

NO. 23A782

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

JOSH TEWALT, ET AL.,

Respondents.

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION
SCHEDULED FOR FEBRUARY 28, 2024

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STATEMENT OF THE CASE

The facts surrounding Creech's brutal murder of fellow inmate David Jensen on May 13, 1981, are not new to this Court. In 1993, this Court explained:

The facts underlying this case could not be more chilling. Thomas Creech has admitted to killing or participating in the killing of at least 26 people. The bodies of 11 of his victims – who were shot, stabbed, beaten, or strangled to death – have been recovered in seven States. Creech has said repeatedly that, unless he is completely isolated from humanity, he likely will continue killing. And he has identified by name three people outside prison walls he intends to kill if given the opportunity.

Creech v. Arave (Creech IV), 507 U.S. 463, 465-66 (1993).

The Idaho Supreme Court discussed the facts surrounding David's murder. *See State v. Creech (Creech I)*, 670 P.2d 463, 465 (Idaho 1983). Creech pled guilty to David's murder and was sentenced to death by a judge. *Id.* at 465-66. On appeal, The Idaho Supreme Court affirmed his conviction and death sentence. *See generally Creech I*. Creech next sought state collateral relief, which was denied; the Idaho Supreme Court affirmed. *See generally State v. Creech (Creech II)*, 710 P.2d 502 (Idaho 1985).

Creech then filed his first federal habeas petition, which the federal district court denied. *Creech v. Arave (Creech III)*, 947 F.2d 873, 875 (9th Cir. 1991). The Ninth Circuit granted sentencing relief. *Id.* at 881-85. This Court granted certiorari regarding one issue and reversed, but remanded for further proceedings because Creech was entitled to resentencing pursuant to the Ninth Circuit's ruling on the two other sentencing claims. *Creech IV*, 507 U.S. at 465, 478-79. On remand, the trial court again sentenced him to death. *State v. Creech (Creech V)*, 966 P.2d 1, 6 (Idaho 1998). Creech then sought post-conviction relief, which was denied. *Id.* The Idaho Supreme Court affirmed

Creech's death sentence and denial of post-conviction relief. *See generally Creech V.*

Creech's two most recent direct attacks on his conviction were denied in early February 2024. *See Creech v. State ("Creech IX")*, No. 51229, 2024 WL 510142 (Idaho Feb. 9, 2024), and *Creech v. State ("Creech X")*, No. 50336, 2024 WL 510105 (Idaho Feb. 9, 2024). It has been over forty-three years since Creech pleaded guilty to murdering David. *See Creech v. Richardson ("Creech VIII")*, 40 F.4th 1013, 1017-23 (9th Cir. 2022) (describing the various proceedings).

Creech filed this action in March 2020. After going up on appeal twice, *see Pizzuto v. Tewalt*, 997 F.3d 893 (9th Cir. 2021), and *Creech v. Tewalt ("Creech VII")*, 84 F.4th 777, 793 (9th Cir. 2023), the district court permitted Creech to amend his Complaint to plead three claims. (App. F, pp. App. 46-070). On January 29, 2024, after Creech filed his Second Amended Complaint (App. G., pp. App. 71-139), the Idaho Commission of Pardons and Parole denied Creech's commutation petition. (App. B, p. App. 7). On January 30, 2024, Judge Jason Scott of the Fourth Judicial District of the State of Idaho entered Creech's current death warrant. (*Id.*). Creech's execution is scheduled for February 28, 2024. (*Id.*). On February 6, 2024, Creech filed a Motion for Preliminary Injunction seeking an order "to enjoin Defendants from executing him until the claims he has presented have been resolved." (App. H, p. App. 142).

The district court denied Creech's Motion on February 23, 2024. (App. B). Creech filed a notice of appeal. (App. J., p. App. 1). On February 25, 2024, the Ninth Circuit affirmed the district court's denial of Creech's Motion for a Preliminary Injunction. (App. A; App. J, p. App. 184). Creech filed a petition for rehearing en banc,

which was denied. (App. J, p. App. 184). Creech filed his petition for certiorari and the instant application for a stay of execution on February 26, 2024.

ARGUMENT

Creech’s Application For Stay Of Execution Should be Denied

1. Legal Standards for a Stay of Execution

Creech cites *Hilton v. Braunskill*, 481 U.S. 770 (1987), to contend he should be granted a stay of execution. (Application, p.2.) In *Hilton*, this Court identified the four factors to be considered in issuing a stay:

(1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776. However, this Court recognized that, because “the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.” *Id.* at 777.

While those four factors were reaffirmed in *Nken v. Holder*, 556 U.S. 418 (2009), the Court concluded, “The first two factors of the traditional standard are the most critical.” *Id.* at 434. Addressing those two factors, the Court explained, “It is not enough that the chance of success on the merits be ‘better than negligible.’ ... By the same token, simply showing some ‘possibility of irreparable injury’ fails to satisfy the second factor.” *Id.* at 434-435 (internal citation omitted). The Court reiterated, “A stay is not a matter of right, even if irreparable injury might otherwise result.” *Id.* at 433. Additionally, “Last-minute stays should be the extreme exception, not the norm[.]”

Bucklew v. Precythe, 587 U.S. ___, 139 S. Ct. 1112, 1134 (2019); *see also Barr v. Lee*, 591 U.S. ___, 140 S. Ct. 2590, 2591 (2020). In the specific context of a stay pending disposition of a petition for a writ of certiorari, this Court has articulated the factors as follows:

[A]n applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

2. Creech Cannot Make a Strong Showing of Success on the Merits.

Creech has failed to demonstrate he is likely to succeed on the merits of his due process claim and there is no reasonable probability the Court will grant certiorari. First, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. Thus, “when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally ... be denied,” a “policy . . . applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.” *Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). Creech is not arguing that the district court or Ninth Circuit applied the wrong law. Creech’s application and petition merely ask this Court to conduct the same review of the facts and law that the district court and Ninth Circuit already conducted and conclude that the district court clearly

erred based on its factual findings. Based on Creech's request to relitigate application of the correct legal standard to the facts found by the district court, there is no reasonable probability the Court will grant certiorari.

At the district court, the parties extensively briefed Creech's claims. While the arguments were discussed at length there and supplemented at the Ninth Circuit, they warrant a brief discussion here. Before the district court, Creech failed to demonstrate a likelihood of success on the merits of his Eighth Amendment as applied method-of-execution claim. His Eighth Amendment Claim failed "as a matter of law because he has refused to identify an alternative method of execution." (App. A, p. App. 5 (applying *Bucklew*, 139 S. Ct. at 1125)). Additionally, he failed to show a likelihood of success on the merits because his Eighth Amendment claim rests on speculative medical conditions that he does not have. *Id.* Creech cannot challenge the district court's conclusions regarding his *as applied* method of execution on either the facts or the law.

Creech cannot demonstrate a likelihood of success on the merits of his due process claim. Creech has changed the nature of this claim. In his second amended complaint, Creech emphasized his allegations that IDOC had not informed him of the method of execution it intended to use and his claim that IDOC's execution protocol was no longer valid. (App. A, p. App. 4.) IDOC confirmed it intended to proceed with a single-chemical protocol using manufactured pentobarbital. (*Id.*) It also notified Creech that the execution protocol remains in full force and effect and IDOC is presently following the protocol. (*Id.*) On appeal, Creech has repackaged his due process claim, focusing on the narrow ground that he has a Fourteenth Amendment

right to know the source of the execution chemical.

Creech supported this claim with assertions premised on unauthenticated, inadmissible exhibits and “purely speculative” claims about the quality of the execution chemical based on his expert’s conjecture. (*Id.*) The district court properly concluded that Creech received adequate information about the IDOC’s intended method of execution as well as the procedures to be used during his execution before he filed his second-amended complaint. The Ninth Circuit affirmed the district court’s finding that IDOC established the provenance and reliability of the execution chemical. More information about the provenance and reliability of the execution chemical would not cure the errors in Creech’s Eighth Amendment claim. His due process claim fails on the facts; it also fails as a matter of law.

Creech’s reliance on *California v. American Stores, Co.*, 492 U.S. 1301 (1989) (O’Connor, J. in chambers) is inapposite.¹ Justice O’Connor recommended a stay upon finding a reasonable probability that at least four Justices would vote to grant a petition for certiorari because, among other factors, “the issue presented appears to be an important question of federal law over which the Circuits are in conflict.” *Id.* at 1305, 1307. Creech has not suggested that the Ninth Circuit’s decision conflicts with the decisions of other circuits. *See* Sup. Ct. R. 10(a). Other circuits have repeatedly

¹ Creech also relies upon *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306 (1989) (Marshall, J. in chambers), that likelihood of success on the merits relies upon “plausibility of the arguments advanced....”. *Id.* at 1310. Justice Marshall’s reference to “plausibility” appears inconsistent with this Court’s standards for entry of a stay. Additionally, the Court later described the basis for certiorari differently than Justice Marshall’s statement. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989) (Court granted certiorari “[b]ecause of the importance and sensitivity of the issue and because of differing interpretations of the pertinent language of [the freedom of information act]).

rejected due process claims to execution-related information. *See Creech VII*, 84 F.4th at 793 (citing *Jones v. Comm’r*, 811 F.3d 1288 (11th Cir. 2016); *Phillips v. DeWine*, 841 F.3d 405 (6th Cir. 2016); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015); *Trottie v. Livingston*, 766 F.3d 450 (5th Cir. 2014)). In support of his due process claim, Creech relies upon Ninth Circuit caselaw that has merely left open the question of whether due process requires the state to provide execution-related information to an inmate so that such inmate could assert an Eighth Amendment method-of-execution claim. *First Amend. Coal. v. Ryan*, 938 F.3d 1069, 1080 (9th Cir. 2019) (citing *Lopez v. Brewer*, 680 F.3d 1068, 1083 (9th Cir. 2012) (Berzon, J. concurring in part and dissenting in part)).

In *Creech VII*, the Ninth Circuit directed the district court to permit Creech to amend his due process claim. The Ninth Circuit focused on information that Defendant Tewalt had suspended the protocol on two occasions and IDOC had not “identified the drug or drugs to be used in a particular execution, although [the protocol] sets out four lethal injection alternatives.” 84 F.4th at 793-794. The Ninth Circuit did not “express [any] opinion on whether such a due process right exists, or even if it does exist, whether it would apply [to Creech].” *Id.* IDOC has satisfied the possible due process guarantees identified by the Ninth Circuit. Creech can no longer complain of lack of notice concerning the method of his execution or the way it will be carried out. Creech was able to assert an Eighth Amendment method-of-execution claim. The fact that it fails as a matter of law does not somehow provide him with the ability to bootstrap a new legal theory to delay his execution. *See Bucklew*, 139 S. Ct. at 1134 (“Courts should

police carefully against attempts to use such challenges as tools to interpose unjustified delay.”).

Because Creech does not have a right to disclosure of the source of the execution chemical, he has not shown a significant likelihood of success on the merits of his due process claim. In the face of the lack of significant likelihood of success on the merits of his claim, Creech cannot show any harm from the Ninth Circuit’s internal processes and that claim fails as well.

3. Creech Will Not Be Irreparably Harmed.

Irreparability is a meaningful prerequisite for entry of a stay – even in a capital case. *See, e.g., Ramirez v. Collier*, 595 U.S. 411, 433 (2022) (identifying spiritual harm that would be unremedied aside from death itself). Creech seemingly argues the irreparable harm he will suffer is that death is permanent. (Application, p. 9).

Respondents acknowledge that the Ninth Circuit has explained that capital inmates who will be executed absent a stay or preliminary injunction may be irreparably harmed. *See Towery v. Brewer*, 672 F.3d 650, 661 (9th Cir. 2012) (“We recognize that Towery and Moormann demonstrate irreparable harm, as does every § 1983 plaintiff in an injunction appeal involving an upcoming execution.”). Respondents respectfully submit that facing a lawfully imposed and constitutionally carried out sentence is not irreparable harm; particularly where the sentence has been upheld after multiple direct and collateral attacks. *See, e.g., Creech v. Richardson* (“*Creech XI*”), Docket No. 24-275, 2024 WL 748385 (9th Cir. Feb. 23, 2024) (describing procedural history); *see also Kotz v. Lappin*, 515 F. Supp. 2d 143, 152 (D.D.C. 2007)

(“Without showing that his incarceration is wrongful, the court is loathe [sic] to declare that the plaintiff would suffer ‘extreme or very serious damage’ by serving the remainder of a properly-imposed sentence. Although the plaintiff does, indeed, face a sympathetic set of circumstances, he simply has not made a sufficient showing of irreparable injury”); *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1283 (M.D. Al. 2011) (“the alleged irreparable injury lies in his assertion that, under present protocols, he may be conscious after being injected with pentobarbital and able to feel pain Given the failure of Williams to establish a substantial likelihood that he can succeed on his claim that the use of pentobarbital will ‘very likely . . . cause serious illness and needless suffering,’ resulting in a substantial risk of serious pain, the irreparable injury is not actual and imminent”).

Creech is guilty, his death sentence is lawful and just, and his sentence is being carried out in a constitutional manner. He has been sentenced as punishment for his brutal murder of an intellectually disabled man whom he rendered helpless and stomped to death. Additionally, Creech contends he may suffer some unidentified harm based on speculation concerning the provenance and reliability of pentobarbital that IDOC lawfully acquired in compliance with all regulatory requirements. Creech’s concerns were premised on IDOC using compounded, not manufactured, pentobarbital. Regardless, IDOC did not prompt the expedited nature of these proceedings. IDOC’s protocol was adopted in March 2021. Creech’s medical status has been long-standing. IDOC disclosed information about the execution chemical once it was lawfully acquired. In contrast to Creech’s protestations, IDOC has at all times

complied with state and federal law as well as its execution protocol. Creech was provided a meaningful opportunity to present his Eighth Amendment claim, the fact that it fails as a matter of law does not create more legal or factual import for this Court. Creech's approaching execution will comport with constitutional requirements, and he cannot demonstrate irreparable harm.

4. The Balance of Equities Weigh Against a Stay.

The third and fourth *Hilton* factors also militate against issuance of a stay. The state's interest in avoiding unwarranted delay in carrying out its judgments is exceptionally strong. As noted in *Gomez v. Fierro*, 519 U.S. 918 (1996) (footnote omitted) (Stevens, J., dissenting), "There are powerful reasons for concluding capital cases as promptly as possible. Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment." *Id.* at 918. "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983) (quotes and citation omitted). "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (quotes and citation omitted). The district court specifically found that Creech's "litigation history demonstrates an

instance in which the State's and the victim's interests in finality are especially strong given the lengthy legal proceedings that have delayed the State's timely enforcement of Creech's sentence." (App. B, p. App. 27).

The public interest in the expeditious resolution of capital cases is not negligible; unnecessary delay substantially injures the public's trust in the criminal justice system. Based upon the decades Creech's case has been pending while he has engaged in piece meal litigation, both the third and fourth *Hilton* factors favor the state, particularly because the claim he presents has no merit. Creech's contention that he is seeking a "simple delay" and "there is no tangible harm to the State" (Application, p. 8), rings exceptionally hollow where David's murder occurred in 1981. Creech's efforts have resulted in over forty years of continuous litigation. Even if the Court only considered the delay since Creech was resentenced in 1995, that is still nearly three decades of unwarranted delay. "[J]ustice delayed is justice denied." *Leazer v. Kiefer*, 821 P.2d 957, 967 (Idaho 1991) (Bistline, J., specially concurring) (quoting *Deshazer v. Tompkins*, 460 P.2d 402, 409 (Idaho 1969) (Shepard, J. dissenting)). Nowhere is that statement more relevant than in capital cases, where the Idaho Supreme Court has "recognized the use of dilatory tactics by those sentenced to death to 'thwart their sentences.'" *State v. Beam*, 766 P.2d 678, 683 (Idaho 1988); see also *Rhines v Weber*, 544 U.S. 269, 277-78 (2005) ("[C]apital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death"). Thus, "[t]he federal courts can and should protect States from dilatory or speculative suits[.]" *Hill v. McDonough*, 547 U.S. 573, 585 (2006).

CONCLUSION

The State respectfully requests that Creech's Application for Stay of Execution be denied.

DATED this 27th day of February 2024.

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