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
PETITON FOR REHEARING EN BANC AND MOTION FOR STAY OF EXECUTION

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STATEMENT REQUIRED UNDER FRAP 35 (B)

Undersigned Counsel certifies that *en banc* review is necessary in this matter for the following reasons:

The decision of the panel that allowed for a Governor to arbitrarily and capriciously interfere with the decisions of an independent clemency board conflicts with the Supreme Court's decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); this Court's opinion in *Wilson v. U.S. Dist. Court for N. Dist. of California*, 161 F.3d 1185, 1186-87 (9th Cir. 1998); and the Eighth Circuit's decision in *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000). Rehearing is necessary to secure uniformity of this Court's decisions and to answer this question of exceptional importance.

/s/ Kelley J. Henry
Counsel for Appellant-Petitioner

INTRODUCTION

In England, the clemency power was vested in the crown as early as the eighth century.

> One of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is served: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.

Herrera v. Collins, 506 U.S. 390, 412 (1993) (citing 4 W. Blackstone, COMMENTARIES at 397).

The American system of justice is founded on fairness, mercy, compassion, and humanity. A key component of this foundation is the practice of executive clemency. THE FEDERALIST No. 74, at 341 (Alexander Hamilton) (Hallowell ed., 1842). Clemency is a fundamental part of the American justice system. *Herrera*, 506 U.S. at 410-12.

Executive clemency serves as insurance in an imperfect criminal justice system. *Herrera*, 506 U.S. at 415 (citing K. Moore, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST, 131 (1989)). "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 411-12. As a vital part of our system of laws, the power to grant clemency should not

be used as an exercise of whim or caprice, nor should abuses of the available process be permitted.

In Arizona, there is no opportunity for miscarriages of justice to be corrected in death penalty cases. This is so because, as the record before this Court demonstrates, the Governor's staff have brought executive pressure to bear, bullying members of the Board to not put the Governor in the embarrassing situation of having to publicly decide a clemency case for a death row prisoner.

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.

The secret arm-twisting and bullying of Board members on behalf of the Governor 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 tell 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.

FACTS

The Arizona Board of Executive Clemency ("Board") is an independent public body created to act as a check on the Governor's authority to grant clemency. Arizona Revised Statutes ("A.R.S.") § 31-401. The Governor appoints the members of the Board to five-year staggered terms, the purpose of which is to ensure no particular Governor will have complete control over appointments. Governor Brewer cannot by law grant a request for executive clemency unless the Board issues a favorable recommendation, which requires a majority of the Board's votes. A.R.S. § 31-402(A).

The current members of the Board are Respondents Brian Livingston, Jack LaSota, Ellen Kirschbaum, and Donna Harris. The Board underwent a sudden personnel change in April 2012, when Governor Brewer ousted three members of the Board at once. It was an unprecedented move that garnered significant media attention. (ER 106-07.)

Duane Belcher was appointed to the Board in 1992, and served as the Board's Chairman and Executive Director until April 2012. (ER 230.) He served terms under four governors. (ER 230.) During what would be his last term, Belcher voted to recommend clemency in the high-profile Arizona cases of Bill

Macumber and Robert Flibotte. (ER 237-238, 240.) In early 2012, Appellee Scott Smith, on behalf of Appellee Governor Brewer, met with Belcher and "made it clear" the Governor's office was unhappy with his votes, and did so "in an aggressive manner." (ER 105-06, 241-47.) At this time, current Board members, Appellees LaSota and Kirschbaum, were also on the Board, and Belcher believes that he probably communicated this information to them. (ER 247.)

In April 2012, the Governor abruptly ousted Belcher and two other Board members, Ellen Stenson and Marilyn Wilkens, by refusing to reappoint them to the Board, despite their desire to remain in their positions. (ER 105-09.) Before their ouster, Appellee Smith called Stenson and Wilkens in separately for private interviews in which he was "combative" and expressed his and the Governor's displeasure with their votes for clemency on the Macumber and Flibotte cases, respectively. (ER 107, 109.)

Smith, Belcher, Stenson, and Wilkens each believed that they were ousted because "because the Governor's office does not want to receive clemency recommendations from Board members in high-profile cases." (ER 106-07, 110.) Moreover, current Board members—appellees Livingston, LaSota, and Kirschbaum — were aware that Belcher, Stenson, and Wilkens believed they were terminated because of their prior votes for clemency in high-profile cases. (ER 111, 114, 187, 261, 306).

Governor Brewer appointed Melvin Thomas, Jesse Hernandez, and Appellee Brian Livingston to replace the outgoing Board members in April 2012. They joined Appellees LaSota and Kirschbaum to complete the five-member Board. Hernandez replaced Belcher as Chairman of the Board. (ER 113.)

During Hernandez's tenure as Chairman, Appellee Smith and other agents of Governor Brewer called him in for "come to Jesus" meetings, in which Smith lectured him about the Board's prior clemency recommendations. (ER 113-14.) Hernandez "immediately understood this to mean that Governor Brewer was directing [him] not to recommend clemency in high-profile cases." (ER 113-14.) Further, it "was crystal-clear to [him] that Mr. Smith was telling [him] that, as the new Chairman, [he] was expected to ensure that the Board not recommend clemency in particular kinds of cases." (*Id.*) Hernandez understood that his job was to ensure that the Board did not recommend clemency in certain cases, and current and former Board members corroborate Hernandez's suggestions that he communicated the Governor's wishes to the Board. (ER 111, 113-14, 262, 310.)

In August 2013, Hernandez and Thomas abruptly resigned from the Board. Around the same time, the Supreme Court of Arizona issued execution warrants for Appellants Schad and Jones. On August 27, 2013, the Arizona Supreme Court issued a warrant of execution for Appellant Jones and set his execution for October 23, 2013. The Board has indicated his clemency hearing is scheduled for October

16, 2013. A warrant for Appellant Schad's execution was issued September 3, 2013, setting the date for his execution on October 9, 2013. The Board scheduled his clemency hearing for October 2, 2013. (ER 103.)

During this time, counsel for Appellants investigated the allegations of impropriety that emerged when Thomas and Hernandez abruptly resigned. Pursuant to this investigation, counsel uncovered evidence that Governor Brewer and her agents: interfered with the functioning of the independent Board by directing the members how to vote; refused to reappoint members of the Board that voted to recommend clemency in high-profile cases; and that current members thus held a personal and financial interest in their votes.

Appellant Schad filed a complaint pursuant to 42 U.S.C. § 1983 and § 1985, and Petitioner Robert Jones intervened in that action. (ER1-27, 342.) On account of their imminent executions, Appellants moved for preliminary injunctive relief. (ER117-136.) The District Court ordered the Defendant-Appellees to respond and noted that their opposition should be accompanied by affidavits if they "wish[ed] to dispute the factual accuracy of the information set forth in the complaint and accompanying documents." (ER139.) Notably, Appellees Brewer and Smith did not deny any of the allegations set forth in the complaint, including allegations that the Governor did not reappoint Board members because of their votes in clemency

cases, and that the Governor and her agents met with Board members and told them how to vote in clemency cases.

The District Court held an evidentiary hearing on October 1, 2013. Appellants presented testimony from prior Board members regarding their ouster from the Board on account of their votes for clemency. (*See, e.g.*, ER 240-47.) Despite knowledge that former Board members were not reappointed and thus lost their jobs because of their votes, Appellees Livingston, LaSota, and Kirschbaum each testified that they do not fear losing their jobs based on their votes. (ER 298, 304, 312.) Appellee LaSota, though, revealingly testified that he does not fear losing his job if he votes for clemency, because "I think the only danger is *if one desires to be reappointed*, then it becomes a decision on your future is in the hands of the Governor's Office." (ER 298.) (Emphasis added.) This is an admission that the Governor's Office threatens Board members with financial retaliation and that Board members are aware of such threats. However, the district court denied petitioners motion for preliminary injunctive relief. (ER336-37, 342-56.)

Testimony from the hearing and evidence submitted to the court after the hearing raised serious credibility issues and called into question Appellee Kirschbaum's testimony that she does not fear losing her job if she votes for clemency. At the hearing, Kirschbaum insisted that she did not know whether the prior Board members were terminated because of their votes, but she testified that

the prior Board members thought that they were terminated on account of their votes. (ER 306.) She also testified that she had never been contacted by anyone in the Governor's office regarding her votes. (ER 301-02.) However, according to Thomas's testimony and information he revealed after the hearing, Kirschbaum told Thomas that prior Board members were terminated because of their votes, and indeed, she attempted to intimidate and "goad" him with this information, insinuating that he too would lose his job if his votes displeased the Governor. (*See* ER 256, 258-259, 357.)

During the hearing, Thomas testified that someone[1] who was not a current Board member showed him a portion of a letter which demonstrated that the Governor was unhappy with "several Board members' decisions on a particular case." (ER 256.) He further testified that he thought the person who showed him the letter had done so to "goad" and intimidate him. (ER 258-59.) Thomas also testified that he thought the person who showed him the letter was not supposed to show it to him. (ER 258.) He testified that the portions of the letter that he saw referred "to comments and a particular vote of the Board may have jeopardized the positions of the other three Board members that were being replaced." (ER 259.)

[1] He testified that he did not want to reveal this person's name because the person provided him information in confidence. (ER 255-57.) In his later submission in which he divulged that this "person" was appellee Kirschbaum, Thomas again confirmed that he gave his word to Kirschbaum that he would not divulge their conversation with others unless she gave him permission. (ER 357.)

After the hearing and per court order, Thomas submitted to the district court what he claimed to be the letter he had seen. (ER 357-63.) Despite testifying that the person who had shown him the letter and tried to intimidate him was not a member of the Board, in his submission to the court he asserted that "Ms. Kirschbaum was the source of the letter." (ER 357.) He also claimed "she and I discussed [the letter] regarding why she and others felt former board members had not been re-appointed." (*Id.*) The letter Thomas attached was simply the Board's letter recommending clemency in Flibotte's case, which is not a confidential document. (ER 360-63.)

Immediately upon learning of Thomas's post-hearing submission to the district court, Appellants filed a Rule 59 motion for reconsideration of the district court's order denying preliminary injunctive relief on the grounds that the district court's order heavily relied on its credibility determinations in denying petitioners relief, and Thomas's testimony and post-hearing submission raised serious questions regarding the credibility of both Thomas and Kirschbaum. (ER356-71.) Ignoring the numerous contradictions in both Thomas and Kirschbaum's testimony, the district court denied the motion for reconsideration because it found that Thomas's disclosure did not "call[] into question Kirschbaum's credibility." (ER377-78.)

Appellants appealed the district court's denial of preliminary injunctive relief and the denial of their Rule 59 motion. (ER380.)

In a per curiam opinion, the panel affirmed the lower court by ignoring the factual inconsistencies and serious questions of official misconduct. The panel opinion allows that a Governor can arbitrarily and capriciously interfere with the decisions of an independent clemency board and not offend principles of due process. This holding conflicts with the Supreme Court's decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); this Court's opinion in *Wilson v. U.S. Dist. Court for N. Dist. of California*, 161 F.3d 1185, 1186-87 (9th Cir. 1998); and the Eighth Circuit's decision in *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000).

ARGUMENT

There are genuine and intolerable conflicts between the panel decision and the decisions of this Court, other circuits, and the United States Supreme Court.

The majority of the Supreme Court has found that Appellants are entitled to minimum due process guarantees at their clemency hearings, including the opportunity for a fair hearing and decision-makers who do not act in an arbitrary and capricious manner.[2] *Woodard*, 523 U.S. at 288, 290-91 (O'Connor, J.,

[2] As the District Court recognized, Arizona has set out by statute "what the due process requirements are for clemency matters." (ER286.) *See* Arizona Revised Statutes §§38-401, -401.02; 31-401--403.

concurring in result) (Stevens, J., concurring in part, dissenting in part) (death sentenced prisoner possessed "life interest" entitling him to at least moderate standards of fairness and due process in parole process). Justice O'Connor, joined by four others, recognized that a conviction does not extinguish all of a prisoner's interests in his life before his execution. *Id.* at 289 (O'Connor, J., concurring). The Justices further explained that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* (O'Connor, J., concurring). Further, Justice Stevens recognized that a state could eliminate aspects of capital sentencing or "allow the executive virtually unfettered discretion in determining *the merits* of appeals for mercy. *Id.* at 292 (Stevens, J., concurring in part, dissenting in part) (emphasis added). But, where "a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause." *Id.* (Stevens, J., concurring in part, dissenting in part) (emphasis added). He further explained that the Governor could not, however, remain insulated from judicial review where he or she, for example, based clemency decisions on race, religion, or politics. *Id.* (Stevens, J., concurring in part, dissenting in part).

Most significant to Petitioners' case, Justice Stevens explained, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 294-95 (Stevens, J., concurring in part, dissenting in part) (quotation and citation omitted). "Those considerations apply with special force to the final stage of the decisional process that precedes an official deprivation of life." *Id.* at 295 (Stevens, J., concurring in part, dissenting in part).

In a similar case to Appellants', the Eighth Circuit, following *Woodard*, determined that interference with a death-sentenced prisoner's clemency violated due process. *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). Consistent with *Woodard*, the Eighth Circuit recognized that although a Governor may generally grant or deny clemency, the State may not "deliberately interfere[] with the efforts of petitioner to present evidence." The Court granted relief, finding: "It is uncontested that the interference did in fact occur at one time. As we have tried to explain above, the question whether the effects of the interference still persist is one on which reasonable people could differ, and therefore for a trier of fact." *Id.* at 853. Just as the State had interfered with witnesses in violation of Missouri's statutes, here, Appellees have interfered with Appellants' right to due process and their clemency rights as defined in Arizona's statutes. *See id.* Further, like Appellees here, the State had engaged in conduct that was "fundamentally unfair"

because it "unconscionably interfere[d] with a process that the State itself has created." *Id.* As the Eighth Circuit determined, "The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it by threatening the job of a witness." *Id.*

The panel, however, has now decided that "[t]he Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process." (ECF 14 at 3.) The panel recognized that something as arbitrary as flipping a coin "might" implicate due process concerns. (ECF 14 at 3.) Despite that, and contrary to *Young* and *Woodard*, the panel now disavows that due process is implicated by appellees' behavior here.

In *Wilson v. U.S. Dist. Court for N. Dist. of California*, 161 F.3d 1185, 1186-87 (9th Cir. 1998), this Court also recognized that state interference with a death-sentenced prisoner's clemency proceedings could raise serious questions regarding due process violations. In doing so, the Court relied on *Woodard*, 523 U.S. 272, 288 (O'Connor, J., concurring), to explain that the United States Supreme Court has recognized due process rights attach to clemency proceedings. *Id.* at 1187.

The panel now, inconsistent with *Wilson* and *Woodard*, disavows the idea that Appellants have raised serious questions meriting a temporary restraining

order or preliminary injunction, stating the Supreme Court has "never recognized a case in which clemency proceedings" have implicated due process. (ECF 14 at 3.) What is more, contrary to *Wilson*, the panel has ignored the Appellees' serious misdeeds here to say they raise no sufficient due process concerns. (ECF 14 at 4.) In doing so, the panel has created a split in authority regarding the rights and remedies for due process violations with respect to death-sentenced prisoners' clemency proceedings – a question of exceptional importance. *See* Fed. R. App. P. 35(b)(1) (panel decision conflicts with United States Supreme Court decision, the court to which petition is addressed, or involves question of exceptional importance).

Further, both the district court and the panel acknowledged that the Governor had exerted influence over the Board, and interfered with the Board by, at least, refusing to reappoint those who voted for clemency in high-profile cases. (ECF 14 at 3-4.) Both also held that such interference "was not sufficient to raise due process concerns." (ECF No. 14 at 4.) The panel summarily concluded there were no "serious questions as to the fairness of the Board's proceedings." (ECF 14 at 14.) The panel's holding, especially in light of the evidence in this case, is inconsistent with both *Woodard* and the Eighth Circuit's precedent described in *Young*.

A clemency decision-maker who is motivated by "politics," "personal" considerations, or "political affiliation" violates 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). The panel's opinion affirming the denial of preliminary injunctive relief and rejecting appellants' contentions that there remain serious questions as to the fairness of the Board's proceedings, directly contradicts a prior Ninth Circuit panel opinion. For these reasons the full court should vacate the panel decision and hear this case *en banc*.

Appellees also argued to the panel that *Anderson v. Davis*, 279 F.2d 674 (9th Cir. 2002) showed Petitioners had not established "actual bias." (Ans. Brf. at 9.) That decision relied on a pre-*Woodard* case. *See* 279 F.3d at 676 (citing *In re Sapp*, 118 F.3d 460 (1997)). What is more, this Court in *Anderson* scoured the record for

the type of practices and procedures that would offend due process under *Woodard*. *Anderson*, 279 F.3d at 676-77. Thus, it merely strengthens the point that the panel's dismissal here creates an intra-circuit split of authority on this exceptionally important question.

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

Appellants' established serious questions that the Appellee Governor and her agents arbitrarily and capriciously interfered with the independent Board and current members cannot afford Appellants a full and fair clemency process without risking personal financial repercussions.[3] The district court misconstrued and overlooked evidence that raised serious 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

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

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 the fact 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.

The panel nevertheless concluded there are no significant questions implicating Petitioners' due process rights and interests in their lives. (ECF 14 at 4.) This is not a case in which Appellee Governor has simply failed to automatically reappoint Board members. 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," (ECF10 at 8),

but a clearly communicated campaign to bring the Board's votes in line with the Governor's wishes.

Appellants have raised serious questions rebutting any presumption of impartiality that could be afforded to public officials such as the Board members with credible evidence that they are not, in fact, impartial. *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). The panel's opinion ignores this evidence and significantly misapprehends the facts presented to the district court.

A STAY OF EXECUTION SHOULD BE GRANTED

For all of the above-stated reasons, the Court should issue a stay of execution under the All Writs Act, 28 U.S.C. § 1651 to prevent this appeal from becoming moot.

Respectfully submitted this 7th day of October, 2013.

Kelley J. Henry
Supervisory Asst. Federal Public Defender
Denise Young, Esq.

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

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Counsel for Plaintiff Robert Glen Jones, Jr.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Consolidated Petition for Rehearing *En Banc* and Motion for Stay of Execution contains 4,187 words, excluding the required certificates.

/s/ Kelley J. Henry
Counsel for Mr. Schad

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 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