

MICHAEL K. JEANES
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8
 9 IN THE SUPERIOR COURT OF ARIZONA
 IN AND FOR THE COUNTY OF MARICOPA

10 Samuel V. Lopez,

11 Petitioner,

12 v.

13 Janice K. Brewer, Governor;
 14 the Arizona Board of Executive
 Clemency; the Executive
 15 Clemency Selection Committee,
 Charles Ryan; Robert Halliday,
 16 Eileen Klein, Joe Sciarrotta,
 Scott Smith, Office of Boards
 17 and Commissions; Linda Stiles;
 Does 1-50,

18 Respondents,
 and State of Arizona,
 19 Respondent – Real
 Party in Interest.

No. LC2012-000264-001DT

Petition for Writ of Mandamus and
 Petition for Special Action

21
 22 CAPITAL CASE

23 EXECUTION SCHEDULED MAY 16, 2012
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Jurisdiction

This Court has jurisdiction to entertain this petition and to grant the relief requested pursuant to Article VI, § 14 of the Arizona Constitution and Rules 1(a), 3, and 4 of the Rules of Procedure for Special Actions.

A special action is appropriate when the ultimate remedy sought by the petitioner is not plain, speedy nor adequate. *Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 586, 886 P.2d 1338, 1342 (1994); *Bechter v. Rose In and For Maricopa County*, 150 Ariz. 68, 71, 722 P.2d 236, 239 (1986); *King v. Superior Court*, 138 Ariz. 147, 149-50, 673 P.2d 787, 789-90 (1983). If an issue of law is of general concern to other litigants, it is proper for the Court to exercise jurisdiction over the case. *Orme School v. Reeves*, 166 Ariz. 301, 303, 802 P.2d 1000,1002 (1990).

The issues raised here meet this test. There is no other plain, speedy or adequate remedy available to Mr. Lopez to challenge the violations addressed herein, particularly where that clemency hearing was scheduled just nine days before his scheduled execution. Further, this is an issue of general concern to any individual who may seek a clemency recommendation before the Board because, as explained below, Respondents' actions have now closed that avenue to anyone convicted of a crime in a controversial or high-profile case.

Additionally, a writ of mandamus is the appropriate statutory remedy where there is a violation alleged of Arizona's Open Meetings Law. A.R.S. § 38-431.04; *see also* Rules of Procedure for Special Actions, Rule 1 ("Relief previously obtained against any body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule. . .").

Parties

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Petitioner, Samuel V. Lopez, is indigent and he is an inmate at the Arizona State Prison at Eyman. He is confined on death row and he is scheduled to be executed on May 16, 2012. Respondent Janice K Brewer, is the Governor of Arizona. Charles Ryan, Robert Halliday, Eileen Klein, Joe Sciarrotta, and Scott Smith are members of the Executive Clemency Selection Committee. Respondent Linda Stiles is the Director of Arizona's Office

1 of Boards and Commissions. Does 1-50 are the officers, successors in office, agents,
2 contractors, and employees, along with those acting in concert with them, of the Office of
3 the Governor and/or Arizona Board of Executive Clemency and/or Executive Clemency
4 Selection Committee, who have or will participate in Plaintiff's clemency hearing or the
5 constitution and composition of the Arizona Board of Executive Clemency. The
6 Respondents jointly and/or as individuals acting in their official capacities, violated state law
7 and Mr. Lopez's state and federal constitutional rights in nominating, appointing, and
8 training members of the Arizona Board of Executive Clemency. The State of Arizona
9 ("State") is the real party in interest.

10 **Statement of the Issues**

11 Did Respondents proceed without legal authority when they attempted to conduct an
12 executive clemency hearing with a Board comprised of unqualified members and refused to
13 constitute a legal board for the purpose of conducting Mr. Lopez's clemency hearing?

14 **Statement of the Facts**

15 Petitioner is a death row prisoner awaiting execution in Arizona and is subject to a
16 warrant of execution scheduled to be carried out on May 16, 2012. He appeared, through
17 counsel, before the Arizona Board of Executive Clemency ("the Board") on May 7, 2012,
18 to seek a recommendation for commutation or reprieve from his sentence of death.

19 **1. Selection of Clemency board members**

20 On March 2, March 21, March 28 and March 30, 2012, the Executive Clemency
21 Selection Committee ("the Committee") met for the purpose of discussing the process of
22 selecting applicants to forward to the Governor to fill three open seats on the Arizona Board
23 of Executive Clemency ("the Board"). See Ex. A, Minutes. On March 21 and March 30,
24 applicants were interviewed in executive session. The Committee went into executive
25 session each and every time they met. The only public notice of these meetings that could
26 be located on any government website is of the meeting on March 28. A screenshot of that
27 meeting notice is attached. Ex. B. It does not give notice of the intent to go into executive
28 session. It does not contain an agenda of items to be discussed. No other meeting notices

1 are available on the website, though a subsequent meeting of the Committee on March 30,
2 2012, was held, portions of which were in executive session. Though the Arizona Office of
3 Boards and Commissions provided agendas of the meetings, it is not known if these agendas
4 were posted more than twenty-four hours in advance of the hearing and where they were
5 posted. The general public is directed to the Office of Boards and Commissions website for
6 such information and it appears that it was not available.

7 On March 2, 2012, Committee Member Joe Sciarotta reviewed the statutory
8 requirements for filing the vacant seats during a regular session and informed the Committee
9 that they were "charged with submitting to the Governor a list of three candidates for each
10 vacancy." Ex. A.

11 The selection committee interviewed eight prospective appointees for the three
12 vacancies. Though Arizona law required the Committee to provide the Governor with three
13 names per vacancy (i.e. nine names), the Committee recommended only five total applicants
14 to the governor to fill three open positions on the Board. On April 3 and 4, 2012,
15 Respondent Brewer appointed Respondents Hernandez, Livingston and Thomas to the three
16 positions previously held by Duane Belcher, Marilyn Wilkens and Ellen Stenson, each of
17 whom signed their loyalty oaths prior to appearing before the Senate Judiciary Committee.¹
18 See Ex. C, Appointments and loyalty oaths. On April 19, 2012, the Arizona State Senate
19 confirmed the nominations.

20 2. Open meeting violations

21 The Committee and the Governor violated Arizona's Open Meetings Law in
22 numerous respects during the recent process which resulted in the nominations of
23 Hernandez, Livingston and Thomas. As to Hernandez, Livingston and Thomas, the
24 Committee failed to propose to the Governor three individuals for each open position. As
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26 ¹This process not in conformity with A.R.S. 38-211, which requires the Governor to
27 first nominate the prospective appointees to the Senate, followed by confirmation, after
28 which the Governor may appoint. The Governor's appointment of these members prior to
confirmation was without legal authority.

1 to Hernandez and Livingston, the Governor failed to appoint members who have
2 demonstrated an interest in the state's corrections program.

3 During the nominating process, the Committee held executive sessions without the
4 required notice to, and opportunity to object for, the prospective appointees. This included
5 the March 21 and 30, 2012, interviews. At least one of the prospective appointees, Marilyn
6 Wilkens, would have objected to the executive session if she had been given proper notice.
7 Ex. D (Declaration of Marilyn Wilkens). In addition, the subject matter of the March 2 and
8 21, 2012, executive sessions were improper, involving discussions of "interview questions"
9 and "selection of interview questions."²

10 Despite the multiple violations of Arizona law during the selection and nomination
11 process, Respondents proceeded to complete the appointment and loyalty oaths of
12 Respondents Hernandez, Livingston and Thomas before their confirmations by the Arizona
13 Senate.

14 A Clemency hearing was scheduled for May 7, 2012 before the Arizona Board of
15 Executive Clemency to consider the application of Petitioner Samuel Lopez. After the
16 hearing began, counsel for Mr. Lopez objected to the hearing going forward claiming that
17 three new members of the board did not have the legal capacity to serve due to open meeting
18 and appointment process violations under state law. The board voted 3 - 2 to go into
19 executive session. Lopez objected to the board meeting in executive session and when the
20 board reconvened in an open meeting, Lopez again objected citing the legal authority of the
21 board to act. Lopez declined to go forward until a legally constituted board could hear his
22 plea for clemency. Ultimately, the board took no action on Lopez's application.

23 3. Public record requests

24 On May 2, 2012, during regular business hours, Kelley Henry, on behalf of Plaintiff,
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26 ²Because the records of executive sessions are confidential, Petitioner must allege
27 facts regarding what occurred in those sessions to the best of his ability. Additional
28 discovery will be required to support these claims, including *in camera* review of the sessions
by this Court.

1 requested from Linda Stiles, Arizona's Director of Boards and Commissions, access to all
2 public records relating to the selection, nomination, and appointment of Board members
3 Hernandez, Livingston and Thomas and other applicants for the positions they ultimately
4 filled. Ms. Stiles refused the request, directing Ms. Henry to re-submit it in writing, at which
5 point Ms. Stiles would "have to send it upstairs." Presumably, "upstairs" to Ms. Stiles is,
6 both literally and figuratively, the Governor's office. Ms. Henry submitted follow-up
7 requests in writing on May 2 and May 4, 2012, reiterating the request. The Board failed to
8 permit timely access to the records.

9 On May 7, 2012, 93 pages of records were disclosed in a partial response to the public
10 records request. The response did not include: any and all public notices publicizing the
11 vacancies; any communications that the Committee had with any other legislative, executive
12 or judicial entity before, during or after the interviews; any materials considered by the
13 Committee in selecting applicants; and notes of Committee members regarding the
14 consideration of applicants for the three vacancies.

15 Respondents constituted an illegal Board, ensuring Mr. Lopez would not receive a
16 meaningful hearing on his requests for commutation and reprieve. As a result, on May 7,
17 2012, Mr. Lopez was actually prejudiced by the legal violations of procedure when Arizona
18 was unable to provide him a clemency hearing before a legally-constituted Board.

19 **Argument**

20 Mr. Lopez has a constitutionally protected interest in his life which may not be
21 deprived by the state without due process of law. He is entitled to minimum due process
22 guarantees at his clemency hearing which include the right to reasonable notice and an
23 opportunity for a fair hearing and decision makers who do not act in an arbitrary and
24 capricious manner. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 118 S.Ct.
25 1244, 1253 (1998)(O'Connor, J., concurring in the result). Reading Justice O'Connor's
26 opinion together with Justice Stevens's, a majority of the Court agreed that "[j]udicial
27 intervention might. . .be warranted in the face of a scheme whereby a state official flipped
28 a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied

1 a prisoner any access to its clemency process.” *Id.*

2 Arizona’s due process protections are even broader, requiring that there “must be a
3 hearing in a substantial sense in accordance with the cherished judicial tradition
4 embodying the basic concepts of fair play.” *McGee v. Arizona State Bd. of Pardons &*
5 *Paroles*, 92 Ariz. 317, 376 P.2d 779, 781 (1962) (quotations and citations omitted). *See State*
6 *Bd. of Pardons & Paroles v. Superior Court*, 12 Ariz.App. 77, 467 P.2d 917, 920, 922 (1970)
7 (Arizona Superior Court has power to review Board proceedings to determine due process
8 in commutation hearing and may return matter to Board for further proceedings); *Banks v.*
9 *Bd. of Pardons & Paroles*, 129 Ariz. 199, 629 P.2d 1035 (App.I. 1981).

10 In Arizona, the power to commute or grant reprieve of a sentence of death is vested
11 in the governor by Article 5, Section 5 of the Arizona Constitution, and A.R.S. § 31-443
12 which provides:

13 The governor, subject to any limitations provided by law, may
14 grant reprieves, commutations and pardons, after conviction, for
15 all offenses, except impeachment, upon conditions, restrictions
16 and limitations [s]he deems appropriate.

17 The power to commute or grant a reprieve of a death sentence is governed by A.R.S.
18 § 31-402(A) which provides:

19 For all persons who committed a felony offense before January
20 1, 1994, the board of executive clemency shall have exclusive
21 power to pass upon and recommend reprieves, commutations,
22 paroles and pardons. No reprieve, commutation or pardon may
23 be granted by the governor unless it has first been recommended
24 by the board.

25 Thus, Mr. Lopez is not eligible to have his death sentence commuted nor may he be granted
26 a reprieve without a favorable recommendation from the clemency board.

27 Under Arizona law, “[t]he board of executive clemency. . . consists of five members
28 who are appointed by the governor. . .” A.R.S. § 31-401(A). In selecting those members,
“[t]he governor shall appoint a selection committee consisting of the director of the
department of public safety, the director of the state department of corrections and three other
persons who shall submit a list of three qualified candidates to the governor for each vacancy
on the board. The governor shall fill the vacancy by appointing a member to the board of

1 executive clemency from the list.” *Id.*

2 Arizona law further requires that “[e]ach member. . .shall have demonstrated an
3 interest in the state’s correctional program” and “shall complete a four week course relating
4 to the duties and activities of the board.” A.R.S. § 31-401(B) and (C). “The course shall be
5 designed and administered by the chairman of the board and shall be conducted by the office
6 of the board of executive clemency and the office of the attorney general. The course shall
7 include training in all statutes that pertain to the board and participation in a decision making
8 workshop.” A.R.S. § 31-401(C).

9 The Committee is a public body, subject to Arizona’s Open Meetings Law. A.R.S.
10 § 38-431. When the selection committee enters an executive session, it must provide
11 conspicuous public notice of the executive session and either record or take written minutes
12 of the meeting. A.R.S. § 38-431.01(B). Notice of an executive session must be provided to
13 the members of the public body and the general public at least twenty-four hours in advance.
14 A.R.S. 38-431.01(B) and (C). It must include “a general description of the matters to be
15 considered” and must “provide more than just a recital of the statutory provisions authorizing
16 the executive session[.]” A.R.S. § 38-431(I).

17 Initiation of an executive session requires “a public majority vote of the members
18 constituting a quorum[.]” Among other purposes, “a public body may hold an executive
19 session. . .[for] “[d]iscussion or consideration of. . .appointment. . .of a public officer,
20 appointee or employee of any public body[.]” A.R.S. § 38-431.02(A)(1). However, “with
21 the exception of salary discussions, an officer, appointee or employee may demand that the
22 discussion or consideration occur at a public meeting.” *Id.* To facilitate this right, the public
23 body must provide at least twenty-four hours written notice to the appointee of the bodies
24 intent to go in executive session, and so that he or she may “determine whether the discussion
25 or consideration should occur at a public meeting.” *Id.* This personal written notice to the
26 appointee is specific notice to the appointee and is different from the requirement to provide
27 notice to the general public. *Id.*

28 Any violation of the Open Meetings Law renders **all legal actions taken therein null**

1 **and void** unless, within thirty days of the violation (or when the body reasonably should have
2 known of the violation), they are ratified at a public meeting noticed by “a description of the
3 action to be ratified, a clear statement that the public body proposes to ratify a prior action
4 and information on how the public may obtain a detailed written description of the action to
5 be ratified.” § 38-431.05. Further, “a detailed written description of the action to be ratified
6 and all deliberations, consultations and decisions by members of the public body that
7 preceded and related to such action” shall be made available to the public and “shall also be
8 included as part of the minutes of the meeting at which ratification is taken.” *Id.* This must
9 be made available at least seventy-two hours prior to the ratification meeting. *Id.*

10 **I. The Failure to Identify a Sufficient Number of Qualified Candidates for**
11 **the Board Violates Mr. Lopez’s Due Process and Equal Protection Rights**
12 **and Right to Be Free from Cruel and Unusual Punishment under the**
13 **Eighth and Fourteenth Amendments.**

14 As noted above, Respondents were required to “submit a list of three qualified
15 candidates to the governor for each vacancy on the board.” A.R.S. § 31-401(A). Because
16 there were three vacancies, the law mandated that nine names of qualified individuals be sent
17 to the Governor. The Committee submitted only five names. Those five names did not
18 include former appointees Marilyn Wilkens, Ellen Stenson, or Duane Belcher,³ though all
19 three were qualified to serve and all three had expressed an interest in continuing with the
20 work. Through manipulation of the process for selecting and nominating candidates for the
21 Board, Respondents intended to, and did, arbitrarily deny Mr. Lopez access to Arizona’s
22 clemency process.⁴ U.S. Const. Amends. 5, 8, 14; Ariz. Const. art. 2, §§ 4, 13, 14, 15, 23,
23 and 24.

24 The individuals whose names Respondents did submit were not qualified to serve on
25 the Board. In the case of Jesse Hernandez and Brian Livingston, and as explained further

26 ³Mr. Belcher was not offered an interview, though he had served the State for twenty
27 years under both Republican and Democratic Governors.

28 ⁴The interviews took place the day after the Arizona Supreme Court issued the
execution warrant.

1 below, the individuals had no demonstrated interest in Arizona's correctional system. In the
2 case of Brian Livingston, and as also explained further below, a conflict of interest made his
3 service on the Board improper.

4 These were not technical violations of state statute. They resulted in a Board designed
5 to not forward clemency recommendations to the Governor in high-profile or controversial
6 cases.

7 **II. The Failure to Comply with Arizona's Open Meetings Law Violates Mr. Lopez's Due Process and Equal Protection Rights and Right to Be Free**
8 **from Cruel and Unusual Punishment under the Eighth and Fourteenth**
9 **Amendments.**

10 Respondents violated Arizona's Open Meetings Law in numerous, non-technical
11 respects during the recent process which resulted in the nominations of Jesse Hernandez,
12 Brian Livingston and Melvin Thomas. First, they failed to provide at least twenty-four
13 hours' notice to the prospective appointees of the intent to enter executive session. *See Ex.*
14 *D.* This denied the prospective appointees the opportunity to insist the session be held
15 publicly. *Id.* Second, Respondents discussed interview questions during executive sessions
16 on March 2 and 21, 2012. This subject matter is not an appropriate topic for executive
17 session pursuant to state law. A.R.S. § 38-431.03. Finally, Respondents illegally discussed
18 legal actions during the May 7, 2012, executive session held during the time for Mr. Lopez's
19 clemency hearing. Each of these actions violated Arizona's Open Meeting Laws. *City of*
20 *Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (Ariz.
21 1990)("members of a public body may meet in executive session for discussion with
22 attorneys. . . . However, once the members. . . commence any discussion regarding. . . what
23 action to take based upon the attorney's advice, the discussion moves beyond the realm of
24 legal advice and must be open to the public."); *Fisher v. Maricopa County Stadium Dist.*, 185
25 Ariz. 116, 124, 912 P.2d 1345, 1353 (App.I 1995)("It is the debate over what action to take,
26 including the pros and cons and policy implications, of competing alternative courses of
27 action, that must take place in public."). Arizona law favors open meetings. These violations
28 rendered the actions of the Committee null and void. The new members of the clemency

1 board were not legally appointed and therefore did not have authority to act on Mr. Lopez's
2 case. Since the appointments were null and void, Mr. Lopez cannot obtain clemency in
3 Arizona. The clemency statute requires a quorum before any legal action may be taken.
4 While the chair can declare two members of the Board to be a quorum, since the chair's
5 appointment is null and void, he does not have the power to make such a determination. The
6 Governor cannot grant clemency under Arizona law without a recommendation from the
7 Board. As such, Mr. Lopez literally cannot access the process. Accordingly, Mr. Lopez was
8 denied his right to seek clemency before a full, fair and legally-constituted board in violation
9 of the Arizona Constitution, A.R.S. 38-431.03, A.R.S. 38-211, A.R.S. 31-401, and the Eighth
10 and Fourteenth amendments of the United States Constitution. U.S. Const. Amends. 5, 8,
11 14; Ariz. Const. art. 2, §§ 4, 13, 14, 15, 23, and 24.

12 **III. The Failure to Appoint Qualified Members of the Board Violates Mr.**
13 **Lopez's Due Process and Equal Protection Rights and Right to Be Free**
14 **from Cruel and Unusual Punishment under the Eighth and Fourteenth**
15 **Amendments.**

16 Following the violations of Arizona statutes and abuses of process by the Committee,
17 Respondent Brewer proceeded to appoint members of the Board who had no demonstrated
18 interest in the state corrections system and who had a conflict of interest which made them
19 ineligible to serve. A.R.S. § 31-401(B). This action violated Mr. Lopez's rights to due
20 process and equal protection and to be free from cruel and unusual punishment. U.S. Const.
21 Amends. 5, 8, 14; Ariz. Const. art. 2, §§ 4, 13, 14, 15, 23, and 24.

22 Jesse Hernandez was nominated to replace Duane Belcher. This year, Mr. Hernandez
23 received a Bachelor of Science in Business Management, and in 2010 he received a degree
24 in Christian Studies. His employment history includes: United States Congress, Outreach
25 and Government Affairs; Wall Street Group, Business Owner and United Parcel Service,
26 Community and Government Affairs Representative. Mr. Hernandez's employment history
27 fails to demonstrate an interest Arizona's correctional program. Furthermore, though Mr.
28

1 Hernandez's "other qualifications" seem to demonstrate his interest in affairs in Arizona,⁵
2 none of it relates to corrections.

3 A twenty-year veteran of the Board widely supported by victims, prosecutors and
4 defense attorneys, Chair and Executive Director Duane Belcher, was not afforded an
5 interview for a position. Instead, he "was told that they were going in a different direction
6 and that [he is] not included in that[.]" Amanda Lee Myers, *Governor Overhauls Arizona's*
7 *Clemency Board* (visited May 6, 2012), <[http://www.myfoxphoenix.com/dpp/news/politics/](http://www.myfoxphoenix.com/dpp/news/politics/state_politics/AZArizona-ExecutionsBoard-04212012)
8 [state_politics/AZArizona-ExecutionsBoard-04212012](http://www.myfoxphoenix.com/dpp/news/politics/state_politics/AZArizona-ExecutionsBoard-04212012)>.

9 Brian Livingston was nominated to replace Ellen Stenson. Mr. Livingston's
10 employment and education history demonstrates his extensive interest in and commitment
11 to law enforcement. However, he does not have a demonstrated interest in corrections, which
12 entails goals and concerns different from law enforcement. Furthermore, Mr. Livingston has
13 a conflict of interest which makes his service on the Board improper. Defendant Livingston
14 is executive director of the Arizona Police Association and thus represents, and has a
15 financial interest in, individuals who are witnesses in the cases which come before the Board.
16 His current position will continually put Livingston in a position of conflict.

17 **IV. The Participation in a Board Hearing by Unqualified, Illegally-appointed**
18 **and Conflicted Members of the Board Violated Mr. Lopez's Due Process**
19 **and Equal Protection Rights and Right to Be Free from Cruel and**
20 **Unusual Punishment under the Eighth and Fourteenth Amendments.**

21 The three newly-appointed Board members appeared on May 7, 2012, to participate
22 in Mr. Lopez's clemency hearing regarding his sentence of death. They were ineligible to
23 do so for all of the reasons stated above—including their nomination in violation of Arizona's
24 Open Meetings Law and Arizona's statutes regarding nomination of individuals to the Board

25 ⁵Mr. Hernandez omitted his role as chairman of Patriots for Pearce on his application
26 or resume. When asked as to whether he had any role in the Pearce campaign, Mr.
27 Hernandez stated, "Absolutely none, whatsoever." When asked about his chairmanship of
28 the political action committee, Mr. Hernandez said, "I stand corrected." Mr. Hernandez then
claimed such chairmanship was merely honorary, but it appears that Mr. Hernandez's gmail
address is the RSVP for at least one fund-raiser for Mr. Pearce, co-sponsored by the Arizona
Police Association, the group Mr. Livingston lobbies for.

1 of Executive Clemency and a conflict of interest—and also because they had not completed
2 the required four-week training course required by Arizona law. A.R.S. § 31-401(C) requires
3 each board member to complete this training which includes “training in all statutes that
4 pertain to the board and participation in a decision making workshop.” This training is
5 required for them to properly carry out their function of ensuring public safety and providing
6 due process and equal protection to the applicants appearing before them.

7 The failure to comply with the training requirement is particularly harmful because
8 there is no other means for newly-appointed Board members to gain the expertise necessary
9 to make decisions in these cases. Neither Arizona statute nor the Board have any standards
10 guiding the exercise of reasoned moral judgment in a capital clemency hearing. It is also
11 particularly harmful in this case because these Board members were not entering their
12 positions with a clean slate. Rather, they entered with the knowledge that the Governor did
13 not intend for them to forward a recommendation for a grant of clemency in a controversial
14 or high-profile case.

15 Respondent Livingston’s had an additional conflict of interest in Mr. Lopez’s case.
16 Petitioner was convicted of a 1986 crime investigated by the Phoenix police department, of
17 which Livingston was a member. Officers of that department were prosecution witnesses in
18 Petitioner’s trial. In addition to his general conflict of interest described above, Livingston
19 had a specific conflict in this case, yet failed to recuse himself from participation in the
20 hearing.

21 Despite a substantial and compelling case for mercy, Mr. Lopez was not given the
22 opportunity for a hearing before a legally-constituted board. Respondents denied Mr. Lopez
23 due process and access to the clemency process guaranteed by Arizona law and the United
24 States Constitution. U.S. Const. Amends. 5, 8, 14; Ariz. Const. art. 2, §§ 4, 13, 14, 15, 23,
25 and 24.

26 **V. The Director of Boards & Commissions Violated Plaintiff’s Rights to Due**
27 **Process, Equal Protection and to Be Free from Cruel and Unusual Punishment**
28 **When it Refused to Comply with Arizona’s Public Records Act.**

Arizona law requires that “[p]ublic records and other matters in the custody of any

1 officer shall be open to inspection by any person at all times during office hours.” A.R.S.
2 § 39-121. Despite this requirement, Respondent Linda Stiles, Arizona’s Director of Boards
3 and Commissions refused to honor the May 2, 2012, in-person request of Petitioner’s counsel
4 to inspect and/or copy all records relating to the selection, nomination and appointment of
5 Respondents Jesse Hernandez, Brian Livingston, and Melvin Thomas, and other applicants
6 for the positions to which those Respondents were appointed. Counsel made written follow-
7 up requests on May 2 and May 4, 2012, which also were not granted until May 7. At that
8 time, Respondents only partially complied with the request.

9 The denial of access to Arizona public records without justification by the Office of
10 Boards and Commissions interfered with Mr. Lopez’s right to access this Court and seek a
11 remedy for the violations of his statutory and constitutional rights alleged here. As explained
12 previously, the violations of Arizona’s Open Meetings Law prevent him from alleging more
13 specifically the facts in support of the claims he raises here. The violation of Arizona’s
14 public records statutes compound the harm caused by the Open Meetings Law violations and
15 denied Mr. Lopez’s rights to due process, equal protection, to access the courts, and to be
16 free from cruel and unusual punishment. U.S. Const. Amends. 5, 8, 14; Ariz. Const. art. 2,
17 §§ 4, 13, 14, 15, 23, and 24.

18 **VI. The Abuse of the Statutory Process to Deny Access to Clemency Violates**
19 **Mr. Lopez’s Due Process and Equal Protection Rights and Right to Be**
20 **Free from Cruel and Unusual Punishment under the Eighth and**
21 **Fourteenth Amendments.**

22 In combination, all of the actions above ensured that Mr. Lopez’s clemency hearing
23 was a sham. Former chair and executive director Duane Belcher has explained: “It’s clear
24 to me now that they are trying in any way they can to manipulate the outcome of clemency
25 hearings. . .If the cases don’t go before the governor, she doesn’t have to say yes or no.” Bob
26 Ortega, *Clemency Board Faces Legal Hurdles* (visited May 7, 2012),
27 <[http://www.azcentral.com/news/articles/2012/05/06/20120506arizona-prison-clemency-](http://www.azcentral.com/news/articles/2012/05/06/20120506arizona-prison-clemency-brewer.html)
28 [brewer.html](http://www.azcentral.com/news/articles/2012/05/06/20120506arizona-prison-clemency-brewer.html)>. Defendants’ actions in concert guaranteed that a majority of the Board would
never vote to forward a recommendation for clemency to the Governor in any controversial

1 or high-profile case, including capital cases. *Id.*, (former Board members “attribute their
2 departures to the Governor’s displeasure with their votes to grant clemency in certain
3 cases.”). Respondents’ actions, separately and in concert, were intended to, and did,
4 guarantee that a majority of the Board would never forward a recommendation for clemency
5 to the Governor in any controversial or high-profile case. They were designed to, and did,
6 result in a Board which is illegally-constituted and will deny a clemency recommendation in
7 every capital case that comes before it, regardless of the facts, merits, and call for mercy in
8 any individual case. Participating in such a hearing would have been meaningless, leaving
9 Mr. Lopez no choice but to object to the procedure and seek redress from this Court. This
10 complete denial of access violated Mr. Lopez’s constitutional rights and requires relief. U.S.
11 Const. Amends. 5, 8, 14; Ariz. Const. art. 2, §§ 4, 13, 14, 15, 23, and 24.

12 **Conclusion**

13 Mr. Lopez respectfully requests this Court:

- 14 1) accept jurisdiction of this petition for special action and writ of mandamus;
- 15 2) grant the petition for special action and petition for writ of mandamus;
- 16 3) direct the parties to seek a stay of execution, presently scheduled for May 16, 2012,
17 from the Arizona Supreme Court pending resolution of this case;
- 18 4) issue an order to show cause for why relief should not be granted and otherwise order
19 expedited briefing and determination of this case;
- 20 5) declare the selection, nomination, appointment, and confirmation of Jesse Hernandez,
21 Brian Livingston, and Melvin Thomas null and void and order Respondents to
22 constitute a Board of Executive Clemency which complies with state law and state
23 and federal due process;
- 24 6) grant any further and other relief this Court deems necessary in the interests of justice.

25 Respectfully submitted this 9th day of May, 2012.

26 Julie S. Hall
27 Julie S. Hall
28 Denise I. Young *by ADS*

Attorneys for Mr. Lopez

Exhibits

- A March 2, March 21, March 28 and March 30, 2012, Minutes of the Executive Clemency Selection Committee
- B Screenshot of March 28, 2012, Notice of Meeting of Executive Clemency Selection Committee
- C Appointments & Loyalty Oaths
- D Declaration of Marilyn Wilkens

A



MINUTES

EXECUTIVE CLEMENCY NOMINATING COMMITTEE

Wednesday, March 21st, 2012

1:30 p.m.

State Capitol Executive Tower
6th Floor Conference Room
1700 W. Washington Street
Phoenix, Arizona 85007

Members Present: Director Robert Halliday, Ms. Eileen Klein, Director Charles Ryan, Mr. Joe Sciarrotta, Mr. Scott Smith

Staff Present: Mr. Peter Johnson, Ms. Abby Muller, Ms. Linda Stiles

1. Call to Order

Mr. Sciarrotta called the Executive Clemency Nominating Committee ("Committee") meeting to order at approximately 1:47 PM. 4 members were present, Director Ryan joined the Committee at 1:54PM.

2. Approval of Minutes from March 2, 2012 Committee Meeting

ACTION: Director Halliday moved that the March 2, 2012 minutes be approved. Mr. Smith seconded and the motion passed unanimously.

3. Due Diligence/Reference Check Reports and Selection of Interview Questions

Mr. Smith motioned to go into Executive Session at approximately 1:49PM. Director Halliday seconded the motion. The Committee voted unanimously to go into Executive Session.

4. Interviews of Applicants and Discussion of Applicants

The Committee discussed this item in Executive Session.

5. Recommendation of Applicants to the Governor

At approximately 5:45PM the Committee returned to public session. No motions were made for recommending applicants to the Governor.

6. Recommendation of Applicants to the Governor

No motions were made for recommending applicants to the Governor.

7. Call to the Public

No members of the public asked to speak.

8. Adjournment

Mr. Sciarrotta motioned to adjourn the meeting at approximately 4:40PM. Motion seconded by Mr. Smith and passed unanimously.



MINUTES

EXECUTIVE CLEMENCY NOMINATING COMMITTEE

Wednesday, March 28th, 2012

4:00 p.m.

State Capitol Executive Tower
6th Floor Conference Room
1700 W. Washington Street
Phoenix, Arizona 85007

Members Present: Director Robert Halliday, Ms. Eileen Klein, Director Charles Ryan, Mr. Joe Sciarrotta, Mr. Scott Smith

Staff Present: Mr. Peter Johnson, Ms. Linda Stiles

1. Call to Order

Mr. Sciarrotta called the Executive Clemency Nominating Committee ("Committee") meeting to order at approximately 4:23PM. All members were present.

2. Approval of March 21 2012 Minutes

ACTION: Director Ryan moved that the March 21, 2012 minutes be approved. Mr. Smith seconded and the motion passed unanimously.

4. Review of Applications

Mr. Sciarrotta motioned to go into Executive Session at approximately 4:25PM. Director Halliday seconded the motion. The Committee voted unanimously to go into Executive Session.

5. Selection of Applicants for Interview

At approximately 4:38PM the Committee returned to public session

ACTION: Director Halliday motioned to interview Armando R. Garcia and Melvin Thomas. Mr. Smith seconded and the motion passed unanimously.

The Committee agreed to schedule the interviews for Friday March 30th, 2012.

6. Recommendation of Applicants to the Governor

No motions were made for recommending applicants to the Governor.

7. Call to the Public

No members of the public asked to speak.

8. Adjournment

Mr. Sciarrotta motioned to adjourn the meeting at approximately 4:40PM. Motion seconded by Mr. Smith and passed unanimously.



MINUTES

EXECUTIVE CLEMENCY NOMINATING COMMITTEE

Friday, March 30th, 2012
1:30 p.m.
State Capitol Executive Tower
6th Floor Conference Room
1700 W. Washington Street
Phoenix, Arizona 85007

Members Present: Director Robert Halliday, Ms. Eileen Klein, Director Charles Ryan, Mr. Joe Sciarrotta, Mr. Scott Smith

Staff Present: Mr. Peter Johnson, Ms. Abby Muller, Ms. Linda Stiles

1. Call to Order

Mr. Sciarrotta called the Executive Clemency Nominating Committee ("Committee") meeting to order at approximately 1:25PM. All members were present.

2. Approval of Minutes from March 28, 2012 Committee Meeting

ACTION: Ms. Klein moved that the March 28, 2012 minutes be approved. Director Halliday *seconded and the motion passed unanimously.*

3. Due Diligence/Reference Check Reports

Mr. Sciarrotta motioned to go into Executive Session at approximately 1:26PM. Director Halliday seconded the motion. The Committee voted unanimously to go into Executive Session.

4. Interviews of Applicants and Discussion of Applicants

The Committee discussed this item in Executive Session.

5. Recommendation of Applicants to the Governor

At approximately 2:35PM the Committee returned to public session

ACTION: Director Halliday motioned that the Committee recommend the following applicants to the Governor:

- Armando Garcia

- Jesse Hernandez
- Brian Livingston
- Mark Spencer
- Melvin Thomas

6. Call to the Public

No members of the public asked to speak.

7. Adjournment

Mr. Sciarrotta motioned to adjourn the meeting at approximately 2:40PM. Motion seconded by Director Ryan.

B

<http://apps.azdoa.gov/service>
Public Meeting Noti..
Arizona Revised Statutes

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[Suggested Sites](#)
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AZDOA.GOV
ATT.NET - Email, News, Sports, Entertainment and Games
http://att.ny.yahoo.com/
Public Meeting No

Public Meeting Notices
 Notices 16 to 26 of 26

« «

Date/Time	Organization	Public Meeting Notice for:
5/22/2012 9:00:00 AM	Az Commission on the Arts	Executive Clemency Nominating Co Date: 3/28/2012 Time: 4:00:00 PM Location: State Capitol, Executive Towers Address: 1700 W. Washington St., 6th Fl Phoenix, AZ Contact Information: Linda Stiles - 602-542-2449 Notes: Meeting of the Committee***1s AGENDA - 03/27/12***
5/22/2012 9:30:00 AM	Az State Board of Technical Registration	
5/23/2012 9:00:00 AM	Az Commission on the Arts	
5/23/2012 9:00:00 AM	Az Commission on the Arts	

11:35 AM 3/29/2012

C

NOTICE OF APPOINTMENT

L12-167

To the Director of the BOARD OF EXECUTIVE CLEMENCY

This is to notify you that under the provisions of A.R.S. 31-401

I have, this 3rd day of April 2012 appointed Melvin Thomas
of 2666 N. 41th Ave Phoenix, AZ 85009

to be a member of the BOARD OF EXECUTIVE CLEMENCY
at a salary as provided by law.

This appointment is to begin 1/16/2012 and expire 1/16/2017

Janice K. Brewer
Janice K. Brewer Governor

ATTEST: Keh Bennett
Keh Bennett Secretary of State

New Board, Commission, Council or Agency

Reappointment

New appointment to succeed Marilyn Lee Wilkens

Date of Senate confirmation:

Confirmation not required.

LOYALTY OATH OF OFFICE

(Please read A.R.S. §38-231 on the reverse side of this form.)

State of Arizona, County of Maricopa I, Melvin Thomas

do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of the BOARD OF EXECUTIVE CLEMENCY

according to the best of my ability, so help me God (or so I do affirm)

Melvin Thomas
Signature of officer or employee

SUBSCRIBED AND SWORN to me this 9th day of April, 2012

Nov. 4, 2012
Commission Expires

Cheryl Lang
NOTARY PUBLIC
MARICOPA COUNTY
My Commission Expires
November 4, 2012

Filed in the office of the Board of Executive Clemency
this _____ day of _____, 2012 at _____ M.

Director

NOTICE OF APPOINTMENT

L12-166

To the Director of the BOARD OF EXECUTIVE CLEMENCY

This is to notify you that under the provisions of A.R.S. 31-401 I have, this 3rd day of April 2012 appointed Brian L. Livingston of 1102 West Adams Street Phoenix, AZ 85007

to be a member of the BOARD OF EXECUTIVE CLEMENCY at a salary as provided by law.

This appointment is to begin 1/16/2012 and expire 1/16/2017

Janice K. Brewer
Janice K. Brewer Governor

ATTEST: Ken Bennett
Ken Bennett Secretary of State

- New Board, Commission, Council or Agency
- New appointment to succeed Ellen S. Stenson
- Date of Senate confirmation:

- Reappointment
- Confirmation not required.

LOYALTY OATH OF OFFICE

(Please read A.R.S. §38-231 on the reverse side of this form.)

State of Arizona, County of Maricopa I, Brian L. Livingston do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of the BOARD OF EXECUTIVE CLEMENCY according to the best of my ability, so help me God (or so I do affirm)

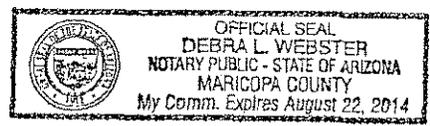
[Signature]
Signature of officer or employee

SUBSCRIBED AND SWORN to me this 10th day of April, 2012

August 22, 2014
Commission Expires

Debra L Webster
Notary Public

Filed in the office of the Board of Executive Clemency this _____ day of _____, 2012 at _____ M



Director

NOTICE OF APPOINTMENT

To the Director of the BOARD OF EXECUTIVE CLEMENCY

This is to notify you that under the provisions of A.R.S. 31-401 I have, this 3rd day of April 2012 appointed Jesse J. Hernandez of 450 E. Carson Drive Tempe, AZ 85282 to be a member of the BOARD OF EXECUTIVE CLEMENCY at a salary as provided by law.

This appointment is to begin 1/17/2011 and expire 1/18/2016

Jessica K. Brewer
Jessica K. Brewer Governor

ATTEST: Ken Bennett
Ken Bennett Secretary of State

- New Board, Commission, Council or Agency
 New appointment to succeed Duane Belcher
 Date of Senate confirmation:

- Reappointment
 Confirmation not required.

LOYALTY OATH OF OFFICE

(Please read A.R.S. §38-231 on the reverse side of this form.)

State of Arizona, County of Maricopa I, Jesse J. Hernandez do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of the BOARD OF EXECUTIVE CLEMENCY according to the best of my ability, so help me God (or so I do affirm)

Jesse J. Hernandez
Signature of officer or employee

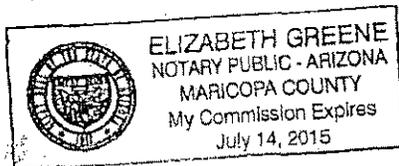
SUBSCRIBED AND SWORN to me this 09 day of April, 2012

7/14/15

Commission Expires

Elizabeth Stone
Notary Public

Filed in the office of the Board of Executive Clemency this 19th day of April, 2012 at 5:37 PM



Jesse J. Hernandez
Director

D

Declaration of Marilyn Wilkens

I, Marilyn Wilkens, being of lawful age and duly sworn, hereby declare the following to be true and correct to the best of my information and belief:

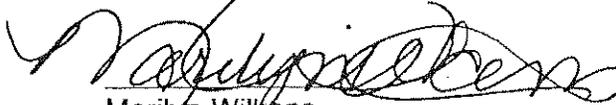
From January, 2010 to April 18, 2012, I was a member of the Arizona Board of Executive Clemency. I was appointed to the Board to fill out a position that was vacant.

I applied for reappointment to my position on the Board. I wanted to continue with the important work of the Board.

I was selected for an interview by the Executive Clemency Selection Committee. The only communication that I had with anyone on behalf of the Executive Clemency Selection Committee about my interview prior to my interview was with Peter Johnson. Mr. Johnson first reached me by telephone to set up my interview. Mr. Johnson sent me two emails regarding the scheduling of my interview. Those emails are attached to this declaration.

At no time prior to my interview did I receive written notice that my interview would be in executive session. When I went in for my interview on March 21, 2012, I was informed that the interview was being conducted in executive session. I was not informed that I could demand that the interview be held in a public regular session. If I had been so informed, I would have objected to the executive session and demanded that the interview be in a public, regular session.

I declare under the penalty of perjury that the foregoing is true and correct. Dated this 7th day of May, 2012 in Phoenix, Maricopa County, Arizona.


Marilyn Wilkens



To:
Cc:
Bcc:
Subject: Fw: Confirmation of Interview on Wednesday, March 21st

----- Forwarded message -----
From: **Peter Johnson** <pjohnson@az.gov>
Date: Thu, Mar 15, 2012 at 3:14 PM
Subject: Confirmation of Interview on Wednesday, March 21st
To: marilynwilkins@gmail.com

Hello Marilyn,

This e-mail is just confirming your interview for the Board of Executive Clemency on Wednesday, March 21st from 2:30PM-3:00PM at the Executive Tower(1700 W. Washington St.) in the 8th Floor Conference Room.

Thank you,

Peter

Peter Johnson

Project Specialist

Office of Governor Brewer

Boards and Commissions

1700 W. Washington, Suite 101

Phoenix, AZ 85007

Office: (602)-542-1754

Fax: (602)-542-0758

pjohnson@az.gov



To:
Cc:
Bcc:
Subject: Fw: Important Information regarding your interview on this Wednesday, March 21st

From: **Peter Johnson** <pjohnson@az.gov>
Date: Mon, Mar 19, 2012 at 2:31 PM
Subject: Important Information regarding your interview on this Wednesday, March 21st
To:

Hello,

The location for your interview has changed to:

State Capitol Executive Tower

6th Floor Conference Room

1700 W. Washington St.

Phoenix, AZ 85007

Peter Johnson

Project Specialist

Office of Governor Brewer

Boards and Commissions

1700 W. Washington, Suite 101

Phoenix, AZ 85007

Office: (602)-542-1754

Fax: (602)-542-0758

pjohnson@az.gov