

No. 13-16978

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,
Plaintiff-Appellant,

and

ROBERT GLEN JONES, Jr.
Intervenor-Plaintiff,

vs.

JANICE K. BREWER, ET AL.,
Defendants-Appellees.

On Appeal from the United State District Court
District of Arizona, No. 2:13-cv-01962-PHX-ROS

****CAPITAL CASE EXECUTIONS SCHEDULED FOR
OCTOBER 9, 2013 AT 10:00 A.M. MST
OCTOBER 23, 2013 AT 10:00 A.M. MST****

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY OF
EXECUTION**

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CIRCUIT RULE 27-3 CERTIFICATE

1. The contact information for appellants' counsel is listed on the cover of this document. The contact information for appellees' counsel is as follows:

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2. The Arizona Department of Corrections has declared that the 24-hour window for carrying out Edward Schad's execution, *see* Ariz. R. Crim. P. 31.17(c)(3), will begin at 10:00 a.m. Mountain Standard Time on October 9, 2013, in four days. Robert Jones' would begin at 10:00 a.m. Mountain Standard Time on October 23, 2013. If this Court has not decided this appeal by these dates, this appeal will become moot if there is not a stay in place to prevent these scheduled executions from being carried out. *See McKenzie v. Day*, 57 F.3d 1495 (9th Cir. 1995).

3. Counsel for Defendants-Appellees will be notified via email and ECF notice of this motion.

4. The relief requested in this Motion was requested in the district court (Dist. Ct. Doc. No. 6), and was denied (Dist. Ct. Doc. No. 30). The grounds

submitted here were, in large part, submitted to the district court. Arguments that arise from the district court's error in its ruling were not submitted to the court.

EMERGENCY REQUEST FOR STAY OF EXECUTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-3, Plaintiffs-Appellants Edward Schad and Robert Jones ask this Court for an emergency order staying their scheduled executions pursuant to 28 U.S.C. § 1651 (All Writs Act).

Here, the factors weigh in favor granting stays of execution.

A. APPLYING THE FOUR-FACTOR TEST, THIS COURT SHOULD FIND STAYS ARE WARRANTED.

The standard for granting a stay of execution is equivalent to the four factors Appellants must show in order to obtain a preliminary injunction. *See Towery v. Brewer*, 672 F.3d 650, 657–58 (9th Cir. 2012) (“In the context of a capital case, the Supreme Court has emphasized that [the standards for granting a preliminary injunction] apply when a condemned prisoner asks a federal court to enjoin his impending execution . . .”) (*citing Hill v. McDonough*, 547 U.S. 573, 583-84 (2006)). Appellants must show: (1) serious questions going to the merits of the claims; (2) a likelihood of irreparable harm; (3) the balance of equities tips in their favor; and (4) the public interest is served by the stay. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011).

For the reasons stated in the opening brief, Appellants submit that they have satisfied each of these four factors. Including a substantial likelihood of success on

the merits of this appeal. Appellants will be irreparably harmed if a stay is not granted. Appellants have demonstrated that they are likely to prevail on appeal of the order denying a preliminary injunction. Moreover, once provided an opportunity for discovery and full factual development of their claims, Appellants are likely to prevail on the merits of their complaint. Appellants rights to pursue this lawsuit should be protected. This Court has the jurisdiction under the All Writs Act to issue a stay of execution to prevent the appeal from becoming moot.

Appellants did not delay in bringing this request for relief. *See Nelson*, 541 U.S. at 649-50. A warrant for Appellant Schad's execution was issued on September 3, 2013, setting the date for his execution on October 9, 2013. The Arizona Board of Executive Clemency scheduled his clemency hearing for October 2, 2013. (*See* Dist. Ct. Doc. No. 1-4.) On August 27, 2013, the Arizona Supreme Court issued a warrant of execution for Plaintiff Jones and set his execution for October 23, 2013. The Arizona Board of Executive Clemency has indicated his clemency hearing is scheduled for October 16, 2013.

Appellants did not learn the facts giving rise to their constitutional claims until after the time the Arizona Supreme Court issued their warrants of execution. (*See* Dist. Ct. Doc. Nos. 1-5, 1-6, 1-7, 1-8, 1-9.) Appellant Schad filed his § 1983 and § 1985 action forthwith on September 26, 2013. The following day, he moved for a temporary restraining order and/or a preliminary injunction, and a hearing

was held on October 1, 2013. Appellant Jones was permitted to intervene. (Dist. Ct. Doc. Nos. 6, 10, 13.)

The district court issued its final order on October 4, 2013. (Dist. Ct. Doc. No. 30), and Appellants are filing their opening brief in this Court on October 5, 2013.

Appellants did not delay in filing their § 1983 and § 1985 actions, and filed complaints as soon as was practicable after learning the facts that gave rise to this cause of action. Moreover, Appellants filed this appeal the same day the district court entered an appealable order. (Dist. Ct. Doc. Nos. 21, 22.) This Court should find Appellants have not delayed seeking relief. Appellees cannot cry delay when their intentional actions in keeping the public and Appellants in the dark caused the delay in Plaintiff's discovery of the facts that give rise to the complaint.

Importantly, the public interest supports a stay of execution. The secret arm-twisting and bullying of Board members by Appellee Smith on behalf of Appellee Brewer should be aired in an open hearing. The death penalty in Arizona has been found to be constitutional and executions are transparent. In Arizona, a veil covers the clemency process as the governor's intermediaries meet secretly with Board members and tells them what the governor expects them to do. The public has a right to know what goes on behind the scenes. The veil must be lifted.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), Justice O'Connor writing for a majority of the Justices held that the minimal due process constitutional requirement would be compromised if the clemency decision maker flipped a coin. Appellant Schad would have stood a better chance at his clemency hearing if the Board flipped a coin. Appellant Jones has an upcoming hearing. He too, would have a chance at clemency with a coin flip. As it stands now, there is no due process afforded to Arizona death sentenced prisoners in clemency proceedings as the fix is in. The process needs to be repaired. Until it is, Appellants' executions should be stayed.

CONCLUSION

For the foregoing reasons, Appellants request that this Court enter stays of execution to permit this Court to give full consideration to this appeal without it becoming moot by virtue of their executions.

Respectfully submitted this 5th day of October, 2013.

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Supervisory Asst. Federal Public Defender
Denise Young, Esq.

By s/Kelley J. Henry
Counsel for Plaintiff Edward Harold Schad

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Timothy M. Gabrielson
By s/Dale Baich
Counsel for Plaintiff Robert Glen Jones, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit. 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