IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD HAROLD SCHAD, JR.,

Plaintiff,

vs.

JANICE K. BREWER,
Governor Of The State Of Arizona, In Her Official Capacity,

SCOTT SMITH,
Chief Of Staff To Governor Brewer, In His Official Capacity

BRIAN LIVINGSTON,
Chairman and Executive Director, Arizona Board of Executive Clemency

JOHN "JACK" LASOTA,
Member, Arizona Board of Executive Clemency, In His Official Capacity

ELLEN KIRSCHBAUM,
Member, Arizona Board of Executive Clemency, In Her Official Capacity

DONNA HARRIS,
Member, Arizona Board of Executive Clemency, In Her Official Capacity

Defendants.

No. 2:13-cv-01962-ROS

MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

DEATH PENALTY CASE - EXECUTION SET FOR OCTOBER 9, 2013 10:00 AM

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Counsel for Petitioner Schad

Pursuant to Fed. R. Civ. P. 65,[1] Plaintiff, Edward Schad, by counsel moves this Court for a Temporary Restraining Order and/or Preliminary Injunction enjoining Defendants Livingston, LaSota, Kirschbuam and Harris from convening a reprieve/commutation hearing in his case and enjoining and/or staying any execution of Schad pending his being provided clemency proceedings that do not violate his rights to be free from cruel and unusual punishment, to equal protection under the law and to fundamental due process as guaranteed to him by the Eighth and Fourteenth Amendments of the United States Constitution. In support of his motion, Plaintiff states the following:

MEMORANDUM IN SUPPORT OF MOTION

"[E]xecutive clemency exists to provide relief from harshness or mistake in the judicial system, and is therefore vested in an authority other than the courts." *Ex parte Grossman*, 267 U.S. 87, 120-121 (1925). Justice O'Connor's opinion in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) explains the modern due process concerns for executive clemency:

[1] Fed. R. Civ. P. 65(b)(1) contemplates that a party may obtain a TRO without first filing a written motion or giving notice to the opposing counsel. This motion is filed under exigent circumstances. Plaintiff's complaint is supported by five declarations, all of which were only recently received. Plaintiff's lead attorney resides in Nashville, Tennessee and is also primarily responsible for the appellate briefing in the related habeas matter pending in the Ninth Circuit Court of Appeals. To the extent that there are technical errors in drafting or the court seeks additional information, Plaintiff respectfully suggests that supplementation either orally at a hearing or in writing should be liberally granted.

> A prisoner under a death sentence remains a living person and consequently has an interest in his life. The question this case raises is the issue of what process is constitutionally necessary to protect that interest in the context of Ohio's clemency procedures. It is clear that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." *Ford v. Wainwright*, 477 U.S. 399, 429, 106 S.Ct. 2595, 2612, 91 L.Ed.2d 335 (1986) (O'CONNOR, J., concurring in result in part and dissenting in part). I do not, however, agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. THE CHIEF JUSTICE's reasoning rests on our decisions in *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981), and *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). In those cases, the Court found that an inmate seeking commutation of a life sentence or discretionary parole had no protected liberty interest in release from lawful confinement. When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect, as Justice STEVENS' dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution. See *post*, at 1254–1255. Thus, although it is true that "pardon and commutation decisions have not traditionally been the business of courts," *Dumschat*, *supra*, at 464, 101 S.Ct. at 2464, and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency 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. 523 U.S. at 288-89 (1998)(emphasis supplied).

This Court balances four factors in consideration of Plaintiff's motion: (1) whether the movant has a strong likelihood of success on the merits; (2) whether

the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) how the public interest would be affected by issuance of the injunction. On balance these factors favor Plaintiff's motion and counsel that this Court should temporarily enjoin Defendants from conducting a clemency/reprieve hearing and enjoin his execution until such time as this matter can be fully adjudicated.

I. Plaintiff Has a Strong Likelihood of Success on the Merits of His Complaint Which Is Supported with Declarations from Five Former Members of the Arizona Board Of Executive Clemency All of Whom Served Under Defendant Governor Brewer.

Plaintiff has filed a Complaint supported by sworn declarations from five former board members (including two former chairman), all of whom served during Defendant Brewer's Administration, which establish a *prima facie* case that Defendants Smith and Brewer have proactively tampered with the executive clemency process to such an extent that Schad cannot receive a full, fair, independent access to a clemency hearing. *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) (granting interim relief based upon state official's deliberate interference with fundamentally fair clemency process). Two of the three current board members have already stated that they will not recommend clemency for Plaintiff. Attachment I to Complaint. Defendant Kirschbaum specifically voiced her

concern about repercussion from the Governor were she to vote favorably for Plaintiff. *Id.* [2]

The totality of the circumstances, as supported by sworn declarations, not mere conclusions or general accusations, establish that Plaintiff cannot obtain a fair clemency hearing.

> Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created. The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it by threatening" or intimidating board members, from engaging in a mere farce of a clemency proceeding, and from violating governing law.

Young, 218 at 853 (8th Cir. 2000).

Here, as in *Young*, the conduct of Defendants "unconscionably interferes with a process that the State itself has created." The circumstances show that no high profile inmate can or will receive a favorable recommendation by the Board which results in an absolute bar to clemency for any high profile inmate. Further, Plaintiff has shown that this absolute bar to clemency is likely to be applied specifically to him where the majority of qualified members have already stated

[2] After the instant complaint was filed, and after she received email service of the same, Defendant Kirschbaum faxed a letter to undersigned counsel denying Schad's request that she recuse herself from the upcoming hearing. Though the letter contains self-serving assurances that Defendant Kirschbaum is not biased against Plaintiff, noticeably absent is a denial of the conversation which was overheard by Declarant Hernandez. Defendant Kirschbaum's letter is attached to this document as Attachment J.

that they will not vote in his favor based solely out of fear of professional repercussions. Such fears are not unfounded or speculative. Defendants Livingston, Kirschbaum, LaSota and Harris are familiar with the ousting of three board members by Defendant Governor Brewer, together with the actions of Defendant Smith acting as the Governor's agent. They are familiar with Defendants Smith's admonitions to not vote in favor of clemency "for the sake of the administration."

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-412 (1993). In Arizona, the legislature enacted the clemency board for the purpose of creating a check on gubernatorial discretion and to add an extra layer of impartiality, fairness and due process. Defendant Brewer and Defendant Smith's behind-the-scenes-arm-twisting and overtly retaliatory actions toward former board members have destroyed any semblance of fairness or impartiality in defiance of legislative intent, and most importantly for Plaintiff, deprive him of due process and equal protection of the laws.

Where clemency is then a "court of last resort" and the only means by which an man – like Edward Schad, who has acted with extreme respect for authority and and as a model inmate all the while proclaiming his innocence – can preserve his

very life, due process requires the balancing of the interests of the Plaintiff, the interests of society, the contribution of the requested procedure to accurate truthfinding, and the risk of erroneous deprivation if the procedure is not adopted. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *See also Brock v. Roadway Express*, 481 U.S. 252, 261, 107 S.Ct. 1740, 1747 (1987), *citing Goldberg v. Kelly*, 397 U.S. 254, 66-271, 90 S.Ct. 1011, 1019-1033 (1970)("Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated.").

This case presents precisely the rare, yet arbitrary interference with clemency that *Woodard* was designed to prevent. If due process countenances such political machinations and intimidation to allow a man to be executed with no meaningful access to the state's clemency process, then *Woodard* has been rendered absolutely meaningless. If a flip of a coin violates due process under *Woodard*, certainly the Governor and the Board's use of weighted dice which always come up "denied" likewise violates due process. Schad has pleaded and shown that the process is fraudulent, and due process under *Woodard* does not countenance the intimidation and fraud which is occurring here. The court could so conclude upon deciding this case on the merits.

The clemency process as it currently stands does not afford Plaintiff even the barest due process. Sworn statements by *all five of the most recent* members of the Clemency Board, including *both of its two Chairpersons*, establish that the individuals constitutionally entrusted to decide whether Mr. Schad will live or die operate under the constant fear of losing their jobs if their vote displeases Governor Brewer. These declarations show that it is crystal-clear to the Board what vote will displease Governor Brewer: those in favor of clemency in high-profile or controversial cases, just like Plaintiff's. Ex-Chairman Hernandez swore that he was called to repeated off-site "come to Jesus" meetings with Defendant Smith and told how to vote in multiple cases, and ex-member Thomas in turn swore that Hernandez conveyed these sentiments to the other board members, including those who currently sit. Two of the three members currently slated to make recommendations to the Governor whether Mr. Schad should receive mercy have already illegally discussed his fate and decided that they would vote "no." One of these members specifically stated that her vote against Mr. Schad was a direct result of her fear of the Governor. These facts establish that not only Board members operate out of fear rather than neutrality, and that the Board's constitutional independence is a sham, but that no death-row inmate will *ever* have an opportunity for a fair clemency process in Arizona as it currently operates.

Arizona's scheme cannot supply Plaintiff even the minimal constitutional due process to which he is entitled. Plaintiff is entitled to a neutral Clemency Board.

To put Plaintiff's situation in perspective consider that a person whose car is being repossessed is entitled to a neutral judge. *See Fuentes v. Shevin*, 407 U.S. 67 (1972). A person who is being tried for a traffic offense is entitled to a neutral judge. *Ward v. Monroeville*, 509 U.S. 57 (1972). If neither property nor liberty can be taken in the absence of a neutral arbiter, surely Plaintiff's life cannot. The decision to grant or deny clemency in a death penalty cases must comply with the Eighth and Fourteenth Amendments. *Woodard*, at 290-92. A "minimum requirement of due process" is a "neutral and detached hearing body." *Morrisey v. Brewer*, 408 U.S. 471, 489 (1972); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995). Although the parameters of the minimal due process requirements of *Woodard* is unclear, what is crystal clear is this Court's longstanding recognition that the cornerstone of constitutional due process – whether it is "minimal" due process, "regular" due process, or "heightened" due process – is a "fair and impartial tribunal," *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995), *citing and quoting*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The

neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.").

The Supreme Court has invalidated any number of deliberative systems involving protected liberty, property or life interests as violative of due process where the decision-maker was compromised by monetary influence, personal or institutional interest, or other indicia of bias or lack of appearance of neutrality and fairness. *See e.g.*, *Connally v. Georgia*, 429 U.S. 245 (1977) (justices of the peace being paid for issuance but not for non-issuance of search warrants); *Taylor v. Hayes*, 418 U.S. 488 (1974) (judge who had previously held defendant in contempt); *Gibson v. Berryhill*, 411 U.S. 564 (administrative board consisting of optometrists in private practice hearing charges filed against optometrists competing with board members); *Morrisey v. Brewer*, 408 U.S. 471 (1972) (prohibiting parole officer from making determination whether parole was violated).

Moreover, the United States Supreme Court has emphasized time and again that the concept of a fair and impartial decision-maker applies with equal force to administrative proceedings as it does to criminal and civil judicial proceedings. In *Withrow v. Larkin*, 421 U.S. 35 (1975), the Supreme Court dealt with the issue of a physician challenging a medical board's dual investigative and adjudicatory functions. Although the Supreme Court held that the board's dual function did not

present such a conflict that would warrant the granting of a temporary restraining order, the Court set forth the following explanation of the basic fairness requirement:

> Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' [] This applies to administrative agencies which adjudicate as well as to courts. [] **Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'** [] In pursuit of this end, various situations have been identified in which experience teaches that the **probability of actual bias** on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Id. at 46-47 (emphasis added). The *Withrow* Court went on to hold that the claim failed because "there was no evidence of bias or the risk of bias or prejudgment" and that the board's procedures do not in and of themselves contain "an unacceptable risk of bias." *Id*. at 54. Unlike the threats to job security and overt interference in the voting at issue in Mr. Schad's case, "no specific foundation ha[d] been presented for suspecting that the [b]oard had been prejudiced." *Id.*

A clemency decision-maker who is motivated by "politics," "personal" considerations, or "political affiliation" would violate due process. *Woodard, supra*, 523 U.S. 272, 290-92 (1998)(Justices Stevens, concurring in part and dissenting in part); *see also id.*, 523 U.S. at 289 (O'Connor, J., joined by Souter, J., Ginsburg, J., and Breyer, J., concurring). Surely the state decision-makers in this case, who are appointed by the Governor to the Clemency Board, and who are

compromised their status as voting under threat of job loss; as irrevocably biased against a particular prisoner; or as direct fear of the Governor's opinion have such impermissible personal and political motivations, whether consciously or subconsciously, they cannot be permitted to decide Mr. Schad's case. Even the most minimum standards of due process must have a fair and impartial decision-maker to give them affect.

A fundamental tenet of constitutional due process is a "fair and impartial tribunal," *Porter v. Singletary*, 49 F.3d 1483, 1487 (11th Cir. 1995), *citing and quoting Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."). The Court has invalidated any number of deliberative systems involving protected liberty, property or life interests as violative of due process where the decision-maker was compromised by monetary influence, personal or institutional interest, or other indicia of bias or lack of appearance of neutrality and fairness. *See e.g., Connally v. Georgia*, 429 U.S. 245 (1977) (justices of the peace being paid for issuance but not for non-issuance of search warrants); *Taylor v. Hayes*, 418 U.S. 488 (1974) (judge who had previously held defendant in contempt); *Gibson v. Berryhill*, 411 U.S. 564 (administrative board consisting of

optometrists in private practice hearing charges filed against optometrists competing with board members); *Morrisey v. Brewer*, 408 U.S. 471 (1972) (prohibiting parole officer from making determination whether parole was violated).

In the context of clemency proceedings, the Due Process Clause of the Fourteenth Amendment to United States Constitution guarantees Mr. Schad the modest right to at least minimal due process and procedural safeguards to protect his interest in life. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 1250 (opinion as to section I, and judgment of the Court, by Rehnquist, C.J.) *Id*. at 289 (O'Connor, J. concurring). A right to a fair and impartial tribunal, and, equally as important, the perception of such, is ingrained in the Due Process clause of the United States Constitution. Basic and minimal due process requirements include "an 'impartial' decisionmaker." *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 (1975) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1971)). *See also*, *Woodard*, 523 U.S. at 290-91 (Stevens, J., concurring in part and dissenting in part) (recognizing that "minimal" due process safeguards would be violated by clemency procedures infected by bribery or political animosity). It is especially critical that executive clemency proceedings afford condemned prisoners like Mr. Schad both the appearance and reality of reliability, impartiality and due process because:

> [e]xecutive clemency has provided the "fail safe" in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible, But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.

Herrera v. Collins, 506 U.S. 390, 415 (1993). The system to which Plaintiff is subjected is far worse than the example condemned by Justice O'Connor in *Woodard*: for Plaintiff a flip of the coin gives him a chance of a favorable result. Defendant's actions have created a clemency proceeding wherein the Board has already avowed not to grant clemency and where the members are bullied to vote in accordance with the interests of the administration.

II. Plaintiff Will Suffer Irreperable Harm, *Viz*, the Denial of Access to Full, Fair, and Independent Clemency Hearing Absent A Temporary and/or Preliminary Injunction.

It is unquestionable that the value of a human life is inestimable and that Plaintiff's right to life – like the right to life possessed by all persons – is the fundamental human right. This fact alone makes clear that any questions about the fairness of the process must be resolved strictly in favor of Plaintiff.

Where clemency is the final opportunity for Plaintiff to plead his case of innocence (a plea which the procedural technicalities of habeas foreclose) and to plead the unjustness of his sentence free from the shackles of procedural default and AEDPA deference, it is unconscionable to force him to do so in front of board

so clearly tainted. It is not just the appearance of due process that Plaintiff is entitled to, but actual due process. Plaintiff is entitled to one fair opportunity to fully and completely make his case that he did not murder Lorimer Grove and that he is a person of good moral character who suffers from a debilitating illness which is largely under control, that he is not a threat to society and that he is far from the worst of the worst. To deny him that opportunity for arbitrary and capricious political platitudes such as a Defendant's desire to appear tough on crime while at the same time not wanting to be placed in the position of actually having to make those choices is beyond the pale and violates even the most minimal standards of due process.

III. No One Will Be Harmed by A Temporary and/or Preliminary Injunction

Mr. Schad is a seventy-one year old model inmate who has already served the equivalent of a life sentence for a crime he has steadfastly denied for thiry-five years. His 1979 conviction was unconstitutional and reversed. He was retried in 1985. The United States Supreme Court accepted review of that decision and upheld it by the smallest of margins 5-4.[3] This Court stayed his habeas case twice, first because the Court ruled that it would not consider procedural defenses in light

[3] It is widely accepted that had Justice Souter heard Mr. Schad's case later in his term of service his vote would have been different.

of the 9th Circuit decision in Robert Smith v. Schriro and then when the Court refused to apply Ring v. Arizona retroactively.[4]

Defendants will undoubtedly claim that any delay will prejudice the state's interest in finality. But it is important to note that it is the State that created this situation, through Defendant Brewer and her agent Defendant Smith. The interest in finality is not great where it is the misconduct of State officials which give rise to the complaint and where Plaintiff has already been effectively punished by a life sentence and will continue to be punished through harsh conditions of confinement.[5] Plaintiff merely seeks a fair opportunity to plead his case for sentence commutation in front of a fair and unbiased board. He seeks due process of law and equal protection of the law that is guaranteed to him as a citizen of the United States.

[4] In yet another cruel twist of fate for Mr. Schad, he raised the Ring issue before *Walton v. Arizona* was decided. At the time he raised the issue, the Ninth Circuit had ruled in *Adamson* that capital defendants weren't entitled jury trials. But the Arizona courts refused to follow the Ninth Circuit. The Supreme Court agreed with the Arizona Supreme Court in *Walton* and then reversed *Walton* in *Ring*. By then, it was too late for Schad to get relief, even though his capital sentence was plainly obtained in violation of the United States Constitution. But because he was prescient in his legal arguments, he was denied the benefit of the application of the correct law to his case.

[5] Courts must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Here, Plaintiff has not created the delay. The change in board members only occurred in August, and Plaintiff only recently learned the reasons behind those changes. The declarations were obtained this very week. Plaintiff should not be punished by Defendants' secretive actions.

IV. The Public Interest Lies in Granting A Temporary and/or Preliminary Injunction

The Public Interest is in favor of a full airing of the instant complaint which cannot happen in a few short weeks. Defendants will no doubt respond with general denials of the allegations in the complaints. But such self-serving denials cannot justify the denial of Plaintiff's motion. The public interest is in permitting the complaint to continue along an expedited path of discovery (including depositions of the parties and requests for production of documents) followed by a bench trial.

Moreover, the legislature has determined that the public's interest is in the Board acting as a check on the Governor's power. If, as Plaintiff alleges, the Defendants acted to defeat that interest, then the public interest clearly lies in favor of a temporary restraining order and/or preliminary injunction.

Finally, the public interest is served by enforcing constitutional rights. *Preminger v. Principi*, 422 F.3d, 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.").

The conduct of Defendants "unconscionably interferes with a process that the State itself has created." *Young*, 218 F.3d at 853. To deny Plaintiff's motion is

to countenance the actions of Defendants Brewer and Smith and the impact of those actions on the remaining Defendants.

WHEREFORE, the motion should be granted.

Respectfully submitted this 27th day of September, 2013.

Kelley J. Henry
Supervisory Asst. Federal Public Defender
Denise Young, Esq.

By *s/Kelley J. Henry*
Counsel for Plaintiff Edward Schad

Certificate of Service

I hereby certify that on September 27, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona. I also certify that I emailed a copy of the same to counsel, Kelly Gibson as well as to Mr. Jeffrey Zick and Mr. Jon Anderson, Assistant Attorneys General. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry
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ARIZONA
BOARD OF EXECUTIVE CLEMENCY

September 25, 2013

Ms. Kelley J. Henry
Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805

Re: Edward Schad Request for Sentence Commutation and Executive Clemency

Dear Ms. Henry:

I have received and acknowledge your correspondence dated September 23, 2013. Please be aware, that it is my full intent to conduct a full and fair clemency that comports with federal due process principles for Mr. Edward Schad and any future hearings. I have no personal bias or prejudice against Mr. Schad wanting my recusal or requiring me to arbitrarily recuse myself. My decisions are based on a comprehensive review of materials presented to me as well as all the information presented at hearings.

Sincerely,

Ellen Kirschbaum, Board Member
Arizona Board of Executive Clemency

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