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

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

CAPITAL CASE

EXECUTION SCHEDULED MAY 16, 2012

Petitioner Samuel Lopez moves this Court for permission to amend his Petition for Writ of Mandamus and Petition for Special Action with Claim VII, which is set forth in Exhibit 1, attached. The facts supporting this claim did not exist at the time Mr. Lopez filed his petition. *Spitz v. Bache & Co., Inc.*, 122 Ariz. 530, 596 P.2d 365 (1979)(trial court abused discretion denying amendments which involved same defendants and arising form same transactions while case still in discovery phase). This Court should grant the motion to amend unless it finds there has been undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, or undue prejudice to the Respondents. *Owen v. Superior Court of State of Ariz., In and For Maricopa County* , 133 Ariz. 75, 649 P.2d 278 (1982). None of those circumstances are present here. Because Mr. Lopez could not have discovered these facts and asserted this claim until now, the interests of justice require that he be permitted to amend his complaint. Ariz.R.Civ.P. 15(a)("Leave to amend shall be freely given when justice requires.").

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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Exhibit 1

At page 15, line 12, insert:

VII. This Court Should Prohibit the Future Participation of Respondents Brewer and the Board of Executive Clemency Due to Bias and the Appearance of Impropriety.

On May 7, 2012, counsel for Petitioner Samuel V. Lopez appeared before the Board to present Mr. Lopez's case and plea for commutation and reprieve of his sentence of death. Because Respondents failed to provide a duly-appointed, legally-constituted Board, however, Mr. Lopez was unable to proceed and instead filed this action. Since that time Respondents, who are included as nominal parties to this action while the State is the real party in interest, have taken an active role and a personal stake in the litigation. Because of those interests, Respondents Brewer and the Board of Executive Clemency are no longer the neutral, unbiased decisionmakers that due process requires. This Court should preclude those Respondents from further participation in Mr. Lopez's application for commutation and reprieve. As a result, his execution must be stayed until another Arizona governor is elected, and an unbiased Board is appointed, to consider his case. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Hurles v. Ryan*, 650 F.3d 1301, 1310 (9th Cir. 2011), *quoting Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437 (1927).

In *Hurles v. Superior Court*, 174 Ariz. 331, 849 P.2d 1 (App.I 1993), the Court of Appeals considered a special action by a death-noticed defendant challenging the trial court's failure to appoint a second defense lawyer to his case. The State was the real party in interest and the superior court judge, the decisionmaker in the petitioner's underlying case, was the nominal party in interest. *Id*., at 331-332, 849 P.2d at 1-2. Although the real party in interest did not file a brief, the Attorney General's Office filed a brief on behalf of the trial judge. *Id*., at 332, 849 P.2d at 2. The Court of Appeals explained that the "status [as nominal defendant] is a formality" and that such an appearance was improper in a case such as that, where the appearance was not in an

"administrative, policy-defending, role", but to assert that the defendant had ruled correctly below. *Id*. It is improper, however, when "'the trial judge, that impartial dispenser of justice ... stands before the appellate tribunal to defend his ruling and his honor. The trial judge is no longer impartial. He is an adversary and an advocate....'" *Id*, at 333, 849 P.2d at 3, *quoting State ex rel. Dean v. City Court,* 123 Ariz. 189, 191, 598 P.2d 1008, 1010 (App.1979).

The case proceeded before the same trial judge and the defendant was sentenced to death. The Ninth Circuit subsequently considered those facts and held the judge had acted improperly in failing to recuse herself from deciding the case. *Hurles v. Ryan*, *supra*. The court explained that a decisionmaker must recuse herself where she

> becomes embroiled in a running, bitter controversy with one of the litigants,. . .if she becomes enmeshed in matters involving [a litigant],. . .or if the judge acts as part of the accusatory process[.] At bottom, then, the Court has found a due process violation when a judge holds two irreconcilable roles, such that her role as an impartial arbiter could become compromised.

Id., at 1311 (internal quotations and citations omitted; first brackets in original).

Because "[a] fair trial in a fair tribunal is a basic requirement of due process[,]" *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623 (1955), the Ninth Circuit reversed Hurles's death sentence based on the judge's "*appearance of and potential for* bias, not actual, proven bias[,]" which would be "nearly impossible" to show. *Hurles v. Ryan*, 650 F.3d at 1310 (emphasis in original) In its decision, the Ninth Circuit relied not only on the fact that the Respondent judge had obtained counsel to file a brief on her behalf, but also on statements she made about the merits of the case, even though trial had not yet occurred. *Id*., at 1318-1319. These statements involved not only prejudgment of the case, but also negative comments about Hurles's defense counsel. *Id*., at 1319-1320. These improprieties created an unconstitutionally acceptable risk of bias because the "average" decisionmmaker "would be tempted 'not to hold the balance nice, clear, and true.'" *Id*., at 1320, *quoting Tumey v. Ohio,* 273 U.S. at 532.

Although the decisionmakers here are the Board and the Governor, this case is

otherwise indistinguishable from *Hurles*. Rather than remaining nominal parties to the special action, Respondents obtained their own counsel, who filed a brief on their behalf. Their position was not to address an administrative practice or policy, but to defend their actions in this case as correct. Further, Respondents have become bitterly embroiled in this special action and prejudged Mr. Lopez's request for clemency, as demonstrated by their public comments. Through her spokesman, the Governor "said the appointments were in full accordance with the law." Michael Kiefer & Bob Ortega, *Defense Lawyer Leaves Samuel Lopez's Clemency Hearing*, (visited 5/13/2012) <http://www.azcentral.com/news/articles/2012/05/07/20120507samuel-lopez-clemency-hearing-defense-attorney-leaves.html>. She went further, again through her spokeperson, the impugn clemency counsel: "These are the kinds of desperate tactics from an attorney trying to do anything possible to save her client[.]" Gary Grado, ARIZONA CAPITOL TIMES, (May 8, 2012)(article title and page number unavailable).

The Governor continued her improper attacks through her spokesperson, who publicly announced "that the lawsuit is without merit, that the board and the committee acted within the law and that the governor is confident the court will agree with her." Associated Press, *Arizona Death Row Inmate Sues Brewer*, (published 5/10/2012) <http://www.canadianbusiness.com/article/83653--apnewsbreak-arizona-death-row-inmate-sues-brewer#.T6wgJgyCkIA.email>. He further conveyed the Governor's opinion that "[T]his lawsuit is the desperate act of a defense attorney attempting to further delay justice for the heinous crimes committed by her client 25 years ago. . .Throwing together a host of trumped-up charges against a citizen board does not change that fact." *Id*. The Board as well evidence its own bias through its reputed chair and executive director, Jesse Hernandez, who said publicly that "the lawsuit was a 'cheap attempt' by Lopez's attorneys. '(Henry) is just grandstanding, just like she was the day she walked out[.]' He concluded, 'she's throwing mud at the wall hoping that some of it sticks.'" *Id*. Hernandez further publicly commented on his view of the merits of the case, explaining that "he and the other two new board members just had to start the four-week training process, not

finish it, before beginning their duties, and that he doesn't need experience in corrections or a law degree to vote on whether someone deserves mercy." *Id.*

While arguably permissible for a litigant, the statements above indicate Respondents have gone far beyond their role as nominal parties in this case. Pursuant to both *Hurles* decisions, due process can no longer tolerate their participation in the clemency decision in Mr. Lopez's case. U.S.Const. Amends 5, 6, 8, and 14; Ariz.Const. art. 2, §§ § 4, 13, 14, 15, 23, and 24.