No. 23-6830

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

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EXECUTION SCHEDULED FOR FEBRUARY 28, 2024 AT 10 AM MST

Mary E. Spears*
Deborah A. Czuba
Federal Defender Services of Idaho
702 W. Idaho Street, Suite 900
Boise, ID 83702
Mary_Spears@fd.org
Deborah_A_Czuba@fd.org
Telephone: (208) 331-5530
***Counsel of Record**

Counsel for Petitioner

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The State's response to Mr. Creech's petition for writ of certiorari attempts to validate its unprecedented secrecy by hiding behind its statute, which it persists in claiming trumps the requirements of due process. In addition, the State tries to convince this Court that the patently deficient process that Mr. Creech has received – created and championed by the State and countenanced by the Ninth Circuit – is sufficient. But because the State's attempts are premised on misunderstandings of Mr. Creech's arguments, misstatements of the law, and misrepresentations of the facts, they should be rejected.

I. The State miscomprehends Mr. Creech's arguments in support of certiorari.

The State's Brief in Opposition gets off to a bad start when on the very first page it misapprehends the nature of the petition for certiorari. Contrary to the State's mischaracterization, Mr. Creech does not ask this Court to grant his preliminary injunction. Br. Opp. at 1. Nor does he ask the Court to hold Idaho's or any and every other state's execution secrecy statute unconstitutional. *See id.* at 3, 10. He asks the Court to allow him the opportunity to brief the Court on an important question of federal law that has not been settled by this Court: "[w]hether it comports with due process for a state to refuse to provide a condemned inmate information about his method of execution that would enable him meaningfully to mount an Eighth Amendment challenge to that method[.]" Pet. at i; *see also* Sup. Ct. R. 10(c).

Later, attempting to distill both of Mr. Creech's three-line Questions Presented, the State manages to misconstrue them. Br. Opp. at 3-4. "Creech has raised two issues[,]" the State says: a straightforward constitutional challenge to

Idaho Code Section 19-2716A and "whether the Ninth Circuit's *decision* to expedite" his appeal violated due process. *Id.*[1] "Neither of these issues were presented to the lower courts[,]" the State complains. *Id.* at 4; *see also id.* at 6 ("Creech did not raise the constitutionality of Idaho Code § 19-2716A until he was in front of the Ninth Circuit."). But the district court, on whose judgment the State relies so heavily, *see id.* at 8, 12, begs to differ. App. 060 ("Creech specifically challenges the constitutionality of I.C. § 19-2716A[ ]").

The State's failure to follow Mr. Creech's arguments holds true for its attack on his Ninth Circuit-based due process claim as well. Mr. Creech never challenged the appellate court's *decision* to expedite his appeal; certainly some amount of expedited consideration would have been proper given the amount of time the district court had afforded him for appeal by waiting seventeen days to issue its order. *See* Pet. at 8. His challenge was to *how* expedited (and how cursory) that consideration was, and how the Ninth Circuit's own self-imposed deadlines were abandoned in ways that favored the State by lessening its workload even though Mr. Creech's own counsel were made to work overnight to bring a timely petition for rehearing en banc. *See* Pet. at 22-24. It is easy to say one's opponent never presented an argument when one has simply dreamed up that argument.

Next, the State moves on to misunderstanding the nature of Mr. Creech's first procedural due process claim. Seeking to link him somehow with activist

[1] In this reply, unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

pharmaceutical companies who will no longer sell their products for use in executions, it seems to chide him for seeking execution information for information's sake. *See* Br. Opp. 9-10. But Mr. Creech's claim is that he needs the information *to meaningfully make his Eighth Amendment challenge*. *See* Pet. at i, 14; *see also Bucklew v. Precythe*, 139 S. Ct. 112, 1130–32 (2019) (discussing factual information about the execution process with respect specifically to the petitioner). The State's clues that this is the case can be found in the fact that he seeks not public disclosure of "IDOC's [pentobarbital] source's identity[,]" *see* Br. Opp. 9, but extensive other information that goes not to the source but to the reliability and efficacy of the drug itself, *see, e.g.*, Pet. at 20. Much of this information, one would think, does not and could not possibly tend to reveal the State's source, such as the question of whether the drugs were obtained from the veterinary industry. Indeed, if an answer to that question *would* reveal the State's source, it means the State intends to kill its inmates by injecting them with drugs made to euthanize dogs or horses, and that *would* present a patently obvious Eighth Amendment issue.

Misapprehensions continue when the State claims that Mr. Creech "seeks[,]" from this Court, a grant of evidentiary hearing "as a stay of execution." Br. Opp. 12. This is nonsensical; a petition for writ of certiorari is an invitation that the Court consider an important area of law, Sup. Ct. R. 10(c), not an evidentiary hearing request. To be sure, in the district court Mr. Creech *sought* such a hearing, but to the extent his petition for certiorari mentioned one it all, it was in the context of *In re Ohio Execution Protocol Litig.*, 845 F.3d 231 (6th Cir. 2016), *cert. denied sub nom.*

Fears v. Kasich, 583 U.S. 875 (2017), and was intended as an example of what ample due process in the execution secrecy contexts looks like. Similarly, the State misconstrues what Mr. Creech asks this Court to do (and indeed what it can do) when it claims that his request for the Court's "guidance" is in fact a request that it disrupt "all circuit courts' expedited procedures." Br. Opp. at 14. Guidance is not intervention. Entire fields of law exist making the point that some of this Court's decisions are retroactive (and hence could conceivably count as "intervention") while many are not. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288 (1989). The Solicitor General of a state should be aware of such a distinction.

Finally, the State attacks Mr. Creech's petition for "abandon[ing]" what it perceives as his "main claim," his Eighth Amendment challenge. Br. Opp. 6. It then goes on to waste precious space in its brief attacking a claim that is not before this Court. *Id.* at 8-9. The State's real concern here is relitigating the Motion to Dismiss it lost in the district court, *see* App. 046-70, a loss that was based on the fact that Mr. Creech was "apparently being forced to guess about the exact method of lethal injection [the State] intends to use[,]" *id.* at 058-059. But more to the point, it is the Petitioner's prerogative to winnow claims as he sees fit, particularly given that he is to be executed in fifteen hours. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). That the State is disappointed it did not

have the opportunity to make its preferred argument does not entitle it to make up an appeal that does not exist.

II. The State misstates the law in arguing against certiorari.

The State's misunderstandings of what Mr. Creech argued and what is before the Court are not the end of its errors. It also makes claims that are not consistent with the law. For instance, it implies the district court was correct when it ruled that due process was not violated because "Idaho law maintains as confidential the [execution] chemical's source's identity[.]" Br. Opp. 3; *see also id.* at 10. At the risk of repeating the obvious, state action cannot – for obvious reasons – trump the Fourteenth Amendment right to due process. *Shelley v. Kraemer*, 334 U.S. 1, 18, 20 (1948); *see also* Pet. at 22. The State is "not aware of any court finding" a statute like Idaho's unconstitutional, the State says. Br. Opp. at 10. It is a good thing that is not what was put to the Court. What Mr. Creech asked the Court to consider were whether, given both Idaho's statute and its exceptionally broad interpretation of the statute's purported protection – which, again, it claims covers information that could not possibly reveal the identity of the pentobarbital source, *see supra* Part I; Pet. at 1-2 – the chokehold on execution information viewed holistically violates due process. That is, he asked the Court to consider whether he does not receive the process he is due when the State impedes his right and ability to make a method-of-execution challenge by withholding a vast swath of technical information, *not just the source*, that is necessary to make such a challenge in a meaningful way. Pet. at i, 6-8, 14-16.

Additionally, much like the district court, the State makes Mr. Creech's point on his due process argument without intending to. Mr. Creech cannot show how the

State's drug would interact with his many health conditions such as to show a substantial risk of severe pain, the State trumpets, *see* Br. Opp. 8, eliding the fact that that is the claim and is precisely the point made by the Ninth Circuit cases cited in his petition, Pet. at 14-15. To use the same example described above, a drug made to put down horses is not meant to be administered to a seventy-three-year-old man with hypertension and a history of massive aortic aneurysm, and could very give rise to a substantial risk of severe pain. But Mr. Creech has no idea if the State's drugs were made for horses or humans. He needs access to that information in order to make a meaningful method-of-execution challenge, and to the extent the State argues otherwise it misstates the interaction between the Eighth and Fourteenth Amendments on this point. *See Bucklew*, 139 S. Ct. at 1131–32 ("The problem with all of these contentions is that they rest on speculation unsupported, if not affirmatively contradicted, by the evidence in this case.").

Last, the State handwaves any concerns Mr. Creech might have about its pentobarbital because "[it] is to use manufactured pentobarbital and . . . Mr. Creech was aware of [that] when he filed his second-amended complaint." Br. Opp. at 2-3. That is true so far as it goes. But either the State has forgotten the timeline of events since October of 2023 – a confusing lapse of memory, given it was reminded of that timeline in yesterday's petition, *see* Pet. at 4-10 – what the State seems to be saying here is that Mr. Creech should have filed a different version of his amended complaint than that authorized by the district court when it granted his Motion for Leave to Amend (App. 046-70). He was not free to do so. Fed. R. Civ. P. 15(a)(2) (after twenty-

one days have passed, amendment is only possible by leave of the court); *cf. Cuthbertson v. United States*, 925 F.2d 1469, 1991 WL 12777 at *2 (9th Cir. 1991) (Mem.) (plaintiffs properly complied with court's order granting leave to amend by bringing a third amended complaint containing only those claims authorized by the court). That the State told the *Idaho Statesman* in the intervening 105 days between when Mr. Creech first *submitted* his Proposed Second Amended Complaint in October and when he was finally permitted to *file* it, *see* Pet. at 4-6, both does not change what the law authorized him to do and exemplifies how the State's slipperiness with respect to its method of execution continually violates Mr. Creech's right to due process.

III. The State misrepresents the facts in its haste to see Mr. Creech executed.

Last but not least, the State also errs by presenting the Court with a version of the facts that does not quite comport with actual events. For instance, it claims that Mr. Creech "knows [the State] will use manufactured pentobarbital" to kill him, Br. Opp. at 9, and once again that is true so far as it goes. But what the State elides is *how* he first came by that knowledge: not through discovery in his own case, nor even though discovery in former co-plaintiff Gerald Pizzuto's case, but from the *Idaho Statesman*. App. 031-042. It does not comport with due process for a condemned man to learn how the State intends to kill him from the local paper. Nor, Mr. Creech submits, does it comport with due process for the State to pretend that fact is meaningless. Rather, it is part of Idaho's pattern and practice of severe, unprecedented execution secrecy; that a public information request could pry more

information out of the State than a death row inmate could in nearly five years of litigation speaks volumes about the amount of process the State has afforded Mr. Creech, though not in the way in which it claims.

Nor are the State's misrepresentations limited to Mr. Creech's first due process challenge. It is interesting that the State claims "both sides had a chance to brief" the Ninth Circuit appeal, Br. Opp. at 3, as that implies a briefing schedule that, even if expedited, followed the normal course. But what instead happened was that Mr. Creech was allowed a handful of pages to try to persuade the Ninth Circuit to let him live – in the six hours he was given he ultimately had the time to draft and submit twelve, *see* Pet. at 8-9 – and that was that. He was afforded no opportunity to respond to the State's arguments in a reply, which is perfectly possible even in a compressed time frame, as the instant filing demonstrates. Nor was he even granted the opportunity to answer the appellate court's questions directly in oral argument, even though that too would have been possible in the twenty-three hours the Ninth Circuit took to decide the appeal. Again, Mr. Creech has examined the cases of recently-scheduled inmates across the country and can find no comparable situation. Due process in expedited circumstances is possible. The Ninth Circuit just didn't provide it.

Attacking that point further, the State cites *Williams v. Hobbs*, 562 U.S. 1097 (2010), for the proposition that Mr. Creech cannot succeed on this point because he did not waste hours or days of his remaining life trying to litigate for more fulsome briefing at the Ninth Circuit. That case is particularly inapposite, as examination of

the docket below (at the Eighth Circuit) reveals that two years of it were expended on motions for extensions of time. *See, e.g.*, *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009) (Nos. 07-1984, 07-2115).[2] In such a situation and with so much time, a party who fails to present an issue to the circuit court is indeed primed for more failure before this Court. But that, the State fails to point out, is far from Mr. Creech's situation.

The State also seems to believe Mr. Creech did not object to the Ninth Circuit's "truncated timeline[ ]" because he does not understand the appellate court has the discretion to "establish deadlines" in capital cases. Br. Opp. at 13, 17. But minutes after he filed his Letter Brief, Mr. Creech also presented the Ninth Circuit with an Emergency Motion for Stay of Execution Pending Appeal, App. 183, the entire goal of which was and can only have been to ask for more time to fully brief, argue, and allow the Court to consider the case. That is per se an objection to the Ninth Circuit's extremely "truncated timeline." Contrary to the State's misrepresentation, in other words, Mr. Creech fully understands that the Ninth Circuit has the ability to set deadlines – he simply objected to them.

Finally, and most notably, the State portrays the instant case as an example of "dilatory tactics promoted by condemned inmates." Br. Opp. at 14; *see also id.* at 15 ("The Ninth Circuit expedited [Mr.] Creech's appeal because he appealed five days

[2] Between April 25, 2007—the date the notice of appeal was filed—and December 2, 2009—the date the Eighth Circuit issued the mandate—undersigned counsel counts fourteen motions for an extension of time in the *Williams* docket. That does not include this Court's order extending the time to file the petition for certiorari for an additional two months.

before his scheduled execution."). Mr. Creech's petition sets forth all the many ways in which he and his efforts to obtain execution information have been far from dilatory, Pet. at 3-8, 19, 22, and he will not belabor them here. Instead, he ends by noting this: Mr. Creech has spent five years trying to obtain information about his execution, the most important function that State can ever carry out, only to be stymied by the State itself at every opportunity, and now the State attacks him for daring to spend the last five days of his life trying one last time for a chance to obtain that information. It is not Mr. Creech's due process claims which are "patently absurd." Br. Opp. at 15. It is the State of Idaho's conduct here.

CONCLUSION

The Court should reject the State's arguments and grant the petition for certiorari.

Respectfully submitted this 27th day of February 2024.

Mary E. Spears
Counsel of Record
Deborah A. Czuba
Capital Habeas Unit
Federal Defender Services of Idaho
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Telephone: 208-331-5530
Facsimile: 208-331-5559