CAPITAL CASE: EXECUTIONS SET OCTOBER 9, 2013 at 10:00 A.M.

AND OCTOBER 23, 2013 at 10:00 A.M.

No. 13-16978

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD

Appellant-Petitioner

AND

ROBERT GLEN JONES, JR.

Intervenor-Plaintiff

v.

JANICE K. BREWER, ET. AL

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
REPLY BRIEF OF EDWARD HAROLD SCHAD AND ROBERT GLEN JONES, Jr.

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Something is rotten in the State of Arizona. The Answering Brief, which purports to answer for ALL appellees, does not defend the actions of Appellee Brewer or Smith. The Answering Brief, filed on their behalf, does not contest Smith's "come to Jesus" meetings with two former Board chairs,[1] Smith's intimidating and aggressive behavior toward board members, or that Brewer, through Smith, has bullied former board members. Appellees response is that this behavior does not "shock the conscience." Ans.Brf. at 7. Which begs the question, whose conscience? The public conscience is shocked when elected state officials tamper with the votes of a legislatively created board who is supposed to be independent.

I. FACTUAL MISREPRESENTATIONS

Appellants did not get a full hearing. The court gave them a preliminary hearing. Time and again, the Court repeated that factual allegations not denied were presumed true. The Court assured Appellants that she would draw all inferences from the record, including the affidavits, and presumably the later submission of Thomas, in a light most favorable to Appellants. ER325. Under that standard, Appellants met their burden of clear evidence which raises serious questions about official misconduct and attempts to influence the board – which is the core of Appellants' complaint.

[1] The Brewer administration is the only administration to engage in such meetings in over twenty years. ER235

Appellees description of Thomas' testimony is so wrong that it appears almost intentionally misleading. Thomas was a hostile witness.[2] He testified that he was offended by the questioning. Thomas was extraordinarily evasive about the source of a letter that he has always claimed was shown to him in an effort to intimidate and goad him. He testified that the person who showed him the letter did so as a means of communicating to him, this could happen to you too, clearly threatening his financial interest.

Schad made an effort to find out the source of the letter at the preliminary hearing so that counsel could cross examine the source. Thomas was evasive in his response. In his testimony Thomas clearly stated that the person who showed him the letter was not a Board member. ER255. Though he was asked to reveal the identity of the person in question, Thomas refused. The Court ordered Thomas to seek the permission of the person in question and to provide the Court with the letter. Thomas did so, but only outside of court and in an unsworn letter. ER357-364.

After the hearing, it was learned for the first time that the person who intimidated, goaded and implied to Thomas he could lose his job for his vote was Ellen Kirschbaum, a current Board member. Further, the claimed "confidential" record that she wasn't supposed to show him, is now claimed to be an infamous

[2] Thomas has a confidential complaint pending against the Board.

public record that had already been the source of several news articles. It is questionable whether the letter Thomas filed with the Court is in fact THE SAME letter that Kirschbaum showed him. After all, Kirschbaum is the source of what Thomas filed.

Appellants most certainly did not have a full opportunity to question Kirschbaum.[3] If Appellants had been armed with the letter and Thomas' testimony, the questioning of Kirschbaum would have been far different. One can only imagine the cross-examination of Ms. Kirschbaum who professed to be such a moral person that she would never allow her vote to be compromised when we later learned that she personally tried to compromise the vote of a Board member and all because of the misdeeds Appellee Brewer and Smith. ER303. Livingston testified that Kirschbaum also warned him about the fate of the other board members. ER316.[4] These shenanigans are clear evidence which raise serious questions and warrant a preliminary injunction.

Appellees conveniently ignore the admission of Appellee LaSota that a person seeking reappointment could be in danger due to their votes. ER298-299.

[3] Appellees admitted the communications between the Governor's staff and the Board is relevant. ER222-223.

[4] Kirschbaum has also filed a complaint against the State. She admitted to discussions with Livingston about bringing Thomas back onto the Board. ER308.

There was no need to cross-examine LaSota,[5] he admitted the influence was there. Instead, Appellees suggest that simply because three Board members said they weren't influenced, we should take them at their word. The evidence, and the subsequent behavior of the Board, demonstrates otherwise. For example at the so-called clemency hearing for Schad, Board chair Livingston railed against Schad and told him that his pristine prison record (35 years on death row with zero disciplinary infractions) was evidence that Schad was "a manipulative sociopath." The bias of Livingston and Kirschbaum was on full display at the proceedings, where Kirschbuam said she would only vote for clemency in a capital case if an individual actually proved their innocence, which is the same as saying she will never vote for clemency.[6]

Appellants have presented enough evidence to warrant a preliminary injunction and full discovery in order to prove all three claims in their complaint (intentional interference, violations of open meetings[7] and conspiracy to violate equal protection.)

[5] LaSota later voted in favor of granting Schad a reprieve so that he could fully litigate the appeal and the case in the district court. http://azstarnet.com/news/state-and-regional/clemency-board-denies-death-sentence-appeal/article_79feb3a1-97ec-5624-88c7-e4ba375cd7bf.html.
[6] Compare, Kirschbaum testimony that she takes these cases very seriously, "because these are peoples lives." ER303.
[7] Livingston admitted that he has violated the open meetings act in other cases. ER316.

II. APPELLANTS ARE ENTITLED TO DUE PROCESS IN THEIR CLEMENCY PROCEEDINGS.

Appellees concede that minimal due process protections apply to the clemency process under *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998), and these protections include "a decision-maker who does not act in a completely arbitrary and capricious manner." (Ans.Brf. at 7.) Indeed, a clemency decision-maker who is motivated by "politics," "personal" considerations, or "political affiliation" would violate due process. *Woodard*, 523 at 290-92. (Stevens, J. concurring in part and dissenting in part); *see also id.*, 523 U.S. at 289 (O'Connor, J., concurring). Moreover, the Supreme Court has repeatedly held that minimal due process requirements include a neutral and detached decision-maker. *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974) (minimal due process requires "sufficiently impartial" decision-maker to determine whether to revoke good-time in prison disciplinary proceedings); *Morrissey v. Brewer*, 408 U.S. 741 (1972)(minimum requirements of due process include "neutral and detached hearing body"); *Irvin v. Dowd*, 366 U.S. 717 (1961) (failure to accord accused fair hearing violates even minimal standards of due process).[8]

[8] To the extent the Supreme Court in *Woodard* did not define the precise parameters of "minimal due process" protections in clemency proceedings, other cases in which courts address "minimal due process" are illustrative. *See Wilson v. United States Dist. Court for the N. Dist. Of California*, 161 F.3d 1185, 1187 (1998) (lack of adequate notice of issues implicates fundamental due process rights in other contexts, and failure to accord prisoner seeking clemency with such notice violated minimal due process protections under *Woodard*).

Appellees assert that "[d]ue process violations only exist[] if the Board's procedures 'shock the conscience,'" and rely on *Woratzeck v. Arizona Bd. Of Executive Clemency*, 117 F.3d 400, 404 (9th Cir. 1997)[9] for this proposition. (Ans.Bf. at 12.) Appellees' reliance is misplaced. Subsequent authority from this Court has not followed *Woratzeck*'s test when evaluating whether clemency procedures comport with minimal due process violations. Instead, this Court has looked to whether the prisoner presented evidence implicating a fundamental due process right. *See Wilson*, 161 F.3d at 1187 (evidence governor did not provide adequate notice of issues to be considered implicated fundamental right of due process and stated claim of due process violation); *see also Anderson v. Davis*, 279 F.3d 674 (9th Cir. 2002) (rejecting prisoner's clemency due process claim because *inter alia*, prisoner did not show decision-maker was partial, allege clemency procedures infected by bribery, personal or political animosity, or clemency procedure is equivalent to a coin flip).

Appellees cite *Anderson* to argue Appellants failed to establish "actual bias." (Ans.Brf. at 9.) While this Court recognized in *Anderson* that other courts had determined that a governor may adopt a general policy of not granting clemency in

[9] This opinion was issued before the Supreme Court decided *Woodard* in 1998. *See Woratzeck*, 117 F.3d at 402 (citing the Sixth Circuit opinion in *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (1997)).

capital cases[10], it nevertheless went on to scour the record for the type of practices and procedures that would offend due process under *Woodard*. *Anderson*, 279 F.3d at 676-77. Notably, the Court denied relief in *Anderson* because the prisoner had not presented "any evidence or information suggesting that [the] Governor . . . [was] anything other than a state officer of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Anderson*, 279 F.3d at, 677 (internal quotation, citation, and footnote omitted). The evidence presented here shows the opposite. Appellee Governor and her staff have intimidated and interfered with a legislatively-created independent Board to prevent them from deciding Appellants' clemency proceedings on the merits of the reasons they present for mercy.

III. APPELLANTS DEMONSTRATED SERIOUS QUESTIONS AS TO THE MERITS OF THEIR CLAIMS.

As detailed in the Opening Brief, Appellants' established serious questions that the Appellee Governor and her agents interfered with the independent Board and current members cannot afford Appellants a full and fair clemency process.[11] The district court misconstrued and overlooked evidence that raised serious

[10] The court in *Anderson* relied on a Sixth Circuit opinion that was issued before the Supreme Court's decision in *Woodard*. *See Anderson*, 279 F.3d at 676 (citing *In re Sapp*, 118 F.3d 460 (1997)). The Supreme Court decided *Woodard* in 1998. The Supreme Court has not yet decided whether these types of blanket policies comport with the minimal due process protections envisioned by *Woodard.*

[11] Appellees have not challenged that Appellants satisfy the three remaining factors considered in granting a TRO or preliminary injunction.

questions going to the core of Appellants' claims that Appellee Brewer and her agents intimidated Board members to produce a desired result regarding their votes in high-profile cases, made object lessons of fired Board members, and communicated that message to current Board members. This interference with the Board raises serious questions regarding the violations of Appellants' due process rights.

The district court found: "Governor Brewer's failure to reappoint certain Board members was driven, at least in part, by dissatisfaction with those members' past votes." (ER348.) The evidence also established that current Board members know the Governor will not reappoint them if she did not like their votes. (ER298-299.) What is more, Appellee Kirschbaum attempted to intimidate and "goad" Thomas by discussing the Governor's displeasure with the Board's votes. (See ER256,258-259,357.) Tellingly, Kirschbaum denied this behavior and that she was the person who sought to intimidate Thomas only came to light after the hearing. Current Board members Livingston, LaSota, and Kirschbaum were all on the Board while Hernandez was Chairman and relayed messages from the Governor's office. Appellees made an object lesson of ousted Board members. Appellees' self-serving and now-impeached statements, contrary to other evidence in the record, are not sufficient to dissolve the serious questions presented here.

Appellees nevertheless argue "Appellants illogically conclude that since the Governor does not automatically reappoint members, the mere fear of losing a[n] appointed position is sufficient to demonstrate bias and a violation of due process." (Ans.Brf. at 8.) Appellees ignore the facts and misconstrue Appellants' arguments. First, this is not a case in which Appellee Governor has simply failed to automatically reappoint. Appellee Governor and her staff ousted an unprecedented three members at once, dragged members in for private "interviews" regarding their votes, and held "come to Jesus" meetings with someone who served with current members as their Chairman mere months ago. Appellants do not rely merely on a "fear of not being reappointed," (Ans.Brf. at 8), but a clearly communicated campaign to bring the Board's votes in line with the Governor's wishes.

Finally, Appellees suggest "Public officials are presumed to act fairly and with honesty and integrity." (Dkt. 7 at 9.) Appellants have raised serious questions rebutting any such presumption. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (citations omitted)(biased decision maker constitutionally unacceptable; probability of actual bias unconstitutionally high where adjudicator has pecuniary interest in outcome and has been target of personal abuse or criticism); *see also Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528 (8th Cir. 2004) (assuming

presumption of impartial decision makers applies, record contains evidence to rebut it, even considering turnover in state personnel).

Respectfully submitted this 6th day of October, 2013.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Appellants Reply Brief contains 2099 words, excluding the required certificates.

/s/ Kelley J. Henry
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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 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.

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