

**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. \_\_\_\_\_

**COMPLAINT FOR  
EQUITABLE, INJUNCTIVE,  
AND DECLARATORY  
RELIEF [42 U.S.C. §1983; 42  
U.S.C. §1985(3)]**

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

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## **NATURE OF ACTION<sup>1</sup>**

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations by the Office of the Governor, the Arizona Board of Executive Clemency (“the Board”) and its members who, while acting under color of state law, have violated the rights of Plaintiff to due process of law and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

2. This Complaint does not challenge Plaintiff’s underlying capital conviction or sentence of death. Rather, Plaintiff challenges the absence of procedures for him to fully and fairly present his case for commutation of his sentence of death to the Board.

3. Plaintiff seeks equitable, injunctive, and declaratory relief to prevent Defendants from holding a commutation hearing, in the absence of full, fair, independent available process that would permit a full and fair presentation of Plaintiff’s case for commutation and to enjoin his execution until such time as a full and fair clemency process becomes available.

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<sup>1</sup> It should be noted that this complaint is filed under exigent circumstances by Schad’s appointed counsel whose primary practice involves cases brought pursuant to 28 U.S.C. §2254. Plaintiff should not be punished for any defect in pleading under the circumstances but should be granted leave to amend as necessary.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil rights violations), 28 U.S.C. § 1367 (supplemental), 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief). Plaintiff invokes this Court's jurisdiction pursuant to Article III of the United States Constitution, the Eighth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §1983, and 42 U.S.C. §1985(3).

5. Venue is proper pursuant to 28 U.S.C. § 1391(b). Plaintiff is currently incarcerated at the Arizona State Prison Complex ("ASPC") – Eyman, Browning Unit, 4374 East Butte Avenue, Florence, Arizona, which is located within the District of Arizona. His inmate number is 40496.

6. The Office of the Governor, the Arizona Board of Executive Clemency and all Defendants' offices are in Phoenix, Arizona, which is within the District of Arizona.

### **THE PARTIES**

7. Plaintiff Schad is a United States citizen and resident of the State of Arizona. He is held under color of state law subject to a sentence of death imposed by the Superior Court of Yavapai County.

8. Plaintiff Edward Harold Schad is under a warrant of execution. His execution has been scheduled for October 9, 2013.

9. His execution is scheduled to take place at the Central Unit at ASPC – Florence within the state of Arizona and within this judicial district.

10. Defendant Janice K. Brewer is the Governor of the State of Arizona and is being sued in her official capacity for equitable relief.

11. Defendant Scott Smith is the Chief of Staff to the Governor of Arizona and is being sued in his official capacity for equitable relief.

12. Defendant Brian Livingston is the Chairman and Executive Director of the Arizona Board of Executive Clemency and is being sued in his official capacity for equitable relief.

13. Defendants John “Jack” LaSota, Ellen Kirschbaum, and Donna Harris are members of the Arizona Board of Executive Clemency and are being sued in their official capacities for equitable relief.

14. There is presently one vacancy on the five-member Board.

#### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

15. Exhaustion is not necessary under the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e, because this suit does not challenge prison conditions and because there are no available administrative remedies that could address the challenged federal constitutional and state statutory violations.

16. It would be futile for Plaintiff to attempt to exhaust any remedies available to him in an effort to resolve this issue.

17. Upon learning of the allegations contained in this complaint, Plaintiff, by counsel, requested each member of the Board to recuse themselves from the scheduled reprieve/commutation hearing. Attachment A. The Board refused to comply with Mr. Schad's request. Attachment B.<sup>2</sup>

## RELEVANT FACTS

### I. FACTS RESPECTING PLAINTIFF'S REQUEST FOR EXECUTIVE CLEMENCY (SENTENCE COMMUTATION)

17. Plaintiff incorporates by reference each and every statement and allegation set forth throughout this Complaint as if fully rewritten.

18. Plaintiff was convicted and sentenced to death for the murder of Lorimer Grove. *State v. Schad*, 633 P.2d 366 (Ariz. 1981). His conviction was overturned due to an instructional error. *State v. Schad*, 691 P.2d 710 (Ariz. 1984). He was re-tried and once again sentenced to death. *State v. Schad*, 788 P.2d 1162 (Ariz. 1989). Plaintiff sought review in the United States Supreme Court which was granted. In a 5-4 decision, the Court affirmed the decision of the Arizona Supreme Court that the jury was not required to unanimously agree on a single theory of first-degree murder and that a lesser included instruction on the offense

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<sup>2</sup> Mr. LaSota was the only Defendant to provide a written response. It is an unsigned, unsworn letter which was emailed to undersigned counsel from Mr. LaSota's official email address. No other board members responded. Their failure to respond is taken as a constructive denial of Plaintiff's request that they recuse themselves. It is unclear whether Defendant Harris intends to vote at the scheduled hearing as she has not received her statutorily mandated training and as of this date is not listed as a member of the Board on the Board's official website. [www.azboec.gov](http://www.azboec.gov).

of robbery was not required. *Schad v. Arizona*, 501 U.S. 1277 (1991), *reh'g denied*, 501 U.S. 1277 (1991). Plaintiff promptly sought state post-conviction relief which was denied. Plaintiff next sought relief from his conviction and sentence by filing a petition for writ of habeas corpus which was denied. The opinion of the Court was affirmed on appeal. *Schad v. Ryan*, 671 F.3d 708(9<sup>th</sup> Cir. 2011).

19. On January 8, 2013, the Arizona Supreme Court issued a warrant for Plaintiff's execution to take place on March 6, 2013. In response to the warrant the Board scheduled a commutation/reprieve hearing to take place on February 27, 2013. Plaintiff indicated that he wished to participate in a clemency hearing and submitted materials to the Board in support of his request that his sentence to be commuted to life imprisonment. Attachment C (Commutation Request)(collective). On February 26, 2013, the Ninth Circuit Court of Appeals granted Plaintiff's request to remand his habeas case to this Court. *Schad v. Ryan*, 07-99005, 2013 WL 791610, \*3 (9th Cir. Feb. 26, 2013). In accordance with the policies and procedures of the Board, Plaintiff's hearing for reprieve/commutation was cancelled as it appeared he had available judicial remedies. Plaintiff's request for sentence commutation remains pending. Attachment D, email correspondence. The Ninth Circuit's February 26, 2013 Order was subsequently vacated by the United States Supreme Court. *Ryan v. Schad*, 133 S. Ct. 2548 (2013).

20. On September 3, 2013, the Arizona Supreme Court issued a new warrant for Plaintiff's execution setting the date for October 9, 2013. The Board re-scheduled Plaintiff's reprieve/commutation hearing for October 2, 2013. Attachment D.

21. Thereafter, Plaintiff became aware of the following facts.

## **II. FACTS RESPECTING THE BOARD**

22. The Arizona Board of Executive Clemency is an independent public body created by the Arizona State Legislature to act as a check on the Governor's authority to grant clemency. ARS §31-401.

23. The members of the Board are appointed by the Governor to five year staggered terms. ARS §31-401. The purpose of the staggered terms serves to ensure that no particular Governor will have complete control over the appointments to the Board with the intent of maintaining neutrality amongst the members. All current members of the Board were appointed by Governor Brewer.

24. Each newly appointed board member must complete a four week training course "relating to the duties and activities of the board." ARS §31-401(C).

25. Board members may only be removed by the Governor and only for cause. ARS §31-401(E).



26. The Board is subject to the Arizona Open Meetings law. ARS § 38-431.

27. The open meetings law states:

All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

ARS §38-431.01(A).

28. A meeting “means the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.” ARS §38-431(4).

29. A quorum of the Board is generally considered three members, but can be as few as two members. ARS §31-401(I).

30. Under the open meetings law, “legal action” “means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state.” ARS §38-431.

31. The Governor of the State of Arizona is not empowered to grant a request for executive clemency unless the Board issues a favorable

recommendation. A tie vote is interpreted as a denial of executive clemency and deprives the Governor of the authority to grant an application.

**III. FACTS RESPECTING THE ACTIVITIES OF THE CLEMENCY BOARD AND EFFORTS MADE BY AND/OR ON BEHALF OF THE OFFICE OF THE GOVERNOR TO INFLUENCE THE DECISIONS OF THE BOARD**

32. On or about April 9, 2012, Jesse Hernandez was appointed to the Board of Executive Clemency as Chairman and Executive Director. Hernandez replaced Duane Belcher who had sought to be reappointed to the position he had held for two decades.

33. On or about April 9, 2012, Melvin Thomas was appointed to the Board.

34. On or about April 10, 2012, Brian Livingston was appointed to the Board.

35. Mr. Thomas and Mr. Livingston were appointed to replace Members Ellen Stenson and Marilyn Wilkens.

36. Mr. Belcher, Ms. Stenson, and Ms. Wilkens had each applied to retain their appointments to the Board.

37. Mr. Belcher was not afforded an interview and his name was not forwarded to the Governor as a nominee for his position. Attachment E, Declaration of Duane Belcher. In his sworn declaration, Belcher states:

I served on the Board for approximately 20 years. When Governor Brewer decided to replace three Board members (including myself) at

one time, I was quite surprised. During my tenure with the Board, I had never seen a time where an Arizona Governor had replaced so many Board members at one time. It was my opinion that the Governor's office wanted Board Members who would vote the wishes of her office, rather than vote their conscience, based on the facts and circumstances of each case.

*Id.* Mr. Belcher further explains that he came to that opinion based on his interaction with Defendant Smith, and other acting as agents for Defendant Governor Brewer.

In early 2012, I had a meeting with Joe Sciarotta and Scott Smith, General Counsel and Deputy Chief of Staff to Governor Brewer. They were direct, and made it clear to me, that the Governor's office was unhappy with my vote to recommend clemency for William Macumber in 2009 and again in 2011. I was told that the Governor was "blindsided" by the Board's vote to recommend Clemency in the Macumber case. They also questioned me regarding the Board's vote to recommend clemency in the case of Robert Flibotte ADC #265716. The aforementioned were considered to be high profile cases.

*Id.* As a result of this meeting, the former Chairman concluded, "In my view the Governor's Office was attempting to influence the Board's vote in certain cases that were recommended for executive clemency." *Id.*

38. Ms. Stenson was afforded an interview. Ms. Stenson's interview was held in executive session without proper notice of such. The Governor's Chief of Staff, Defendant Scott Smith, "ran the show." Appendix F, Declaration of Ellen Stenson. During the interview, Mr. Smith asked Ms. Stenson if she stood by her 2009 vote to recommend commutation for Bill Macumber. *Id.* Mr. Macumber's

case had brought national attention because of a persuasive case of innocence. At the time the question was asked, it was apparent to all involved that Mr. Macumber's case could "quite possibl[y]" come before the Board in the future. *Id.* Ms. Stenson informed Mr. Smith that she stood by her 2009 vote. Ms. Stenson's name was not forwarded to the Governor for nomination. She was not re-appointed. Ms. Stenson believes that her 2009 vote together with her answer that she would vote the same way "influenced the Governor's decision to oust [her] from the Board." *Id.*

39. Marilyn Wilkens was similarly removed from her seats by the Governor in retaliation for her votes recommending clemency in a high profile case. Ms. Wilkens was interviewed. Similar to Ms. Stenson, Ms. Wilken's interview was held in executive session without prior notice. "When I arrived for my interview, I learned that it would be conducted in an executive session, rather than in a public forum. This struck me as unusual. Had I been informed and been aware that I could object to the closed-door discussion, I would have expressed my concern and requested that my interview be conducted in a public session." Attachment G.

40. Like, Stenson, Wilkens was also questioned about her vote on a high-profile case:

During my reappointment interview in executive session, it was explained that there was dissatisfaction with my vote on a particular

commutation of sentence case; I was informed that I had not voted in accordance with the way the Governor's staff (representing the Governor in the interview), had preferred as an outcome on the case, clearly then indicating the Governor's Office displeasure with my vote.

Specifically Scott Smith, who at that time was the Deputy Chief of Staff for Governor Jan Brewer, and also a member of the candidate Selection Committee, was displeased that I voted to reduce the sentence of Robert Flibotte, a 74-year first-time male sex offender who had been sentenced to 90 years prison time for possession of child pornography. I explained during my interview, the facts and case history to the Selection Committee members, that I employed in finalizing my decision to vote a recommendation for a reduction in sentence. Mr. Smith was face-to-face with me, with about five inches separating us. He was shaking his finger at me and told me in a raised voice, almost yelling at me, that I voted to let a "sex offender" go. He became very agitated, refusing to accept the tenets of my explanation, which outlined that Mr. Flibotte would be under probation the remainder of his life and also supervised by Gila County Probation Services and would be required to publicly register as a sex offender. This discussion concluded my candidate interview with the Committee.

Attachment G.

41. Ms. Wilkens also believes that she was not reappointed because of her voting record and intent to remain independent of the Governor.

I have concluded that I was not reappointed to continue my service with the Board because the Governor's office does not want to receive clemency recommendations from Board members in high-profile cases.

Attachment G.

42. The fact that the previous members had been removed as punishment for their votes was made known to the new appointees who replaced them. Former Member Melvin Thomas, who resigned from the Board in August, 2013, declares, “I was aware that three Board members who left before me were forced out because each one had recommended clemency in on or more cases that got sent up to Governor Brewer.” Attachment H, Declaration of Melvin Thomas. Thomas also stated, “The other members of the Board while I served were also aware that their predecessors lost their jobs because of how they voted.” *Id.*

43. Mr. Thomas swore under oath that, “At least one Board member who had voted for clemency received a letter from the Governor’s office informing him or her that the Governor was displeased with his or her vote. I know about this letter because one of the individuals who received one showed it to me.” *Id.*

44. During the time Mr. Thomas and Mr. Hernandez served on the Board members of the Governor’s staff acting as agents of the Governor, including Defendant Smith, openly and overtly attempted to influence the votes of the Board on pending matters. Mr. Thomas swore, “On more than one occasion, Chairman Hernandez informed the Board members that Governor Brewer was unhappy with one of our recent decisions or that she would be unhappy if we voted a certain way in an upcoming case. Mr. Hernandez indicated that he was getting his information from the Governor’s office.”

45. Although the Board was created by the Arizona legislature to be an independent body, under Governor Brewer the Board is not independent, at least with respect to high profile cases. Former Chairman Hernandez learned this shortly after being appointed to the Board. Mr. Hernandez has declared under oath, “Soon after I took office I learned that the Board is not independent of the Governor.” Attachment I.

46. Defendant Smith, acting on behalf of Defendant Governor Brewer, summoned Hernandez to his office for what Hernandez describes as “come to Jesus” meetings. *Id.* In the first meeting, Defendant Smith, “lectured [Hernandez] about Governor Brewer’s policy to be tough on crime. [Smith] said, ‘We don’t want another Macumber of Flibotte.’ [Hernandez] immediately understood this to mean that Governor Brewer was directing [Hernandez] not to recommend clemency in high-profile cases.” *Id.*

47. Mr. Hernandez has declared that he knew who Defendant Smith was referring to when he mentioned Macumber and Flibotte. He was aware that Mr. Macumber’s case has garnered national attention and that the previous board had recommended clemency and Governor Brewer had twice denied Macumber clemency. He also knew that Macumber’s son had confronted Brewer at a press conference, embarrassing her and causing her to “shut it down.” *Id.* Mr. Hernandez knew that Flibotte who was serving 90 years for downloading child

pornography. The previous board had voted for a partial commutation of sentence. *Id.* Mr. Hernandez declares, “It was crystal-clear to me that Mr. Smith was telling me that, as the new Chairman, I was expected to ensure that the Board not recommend clemency in particular kinds of cases.” *Id.*

48. Defendant Smith summoned Hernandez to several more “come to Jesus meetings.” Each meeting coincided with a high profile case. Each time, “Smith, or the other members of the Governor’s staff would tell me the Governor’s philosophy that she must be tough on crime. I was also told that it was important to stay in line with these views ‘for the sake of the administration.’ The clear implication was that we were not to vote for clemency in the upcoming case.” *Id.*

49. Hernandez declares that the Governor’s message is well understood by the other members of the Board which includes Defendants Livingston, Kirschbaum and LaSota. Hernandez states, “During my time on the Board, the other members understood clearly that they risked losing their jobs if they voted contrary to the Governor’s wishes and forced her to decide a case that she did not want to decide. For instance, I once mentioned to Ellen Kirschbaum that I noticed that she was ‘always a no’ vote. She agreed and stated that the reason was that she would imagine, ‘What would the Governor think?’” *Id. See also*, Attachment H.

50. As a result of his experiences on the Board, Hernandez concludes, “Because the Board is not independent from the Governor and members are aware



their jobs are at stake, the Board will *never* vote for commutation of a death sentence. There is not even the tiniest sliver of hope that any death-row prisoner will ever get a majority vote recommendation for clemency” *Id.* (emphasis in original). Mr. Hernandez states that any application would be “a waste of time” because the application would be “automatically turned down.” *Id.*

51. With respect to Mr. Schad, specifically, Mr. Hernandez recalls in his sworn declaration, dated September 23, 2013, “A couple of months ago, Brian Livingston sent the Board an email to update us that death-row prisoner Edward Schad had received a stay of execution. I overheard members Kirschbaum, Thomas and Livingston discussing Mr. Schad’s case in the break room. They all agreed that they would not be voting for clemency in his case. Ms. Kirschbaum said something similar to what she had told me before, ‘I could not put my name on that. What would the Governor think?’” *Id.*

## CLAIMS FOR RELIEF

### CLAIM ONE

**DEFENDANTS' ACTIONS UNDER COLOR OF STATE LAW RENDER IT IMPOSSIBLE FOR PLAINTIFF TO ACCESS THE CLEMENCY PROCESS IN THAT THE DEFENDANTS HAVE CREATED A CLEMENCY PROCESS THAT IS ARBITRARY, CAPRICIOUS AND EFFECTIVELY DENIES ACCESS TO EXECUTIVE CLEMENCY FOR HIGH PROFILE ARIZONA INMATES AND CONSEQUENTLY VIOLATES PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AND RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

52. Plaintiff incorporates by reference each and every statement and allegation set forth throughout this complaint as if fully set forth herein.

53. Plaintiff has a constitutionally protected interest in his life which may not be deprived by the state without due process of law. He is entitled to minimum due process guarantees at his clemency hearing which include the right to reasonable notice and an opportunity for a fair hearing and decision makers who do not act in an arbitrary and capricious manner. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288, 118 S.Ct. 1244, 1253 (1998)(O'Connor, J., concurring in the result). Reading Justice O'Connor's opinion together with Justice Stevens's, a majority of the Court agreed that "[j]udicial intervention might . . . 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.*

54. Arizona's due process protections are even broader, requiring that there "must be a hearing in a substantial sense .... in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *McGee v. Arizona State Bd. of Pardons & Paroles*, 92 Ariz. 317, 376 P.2d 779, 781 (1962) (quotations and citations omitted). *See State Bd. of Pardons & Paroles v. Superior Court*, 12 Ariz.App. 77, 467 P.2d 917, 920, 922 (1970) (Arizona Superior Court has power to review Board proceedings to determine due process in commutation hearing and may return matter to Board for further proceedings); *Banks v. Bd. of Pardons & Paroles*, 129 Ariz. 199, 629 P.2d 1035 (App.I. 1981). Arizona's guarantee of due process animates and strengthens Plaintiff's right to federal due process in executive clemency.

55. In Arizona, the power to commute or grant reprieve of a sentence of death is vested in the governor by Article 5, Section 5 of the Arizona Constitution, and A.R.S. § 31-443 which provides:

The governor, subject to any limitations provided by law, may grant reprieves, commutations and pardons, after conviction, for all offenses, except impeachment, upon conditions, restrictions and limitations [s]he deems appropriate.

56. The power to commute or grant a reprieve of a death sentence is governed by A.R.S. § 31-402(A) which provides:

For all persons who committed a felony offense before January 1, 1994, the board of executive clemency shall

have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons. No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the board.

Thus, Plaintiff is not eligible to have his death sentence commuted nor may he be granted a reprieve without a favorable recommendation from the clemency board.

57. Defendant Smith, acting as the agent of Defendant Brewer, actively sought to influence the votes of the Board in a secretive, arbitrary, and capricious manner. His actions have had a direct and intended negative impact on Plaintiff's ability to even access executive clemency.

58. Here two current board members,<sup>3</sup> in violation of the open meetings act, have already stated, unequivocally, that they will not vote for clemency. There are only four current sitting members on the Board. Defendant Harris, who is newly appointed, is not qualified to sit on Plaintiff's case by statute because she has not received her training. But even if she sat, Schad cannot receive a favorable clemency vote because a tie vote of 2-2 is a negative recommendation. It is thus impossible for Plaintiff to receive a full, fair, independent clemency hearing which is guaranteed to him by statute. Nor can he receive a clemency hearing that

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<sup>3</sup> Defendant LaSota neither admits or denies that this meeting happened. His unsigned, unsworn letter, merely notes that he does not understand the conversations of two members of the Board would constitute an Open Meetings violation. Attachment B. Of course, three Board Members were present which plainly constitutes a quorum and open meeting violation. Further, under the statute two members can be a quorum. LaSota's failure to deny that the meeting occurred could be viewed as a tacit admission of the meeting.

comports with due process where the majority of qualified board members has already determined the outcome of his application based on arbitrary and capricious factors.

59. Furthermore, Defendant Smith's actions on behalf of Defendant Governor Brewer, have so impacted the Board that it is impossible for any death-row inmate to access executive clemency while Governor Brewer holds office. Defendant's actions have rendered the Arizona Executive Clemency process a sham.

## **CLAIM TWO**

### **THE FAILURE TO COMPLY WITH ARIZONA'S OPEN MEETINGS LAW VIOLATES PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AND RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

60. Plaintiff incorporates by reference each and every statement and allegation set forth in this complaint as if fully set forth herein.

61. The Board is a public body, subject to Arizona's Open Meetings Law. A.R.S. § 38-431. When the Board, or the Committee that selects the Board, enters an executive session, it must provide conspicuous public notice of the executive session and either record or take written minutes of the meeting. A.R.S. § 38-431.01(B). Notice of an executive session must be provided to the members of the public body and the general public at least twenty-four hours in advance. A.R.S.

38-431.01(B) and (C). It must include “a general description of the matters to be considered” and must “provide more than just a recital of the statutory provisions authorizing the executive session[.]” A.R.S. § 38-431(I).

62. Initiation of an executive session requires “a public majority vote of the members constituting a quorum[.]” Among other purposes, “a public body may hold an executive session. . .[for] “[d]iscussion or consideration of. . . appointment. . .of a public officer, appointee or employee of any public body[.]” A.R.S. § 38-431.02(A)(1). However, “with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting.” *Id.* To facilitate this right, the public body must provide at least twenty-four hours written notice to the appointee of the body’s intent to go in executive session, so that he or she may “determine whether the discussion or consideration should occur at a public meeting.” *Id.* This personal written notice to the appointee is specific notice to the appointee and is different from the requirement to provide notice to the general public. *Id.*

63. Any violation of the Open Meetings Law renders **all legal actions taken therein null and void** unless, within thirty days of the violation (or when the body reasonably should have known of the violation), they are ratified at a public meeting noticed by “a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on

how the public may obtain a detailed written description of the action to be ratified.” § 38-431.05. Further, “a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action” shall be made available to the public and “shall also be included as part of the minutes of the meeting at which ratification is taken.” *Id.* This must be made available at least seventy-two hours prior to the ratification meeting. *Id.*

64. Arizona law strongly favors open meetings. Defendants violated Arizona’s Open Meetings Law in numerous, non-technical respects pursuant to state law. See Attachments E,F,G,I. The interviews of clemency board applicants, such as Ms. Stenson and Ms Wilkens, as to specific cases that may come before the board in the future, Attachments F and G, are violations of the Open Meetings Law. The numerous “come to Jesus” meetings initiated by Defendant Smith on behalf of Defendant Governor Brewer, in which Defendant Smith sought to influence the vote of the Board constituted an improper open meeting. Attachments H, I. The discussion between three members of the Board respecting how they would vote on Mr. Schad’s application is a violation of the Open Meetings law. Attachment I.

65. Each of these actions violated Arizona’s Open Meeting Laws. *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (Ariz.

1990)(“members of a public body may meet in executive session for discussion with attorneys. . . . However, once the members. . .commence any discussion regarding. . .what action to take based upon the attorney's advice, the discussion moves beyond the realm of legal advice and must be open to the public.”); *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App.I 1995)(“It is the debate over what action to take, including the pros and cons and policy implications, of competing alternative courses of action, that must take place in public.”).

66. Most serious for Plaintiff is the fact that two of the current, sitting Board Members have already unequivocally stated in the presence of each other (and at the time another voting member of the Board) that they would not vote in favor of Plaintiff, even before hearing his case. It should be noted that Plaintiff’s commutation request was supported by numerous institutional records demonstrating 35 years of pristine behavior and the declarations of two corrections officers who know Plaintiff and who unequivocally state that he is a model prisoner. Further, the State has not presented any written opposition to the Board and the victim’s family members have been silent as to their preference since the beginning of this case.



### **CLAIM THREE**

**DEFENDANTS CONSPIRED UNDER COLOR OF STATE LAW TO DEPRIVE HIGH PROFILE ARIZONA INMATES ACCESS TO EXECUTIVE CLEMENCY IN VIOLATION OF THE EQUAL PROTECTION CLAUS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH, IN A DEATH PENALTY CASE, ALSO VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (42 U.S.C. § 1985)**

67. Plaintiff incorporates by reference each and every statement and allegation set forth in this complaint as if fully set forth herein.

68. Defendants acting together have conspired to deprive high-profile inmates, including death row inmates, access to executive clemency in violation of the equal protection of the law.

69. Plaintiff is a high-profile inmate by virtue of his sentence of death. As such he is a member of a class of inmates that Defendants have conspired to deprive him, and have deprived him, of the equal protection of the laws.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for:

(1) Temporary, preliminary, and permanent injunctive relief to enjoin Defendants from convening as the Arizona Board of Executive Clemency to consider Petitions for Executive Clemency that will be filed by the Plaintiffs due to the above-described violations of Plaintiff's rights to due process of law and to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

(2) Temporary, preliminary, and permanent injunctive relief to enjoin the Arizona Board of Executive Clemency from convening, even if constituted with other members, until a legally-constituted, legally-performing, conflict-

free, and independent Board may be empanelled to fully and fairly consider Plaintiff's Petition for Executive Clemency.

(3) A declaratory judgment that undue pressure placed on the Board by the Governor and her intermediaries renders the Defendants unable to perform their quasijudicial duties fairly and impartially and their convening to consider Plaintiff's Petition for Executive Clemency would violate Plaintiff's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

(4) Appropriate and necessary discovery and an evidentiary hearing to permit Plaintiff to prove his constitutional claims;

(5) Reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States;

(6) Costs of the suit; and

(7) Any such other relief as the Court deems just and proper.

Respectfully submitted this 26<sup>th</sup> 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 26, 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 Defendants and their 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. I further certify that I have caused copies of this complaint to be delivered via priority overnight mail to the defendant's at their place of business.

Kelley J Henry  
Counsel for Edward Schad