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(STATE BAR NUMBER 004643)

ATTORNEY FOR RESPONDENTS JANICE K. BREWER, THE ARIZONA BOARD OF EXECUTIVE CLEMENCY, THE EXECUTIVE CLEMENCY SELECTION COMMITTEE, CHARLES RYAN, ROBERT HALLIDAY, EILEEN KLEIN, JOE SCIARROTTA, SCOTT SMITH, OFFICE OF BOARDS AND COMMISSIONS, AND LINDA STILES; DOES 1-50

**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 Sciarrotta, 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

Respondents Governor Janice K. Brewer, the Arizona Board of Executive Clemency, the Executive Clemency Selection Committee, Charles Ryan, Robert Halliday, Eileen Klein, Joe Sciarrotta, Scott Smith, Office of Boards and Commissions, and Linda Stiles oppose 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.

Respondents join in Real Party of Interest State of Arizona's response, which notes that clemency is a "matter of grace," *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280-81 (1998), and that pardon and commutation decisions are "rarely, if ever, appropriate subjects for judicial review." *Id.* at 276. Courts should address claims relating to clemency only upon a showing that an inmate has been denied *minimal* due process, which has been defined as an opportunity to present reasons why 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).

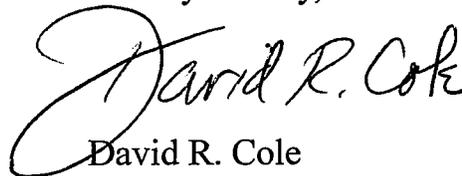
Here, Lopez was given an opportunity to present his case for commutation or reprieve to the Arizona Board of Executive Clemency on May 7, 2012, but he chose not to do so. Lopez and his counsel declined to go forward with the scheduled hearing, asserting that the procedure would have been flawed because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

Lopez does not have standing to challenge the qualifications of Board members appointed by Governor Brewer with the consent of the Arizona Senate. The appointment process is a political matter left to the discretion of elected officials and is not subject to judicial review.

Furthermore, even assuming Lopez has standing to raise claims relating to the nomination process for Board members, his claims fail because the Executive Clemency Selection Committee and Governor Brewer appropriately exercised their authority in appointing individuals who are qualified to serve. Lopez's petition for writ of mandamus and special action should be summarily rejected.

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

RESPECTFULLY SUBMITTED this 11th day of May, 2012.



David R. Cole

Solicitor General

Attorney for Respondents

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

MEMORANDUM OF POINTS AND AUTHORITIES

A. THE POLITICAL APPOINTMENT PROCESS BY WHICH NEW BOARD MEMBERS WERE SELECTED IS FINAL AND NOT SUBJECT TO FURTHER REVIEW.

There are three new members of the Board of Executive Clemency. On April 3 and 4, 2012, acting on March 30, 2012, recommendations by the Executive Clemency Selection Committee (“Committee”), Governor Brewer nominated Jesse Hernandez, Brian Livingston, and Melvin Thomas to the Board. On April 19, 2012, the Arizona Senate confirmed the nominations and the appointments became final.

Arizona Revised Statutes § 31–401 provides that the Governor shall appoint members of the Board of Executive Clemency to five-year terms. The Governor’s nominees for the Board must be approved by the Arizona Senate. A.R.S. § 38–211. Once the Governor nominates an individual to a board and the Senate confirms, the appointment is final and complete. *McBride v. Osborn*, 59 Ariz. 321, 127 P.2d 134 (1942).

A challenge to the nomination process for new board members must be made before the political appointment process becomes final, i.e., upon Senate confirmation. *See Bd. of Educ. of Boyle Co. v. McChesney*, 32 S.W. 2d 26, 28 (Ky. Ct. App. 1930) (“An appointment to office once completed is irrevocable. It is

completed when the last act of the appointing authority has been accomplished.”) (citing *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60).

Here, the process became final for the three new Board members when the Senate confirmed their appointments on April 19, 2012. Lopez waited over a month to assert allegations patently made to delay his execution, and he has not provided a reasoned basis for challenging the new Board members’ continuing service on the Board.

B. THE COMMITTEE AND THE GOVERNOR ACTED APPROPRIATELY IN APPOINTING QUALIFIED INDIVIDUALS TO THE BOARD.

Even assuming Lopez has standing to challenge the appointment process of Board members, his claims are meritless.

1. *The committee complied with relevant rules and procedures in nominating three new board members.*

Lopez argues that the Committee was required to submit nine names to the Governor to fill three vacancies on the Board. However, under A.R.S. § 31–401(A), the Committee is required only to “submit a list of three qualified candidates to the governor for each vacancy on the board.” The statute does not require that all three lists be submitted at the same time, and there is nothing

illogical or untoward about submitting the lists sequentially, which requires a total of only five names.¹

Lopez appears to be suggesting some sort of impropriety because three Board members whose terms had expired were either not interviewed (Duane Belcher) or were interviewed but not included on lists sent to the Governor (Marilyn Wilkens and Ellen Stenson) even though they “had expressed an interest in continuing with the work.”² (Motion, at 9.)

A public official does not have a property or contract right to compel his or her continuation in office. *Ahearn v. Bailey*, 104 Ariz. 250, 254 (1969). An official whose term has expired has no right to be reappointed, and there is no requirement in the instant case that former Board members be considered for reappointment.

Lopez further asserts—by way of his attorney’s subjective opinion—that two newly-appointed Board members are not qualified to serve because they “had no

¹This practice is consistent with procedures followed by trial and appellate court nominating commissions when submitting names to the Governor for judicial appointments. *See* Attachment A; *see also* Arizona Constitution art. 6, sec. 37 (requiring judicial nominating commissions to send three names to the Governor to fill vacancies on the trial court and the Arizona Court of Appeals).

² Former Board member Duane Belcher submitted an application in November 2010 to be considered for re-nomination when his term expired in January 2011. He was allowed to remain as a holdover Board member and Chairman for more than a year after his term expired.

demonstrated interest in Arizona’s correctional system.” Lopez apparently bases this claim on the fact that the new Board members’ employment history does not include corrections-related work.³

This claim is similarly meritless. A.R.S. § 31-401(B) provides that “members shall be appointed on the basis of broad professional or educational qualifications and experience and shall have demonstrated an interest in the state’s correctional program.” There is no specific professional or educational background requirement to serve on the Board, and it would in fact be illogical to assume that a specific type of prior employment is necessary. Furthermore, the “demonstrated interest” requirement is something that can presumably be established by virtue of voluntarily applying to be considered, going through an interview process, and agreeing to serve on the Board.

2. *Lopez has not established that open meeting laws were violated.*

The Committee provided public notice of the meetings at issue, including notice that deliberations might be conducted in executive session. Lopez nevertheless argues that the Committee was required to provide 24 hours’ prior

³ Lopez’s argument is inconsistent with his argument that former Board member Ellen Stenson should be reappointed; Ms. Stenson did not have any corrections-related work in her background prior to serving a 5-year term on the Board. (See Attachment B.)

notice specifically to *prospective appointees* detailing the Committee's intent to enter executive session. Lopez thus concludes that prospective appointees were improperly "denied the opportunity to insist the session be held publicly."

Lopez was not a prospective appointee, and no prospective appointee has joined this suit or asserted his or her right to receive such notice in a separate suit. Therefore, Lopez cannot assert claims belonging to other parties in an attempt to invalidate the Committee's decision.

Arizona courts maintain a "rigorous standing requirement" under which a plaintiff must establish "a distinct and palpable injury" in order to obtain relief. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, 108 P.3d 917, 919 (2005). Courts "will consider the merits of a case without such an injury 'only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur. The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception.'" *Id.* (citing *Sears v. Hull*, 192 Ariz. 65, 71, ¶ 16, 961 P.2d 1013, 1019 (1998)). Lopez does not have standing to raise this claim.

Furthermore, pursuant to A.R.S. § 38-431.03(A)(1), Board members determine the propriety or need for confidential executive sessions. *See Cooner v. Board of Education*, 136 Ariz. 11, 16, 663 P.2d 1002, 1007 (1983) (holding that

body conducting a public meeting is not required to give prior individual notice before holding discussions in executive session).⁴ At best, Section 38-431.03 (A) (1) only requires that personal notice of planned executive sessions be given to current officers, employees or appointees.

Lopez was not an employee or appointee of either the Board or Committee, and was not entitled to receive notice of the Committee's proposed executive session. Thus, he does not have standing to raise a challenge under the statute.

Finally, even assuming personal notice should have been given to potential appointees, the absence of such notification was at most a technical violation that did not nullify the subsequent actions of the Committee at a subsequent meeting publically taking action to recommend individuals to the Governor. *See Cooner*, 136 Ariz. At 18, 663 P.2d at 1009 ("The executive session, even if invalid, did not

⁴ Lopez also makes a conclusory attack on the Executive Clemency Board's decision to go into executive session during the May 7 hearing. The executive session came after Lopez's counsel addressed the Board with a laundry list of objections to the Board's legitimacy and authority to proceed with the hearing. The Board went into a properly-noticed executive session pursuant to A.R.S. § 38-432/03(A)(3), for discussion and consultation with the Board's legal counsel. There was nothing improper about the Board's decision to go into executive session for legal advice, and Lopez presents no evidence that the Board took "legal action" in the executive session. In fact, upon returning to the public session, the Board chair asked Lopez's counsel whether she wanted to proceed with the hearing. Only after Lopez's counsel declined to go forward did the Board vote—in public session—to end the hearing.

prevent correct action from being taken at the public meeting.”); *Karol v. Board of Ed. Trustees, Florence Unified School Dist. Number One of Pinal*, 122 Ariz. 95, 593 P.2d 649 (1979) (“We hold, therefore, that a technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature. . . .”)⁵

The prospective appointees suffered no prejudice from the lack of personal notice. The Committee met and interviewed each prospective appointee in executive session to ascertain their qualifications for a position on the Board. The Committee then voted in open session to forward a list of names to the Governor as required by statute. *Karol*, 122 Ariz. at 98, 652 P.2d at 652 (“We do not believe, in order to conduct a meeting openly, the public body need disclose every fact, theory, or argument pro or con raised in its deliberations, or every detail of the recommended decision on which a vote is about to occur.”)

⁵ Additionally, there is no legal requirement that applicants must be interviewed or allowed to make any type of presentation.

3. *There is no evidence that Board members are unqualified or would have had a conflict of interest in hearing Lopez's plea for clemency.*

Lopez again asserts that the newly-appointed members are not qualified because they do not have a “demonstrated” interest in the State corrections system. As noted previously, there is no requirement that prior employment history relate to the corrections system. Lopez has not presented evidence that any of the newly-appointed board members do not have an interest in the State corrections system, and there is in fact a presumption to the contrary. *See Havasu Heights v. Desert Valley Wood Products*, 167 Ariz. 383, 387, 807 P.2d 1119, 1123 (App. 1990) (noting presumption of honesty and integrity for public officials).

Lopez further argues that Board member Brian Livingston has a conflict of interest because he previously worked for the Phoenix Police Department and is currently the Executive Director of the Arizona Police Association. This allegation fails because there is no evidence that Mr. Livingston has an actual conflict or would have prejudged specific facts at issue. *See Havasu*, 167 Ariz. at 387, 807 P.2d at 1123 (holding that a claimant must demonstrate prejudgment of specific facts at issue and that the mind of the decision maker is “irrevocably closed” on the particular issues being decided). “Without a showing of actual bias or prejudice, the members of [an administrative board] are presumed to be fair.” *Lathrop v.*

Arizona Bd. of Chiropractic Examiners, 182 Ariz. 172, 180, 894 P.2d 715, 723 (App. 1995).

In the instant case, Board member Livingston was not employed by the Phoenix Police Department when Lopez's crime was being investigated, and, in any event, Lopez has not asserted that the Phoenix Police Department's involvement in the case created any type of issue relevant to the clemency proceeding. Thus, Lopez has not established that Mr. Livingston's prior employment or his current involvement with the Phoenix Police Department through his work as Executive Director of the Arizona Police Association creates a conflict of interest that would render him incapable of fairly considering a plea for mercy from Lopez.

4. *The new Board members received adequate training to carry out their responsibilities.*

Lopez alleges that new Board members were not qualified to consider his case because they had not completed the four weeks of training specified in A.R.S.

§ 31-401(C). The statute at issue states:

Each member appointed to the board shall complete a four week course relating to the duties and activities of the board. The course shall be designed and administered by the chairman of the board and shall be conducted by the office of the board of executive clemency and the office of the attorney general. The course shall include training in all statutes that pertain to the board and participation in a decision making workshop.

The statute does not require that the training occur before members start serving, and it does not indicate when the training must occur or the total number of hours that must be spent in training. Nor does the statute preclude accelerated training. New board members have in fact received significant training. (See Attachment C, Declaration of Mary Jane Gregory.) Board members have been given extensive materials, including relevant statutes and case law, as well as materials prepared by Martin Lieberman, the former Director of the Arizona Office of State Capital Post-Conviction Defender. (Id.) Lopez would have this Court add language to the statute, which would violate well-settled principles of statutory construction.

The level of training provided to new Board members prior to Lopez's scheduled hearing does not "shock the conscience" or otherwise entitle Lopez to relief. *See 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 is not entitled to relief.

5. Lopez's recent public records request does not establish a basis for relief.

Lopez argues that his May 2, 2012 public records request has not been adequately addressed. Respondents have in fact responded to Lopez's request. (See Attachment D.)

Furthermore, Lopez has not explained how the documents he seeks could show a due process violation under *Woodard* or otherwise establish a basis for relief. Lopez has not presented evidence of any violation that would warrant the extraordinary remedies he seeks.

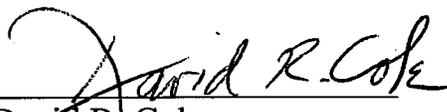
CONCLUSION

Lopez has not established any impropriety in the appointment process for members of the Board of Executive Clemency. Nor has he established any other basis for relief. This Court should deny Lopez's motion for writ of mandamus and petition for special action.

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RESPECTFULLY SUBMITTED this 11th day of May, 2012.


David R. Cole
Solicitor General

Attorney for Respondents
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

CERTIFICATE OF SERVICE

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

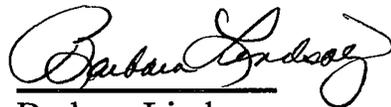
The Hon. Joseph Kreamer
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2693112

ATTACHMENT A

Cattani, Kent

From: Haney, Vanessa [VHaney@courts.az.gov]
Sent: Tuesday, July 26, 2011 3:27 PM
To: Baumstark, Mike; Byers, Dave; Davis, Norman; Human Resources - AOC; Joe Sciarrotta; Landau, Jerry; Liewer, Jennifer; Lundgren, Kathleen; Simmons, Sarah; Smith, Lorraine; Supreme Court; Tim Eigo; Williams, Henrietta
Subject: NEWS RELEASE: Judicial Nominees Announced

FOR IMMEDIATE RELEASE

July 26, 2011

Contact: Vanessa Haney
(602) 452-3308

JUDICIAL NOMINEES ANNOUNCED

The Pima County Commission on Trial Court Appointments has recommended four candidates to Governor Jan Brewer for two openings on the Pima County Superior Court.

Nominees for the opening created by the retirement of Judges Hector Campoy and Michael Cruikshank are **Jeffrey T. Bergin**, 48, Republican, a partner in the law firm of Lewis, Brisbois, Bisgaard and Smith; **Kenneth C. Stanford**, 55, Democrat, a Commissioner for the Pima County Superior Court; **Pamela A. Treadwell-Rubin**, 50, Democrat, a partner in the law firm of Goering, Roberts, Rubin, Brogna, Enos and Treadwell-Rubin, PC; and, **Catherine M. Woods**, 49, Republican, a partner in the law firm of Rusing and Lopez, PLLC.

Governor Brewer will make the appointments.

ATTACHMENT B

Ellen S. Stenson
2535 N. 15th Street #6
Phoenix AZ 85006
602-628-4228
E_stenson@yahoo.com

Experience

Arizona Board of Executive Clemency
Board Member
May 2007 to Present (Appointed January 2007)

Use sound judgment to evaluate an eligible inmate's appropriateness for release into the community, recommend a commutation or pardon to the Governor, or grant absolute discharge from parole.

Review materials (e.g. court records including presentence reports and sentencing minute entries, Department of Corrections records) for each scheduled case prior to hearing. Analyze court documents regarding each inmate and offense history, as well as reports on inmate behavior while incarcerated, to determine if the inmate poses a threat to the community and is likely to re-offend if released.

Participate in interviewing inmate during each hearing.

Perform Board chair duties in Chairman's absence.

Compose and prepare letters to the Governor with a Board recommendation for commutation of sentence or pardon. Author dissent letters when my vote is not in the majority.

Arizona Legislature
Ombudsman Citizens' Aide
Assistant Ombudsman for CPS (Child Protective Services)
March 2002 to May 2007

Investigated and evaluated CPS actions in specific cases involving alleged violations of state statutes, administrative rules and agency policies. Reported findings, in writing and verbally, to the Legislature and Governor. Recommended corrective action to the agency regarding individual cases as well as overall agency operation when appropriate. One such recommendation was for the agency to provide balanced reports to the court that include information provided by the professionals involved with the family as well as the family's perspective.

Communicated at length with parents, grandparents, foster parents and other interested parties to explain the court juvenile dependency process.

Traveled throughout the state to review confidential case files and interview staff to thoroughly understand the agency's course of action in a particular case. Served on various child welfare committees and participated in numerous conferences geared toward improving the state's protection of children and families, updating the child welfare community on changes to existing policy and law, and sharing best practices.

Arizona Legislature
Ombudsman Citizens' Aide
Assistant Ombudsman
July 1997 to March 2002

Investigated and resolved citizens' complaints concerning state agencies. Analyzed and evaluated the agency's actions in the citizen's specific case as to compliance with statute, administrative rule, agency policy and overall fairness to the citizen. Mediated non-regulatory disputes between agencies and citizens.

Prepared and presented written and oral reports of investigation and recommendations to the Legislature and Governor regarding specific agency actions as well as advocate for systemic change to make the agency's practices more fair to citizens.

Quarles & Brady, Phoenix, Arizona
Legal Assistant, Government Relations Department
September 1993 – January 1995

Tracked and distributed updates on legislation for law firm's government relations clients and prepared firm committee meeting agendas and materials.

Education and Military

B.A. Political Science, Arizona State University, May 1997

U.S. Air Force, 1984 to 1988

Professional Volunteer Experience and Training

National Institute of Corrections (NIC) Parole Board Member Orientation, July 2011

Volunteer Mediator in Superior Court of Maricopa County, Arizona, January 1998 to January 2007

Investigator and Advanced Investigator Training through Council on Licensure,
Enforcement and Regulation (CLEAR), 1999

ATTACHMENT C

ATTACHMENT D



STATE OF ARIZONA

May 11, 2012

EXECUTIVE OFFICE

JANICE K. BREWER
GOVERNOR

Kelley Henry
Supervisory AFPD – Capital Habeas
810 Broadway, Suite 200
Nashville, TN 37203

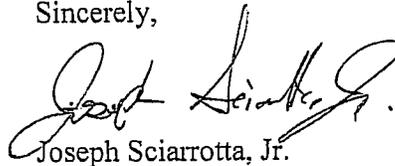
Re: Public Records Request

Dear Ms. Henry:

I write in response to your May 9, 2012 e-mail. Your assumptions are not accurate. In an effort to provide more clarity, let me address the individual categories of your initial public records request:

1. Descriptions of vacancies are created, maintained and routinely updated online. Accordingly, the online descriptions are not maintained after a position is filled. Current vacancies are online.
2. Documents were provided on May 7, 2012.
3. Documents were provided on May 7, 2012.
4. Documents were provided on May 7, 2012.
5. Your request was vague and overly broad. No responsive documents appear to exist. To the extent your request was meant to cover communications between the Governor's Office of Boards and Commissions and the Arizona Department of Administration, attached are facsimile transmissions between those two offices regarding the posting of meeting notices. All meetings were timely noticed.
6. Documents were provided on May 7, 2012.
7. To the extent any documents exist, executive session documents pertaining to what was discussed and considered are confidential and a revelation of executive session discussion and consideration to anyone other than those individuals provided for pursuant to Arizona statute is a violation of Arizona law.

Sincerely,



Joseph Sciarrotta, Jr.
General Counsel