

**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

**RESPONSE TO MOTION TO
QUASH**

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

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Defendants Motion to Quash is filled with fanciful and ludicrous allegations and personal attacks on Plaintiff's counsel evidencing a bias on the part of Defendant Board Members against Plaintiff's advocate.

First, Plaintiff did not wait until the last moment to issue subpoenas. Plaintiff cannot issue a subpoena without a reason. Plaintiff did not have grounds for his complaint until all of the declarations were received and after he gave Defendants the opportunity to recuse themselves from the clemency hearing.¹ Plaintiff moved with lightning speed to file the complaint. Once filed, Plaintiff was informed by Court staff that he would need to file his TRO motion forthwith, which he did. The Court granted Plaintiff a hearing on his TRO at the close of business on Friday, September 27, 2013 while Plaintiff's counsel was still in Nashville. The hearing was scheduled for the following Monday. Plaintiff accomplished this while simultaneously conducting appellate briefing in the habeas case in the Ninth Circuit.²

It is Defendants filing on September 30, 2013 which created the factual dispute which gave rise to the request for subpoenas. Plaintiff is not attempting to delay the TRO hearing. Plaintiff is prepared to meet his burden of proof. It is Defendants who are attempting to convert the TRO/PI hearing into something

¹ The Lopez litigation was different.

² Plaintiff apologizes for the informal nature of the pleading. At present it is one hour before the hearing. Plaintiff will supplement his response orally.

more. Further, there is nothing shocking or surprising about a civil complainant requesting discovery after the complaint has been filed and the Defendants dispute the facts. Plaintiff agrees that it would be preferable for this discovery to take place on a different schedule.

Defendants citation to *Anderson v. Davis*, 270 F.3d 674 (9TH Cir. 2002) is interesting for two reasons. One, the portion of the citation they choose is a quasi-admission that Defendant's Brewer and Smith's intent is to make sure that no death row inmate ever receives clemency, substantiating claim one and claim three of the complaint. But the entire quote reads:

However, on the assumption that there might be a ground in this matter for the denial of clemency-as suggested by Justice O'Connor in *Woodard*-that would offend the Constitution, we have scoured the record to see if there is any such problem in this case, and we find none. Anderson does not present us with any suggestion that race, religion, **political affiliation**, gender, nationality, etc. are involved in this case. He has not alleged that the Governor's procedures are "infected by bribery, **personal or political animosity**, or the deliberate fabrication of false evidence." *Woodard*, 523 U.S. at 290-91, 118 S.Ct. 1244 (Stevens, J., concurring and dissenting). Nor does he allege that coin-flipping or **another capricious decisionmaking process is present**. Furthermore, Anderson does not claim he has been misled in any way by the Governor, or that he failed to receive adequate notice of the issues to be considered in his request for clemency. In this respect, Anderson's case is easily distinguishable from the claims presented to this Court by way of mandamus in *Wilson v. United States Dist. Court (Siripongs)*, 161 F.3d 1185 (9th Cir.1998).

Id. (emphasis supplied).

Plaintiff has raised a claim that the board cannot be neutral, no matter how much they may want to be, because of the actions of Defendants Smith and Brewer, actions which are still not denied. The *Young* case establishes his right to a TRO/PI. Defendant Boar Members' self-serving affidavits are not entitled to a rebuttable presumption of credibility. *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 553 (8th Cir. 2004). Plaintiff is entitled to offer proof, and conduct discovery, disputing them.

WHEREFORE, the motion should be denied.

Respectfully submitted this 1st day of October, 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 October 1, 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 and Brian Luse. 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
Counsel for Edward Schad