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ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, vs. ROBERT GLEN JONES, JR., Appellant.	Arizona Supreme Court Case No. CR-98-0537-AP Pima County Superior Court Case No. CR-57526 United States District Court Case No. CV-03-478-TUC-DCB Ninth Circuit Court of Appeals Case No. 10-99006 United States Supreme Court Case No. 12-9753

MOTION FOR RECONSIDERATION OF THE ORDER GRANTING THE MOTION FOR WARRANT OF EXECUTION

Robert Glen Jones, Jr., through counsel, moves pursuant to Rule 31.18. Ariz. R. Crim. P., for reconsideration of the Court's order of August 27, 2013, in which it granted the State of Arizona's Motion for Warrant of Execution. Mr. Jones respectfully requests that the Court consider new material not pleaded in his earlier

opposition to warrant or his supplement to that opposition. The new material militates against executing Mr. Jones after consideration of a request for commutation by an Arizona Board of Executive Clemency ("Board") that presently is comprised of only three members. That number fails to comply with the Court's requirement that the Board's operations "not be done with less formality than the spirit and traditions of the law contemplate." *See McGee v. Arizona State Board of Pardons and Paroles*, 92 Ariz. 317, 320, 376 P.2d 779, 781 (1962). One "tradition" of the Board with respect to consideration of clemency applications during the period of the modern Arizona death penalty, is that the Board has not met with as few as three members, as it would do now after two recent resignations. Since the Board was reduced to five members from seven in 1997, it has met almost exclusively with five members on capital clemency applications.

Mr. Jones relies for support on the attached Memorandum in Support.

MEMORANDUM IN SUPPORT

I. Introduction.

On August 27, 2013, the Court granted the State of Arizona's Motion for Warrant of Execution and set Mr. Jones' execution for October 23, 2013. The Court later set an execution for Edward Schad for October 9, 2013.

One of the bases for Mr. Jones' opposition to the Court's setting an execution date, as set forth in his Supplement in Response to Motion for Warrant of Execution (at 2-7), was the sudden resignation of two members of the Board, including its Chairman, which left only three Board members on a five-member Board. The State argued in a supplemental reply that only a quorum was necessary for the Board to consider any application for executive clemency that might be filed by Mr. Jones prior to his execution. The State stated:

> Jones first argues that, in light of the resignation of two members of the Board of Executive Clemency, "the Board currently lacks the five

> members needed to provided [him] with a fair hearing." (Supplement, at 4-5.) But three members remain, which constitutes a quorum under A.R.S. § 31-401I (2012). This Court therefore need not, as Jones requests, delay granting the warrant until the Governor fills the two vacancies.

Supplemental Reply to Opposition to the State's Motion for Warrant of Execution at 1.

A.R.S. § 31-401(A) states that the Board "is established consisting of five members who are appointed by the governor." The statute further requires:

> Each member 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. *No more than two members from the same professional discipline shall be members of the board at the same time*.

Id. at 401(B) (emphasis added). Thus, state law strives for diversity in the composition of the Board, doubtless for the purpose of insuring that the members fairly consider the merits of a petition and, in capital cases, to insure that varied viewpoints be presented on the question of whether extenuating circumstances exist that might favor a recommendation of mercy.

II. Due process attaches to the Board's practices.

In *McGee,* this Court held that due process requires that a person under a sentence of death be given notice of a hearing before the Board of Pardons and Parole and an opportunity to be heard. *Id*. The Court noted:

> [T]here must be a hearing in a substantial sense. And to give substance to a hearing, which is for purposes of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.
>
> The maintenance of the proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest

> interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve their purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play. (*Morgan v. United States*, 304 U.S. 1, 22 (1938)).

376 P.2d at 781 (*quoting Forman v. Creighton School District No.14*, 87 Ariz. 329, 332, 351 P.2d 165, 167 (1960) ("decorum established by usage in quasijudicial proceedings" required, as a matter of state and federal constitutional due process, that terminated tenured teacher be permitted to cross-examine opposing witnesses in proceedings before school district's board of trustees). Thus, the Court has held that due process attaches to the Board's procedures.

That is consistent with the views of five members of the Supreme Court, albeit in concurring and dissenting opinions and not in the Court's majority opinion in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). There, Justices O'Connor, Souter, Ginsburg, and Breyer, in a concurring opinion, and Justice Stevens, in a partial concurrence and dissent, would have found a federal constitutional life interest in capital clemency proceedings that permits a life to be extinguished after a clemency proceeding that comports with due process. *Id*. at 288 (O'Connor, J., *concurring*), 290 (Stevens, J., *concurring in part, dissenting in part*). *See Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (court assumed due process of type found by Justice O'Connor in concurrence in *Woodard* applied in clemency but found absence of factors that might require court involvement, including bribery, personal or political animosity, fabrication of false evidence or arbitrariness).

In *McGee*, a capital clemency petitioner was denied the opportunity to present witnesses at his hearing. This Court ruled that the taking of a human life, "[i]f it is to be justified under law, it must not be done with less formality than the spirit and traditions of the law contemplate." 376 P.2d at 781. This Court

overlooked that principle in granting the State of Arizona's Motion for Warrant of Execution.

III. A mere quorum fails to comport with the usage, spirit and traditions of capital clemency.

With regard to Mr. Jones, a Board that consists of a mere three members with respect to the consideration of a request for commutation of sentence fails to comply with the usage, spirit and traditions of the practice in Arizona, which has not seen a capital clemency petitioner appear before a Board with as few as three members present. It also fails to bring to the decision whether to recommend commutation the divergent viewpoints that are contemplated by the section of the statute that requires that not more than two Board members come from the same discipline. It also fails to comply with state and federal constitutional due process.

With respect to the last 27 executions in Arizona since the Board went from seven to five members in 1997, no clemency applicant making a request for *commutation* has appeared before, and had his application considered by, a Board of as few as three members.[1] Mr. Jones attaches as an Exhibit to this Motion for Reconsideration a Table and supporting press accounts and court documents that demonstrate that a minimum of four and, typically all five Board members sat in judgment at each capital clemency hearing. At least seven of those executed, Darrick Gerlaugh, Ignacio Ortiz, Donald Miller, Robert Comer, Donald Beaty, Thomas Kemp, and Richard Stokley, refused to request a commutation hearing. To the extent the press reported Board votes as to those inmates, they were as to a reprieve, not commutation. Ex. at 23, 40, 48, 50, 63, 82 . Mr. Ortiz, Mr. Kemp and Mr. Stokley issued statements that they would not appear for commutations on the basis of futility based on Board politics. *Id*. at 40, 63, 82.

[1] Walter LaGrand, a German national, won a reprieve recommendation by a vote of 2 to 1 on the basis that the German Government sought to appear. Ex. at 32. Board Chairman Duane Belcher abstained from voting. *Id*.

Five of those executed, Douglas Gretzler, Karl and Walter LaGrand, Jeffrey Landrigan, and Daniel Cook (second hearing), appeared before Boards of four members. *Id*. at 18, 26, 34, 53, 73. On Mr. Landrigan's application, a new Board member was awaiting confirmation. *Id*. at 53. With respect to the applications of Mr. Cook (second application) and Mr. Lopez, one Board member was reported absent. *Id*. at 76, 71.

Thus, of the 27 applicants executed, the following 16 had their applications considered by a Board consisting of all five members: 1) William Woratzek; 2) Jose Ceja; 3) Jose Villafuerte; 4) Arthus Ross; 5) Jesse Gillies; 6) Robert Vickers; 7) Michael Poland; 8) Anthony Chaney; 9) Patrick Poland; 10) Eric King; 11) Richard Bible; 12) Thomas West; 13) Robert Moorman; 14) Robert Towery; 15) Samuel Lopez; and, 16) Daniel Cook (first hearing). *Id*. at 4, 12, 15, 16, 21, 36, 37, 44, 45, 54, 55, 57, 58, 61, 71, 73.

The governor may not grant a commutation unless a majority of the Board so recommends. Mr. Landrigan was deprived of a potential majority vote when only four members were present and deadlocked in a vote of 2-2. Just as Mr. Landrigan was deprived of the diversity that may have allowed him to receive three votes that would have sent a recommendation for commutation to the governor, a Board of only three members, which would consider the application of Mr. Jones were this Court to allow the execution to go forward, is not in keeping with the spirit and traditions of the Board. While a quorum may be sufficient to expedite the Board's business, it is not consistent with historical practice in death penalty cases and deprives Mr. Jones of the diversity of Board viewpoints with respect to whether circumstances extenuate whether he should be executed.

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Conclusion

Mr. Jones respectfully requests that the Court withdraw its order setting Mr. Jones' execution date for October 23, 2013, and deny without prejudice the State's request for an execution warrant until such time as the State of Arizona has in place a properly-constituted and trained Board of five members.

Respectfully submitted this 11th day of September, 2013.

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