

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

---

Edward Harold Schad, Jr.,	)	
Robert Glen Jones, Jr.,	)	
	)	
Plaintiffs,	)	CV-13-1962-PHX-ROS
	)	
vs.	)	Phoenix, Arizona
	)	October 1, 2013
Janice K. Brewer, et al.,	)	3:53 p.m.
	)	
Defendants.	)	
	)	
	)	

---

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING - VOLUME I

(Pages 1 through 63, inclusive.)

Official Court Reporter:  
Linda Schroeder, RDR, CRR  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 32  
Phoenix, Arizona 85003-2151  
(602) 322-7249

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

For the Plaintiff Schad:

Federal Public Defender's Office  
By: KELLEY J. HENRY, ESQ.  
810 Broadway, Suite 200  
Nashville, TN 37203

For the Plaintiff Jones:

Federal Public Defender's Office  
By: DALE A. BAICH, ESQ.  
SARAH E. STONE, ESQ.  
850 West Adams Street, Suite 201  
Phoenix, AZ 85007

For the Defendants:

Office of the Arizona Attorney General  
By: KELLY ELAINE GILLILAN-GIBSON, ESQ.  
BRIAN PATRICK LUSE, ESQ.  
1275 West Washington Street  
Phoenix, AZ 85007

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX OF WITNESSES

<u>WITNESSES FOR THE</u> <u>PLAINTIFFS:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>
BELCHER, Duane	14	33	34
THOMAS, Melvin	35	48	
STENSON, Ellen	50	57	
WILKENS, Marilyn Lee	58		

INDEX OF EXHIBITS

<u>EXHIBIT NO.:</u>	<u>DESCRIPTION:</u>	<u>RECEIVED:</u>
1	Macumber Documents	24

1 (Plaintiffs appearing via video teleconference.)

2 THE CLERK: This is case number CV 13-1962, Schad,  
3 et al., versus Brewer, et al., on for temporary restraining  
4 order hearing. Counsel, please announce for the record.

5 MS. HENRY: Kelley Henry on behalf of plaintiff Edward  
6 Schad.

7 THE COURT: Thank you.

8 MR. BAICH: Dale Baich and Sarah Stone on behalf of  
9 plaintiff Jones.

10 THE COURT: Thank you.

11 MS. GILLILAN-GIBSON: Kelly Gibson on behalf of Janice  
12 Brewer, the Governor; Scott Smith, Chief of Staff; Brian  
13 Livingston, Chairman of the Arizona Board of Executive  
14 Clemency.

15 THE COURT: I'm sorry. And I don't have -- For some  
16 reason I have your name listed in the front here. Kelly  
17 Livingston, right?

18 MS. GILLILAN-GIBSON: No. Kelly Gibson.  
19 Mr. Livingston is the Chairman of the Arizona Board of  
20 Executive Clemency.

21 THE COURT: Right. And you are? What's your name?  
22 I'm sorry?

23 MS. GILLILAN-GIBSON: My name is Kelly Gibson. In my  
24 written pleadings I have a hyphenated name, Your Honor, but for  
25 purposes of this, Gibson is fine.

1 THE COURT: Yes, I do remember that now. And who else  
2 is with you?

3 MR. LUSE: Good afternoon, Your Honor. Brian Luse,  
4 Assistant Attorney General, on behalf of the defendants.

5 THE COURT: Okay. All right. And we have Mr. Schad.  
6 Are you there?

7 MS. HENRY: Your Honor, I believe --

8 DEFENDANT SCHAD: We're here.

9 THE COURT: Can you hear me?

10 DEFENDANT SCHAD: Yes, ma'am.

11 THE COURT: And also Mr. Jones? Mr. Jones?

12 DEFENDANT JONES: Hello? Yes, ma'am.

13 THE COURT: Can you see me and hear me?

14 DEFENDANT JONES: I can see you, but I can't hear you.  
15 But he's going to listen to you and let me know what's going  
16 on.

17 THE COURT: Well, you must have heard me. You must  
18 have heard me because you answered the very question I asked.

19 Okay. Let's try again. Mr. Schad, can you hear me?

20 DEFENDANT SCHAD: Yes, ma'am.

21 THE COURT: And, Mr. Jones, can you hear me?

22 DEFENDANT JONES: Hello?

23 THE COURT: Well, if you answered yes, that means you  
24 can hear me.

25 MR. BAICH: Your Honor, it appears that the prisoners

1 are sharing a handset of a telephone.

2 THE COURT: Okay.

3 MS. SALLY ARVIZU: I don't believe they have a  
4 microphone or speaker system. It sounds like they have a  
5 telephone handset they both have to listen to.

6 THE COURT: They're going to have to share?

7 MS. SALLY ARVIZU: Uh-hmm.

8 THE COURT: Okay. Then what we will do is take it as  
9 slowly -- We will take this as slowly as possible. Mr. Schad  
10 and Mr. Jones, you are not to ask questions. You have very  
11 competent counsel representing you. Unless we need to take a  
12 break for your counsel to speak with you, you are here just to  
13 allow you to be present as you are entitled to in this 1983  
14 action.

15 All right. I think you understand, and we will  
16 proceed.

17 First of all, as we have the expedited motion to quash  
18 subpoenas to produce documents, let me hear from the defendants  
19 and Ms. Gibson.

20 MS. GILLILAN-GIBSON: Yes, Your Honor. The defendants  
21 filed the motion to quash. The Governor's Office as well as  
22 the Arizona Board of Executive Clemency got a subpoena to  
23 produce documents from a four-year period of time yesterday  
24 close to 4:00 p.m.

25 There's a couple bases for the objection. The first

1 basis is these documents are really irrelevant. If you read  
2 our expedited motion to quash, the issue before this Court for  
3 purposes of deciding a TRO is whether the current Board members  
4 have a bias that prevents them from executing their duties by  
5 law and conducting a Clemency hearing where they will provide  
6 both Mr. Schad and Mr. Jones with due process of law.

7 THE COURT: Let me interrupt you for a moment so  
8 that -- And I will do so along the way, and I apologize for  
9 doing so, but we don't -- it's already 4:00 today.

10 Isn't there a portion of their request which might be  
11 relevant, assuming it exists, and that is if there were  
12 communications between the Governor or the Governor's staff to  
13 the present Board?

14 MS. GILLILAN-GIBSON: Yes, if they existed --

15 THE COURT: And if those communications, if those  
16 communications were of the nature that the plaintiffs allege  
17 were the same type of communications that allegedly took place  
18 with former Board members, wouldn't that be relevant?

19 MS. GILLILAN-GIBSON: It is relevant, Your Honor. The  
20 defendants adamantly deny that those conversations took place.  
21 I assume you're looking into the affidavit by Mr. Hernandez  
22 alleging communications --

23 THE COURT: What I -- I know you adamantly deny that.  
24 But this is on a motion to quash. And what they're asking for  
25 are -- do any of those -- have there been any communications?

1 And so essentially they want to see the communications if there  
2 ever have been that would be of a like nature of the alleged  
3 communications that took place between Mr. Scott and the former  
4 members.

5 MS. GILLILAN-GIBSON: Right. Then I would turn to our  
6 second part of our objection, which is the timeliness of the  
7 subpoena, Your Honor.

8 THE COURT: Well, let's -- let me answer -- let's have  
9 you answer that. Would that be relevant if it existed?

10 MS. GILLILAN-GIBSON: Excuse me? Would the documents  
11 be relevant if it existed?

12 THE COURT: Yeah. Say, for example, what they are  
13 hoping to find, and that is all that we have on a discovery  
14 request, is they are hoping to find something of the nature  
15 that they allege occurred, that is, communications by the  
16 Governor or by somebody on behalf of the Governor of the same  
17 nature that they allege occurred -- and there are affidavits of  
18 such -- between Mr. Scott and previous Board members. So if  
19 those existed, wouldn't that be relevant?

20 MS. GILLILAN-GIBSON: Relevant but not necessary, Your  
21 Honor. We have the current Board members here who have  
22 submitted affidavits saying that conversations regarding  
23 Mr. Schad did not take place, that no one is influencing them  
24 on how they vote. And so while it may be relevant, it's going  
25 to be duplicative of what can be here today.



1 THE COURT: Okay. Can they answer the question as to  
2 whether or not those documents exist, whether or not they  
3 received? Wouldn't that be the most relevant issue here today?

4 MS. GILLILAN-GIBSON: Yes, yes. I think the witnesses  
5 here --

6 THE COURT: So then what -- As I see it, I'm going to  
7 hear from the plaintiffs' counsel about this and ask if  
8 that's -- is that in fact what you're looking for?

9 Ms. Henry, is that what you're looking for?

10 MS. HENRY: Yes, Your Honor, that's exactly what we're  
11 looking for.

12 THE COURT: So if they took the stand and you had the  
13 opportunity to vigorously cross-examine them, as I know you  
14 will, and they were to say we never received those documents,  
15 would that be enough?

16 MS. HENRY: No, Your Honor, it would not be enough. I  
17 mean, we have conflicting affidavits whether or not the  
18 documents exist or don't exist, so we have a fact dispute here.

19 THE COURT: Well, conflicting affidavits. Okay. Let  
20 me ask you this.

21 Conflicting affidavits from the present Board members?

22 MS. HENRY: Yes, ma'am. Well, no. I'm sorry. Melvin  
23 Thomas has given a declaration that's on file with this Court  
24 that's attached to our complaint that says he has observed a  
25 letter that was from the Governor's Office directed to a Board

1 member. I believe his testimony will be that he can place the  
2 timing of that letter as coming from this current  
3 administration.

4 He has thus far been unwilling to tell us who showed  
5 him the letter because he fears personnel action against that  
6 individual.

7 THE COURT: Showed him, and what was the content of  
8 the letter?

9 MS. HENRY: As I understand the content of the  
10 letter -- and Mr. Thomas can testify -- is that it was from  
11 someone in the Governor's Office in the administration, a  
12 person I don't know, complaining about a vote in a particular  
13 case that came before the Board. My understanding of the  
14 letter --

15 THE COURT: Was this before -- Was this at the time  
16 the present Board was composed, or was this before -- while  
17 Mr. Hernandez was the Chair of the Board?

18 MS. HENRY: It would have had to have been when  
19 Mr. Hernandez was the Chair of the Board, because Mr. Thomas --

20 THE COURT: Okay. So then who was -- what was the  
21 composition of the Board at the time Mr. Thomas allegedly  
22 received this letter?

23 MS. HENRY: It would have been Mr. Livingston,  
24 Ms. Kirschbaum, Mr. LaSota, Mr. Hernandez, and Mr. Thomas. And  
25 to be clear, Your Honor, I'm saying that's the time that he saw

1 the letter. I don't have the letter, so I don't know who it  
2 was addressed to and the timing that it was sent. Only that he  
3 says it was from this administration, and it was shown to him  
4 as an object lesson.

5 THE COURT: So he received this letter at the time  
6 when the present Board was composed, the present Board we have  
7 now. And the letter complained about a decision that the  
8 clemency Board had made or was a threat of some sort?

9 MS. HENRY: Your Honor, to be clear, he did not  
10 receive the letter. The letter was addressed to a different  
11 Board member.

12 THE COURT: Does he know which Board member?

13 MS. HENRY: He's not shared that with me. I just met  
14 him for the first time on Sunday.

15 THE COURT: He hasn't shared that with you. Is he  
16 going to refuse to share that with you or me?

17 MS. HENRY: I don't think he can refuse you.

18 THE COURT: Well, I may not ask him, because this is  
19 not discovery.

20 MS. HENRY: Yes, ma'am.

21 THE COURT: So I'm not going to turn to him and ask  
22 him. If you think it's relevant, then you ask him. If he  
23 refuses to answer it's up to him.

24 MS. HENRY: I intend to ask the question. I was also  
25 hoping to get assurances that if he revealed the person who

1 showed it to him, that no adverse personnel action would be  
2 taken against that individual.

3 THE COURT: I'm not sure I can do that. I'm not sure  
4 I have the authority to do that. It seems to me that that's a  
5 separation of power, an executive decision as opposed to a  
6 judicial decision. But we'll deal with that.

7 Well, okay. That's something new that I didn't really  
8 see so far unless you're going to tell me I missed it.

9 MS. HENRY: It would be contained in the affidavit of  
10 Mr. Thomas which is attached to our complaint. I'm sorry.  
11 It's a declaration of Mr. Thomas that's attached to our  
12 complaint.

13 THE COURT: But, I mean, in terms of the timing of all  
14 of this.

15 MS. HENRY: I'm not sure how -- if it was perfectly  
16 clear.

17 THE COURT: I will -- I'm going to take that under  
18 advisement. But let me also remind plaintiffs' counsel that  
19 you all know so well, being very experienced in this area, is  
20 that I will not allow a fishing expedition on a TRO.

21 The issue that I have in front of me and you  
22 accurately cited what the law is in the Ninth Circuit to  
23 determine whether or not a temporary restraining order is to be  
24 granted, even in something as serious as a death penalty case,  
25 is you have to show a substantial likelihood of success. And

1 that has to be on the papers. And I certainly have seen that  
2 before in a case not too long ago where there were -- there was  
3 enough on the record to where I was concerned about there not  
4 being enough discovery.

5 But I will tell you right now that based upon what  
6 I've seen so far -- we haven't heard the testimony -- that it  
7 is unlikely that I would allow an expedition into the discovery  
8 that you're asking for which appears to me to be tentative at  
9 best at this point, although you've given me something to think  
10 about. Okay?

11 So it's under advisement. It's -- I'm not granting it  
12 just certainly for the purpose of this hearing. This is a  
13 temporary restraining order hearing based upon any evidence  
14 that you have to offer.

15 So -- And I will -- I will rule on that likely at the  
16 end of the hearing today.

17 Do you want to call your first witness?

18 MS. HENRY: Yes, ma'am. Plaintiff Schad calls Duane  
19 Belcher.

20 MS. GILLILAN-GIBSON: Your Honor, may I be heard on  
21 her first witness?

22 THE COURT: And why?

23 MS. GILLILAN-GIBSON: I want to object on the basis of  
24 relevancy. Mr. Belcher is a prior Board member. He does not  
25 have -- And his affidavit doesn't contain any information

1 regarding whether or not the current Board members can be fair  
2 and impartial. In the motion we had to quash, we cited you a  
3 case of Parker versus --

4 THE COURT: Let me stop you for a second. Generally  
5 the Rules of Evidence apply generally in every hearing before  
6 the Court. But the rules are, on a temporary restraining  
7 order, preliminary injunction, and sometimes an injunction, but  
8 primarily a temporary restraining order and preliminary  
9 injunction hearing the rules are relaxed, particularly with  
10 respect to something where there is a, without any doubt, there  
11 is the likelihood of irreparable harm. So I'm going to allow  
12 it. You can make the objections or you can cross-examine as  
13 you wish. I'm well aware of what your view is so far on the  
14 issue of relevancy.

15 DUANE BELCHER, PLAINTIFFS' WITNESS, SWORN

16 THE CLERK: Please say your name for the record and  
17 spell your last name.

18 THE WITNESS: Duane Belcher, B-e-l-c-h-e-r.

19 THE COURT: And you may proceed.

20 MS. HENRY: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MS. HENRY:

23 Q. Mr. Belcher, can you tell us how you are currently  
24 employed?

25 A. I'm retired.

1 Q. And what did you retire from?

2 A. State of Arizona Board of Executive Clemency.

3 Q. What was your position at the time of retirement with the  
4 Arizona Board of Executive Clemency?

5 A. Well, I had just been replaced as the Chairman/Executive  
6 Director, so actually at the time of my termination, I was in a  
7 training capacity for new Board members that were to come  
8 aboard.

9 Q. How long did you serve as a Board member of the Arizona  
10 Board of Executive Clemency?

11 A. Since 19 -- I was appointed by Governor Symington in 1992.

12 Q. And at the time you were appointed, it actually had a  
13 different name; is that correct?

14 A. Yes. It was the Arizona Board of Pardons and Paroles at  
15 that time.

16 Q. And then at some point when the legislation changed, was it  
17 with the Truth in Sentencing Act?

18 A. Yes. When Truth in Sentencing came aboard, the Board  
19 underwent a name change. The responsibilities basically  
20 remained the same pretty much, but the name was changed to the  
21 Arizona Board of Executive Clemency.

22 Q. And how many different governors did you serve under?

23 A. Two terms under Governor Symington, Governor Hull for a  
24 period of time, two terms under Governor Napolitano, and the  
25 remainder under Governor Brewer.

1 Q. Mr. Belcher, we're going to be brief today because it's  
2 late in the day, and this is a preliminary hearing, but just  
3 for purposes of the record and to sort of establish the next  
4 questions I want to ask you about, could you just briefly  
5 describe what the function of the Board was at the time that  
6 you served as a Board member and the Executive Director and  
7 Chairman.

8 A. Well, initially in '92 obviously the mechanism that we all  
9 know as parole was alive and well at that point in time. So a  
10 great deal of the Board's authorities and hearings were people  
11 that were in prison that were applying and eligible for parole  
12 status. And the Board made the decision basically whether or  
13 not they should be released from incarceration under parole.

14 Also, there were pardon responsibilities at the time  
15 and also executive clemency, which were basically the Board  
16 would conduct hearings, and the Board would make decisions  
17 whether or not to forward to the Governor the Board's  
18 recommendation that a person either receive a pardon if it was  
19 a pardon application or executive clemency. There were also  
20 death penalty cases that the Board heard. And basically the  
21 function was the same, that the Board would hear the case and  
22 make a decision whether or not a recommendation would be made  
23 to the Governor to either commute the sentence from the death  
24 penalty to, most of the time, to life in prison without the  
25 possibility of parole.



1 Q. And what is your understanding about the Board's role in a  
2 death penalty case in terms of the Governor's ability to grant  
3 a sentence commutation?

4 A. Well, the Board, in my estimation, has always been known as  
5 an independent hearing body. The Board is supposed to hear  
6 information, testimony, review documents or whatever, and make  
7 a decision based on the merits of the information that they  
8 have whether or not to forward a recommendation to the  
9 Governor. And so that's my understanding of what -- I hope I  
10 answered the question.

11 Q. Is the Board's recommendation binding on the Governor?

12 A. No. No. The Governor is under no obligation to go along  
13 with the Board's recommendation. However, if the Board fails  
14 to make a recommendation, then the Governor does not have the  
15 power to commute a sentence or act in any way on that  
16 particular case. It's only if the Board makes a positive  
17 recommendation to the Governor, then the Governor can act on  
18 the Board's recommendation.

19 Q. How many members are there on the Board?

20 A. There are, I believe, five now. When I started, there were  
21 seven, and through the years the number of Board members has  
22 been reduced.

23 Q. How long do the Board members serve a term?

24 A. They're five-year staggered terms. At least it was  
25 designed that way when I first came aboard that Board members

1 were appointed for five-year terms and that every year  
2 basically a term would expire and then a new Board member would  
3 be appointed, and that's the way that it would go.

4 Q. And I want to ask one more question, because, again, it's  
5 going to become relevant.

6 A. Okay.

7 Q. With respect to folks who have -- And I don't have the  
8 right terminology. I'm not an Arizona lawyer, as everybody  
9 here knows. At some point after Truth in Sentencing, the Board  
10 heard certain requests for early release if -- because of  
11 mandatory sentencing. Can you explain that process?

12 A. That was called a Disproportionality Review. Basically the  
13 legislature decided, when the criminal code changed from the  
14 old criminal code to the new one, that individuals -- they  
15 wanted to know whether or not there was some significant  
16 differences in the sentences that a person would receive prior  
17 to January 1, 1994, and that was the effective date. So if  
18 they committed a crime in December of '93 versus the same type  
19 of crime January of 1994, were there some significant  
20 differences in the penalties that were imposed?

21 And so they gave the Board the responsibility of  
22 basically putting together and conducting all the hearings  
23 necessary under that Disproportionality Review Act. And it was  
24 basically to say if the Board felt that the sentence was  
25 disproportionate, sort of out of whack with the other, and that

1 the Board felt a person would remain at liberty without  
2 violating the law if they were granted some type of clemency,  
3 then the Board could recommend those cases to the Governor.

4 Q. And that worked the same way as a death penalty  
5 recommendation, that they had to have a majority of the Board  
6 in order to get a positive recommendation?

7 A. Yeah. They would have had to have a majority of the Board  
8 to get a positive recommendation.

9 Q. So a two/two split is a negative recommendation?

10 A. Yes, because it's -- basically the status quo remains. If  
11 there's four Board members, and two say yes and two say no,  
12 it's not a majority of a quorum of the Board, and that is what  
13 the standard is.

14 Q. You've mentioned a number of governors who you served  
15 under. Excluding Governor Brewer, so before Governor Brewer  
16 took office, did any of the other governors or members of their  
17 staff ever contact you to let you know that they were  
18 displeased with the Board's vote in a certain matter?

19 A. To the best of my recollection, no.

20 Q. Prior to Governor Brewer --

21 A. I'm sure probably some of them were, but they never  
22 contacted me to express to me that they were dissatisfied with  
23 either my decision or --

24 THE COURT: When you say they probably were, what  
25 makes you say they probably were contacted?

1 THE WITNESS: No, I didn't mean contacted. I mean  
2 maybe dissatisfied with or not in agreement with the Board's  
3 recommendation.

4 THE COURT: I see. So that there may have been some  
5 disagreement, but it was never communicated?

6 THE WITNESS: Right. That's correct.

7 THE COURT: Thank you.

8 Q. (BY MS. HENRY) Prior to Governor Brewer's administration,  
9 did any member of any other gubernatorial staff ever call you  
10 in for a meeting to discuss the vote in any particular case?

11 A. No. Well, if I can clarify that, there have been times  
12 where individual staff members from other administrations have  
13 asked or called me to clarify some information, because in  
14 serving as the chairman, a lot of the responsibilities that  
15 were not basically placed on the Board members were in fact  
16 placed on the Chairman. So if it was a matter of victim  
17 notification or some other, you know, technical things, then in  
18 fact they might ask me was this done or was that done or  
19 whatever but not to basically discuss the vote.

20 Q. Your term expired during Governor Brewer's administration;  
21 is that correct?

22 A. That's correct.

23 Q. Prior to your term expiring -- and, again, I'm going to try  
24 and facilitate things to move us along -- did you have an  
25 occasion to hear the clemency case on behalf of a gentleman

1 named William Macumber?

2 A. Yes, I did.

3 Q. And did you -- do you recall what the Board's vote was in  
4 that case?

5 A. I believe the first Bill Macumber clemency hearing, I  
6 believe it was a unanimous vote of -- and I'm thinking five  
7 members at the time. I could be a little off because I don't  
8 have all of the records in front of me. But I believe it was  
9 in fact a unanimous vote to recommend clemency in the first  
10 Bill Macumber hearing.

11 MS. HENRY: Your Honor, I apologize for not having  
12 these exhibits pre-marked, but I was wondering if I could mark  
13 an exhibit.

14 THE COURT: Sure.

15 MS. HENRY? May I approach the witness, Your Honor?

16 THE COURT: Yes. Why don't you hand it to Christine.  
17 She does well at that.

18 LAW CLERK: This Christine.

19 THE COURT: Yeah, two Christines.

20 Q. (BY MS. HENRY) Mr. Belcher, in front of you is a  
21 collective exhibit Plaintiffs' No. 1. Do you recognize that  
22 exhibit?

23 A. Yes, I do.

24 Q. And if you could, tell the Court what that exhibit is.

25 A. And that is the -- Wait a minute. That's the first exhibit

1 in the packet. That was a letter that was written by myself on  
2 behalf of the Board, and this letter basically was notifying  
3 Mr. Macumber that his application for clemency had been denied  
4 by the Governor and also was advising him that if eligible he  
5 could reapply for commutation two years from May of '09. And  
6 that's when the Board basically made the -- had the hearing and  
7 made the recommendation.

8 Q. And attached to that letter is there also another letter  
9 dated August 25th, 2009?

10 A. Yes, there is.

11 Q. And can you tell the Court what that letter is?

12 A. That is the letter that the Board submits in every  
13 recommendation for clemency to the Governor basically  
14 outlining, explaining the reasons why the Board felt that  
15 executive clemency would in fact be in order.

16 Q. And in 2009, the Board unanimously recommended clemency on  
17 behalf of Mr. Macumber; is that correct?

18 A. That's correct.

19 Q. And obviously the Governor chose not to go along with that  
20 recommendation. Were you contacted by anyone in the Governor's  
21 administration regarding the Board's vote -- Well, before I ask  
22 you that, did Mr. Macumber come before the Board again?

23 A. Yes, he did.

24 Q. A second time in 2011?

25 A. I believe that was -- I'm not real sure about the date, but

1 I'm -- that's probably correct.

2 Q. And at the time, the original five Board members -- the  
3 composition of the Board at that point was different; is that  
4 also correct?

5 A. That's correct.

6 Q. And the only folks who were on the Board at that time who  
7 had sat in 2009 were yourself and Ms. Stenson; is that correct?

8 A. That's correct.

9 Q. And I'm asking some leading questions just to move along,  
10 Judge.

11 And at the time in -- that Mr. Macumber came back,  
12 Ms. Stenson was unable to be present for the hearing. Is that  
13 your memory?

14 A. That is correct.

15 Q. And what was the result of that second hearing?

16 A. I believe it was two to two. There were two Board members  
17 that were voting favorably to recommend clemency to the  
18 Governor and two Board members disagreed, so two/two split. Of  
19 course there was no recommendation that was made.

20 Q. And so at that time it was you and Mr. LaSota who voted in  
21 favor of Mr. Macumber?

22 A. To the best of my recollection, that's correct.

23 Q. And Ms. Wilkens and Ms. Kirschbaum who voted against  
24 Mr. Macumber?

25 A. That's also correct.

1 Q. There was another individual who came before the Board that  
2 I want to ask you about, a gentleman by the name of  
3 Mr. Flibotte, and that's F-l-i-b-o-t-t-e. You don't have an  
4 exhibit in front of you with his name. Do you recall the  
5 Flibotte case?

6 A. I do.

7 Q. Can you describe briefly what the Flibotte case involved?

8 A. Mr. Flibotte was an older gentleman. I don't know. He was  
9 not from Phoenix or Tucson but I think in one of the other  
10 counties. And he was convicted of possessing child  
11 pornography. And as I recall, the judge in the case issued a  
12 603L order, which basically is the Court's ability, if they  
13 have to sentence somebody to a specific amount of time in  
14 prison and they think that's excessive, the Court can issue a  
15 603L order basically saying: You can apply for executive  
16 clemency. We as the Court felt that the sentence we imposed is  
17 too much.

18 Q. And Mr. Flibotte was a 603L case?

19 A. To the best of my recollection, that's correct.

20 Q. And my courtroom skills are rusty, so I'm going to ask you  
21 about that in a minute, but, Your Honor, I would move admission  
22 of Plaintiffs' Exhibit No. 1.

23 MS. GILLILAN-GIBSON: No objection.

24 THE COURT: It's admitted.

25 MS. HENRY: Thank you, Your Honor, and I apologize for



1 not doing that at the same time.

2 THE COURT: Thank you.

3 Q. (BY MS. HENRY) Turning back to the Flibotte case, do you  
4 recall what the Board's recommendation in Mr. Flibotte's case  
5 was?

6 A. Again, to the best of my recollection, I believe it was  
7 time served. He had obviously been in prison for a period of  
8 time, and I think that the Board recommended to the Governor  
9 that his sentence be commuted to time served.

10 Q. And do you recall if that vote was unanimous or if there  
11 was dissent?

12 A. That I don't.

13 Q. And Mr. Flibotte's case came before the Board near the end  
14 of your term of service as it turned out; is that correct?

15 A. That's correct.

16 Q. Do you know who Scott Smith is?

17 A. Yes.

18 Q. Who is Scott Smith?

19 A. I believe he's the Governor's Chief of Staff at this time.

20 Q. At the time that you knew Scott Smith, did you -- what was  
21 his position?

22 A. I believe part of the time that he was Deputy Chief of  
23 Staff.

24 Q. At any point during your term of service did you have any  
25 interaction with Mr. Smith regarding the Board's votes on any

1 particular cases?

2 A. Yes, ma'am.

3 Q. Could you please share with the Court that experience.

4 A. I believe it was a couple of times, but it was regarding  
5 those two cases, the Macumber case, as you've mentioned here,  
6 and the Flibotte case. And I remember being called to the  
7 Governor's --

8 THE COURT: Let me ask you for foundation. When did  
9 that occur? When did those occur? Can you estimate, or do you  
10 remember?

11 THE WITNESS: Unless it's in my affidavit, I don't.

12 THE COURT: And if you proffer what's in the affidavit  
13 to remind me, just go ahead, and I'm sure counsel will agree.  
14 When was that?

15 MS. HENRY: Early 2012.

16 THE COURT: Thank you.

17 THE WITNESS: All right. So it was specific to those  
18 cases, the Macumber case. I had a discussion with Mr. Scott  
19 Smith and Mr. Joe Sciarrotta, who is the General Counsel to the  
20 Governor regarding -- I believe the first time it was regarding  
21 the Macumber case.

22 And I was asked a number of questions as to why I  
23 voted and why did I feel the Board voted to recommend to the  
24 Governor executive clemency in the case. And I was asked some  
25 specific questions as to did the Board notify the victims in

1 the particular case. One I recall. And I did everything in my  
2 power as Chairman to obviously find victims -- that was my  
3 responsibility -- and notify them.

4 And I in fact had spoke to the only victim that I  
5 could find in the Macumber case. And I recall also being asked  
6 did I notify Carol Macumber, the victim in the particular case.  
7 And so my question was Carol Macumber was not a victim by  
8 statute in that particular case. She was the wife of Bill  
9 Macumber, and she basically was the one, I think, that came  
10 forward and said my husband had admitted to me that he  
11 committed these crimes.

12 So I clarified that to them because, again, she was  
13 not a legal victim. And we tried to do everything we could to  
14 notify everybody that had an interest in the particular case.

15 And then I was basically asked, well, you didn't  
16 believe her when she --

17 MS. GILLILAN-GIBSON: Objection, Your Honor. Hearsay.

18 MS. HENRY: Your Honor, it's not being offered for the  
19 truth of the matter asserted but more to explain --

20 THE COURT: In fact, who was this that made this  
21 statement to you? You were about to tell me something. Who  
22 was it?

23 THE WITNESS: Scott Smith and Joe Sciarrotta, who was  
24 the General Counsel.

25 THE COURT: And I thought Mr. Smith was a defendant in

1 this case.

2 MS. HENRY: He is.

3 THE COURT: All right. So then why isn't that an  
4 admission?

5 MS. GILLILAN-GIBSON: Your Honor, Joe Sciarrotta is  
6 not an admission, and Mr. Belcher did not specify who said.

7 THE COURT: And there is no agency connection that you  
8 can establish?

9 MS. HENRY: Let me ask a few more questions, Your  
10 Honor.

11 THE COURT: Because otherwise when you say it's  
12 offered for the truth or not truth, is it your position it's  
13 not hearsay, or is there an exception to the hearsay rule in  
14 that it's not being offered for the truth, number one, or that  
15 it's as she happens to be an agency for the Governor, and if  
16 so, you have to establish the foundation for it? Which is it?

17 MS. HENRY: Let me establish the foundation for it,  
18 Your Honor.

19 Q. (BY MS. HENRY) Let me back up a couple steps. And I'm  
20 sorry I'm trying to go too quickly.

21 Scott Smith at the time was the Deputy Chief of Staff  
22 for the Governor?

23 A. I believe so.

24 Q. And was he your liaison to Governor Brewer?

25 A. No. Joe Sciarrotta was my liaison to Governor Brewer.

1 Really the Deputy General Counsel was actually my liaison.

2 Q. Let me ask you who is Joe Sciarrotta?

3 A. Joe Sciarrotta was the General Counsel to the Governor.

4 Q. So the General Counsel for the Governor and the Chief  
5 Deputy Counsel for the Governor had a meeting with you about  
6 Bill Macumber? Let's just focus on that right now.

7 A. That's correct.

8 Q. And was it Scott Smith or Joe Sciarrotta who asked the  
9 question about why Carol Macumber was not contacted?

10 A. I believe it was, to the best of my recollection, I believe  
11 it was Mr. Sciarrotta.

12 Q. And Mr. Sciarrotta's question to you was what?

13 A. Was the victim notified in a particular case. And it was  
14 specifically mentioned Carol Macumber. And then that's when I  
15 responded that Carol Macumber was not a victim in the Bill  
16 Macumber case and that I had in fact notified the victim or  
17 made every effort to notify the true victim by statute that I  
18 could.

19 Q. And a lot of people in this courtroom are very familiar  
20 with the Bill Macumber case, but those who look at the record  
21 on down the road may not be. Mr. Macumber was accused of what?

22 A. Of a double homicide. And I forget when it took place. It  
23 was quite a few years ago. There were two young individuals  
24 that were killed in the desert.

25 MS. GILLILAN-GIBSON: Your Honor, I'm going to object.

1 Again, we have limited time for this TRO. The issue's bias  
2 about the current Board, so I don't know what the specific  
3 facts about Macumber --

4 THE COURT: I'm going to sustain the objection.

5 Q. (BY MS. HENRY) In any event, Carol Macumber was not the  
6 victim of that crime; she wasn't murdered, and she wasn't a  
7 family member?

8 A. That's correct.

9 Q. That's all I was getting at, Your Honor.

10 And you were asked that question. Do you recall being  
11 asked a question by any member of the Governor's staff  
12 regarding the Flibotte vote?

13 A. Yes.

14 Q. Which member of the Governor's staff asked you questions  
15 about Flibotte?

16 A. To the best of my recollection, both Mr. Scott Smith and  
17 Joe Sciarrotta. Who asked what specific question, I can't  
18 remember.

19 Q. The two of them were together in a meeting with you?

20 A. That's correct.

21 Q. Was there anyone else present in the meeting?

22 A. No.

23 Q. Where did the meeting take place?

24 A. I believe it was the -- I don't know -- the eighth or ninth  
25 floor conference room in the Governor's Tower.

1 Q. So you -- It was at the Governor's Office?

2 A. Yes.

3 Q. And what was asked of you about or said to you about the  
4 Flibotte vote?

5 A. Well, specifically one question was asked was why did the  
6 Board recommend time served in the Flibotte case and not what  
7 the Court had basically suggested might be appropriate -- an  
8 appropriate sentence.

9 Q. Did you -- What was the tone of the questioning in the  
10 conversation?

11 A. My impression of the tone was it was -- they were not  
12 satisfied with what the Board's recommendation was to them.

13 Q. What about their demeanor caused you to come to that  
14 conclusion?

15 A. Well, the questions that were asked and sometimes the body  
16 language, the raising of voices, the leaning up in chairs, body  
17 language, is the best I can --

18 Q. Do you recall who raised their voice?

19 A. I believe Scott Smith was one of them that did.

20 Q. And you motioned leaning forward in the chair in sort of  
21 a -- in what kind of manner?

22 A. My opinion was in an aggressive manner.

23 Q. Did you communicate the content -- In early 2012, who were  
24 the members of the Arizona Board of Executive Clemency besides  
25 yourself?

1 A. I believe that was myself, Ms. Ellen Stenson, Ms. Marilyn  
2 Wilkens, Ellen Kirschbaum, and Mr. Jack LaSota.

3 Q. So two current members were on the Board at the time?

4 A. Yes, Mr. LaSota and Ms. Kirschbaum.

5 Q. Did you communicate what had been said to you by  
6 Mr. Sciarrotta and Mr. Smith to the members of the Board of  
7 Executive Clemency?

8 A. I probably did, but I can't remember specifically having  
9 any type of meeting or whatever, but I imagine that I did.

10 Q. Do you recall Mr. Smith telling you that the Governor felt  
11 blindsided by the vote in the Macumber case?

12 A. Yes.

13 Q. In this matter, Mr. Belcher, were you asked to provide an  
14 affidavit on behalf of plaintiff Mr. Schad?

15 A. Yes, I was.

16 Q. And did you review a declaration for errors and accuracy?

17 A. Yes, I did.

18 Q. And that document has been filed with this Court as  
19 document 1-5, and it's dated September the 26th of 2013; is  
20 that correct?

21 A. I believe so.

22 Q. And you signed that document in Tucson, Arizona; is that  
23 correct?

24 A. That's correct.

25 Q. At the Office of the Federal Public Defender down there?



1 A. That's also correct.

2 Q. The contents of this declaration, are they true and  
3 accurate to the best of your knowledge and belief?

4 A. Yes, they are.

5 Q. And you reviewed it carefully before you signed it?

6 A. Yes, I did.

7 MS. HENRY: If I could have just one moment, Your  
8 Honor?

9 Mr. Belcher, I have no further questions for you, but  
10 defense counsel may have some.

11 THE WITNESS: Thank you.

12 THE COURT: Counsel.

13 CROSS-EXAMINATION

14 BY MS. GILLILAN-GIBSON:

15 Q. Good afternoon, Mr. Belcher. How are you doing?

16 A. Good afternoon. How are you?

17 Q. So, Mr. Belcher, when you were on the Board, did you always  
18 vote independently?

19 A. Yes, ma'am.

20 Q. Did you ever vote according -- based on outside influence?

21 A. Well, outside influence, yes, I did.

22 Q. Okay. Did anyone pressure you to vote a particular way?

23 A. No, ma'am.

24 Q. So you always voted based on the information you received  
25 at the hearing; is that correct?

1 A. That's correct.

2 Q. So after this meeting that you had with Mr. Sciarrotta and  
3 Mr. Smith, did you come back to the Board and try to influence  
4 the current Board members' vote?

5 A. No.

6 Q. Did you tell Ms. Kirschbaum and Mr. LaSota that they would  
7 have to vote a certain way?

8 A. No.

9 MS. GILLILAN-GIBSON: I have no further questions,  
10 Your Honor.

11 THE COURT: Thank you. Redirect.

12 REDIRECT EXAMINATION

13 BY MS. HENRY:

14 Q. You know defendant -- or you know Mel Thomas; is that  
15 correct?

16 A. Yes, I do.

17 Q. And you spent some time --

18 MS. GILLILAN-GIBSON: Objection, Your Honor. Goes  
19 beyond the scope of cross-examination.

20 MS. HENRY: I'm laying foundation to ask a question  
21 that actually is responsive to cross-examination.

22 THE COURT: Okay. We'll see. Go ahead.

23 MS. HENRY: Your Honor, may I just ask a leading  
24 question?

25 THE COURT: Go ahead.

1 Q. (BY MS. HENRY) Did you tell Mr. Thomas that you believed  
2 that the reason that you were not reappointed as Chairman of  
3 the Board and as a Board member is because of your vote on  
4 certain cases such as Mr. Flibotte's case and Mr. Macumber's  
5 case?

6 A. I believe I did.

7 MS. HENRY: Thank you, Your Honor. No further  
8 questions.

9 THE COURT: All right. You may step down.

10 MS. HENRY: Your Honor, plaintiff Schad calls Melvin  
11 Thomas.

12 Your Honor, may Mr. Belcher be excused?

13 MS. GILLILAN-GIBSON: Yes, he may, Your Honor.

14 THE COURT: Thank you.

15 MELVIN THOMAS, PLAINTIFFS' WITNESS, SWORN

16 THE CLERK: State your name for the record, and spell  
17 your last name please.

18 THE WITNESS: Melvin Thomas, T-h-o-m-a-s.

19 DIRECT EXAMINATION

20 BY MS. HENRY:

21 Q. Mr. Thomas, how are you currently employed?

22 A. Am I currently employed?

23 Q. Are you currently employed?

24 A. No, ma'am.

25 Q. Where were you last employed?

1 A. Where was I last employed?

2 Q. Yes, sir.

3 A. With the Arizona Board of Executive Clemency.

4 Q. And how long did you serve with the Arizona Board of  
5 Executive Clemency?

6 A. Approximately a year and three or four months.

7 Q. Were you appointed in April of 2012 and served until August  
8 of 2013? Does that sound about right?

9 A. Yes, that's correct.

10 Q. And at the time that you came to the Board, were you aware  
11 that, as you said in your declaration, three Board members who  
12 had left before you had been forced out?

13 A. I became aware of some comments after I got on the Board.  
14 I wasn't aware of anything prior to because I didn't speak to  
15 anyone on the Board prior to meeting with Duane on my first --  
16 Mr. Belcher on my first day.

17 Q. So you came to know that once you started working at the  
18 Board?

19 A. There were comments that were made about why people were  
20 gone.

21 Q. And, Mr. Thomas, you provided a declaration for an attorney  
22 with the local Federal Public Defender's Office, Ms. Laura  
23 Berg; is that correct?

24 A. Yes, ma'am.

25 Q. And you read the declaration?

1 A. Yes, ma'am.

2 Q. And looked at it very carefully?

3 A. I had her change some things that weren't quite accurate.  
4 And to be perfectly honest with you, I missed one, because I  
5 have to look at it. Do you mind? I have to pull it up on my  
6 phone.

7 THE COURT: She has it. She'll provide it to you.

8 MS. HENRY: Your Honor, may I provide the witness with  
9 document 1-8?

10 THE COURT: Please give it to Christine.

11 MS. HENRY: I'm sorry.

12 Q. (BY MS. HENRY) In front of you, Mr. Thomas, is document  
13 1-8 titled Declaration of Melvin Thomas. Do you see that  
14 there?

15 A. Yes, ma'am.

16 Q. And do you see on the second page your signature?

17 A. Yes, ma'am.

18 Q. And it's dated the 16th day of September, 2013; is that  
19 correct?

20 A. Yes, ma'am.

21 Q. And I'll direct your attention to Paragraph 3. Do you see  
22 where I'm talking about there?

23 A. Yes, ma'am.

24 Q. And do you see in the third sentence "I was aware that the  
25 three Board members who left before me were forced out because

1 each one of them had recommended clemency in one or more cases  
2 that got sent up to Governor Brewer"?

3 A. That was some information that was implied, yes.

4 Q. And that's what you wrote in your declaration?

5 A. Yes, ma'am.

6 Q. And you received that information from Duane Belcher?

7 A. No, not directly from Mr. Belcher.

8 Q. Who did you receive that information from?

9 A. Various folks that apparently thought that they knew more  
10 about what was going on than I did.

11 Q. Mr. Thomas, did you tell us in your declaration and did you  
12 tell me on Sunday that at least one Board member who had voted  
13 for clemency received a letter from the Governor's Office  
14 informing him or her that the Governor was displeased with his  
15 or her vote?

16 A. I further clarified that for you too that it was on a phone  
17 where the person had a, just like that --

18 Q. Mr. Thomas, I'm want to ask you all about the letter, but  
19 my question to you right now --

20 A. Well, the way you asked me the question disturbs me because  
21 that's not quite accurate. But go ahead.

22 Q. Mr. Thomas, right now let me just ask you is the  
23 declaration that you signed, does it say in Paragraph 3 at  
24 least one Board member who had voted for clemency received a  
25 letter from the Governor's Office informing him or her that the

1 Governor was displeased with his or her vote? Is that what it  
2 says there?

3 A. Yes, ma'am.

4 Q. Now, the letter that you observed -- Did you observe a  
5 letter? Is that true?

6 A. It was a -- supposedly a letter, but I didn't see the whole  
7 letter because it was on their phone as an e-mail.

8 Q. So you saw a letter on someone's phone?

9 A. Yes. And they showed me just portions of that. I don't  
10 know who signed it or who it was addressed to. That was what  
11 my clarification was with you on Sunday.

12 Q. And I believe what you said was that the letter was dingy;  
13 is that correct?

14 A. Yes, ma'am.

15 Q. I didn't understand it to have been on a phone, so that was  
16 my confusion. I apologize.

17 A. Say that again please.

18 Q. I didn't understand you were saying it was on someone's  
19 phone. So on someone's phone you saw a dingy letter?

20 A. Well, that's why I showed you the phone, because it was not  
21 some little small phone. It was the -- what do you call  
22 these? -- notebook, notepads, notebooks. Okay.

23 Q. The person who showed you the letter was not a Board  
24 member; is that correct?

25 A. No, ma'am.

1 Q. That's not correct?

2 A. The person who showed it to me was not a Board member, no.

3 Q. And you've been unwilling to share with us the name of the  
4 individual who showed you the letter?

5 A. And I shared with you -- Yes, I am, and that was because I  
6 had to check with that person to find out if it was okay if I  
7 would divulge that information to anyone else, because they  
8 gave it to me in confidence.

9 Q. Are you willing to answer the question today for the Judge?

10 A. In private.

11 Q. Why is it you don't want to give the name?

12 A. Because the person showed it to me to give me some  
13 information about what they believe had been going on, but I  
14 don't know who the letter was addressed to. It could have been  
15 to anyone. Okay. Just showed me a section of the letter on  
16 their phone.

17 MS. GILLILAN-GIBSON: Your Honor, I don't mean to  
18 interrupt. I guess I'm just seeking a clarification, because  
19 the declaration says it was at least one Board member who had  
20 received this letter, and now, based on the questioning, it  
21 wasn't a Board member who received a letter.

22 MS. HENRY: That's what I'm trying to establish.

23 THE COURT: Well, what I understand so far -- and  
24 correct me if I'm wrong -- is that someone showed you on a  
25 notebook, if that's what it's called, a letter that one of the



1 Board members had received.

2 THE WITNESS: Allegedly received, yes.

3 THE COURT: A letter that that Board member had  
4 received showing or indicating that the Governor was unhappy  
5 with that Board member's decision?

6 THE WITNESS: Not just that Board member but several  
7 Board members' decisions on a particular case, but I don't  
8 remember the case.

9 THE COURT: So the letter read that? Is that what the  
10 letter stated, or is that what the person said?

11 THE WITNESS: That's what they said. It implied that  
12 they were upset with their votes on a particular case. I don't  
13 know which case that was either.

14 THE COURT: With all the Board members' decisions?

15 THE WITNESS: No.

16 THE COURT: I'm very confused about --

17 THE WITNESS: Not with all the Board members'  
18 decisions. There was a particular case, and they were upset  
19 with how the Board had voted.

20 THE COURT: Okay. So they -- Let's try not to --

21 THE WITNESS: And I don't know if it was -- Because I  
22 didn't see a signature block or who it was addressed to.

23 THE COURT: All right. Thank you. Let's both you and  
24 I try not to use pronouns.

25 This person who you have not identified showed you

1 what he or she thought was a letter that the Board members  
2 received from the Governor or an agent of the Governor that  
3 indicated or implied that the Governor was displeased with the  
4 Board members' decision on a particular case?

5 THE WITNESS: Yes, ma'am.

6 THE COURT: And you haven't identified who that person  
7 is. Did you read the letter?

8 THE WITNESS: All I saw was like on here. They just  
9 pulled up a section of the letter.

10 THE COURT: Okay. Could you tell from the section  
11 that it was actually addressed to all the Board members?

12 THE WITNESS: No.

13 THE COURT: Could you tell that it was a letter from  
14 the Governor or an agent of the Governor?

15 THE WITNESS: No.

16 THE COURT: So then how did you come to conclude that  
17 it came from the -- that it was a letter and that it came from  
18 the Governor or an agent of the Governor?

19 THE WITNESS: That was implied by the person who  
20 showed it to me.

21 THE COURT: That was implied or specifically said?

22 THE WITNESS: Implied.

23 THE COURT: Go ahead.

24 Q. (BY MS. HENRY) Why -- What was the purpose of showing you  
25 the letter?

1 A. I think, to be honest with you, I really don't know. I  
2 think they thought that I would be intimidated by it.

3 Q. And you have chosen not to reveal the name of the  
4 individual because you feel like the person wasn't supposed to  
5 show you the letter?

6 A. I don't think they were.

7 Q. I'm sorry?

8 A. I don't believe they were or they had no reason to show it  
9 to me, to be perfectly honest with you.

10 Q. Do you fear adverse personnel action will come to that  
11 individual for having shown you the letter?

12 A. No. Why?

13 THE COURT: I'm sorry. Your answer?

14 THE WITNESS: No. I don't think any adverse personnel  
15 action.

16 Q. (BY MS. HENRY) Could they get in trouble?

17 A. I don't know if they could get in trouble, but I would have  
18 to ask that person, because they showed it to me in confidence,  
19 and I said: Okay, cool. I'm not going to share that with  
20 anyone else.

21 THE COURT: Can you -- Let me interrupt for a second.

22 THE WITNESS: Yes, ma'am.

23 THE COURT: Did you read it, what they showed you?

24 THE WITNESS: Just the first couple sentences, and  
25 then I decided that -- you know what? -- I don't care what that

1 implies; I'm going to do what I do.

2 THE COURT: When you said just a couple of sentences,  
3 could you identify it as actually a letter or the person said  
4 it was a letter?

5 THE WITNESS: They said it was a letter.

6 THE COURT: So you saw a couple of sentences. What do  
7 you recall those sentences stated?

8 THE WITNESS: Referring to comments and a particular  
9 vote of the Board may have jeopardized the positions of the  
10 three Board members that were being replaced.

11 THE COURT: It said they may have jeopardized?

12 THE WITNESS: Their ability to be objective. I don't  
13 know what that really meant.

14 THE COURT: I'm not quite sure what you're saying.  
15 Can you more than paraphrase it? What was said?

16 THE WITNESS: Well, Judge, to be honest with you, I  
17 really wasn't paying a whole lot of attention. I think the  
18 person was just trying to goad me into thinking that I would  
19 succumb to that kind of pressure. And I just made a comment to  
20 them at the time.

21 THE COURT: So was it more of what the person said  
22 than what you read?

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Okay. And you can't recall exactly what  
25 was set forth in this purported letter?

1 THE WITNESS: No, ma'am.

2 THE COURT: Okay. Go ahead.

3 Q. (BY MS. HENRY) Moving on from the subject of the letter, I  
4 want to ask you, Mr. Thomas, because you and I have seen each  
5 other in a professional setting but actually never had a  
6 discussion about this matter or your declaration until  
7 Sunday --

8 A. That's correct.

9 Q. -- of this week, whatever today is?

10 And when we met, it was very important to you that I  
11 let the Judge know -- and I told you that I would -- that you  
12 did not take part in any conversation about the Schad case with  
13 Ms. Kirschbaum or Mr. Livingston; is that correct?

14 A. That's absolutely correct.

15 Q. That's your testimony?

16 A. Yes, ma'am.

17 Q. And if Mr. Kirschbaum or if Ms. Kirschbaum and  
18 Mr. Livingston had a conversation not in your presence, you  
19 wouldn't know about it?

20 A. If I wasn't present, I wouldn't know anything about it.

21 Q. Did you and other Board members have a break room?

22 A. Yes, ma'am.

23 Q. Did you go to the break room?

24 A. Yes, ma'am.

25 Q. Did you go to lunch together sometimes?

1 A. Occasionally, after January -- I'm sorry. After we moved  
2 back into the building, because we were holding hearings during  
3 the renovations at 1601 South 16th Street, I believe.

4 Q. Thank you. Do you still have your declaration in front of  
5 you?

6 A. Yes, ma'am.

7 Q. Let me direct you to Paragraph 4. In that declaration in  
8 Paragraph 4 did you also tell the attorney with the Federal  
9 Public Defender's Office that "The other members of the Board,  
10 while I served, were also aware that their predecessors had  
11 lost their jobs because of how they voted"? Did you say that?

12 A. I believe everybody knew that or at least suspected that  
13 folks had been replaced because of some particular vote or  
14 votes that they had made in the past.

15 Q. And did you also swear under penalty of perjury that I knew  
16 that it was possible that I too could lose my job as a result  
17 of how I voted, but it did not affect my vote?

18 A. It was implied, but I'm one -- Well, I'm one of those  
19 individuals that says you're not going to intimidate me. I'm  
20 sorry.

21 Q. So it was implied, you weren't intimidated, but you did  
22 state that you knew it was possible that you could lose your  
23 job?

24 A. You could lose your job for any given reason, yes.

25 Q. Mr. Thomas, I'm not trying to argue with you.

1 A. I understand, but yes.

2 Q. You said that in your declaration?

3 A. Yes, ma'am.

4 Q. And you signed it?

5 A. Yes, I did.

6 Q. And in Paragraph 5 did you share with us in your  
7 declaration that "On more than one occasion Chairman Hernandez  
8 informed the Board members that Governor Brewer had been  
9 unhappy with one of our recent --" and there's a typographical  
10 error there -- "our recent our decisions or that she would be  
11 unhappy if we voted a certain way in an upcoming case"? Did  
12 you sign that?

13 A. Yes, I did.

14 Q. And did you also tell us that Mr. Hernandez indicated he  
15 was getting his information from the Governor's Office?

16 A. Yes, ma'am.

17 Q. And you've also been very clear that you didn't let that  
18 affect your vote?

19 A. To be perfectly honest with you, half the stuff that came  
20 off his lips I didn't believe in the first place.

21 Q. So, Mr. Thomas, did Mr. Hernandez say those things?

22 A. Yes, ma'am.

23 Q. All right. Mr. Thomas, you resigned your position from the  
24 Board in early August, August 6, 2013; is that correct?

25 A. Was that the first Monday?

1 Q. The first Monday in August you resigned?

2 A. Yes, ma'am.

3 Q. And you resigned in an effort to accelerate the Department  
4 of Administration's investigation into a matter that you and  
5 your fellow Board members had filed against Mr. Hernandez; is  
6 that correct?

7 A. Which one are you referring to?

8 Q. You -- Let me ask you this. Have you and your fellow Board  
9 members filed a complaint with the Department of Administration  
10 alleging that Mr. Hernandez has cheated you out of money?

11 A. Yes.

12 Q. And you were frustrated with the pace of that  
13 investigation; is that correct?

14 A. No. It was a totality of the -- There was a prior one as  
15 well. It's kind of hard to explain because it has nothing to  
16 do with this case. But if you don't mind, I will.

17 Q. If it's not relevant it's not relevant.

18 A. Okay.

19 MS. HENRY: One moment, Your Honor.

20 THE COURT: Sure.

21 MS. HENRY: That's all I have, Your Honor.

22 THE COURT: All right. Cross.

23 CROSS-EXAMINATION

24 BY MS. GILLILAN-GIBSON:

25 Q. Good afternoon, Mr. Thomas.



1 A. Good afternoon, Ms. Gibson.

2 Q. Did you take your job seriously as a Board member?

3 A. Absolutely.

4 Q. Did anyone ever specifically tell you how to vote?

5 A. No.

6 Q. Did you let anyone tell you how to vote?

7 A. No.

8 Q. While you were a Board member, did you witness anybody tell  
9 any of your other co-Board members how to vote?

10 A. No.

11 Q. You had already testified that you never participated in a  
12 conversation with Ms. Kirschbaum and Mr. Livingston regarding  
13 the Schad matter; is that correct?

14 A. No, ma'am, because when I left, Schad wasn't even up for  
15 anything. Now, there was no reason to have a discussion about  
16 any inmate coming up for clemency, particularly during our  
17 lunch hour. And to be perfectly honest with you, during our  
18 lunch hours, our breaks, we rarely talked about work. We  
19 talked about basketball, football, various wines.

20 Q. Okay. And so as a Board member, if you would have  
21 witnessed two people predetermining a case, what action would  
22 you have taken?

23 A. I would have had to contact, prior to you, it was Mary Jane  
24 Gregory.

25 Q. So had you witnessed two Board members violating -- or more

1 than two Board members violating the Open Meeting law, you  
2 would have reported it?

3 A. That's the way I was trained by Ms. Gregory when she had me  
4 sit in her office for about eight hours going over the various  
5 statutes. And then there was a subsequent briefing about the  
6 various statutes and particularly the Open Meeting statute.

7 Q. Okay. And during the time you were on the Board with  
8 Ms. Kirschbaum, Mr. LaSota, and Mr. Livingston, were there  
9 times that you actually voted for commutation?

10 A. Yes, ma'am.

11 Q. So the vote wasn't no every single time, right?

12 A. No, ma'am.

13 MS. GILLILAN-GIBSON: Okay. I have no further  
14 questions.

15 THE COURT: All right. Redirect?

16 MS. HENRY: No, Your Honor.

17 THE COURT: You may step down.

18 MS. HENRY: Plaintiff Schad calls Ellen Stenson.

19 THE COURT: Thank you.

20 ELLEN STENSON, PLAINTIFFS' WITNESS, SWORN

21 THE CLERK: State your name for the record, and spell  
22 your last name please.

23 THE WITNESS: Ellen Stenson, S-t-e-n-s-o-n.

24 THE COURT: Go ahead.

25 MS. HENRY: Your Honor, may I provide Ms. Stenson her

1 declaration?

2 THE COURT: Yes.

3 DIRECT EXAMINATION

4 BY MS. HENRY:

5 Q. Ms. Stenson, how are you currently employed?

6 A. With the Clerk of Court in Maricopa County.

7 Q. And in what capacity?

8 A. Courtroom clerk.

9 Q. At some point in your career have you been employed as a  
10 member of the Arizona Board of Executive Clemency?

11 A. Yes.

12 Q. When were you first appointed to the Board?

13 A. I was appointed, I believe, February of 2007 and then  
14 confirmed by the Senate in May of 2007.

15 Q. How long did you serve with the Board?

16 A. Five years.

17 Q. How long is a term with the Board?

18 A. Five years.

19 Q. Had you applied for reappointment?

20 A. Yes.

21 Q. During the time that you served as a member of the Arizona  
22 Board of Executive Clemency, did you have occasion to consider  
23 the case of Bill Macumber?

24 A. Yes.

25 Q. And when you were -- His case came before the Board, we've

1 heard testimony already today, twice, in 2009 and again in  
2 2011; is that correct?

3 A. I think it came up in 2012 the second time.

4 Q. Thank you for correcting me.

5 And when Mr. Macumber's case came up in 2009, were you  
6 among the Board members who heard the case?

7 A. Yes.

8 Q. And what was your vote at that time?

9 A. To recommend -- recommend to the Governor clemency.

10 (Video teleconference interruption.)

11 MS. SALLY ARVIZU: My apologies. The -- It appears  
12 their bridge cut off right at 5:00 p.m.

13 THE COURT: Okay. We're not going to have it after  
14 that? Is that your understanding? Christine, do you know  
15 anything about it?

16 MS. SALLY ARVIZU: I'm not aware of that. If you give  
17 me a moment, I can call the prison. I can call the jail.

18 THE COURT: Counsel, is it your position they have to  
19 be present?

20 MS. HENRY: No, Your Honor. We appreciate your  
21 accommodation, but we can move forward.

22 THE COURT: You can check, but we'll go ahead. Thank  
23 you.

24 MS. HENRY: Thank you, Your Honor.

25 Q. (BY MS. HENRY) My apologies, Ms. Stenson.

1           So in 2009, your vote amongst -- was in favor of  
2 Mr. Macumber for receiving executive clemency; is that correct?

3 A. Yes.

4 Q. And that recommendation was ultimately not followed by the  
5 Governor at the time?

6 A. Correct, yes.

7 Q. And Mr. Macumber came back up for clemency again, and that  
8 time were you able to sit on the panel?

9 A. No. I had a trip planned out of state.

10 Q. And you and Mr. Belcher were the only two Board members at  
11 that time who had heard the previous commutation case; is that  
12 correct?

13 A. Yes.

14 Q. And so you had an unavoidable trip out of town, and so the  
15 Board split two/two? Is that your understanding?

16 A. Yes.

17 Q. When your term expired with the Board and you reapplied,  
18 did you have an opportunity to have an interview with the  
19 executive clemency nominating selection committee?

20 A. Yes.

21 Q. And can you describe that interview and how it compared to  
22 your previous interview?

23 A. My previous interview, my first interview with the  
24 Governor's Office, was in 2007, and it was with two  
25 individuals. This one in 2012 was there were four -- three or

1 four or five people interviewing me.

2 Q. In the 2012 interview, was it conducted in an executive  
3 session?

4 A. I came to find out later it was considered an executive  
5 session. I don't think I knew that ahead of time.

6 Q. Okay. And in the interview there were five --

7 MS. GILLILAN-GIBSON: Your Honor, I need to object at  
8 this time. Under Arizona law, things that occur in the  
9 executive session are confidential. If she discloses what  
10 happens in executive session under 38-431.03 as well as 38-504,  
11 there is potentially criminal liability, Your Honor. So I  
12 don't know if the Court should advise the witness of that prior  
13 to this line of questioning.

14 THE COURT: If it's ordered by the Court, it's no  
15 longer criminal, right?

16 MS. GILLILAN-GIBSON: Pardon?

17 THE COURT: As long as I order it?

18 MS. GILLILAN-GIBSON: I'm not sure. I mean, I think  
19 the statute says that the information is confidential, and  
20 disclosure is subject to criminal penalties. If you order it,  
21 I'm not -- it would be up to any prosecuting authority whether  
22 or not that would be sufficient. It's sort of like -- It  
23 sounds like you're trying to grant immunity.

24 THE COURT: That's true, but do you have any authority  
25 that I cannot order it under any circumstances in a federal

1 court?

2 MS. GILLILAN-GIBSON: I don't, Your Honor.

3 THE COURT: What's your position?

4 MS. HENRY: Your Honor, I would ask that you order the  
5 witness to answer the question as it relates to her being  
6 questioned regarding the Macumber case.

7 THE COURT: Well, I know you're asking that, but  
8 what's the answer to the law?

9 MS. HENRY: I don't believe that -- I believe that  
10 Your Honor has the authority to order her to answer the  
11 question and that she would not face criminal liability.

12 THE COURT: But before I do something that's void as a  
13 matter of law, then we'd better have some authority for it.

14 MS. HENRY: That I cannot provide you as I stand here  
15 today, Your Honor.

16 THE COURT: Okay. Well, then, if it was an executive  
17 session, is there any dispute that it was executive session, or  
18 is there a dispute as to whether it was not?

19 MS. HENRY: There is no dispute that they called it  
20 into an executive session. There is a huge dispute as to  
21 whether it was a proper executive session. And there's also a  
22 huge dispute as to whether or not what they did in the  
23 executive session qualified.

24 THE COURT: Was it briefed? I don't recall that it  
25 was briefed. I remember that there was an argument it was

1 executive session. There was an argument that it shouldn't  
2 have been executive session. But I'm not sure it was briefed.  
3 And I am not familiar enough with the Open Meeting law in  
4 Arizona to know whether or not I have the authority to order  
5 it. I suspect I do. But I'm not sure under what  
6 circumstances. So I'm not going to allow it.

7 MS. HENRY: Your Honor, the reason it wasn't briefed  
8 is because that objection was made just now.

9 And it would be our position that we should be given  
10 an opportunity to provide you with that information. Of course  
11 it's already before the Court in the form of a declaration.  
12 And it's our further position that particularly --

13 THE COURT: I'm certainly going to take it. It's in  
14 affidavit form. There was no objection made. I'll consider  
15 the affidavit. Anything else?

16 MS. HENRY: No, thank you, Your Honor. That's fine.  
17 Q. (BY MS. HENRY) Without going into the contents of your  
18 interview, Ms. Stenson -- That's fine. I'm not going to ask  
19 you anything more at all about the interview?

20 THE COURT: It's in the record.

21 MS. HENRY: It is in the record, Your Honor.

22 THE COURT: And I will consider what she stated.

23 MS. HENRY: Your Honor, I'm not going to ask this  
24 witness anymore questions. She's been very kind and  
25 cooperative.



1 THE COURT: Okay. Cross.

2 CROSS-EXAMINATION

3 BY MS. GILLILAN-GIBSON: .

4 Q. Ms. Stenson, did you vote independently when you were a  
5 member of the Board of Executive Clemency?

6 A. Yes.

7 Q. Did anyone tell how to vote, and did you follow through by  
8 voting the way they told you?

9 A. No one told me how to vote.

10 MS. GILLILAN-GIBSON: I have no further questions,  
11 Your Honor.

12 THE COURT: All right. Redirect?

13 MS. HENRY: No, Your Honor.

14 THE COURT: You may step down.

15 MS. HENRY: Your Honor, in light of defendant's  
16 counsel's most recent objection, may I have a moment to confer  
17 with counsel before I call my next witness?

18 THE COURT: The witness is still in the courtroom.  
19 Any objection to excusing her?

20 MS. GILLILAN-GIBSON: No, Your Honor.

21 MS. HENRY: Thank you, Your Honor. I apologize.

22 Plaintiff Schad calls Marilyn Wilkens.

23 THE COURT: Thank you.

24 MS. HENRY: Who was right behind me.

25 THE CLERK: Can you please come forward, all the way

1 up here.

2 MARILYN LEE WILKENS, PLAINTIFFS' WITNESS, SWORN

3 THE CLERK: State your name for the record spell your  
4 last name please.

5 THE WITNESS: Marilyn Lee Wilkens, W-i-l-k-e-n-s.

6 DIRECT EXAMINATION

7 BY MS. HENRY:

8 Q. Good afternoon, Ms. Wilkens.

9 A. Good afternoon.

10 Q. Ms. Wilkens, did you serve as a member of the Arizona Board  
11 of Executive Clemency?

12 A. Yes, I did.

13 Q. When were you first appointed?

14 A. In January of 2010.

15 Q. When you were initially appointed as a member of the  
16 Arizona Board of Executive Clemency, did you receive an  
17 interview in 2010?

18 A. No, I did not.

19 Q. You were appointed?

20 A. Correct. And it was explained to me because I was filling  
21 out somebody's term.

22 Q. So you were completing a five-year term of someone else?

23 A. That is correct.

24 Q. And when you applied for reappointment, what year was that?

25 A. When I applied for it, I believe it was in the latter part

1 of fall to winter, like November of 2011.

2 Q. Thank you. During the time that you served as a member of  
3 the Arizona Board of Executive Clemency, did you have an  
4 opportunity to sit on one of the Board's cases involving a  
5 gentleman by the name of Bill Macumber?

6 A. Yes, I did.

7 Q. And how did you vote in that case?

8 A. I voted against any clemency action for him.

9 Q. And also while you were a member of the Arizona Board of  
10 Executive Clemency did you have an opportunity to sit on a case  
11 with a gentleman by the name of Flibotte?

12 A. Yes, I did.

13 Q. And can you tell us how you voted in that case?

14 A. I did vote, along with the remainder of the Board, the  
15 other members participating in that hearing, to recommend  
16 clemency action for him to the Governor's Office.

17 Q. And, Ms. Wilkens, I'm going to ask some very specific  
18 questions right now, okay?

19 When you applied for reappointment, you were not  
20 reappointed; is that correct?

21 A. That is correct.

22 Q. And what is -- Did you form -- Let me ask -- I'm going to  
23 back up. I'm trying to ask specific questions.

24 When you went in to be -- Did you receive an interview  
25 for the reappointment?

1 A. Yes, I did.

2 Q. And can you tell the Court who was present during the  
3 interview?

4 A. We were led -- I was led into the interview room where the  
5 interview was conducted by, I believe, Ms. Stiles, and then  
6 present were Scott Smith, Joe Sciarrotta, Eileen Klein, I  
7 believe you pronounce his name Mr. Halliday, and Mr. Ryan,  
8 and -- Yes.

9 Q. And Ms. Stiles is head of Boards & Commissions?

10 A. Correct.

11 Q. Mr. Halliday is head of DPS?

12 A. Correct.

13 Q. Mr. Ryan is head of the Department of Corrections?

14 A. Correct.

15 Q. Ms. Klein was at the time Governor Brewer's Chief of Staff?

16 A. You know, I don't know exactly what her position was at  
17 that time.

18 Q. But she was with the Governor's Office?

19 A. Okay.

20 Q. Is that correct?

21 A. Yes, she was with the Governor's Office.

22 Q. Scott Smith was also with the Governor's Office?

23 A. That's correct.

24 Q. And Joe Sciarrotta was the Governor's General Counsel?

25 A. Correct.

1 Q. Did you know Scott Smith prior to that interview?

2 A. Oh, absolutely.

3 Q. How long have you known Scott Smith?

4 A. I would say close to 20-plus years.

5 Q. Did you know -- And I should ask you this. Before you were  
6 a member of the Arizona Board of Executive Clemency, did you  
7 serve some time in public service working for the state?

8 A. Yes. I worked for the Department of Corrections for the  
9 longest period of time but also actually the Governor's Office  
10 at one point, Department of Administration, Department of  
11 Health Services.

12 Q. Did you know Mr. Smith as a result of your employment with  
13 the Department of Corrections?

14 A. Yes, I did.

15 Q. And you knew him back when he worked for Sam Lewis?

16 A. That's correct, as legislative liaison.

17 Q. And you also have a longstanding relationship with  
18 Mr. Ryan; is that correct?

19 A. Correct.

20 Q. Now, Ms. Wilkens, I do not want to ask you any questions  
21 about what happened in terms of the content of the questions  
22 that were asked you within your job interview, okay?

23 A. Okay.

24 Q. Were you told before you went to your job interview that it  
25 was going to be an executive session?

1 A. No, I was not.

2 Q. If you had been given an opportunity to object to your  
3 interview being in executive session, would you have objected?

4 A. Yes.

5 Q. Did you know you could object when you were called in for  
6 the job interview?

7 A. No.

8 Q. Ms. Wilkens, did you provide a declaration to counsel --  
9 not to me -- but for someone from the Federal Public Defender's  
10 Office --

11 A. Yes --

12 Q. -- here in Arizona?

13 A. -- I did.

14 Q. I just spoke over you. I'm sorry. Yes, you did?

15 A. Yes, I did.

16 MS. HENRY: And, Your Honor, if I may provide  
17 Ms. Wilkens with a copy of that declaration? And could I  
18 please have this marked as Plaintiffs' Exhibit No. 2?

19 THE COURT: Yes. And, counsel, we're going to have to  
20 take a break. I have someone I have to talk to at 5:15,  
21 shouldn't take more than 15, 20 minutes. We'll take a break.

22 MS. HENRY: Thank you.

23 (Proceedings recessed at 5:16 p.m.)

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, LINDA SCHROEDER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 2nd day of October, 2013.

s/Linda Schroeder  
Linda Schroeder, RDR, CRR