No. 23-6831

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

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR FEBRUARY 28, 2024 10 AM MST

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The prosecutors have not justified their lie about the sock 1

II. The prosecutors have not justified their lie about the Walker case 3

III. Certiorari is appropriate 5

IV. A stay of execution is warranted 8

A. Mr. Creech is likely to succeed on the merits 8

B. The balance of harms and public interest favor a stay 11

CONCLUSION 15

TABLE OF AUTHORITIES

Judicial Opinions

Anderson v. Davis, 279 F.3d 674 (9th Cir. 2002) 6, 7

Bridge v. U.S. Parole Comm., 981 F.2d 97 (3d Cir. 1992) 10, 9

Creech v. Idaho Comm. of Pardons & Parole, --- F.4th ----, 2024 WL 755720 (9th Cir. 2024) 11

Creech v. Richardson, 59 F.4th 372 (9th Cir. 2023) 11

Herrera v. Collins, 506 U.S. 390 (1993) 13

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) 7

State v. Creech, 670 P.2d 463 (Idaho 1983) 10, 11

Winfield v. Steele, 755 F.3d 629 (8th Cir. 2014) 8, 9

State Statutes

Idaho Code § 20-1016 9

Other

Edward A. Hartnett, *Ties in the Supreme Court of the United States,* 44 William & Mary L. Rev. 643 (2002) 12

Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 Yale L. Rev. 889 (1981) 13

The respondents in this case are attempting to shield the prosecutor's lies by invoking the very lack of process in clemency that calls for both a stay and certiorari.

I. The prosecutors have not justified their lie about the sock.

Having apparently decided that the description they offered to the Ninth Circuit three days ago was too implausible for even them to defend, the prosecutors have now returned to the second of the three completely incompatible stories they have told about the sock slide. At the commutation hearing, the prosecutors plainly depicted the sock as the murder weapon, by placing it directly next to a statement about the murder weapon that the image was meant to disprove. *See* Pet. 9. A few weeks later, in federal district court, the sock became the one that *matched* the murder weapon. *See* Dist. Ct. Dkt. 11 at 6–7. At an oral argument that is nowhere even acknowledged in their opposition, even though it occurred only this last Saturday, the slide suddenly portrayed *two* "matching socks taken from Mr. Creech's cell," Oral Arg. at 27:29–27:37—i.e., neither of them was either the murder weapon or the sock that matched the murder weapon. Now, having had a few days to reflect, the prosecutors have decided that their initial gambit at the district court was the most defensible: the sock is, after all, a *match* for the murder weapon. *See* ACPA Opp. 9.

The history of the shell game the prosecutors have played with this key piece of evidence is enough, standing alone, to show the dishonesty at issue. Perhaps more to the point, the prosecutors still cannot explain how their account of the slide

makes any sense of the image they presented. The image, to repeat, placed a statement about a name on the murder weapon next to a photograph of a sock with a name on it. For all of the many words the prosecutors type on the subject, they do not answer the basic and obvious question at the heart of the issue: how does a photograph that is not the murder weapon disprove a statement about the name on the murder weapon? Although the prosecutors quote a number of actors who have denied relief, *see* ACPA Opp. 10–12, none of those passages answer the question either.

Another critical fact ignored by the prosecutors is what the circled sock looked like. Specifically, it had brownish discoloration and a hole. *See* Pet. 9. Given the sock's placement next to text that referred in bold to "the weapon," *id.*, the viewer would naturally have assumed the discoloration was supposed to be blood and the hole was made by the batteries when they "broke through the sock," as the prosecutor made sure to describe to the Commission. Dist. Ct. Dkt. 11-1 at 16.

The prosecutors' latest characterization of the purpose of the sock photograph just highlights how outlandish their position is. According to the prosecutors, Ms. Longhurst was attempting to refute Mr. Creech's statement "that the murder weapon sock was not his." ACPA Opp. 9. "To do so, she showed a picture of" a sock "from Creech's cell." *Id.* This sock, she announced, "had Creech's name on it." *Id.* at 10. The only fact that proves is, literally, that Mr. Creech's sock had Mr. Creech's name on it. It would be comical if the prosecutors weren't seeking to put a man to death tomorrow based on this charade. Because the prosecutors have only

underscored the lie by changing their story yet again, the falsehood about the sock remains, and the issue continues to justify both a stay and certiorari.

II. The prosecutors have not justified their lie about the Walker case.

The ACPA argues that Ms. Longhurst's statement that Mr. Creech has been "positively identified as the murderer" of Daniel Walker has been corroborated. ACPA Opp. 12. It has not. First, in addition to saying Mr. Creech had been positively identified, Ms. Longhurst told the Commission that the Walker case was closed and Mr. Creech got away with murder. *See* Pet. 21. She explained that he would not be prosecuted because of "what is going on here in Idaho." Dist. Ct. Dkt. 11-1 at 14. This left the Commission with the unmistakable impression that unless Mr. Creech was executed, he would never be held accountable for the death of Mr. Walker. But the main problem is nothing has actually been corroborated or proven, and the prosecutors are relying entirely on their assurances to know best based on secret evidence never aired in the light of day. ACPA Opp. 13.

Contrary to the State's apparent view, the San Bernardino Sheriff's Department ("SBSD") announcement only indicated Mr. Creech was a suspect. *See* Dist. Ct. Dkt. 4-4. It did not announce that the SBSD had a "positive identification" of Mr. Creech. In fact, none of the witnesses from 1974 have identified Mr. Creech. Those witnesses described two men as the murderers. *See e.g.*, Douglas Walker, *Daniel My Brother: Mystery in the Mojave* (2023) at 136–37 (quoting witness descriptions of his brother's killers). Mr. Creech, if he even was in California at the time, would have been traveling with a 17-year-old girl. *See generally* Dist. Ct. Dkt.

4-8. The State has not explained how these witness statements are possible if the killer was Mr. Creech. Moreover, an echo chamber does not constitute proof—the San Bernardino District Attorney, who is evidently doing what he can to assist his fellow prosecutor carry out an execution, announced Mr. Creech was a suspect, but even he indicated that no charges would be brought against Mr. Creech for "jurisdictional" issues. *See* 9th Cir. Dkt. 17-2. With no new evidence, and all available evidence pointing to someone else, it is not surprising there are no new charges. It's for the same reasons there were no charges back in the 1970s when the SBSD ruled Mr. Creech out as a suspect—the confession was bogus.

Other than stating the matter is disputed, ACPA Opp. 14, the prosecutors offer no meaningful debate. For example, the ACPA has not denied that the new allegation relies entirely on a single interview, not *interviews* despite what Ms. Longhurst announced, *see* Dist. Ct. Dkt. 11-1 at 14, and this is the farfetched interview where Mr. Creech falsely confesses to murdering people who are still alive and burying many bodies that never existed, *see* Dist. Ct. Dkt. 15-6. No other documented interviews appear to exist at all.

Despite hints that there is some form of new evidence that has not been revealed—the State has not said what it is. As the known evidence stands now, Mr. Creech was denied clemency after Ms. Longhurst assured the Commissioners Mr. Creech had murdered Daniel Walker, he had been "positively identified," and the case was closed. If the prosecutors have more evidence, they should have produced it before they sought to put Mr. Creech to death.

Lastly, the ACPA asks the Court to excuse the prosecutor's false statement by pointing to the fact that she informed the Commission that Mr. Creech had not been convicted of killing Mr. Walker. See ACPA Opp. at 14 (quoting App. 9). The ACPA hopes to capitalize on the Ninth Circuit's mistaken understanding of what Ms. Longhurst was doing when she told the Commission there had been no conviction. She was not qualifying her statement that the case was closed and Mr. Creech was the murderer. Instead, she was telling the Commission, just like her slide said, that Mr. Creech "got away with this murder," Pet. 8, and that they'd simply have to take her word for it. That word remains false.

III. Certiorari is appropriate.

The prosecutors' challenges to the certiorari-worthiness of the case are meritless.

First, the prosecutors submit that the appeal is too fact-bound to allow for consideration of the underlying constitutional question. *See* ACPA Opp. 14. However, there are only genuine factual disputes in the case if one views it while suspending all normal rules of language and logic. To begin, the juxtaposition of a sock with a name on it next to a statement about a murder weapon with a name on it represents a claim about a murder weapon. That is the reality of the sock slide. And it is a visual reality. The prosecutors cannot manufacture a factual dispute by denying that visual reality and creating an alternative one, where it somehow became relevant in a capital commutation hearing whether Mr. Creech wrote his own name on his own socks. Thus, the concession that establishes the clarity of the

record is simply that the sock in the slide isn't the murder weapon. On that, at least, the prosecutors have been consistent ever since they deceived the Commission to the contrary.

The same can be said of the Walker case. Neither the prosecutors nor the Commission tell the Court that they solved the murder. Neither of them offer a single shred of evidence to support the accusation apart from a statement discredited fifty years earlier and a series of references to secret information only the prosecutors possess. Neither of them even attempt to defend Ms. Longhurst's use of a suddenly recalled memory by a detective of an undocumented interview fifty years earlier. All that the Commission can come up with is that "[c]lemency proceedings are informal." Comm. Opp. 14. Perhaps that is a reason why prosecutors should not casually declare murders solved at them during their PowerPoint presentations. In any event, the record is clear of the Walker case: Ms. Longhurst lied about it.

Having failed to muddy up the record, both the prosecutors and the Commission attempt to cast doubt on the uncertainty in the law that Mr. Creech identified. *See* ACPA Opp. 15–17; Comm. Opp. 6–8. In that effort, the prosecutors claim that the Ninth Circuit "held nothing at all about whether allegations of false evidence state a claim under due process" in *Anderson v. Davis*, 279 F.3d 674 (9th Cir. 2002). ACPA Opp. 15. The prosecutors' interpretation is belied by the plain language of *Anderson*. There, the Ninth Circuit indicated that it had "scoured the record to see if there" had been a "problem" in the clemency proceedings "that would

offend the Constitution." *Id.* at 676. One such problem the court looked for was "the deliberate fabrication of false evidence." *Id.* In other words, the Ninth Circuit examined the case for false evidence because it felt that such conduct was unconstitutional. That is a direct holding on the question presented. The prosecutors badly misunderstand what it means for something to constitute "dicta" when they give *Anderson*'s discussion of false evidence that label. Although the prosecutors perfunctorily claim that the pertinent passages in *Anderson* were "not involved in the question under consideration," ACPA Opp. 17, that is incorrect—the question under consideration was whether there was "a ground in th[e] matter for the denial of clemency . . . that would offend the Constitution." *Anderson*, 279 F.3d at 676. The answer to the question was a holding.

More significantly, both the prosecutors and the Commission understate the degree of uncertainty in the law regarding due process protections in clemency. For their part, the prosecutors offer a six-page recitation of the circuit cases most favorable for their side on the issue. *See* ACPA Opp. 19–24. Their briefing would be quite helpful on the merits, after certiorari is granted. It is less useful now, though, because it falls well short of demonstrating that *this Court* has provided the necessary level of guidance. As acknowledged by the prosecutors, such direction still comes entirely from a two-paragraph separate writing by a single Justice in an opinion lacking a majority. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–90 (1998) (O'Connor, J., concurring). That is hardly enough of a blueprint for

an area of the legal system affecting large numbers of people in every state in the country.

As for the Commission, it offers the cold comfort that the "consistent theme" in the circuits is obedience to "Justice O'Connor's concurrence in *Woodard*." Comm. Opp. 7. Obviously, the lower courts are doing their best to adhere to the concurrence. Nevertheless, a two-page writing by a single Justice is incapable of providing much clarity to anyone, leading to inevitable ambiguity in the law. No doubt, the murkiness of the guideposts in this space account for why circuit judges have disagreed with one another about what *Woodard* requires. *See Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (per curiam) (en banc) (Gruender, J., concurring) (criticizing a prior opinion by the Eighth Circuit for having "misapplied Justice O'Connor's concurring opinion in" *Woodard*).

Lastly, Mr. Creech notes that neither the prosecutors nor the Commission dispute Mr. Creech's explanation as to how the second question presented (whether harmless error applies to clemency) is important and unsettled.

IV. A stay of execution is warranted.

The respondents do not undermine the need for a stay of execution.

A. Mr. Creech is likely to succeed on the merits.

Preliminarily, it is easy to dispense with the prosecutors' extraordinary argument that relief should be denied based on the assumption that Idaho's Governor would have declined to do his lawful duty, disregarded the Commission's favorable recommendation, and reflexively rejected a commutation petition that he

never received, no matter what facts were presented to him. *See* ACPA Opp. 28–29. As a factual matter, the defendants are mistaken that the Governor announced that he was determined to deny a commutation even if Mr. Creech convinced four Commissioners to recommend clemency. The statements by the Governor about the clemency process do not address whatsoever a hypothetical world in which the Commission had forwarded to him a favorable recommendation. Dist. Ct. Dkt. 12 at 7. The Governor made his announcement after the Commission denied Mr. Creech's commutation petition and was communicating to the public only that, in light of the adverse decision by the Commission, he would not be intervening on Mr. Creech's behalf. *Id.*

But the Governor never made the claim that he would have refused to weigh the Commissioner's views had they voted to recommend a commutation, which is what the prosecutors are essentially suggesting now. A commutation petition only reaches the Governor's desk in the event of a favorable recommendation by the Commission. *See* Idaho Code § 20-1016(2). The Governor then has a statutory duty to evaluate the Commissioner's recommendation and make a determination. *See* Idaho Code § 20-1016. "Government officials are presumed to act in good faith." *Bridge v. U.S. Parole Comm.*, 981 F.2d 97, 106 (3d Cir. 1992). The defendants' stance presumes the opposite—that the Governor is so indifferent to the opinions of the Commissioners, who he appoints, that it would make no difference to him what they recommended. The Governor himself has confirmed that he would not act so irresponsibly. He was described in the media as having "pledged . . . to allow the

process to play out before making any decisions about Creech" and quoted as follows: "[U]ntil that hearing takes place – I have no idea, because what were their [i.e., the Commission's] grounds for doing that? And that's what will help me make my determination." Dist. Ct. Dkt. 15-1 at 12–13.

Next, the prosecutors believe it "is extremely telling" that no judge requested a vote on rehearing en banc at the Ninth Circuit while the window was open. ACPA Opp. 27–28. What the prosecutors neglect to mention is that the window was open for three hours on a Sunday. *See* Pet. 17. The fact means little more than that Mr. Creech was denied the kind of full and fair appeal that his claims clearly call for.

The Commission deals with the likelihood of success on the merits by narrating the facts most supportive of its own cause. *See* Comm. Opp. 8–9. Its main tack is to rely on the 1995 determination by Judge Newhouse that the sock belonged to Mr. Creech. *Id.* at 9. The Commission chooses to ignore the same judge's finding far closer in time to the offense that Mr. Creech did "not instigate the fight with the victim, but the victim, without provocation attacked him." *State v. Creech*, 670 P.2d 463, 467 (Idaho 1983). There is nothing—and the Commission cites nothing—making the judge's 1995 version more compelling than the 1983 account for clemency purposes. Both parties were free to present their best evidence on the point. Ms. Longhurst's evidence was false. It proved not that the weapon belonged to Mr. Creech but rather that he was guilty of writing his name on a sock. That is why the question is close, and why the false evidence mattered, and that is what makes the likelihood of success so strong.

Mr. Creech very much agrees with the Commission that "[t]here was no need for the prosecutor to make [the] murder appear more cold-blooded." Comm. Op. 9. Indeed. Ms. Longhurst should have used the legitimate evidence that went to that point, rather than the false evidence she chose, so that there was an even playing field between the two sides.

It is also quite inaccurate for the Commission to call the question of the origin of the sock a "very small piece of evidence" for Mr. Creech's "orchestration of the murder." *Id.* 10. It was, in fact, the *only* physical evidence of that alleged fact. Most of the supposed evidence for the same narrative came from fellow inmates jockeying for favor from the same prosecutors' office that was pursuing death against Mr. Creech—and which later lied at his clemency proceedings. *See Creech v. Richardson*, 59 F.4th 372, 391–92 (9th Cir.), *cert. denied*, 144 S. Ct. 291 (2023).

The Commission also errs in reading the Ninth Circuit as having deemed the premeditation of the attack irrelevant to clemency. *See* Opp. 12. To the contrary, the Ninth Circuit rightly gave as the first reason for the three anti-clemency Commissioners' vote "the coldblooded nature of" the offense. *Creech v. Idaho Comm. of Pardons & Parole*, --- F.4th ----, 2024 WL 755720, at *4 (9th Cir. 2024). The issue was at the front and center of clemency, and it was the subject of Ms. Longhurst's fraudulent murder-weapon slide.

B. The balance of harms and public interest favor a stay.

On the equitable balancing, the Commission boldly posits that death does not constitute an irreparable harm. *See* Comm. Opp. 16. Without question and by

definition, Mr. Creech will receive irreparable harm if he is executed based on the lies of the prosecutor. *See* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 William & Mary L. Rev. 643, 676 (2002) ("Everyone agrees that death constitutes irreparable harm."). The State's approach would render the factor superfluous by conflating irreparable harm with a likelihood of success on the merits. *See* Comm. Opp. 16. There would then be no point in having the two serve as separate factors, which this Court has long done.

The prosecutors maintain that Mr. Creech should be executed now because he has had the temerity to seek thorough constitutional review of his first-degree murder conviction and death sentence. *See* ACPA Opp. 29–30. Apart from how inappropriate that maneuver is for its own sake, it is also categorically off-base here. Mr. Creech is raising serious constitutional claims about a commutation hearing that took place roughly five weeks ago. He has exercised tremendous diligence in pursuing his remedies and has already presented facts revealing extreme governmental misconduct despite the limited time the death warrant provided him and the limited record the prosecutors' obstructionism, combined with the district court's denial of discovery, imposed upon him. The prosecutors are hoping this Court will automatically assume that a stay application by a death-row inmate must be an act of deliberate sandbagging, but the unusual facts in the case prove the exact opposite. As for the Commission, the best it can come up with on this subject is to blame Mr. Creech for not seeking a commutation when he was still actively litigating the constitutionality of his conviction and sentence, something

that clemency boards universally resist. Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 Yale L. Rev. 889, 892 (1981); *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (describing clemency as "the historic remedy for preventing miscarriages of justice *where judicial process has been exhausted*").

Straining to turn a case about prosecutorial misconduct into a case about the separation of powers and comity, the Solicitor General warns darkly that any ruling in Mr. Creech's favor would "discredit[] the authority of the Commission" and "would be an inappropriate judicial intrusion into the executive's exercise of its clemency power." Comm. Opp. 13. Notwithstanding the General's anxieties, there is nothing destabilizing to comity about a simple stay and grant of certiorari to review the matter, which of course might conclude with a ruling against Mr. Creech. What is more, if there is a due process limit to clemency proceedings, as we know from *Woodard* there is, then there is a point at which the federal courts are obligated by the Constitution to step in. That is how judicial review operates in every arena, and it is no different in clemency.

Mr. Creech also posits that the Commission's decisions remove at least some of the judicial deference it might otherwise enjoy. The Commission had an easy chance to remedy the concerns at issue here through a short continuance. *See* Dist. Ct. Dkt. 5-8, 5-9, 5-10. Had it done so, the Commission could have resolved the matter internally, and the courts would have acknowledged its prerogative to do so. Nonetheless, the Commission walked down a different path, closing its ears to the

misconduct, joining ranks with the prosecutors, and hustling Mr. Creech to the execution chamber to rid itself of any inconvenient improprieties that occurred at the commutation hearing. It would be troubling if this Court overlooked constitutional flaws in a clemency proceeding by deferring to an agency that went out of its way to hush those flaws up and in so doing only compounded the due process violations.

It is deeply ironic for the Commission to oppose a stay on the basis that clemency is "not about relitigating the underlying offense." Comm. Opp. 14. What was Ms. Longhurst doing in displaying an image about the murder weapon (whatever it actually showed) if not "relitigating the underlying offense"? Ms. Longhurst was attempting to make a point about how aggravated the crime was. Unlike the Commission, Mr. Creech doesn't fault her for doing so. The prosecutor was entitled to argue to the Commission that the crime was aggravated enough to deserve an execution, and Mr. Creech was entitled to argue the opposite. What she was not entitled to do was present false evidence while making the case. The informality of a clemency proceeding cannot be a license to lie.

The Commission gives Ms. Longhurst and her colleagues insufficient credit for their public messaging talents when it minimizes the Walker case as "just one of 10 murders that the prosecutor described to the Commission, in addition to the murder of Mr. Jensen." Comm. Opp. 11. It was the only one of the ten that the prosecutors' claimed to have just "solved" and it was the only one of the ten that they put in the press release that so effectively shaped the media's coverage of the

proceedings. *See* Dist. Ct. Dkt. 4-3. Moreover, in asserting that the evidence was enough to justify the result without the lies, the Commission assumes that harmless error applies when that is one of the very unanswered questions militating in favor of certiorari. *See* Pet. at 29–35.

Finally, and as usual, the prosecutors close by congratulating themselves for their service to the victims while ignoring one important victim whose interests they are most assuredly not representing. That is Doug Walker, the brother of Daniel Walker. He is seeking the truth about a crime the prosecutors are actively fighting to bury by executing Mr. Creech tomorrow after convicting him in the space of a few minutes and on the authority of a single PowerPoint slide and a splashy press release. The prosecutors do not speak for Doug Walker, and they do not speak for any member of the public who values governmental integrity over the prosecutors' desire to add a notch on their belt with an execution based on lies.

CONCLUSION

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

Respectfully submitted this 27th day of February 2024.

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