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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD HAROLD SCHAD, JR., et. al, Plaintiff, vs. JANICE K. BREWER, et. al, Governor Of The State Of Arizona, In Her Official Capacity, Defendants.	No. 2:13-cv-01962-ROS RULE 59 MOTION TO RECONSIDER ORDER DENYING PRELIMINARY INJUNCTION DEATH PENALTY CASE - EXECUTION SET FOR OCTOBER 9, 2013 10:00 AM OCTOBER 23, 2013 10:00 AM

Based on Melvin Thomas' October 3, 2013, submission to the Court, Doc. No. 31, Melvin Thomas either committed perjury in his testimony on October 1, 2013, or he lied to the Court in his unsworn letter on October 3.[1] If Thomas' latest letter is to be believed, Ellen Kirschbuam certainly misled the court, and may also have committed perjury. Both witness' testimony and credibility has certainly been called into question. Plaintiffs did not have this information at the time of the preliminary hearing, despite repeated efforts to obtain it.[2] This Court should withdraw its orders of October 4, Doc. No. 30, and October 1, Doc. No. 21, and issue a preliminary injunction. Alternatively, the Court should conduct further inquiry.

At the preliminary hearing, Thomas testified that an unnamed person showed him a letter that reflected Defendant Brewer's displeasure with the Board as a result of their votes in a case. Thomas testified that the unknown person did so in an effort to intimidate him: "I think they thought that I would be intimidated by it." TR Vol. 1, p. 43. Thomas testified that "the person was just trying to goad me into thinking that I would succumb to that kind of pressure." *Id.* p. 44. Thomas testified that it was implied that he could likewise suffer the same fate as three Board members who had been ousted for their vote in a particular case or cases.

[1] Despite repeated efforts to obtain a copy of Mr. Thomas' letter on October 3, Plaintiff's counsel did not receive it until October 4 at 9:19 a.m.

[2] Thomas refused to answer questions and was evasive. Tr. Vol. 1, at 38-44. Defendants refused to comply with subpoenas, which this Court quashed, Doc No. 21, despite Defendants' counsel's concessions that communications between the Governor, or Smith, and the Board are relevant to Plaintiffs' complaint. Tr. Vol. 1, pp 7-9.

Critically, Thomas testified that the person who showed him the letter was NOT a board member. Tr. Vol. 1, p. 40 (**The person who showed it to me was not a Board member[.]") (**emphasis supplied)**.** Thomas now says that the person to whom he was referring is Defendant Ellen Kirschbaum, who is a current Board member. According to Thomas' testimony at the hearing, then, Defendant Kirschbaum was attempting to "goad" and "intimidate him," and implied to him that he could lose his job as a result of his votes.

Kirschbaum swore under oath that she did not know the reason that the three board members were ousted. Tr. Vol. 2, p. 91. She also swore that no one from the Governor's office ever expressed displeasure with her votes. *Id.* p. 86-87. Kirschbaum testified that she did not think her job was at risk for her votes. *Id.* p. 89. If Kirschbaum attempted to goad and intimidate Thomas and implied that he too could lose his job if he didn't fall in line, then her October 1 testimony is not credible. Plaintiffs ought to at least have an opportunity to cross examine these witnesses about these glaring inconsistencies.

Thomas' letter to Court raises even more questions. In court, under oath, Thomas went to great lengths to explain why the letter he described as seeing on a tablet type phone was "confidential" and it was shown to him in "confidence" and the person wasn't supposed to show it to him. Tr. Vol. 1, p. 43-44. Now, Thomas says that the letter he was shown was the Flibotte letter that was already in the

record in these proceedings, and more importantly, it was a public record. Doc. No. 31. If one carefully reads what Thomas submitted on October 3, the source of the submission is Kirschbaum. Kirschbaum emailed Thomas the letter after Court proceedings and then sent another email saying that what she had sent Thomas was just a draft. Doc. No. 31, pp. 3, 8.The circumstances surrounding these conversations and letter are nonsensical.

Kirschbaum proudly proclaims authorship of the Flibotte letter. *See* Tr. Vol. 2, p. 86. The Flibotte letter is a public record. It is not confidential. Anyone can get it from the Board. This begs the question: why would Thomas refuse to say who showed him the letter, who the letter was from, and who it was addressed to if the letter was public record and authored by a Board member who seems to be proud that she penned the letter? Why is it that Kirschbaum wasn't supposed to show it to him? Moreover, given the inconsistencies in Thomas' testimony and his evasiveness surrounding the letter, is his unsworn letter to the court actually what Kirschbaum showed him in an attempt to "intimidate" him? Indeed, Thomas's revelations have seriously called into question Kirschbaum's credibility. Kirschbaum testified that she did not know if Belcher, Wilkens, and Stenson were ousted for their vote. Tr. Vol. 2, p. 91. But Thomas said that the person who showed him the letter, presumably Kirschbaum, was showing him this letter to goad and intimidate him, implying that he too could lose his job. Kirschbaum

claims to have never been contacted by the Governor and her staff with complaints about any of her votes, TR Vol. II, p. 86-87, but according to Thomas, she was.

Thomas testified, that the person, presumably Kirschbaum, was showing him the letter to give him information about what was going on. Under oath, he described the letter to the Court:

> THE COURT: A letter that that Board member had received showing or indicating that the Governor was unhappy with that Board member's decision?
>
> THE WITNESS: Not just that Board member but several Board members' decisions on a particular case, but I don't remember the case.
>
> THE COURT: So the letter read that? Is that what the letter stated, or is that what the person said?
>
> THE WITNESS: That's what they said. It implied that they were upset with their votes on a particular case. I don't know which case that was either.

Tr. Vol. 1, p. 41. This testimony is inconsistent with his October 3 unsworn submission. Thomas went further in explaining that the person who showed him this letter indicated that the Board member jeopardized their jobs with their votes and their "ability to be objective" was "jeopardized." *Id.* p. 45.

Reading together Thomas's declaration, testimony, and later submission to the court, as well as how those relate to Kirschbaum's testimony, it seems, at the very least that there are serious questions whether this is in fact the letter, or whether the witnesses have testified truthfully.

Even if the letter produced by Thomas, through Defendant Kirschbaum, is the letter to which he was referring, considering all of his statements together, he has told the court that the efforts to intimidate him and goad him and to influence his vote came from Defendant Kirschbaum. The Court asked, "So was it more of what the person said than what you read?" Thomas answered, "Yes, ma'am." *Id.* p. 45. Thomas testified it was implied that he could lose his job because of the way he voted. *Id.* p. 46. Thomas also testified that former chairman Hernandez tried to pressure their votes and claimed that the pressure was coming from the Governor's office. *Id.* p. 47.

The letter that Melvin Thomas provided to the Court on October 3, 2013, raises serious questions of perjury and impeaches the testimony of Ellen Kirschbaum. What has just transpired calls into question this Court's credibility findings, which are the very basis of this Court's October 1 and 4, 2013 Orders.

This Court should reconsider its October 1 and October 4 orders, grant a preliminary injunction staying Plaintiffs' executions, and permit them to conduct expedited discovery. Alternatively, this Court should conduct further inquiry into the matters raise by the submission by Thomas.

Respectfully submitted this 4th 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 4, 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, Dale Baich, Kelly Gibson and Brian Luse. I further certify that I emailed copies to Ms. Kristine Fox, Capital Case Staff Attorney for the District of Arizona and Ms. Margaret Epler, Capital Case Staff Attorney for the Sixth Circuit.

Kelley J Henry
Counsel for Edward Schad