

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.	)	OCCA Case
GENTNER F. DRUMMOND,	)	No. MA-2024-_____
ATTORNEY GENERAL,)	
Petitioner,	)	Clemency Hearing re:
	)	Kevin R. Underwood,
	)	DOC # 576482
v.)	
	)	CLEMENCY HEARING
OKLAHOMA PARDON	)	PREVIOUSLY SCHEDULED
AND PAROLE BOARD,	)	FOR WEDNESDAY,
	)	DECEMBER 4, 2024,
Respondent.	)	AT 9:00 A.M.
)	
	)	EXECUTION SCHEDULED
	)	FOR THURSDAY,
	)	DECEMBER 19, 2024,
	)	AT 10:00 A.M.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

COMES NOW Petitioner, the State of Oklahoma, by and through Gentner F. Drummond, Oklahoma Attorney General, as well as Caroline E.J. Hunt, Deputy Attorney General, and Jennifer L. Crabb, Assistant Attorney General and Director of Capital Appeals, and respectfully petitions this Honorable Court for a Writ of Mandamus directed to the Oklahoma Pardon and Parole Board, ordering it to hold, as previously scheduled (but now canceled), the clemency hearing for capital inmate Kevin R. Underwood, Department of Corrections (“DOC”) # 576482, on **Wednesday, December 4, 2024, at 9:00 a.m.** Underwood’s execution is scheduled for December 19, 2024, at 10:00 a.m., and no stay of that execution, whether judicial or executive, has been entered. Nevertheless, on November 29, 2024, the Board canceled the clemency hearing,

apparently on grounds that two Board members had resigned from the five-member Board and that the Board preferred for the hearing to be held once new Board members are appointed to those vacancies. However, because of Underwood's active and imminent execution date, and the fact that the Board still has a quorum available to conduct the meeting—three out of five members—the Board *must* hold the clemency hearing as previously scheduled. Pursuant to Rules 10.1(C)(1) and 10.5(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024), a brief in support is being filed simultaneously herewith that more fully explains and supports the State's position.

Wherefore, for the reasons contained within the State's brief in support, the State respectfully requests that this Court issue a Writ of Mandamus and/or other appropriate relief, ordering the Oklahoma Pardon and Parole Board to hold the clemency hearing for Underwood as previously scheduled.

Respectfully Submitted,

GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA



CAROLINE E.J. HUNT, OBA #32635
DEPUTY ATTORNEY GENERAL
JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL

CAPITAL APPEALS DIRECTOR
313 N.E. 21st Street

Oklahoma City, Oklahoma 73105
(405) 522-4423 FAX (405) 522-4534

ATTORNEYS FOR PETITIONER

CERTIFICATE OF MAILING

On this 2nd day of December, 2024, a true and correct copy of the foregoing was mailed to:

Oklahoma Pardon and Parole Board
Executive Director Tom Bates
General Counsel Kyle Counts
4345 N. Lincoln Blvd., Suite 1082 Oklahoma City, OK 73105

Brendan Van Winkle
Hunter Labovitz
215 Dean A. McGee Avenue, Ste. 707
Oklahoma City, Oklahoma 73102
Counsel for Underwood



CAROLINE E.J. HUNT

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.	)	OCCA Case
GENTNER F. DRUMMOND,	)	No. MA-2024-_____
ATTORNEY GENERAL,)	
	)	Clemency Hearing re:
Petitioner,	)	Kevin R. Underwood,
	)	DOC # 576482
v.)	
	)	CLEMENCY HEARING
OKLAHOMA PARDON	)	PREVIOUSLY SCHEDULED
AND PAROLE BOARD,	)	FOR WEDNESDAY,
	)	DECEMBER 4, 2024,
Respondent.	)	AT 9:00 A.M.
)	
	)	EXECUTION SCHEDULED
	)	FOR THURSDAY,
	)	DECEMBER 19, 2024,
	)	AT 10:00 A.M.

**BRIEF IN SUPPORT OF EMERGENCY
PETITION FOR WRIT OF MANDAMUS**

COMES NOW Petitioner, the State of Oklahoma, by and through Gentner F. Drummond, Oklahoma Attorney General, as well as Caroline E.J. Hunt, Deputy Attorney General, and Jennifer L. Crabb, Assistant Attorney General and Director of Capital Appeals, and respectfully petitions this Honorable Court for a Writ of Mandamus directed to the Oklahoma Pardon and Parole Board, ordering it to hold, as previously scheduled (but now canceled), the clemency hearing for capital inmate Kevin R. Underwood, Department of Corrections (“DOC”) # 576482, on **Wednesday, December 4, 2024, at 9:00 a.m.** The Board’s decision to cancel the previously scheduled clemency hearing, despite a quorum of the Board available to proceed, was unauthorized by state law,

extraordinary relief is warranted, and this Court should exercise its mandamus power to order the Board to proceed with the hearing.

I. BACKGROUND

On October 1, 2024, this Court scheduled Underwood's execution for December 19, 2024. On October 2, 2024, the Board scheduled Underwood's clemency hearing for Wednesday, December 4, 2024, at 9:00 a.m. Both parties submitted clemency packets on November 15, 2024. The State—and as far as the State knows, the defense—stood ready to proceed with the December 4 clemency hearing.

The afternoon of Black Friday, November 29, 2024, however, the State learned that the Board was down two members, specifically, that one Board member—Dr. Edward Konieczny—had recently resigned and that another—Mr. H. Calvin Prince III—would be resigning that day. As conveyed to the State, the Board, despite having a quorum of members able to conduct the clemency hearing (i.e., three out of five members) did not wish to hear the clemency until the two vacancies are filled and a full Board will be present. To the State's understanding, Mr. Prince's resignation was tendered later that day via email. Sometime in the early evening of Black Friday, the Board posted on its website that Underwood's December 4 clemency hearing was canceled (as well as the Board's regular December meeting that was set to begin December 2).

As of the filing of this writ, however, no order—executive or judicial—has been entered staying Underwood’s execution.

II. ARGUMENT AND AUTHORITY

A. Standard of Review

To obtain a writ of mandamus, the State must show (1) it “has a clear legal right to the relief sought”; (2) the District Court’s “refusal to perform a plain legal duty not involving the exercise of discretion”; and (3) “the adequacy of mandamus and the inadequacy of other relief.” Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

The State meets all three requirements.

B. A Clear Legal Right to the Relief Sought

The State has a clear legal right to the relief sought. Rule 10.6(B)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). The Oklahoma Pardon and Parole Board has the “duty . . . to make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.” Okla. Const. Art. 6, § 10. Per the Board’s administrative rules, the Board is required to schedule a clemency hearing within three days of receiving notice that an execution has been set. PPB Rules

Title 515: 10-3-1.¹ “The clemency hearing will be scheduled on or before the twenty-first calendar day preceding the scheduled execution date, unless otherwise directed by the Chairperson.” *Id.*

Although the clemency hearing is for the benefit of the condemned inmate, the State has an overwhelming interest in ensuring that inmates are afforded all available rights before an execution is carried out. *Cf.* Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021) (“Mandamus is also appropriate to ensure procedural due process requirements are followed in administrative proceedings.”).

The Constitution and the Board’s rules speak in mandatory terms. *See Anderson v. State*, 2018 OK CR 13, ¶ 3, 422 P.3d 765, 767 (“the use of the term ‘shall’ in a statute usually indicates a mandatory duty”). The State has a clear legal right to a clemency hearing in advance of Underwood’s execution. *Cf. Woolen v. Coffman*, 1984 OK CR 53, ¶ 8, 676 P.2d 1375, 1377 (granting a writ of mandamus because “[t]he Legislature’s choice of the word ‘shall’ is highly significant. It is usually given the meaning of ‘must’, and is interpreted as implying a command or mandate.”).

¹ chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://oklahoma.gov/content/dam/ok/en/ppb/documents/rpp/Title_515.pdf

C. Plain Legal Duty

Per the previous subsection, the Board's refusal to proceed with Underwood's clemency hearing implicates a plain legal duty, not an exercise of discretion. As long as Underwood's execution date remains December 19, 2024, the Board *must* hold a clemency hearing.

The absence of two Board members does not alter this duty, for only three members constitute a quorum. According to the Board's Policy 101, Subheading "**Officers, Terms of Office, and Qualifications**", paragraph 2, "A quorum shall consist of three (3) members."² Thus, the Board has a plain legal duty to hold a clemency hearing for Kevin Underwood. The December 4, 2024, hearing date was already a departure from the Board's twenty-one-day rule. It does not appear that having the hearing on a later date, but still before the December 19 execution date, would address the Board's apparent concern that it lacks the full five members. Accordingly, the Board has a plain legal duty to proceed with the scheduled December 4 date.

As an additional matter, it appears that the Board's cancelation of the clemency hearing did not comply with the Open Meetings Act. The statutes governing the Board provide that "[a]ll meetings of the Pardon and Parole Board shall comply with Section 301 et seq. of Title 25 of the Oklahoma Statutes," i.e.,

² chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://oklahoma.gov/content/dam/ok/en/ppb/documents/rpp/Policy%20101%20-%20Duties%20and%20Responsibilities%20of%20the%20PPB%20Revised%202016.pdf

the Open Meetings Act. 57 Okla. Stat. § 332.2(P). The Board's administrative rules also provide that "Clemency Hearing[s] will comply with the Open Meeting Act as per 25 O.S. § 301." PPB Rules 515:10-5-2.

The Open Meetings Act, in turn, regulates how and when open meetings may be scheduled and/or changed:

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

25 Okla. Stat. § 303.

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

25 Okla. Stat. § 311(A)(8).

Here, the Board did not cancel the clemency hearing at least ten days prior to the scheduled hearing date. Moreover, even assuming the Open Meetings Act allows for cancelations with less notice in emergency situations, no such emergency exists here where the Board has a quorum and could proceed on the scheduled hearing date.

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

In any event, regardless of the Open Meetings Act's requirements, the Board must proceed with the clemency hearing in light of Underwood's active, imminent execution date.

D. The Adequacy of Mandamus and the Inadequacy of Other Relief

Mandamus is the exclusive adequate remedy for the State. The Board unilaterally canceled Underwood's clemency hearing without any stay of execution in place, leaving the State no option but to file a writ. While the Open Meetings Act provides for legal actions for violations of its provisions, *see* 25 Okla. Stat. § 314, this would not address the much bigger problem here, which is that the Board has abdicated its mandatory duty to hold a clemency hearing in light of Underwood's active and imminent execution date. The State has no other avenue of relief to force the Board to act.

III. CONCLUSION

For the reasons previously stated, the State has a clear legal right to the relief sought, the Board has refused to perform a plain legal duty in canceling Underwood's clemency hearing scheduled for December 4, 2024, and the State lacks any other remedy than an extraordinary writ. Accordingly, the State respectfully requests that this Court issue a Writ of Mandamus and/or other appropriate relief, ordering the Board to proceed with holding Underwood's clemency hearing on December 4, 2024, as previously scheduled. With the execution scheduled on December 19, 2024 and the clemency hearing supposed to occur on December 4, 2024, the State seeks an expedited briefing schedule and decision on this matter.

Respectfully Submitted,

**GENTNER F. DRUMMOND
ATTORNEY GENERAL OF OKLAHOMA**




**CAROLINE E.J. HUNT, OBA #32635
DEPUTY ATTORNEY GENERAL
JENNIFER L. CRABB, OBA #20546
ASSISTANT ATTORNEY GENERAL
CAPITAL APPEALS DIRECTOR
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 522-4423 FAX (405) 522-4534
ATTORNEYS FOR PETITIONER**

CERTIFICATE OF MAILING

On this 2nd day of December, 2024, a true and correct copy of the foregoing was mailed to:

Oklahoma Pardon and Parole Board
Executive Director Tom Bates
General Counsel Kyle Counts
4345 N. Lincoln Blvd., Suite 1082 Oklahoma City, OK 73105

Brendan Van Winkle
Hunter Labovitz
215 Dean A. McGee Avenue, Ste. 707
Oklahoma City, Oklahoma 73102
Counsel for Underwood



CAROLINE E.J. HUNT