

FILED

FOR PUBLICATION

OCT 07 2013

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,

Plaintiff - Appellant,

and

ROBERT GLEN JONES, JR.,

Intervenor-Plaintiff,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; SCOTT SMITH, Chief of Staff to Governor Brewer, in his official capacity; BRIAN LIVINGSTON, Chairman and Executive Director, Arizona Board of Executive Clemency; JACK LASOTA, Member, Arizona Board of Executive Clemency, in his official capacity, AKA John Jack Lasota; ELLEN KIRSCHBAUM, Member, Arizona Board of Executive Clemency, in her official capacity; DONNA HARRIS, Member, Arizona Board of Executive Clemency, in her official capacity,

Defendants - Appellees.

No. 13-16978

D.C. No. 2:13-cv-01962-ROS

OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, Senior District Judge, Presiding

Submitted October 7, 2013*
San Francisco, California

Before: SCHROEDER, REINHARDT, and GRABER, Circuit Judges.

Per Curiam:

Plaintiff-Appellant Edward Schad is scheduled to be executed on October 9, 2013, in Arizona for the 1978 murder of Lorimer Grove. His efforts to reopen the district court's 2006 habeas judgment by invoking Federal Rule of Civil Procedure 60(b) have been the subject of another appeal, No. 13-16895, in a separate district court action. In our opinion, we affirmed the district court's denial of relief and recounted the long history of this litigation. *Schad v. Ryan*, No. 13-16895, 2013 WL 5498094, at *1-2 (9th Cir. Oct. 4, 2013).

Schad filed this action in district court prior to his clemency hearing, which took place on October 2, 2013. He unsuccessfully sought to enjoin the hearing and to stay his execution, claiming that the Clemency Board was biased and subject to undue pressure by the Governor in violation of due process. The Clemency Board in Arizona is appointed by the Governor and issues recommendations to the

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Governor. The Governor may grant clemency only when the Board recommends it. Ariz. Rev. Stat. § 31-402(A).

The Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process. One opinion has suggested that due process concerns might be implicated in a situation in which the clemency proceeding's outcome is wholly arbitrary, as would be the case if clemency were determined by a coin toss. *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). Bribery or other corrupt practices have also been suggested as grounds to bring state executive clemency proceedings under federal scrutiny. *Id.* at 290-91 (Stevens, J., dissenting). Schad recognizes the high threshold he faces to prevail, as did the district court in denying the request for injunctive relief.

The district court held an evidentiary proceeding in which it heard testimony from current and former members of the Board. The district court found that the current members of the board testified credibly that no pressure from the Governor was ever exerted upon them to vote against clemency. Former members of the Board also testified that they were not instructed to vote a particular way, and the district court also found their testimony credible. Former members of the Board who recommended clemency in a particular case, however, were not reappointed,

and the district court took that fact into account in reaching its decision. The court held that the evidence was not sufficient to raise due process concerns under the applicable standards.

Schad then filed a Federal Rule of Civil Procedure 59 motion contending that one of the witnesses may have testified falsely in describing the contents of a letter the witness thought may have come from within the Governor's office. When that letter was produced, it showed that it was written by the Board itself and did not support an inference that pressure from the Governor's office was brought on any Board member. The district court denied the motion.

In this appeal, Schad contends the district court's credibility findings were clearly erroneous. The record fully supports the district court's findings and there is no basis to disturb its credibility determinations.

Schad also contends the standards for issuing an injunction were met. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). He contends that there remain serious questions as to the fairness of the Board's proceedings. The record and the district court's well-reasoned decision do not support this contention. The district court did not abuse its discretion in denying an injunction.

The district court's order denying the preliminary injunction is **AFFIRMED**. The request for stay of execution pending a new clemency hearing is **DENIED**.

COUNSEL

Kelley J. Henry, Assistant Federal Public Defender, Nashville, Tennessee; and Denise Irene Young, Law Office of Denise I. Young, Tucson, Arizona, for Petitioner-Appellant Edward Harold Schad.

Timothy M. Gabrielsen, Assistant Federal Public Defender, Tucson, Arizona, for Intervenor-Plaintiff, Robert Glen Jones, Jr.

Kelley Elaine Gillilan-Gibson and Brian Patrick Luse, Assistant Attorneys General, Phoenix, Arizona, for Defendant-Appellees.