

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,
Petitioner,

v.

IDAHO COMMISSION OF PARDONS AND PAROLE, JAN M. BENNETTS, ADA COUNTY
PROSECUTING ATTORNEY, IN HER OFFICIAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 24 2024

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

FOR THE NINTH CIRCUIT

THOMAS EUGENE CREECH,

Plaintiff - Appellant,

v.

IDAHO COMMISSION OF PARDONS
AND PAROLE and JAN M BENNETTS,
Ada County Prosecuting Attorney, in her
official capacity,

Defendants - Appellees.

No. 24-1000

D.C. No.

1:24-cv-00066-AKB

District of Idaho,

Boise

OPINION

Appeal from the United States District Court
for the District of Idaho
Amanda K. Brailsford, District Judge, Presiding

Argued and Submitted February 24, 2024
San Francisco, California

Before: William A. Fletcher, Jay S. Bybee, and Morgan Christen, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Thomas Eugene Creech is on death row for the 1981 murder of David Dale Jensen. In 2023, the State of Idaho granted Creech a commutation hearing before the Commission of Pardons and Parole (the “Commission”), which was held in early 2024. The Commission ultimately denied

the petition for commutation, and Creech's execution is now scheduled for February 28, 2024. Creech filed a § 1983 action in federal court, alleging various due process violations over the course of the commutation proceedings and seeking a preliminary injunction. The district court denied his motion, and we affirm.

I. BACKGROUND

Because we have described elsewhere the factual and procedural history of this case, *see Creech v. Richardson*, 59 F.4th 372, 376–82 (9th Cir. 2023), we recite only those facts most relevant to Creech's commutation-related arguments now before us. In 1981, while serving two life sentences for murders committed in Idaho, and following convictions for additional murders committed in California and Oregon, Creech killed fellow inmate David Dale Jensen, who was disabled. *See id.* at 376–77; *Arave v. Creech* (“*Creech IV*”), 507 U.S. 463, 466 (1993). In relevant part, Jensen attacked Creech with a battery-filled sock. *State v. Creech* (“*Creech V*”), 966 P.2d 1, 5 (Idaho 1998). Creech took the weapon from Jensen. Jensen later returned, wielding a toothbrush with a razor blade fastened to it. Creech beat Jensen with the sock, ultimately killing him. *Id.* Creech pleaded guilty. At his initial sentencing in 1982, Creech testified that, “through an intermediary, [he] provided Jensen with makeshift weapons and then arranged for Jensen to attack him, in order to create an excuse for the killing.” *Creech IV*, 507 U.S. at 466. Although the judge at Creech's original sentencing concluded that “Creech did not instigate the fight

with the victim,” *id.* at 467, the same judge later determined at a resentencing in 1995 that the murder was “planned and executed by Creech,” *Creech V*, 966 P.2d at 7. On October 16, 2023, an Idaho state court issued a death warrant for Creech’s execution, but the warrant was stayed pending Creech’s petition for commutation to life without parole.

The Idaho Commission of Pardons and Parole possesses the exclusive power to grant commutations and pardons, but “only as provided by statute” Idaho Const. art. IV, § 7. The Commission is comprised of seven Commissioners. *See* Idaho Code § 20-1002(1). Except in certain cases not relevant here, “[a]ny decision of the full Commission requires a majority vote of four (4) Commissioners.” IDAPA § 50.01.01.200.08.a. Idaho law further requires recusal in certain cases, *see id.* § 50.01.01.200.07, but it does not supply a tie-breaking method or mechanisms for the appointment of an interim Commissioner in the event of a recusal.

In the case of capital offenses, the Commission may issue a pardon or commutation “only after first presenting a recommendation to the governor.” Idaho Code § 20-1016(2). If the Governor approves the recommendation within thirty days, “the commission’s pardon or commutation shall issue.” *Id.* If the Governor rejects the recommendation or fails to act upon it within thirty days, “no pardon or commutation shall issue from the commission, and the commission’s recommendation shall be of no force or effect.” *Id.*

The Commission ultimately denied Creech’s commutation petition in a 3-3 vote, with one commissioner recused. Creech filed an action under 42 U.S.C. § 1983, alleging various violations of due process by the Commission and the Ada County Prosecuting Attorney’s Office (“ACPA”). The district court denied Creech’s motion for a preliminary injunction. Creech timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have appellate jurisdiction to review the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We review the denial of a preliminary injunction for abuse of discretion, but we review *de novo* the underlying issues of law. *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 475 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1749 (2023).

“The appropriate legal standard to analyze a preliminary injunction motion requires a district court to determine whether a movant has established that (1) he is likely to succeed on the merits of his claim, (2) he is likely to suffer irreparable harm absent the preliminary injunction, (3) the balance of equities tips in his favor, and (4) a preliminary injunction is in the public interest.” *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We focus here on the “likelihood of success” element, which is the most important factor. *See Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

III. ANALYSIS

Our review of state commutation proceedings is limited. *See Wilson v. U.S. Dist. Ct. for N. Dist. of Cal.*, 161 F.3d 1185, 1186 (9th Cir. 1998). “[P]risoners have no liberty interest in clemency proceedings because the decision to grant or deny clemency rests wholly in the discretion of the executive.” *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999). If a state provides a commutation proceeding, the Due Process Clause of the Fourteenth Amendment requires only “*minimal* procedural safeguards” *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring in part and concurring in the judgment);¹ *see also id.* at 292 (Stevens, J., concurring in part and dissenting in part) (“There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required.”); *Woratzek v. Ariz. Bd. of Exec. Clemency*, 117 F.3d 400, 404 (9th Cir. 1997) (“[T]he due process that the Constitution requires for a clemency hearing is quite limited.”).

The precise contours of our review of a commutation proceeding are unclear. At the least, a procedural due process violation exists if “the clemency proceeding’s outcome is wholly arbitrary” *Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013)

¹ Justice O’Connor’s concurring opinion, joined by a plurality of justices, constitutes the Court’s holding in light of Justice Stevens’ partial concurrence. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *see also, e.g., Barwick v. Governor of Fla.*, 66 F.4th 896, 902 (11th Cir.) (per curiam) (“Justice O’Connor’s concurring opinion provides the holding in *Woodard*.”), *cert. denied sub nom. Barwick v. Desantis*, 143 S. Ct. 2452 (2023).

(per curiam). “Judicial 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.” *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring in part and concurring in the judgment). We have assumed without deciding that “bribery, personal or political animosity, or the deliberate fabrication of false evidence” may give rise to a commutation-related due process claim. *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (citation omitted). In the absence of such arbitrariness or invidious misconduct, “notice of the hearing,” *Woodard*, 523 U.S. at 290 (O’Connor, J., concurring in part and concurring in the judgment), “notice of the issues to be considered,” *Wilson*, 161 F.3d at 1187, and “an opportunity to participate in a[] [pre-hearing] interview,” *Woodard*, 523 U.S. at 290 (O’Connor, J., concurring in part and concurring in the judgment), generally satisfy the demands of the Due Process Clause.

Further, even if we found an irregularity, there is some uncertainty as to the proper harmless standard to apply in review of state commutation proceedings. *Cf. Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (noting the general presumption that harmless-error analysis applies to constitutional violations). But we will afford Creech the benefit of *Chapman v. California*’s generous standard, and we therefore assume without deciding that the State bears the burden of

demonstrating that any error is “harmless beyond a reasonable doubt.” 386 U.S. 18, 24 (1967).

Applying these standards, we reject all of Creech’s due process arguments.

1. We first consider Creech’s argument that he was not given adequate notice of the issues to be considered by the Commission and the evidence to be presented at the commutation hearing. Neither we nor the Supreme Court have read the Due Process Clause to require advance notice of the evidence to be presented at a commutation hearing, and Idaho law does not confer a right to receive such notice. Creech received notice of the hearing itself. *See Woodard*, 523 U.S. at 290 (O’Connor, J., concurring in part and concurring in the judgment). And Creech was not misled as to the issues that would be considered by the Commission. *See Wilson*, 161 F.3d at 1187. The State gave Creech considerable information about the logistics and substance of his hearing well in advance thereof. The Commission’s Executive Director met with Creech’s counsel three times before the hearing to discuss the agenda and types of evidence that would be presented. More than three weeks before the hearing, Creech received from the State a copy of the investigation packet that the Commission would be reviewing. Although Creech may not have known all of the specific evidence that would be presented during his commutation hearing—such as evidence concerning the Daniel Walker murder and the introduction of a

picture of a sock labeled “Creech,” which are discussed below—the State satisfied the minimal notice requirements contemplated in *Woodard* and *Wilson*.

2. We next reject Creech’s contention that the Due Process Clause entitled him to the appointment of a replacement commissioner when one Commissioner recused himself. Idaho law does not expressly authorize the appointment of a replacement commissioner in the event of a recusal. This is far from “wholly arbitrary,” *Schad*, 732 F.3d at 947, and Creech has received more than the minimum process he was due under the U.S. Constitution, *see Woodard*, 523 U.S. at 290 (O’Connor, J., concurring in part and concurring in the judgment), so he has failed to make a cognizable procedural due process claim. And we decline to speculate that the presence of an additional commissioner would have changed the outcome. *Cf. Brown v. Davenport*, 596 U.S. 118, 133 (2022) (explaining that “set[ting] aside a conviction based on nothing more than speculation that the defendant was prejudiced . . . would be to give short shrift to the State’s sovereign interes[t] in its final judgment” (citation and quotation marks omitted) (final alteration in original)).

3. We disagree that ACPA violated Creech’s due process rights by suggesting to the Commission that Creech “committed the murder [of Daniel Walker] and got away with it.” Although we will not review the substantive merits of the Commission’s commutation proceeding, we will assume that we may review Creech’s claim that fabricated evidence was deliberately introduced by ACPA. *See*

Anderson, 279 F.3d at 676. The prosecutor’s statements that Creech had been identified as Walker’s killer are not entirely consistent with the San Bernardino Sheriff’s Office press release about the Walker investigation released on January 24, 2024, shortly after the commutation proceeding. It appears² that the prosecutor told the Commission that Creech had been “positively identified as the murderer,” although the press release identified Creech as only a “suspect.” The press release also stated, however, that “[d]etectives were able to corroborate intimate details from statements Creech made regarding Daniel’s murder.”

ACPA’s slide does unequivocally state that “Thomas Creech Murdered Daniel Walker.” Taken alone, that slide might have been misleading by overstating the level of certainty as to Creech’s involvement. But it appears from the hearing minutes that the prosecutor correctly noted that Creech had not been tried for, nor convicted of, Walker’s murder, so the prosecutor’s statements did not mislead the Commission into assuming that Creech had been found responsible in a formal, legal sense.

We are also persuaded that correcting any purported violation would not change the Commission’s vote to deny Creech commutation. Creech’s alleged violations do not call into doubt the stated rationales for the Commissioners’ votes. The Commissioners who voted to deny commutation reasoned that Creech is not

² Because there is no transcript or recording of the hearing, we rely primarily on the meeting minutes attached as an exhibit to the parties’ filings.

“worthy of grace or mercy” for several reasons, including “the coldblooded nature of David Dale Jensen’s murder,” as well as Creech’s “unwilling[ness] to completely disclose the number of people he has killed.” The Commissioners further opined “that the Jensen family would not receive justice if Mr. Creech received clemency, and above all else that they deserve closure in this case.” Overwhelming evidence supports those conclusions.

It is true that the Commissioners who voted against commutation noted “the sheer number of victims that Mr. Creech has created over his lifetime” and that “Mr. Creech was not interested in telling the truth about his additional crimes.” But even taking Daniel Walker’s murder out of the equation would not materially change the record’s support for both of those observations. The prosecutor alleged at the hearing that Creech had killed eleven people, including Walker. Creech agreed that he had killed at least nine people, but he claimed that he had never heard of one of the names and did not kill Dwayne DiCicco. The Commission then asked if Creech could settle “on at least ten people[] that he killed,” to which Creech replied, “no.” *Contra Creech IV*, 507 U.S. at 465 (“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.”).

Even if the Commission had not been presented with any information regarding the status of the Walker investigation, it would have still had ample

evidence that Creech had killed many people, been implicated or suspected in other deaths, and been dishonest about his involvement in the death of DiCicco. Creech had previously confessed to killing DiCicco, even going so far as contact DiCicco's mother several times.

4. We also reject Creech's argument that ACPA violated his due process rights by introducing misleading or fabricated evidence when it displayed a slide of a sock labeled with Creech's name. In 1995, the sentencing judge found "beyond a reasonable doubt . . . [that] [a]ll the weapons which were used in this murder were made by Tom Creech. Jensen was egged on to attack Creech so the justification of self defense could be used. . . . Jensen approached Creech holding a weapon made up of batteries in a sock. *The sock was later determined to be Creech's.*" Findings of the Court in Considering the Death Penalty Under Section 19-2515, Idaho Code, at 3–4, *State v. Creech*, No. HCR-10252 (Idaho Dist. Ct. Apr. 17, 1995) (emphasis added).³ The question of the authenticity of the sock in the photograph and its probative value arose because Creech contended at the Commission's hearing that his remorse and rehabilitation favored commutation. In support, he claimed that he had accepted responsibility for his offenses. ACPA responded by pointing to a pre-hearing statement that Creech gave to investigators, where Creech contradicted the

³ The state trial court's findings are available as an exhibit at Second Petition for Writ of Habeas Corpus, *Creech v. Pasket*, No. 99-CV-00224 (D. Idaho Mar. 24, 2005), ECF No. 131-1.

sentencing judge's 1995 factual finding that the murder weapon was his by stating that it belonged to another inmate. ACPA introduced the slide with the labeled sock to refute Creech's pre-hearing assertion that the murder weapon never belonged to him. In a post-hearing declaration provided to the Commission, Creech's attorney stated that the prosecutor falsely told the Commission during the hearing that the sock bearing Creech's name was the murder weapon. The detailed notes of the hearing describe no such statement by the prosecutor. The minutes state, instead, that in her closing argument to the Commission, the prosecutor "displayed a photograph of the matching sock that was found in Mr. Creech's cell. The name on the sock is 'Creech.'" Creech did not address at the hearing the sentencing judge's 1995 factual finding that the murder weapon was his.

Even if we credit Creech's attorney's post-hearing declaration that the prosecutor falsely told the Commission that the sock bearing Creech's name was the murder weapon, there are other reasons why any such due process violation was harmless beyond a reasonable doubt. The Commissioners who voted to deny commutation did not mention the sock, nor did they even discuss Creech's unwillingness to accept the 1995 factual findings that the murder weapon belonged to him. As explained above, the Commissioners who voted to deny commutation focused on the reprehensible nature of Jensen's murder without reference to whether Creech had provoked Jensen's initial attack. The Commissioners were also

concerned with both Creech's lack of candor about the number of people he had murdered and justice for Jensen's family. Overwhelming evidence supports those reasons.

Bolstering our conclusion as to harmlessness, the Commissioners were unanimous that Creech's conduct—including any evidence of his post-offense rehabilitation—would not entitle him to mercy. The three Commissioners who voted to recommend commutation were explicit that their “decision was not based on any doubt or question about Mr. Creech's guilt or the horrific nature of his crime.” Indeed, their reasoning was not “based on the actions and conduct of Mr. Creech” at all. Instead, their vote reflected “the time that had elapsed since Mr. Creech committed this horrific crime,” and that the sentencing judge and former Ada County deputy prosecutor “no longer believe that a sentence of death is appropriate” It strains credulity to suppose that the reference to the matching sock made the difference in the Commission's denial of commutation.

5. Finally, we disagree with Creech's argument that the Commission violated his due process rights when it failed to pause the proceedings after the hearing based on his complaints of unfairness. Creech raised both the Walker and sock issues to the Commission after the hearing. The Commissioners unanimously rejected Creech's request to defer proceedings pending further factfinding, suggesting that the Commissioners did not consider either issue relevant to the denial

of commutation. The Commission had no obligation to consider Creech's request (which it did), let alone grant it.

IV. CONCLUSION

Creech has failed to establish a likelihood of success on the merits, and we find no legal or clear factual error in the district court's evaluation of the remaining preliminary injunction factors. *See Cal. Chamber of Com.*, 29 F.4th at 475. We dismiss as moot Creech's motion for a stay pending appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,

Plaintiff,

v.

IDAHO COMMISSION OF PARDONS
AND PAROLE and JAN BENNETTS, Ada
County Prosecuting Attorney, in her
official capacity,

Defendants.

Case No. 1:24-cv-00066-AKB

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

FOR IMMEDIATE FILING

Plaintiff Thomas Eugene Creech is a death-row inmate in the custody of the Idaho Department of Correction (IDOC). In 1995, Creech was sentenced to death for beating another inmate to death with a sock filled with batteries. On October 16, 2023, a state district court issued a death warrant for Creech's execution. That court subsequently stayed the warrant pending the Idaho Commission of Pardons and Parole's consideration of Creech's petition for clemency. The Commission held a hearing on that petition on January 19, 2024, and on January 29, it issued a decision denying commutation. The next day, January 30, the state district court again issued a death warrant for Creech's execution. That execution is presently scheduled for February 28.

On February 5, 2024, Creech filed this action under 42 U.S.C. § 1983, alleging the Commission and the Ada County Prosecutor's Office (ACPO) violated his due process rights during his clemency hearing. Creech requests this Court enjoin his execution during this case's pendency. Specifically, pending before the Court in this case are Creech's Motion for Preliminary Injunction (Dkt. 4), his Motion to Expedite Discovery (Dkt. 10), and Plaintiff's Motion for Leave to Submit Notice of Factual Development. (Dkt. 17).

In support of his preliminary injunction motion, Creech presents the Declaration of Christopher M. Sanchez, counsel for Creech, discussing the absence of certain evidence in Creech's litigation case files. (Dkt. 4-2). The remaining information Creech offers, including numerous newspaper articles, is not accompanied by an affidavit either authenticating or describing the information. Rather, the information is simply attached as "exhibits" to Creech's memorandum in support of his preliminary injunction motion. *See K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972) (noting basis for preliminary injunction should be supported by affidavits or verified complaint); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949 (3d ed. 2023) (noting preliminary injunction request should be supported by affidavits).

The Court finds oral argument will not significantly aid its decision-making process and decides the motions on the parties' briefing. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B). *See also* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings."). For the reasons discussed, the Court denies Creech's motions for discovery and a preliminary injunction. Although Creech will suffer irreparable harm in the absence of a preliminary injunction, he has not clearly shown a likelihood of success on the merits of his due process claim. Further, the balance of equities and the public interest weigh against granting an injunction.

BACKGROUND

In October 2023, the Commission granted Creech a clemency hearing to decide whether to recommend that Idaho's Governor commute Creech's death sentence to a sentence of fixed life imprisonment. The Commission is generally comprised of seven commissioners. In October,

however, one of the commissioners recused himself from participating in the hearing. (Dkt. 12-1 at ¶ 10).

The ACPO was designated to present on the State's behalf at the clemency hearing. Before the hearing, the Commission's executive director met with the parties several times and sent the parties at least two memoranda discussing in detail the procedures and process for the hearing. (Dkt. 12-2 at p. 3 (November 13, 2023 memo); Dkt. 12-2 at p. 7 (December 20, 2023 memo)). For example, these memoranda stated that:

[C]ommutations are a matter of clemency, and the hearing is not an adversarial proceeding. As such, the parties will make presentations to the Commission, with only identified supporter(s), identified victim(s), and attorneys speaking, and will not be allowed to call witnesses for questioning, cross examine the other party, or object to what is being said during the parties' presentation time.

(Dkt. 12-2 at pp. 4, 8). Further, another memorandum stated:

Each party will get a copy of the entire hearing packet, with all attachments and party submissions, on December 20, 2023. Victim statements have been removed from the investigative packet and will be submitted separately to the Commission. The parties agree to not make or retain any copy of the hearing packet and return their copy of the hearing packet, including all attachments and party submissions, at the conclusion of the hearing. Any further distribution of the hearing packet will be pursuant to the Idaho Public Records Act.

(*Id.* at p. 9). The record does not reflect that Creech objected to these or any of the Commission's proposed procedures or processes, including proceeding to hearing with only six commissioners.

(Dkt. 12-1 at p. 10).

Per the Commission's outlined procedures, Creech, the State, and the Commission's investigators all presented materials for the Commission to consider at the hearing. On December 20, 2023, the Commission provided those materials to both parties in a "hearing packet." According to Creech, the State's materials consisted of 2,952 pages of documents, although the first twenty-seven pages were removed with the notation that they were "victim

related documents.” (Dkt. 1 at ¶¶ 41-43). Nothing in the record indicates Creech objected to not receiving these redacted materials.

The State’s materials, which Creech did receive, did not contain any reference to Daniel Walker, a 1974 murder victim in San Bernardino County, California. (*Id.* at ¶¶ 47-48). At the hearing, however, the ACPO—as part of its argument against clemency—claimed that San Bernardino authorities had “solved” Walker’s murder; Creech was responsible for it; and the case was “closed.” (*Id.* at ¶ 52, 60). Also, on the day of the hearing, the ACPO issued a press release informing the public that Creech had murdered Walker. (*Id.* at ¶ 63). The San Bernardino Sheriff’s Department also issued a press release stating Creech had been “identified as the *suspect*” in Walker’s murder. (*Id.* at ¶ 66).

Creech alleges, however, that the ACPO had never publicly accused Creech of the San Bernardino murder. (*Id.* at ¶¶ 58, 121-24). Further, Creech alleges the ACPO’s statements to the Commission and its press release claiming Walker’s murder had been “solved” after a “thorough investigation” were false. (*Id.* at ¶¶ 64-70). It appears, however, that Creech was at least a suspect in the crime. In 1975, Creech confessed to a murder with significant similarities to Walker’s murder. (*Id.* at ¶ 82-87).

Additionally, Creech alleges the ACPO revealed for the first time at the clemency hearing a photograph of a sock with Creech’s name written on it in marker. This photograph was not contained in the materials provided to Creech before the hearing. (*Id.* at ¶ 49). According to Creech, there are “discrepancies” between the image of the sock presented to the Commission and the images of the crime scene. (*Id.* at ¶ 172). He suggests the photograph was compromised or fabricated. (*Id.* at ¶¶ 172-75). After the commutation hearing, Creech’s counsel “made several

requests that the Commission postpone its decision” until Creech could investigate the Walker murder and the sock photograph. (*Id.* at ¶ 126). The Commission denied these requests, however.

On January 29, 2024, the Commission issued its decision denying Creech’s clemency petition and declining to recommend that the Governor commute his death-sentence. The vote was split: three commissioners voted to deny clemency, and three voted to grant clemency. Because Idaho law requires a majority of the commissioners to recommend commutations, the Commission did not recommend that the Governor commute Creech’s sentence.¹

The Commission articulated the reasoning for its decision in writing. The three Commissioners who voted in favor of a clemency recommendation explained:

This decision was not based on any doubt or question about Mr. Creech’s guilt or the horrific nature of his crime. The Commissioners do not believe Mr. Creech is worthy of mercy, but that the discretion of the Commission allows for grace to be given even when undeserved. While the Commissioners noted a possibility that Mr. Creech has changed in the years since his crime and considered his current age and health, this decision was not based on the actions and conduct of Mr. Creech. The Commissioner’s decision to recommend a commutation was based on the time that has elapsed since Mr. Creech committed this horrific crime. In addition, the Commissioners were influenced by commentary from Judge Newhouse, the sentencing judge, and former Ada County deputy prosecutor Mr. Jim Harris, who no longer believe that a sentence of death is appropriate for Mr. Creech’s conviction. Finally, the change in law requiring that a death sentence be decided by a jury rather than a judge also influenced the recommendation to commute Mr. Creech’s sentence to life in prison without parole.

(Dkt. 12-3 at p. 42).

Meanwhile, the three Commissioners who voted against clemency reasoned:

We do not believe Mr. Creech is worthy of grace or mercy. This decision was based on the coldblooded nature of David Dale Jensen’s murder and the sheer number of

¹ The Idaho Constitution grants a majority of the Commission the “power to remit fines and forfeitures, and, only as provided by statute, to grant commutations and pardons after conviction and judgment.” Idaho Const., Art. IV, § 7. In cases like Creech’s, where the maximum sentence is death (or life imprisonment), the Commission’s decision on a clemency petition is not final; rather, a majority vote for commutation constitutes only a recommendation to the Governor, who then makes the final clemency decision. Idaho Code § 20-1016(2).

victims that Mr. Creech has created over his lifetime, which shows that he does not place value on human life, other than his own. Mr. Creech was not interested in telling the truth about his additional crimes and violent history and was reluctant and unwilling to completely disclose the number of people he has killed. Further, the Commission believes that Mr. Creech is not capable of true remorse and would take another life if it benefitted [sic] him. He has shown he can still manipulate others to get what he wants. The Commission believes that the Jensen family would not receive justice if Mr. Creech received clemency, and above all else that they deserve closure in this case. If the Commission cannot uphold the death penalty in this case, then the death penalty means nothing in the state of Idaho.

(*Id.* at p. 43).

Following the Commission's denial of clemency, Creech filed this action alleging a single claim of relief for violation of his due process rights. Specifically, Creech alleges the Commission and ACPO violated his due process rights by:

(1) failing to give him adequate notice of the allegations and evidence the prosecution would present; (2) presenting false evidence against him regarding the murder of Daniel Walker and the status of San Bernardino's investigation into the crime; (3) presenting potentially tampered with evidence in the form of an image of a sock with Mr. Creech's name written on it; (4) failing to give notice that the prosecution would be using the image of the sock in its presentation and failing to make examination of the sock available to Mr. Creech prior to the hearing; (5) failing to allow Mr. Creech the chance to contest the evidence against him once he had informed the Commission of the issues with the prosecution's presentation; and (6) denying Mr. Creech's petition on the basis of a tie vote when he had a reasonable expectation that each side would be required to persuade the same name of Commissioners to secure a favorable outcome.

(Dkt. 1 at ¶ 180).

Creech requests a preliminary injunction prohibiting his execution "while the instant case is being litigated." (Dkt. 4 at p. 1). Ultimately, Creech seeks a new clemency hearing in which "(1) the [State] is forbidden from using false evidence against him; (2) [he] is given notice of what the [Commission] will consider in its decision; (3) he is given notice of the evidence to be used against him by the [State], and (4) he is given a reasonable amount of time to investigate the [State's] new claims raised for the first time at his clemency hearing." (Dkt. 1 at ¶ 2).

LEGAL STANDARD

Under Rule 65 of the Federal Rules of Civil Procedure, a party may obtain injunctive relief before final judgment in certain limited circumstances. “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; he is likely to suffer irreparable harm in the absence of preliminary relief; the balance of equities tips in his favor; and an injunction is in the public interest.” *Id.* at 20. The movant must carry his burden “by a clear showing.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). “In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24.

“Under the ‘serious questions’ version of the test, a preliminary injunction is appropriate when a plaintiff demonstrates that ‘serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.’” *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir.2011)). “This approach requires that the elements of the preliminary injunction test be balanced, so that a stronger showing of one element may offset a weaker showing of another.” *Id.* “Serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* (brackets and quotations omitted).

“[T]hese principles apply even in the context of an impending execution.” *Lopez*, 680 F.3d at 1072. In applying them, the Court considers the facts in the light most favorable to Creech,

unless a fact is “blatantly contradicted by the record[] so that no reasonable jury could believe it.”
See Scott v. Harris, 550 U.S. 372, 380 (2007) (summary judgment context).

ANALYSIS

1. Clemency and Due Process

Death row inmates have no constitutional right to clemency proceedings. *See Herrera v. Collins*, 506 U.S. 390, 414 (1993). The Supreme Court has held that “pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.” *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 276 (1998) (plurality) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). Because commutations are matters within the authority of a state’s executive branch, clemency proceedings “are rarely, if ever, appropriate for judicial review.” *Id.*; *see also Dumschat*, 452 U.S. at 464 (“A decision whether to commute a long-term sentence generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision.”). In *Woodard*, the Court addressed the due process rights to which death-row inmates are entitled in a clemency proceeding. *Woodard*, however, is a plurality decision. Chief Justice Rehnquist wrote the primary decision and concluded death-row inmates have no due process rights in a clemency hearing because they received all the process to which they were entitled during trial and sentencing. *Id.* at 281 (plurality).

Justice O’Connor, however, wrote a concurring opinion rejecting the notion that “the Due Process Clause provides no constitutional safeguards” in clemency proceedings. *Id.* at 288. Rather, she concluded “some *minimal* procedural safeguards apply to clemency proceedings.” *Id.* at 289. By way of example, she stated that “judicial intervention might . . . 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 his clemency process.” *Id.* at 289. By contrast, she rejected Woodard’s claim that his due process rights were violated because he did not have adequate notice; he did not have a meaningful opportunity to prepare his petition; his counsel was improperly excluded from an interview and the clemency hearing; and he was precluded from testifying or submitting documentary evidence at the hearing. *Id.* at 289-90.

Three other Justices joined in Justice O’Connor’s concurrence, and another Justice agreed with her rejection of Chief Justice Rehnquist’s conclusion that an inmate has no due process rights in a clemency hearing. *Id.* at 288 (noting Justices Souter, Ginsburg, and Breyer joining); *id.* at 291 (noting Justice Stevens writing separately and rejecting conclusion that no due process rights exist in clemency hearing). Accordingly, Justice O’Connor’s concurring opinion concluding some minimal procedural safeguards apply in clemency proceedings is the controlling law. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (noting in fractured opinions “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”) (internal quotation marks omitted); *see also Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (ruling inmate failed to demonstrate substantial likelihood of success on merits in challenging Governor’s blanket denial of clemency applications).

A federal appellate court, however, is not authorized “to review the substantive merits of a clemency proceeding.” *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). The reason for this rule is twofold. First, *Woodard* at most authorizes only limited judicial review for some minimal procedural due process safeguards. 523 U.S. at 289; *see also Anderson*, 279 F.3d at 676 (relying on *Woodard*). Second, generally the record of the clemency hearing is inadequate—as in this case—to conduct a substantive judicial review of the merits. For example, in this case, the parties’ written submissions to the Commission are not in the record, and their oral presentations were not

recorded and officially transcribed. Rather, apparently only “minutes” were recorded. (Dkt. 11-1 at pp. 8-21).

In resolving Creech’s preliminary injunction motion, the Court relies on Justice O’Connor’s decision in *Woodard* and considers whether Creech has clearly shown a substantial likelihood of success of demonstrating Defendants violated his due process rights because they deprived him of minimal due process safeguards. The Court declines, however, to address Creech’s allegations regarding the substantive merits of the proceeding, including the validity of the evidence. A review of the merits is beyond this Court’s authority.

2. Likelihood of Success on the Merits

Creech fails to clearly show he is likely to succeed on the merits of his due process claim. Due process is a flexible concept, and the determination of what procedural protections are required in any given situation depends on the nature of the proceeding. *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974). For example, the Due Process Clause requires fewer procedural protections for a parole hearing versus a criminal trial. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (“[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.”).

By the same token, a parolee has a right to more procedural due process in a revocation hearing than a clemency petitioner has in a clemency proceeding. *Compare id.* at 488-89 (“[T]he minimum requirements of due process [in a parole revocation proceeding] include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing

body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.”) (internal quotation marks omitted), *with Woodard*, 523 U.S. at 289 (O’Connor, J., concurring) (concluding that only “*minimal*” due process protections are required in the clemency context).

In this case, the Court has carefully and thoroughly reviewed the record, considered the procedures for Creech’s clemency hearing, and finds the Commission provided Creech more than minimal due process in conducting the hearing. For example, Creech was granted a commutation hearing. He had notice of that hearing. The Commissioner’s executive director met several times with the parties about the hearing before it occurred. The director provided the parties with information regarding “the rules and logistical details for the hearing.” (Dkt. 1 at ¶¶ 34-38). The Commission required the ACPO to submit materials and provided Creech with copies of those materials before the hearing. (*Id.* ¶ 41). The Commission allowed Creech to present information at the hearing and gave him an opportunity to speak on his behalf. Finally, the Commission deliberated and issued a written decision explaining the commissioners’ reasoning.

Creech challenges these procedures by eliding the distinction between the amount and type of due process afforded parolees and inmates seeking parole versus clemency petitioners. He relies on *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam), for the proposition that “[a]t a minimum, due process in clemency proceedings requires advance notice and a chance to contest evidence that will be presented against a petitioner.” (Dkt. at ¶ 179). *Swarthout* addresses the due process requirement in the context of parole hearing, however. *Swarthout*, 562 U.S. at 216-17. It does not establish that this same due process is required in a clemency hearing. Moreover, the procedures the Commission provided Creech during the clemency hearing likely would have

satisfied the due process requirements even for a parole hearing. *See id.* at 220 (noting prisoner subject to parole statute “received adequate process when he was allowed an opportunity to be heard and was provided a statement of reasons why parole was denied.”).

Creech’s reliance on *Lankford v. Idaho*, 500 U.S. 110 (1991), and *Wilson v. U.S. Dist. Court*, 161 F.3d 1185 (9th Cir. 1998), to argue that he had a right to notice of the ACPO’s intention to refer to Walker’s murder and show the sock photograph is also misplaced. *Lankford* is distinguishable because it did not involve a clemency proceeding; rather, in that case the defendant challenged the prosecution’s failure to notify him that it intended to seek the death penalty. *Id.* at 500 U.S. at 119. A defendant’s due process rights in that context are greater than in a clemency proceeding.

Similarly, *Wilson* is distinguishable, even though it involved a clemency proceeding. In *Wilson*, the governor informed the petitioner that the governor would not consider exculpatory evidence but then denied clemency specifically because the petitioner failed to present exculpatory evidence. *Wilson*, 161 F.3d at 1186-87. Based on this fact, the Ninth Circuit concluded the petitioner had stated “a claim of a violation of due process.” *Id.* Contrary to *Wilson*, Creech does not allege the decisionmaker in his case—the Commission—misled him in any respect.

Creech has cited no authority that the ACPO was required to provide him with notice of *all* the information it intended to show or discuss during the clemency hearing. That the Commission permitted the parties to view most of the information before the hearing did not create a protectable interest in a right to receive the ACPO’s presentation in its entirety before the hearing. Further, because Creech does not have a constitutional right to a clemency hearing, it necessarily follows he does not have a due process right to post-hearing proceedings including, for example, discovery regarding the clemency proceeding.

Creech also does not cite any authority in support of his assertion that the Commission violated his due process rights by proceeding to the clemency hearing with only six commissioners. Creech does not contend he was surprised by this fact; he was on notice that Idaho law required a majority vote of the Commission for a recommendation of clemency; and he, notably, did not object to the lack of a seventh commissioner.

As Creech acknowledges, “[t]he Commission went to a great deal of trouble and expense to organize a lengthy and complex commutation hearing in a capital case, after months of preparation and logistics involving a large number of people.” (Dkt. 15 at p. 8). Based on a review of the procedures the Commission provided Creech, the Court finds Creech fails to show a substantial likelihood of success on the merits of his claim that his due process rights were violated. The record shows Creech received more than the constitutionally required minimum procedural protections.

Finally, although the Court declines to review the merits of Creech’s claim, it notes that Creech alleges in his complaint that “the prosecution reveal[ed] a photo of the murder weapon for the first time” at the clemency hearing. (Dkt. 1 at § V(C)). The minutes, however, contradict this allegation. Rather than showing the murder weapon—namely the sock containing batteries—the ACPO apparently showed a photograph of the sock purportedly matching the murder weapon. (Dkt. 11-1 at p. 20 (“[The prosecutor] displayed a photograph of the matching sock that was found in [Creech’s] cell. The name on the sock is ‘Creech.’”).

Further, although the ACPO did apparently state during the hearing that “Creech was positively identified as [Walker’s] murderer” (Dkt. 11-1 at p. 14), the minutes show the ACPO discussed numerous other murders Creech allegedly committed. Creech, however, does not dispute

those murders, and it is already an established fact that Creech has committed multiple murders.

As Justice O'Connor stated:

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.

Arave v. Creech, 507 U.S. 463, 465-66 (1993). Finally, the Commission's decision does not appear to have been unduly influenced by either the Walker murder or the sock photograph. The Commission did not mention either when explaining its decision.

3. Irreparable Harm

The Commission argues Creech will not suffer irreparable injury if denied injunctive relief, citing *Powell v. Thomas*, 784 F. Supp. 2d 1070 (M.D. Ala. 2011). In that case, the court ruled the petitioner failed to show irreparable harm because he failed to establish a substantial likelihood of success on the merits of his claim. *Id.* at 1283. *Powell*, however, is contrary to Ninth Circuit law. The Ninth Circuit has recognized that “every § 1983 plaintiff in an injunction appeal involving an upcoming execution” demonstrates irreparable harm. *Towery*, 672 F.3d at 661. Moreover, this Court has previously rejected the argument that irreparable harm requires something more than the plaintiff's death and the inability to continue litigation. *Rhoades v. Reinke*, 830 F. Supp. 2d 1046, 1070-71 (D. Idaho) (“[T]he harm in this instance is Rhoades's death [from execution] and his inability to continue with the litigation, and . . . this harm is irreparable if a stay is not granted.”), *aff'd*, 671 F.3d 856 (9th Cir. 2011). Accordingly, the Court concludes Creech has made a clear showing he will likely suffer irreparable harm in the absence of preliminary relief if IDOC proceeds with the execution.

4. Balance of Equities and Public Interest

As noted above, “[u]nder the ‘serious questions’ version of the test, a preliminary injunction is appropriate when a plaintiff demonstrates that ‘serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.’” *Id.* at 657. Creech, however, has failed to demonstrate “serious questions going to the merits” because he fails to clearly show a likelihood of success on the merits of his claim. Moreover, the balance of equities and public interest do not weigh sharply in Creech’s favor.

The Supreme Court has stated a State has a “strong interest in enforcing its criminal judgments without undue interference from federal courts.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Likewise, crime victims “have an important interest in the timely enforcement of a sentence.” *Id.* These interests are especially strong in cases in which the legal proceedings have continued for many years. *Bible v. Schriro*, 651 F.3d 1060, 1066 (9th Cir.2011) (“[T]he further delay from a stay [of execution] would cause hardship and prejudice to the State and victims, given that the appellate process in this case has already spanned more than two decades.”). Further, the Supreme Court has held a State has a compelling interest in finality and is entitled to the assurance of finality after years of lengthy proceedings have run their course and once a mandate has issued denying habeas relief. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). “Only with real finality can the victims of crime move forward” *Id.* “To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty.” *Id.* (quotation omitted).

The history of Creech’s federal proceedings is too long and complicated to recount here. In brief, Creech has sought relief from his death sentence in the federal courts since the reimposition of his death penalty in 1995—almost thirty years of litigation. Recently, the Supreme

Court denied Creech's petition for certiorari challenging the Ninth Circuit's denial of his second amended habeas petition. *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023) *cert. denied* 114 S. Ct. 291 (Oct. 10, 2023). A few days later, on October 13, 2023, Creech filed his third federal habeas petition alleging that evolving standards of decency render his death sentence unconstitutional. *Creech v. Richardson*, No. 1:23-cv-00463-AKB. This Court concluded it lacked jurisdiction over Creech's unauthorized successive petition under 28 U.S.C. § 2244(b), and that decision is now on emergency appeal. *Creech*, No. 1:23-cv-00463-AKB at Dkts. 15, 17.

A few days after Creech filed his third federal habeas petition, the Ninth Circuit issued the mandate on its decision remanding another of Creech's civil rights cases to this Court, in which Creech has attempted under § 1983 to challenge the State's execution protocol since March 2020. *See Creech v. Tewalt*, 84 F.4th 777, 783 (9th Cir. 2023). Although the Court allowed Creech to amend his complaint—for a third time—to attempt to allege viable claims, his less than clear showing in support of his preliminary injunction motion demonstrates he is unlikely to succeed on the merits of any of his claims. Finally, Creech filed this action on February 5, 2024, challenging the Commission's denial of his clemency petition. This litigation history demonstrates an instance in which the State's and the victims' interests in finality are especially strong given the lengthy legal proceedings that have delayed the State's timely enforcement of Creech's sentence. Accordingly, the Court concludes the balance of equities and public interest are not in Creech's favor.

Because Creech fails to make a clear showing of a likelihood of success on the merits of claim that the Commission and ACPO violated his due process rights and because the balance of equities and the public interest weigh against granting a preliminary injunction, the Court denies Creech's request for an injunction, even though he will suffer irreparable harm as a result.

5. Evidentiary Hearing

The Court disagrees it must hold an evidentiary hearing before denying Creech's request for injunctive relief, as Creech asserts. The Ninth Circuit has ruled that a court does not need to have a hearing on a motion for a preliminary injunction where the essential facts are not in dispute. *Charlton v. Est. of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). Further, a hearing is unnecessary when "the movant has not presented a colorable factual basis to support the claim on the merits or the contention of irreparable harm." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990). The Court finds that in this case, Creech has failed to present a colorable factual basis to support his claim that the clemency hearing violated his due process rights.

Further, the Court declines to grant Creech's Motion to Expedite Discovery. As stated above, Creech has no constitutional right to a clemency hearing; he likewise has no constitutional right to conduct discovery to challenge that hearing. The Court concludes Creech has failed to show good cause to conduct discovery.

ORDER

IT IS ORDERED:

1. Plaintiff's Motion for Preliminary Injunction (Dkt. 4) is **DENIED**.
2. Plaintiff's Motion to Expedite Discovery (Dkt. 10) is **DENIED**.
3. Plaintiff's Motion for Leave to Submit Notice of Factual Development (Dkt. 17) is **GRANTED**.



DATED: February 23, 2024

Amanda K. Brailsford
Amanda K. Brailsford
U.S. District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 25 2024

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

THOMAS EUGENE CREECH,

Plaintiff - Appellant,

v.

IDAHO COMMISSION OF PARDONS
AND PAROLE and JAN M BENNETTS,
Ada County Prosecuting Attorney, in her
official capacity,

Defendants - Appellees.

No. 24-1000

D.C. No.

1:24-cv-00066-AKB

District of Idaho,

Boise

ORDER

Before: MURGUIA, Chief Judge.

On February 25, 2024, Creech filed a petition for panel rehearing and rehearing en banc from the panel's opinion affirming the district court's denial of Creech's request for preliminary injunctive relief. The panel has voted to deny the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc. Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's February 24, 2024, opinion should be reheard en banc. No judge requested a vote within the time period. Accordingly, the petition for panel rehearing and rehearing en banc is denied. En banc proceedings

with respect to the panel's opinion in Appeal No. 24-1000 are concluded.

Creech's Preemptive Objection to Rehearing Process (Docket Entry No. 16), received on February 25, 2024, has been filed and circulated to the full court. The objection is construed as a supplement to Creech's petition for panel rehearing and rehearing en banc and is denied.

The mandate shall issue forthwith in Appeal No. 24-1000.