

NO. 23-6831

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

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

Respondents.

BRIEF IN OPPOSITION AND 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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QUESTIONS PRESENTED

Petitioner Thomas E. Creech (“Creech”) has raised the following question before this Court:

1. Does the State’s intentional presentation of false evidence at a clemency hearing violate due process?
2. Under what circumstances, if any, does harmless-error analysis apply when constitutional challenges are brought to clemency proceedings?

(Pet., p.i.)

Respondent State of Idaho wishes to rephrase the questions as follows:

1. Did the panel deviate from circuit precedent in identifying and discussing the minimal due process guarantees in state clemency proceedings?
2. Did the panel correctly decide that harmless-error analysis applies to a due process violation in a clemency proceeding?

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STATEMENT OF THE CASE

A. Background

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 attacks on his conviction were denied in early February 2024. *See Creech v. Idaho (“Creech VI”)*, No. 51229, 2024 WL 510142 (Idaho Feb. 9, 2024), and *Creech v. Idaho (“Creech VII”)*, No. 50336, 2024 WL 510105 (Idaho Feb. 9, 2024). It has been over forty-three years since Creech pled guilty to murdering Jensen. *See Creech v. Richardson (“Creech VIII”)*, 40 F.4th 1013, 1017-23 (9th Cir. 2022) (describing the various proceedings).

B. Commutation Proceedings and Proceedings Below

On October 16, 2023, a state district court issued a death warrant for Creech’s execution. (App. A, p.015). That court then stayed the warrant pending consideration of Creech’s petition for clemency. (*Id.*). The clemency proceedings are set forth in the district court’s memorandum decision. (*See* App. B., pp.016-018). In summary, the Commission granted Creech a hearing. The executive director met with the parties to provide guidance regarding the procedures and rules to be used. The Commission held the hearing, during which Creech and the prosecutor made presentations.

The Commission denied Creech's commutation petition on January 29, 2024.¹ (App. B, pp. 019-020). On January 30, 2024, Judge Jason Scott of the Fourth Judicial District of the State of Idaho entered Creech's current death warrant. (*Id.* at 015). Creech's execution is scheduled for February 28, 2024. (*Id.*).

On February 5, 2024, Creech filed a Complaint seeking equitable, declaratory and injunctive relief claiming his due process rights were violated during the commutation process. (App. B., p. 15). Creech then, on February 8, 2024, filed a Motion for Preliminary Injunction seeking a preliminary injunction to "protect[] him from execution while the instant case is being litigated." (*Id.*).

The district court denied Creech's Motion on February 23, 2024. (App. B). Creech filed a notice of appeal. (App. A, p. 4). On February 24, 2024, the Ninth Circuit affirmed the district court's denial of Creech's Motion for a Preliminary Injunction. (App. A). Creech filed his petition for certiorari and application for a stay of execution on February 26, 2024, after 9:00 pm local time.

¹ Creech notes that it was a 3-3 tie after one Commissioner recused himself pursuant to the Idaho Administrative Procedure Act 50.01.01.200.07 (Petition, p. 11). This has been litigated in front of the District and Circuit Courts, neither of whom found this claim to implicate a potential due process violation. Dkt. 13-1, p. 8.

REASONS FOR DENYING THE WRIT

A. The Panel Did Not Deviate From Circuit Precedent in Identifying and Discussing the Minimal Due Process Guarantees in State Clemency Proceedings.

Creech makes much of the panel’s statement that the Ninth Circuit has previously “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.” (App. A, p. 6). Creech’s insistence that the panel misapprehended Ninth Circuit precedent is misplaced. The Ninth Circuit has never considered a claim of “deliberate fabrication.”

Creech cites *Anderson v. Davis*, 279 F.3d 674 (9th Cir. 2002), as binding precedent. In *Anderson*, the plaintiff filed a complaint challenging an alleged blanket policy by California Governor Gray Davis to deny all applications for executive clemency filed by persons convicted of murder without consideration of the facts and circumstances of the individual. 279 F.3d at 675. The district court rejected the claim in a “thoughtful and careful opinion read from the bench...” *Id.* at 676. On an emergency motion for an injunction pending appeal of his due process claim, the Ninth Circuit “scoured the record” to determine if any ground *might* exist that would offend the Constitution. *Id.* The Ninth Circuit listed various grounds that *might* raise a due process concern, including deliberate fabrication of evidence but, finding none, denied the motion. *Id.* at 676-677 (emphasis added). Because *Anderson* had not raised any claim that *might* lead to a due process violation, the Ninth Circuit did not analyze any such claim or set any parameters on such an inquiry.

In its decision affirming denial of injunctive relief, the Ninth Circuit correctly recognized that federal court “review of state commutation proceedings is limited.” (App. A, p. 5 (citing *Wilson v. U.S. Dist. Ct. for N. Dist. of Cal.*, 161 F.3d 1185, 1186 (9th Cir. 1998)). The Ninth Circuit then identified the minimal protections due Creech, including notice of the hearing and issues to be considered as well as an opportunity to participate in a pre-hearing interview. (App. A, p. 6 (citations omitted)). The Commission met and exceeded these Constitutional safeguards. Creech was granted a hearing (*id.* at p. 7), notice of that hearing (*id.*), notice of the procedures and rules that applied to the hearing (*id.*), a copy of the materials presented to the Commission (*id.*), an opportunity to address the Commission directly at the hearing both personally and through counsel (*id.* at p.10), a written decision providing the reasons for the Commission’s recommendations (*id.* at pp. 10, 12, 13), and consideration of his request to delay the decision to permit him to investigate two factors he believed influenced the Commission’s recommendations (*id.* at pp.13-14.).

Creech asserts that the Ada County deputy prosecuting attorney lied at the clemency hearing. Creech claims the attorney “declar[ed] him guilty ... of a 1974 murder” and “unequivocally and falsely told the Commission that Mr. Creech had been conclusively determined by authorities to have murdered Daniel Walker.” (Petition, pp. 2, 3). Creech refers to a slide that simply states Creech murdered Mr. Walker and got away with it. Creech further claims that the prosecutor lied in saying that a sock depicted in a photo was the murder weapon Creech used to murder David Jensen. (Petition, p. 9).

B. Contrary to Creech’s Assertion, There Is Not a Circuit Split that Requires This Court’s Intercession.

This Court has determined 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. The Due Process Clause is not violated where...the procedures in question do no more than confirm that the clemency and pardon powers are committed, as is our tradition, to the authority of the executive.” *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (citation omitted). In seeking commutation, a prisoner facing the death penalty possesses a “unilateral hope...for clemency as a matter of *grace*”. *Id.* at 282 (emphasis added). “A denial of clemency merely means that the inmate must serve the sentence originally imposed.” *Id.* at 283.

The clemency process is a state process, vested in the executive. *See e.g.*, IDAHO CONST. art. IV, § 7 (“The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state...”). Each State applies its own laws and regulations. This Court has required “some *minimal* procedural safeguards” to meet due process in state clemency proceedings. *See Woodard*, 523 U.S. at 289 (emphasis added). Thus, the process required in a clemency proceeding includes “notice of the hearing and an opportunity to participate in an interview....” *Id.* at 290. Additionally, due process would be offended by truly outrageous conduct such as (1) “a scheme whereby a state official flipped a coin to determine whether to grant clemency,” or (2) “a case where the State arbitrarily denied a prisoner *any* access to its clemency process.” *Id.* at 289 (emphasis added).

Contrary to Creech’s assertion, there is a consistent theme throughout the circuits, which follows Justice O’Connor’s concurrence in *Woodard*. To preserve due process rights, the court is focused on the process rather than the substance of the proceedings. See *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999) (Outside of “extreme situations” such as a state official flipping a coin, “the federal Due Process Clause does not justify judicial intervention into state clemency proceedings.”); *Workman v. Bell*, 245 F.3d 849, 852–53 (6th Cir. 2001) (“We are not authorized to review the substantive merits of a clemency proceeding. Our only review is to see that there are some minimal procedural safeguards.”); *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) (the court “is limited to analyzing the procedures used during the clemency proceedings and not the substantive merits of the clemency decision”); *Gissendaner v. Comm’r, Georgia Dep’t of Corr.*, 794 F.3d 1327, 1331 (11th Cir. 2015) (providing notice of a hearing, favorable testimony from fifteen witnesses, and written statements from thirteen prison staff satisfies minimal due process).

Creech cites to *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000), which identifies *prior* Eighth Circuit cases that rejected due process claims “aimed at state clemency hearings.” *Id.* at 853. The Eleventh Circuit declined to follow *Young*. *Gissendaner*, 794 F.3d at 1333. Creech relies on *Young* to demonstrate a split among the circuits. But the Eighth Circuit has since addressed due process rights during state clemency proceedings, reiterating the *Woodard* standards. See *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (state provided minimal due process and said

procedures did not rise to the level of arbitrariness provided by *Woodard*; distinguished *Young* on its specific facts). There is no intra-circuit split let alone an inter-circuit split. This Court should decline Creech’s request to further opine on the issue.

C. The Ninth Circuit correctly affirmed the district court’s finding that Creech failed to make a clear showing of a likelihood of success on the merits.

The Ninth Circuit considered all of Creech’s due process arguments and found, “the State satisfied the minimal due process requirements contemplated in *Woodard* and *Wilson*.” (App., A, pp. 7, 8). However, Creech proposes “there can be no serious question that the prosecutors here presented false evidence to the Parole Commission” to support his claim he is likely to succeed on the merits. (*Petition*, p. 20). Creech argues the panel erred by considering the purported violations in a vacuum rather than the cumulative impact. (*Id.*, p. 34). However, it is Creech who is looking at these issues in a vacuum. According to Creech, the “[prosecutor] provided a false foundation to find the crime *more coldblooded*.” (*Id.*, p. 35, emphasis added).

The Ninth Circuit addressed each due process violation allegation and found that “there are other reasons why any such due process violation was harmless beyond a reasonable doubt.” (App., A, p. 12). “Overwhelming evidence supports those reasons.” (*Id.*, p. 13). The prosecutor described Creech’s crime in detail. Ms. Longhurst described how Creech initiated a physical altercation with David Jensen, “the weakest, most vulnerable person in that facility.” (App., D, p. 41). Jensen tried to walk away, but Creech followed him back to his cell, but only after Creech returned to his cell to grab his radio – which he turned on to drown out the beating. (*Id.*) Creech

beat David Jensen “so brutally that the batteries broke through the sock. After that, Mr. Creech began stomping on Jensen. (*Id.*) Again, Creech went back to his cell, cleaned himself up, and again, returned to Jensen’s cell to stomp him” to death. (*Id.*) Ms. Longhurst showed the Commission photographs of the crime scene and of Mr. Jensen’s injuries, noting Creech stomped on Mr. Jensen’s head with such force, it broke the plate in his head and “crushed his skull.” (*Id.*)

This recitation of the details of Mr. Jensen’s murder mirrors the specific findings made by the sentencing court that Creech planned to murder Mr. Jensen, carried out that plan, and made all of the weapons used in the murder. *Creech v. Ramirez*, 2016 WL 8605324 (D. Idaho January 29, 2016). In 1995, the state sentencing court conclusively determined: the sock used to beat Mr. Jensen belonged to Creech, Creech was not in fear when Mr. Jensen approached him with the sock; Creech took the sock away from Mr. Jensen; Creech fabricated a second weapon, ensured it was provided to Mr. Jensen, and suffered only slight cuts when Mr. Jensen initiated another physical confrontation; Creech took steps to muffle any sounds from Mr. Jensen’s cell before he beat him mercilessly; and Creech took breaks from the beating, returning to continue his attack even after believing Mr. Jensen was “mortally injured.” *Id.*

1. Contrary to Creech’s claims, the Evidence Supported the Commission’s Vote Against Commutation Regardless of the Photo of the Sock.

The murder of David Jensen was cold-blooded. There was no need for the prosecutor to make it appear “more cold-blooded” as suggested by Creech. Rather, Creech attempts to minimize or ignore the cold-blooded nature of his murder of Mr. Jensen and suggest the only aggravating factor behind his death sentence is whether

Creech orchestrated the murder and that the only evidence of Creech's orchestration is the sock. Who produced the sock of batteries and how the sock ended upon the hands of Mr. Jensen is one very small piece of evidence regarding Creech's "chilling," cold-blooded murder of Mr. Jensen. Creech's orchestration of the murder, rather than an instance of self-defense, is not new information and is part of the factual basis relied upon by the 1995 sentencing court. (App. A, pp. 2-3).

As the Ninth Circuit correctly recognized, 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." (App. B, p. 11). However, Creech has claimed self-defense on and off throughout the years. As pointed out by the prosecutor during the Commutation hearing, Creech again claimed self-defense during his October 2023 interview with the Commission's investigator in preparation for the commutation hearing. (App. B, pp. 11-12). The Ninth Circuit relied upon the 1995 findings and the commission hearing minutes to conclude the picture of the sock did not violate Creech's minimal due process rights. Creech failed to establish the picture of the sock with Creech's name was affirmatively declared by the prosecutor to be a picture of the murder weapon.

2. Contrary to Creech's Claims, the Evidence Supported the Commission's Vote Against Commutation Regardless of the Walker Murder.

As the Ninth Circuit noted, even without evidence of the Walker murder, the Commission was presented with "ample evidence that Creech had killed many people [and] been implicated or suspected in other deaths..." (App. A., pp.10-11). Despite Creech's claim that the prosecutor "emphasized...most prominently the false

evidence of the Walker murder” (Petition, p. 11), the Walker murder was just one of 10 murders that the prosecutor described to the Commission, in addition to the murder of Mr. Jensen. (App. A, p. 10.) Creech admitted to killing nine of those individuals. (App. A., p. 10).

Furthermore, there is no evidence that Ms. Longhurst lied to the Commission. Both the Ninth Circuit and the District Court carefully scrutinized the statements made about Mr. Walker’s murder and Creech’s involvement. The Ninth Circuit stated the slide from the presentation was at most “misleading by overstating the level of certainty as to Creech’s involvement” (App. A., p. 9). The prosecutor’s opinion that Creech got away with murder is hardly the “deliberate fabrication of false evidence” contemplated by Justice O’Connor. *See Woodard*, 523 U.S. at 289, 291. Creech failed to establish the prosecutor’s reference to Creech’s involvement in the murder of Mr. Walker violated Creech’s minimal due process rights. (App. B, p. 19).

D. The Panel Correctly Decided that Harmless Error Applies to Creech’s Due Process Violation Claim.

The panel unequivocally determined that any “irregularity” in Creech’s clemency hearing would be subject to a harmless error analysis. (App. A, p. 6.) The panel then explained that caselaw does not definitively identify the “proper harmless standard to apply in review of state commutation proceedings.” (App. A, p. 6). Nevertheless, the panel proceeded to apply the “generous standards” set forth in *Chapman v. California*, that any error must be “harmless beyond a reasonable doubt” and assigned the burden of establishing harmless on the State. (*Id.*, pp. 6-7, citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The Commission does not believe that the burden to establish harmless error lies with the State or that the “harmless beyond a reasonable doubt” standard applies to clemency proceedings; nevertheless, the Ninth Circuit correctly reasoned that *Chapman’s* high bar was met in this case. “We are also persuaded that correcting any purported violation would not change the Commission’s vote to deny Creech commutation.” (App. A, p. 9). Relying on the record from the commutation proceeding and the actual decision by the Commission, the Ninth Circuit found that Creech’s due process allegations, “do not call into doubt the stated rationales for the Commissioners’ votes.” (App. A, p. 9). The record of the Commission’s proceedings supports a finding that the sock and/or the Walker investigation had no impact on its decision; any negligible harm arising from these two points is certainly harmless beyond a reasonable doubt.

In its analysis of the claims, the Ninth Circuit found the Commission 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,” so it was clear his request for mercy would have been denied even if the information pertaining to the Walker investigation had never been introduced. (App. A, pp. 10-11). Similarly, the Ninth Circuit found whether Creech’s attack was premediated was not a factor upon which the Commissioners who voted to deny commutation relied. The “overwhelming evidence” supported the denial decision based upon the “reprehensible nature of Jensen’s murder”, Creech’s continued lack of candor, and the interest of justice for the family of Mr. Jensen, not the picture of a matching sock.

(App. A, p. 12-13). Creech pursued mercy by pleading he was not the same person who committed the horrific murder of Mr. Jensen. As the panel correctly noted, no Commissioner found Creech was worthy of mercy based upon his conduct at any time, including his assertions of rehabilitation. (App A, p. 13). To assign harmful error to the reference of a matching sock “strains credulity”. (App. A, p. 13).

This Court must not interfere in a state clemency proceeding when the record clearly establishes the Commission was aware of the allegations (the same allegations before this court and the courts below) and unanimously decided further inquiry into the allegations was not necessary. *See, e.g., Workman*, 245 F.3d at 852–53 (“[w]e are not authorized to review the substantive merits of a clemency proceeding. Our only review is to see that there are some minimal procedural safeguards.”). There can be no other conclusion other than “the Commissioners did not consider either issue relevant to the denial of commutation.” (App. A, pp. 13-14). To assign harmful error discredits the authority of the Commission which is tasked under Idaho law to make clemency decisions on behalf of the state.

For this Court to speculate as to whether the photo of the sock and introduction of Walker’s murder prejudiced Creech would be an inappropriate judicial intrusion into the executive’s exercise of its clemency power. *See 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)). The Commission unanimously denied Creech’s

request to defer its decision after Creech first raised the issue of the sock and the Walker murder. Additionally, as the Ninth Circuit notes in their decision, the Commissioners 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.” (App. A, p. 12). They continue, “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.” *Id.* at 13.

Clemency proceedings are informal for a reason. They are not about relitigating the underlying offense. They are about an individual’s pursuit of mercy and that burden rests squarely on the individual’s shoulders. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (internal citations omitted) (“the party that seeks to have a judgment set aside because of an [agency’s] erroneous ruling carries the burden of showing that prejudice resulted). If he feels his efforts have been thwarted by actions of others, it is his responsibility to demonstrate how that was harmful to his quest for mercy.

Even using the most stringent “harmless beyond a reasonable doubt” standard, the Ninth Circuit rightfully refused Creech’s invitation to distort and ignore the actual record in this matter to find harmful error. The record supports the Commission’s decision based on various findings that are not based upon the Walker investigation or the matching sock photo. (App. D, E). If any alleged due process violations occurred, such violations were harmless beyond a reasonable doubt.

E. Creech’s Application For a 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 or Irreparable Harm.

As discussed above, Creech has failed to demonstrate he is likely to succeed on the merits of his due process claim. The Commission satisfied the minimal due process protections afforded during clemency proceedings. In addition to likelihood of success, 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 cannot show irreparable harm.

Creech seemingly argues the irreparable harm he will suffer is that death is permanent. (Application, p. 4). But Creech is guilty, and his death sentence is lawful and just. Creech was sentenced to death for his brutal murder of an intellectually disabled man who he rendered helpless and stomped to death. Idaho provided him with an opportunity to demonstrate why he should be granted clemency – grace or mercy. He failed to convince a majority of the Commission to make such a recommendation to the governor. Creech pleaded that he is worthy of mercy because he is a changed man and has been rehabilitated. He was not seeking mercy because he did not commit the horrific murder of David Jensen in the cold-blooded, ruthless manner found by the sentencing judge in 1995. The Commission’s decision had a

reasonable basis in fact; facts that did not rest on the photograph of the matching sock or the investigation of David Walker's murder. Creech is not being put to death because of the prosecutor's "lies" during a clemency hearing. He is being put to death based upon a conviction for a horrific murder, the basis for which has been repeatedly upheld. Creech has received all process to which he was due and his approaching execution does not insult the Constitution. He cannot demonstrate irreparable harm simply because his lawful sentence is carried out in a lawful manner.

3. 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. 30).

Clearly, 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 and scream for this Court to deny his request, particularly because the claim he presents has no merit.² Creech’s contention that a brief stay of execution “will not substantially injure the opposing parties” (Application, p. 4), 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

² Creech has only been prompt in his litigation efforts when a death warrant has been issued, including this petition. Creech did not seek clemency until *after* the death warrant was issued in October 2023, despite his record of rehabilitation and good behavior. The Commission’s rules allow commutation consideration of a sentence of death at any time. IDAPA 50.01.01.450.03(d) found at <https://adminrules.idaho.gov/rules/current/50/500101.pdf>.

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 petition for certiorari should be denied.

Respectfully submitted this 27th day of February 2024.

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