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ATTORNEYS FOR RESPONDENT – REAL PARTY IN INTEREST

**ARIZONA SUPERIOR COURT  
COUNTY OF MARICOPA**

Samuel V. Lopez,  
Petitioner,

-vs-

Janice K. Brewer, Governor, the Arizona  
Board of Executive Clemency; the  
Executive Clemency Selection  
Committee, Charles Ryan; Robert  
Halliday, Eileen Klein, Joe Sciarrota,  
Scott Smith, Office of Boards and  
Commissions; Linda Stiles; Does 1–50,

Respondents,

And State of Arizona,

Respondent – Real Party in  
Interest

LC2012–000264–001-DT

**RESPONSE TO PETITION FOR  
WRIT OF MANDAMUS AND  
SPECIAL ACTION**

The Hon. Joseph Kreamer

CAPITAL CASE

EXECUTION SET FOR MAY 16, 2012

The State of Arizona (Real Party in Interest) opposes Petitioner Samuel Lopez’s Petition for Writ of Mandamus and Special Action in which he complains

of alleged due process violations relating to a clemency proceeding he chose not to pursue.

Lopez's request for relief based on alleged flaws in the clemency process should be summarily denied because clemency is a "matter of grace," *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280–81 (1998), and pardon and commutation decisions are "rarely, if ever, appropriate subjects for judicial review." *Id.* at 276. Courts only address claims relating to clemency upon a showing that an inmate has been denied minimal due process, which has been defined as an opportunity to present reasons clemency should be granted and a decision-maker who does not act in a completely arbitrary and capricious manner. *Id.* at 289 (plurality opinion) (O'Connor, J., concurring in part and concurring in the judgment).

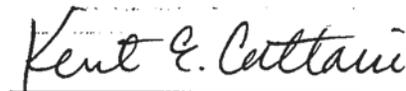
Here, Lopez was given an opportunity to present his case for commutation or reprieve to the Arizona Board of Executive Clemency on May 7, 2012, but he chose not to do so. Lopez and his counsel declined to go forward with the scheduled hearing, asserting that the procedure would have been flawed because of alleged problems in the process by which Board members were appointed by Governor Jan Brewer with the consent of the Arizona Senate, and because some Board members are allegedly unqualified to serve in that capacity.

Lopez's claims do not implicate the minimal due process that must be provided in clemency proceedings, and Lopez does not have standing to challenge the qualifications of Board members appointed by Governor Jan Brewer with the consent of the Arizona Senate. The appointment process is a political issue resolved by elected officials and is not subject to judicial review.

This response is supported by the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 11th day of May, 2012.

Thomas C. Horne  
Attorney General



Kent E. Cattani  
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Division Chief Counsel

Attorneys for Respondents  
Real Party in Interest

## MEMORANDUM OF POINTS AND AUTHORITIES

### A. FACTUAL AND PROCEDURAL BACKGROUND.

Lopez raped and murdered 59-year-old Estafana Holmes in her Phoenix apartment in 1986. *State v. Lopez*, 175 Ariz. 407, 409, 857 P.2d 1261, 1263 (1993). Police found the victim's partially nude body after conducting a "check welfare" call. The apartment was blood-spattered and in disarray with broken and displaced furnishings. Lopez had blindfolded the victim with her pajama pants, and stuffed her mouth with a scarf. Lopez slit the victim's throat and stabbed her more than twenty times in her left breast, upper chest, and lower abdomen. Seminal fluid consistent with Lopez was found in the victim's vagina and anus. *Id.* at 409–10, 857 P.2d at 1263–64.

Lopez was convicted of sexual assault and first-degree murder and was sentenced to death. Following more than two decades of state and federal appellate and post-conviction proceedings, Lopez's convictions and sentences are final, and the Arizona Supreme Court has issued a warrant scheduling his execution for May 16, 2012.

The Arizona Board of Executive Clemency scheduled a commutation/reprieve hearing for Lopez on May 7, 2012. Lopez appeared through counsel, but declined to go forward with the hearing because of alleged problems in the selection process of three newly-appointed Board members.

Lopez argues in his pending motion that it would have been improper for the Board to proceed because (1) the process employed by the Executive Clemency Selection Committee (hereinafter “Committee”) in nominating new Board members was not properly noticed because the State’s central public meeting website that contained an announcement that the Committee would be meeting is allegedly inadequate public notice; (2) the Committee was purportedly required to submit a total of nine names (rather than five) to Governor Brewer to fill the three vacancies on the Board (even though the governing statute requires only three submissions per vacancy and there is no requirement that all positions be filled simultaneously); and (3) some Committee meetings included deliberations in executive session (which Arizona law permits).

**B. LOPEZ’S CLAIMS DO NOT IMPLICATE THE MINIMAL DUE PROCESS RIGHTS THAT MUST BE SATISFIED IN CLEMENCY PROCEEDINGS.**

In *Woodard*, the United States Supreme Court issued a divided opinion on whether an inmate has procedural due process rights with respect to a death penalty clemency hearing. 523 U.S. at 280–81, 289. Four Justices concluded that the Due Process Clause provides *no* constitutional safeguards in that context because an inmate has no constitutional or inherent right to commutation of his sentence, and a request for commutation or clemency is a “matter of grace” and “is simply a unilateral hope.” *Id.* at 280–81. Justice O’Connor’s concurring opinion, which

provides the narrowest majority holding, found, however, that “some *minimal* procedural safeguards apply to clemency proceedings.” *Id.* at 289 (emphasis in original).

Justice O’Connor acknowledged that pardon and commutation proceedings are not traditionally the province of the courts and are generally left to the executive branch. *Id.* at 280. She opined, however, that *limited* due process rights might be available in those types of proceedings: “Judicial 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.” *Id.* See also *Woratzeck v. Arizona Bd. of Exec. Clemency*, 117 F.3d 400, 404 (9th Cir. 1997) (noting that in reviewing an alleged due process violation arising from clemency proceedings, the court determines only whether the Board’s procedures “shock the conscience”).

Lopez does not allege that he was denied access to the clemency process, and in fact there were no restrictions placed on the type of materials or information he could have presented to the Board. Nor does Lopez allege that Board members would have acted arbitrarily in considering a request for clemency. Accordingly, Lopez’s pending allegations are not colorable under *Woodard* and *Woratzeck* and should be summarily rejected.

**C. LOPEZ HAS NOT ESTABLISHED A BASIS FOR RELIEF.**

Lopez's requested mandamus and special action relief are unwarranted. Mandamus is a remedy used to compel a public officer to perform a duty required by law. A.R.S. § 12-2021 (2003); *Sears v. Hull*, 192 Ariz. 65, 68, 961 P.2d 1013, 1016 (1998). But "[m]andamus 'does not lie if the public officer is not specifically required by law to perform the act.'" *Id.* (quoting *Bd. of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973)).

Here, Lopez primarily complains of actions already taken by Governor Jan Brewer or by the Executive Clemency Selection Committee. Those completed actions do not create a basis for mandamus relief. To the extent Lopez is seeking mandamus relief against the Board of Executive Clemency, it is similarly unclear what actions Lopez believe should be compelled. The Board agreed to conduct a commutation/reprieve hearing for Lopez on May 7, 2012. It was Lopez who chose not to go forward.

Lopez's cursory request in the conclusion section of his motion that the court "direct the parties to seek a stay of execution, . . . pending resolution of this case" should be summarily rejected. Lopez has not filed a motion to stay his execution. Nor has he proffered any legal authority for such a remedy.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1760 (2009) (quoting

*Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Id.* at 1761 (citing cases). While a stay involves the exercise of judicial discretion, it is not unbridled discretion; legal principles govern the exercise of discretion. *Id.*

Four factors are considered in evaluating whether to issue a stay:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interests lies.

*Nken*, 129 S. Ct. at 1761. “[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State’s strong interest in enforcing its criminal judgments[.]” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). “A court considering a stay must also apply ‘a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.’” *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 654 (2004)). “Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)).

Lopez’s belated request for injunctive relief should be summarily rejected because he has not shown a likelihood of success on the merits, much less a

“strong showing” of likely success on the merits. To the extent Lopez had a limited due process right to clemency procedures, those rights were protected by offering Lopez an opportunity to make his case for clemency before a duly constituted Board.

Lopez has been given more than two decades of due process to challenge his convictions for raping and murdering an innocent victim. The State’s and the crime victim’s interest in the finality of Lopez’s convictions and sentences militate against further delay. Lopez’s request for relief should be summarily denied.

### CONCLUSION

Based on the foregoing, this Court should deny Lopez’s motion for writ of mandamus and petition for special action.

RESPECTFULLY SUBMITTED this 11th day of May, 2012.

Thomas C. Horne  
Attorney General



Kent E. Cattani  
Division Chief Counsel

Attorneys for Respondents  
Real Party in Interest

## CERTIFICATE OF SERVICE

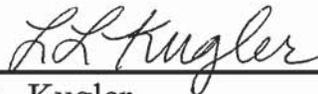
I hereby certify that on May 11, 2012, I deposited for mailing and emailed the foregoing to the following:

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