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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD HAROLD SCHAD, JR., Plaintiff, v. 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	Case No. 2:13-cv-019162-ROS **EXPEDITED MOTION TO QUASH SUBPOENAS TO PRODUCE DOCUMENTS** **CAPITAL CASE** **EXECUTION SET FOR OCTOBER 9, 2013**

DONNA HARRRIS, Member, Arizona Board of Executive Clemency, In Her Official Capacity, Defendants.	

Defendants Governor Janice K. Brewer, Chief of Staff, Scott Smith, Chairman/Executive Director of the Arizona Board of Executive Clemency, Brian Livingston, Board Member, John "Jack" LaSota, Board Member Ellen Kirschbaum, and Board Member Donna Harris files this Motion to Quash two Subpoenas to Produce Documents.

Schad, after 3:00 pm yesterday, served on the Office of the Governor of Arizona and the Board of Executive Clemency two subpoenas for production of over four (4) years of documents. Attached as Exhibits A and B. The subpoenas require production of the documents at 1:00pm today, only six (6) business hours after they were served. Pursuant to Federal Rule of Criminal Procedure Rule 45(c)(A)(i) which states the issuing Court must quash a subpoena that fails to allow a reasonable time to comply, the Defendants request that this Court quash the subpoenas.

The fact that Schad waited to the very last minute to issue the subpoenas is very telling. Schad knew for days or weeks if not months that he would be filing his Complaint and requesting a Temporary Restraining Order/Preliminary Injunction ("TRO"), yet he waited until late the day before the scheduled evidentiary hearing to issue the subpoenas.[1] Schad is simply trying to manufacture a reason to delay the TRO

[1] Ms. Henry, counsel for Schad, has previously asserted these similar claims of bias in her representation of Samuel Lopez in Maricopa County Superior Court Case No. LC2012-000264. In that case, Ms. Henry attacked the qualifications of Jesse Hernandez and the appointment process. Ms. Henry had the opportunity to seek a public records request in order to get the information she has requested in these last minute subpoenas. These issues are not new and the subpoenas are not a ground for delay.

hearing and/or his scheduled commutation/reprieve hearing. The Court should not be swayed by this tactic.

Moreover, Schad's purpose for engaging in this fishing expedition is to try to find facts that might substantiate his claims when he currently has no genuine facts. His request for these documents bolsters the point that Schad cannot meet his required burden before this Court can issue a TRO.

The real issue before this Court is that Schad is claiming that members of the Arizona Board of Executive Clemency ("Board") cannot and will not give him a fair clemency hearing. Schad's argument that the Governor influenced the Board by failing to re-appoint prior members and thereby violates his right to due process is without merit. "Courts have uniformly rejected allegations that due process is violated by a governor who adopts a general policy of not granting clemency in capital cases." *Anderson v. Davis*, 270 F.2d 674 (9TH Cir. 2002).

Although Schad is pursuing yet another attempt at discovery, the very Board members who will decide whether Schad will receive a recommendation for commutation will be available to testify at the TRO hearing. Their testimony, if needed beyond their affidavits, is sufficient and dispositive for this Court to make the determination whether Schad meets his burden of proof that he has a reasonable likely of success on the merits of that question. The current Board members affidavits stating that they are not biased and will be fair and impartial, standing alone, defeat the TRO. *Parker v. State Board of Pardons and Paroles*, 275 F.3d 1032 (11th Cir. 2001) (Court denied inmate's request for a TRO even with the Chairman's past statement that the Board would never grant clemency because court found that the Chairman presently state he could fairly review the clemency application and have an open mind).

CONCLUSION

Since the Board members have asserted they will provide Schad a fair and impartial commutation/reprieve hearing, all the other side issues in this case including the subpoenaed documents are irrelevant. The Defendants respectfully request that his Court quash these subpoenas.

Dated this 1th day of October, 2013.

THOMAS C. HORNE
Attorney General

By: /s Kelly Gillian-Gibson
Kelly Gillilan-Gibson
Brian P. Luse
Attorneys for Defendants

Electronically filed this
1st day of October, 2013 with:

Clerk of the U.S. District Court
for the District of Arizona
401 W. Washington
Phoenix, Arizona 85003

COPY of the foregoing served
Electronically this
1st day of October, 2013

Denise Young, Esq.
2930 North Santa Rosa Place
Tucson, AZ 85712

Kelley J. Henry
Super. Asst. Federal Public Defender
Captial Habeas Unit
Federal Public Defender
Middle District of Tennessee
810 Broadway, Ste. 200
Nashville, TN 37203
Attorneys for Plaintiff

By: Kelly Gillilan-Gibson
3560317

Exhibit A

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Arizona

GOVERNORS OFFICE 8TH FLR

2013 SEP 30 P 3:28

Edward Harold Schad, Jr. *Plaintiff* v. Janice K. Brewer, et al. *Defendant*	))))))	Civil Action No. CV-13-01962-PHX-ROS (If the action is pending in another district, state where:)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Custodian of Records, Office of the Honorable Janice K. Brewer, Arizona Governor, Executive Tower, 1700 West Washington Street, Phoenix, AZ 85007

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attachment A.

Place:	Date and Time:
Courtroom of Honorable Roslyn O. Silver 401 W. Washington St. Phoenix, AZ 85003	10/01/2013 1:00 pm

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/30/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk — *Attorney's signature*

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Schad, who issues or requests this subpoena, are:

Kelley J. Henry, Super. Asst. Federal Public Defender
c/o Federal Public Defender
850 W. Adams Street, Ste. 201, Phoenix, AZ 85007 602.382.2816 Kelley_Henry@fd.org

Civil Action No. CV-13-01962-PHX-ROS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Attachment A

Any and all documents respecting any current or former member of the Arizona Board of Executive Clemency created between February 1, 2009, and September 30, 2013. "Documents" is defined as: all correspondence (including letters, emails, and text messages), investigative reports, notes, memoranda, meeting summaries, agendas, initiating complaint, and any other written matter. "Recordings" is defined as any audio recording, including voicemail messages, CD's, DVD's or other means of recording an oral conversation, interview, or meeting. Please produced unredacted documents. Photocopies of originals will satisfy this request.

Exhibit B

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Arizona

Edward Harold Schad, Jr. *Plaintiff* v. Janice K. Brewer, et al. *Defendant*	)	Civil Action No. CV-13-01962-PHX-ROS (If the action is pending in another district, state where:)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Custodian of Records, Arizona Board of Executive Clemency, 1645 West Jefferson Street, Phoenix, AZ 85007

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attachment A.

Place:	Date and Time:
Courtroom of Honorable Roslyn O. Silver 401 W. Washington St. Phoenix, AZ 85003	10/01/2013 1:00 pm

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/30/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk — *Attorney's signature*

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Schad, who issues or requests this subpoena, are:

Kelley J. Henry, Super. Asst. Federal Public Defender
c/o Federal Public Defender
850 W. Adams Street, Ste. 201, Phoenix, AZ 85007 602.382.2816 Kelley_Henry@fd.org

Civil Action No. CV-13-01962-PHX-ROS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

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(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

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(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

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(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Attachment A

Any and all correspondence received by any current or former member, chairperson, or employee of the Arizona Board of Executive Clemency from any member of the staff of Governor Janice K. Brewer between February 1, 2009, and September 30, 2013. Correspondence is defined as letters, memoranda, email, or text messages. Please produce unredacted documents. Photocopies of originals will satisfy this request.