

No. 23A782

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

JOSH TEWALT, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

EXECUTION SCHEDULED FOR FEBRUARY 28, 2024 AT 10 AM MST

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The State's response to Mr. Creech's application for a stay of execution incorrectly portrays the questions that Mr. Creech has brought to this Court and relies on facts and arguments that are created out of whole cloth. Mr. Creech has satisfied the standards enunciated for a stay by this Court and a stay should be accordingly granted.

I. The Respondents mischaracterize the questions before this Court in an attempt to undermine the clear conclusion that Mr. Creech has demonstrated a likelihood of success on the merits.

The Respondents attempt to characterize Mr. Creech's questions to this Court as mere error correction, arguing that Mr. Creech "merely" asked this Court to conclude that the district court "erred based on its factual findings. Opp. at 4-5. The first question presented to this Court was markedly clear, Mr. Creech asked the Court to provide clarity on the question of whether unprecedented state secrecy can offend due process by creating such an "impenetrable roadblock[]" so as to eviscerate an inmate's ability to have an Eighth Amendment claim heard at a meaningful time and a meaningful manner. *See Lopez v. Brewer*, 680 F.3d 1068, 1082 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in part).

This is hardly error correction. Mr. Creech is not asking this Court to simply look at the Ninth Circuit's decision and come to a different conclusion. It is asking the Court to make a determination and provide guidance about what the limits of state secrecy regarding methods of execution should be and how far they can extend. And of critical importance, whether, as in Mr. Creech's case, they can go too far.

The Respondents seek to add into the balance here whether Mr. Creech has established a likelihood of success on an Eighth Amendment claim that Mr. Creech is not asking this Court to address. Opp. at 5. While Respondent's would like to throw this claim into the mix, that is it because it would serve them well to be able to do so. The reason Mr. Creech's Eighth Amendment claim is not before this Court is because the actions of the Respondents and their unprecedented secrecy have deprived Mr. Creech of the ability to even mount an Eighth Amendment challenge at all.

The Respondents argue that Mr. Creech has "changed" the nature of his due process claim. Opp. at 5. This borders on falsehood to this Court. The Respondents state that the amended complaint argued due process based on failure to inform of the method of execution being used. *Id.* at 5-6. This is true. However, this is because the amended complaint submitted by Mr. Creech and attached to his motion for leave to amend was filed when the State had yet to disclose to Mr. Creech the method that was in fact going to be used to execute him. The same day that Mr. Creech was granted permission to file his amended complaint, the State sought a death warrant. Mr. Creech was immediately forced into a posture of seeking a preliminary injunction, which he did seven days later. Dist. Ct. Dkt. 123.

But Mr. Creech has not "repackaged" his due process claim, Opp. at 5-6, it remains the same as it has been, that the Respondents have "deprived Mr. Creech of information that would allow him to attack the constitutionality of Idaho's execution plans ... Mr. Creech knows that IDOC intends to use supposedly

manufactured pentobarbital ... but he essentially knows nothing else.” App. 150-151.

The Respondents argue that Mr. Creech supported his claims in the District Court with inadmissible exhibits and speculation. Opp. at 6. Again, this is rich coming from the Respondents, who would execute Mr. Creech based on a photocopy of a document generated at the request of and paid for by the State. A document that is uncertified and unattested to by any identifiable source and that has had all possible identifying information redacted, including the name of the testing lab, and any licensing or regulatory numbers. App. 044-045. Each and every critical question regarding this document and what it purports to represent remains unanswered by the State, and the answers to such questions are of profound importance to the reliability and quality of the drugs, *see* App. 177.

The State’s obstruction to obtaining these answers violates Mr. Creech’s procedural due process rights. As put forward in Mr. Creech’s application for a stay to this Court, Mr. Creech has made a strong showing that he is likely to succeed on the merits, i.e., there is “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari” and there is “a significant possibility of reversal of the lower court’s decision.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

II. The Respondents fail to meaningfully engage in the balance of equities.¹

Inconceivably, the primary thrust of the Respondents' argument is focused on the public interest against "delay" and justice not being delayed on "mere pretexts." Opp. Stay at 10. The State also accuses Mr. Creech of "piece meal litigation." *Id.* at 11. It is hardly piecemeal that Mr. Creech's original sentence was as a result of his constitutional rights being violated at the initial proceeding, which no court corrected until the Ninth Circuit intervened after extensive litigation. *See Creech v. Arave*, 947 F.2d 873, 881–85 (9th Cir. 1991), *rev'd in part*, 507 U.S. 463 (1993). It is hardly piecemeal that additional litigation was necessary after this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), a decision that "represent[ed] a remarkable sea change in decades-old precedent-law which lower courts and litigants understood as settled." *Haynes v. Thaler*, 489 F. App'x 770, 776 (5th Cir. 2012) (Dennis, J., dissenting), *vacated on unrelated grounds*, 569 U.S. 1015 (2013). *Martinez* compelled a remand, substantial additional proceedings at the Ninth Circuit, replacement briefs on appeal, a new oral argument, and a lengthy opinion—all of which took about eleven years to accomplish. *See generally Creech v. Richardson*, 59 F.4th 372, 380–82 (9th Cir.), *cert. denied*, 144 S. Ct. 291 (2023).

In contrast, Mr. Creech was permitted to file an amended complaint in this case on January 30, 2024 and did so on January 31, 2024 – 27 days ago. This is not

¹ The Respondents further argue that Mr. Creech will not be irreparably harmed. Because the District Court found that Mr. Creech had met this factor and the Ninth Circuit did not upset this finding, it is not worth wasting the Court's time here. App. 008-009; App. 184.

delay, this is not piecemeal litigation, this is the Respondents' attempts to drive this case through the appellate system in order to execute Mr. Creech without any meaningful opportunity to be heard and without any meaningful review.

The State also promotes "the public's trust in the criminal justice system" as a key factor in the Court's assessment of whether to grant a stay. Opp. 11. Mr. Creech agrees. The public's trust in the criminal justice system is fostered by rules that allow for the full and fair adjudication of legitimate constitutional claims. The Respondents have made no attempt to engage in the fact that the public has an interest in Mr. Creech's claim being heard.

Indeed, the public interest is always served when the Constitution is vindicated. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *see also Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Ray v. Comm'r, Ala. Dep't of Corrs.*, 915 F.3d 689, 701 (11th Cir. 2019) ("[T]he public has a serious interest in the proper application and enforcement of the Establishment Clause"); *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same). Executing a citizen of this country after withholding literally every piece of information regarding the chemical being used to do so is fundamentally and squarely at odds with the transparent and public process this country should have when undertaking this gravest responsibility.

Because the State, the District Court and the Ninth Circuit have all deprived Mr. Creech of any iota of information about the chemical by which he will be

executed and have artificially truncated any meaningful review, Mr. Creech has a strong claim on the equities and a strong claim for certiorari, and a stay of execution is appropriate.

CONCLUSION

The Court should stay Mr. Creech's execution pending his petition for certiorari.

Respectfully submitted this 27th day of February 2024.



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