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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

Samuel V. Lopez,)	No. LC2012-000264-001 DT
Petitioner,)	
v.)	Reply to Response to
Janice K. Brewer, et. al.,)	Petition for Writ of Mandamus and
Respondents,)	Petition for Special Action
and State of Arizona,)	
Respondent – Real)	
Party in Interest.)	
_____)	

CAPITAL CASE
EXECUTION SCHEDULED MAY 16, 2012

Respondents' begin by stressing that clemency is "'a matter of grace'" and that "commutation decisions are 'rarely, if ever, appropriate subjects for judicial review.'" Response to Petition for Writ of Mandamus and Special Action ("Resp."), at 2, *citing Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 276, 280-81 (1998). Mr. Lopez agrees that, if Arizona had a duly-constituted Board to which he could have presented his case for clemency, he would have a difficult row to hoe in complaining about the result. However, that is not this case. Mr. Lopez has not challenged any commutation decision or the choice to dispense or withhold mercy because Arizona was unable or unwilling to provide either. *Woodard* is relevant in that it recognized, as Arizona had already done, that due process applies in clemency hearings.

Mr. Lopez did not "cho[o]se not to" have a hearing before the Board of Executive Clemency; there was no Board to have a hearing before. The selection, nomination and appointment of three of the five Board members were null and void, leaving only two duly-appointed members. A duly-appointed chair could have declared that two-member Board a quorum for purposes of the hearing, but there was no duly-appointed chair able to perform that function and, in any event, Jesse Hernandez did not attempt to do so.

Respondents provide no support for their bold assertion that "[t]he appointment process is a political issue resolved by elected officials and is not subject to judicial review." Resp., at 3. They are partially correct. Several matters in relation to the appointment process have been resolved by elected officials: the legislature has mandated that: 1) the governor may not exercise her appointment power by nominating unqualified individuals, 2) public bodies, like the executive clemency selection committee, may not conduct their business in secret, except in very limited circumstances, and 3) when these rules are violated, the actions taken outside of them are null and void. Where Respondents go wrong is in insisting that the process is not subject to judicial review. The law plainly provides remedies for the violations alleged by Mr. Lopez. *See e.g. State ex rel. Arizona State Bd. of Pardons and Paroles v. Superior Court of Maricopa County*, 467 P.2d 917 (App.I 1970)(superior Court, in special proceedings to review decision of

board refusing to recommend commutation, could return matter to board for further proceedings).

Respondents factual statement begins with their recitation of the facts of the crime in question. Resp., at 4. This only emphasizes the critical need for a clemency hearing before a legally-constituted board. There are compelling, substantial facts that, while they in no way excuse the crime, explain why Mr. Lopez was who he was in 1986. Notice of Filing Exhibit to Petition for Writ of Mandamus and Petition for Special Action, Ex. E. This moving story that cries out for mercy has never been considered by any state or federal court because of the abysmal performance of Mr. Lopez's defense counsel throughout his state court proceedings, making clemency a critical proceeding for him. *Id.*

Relying on *Woodard*, Respondents argue Mr. Lopez's claims are not colorable because he "did not allege he was denied access to the clemency process. . . ." Resp., at 6. That is precisely what he alleged. The three board members, rendered null and void by state statute, were equivalent to three empty chairs in the room. Respondents point out that Mr. Lopez was permitted to present any type of information he desired at the hearing. *Id.* That is of no moment because there was no Board of Executive Clemency to present his case to. The same is true of Respondents' point that Mr. Lopez does not "allege that Board members would have acted arbitrarily in considering a request for clemency." *Id.* It is the height of arbitrariness to allow a man's fate to be decided by individuals who have no legal authority to do so and are unqualified to make that decision.

Respondents ignore that Arizona law is broader on due process in clemency than federal law. *See* Petition, at 7. Respondents fail to address Mr. Lopez's claims under state law, where relief is required.

Respondents do complain that mandamus is not the appropriate remedy in this case. *Id.* However, that is the exact remedy provided under Arizona law for violations of the Open Meetings Laws. A.R.S. § 38-431.04. In any event, Mr. Lopez has filed the special action petition, a procedure which "combine[s] the traditional writs. . .into one

proceeding” for the sake of simplicity and to alleviate confusion over the proper proceeding to use in a given circumstance. Rules of Procedure for Special Actions, Rule 1, State Bar Committee Note. His petition is properly before this Court, which has jurisdiction and the authority to grant the requested relief. To the extent Respondents are unclear about “what actions Lopez believes should be compelled,” Resp., at 7, it is simple: the executive clemency selection committee and the governor should be compelled to constitute an executive clemency board within the bounds of the law so that Mr. Lopez has the opportunity to appear before a body which has the authority to consider his request for commutation and reprieve.

Respondents next argue against a stay of execution based on a federal standard not adopted in Arizona. *Id.*, at 7-8. Even under that standard, however, the equities balance in favor of a stay. The first of the *Nken* factors—a strong showing of likelihood of success on the merits—is contained in the petition. Indeed, in their response, Respondents have failed to dispute the facts alleged in the petition and have not contradicted Petitioner on any point of law. Instead, they conclusively state that Mr. Lopez had “an opportunity to make his case for clemency before a duly constituted Board.” *Id.*, at 9. But that is the very question before this Court. Summarily stating that it is so does not answer that question and it certainly does not show there is not a strong likelihood of success on the merits.

As to *Nken*’s second factor—irreparable injury—Respondents do not attempt to dispute that Mr. Lopez will be irreparably injured absent a stay. Indeed, he will suffer the very definition of an irreparable injury. The third *Nken* factor carries little weight. There will be no substantial injury to the State if a stay is granted. Under any potential outcome of this litigation, Petitioner will die in prison. The only issue is when and by whose hand. So, although Defendants may “suffer[] an inconvenience” in the postponement of an execution, “the injury is more psychological and intangible than substantial. The state will get its man in the end.” *Gomez v. U.S. Dist. Court for N. Dist. of Calif.*, 966 F.3d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting).

Nken's final factor—"where the public interest lies"—also weighs in favor of a stay. There is, at best, an infinitesimal interest in carrying out Mr. Lopez's execution now, later, or not at all, since he will never leave the Arizona prison alive no matter the outcome here. Yet, there is a significant public interest in its public bodies following legal procedure. Ariz. Session Laws 1962, Ch. 138, § 1 ("It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly.")

Respondents ask this Court to apply a presumption against a stay because Mr. Lopez has made a "belated request" and could have brought his claims in time for them to be litigated without the need for a stay. Resp., at 8. This is demonstrably untrue. Mr. Lopez's clemency counsel first learned that the Board was "in transition" on April 19 and 20, 2012. Ex. E, Application for Reprieve and Commutation of Sentence, at 3, n.1. Although she sent a letter to the Board on April 23 requesting notice of the Board's composition, she received no response prior to appearing at the hearing. *Id.* Until the day set for the clemency hearing, Mr. Lopez could not have known which Board members would be present and whether they would attempt to act in violation of the law. And, until they did so, he could not show prejudice from the Respondents' actions. His petition was filed within forty-eight hours of the conclusion of the hearing, and less than three weeks after the reputed Board members were confirmed by the Senate. There has been no undue delay, and certainly none that should cost Mr. Lopez his life. Because each of the *Nken* factors supports the need for a deliberative process to consider Mr. Lopez's petition, this Court should request the Arizona Supreme Court stay the execution presently set for May 16th.

Respectfully submitted this 14th day of May, 2012.

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Copy of the foregoing e-mailed this
14th day of May, to:

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