

**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

**REPLY TO RESPONSE TO  
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

Defendant's Response in Opposition (District Court Docket Entry ("Dkt.") 9.) demonstrates that there is a factual dispute on the critical question of whether Plaintiff, Edward Harold Schad, Jr., will receive a clemency hearing that will comport with Due Process of Law. It is important to keep in mind that this motion is for temporary relief only. At this stage, Mr. Schad does not seek a permanent injunction, but rather he seeks a temporary and/or preliminary injunction so that he may conduct expedited discovery, including requests for production of documents and depositions. This is necessary for Mr. Schad to be able to fully plead his claims without this action becoming moot due to his execution. Defendants' Response highlights the need for Plaintiff to be granted a temporary and/or preliminary injunction so that discovery can commence.

### **I. Defendants Misunderstand Plaintiff's Claims**

Plaintiff maintains that the ousting of Board Members Duane Belcher, Marilyn Wilkens, and Ellen Stenson served as an object lesson for what would happen to board members whose actions displeased Defendant Governor Brewer, or her agent, Defendant Scott Smith. The lesson was reinforced by Defendant Smith in his repeated "come to Jesus" meetings with Mr. Hernandez. Defendant Smith has not denied the meetings took place. Both Duane Belcher and Jesse Hernandez aver that such meetings took place. *See* Declaration of Duane Belcher

(Dkt. 1-5 at para 4); Declaration of Jesse Hernandez (Dkt. 1-9 at paras 4-6). Accordingly, for the purpose of this hearing, this matter must be accepted as true.

Defendants' self-serving declarations wherein they promise to be fair and unbiased do not address the core of Plaintiff's claim, *viz*, that Defendant Brewer through her agent Defendant Smith, sought to intimidate board members in order to produce a desired result with respect to their votes in certain cases. *Young v. Hayes*, 218 F.3d 850 (8<sup>th</sup> Cir. 2000) (state officials must refrain from frustrating clemency process by threatening or intimidating board members, from engaging in a mere farce of a clemency proceeding, and from violating governing law.)

Defendants ignore the import of Plaintiff's evidence. Declarants Belcher, Wilkens, and Stenson all establish the conduct on the part of Defendant Smith, *i.e.* threatening and intimidating behavior relating to votes in cases. Belcher Declaration (Dkt. 1-5 at paras 4-5); Declaration of Marilyn Wilkins (Dkt. 1-7 paras. 4, 7); Declaration of Ellen Stenson (Dkt. 1-6 at paras 4-6). Contrary to Defendants' response, the message was delivered loud and clear—do not vote to recommend clemency in high profile cases.<sup>1</sup> Defendant Brian Livingston swore in his affidavit, "Since becoming a member of the Board I was told by two board

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<sup>1</sup> In their carefully crafted Response, Defendants do not deny that Defendant Smith, acting on behalf of Defendant Brewer, sought to deliver this message through meetings with Belcher and Hernandez. Defendants also do not deny the allegation that someone acting on behalf of Defendant Brewer sent a letter to an as yet unknown Board Member expressing displeasure with the votes in a particular case. Declarant Thomas has a vivid memory of the letter. (Dkt. 1-8) He does not retract his memory in the Affidavit he provided for Defendants. (Dkt 9-1 at Exhibit B.)

members, Mrs. Kirschbaum and Mr. Thomas, that past board members felt they were not being reappointed to a board position because of how they voted in the past.” (Dkt 9-1 at Exhibit E.<sup>2</sup>) Former Board Member Melvin Thomas corroborates Livingston.

The other members of the Board while I served were also aware that their predecessors had lost their jobs because of how they voted. I knew that it was possible that I too could lose my job as a result of how I voted, but this did not affect my votes.

Declaration by Melvin Thomas (Dkt. 1-8 at para 4).

The former board members establish that the Governor and/or her chief of staff were upset by the votes in favor clemency for Mr. Flibotte and Mr. Macumber. Former Chairman Belcher confirms that Defendant Smith expressed his displeasure in a meeting with Belcher. (Dkt. 1-5 at para 4.) Former Chairman Hernandez also describes meetings with Defendant Smith where he made it clear that the Governor did not want another Macumber or Flibotte. (Dkt. 1-9 at paras 4-5.) This evidence, which is not disputed, corroborates Smith’s pattern and practice of calling in the Board Chairmen to exert pressure regarding their votes. These declarations are corroborated by the memory of former member Thomas who recalls Mr. Hernandez informing the Board about the Governor’s displeasure with the vote in a certain case. (Dkt. 1-8 at para 5.) Mr. Thomas also confirms this point

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<sup>2</sup> This Affidavit seems to contradict the Affidavit of Ellen Kirschbaum. (Dkt. 9-1 at Exhibit C, para 3.)

of Mr. Hernandez's declaration: "Chairman Hernandez stated to the Board members that the Governor had been unhappy with one of our decisions." (Dkt. 1-8 at Exhibit B, para 6.)

Defendants response to this evidence is that no Board Member has a right to their position on the Board. That is true of any employee. Each member does have a financial interest in their job. The attempt on the part of Defendants Smith and Brewer to frustrate the clemency process by holding the threat of losing their seat on the Board over the heads of board members violates minimal due process in a capital case.

Defendants' argument that the Court should presume the Board Members unbiased, in the face of the evidence brought forth thus far, is unavailing at this preliminary stage. The state cases cited by Defendants are readily distinguishable. The cases are not in the context of a complaint brought pursuant to 42 U.S.C. §§ 1983 and 1985, nor do they deal with a pre-hearing challenge. Rather, each is an appeal from an adverse decision by an administrative board. The cases do not deal with the same due process concerns raised in the context a capital prisoner's request for clemency.

Defendants cite *Havasu Heights Ranch and Dev. Corp v. Desert Valley Wood Prods.*, 807 P.2d 1119 (Ariz. Ct. App. 1990). *Havasu Heights* relies on the

United States Supreme Court decision in *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), which supports Plaintiff. In *Withrow*, the Court wrote:

Not only is a biased decisionmaker constitutionally unacceptable but ‘**our system of law has always endeavored to prevent even the probability of unfairness.**’ *In re Murchison*, *supra*, 349 U.S., at 136, 75 S.Ct., at 625; *cf. Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). 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. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

*Id.* (footnotes omitted)(emphasis supplied).<sup>3</sup>

## **II. Defendants’ Character Attack On Declarant Hernandez Is Inappropriate And Irrelevant For Purposes Of The Instant Motion.**

Defendants focus solely on attacking Jesse Hernandez’s sworn declaration that he overheard board members discussing Mr. Schad’s case expressing concern about the Governor’s reaction to a favorable vote in the Schad case. Defendants deny that they participated in such conversations. This denial creates a factual dispute which requires discovery. But Defendants go further in an all-out character assault on Mr. Hernandez. Defendants Brewer and Smith hand-picked Mr. Hernandez to be the Chairman of the Board, not Plaintiff. Mr. Hernandez owes no

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<sup>3</sup> *Lathrop v. Ariz. Bd. of Chiropractic Examiners*, 894 P.2d 715 (Ariz. Ct. App. 1995) is similarly inapposite. *Lathrop* did not involve a situation where the Board was subjected to outside influence of pressure.

allegiance to Mr. Schad and certainly has every reason to be hostile to Schad's current counsel who vocally criticized his appointment to the Board in 2012.

The viciousness with which Defendants have attacked Hernandez certainly raises questions as to Defendants motives. Further, the heavily redacted (and incomplete)<sup>4</sup> complaint created by the Department of Administration raises more questions than it answers and has questionable relevance to the matter before the Court for a temporary and/or preliminary injunction.<sup>5</sup>

Defendants focus on Hernandez is far from unassailable and, at best, raises factual issues for which discovery is necessary. Further, Defendants focus on Hernandez is irrelevant in the context of Plaintiff's motion.

### **III. On Balance Plaintiff Has Established His Entitlement to Temporary Relief Where Failure to Issue a Temporary Restraining Order and/or Preliminary Injunction Will Result in the Loss of His Life Without Giving Him an Opportunity to Fully Develop the Facts of His Claim**

In *Young* the Eighth Circuit upheld the preliminary injunction to permit factual development where the death row prisoner brought forth evidence of

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<sup>4</sup> Attachments referred to in the DOA report do not accompany the exhibit filed with the Court.

<sup>5</sup> There is no need for this Court to spend its times during a TRO hearing trying to parse the hearsay allegations in the DOA complaint against Hernandez. It bears noting, however, that Defendants appear to misrepresent the finding of the investigation claiming that the DOA found that Hernandez "engaged in misconduct when he accepted basketball tickets[.]" (Dkt. 9 at 4.) The DOA report did not find that Hernandez accepted tickets. It noted that others claimed Hernandez "joked" about receiving tickets, which is at most ambiguous. (Dkt. 9-1 at Exhibit A, p. 13.) Hernandez, to Schad's knowledge and belief, was not provided with a copy of the DOA report prior to his resignation, and has not had an opportunity to respond to the allegations. Again, Defendants Brewer and Smith placed Hernandez in his position.



official intimidation with the intent to tamper with clemency proceedings. Plaintiff has similarly brought forth such evidence. Defendants do not address the *Young* case in their response.

Defendants agree that Plaintiff is entitled to some measure of federal due process at his clemency hearing. (Dkt 9 at 6-7.) Defendants do not dispute that state official's actions designed to frustrate the fairness of a clemency hearing constitute a violation of federal due process.

Defendants fail to appreciate the importance of the fact that this case deals with a capital prisoner's due process right to a fair clemency hearing. *Woodard* acknowledges that, "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288, 118 S. Ct. 1244, 1253, 140 L. Ed. 2d 387 (1998)(O'Connor, J. concurring). This Court can weigh this factor heavily in determining whether to grant a TRO/Preliminary Injunction.

Defendants allege that Schad "misconstrues the basic function of clemency." Disturbingly, it is Defendants who fail to acknowledge or recognize the important role that clemency plays as the fail-safe against unjust executions. *See Herrerra v. Collins*, 506 U.S. 390, 415 (1993) ("Executive clemency has provided the "fail safe" in our criminal justice system.") While Plaintiff agrees that it is in the public's interest to ultimately have his case aired before a fair board, Plaintiff

cannot achieve that goal at this time. Further, given the disturbing allegations that have only recently come to light, the public is entitled to a full factual development regarding the alleged misdeeds of Defendant Smith, on behalf of Defendant Brewer, and the impact those misdeeds have had on the workings of the Board.

Defendants do not address Schad's argument that no harm will befall any entity by granting Schad a TRO/preliminary injunction. The Court should weigh this factor in Plaintiff's favor.

#### **IV. CONCLUSION**

At this preliminary stage, Plaintiff need not establish his conclusive entitlement to relief, as Defendants suggest. Plaintiff has presented enough to warrant interim relief, followed by expedited discovery and a full hearing, after which this Court should fashion a remedy which will ensure the fairness of the Board, including insulating Board members from intimidation and retaliation designed to frustrate the clemency process.

WHEREFORE, the motion should be granted.

Respectfully submitted this 1<sup>st</sup> 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 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*

Counsel for Edward Schad