/14/00 Communication From Charles Traugotter To Board Members, App. at 644.

to ascertain whether they or their witnesses would also be available that day.

Over the weeks that followed, AAG Pruden and ADA Campbell prepared material for presentation at the January 25 hearing.²⁵ Summers recommended that ADA Campbell present specified evidence,²⁶ thanked ADA Campbell “for all you do,”²⁷ and let Campbell know that he was looking forward to Campbell’s presentation. In Summers’s words, “It will be good.”²⁸

On January 5, 2001, AAG Pruden explained to ADA Campbell Gen. Summers’s reasoning in informing the press of an escape Workman attempted in 1986. AAG Pruden reported to Summers and the Attorney General’s Media Advisor that Campbell agreed with Summers’s strategy.²⁹

On January 9, 2001, Summers and others attended another meeting concerning Workman; this meeting was attended by, among others, Jay Holland (Governor’s Legal Counsel), James Floyd (Governor’s Deputy Legal Counsel), Sol. Gen. Michael Moore, AAG Pruden, AAG Whalen, Teresa Thomas (Parole Board Staff Attorney), and Donna Blackburn (Parole Board Executive Director). At that meeting, the attendees discussed the upcoming hearing, Dr. Smith’s testimony at that hearing, and logistics for the hearing and subsequent execution.³⁰

On January 10, 2001, the Attorney General’s Media Advisor informed AAG Pruden that a

²⁴ See 1/2/00 Communication From Glenn Pruden To John Campbell, App. at 642; 1/2/01 Communication From Glenn Pruden To Michael Meyer, App. at 643; 1/3/01 Communication From Glenn Pruden To John Campbell, App. at 644.

²⁵ 1/3/01 Communication From Paul Summers To John Campbell, App. at 645.

²⁶ *Id.*

²⁷ 1/4/01 Communication From Paul Summers To John Campbell, App. at 646.

²⁸ App. at 647.

²⁹ 1/9/01 Communication From Glenn Pruden To Amy Tarkenton, App. at 648.

television station was doing a story on the man who took Harold Davis's false statement that he saw Workman shoot Oliver. The Media Advisor relayed the man's request that the Attorney General meet with him.⁸⁰ Two days later Pruden informed Campbell that a Knoxville newspaper would be publishing a story on Workman's 1986 escape attempt in the coming days, (thus fulfilling Gen. Summers' specific suggestion about "disclosing" this as part of a public media campaign).⁸¹

In the weeks that followed, General Summers, AAG Pruden, and ADA Campbell continued preparing material for presentation at the January 25 hearing.⁸² At that hearing the Parole Board voted 6-0 to recommend that the Governor not commute Workman's death sentence. As the transcript reflects, several Board members were openly hostile to Workman and to Workman's witnesses (including a nationally eminent medical examiner, Dr. Cyril Wecht), and his counsel. One member told Workman, as he announced his adverse decision, that he "resent[ed]" Workman's insistence on his actual innocence, because it suggested the police officers who were shot were "stupid[]" and "ignorant[.]"⁸³

⁸⁰ App. at 649.

⁸¹ App. at 650.

⁸² 1/10/01 Communication From Glenn Pruden To John Campbell, App. at 651; 1/16/01 Communication From Glenn Pruden To Paul Summers et. al., App. at 652; 1/17/01 Communication From Glenn Pruden To John Campbell, App. at 653; 1/18/01 Communication From Glenn Pruden To Paul Summers et. al., App. at 654; 1/19/01 Communication From Glenn Pruden To Paul Summers, App. at 655; 1/19/01 Communication From Pruden To Summers, App. at 656.

⁸³ The ridicule of Dr. Wecht, who consulted on the Kennedy assassination file, among others, Congress, echoed earlier public comments by Gen. Summers, who on March 28, 2000 asserted publicly that there was no doubt Workman shot Lt. Oliver, and ridiculed Workman's efforts to prove otherwise by saying, next we'll be hearing about a man shooting from a "grassy knoll." See *Officer's daughter, Workman's seek to stop execution*, Memphis Commercial Appeal, March 28, 2000. Memphis.com.

The day after the clemency hearing, Attorney General Summers appeared on a televised newscast. The television announcer asked Summers whether it was the Parole Board's function to retry the case. Summers responded that the Parole Board:

chose to have a lengthy hearing, because, I think, there were some answers that they wanted and also I thought it would help the public understand, and they thought it would help the public understand.⁶¹

2. *By Acting As Advisor To The Parole Board And Governor While Simultaneously Preparing The Case Against Workman, Summers And His Assistants Violated Workman's Constitutional Rights.*

Numerous courts of appeals judges have acknowledged that when decision-makers in the clemency process either are biased or appear to be biased, there is a violation of due process and/or equal protection. Pickens v. Tucker, 23 F.3d 1177, 1178 (8th Cir. 1994)(Arnold, C.J., Arnold, McMillian, Wolfman, JJ., dissenting from denial of rehearing en banc)(in clemency, death-sentenced inmate entitled to "unbiased" "sensitive and neutral decision-maker." "An impartial decision-maker is a fundamental requirement of due process."); Orey v. Hopkins, 972 F.2d 210 (8th Cir. 1992)(denying motion to vacate stay where district court granted stay based on Attorney General's representing state in seeking execution while also sitting on clemency board)

In this case, the triple roles of the Attorney General as both party and agent of the decision makers indicates that Philip Workman's constitutional rights were violated. *Id.* Any gubernatorial control with the Attorney General under these circumstances on this issue is likewise improper. See Workman v. Arizona Board of Executive Clemency, 117 F.3d 400, 402, 404 (9th Cir. 1997) (AG acting as "legal counsel to the Board" and also "actively involved on behalf of the prosecution" was, in appellate panel's unanimous view, "unfortunate and inexcusable"; but two judges not finding

⁶¹ 1/30/01 Transcript of Television Excerpt, App. at 658 (emphasis added).

this to "shock the conscience" when the dual role was fully disclosed and noted at hearing to petitioner and complained about to the board; no "actual innocence" claim involved; one-judge dissent. (Emphasis added).

With his very life in the hands of the Governor and the Board, Philip Workman was entitled to the assurance that a clemency decision would be made by an "impartial" and just decision-maker, who shunned even the appearance of impropriety, recognizing the gravity of the decision before them and the life interest at stake. (Cf. Blackburn letter, promising "impartiality.")

In carefully phrased statements to the Sixth Circuit and to the media, the Attorney General and his assistants have made general denials of "allegations" against his playing a "dual role" without any specific explanation or discussion of his conduct. Likewise, when questioned by the media⁸⁴ about a conflict of interest in his multiple roles, the Attorney General simply shrugged it off to the Tennessee Constitution. By thus indicating that they see no problem with the Attorney General's multiple roles, "[t]he State [officials] ha[ve] failed to grasp the judicially shocking nature of these conflicting roles." *Orey v. Stenberg*, 34 F.3d 655, 642 (8th Cir. 1994) (Gibson, J., dissenting). "The attorney general, having successfully obtained affirmance of [Workman's conviction and] death sentence in [the federal courts] can hardly be expected to oppose the execution of this sentence" when whispering in the Governor's ear as his counsel. *Orey*, 5 F.3d at 1134 (8th Cir. 1993) (Gibson,

⁸⁴See Videotape of telecast interview, App. ___; General Summers. "I'm the Attorney General of the State of Tennessee, and by the Constitution, I'm the Governor's lawyer, too." Interviewer: "But does that make for a conflict?" General Summers: "Absolutely not. I'm gonna give the Governor objective advice. I'm gonna get the facts out there and he can make that decision."

J., dissenting). See also *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 459 (1971). "The State has created a playing field that is tilted toward denial and is therefore fundamentally unfair." *Otey*, 5 P.3d at 1134 (Gibson, J., dissenting). Workman has been denied substantive due process "in view of the actual conflicting positions of the attorney general in [his] case." *Otey v. Steinherr*, 34 F.3d 635, 641 (8th Cir. 1994)(Gibson, J., dissenting).

Here, General Summers personally suggested witnesses, discussed litigation strategy, and pondered media strategy, including a glibish post-execution re-enactment which would "validate" the governor's decision (presumably to deny clemency). At the same time, Summers was purporting to be an impartial adviser to the board and the governor. The General's conduct is so outrageous as to "shock the conscience," and even by this elevated standard Philip Workman is entitled to the relief requested. However, in an "actual innocence" case, as here, a "shock the conscience" standard is not necessary. Cf. *Wrightzek*, *supra*, 117 P.3d 400 (9th Cir. 1997)(dual AG roles; not actual innocence; facts less egregious; but AG's conduct nevertheless "inexcusable").

K. Philip Workman's Constitutional Rights Were Violated by the Board's Use of an Undefined "Burden," By the Board's Permitting Use of Surprise Evidence, and by the Board's Denial of Cross-Exam and Rebuttal.

Philip Workman's Constitutional rights, including Due Process, Eighth Amendment, and Sixth Amendment Confrontation and Compulsory Process rights, were violated by the Board's imposing on him a "burden" of unknown and undefined nature, and by the Board's breaching its own rules to permit the State's presentation of "surprise" evidence, and by the Board's denying him the

opportunity to meaningfully cross-examine, or to meaningfully rebut, this "ambush" of false "100 percent" scientific evidence by an expert witness.

The State failed to provide Workman any notice that Dr. O.C. Smith was going to claim that the mortal wound to Lieutenant Oliver contained aluminum residue. And when Smith presented this evidence, the Parole Board's edict that Workman could not cross-examine the witnesses against him prevented Workman from establishing that Smith's testimony was false. These were constitutionally intolerable circumstances that mock justice, and should shock any legal conscience.

1. *Uninformed Burden*

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

This claim is meritorious. In the clemency case of *Wilson v. United States District Court*, 161 F.3d 1185, 1186 (9th Cir. 1998), the United States District Court granted a TRO based on the fact that the inmate (Stripongs) "did not have any actual or constructive knowledge of the grounds upon which the [decisionmaker] to rely in considering . . . the clemency request." The Ninth Circuit upheld the TRO, noting that he had a substantial likelihood of winning his claim on the merits. *Id.*

2. *O.C. Smith Surprise Testimony*

Due process also cannot countenance the state's (pathology) (O.C. Smith) springing

purportedly "scientific" evidence at the hearing on Philip Workman – the purported results of a previously unknown "test," performed by someone other than Smith, actually unidentified declarant(s), in turn, also not even subject to cross-examination. This harkens back to the pre-Walter Raleigh days of now-forbidden *ex parte* affidavits. *Cf. Lilly v. Virginia*, 527 U.S.116 (1999). The violation here is even more egregious given that the parties were to provide any such materials before the hearing itself. Violating the letter if not the spirit of pre-proceeding discovery and then introducing new, un-cross-examined materials in a proceeding on a man's life violated due process. Workman's "assertion that the state's communications [the pre-proceeding notice given to Workman] misled his counsel about the issues to be considered in the clemency proceeding states a claim of a violation of due process." *Wilson*, 161 F.3d at 1187.

3. Denial Of Cross-Examination

Finally, there was a denial of due process because Philip Workman was denied the most critical element in the truth-determining process – the "greatest legal engine ever invented for the discovery of truth," (S. Wigmore § 1367 (4d ed. 1940); *Calkins v. Green*, 309 U.S. at 156, 90 S.Ct. at 1935) – the right to cross-examine and confront key witnesses. The clemency board explicitly prohibited Mr. Workman from any cross-examination of the State's witnesses, while the board thoroughly cross-examined Mr. Workman's witnesses as if they were hostile witnesses. Such a deprivation is clearly in violation of Mr. Workman's right to due process for Mr. Workman was essentially denied the only safeguard for testing the value of the statements of the State's witnesses.⁸

⁸"The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." S. J. Wigmore, *Evidence* §1367 (J. Chadbourne rev. 1974)

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

This elementary proposition regarding cross-examination bears repetition:

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

Ginn v. Malloy, 350 U.S. 474, 496, 79 S.Ct. 1400, 1413 (1959) (emphasis supplied).

It is well-settled that in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g., *ICC v. Louisville and Nashville Railway Co.*, 227 U.S. 88, 93-96, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1915); *Willner v. Committee on Character and Efficiency*, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181, 16 L.Ed. 324 (1963). Here, the decision before the Board was not merely important, but life-threatening. With such monumental interests at stake, the flexible principles of due process required "an effective opportunity to defend by confronting any adverse witnesses . . ." *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020 (1970).

In fact, the courts have continually held that when lesser interests than life are at stake, cross-examination is required as a matter of due process. For example, in *Goldberg*, the Supreme Court addressed the rights of a welfare recipient in a hearing to determine whether such aid would be

terminated. The Goldberg court found that the failure to permit confrontation and cross-examination of adverse witnesses was "fatal to the constitutional adequacy of the procedures." Goldberg, 397 U.S. at 268, 90 S.Ct. at 268.

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

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

With Philip Workman's fundamental right to life on the line and no court to hear his evidence, and the risk of execution of an "actually innocent" person at stake, surely he was entitled

to cross-examination. See Herrera, supra. Workman here was denied that most fundamental right, and as a result, the truth has not been fairly determined. If a person who might lose his *entitlement* to welfare benefits is entitled to cross-examination (Cookling), and if a parolee is entitled to cross-examination (Menissey), and food stamp recipients are entitled to cross-examination, then certainly Philip Workman, who has a *fundamental right to life* and to establish his actual innocence, must be entitled to cross-examination to establish his innocence.

Moreover, the very actions of the Board demonstrate the arbitrariness and irrationality of the prohibition against cross-examination in this case. The Board told counsel for Workman that the Board would not allow cross-examination, because the Parole Board proceeding was a "fact-finding proceeding." This is wholly irrational and arbitrary and therefore a violation of due process. *The fact that the proceeding is a fact-finding proceeding is the reason for requiring cross-examination – not denying it* – so the Supreme Court has said for decades.

The procedures provided by the Board violate due process. They also violate the principles of the Eighth Amendment's bar against cruel and unusual punishments, and of the Confrontation Clause and the Compulsory Process Clause of the 6th Amendment, as incorporated in Fourteenth Amendment due process.

IV. CONCLUSION

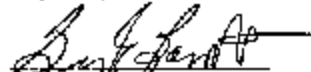
"The Constitution of the United States does not require that a state have a clemency procedure, but . . . it does require that, if such a procedure is created, the state's own officials refrain from frustrating it . . ." Young v. Hayes, supra, 218 F.3d at 853. Philip Workman has been denied a fundamentally fair clemency process, in violation of the Eighth, Sixth and Fourteenth Amendments (and of the parallel Fourteenth Constitutional provisions). The Motion for a Temporary

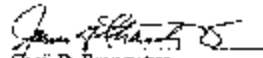
Restraining Order should be granted.

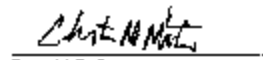
For all the reasons stated above, and as set forth in the Complaint, and its attachments, if any, and in the accompanying Appendix, and as argued to the Court, and based on the entire record, Plaintiff Philip Workman respectfully and earnestly requests and beseeches this Court to consider justice, and to do justice, maintain the status quo, stay the impending execution by lethal injection, and grant this Motion for a Temporary Restraining Order and set a hearing for a Motion for Preliminary Injunction. Plaintiff and his counsel sincerely thank this Federal Court for its attention to this Motion and to his case.

March 27, 2001

Respectfully submitted,


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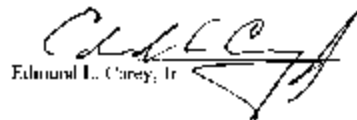

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Certificate of Service

I hereby certify that a copy of the foregoing Memorandum in Support of Motion for Temporary Restraining Order was served by hand on Paul Summers or his designee, Attorney General, State of Tennessee, 500 Charlotte Avenue, Nashville, TN 37243, this 27th day of March, 2001..


Edmund L. Carey, Jr.