

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,  
Petitioner,

v.

STATE OF IDAHO,  
Respondent.

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

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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

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Jonah J. Horwitz  
*Counsel of Record*  
Nicole R. Gabriel  
FEDERAL DEFENDER SERVICES OF IDAHO, INC.  
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Boise, Idaho 83702  
[Jonah Horwitz@fd.org](mailto:Jonah.Horwitz@fd.org)  
[Nicole Gabriel@fd.org](mailto:Nicole.Gabriel@fd.org)  
208-331-5530

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Pursuant to Supreme Court Rule 39, Petitioner Thomas E. Creech asks for leave to file the accompanying petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Creech is an indigent prisoner on Idaho's death row, where he has been since 1982. Mr. Creech has proceeded in forma pauperis in both state and federal courts on numerous occasions throughout the last forty-two years.

In the notice of appeal to the Idaho Supreme for the case below, undersigned stated that Mr. Creech is "indigent and is represented at public expense by all of his attorneys." Ex. 1 at 4. While there were no filing fees associated with the appeal, preparations for the record and transcripts were at the expense of the county and Mr. Creech was not deemed responsible for them.

In addition, Mr. Creech's attorneys with the Federal Defender Services of Idaho, who exclusively represent indigent clients, were appointed to the case by the United States District Court for the District of Idaho on June 14, 1999, *see* Ex. 2 at 4, and have continued to operate under the same order since.

Respectfully submitted this 20th day of February.



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Jonah J. Horwitz  
*Counsel of Record*  
Capital Habeas Unit  
Federal Defender Services of Idaho  
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Telephone: 208-331-5530  
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# **EXHIBIT 1**

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Attorneys for Petitioner Thomas Eugene Creech

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COURT OF ADA

THOMAS EUGENE CREECH,	)	<b>CAPITAL CASE</b>
	)	
Petitioner-Appellant,	)	CASE NO. CV01-23-16641
	)	
v.	)	<b>NOTICE OF APPEAL</b>
	)	
STATE OF IDAHO,	)	<b>Execution Scheduled for</b>
	)	<b>November 8, 2023</b>
Respondent.	)	
	)	<b>Supreme Court No. 51229-2023</b>
_____	)	

TO: THE ABOVE-NAMED RESPONDENT, STATE OF IDAHO AND THE PARTY'S ATTORNEYS, JAN M. BENNETTS, ADA COUNTY PROSECUTING ATTORNEY AND JILL LONGHURST, ADA COUNTY DEPUTY PROSECUTING ATTORNEY, 200 W. FRONT STREET, ROOM 3191, BOISE, ID 83702, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named petitioner-appellant, THOMAS EUGENE CREECH, appeals against the above-named Respondent to the Idaho Supreme Court from the Order of Dismissal entered on October 16, 2023, and the Judgment of Dismissal also entered on October 16, 2023, the Honorable Jason D. Scott, presiding. Copies of the judgment and order being appealed are attached to this notice.
2. The appellant has a right to appeal to the Idaho Supreme Court, and the judgment and order described in paragraph 1 above are an appealable order and judgment under and pursuant to Idaho Appellate Rule (I.A.R.) 11(a)(1).
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.
  - a. The district court erred in dismissing the Petitioner-Appellant's Petition for Post-Conviction Relief.
4. The appellant requests the clerk's record be prepared in electronic form alone (not in hard copy). The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(1). In addition to those documents automatically included under I.A.R. 28(b)(1) and I.A.R. 31, the appellant requests that all documents filed in the case be included in the clerk's record. These additional documents include, but may not be

limited to, the following (references to any document include all the material attached thereto, in the form of exhibits, addenda, etc.):

**b. MOTIONS**

- i. Petition for Post-Conviction Relief, filed October 13, 2023.
- ii. Motion to Stay Execution, filed October 13, 2023.
- iii. Memorandum in Support of Motion to Stay Execution, filed October 13, 2023.
- iv. Emergency Motion to Shorten Time, filed October 13, 2023.
- v. Motion for Judicial Notice, filed October 13, 2013.

**c. ORDERS**

- i. Order of Dismissal, filed October 16, 2023.
- ii. Judgment of Dismissal, filed October 16, 2023.

**d. MISCELLANEOUS**

- i. Exhibits 1–11 to Petition for Post-Conviction Relief, filed October 13, 2023.
- ii. Clerk’s Certificate of Mailing, dated October 16, 2023.

**5. I CERTIFY:**

- a. That a copy of this Notice of Appeal has been served on Sandra

Barrios, the Trial Court Administrator for Ada County, whose address is set forth below in the certificate of service.

b. That the appellant is indigent and is represented at public expense by all of his attorneys and is therefore exempt from paying for the preparation of the clerk's record and transcripts, which should be provided at the expense of the county pursuant to I.C. § 1-1105(2), I.C. § 19-4904, I.C. § 31-3212(4), I.C. § 67-2301, and I.A.R. 27(f).

c. That there are no filing fees for this appeal under I.A.R. 23(a)(10).

d. That service has been made upon all parties required to be serviced pursuant to I.A.R. 20.

DATED this 16th day of October, 2023.

/s/ Jonah J. Horwitz  
Jonah J. Horwitz  
Attorney for Petitioner-Appellant

**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served on the following on this 16th day of October, 2020, through iCourt’s e filing and serve system:

JILL LONGHURST  
Ada County Deputy Prosecuting Attorney  
Ada County Prosecutor’s Office  
200 W. Front St., Rm. 3191  
Boise, ID 83702  
[jill@adacounty.id.gov](mailto:jill@adacounty.id.gov)

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail (FedEx)  
 iCourt file and serve

Ada County Prosecuting Attorney  
200 W. Front St., Rm. 3191  
Boise, ID 83702  
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 Hand Delivery  
 Facsimile  
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 iCourt file and serve

L. LAMONT ANDERSON  
Chief, Capital Litigation Unit  
Idaho Attorney General’s Office  
P.O. Box 83720  
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U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail (FedEx)  
 iCourt file and serve

SANDRA BARRIOS  
Trial Court Administrator  
Ada County District Court  
200 W. Front St.  
Boise, ID 83702

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail (FedEx)  
 iCourt file and serve

/s/ Jonah J. Horwitz  
Jonah J. Horwitz



# **EXHIBIT 2**

U.S. COURTS

99 JUN 14 AM 10:19

REC'D \_\_\_\_\_ FILED \_\_\_\_\_  
CAMERON S. BURKE  
CLERK IDAHO

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH	)	
	)	
	)	CIVIL NO. 99-0224-S-BLW
Petitioner,	)	
	)	
v.	)	
	)	<b>ORDER GRANTING A STAY OF</b>
DAVE PASKETT, Warden of the	)	<b>EXECUTION AND APPOINTING</b>
Idaho Maximum Security Institute,	)	<b>COUNSEL</b>
Department of Correction, State of Idaho	)	
	)	
Respondent.	)	
	)	
_____	)	

On June 10, 1999, Thomas Eugene Creech filed an application to proceed in forma pauperis and for appointment of counsel (docket # 2), and an application for stay of execution (docket # 3). In addition, the Capital Habeas Unit has filed a Statement of Issues (docket #1) on behalf of the petitioner. This Statement of Issues was authorized by the petitioner. The petitioner now comes before this court seeking a stay of execution for the purpose of pursuing habeas corpus relief.

Order - page 1

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## **1. Background.**

On May 13, 1991, while serving a life sentence at the Idaho State Correctional Institution for two counts of first degree murder, the petitioner killed inmate David Dale Jensen. Following a plea of guilty, the petitioner was sentenced to the death penalty in January 1982. The Idaho Supreme Court vacated the sentence because the petitioner was not present, and the petitioner was resentenced to the death penalty on March 17, 1983, by the state district court in Ada County, Idaho. This sentence was affirmed by the Idaho Supreme Court. *State v. Creech*, 105 Idaho 362 (1983). On May 19, 1983, the petitioner sought to withdraw his guilty plea pursuant to Idaho Criminal Rule 33. The district court denied this motion and the denial was affirmed by the Idaho Supreme Court. *State v. Creech*, 109 Idaho 592 (1985).

The petitioner next filed a Petition for Writ of Habeas Corpus before the United States District Court. This petition was dismissed on June 18, 1986. The petitioner appealed this dismissal to the Ninth Circuit Court of Appeals which reversed the dismissal on three grounds: (1) the trial court erred in not allowing additional mitigating evidence, (2) the trial court found two aggravating circumstances without making the findings beyond a reasonable doubt, and (3) the aggravating factor "utter disregard" was unconstitutionally vague. *Creech v. Arave*, 947 F.2d 873 (9<sup>th</sup> Cir. 1991). The State of Idaho appealed to the United States Supreme Court on the limited issue of whether the aggravating factor "utter disregard" was unconstitutional. The United States Supreme Court held the factor to be constitutional, reversing in part the Ninth Circuit decision. *Arave v. Creech*, 507 U.S. 463 (1993). Pursuant to the Ninth Circuit remand the United States District Court ordered the petitioner to be resentenced. The

petitioner was resentenced to the death penalty on March 13, 1995. On May 9, 1995, the petitioner filed a petition for post-conviction relief in the state district court which was denied. The petitioner then appealed his conviction and sentence and the denial of his post-conviction petition to the Idaho Supreme Court. The Idaho Supreme Court affirmed the conviction and sentence and the dismissal of the post-conviction petition. *State v. Creech*, 132 Idaho 1 (1998). The petitioner appealed to the United States Supreme Court which denied his petition for Writ of Certiorari on June 1, 1999. A death warrant was issued by the state district court setting an execution date of June 24, 1999.

**2. Application to proceed in forma pauperis.**

The Court has examined the application to proceed in forma pauperis and has determined that it adequately establishes petitioner's indigence. Petitioner will be allowed to proceed without the filing of costs or fees.

**3. Appointment of counsel.**

This district's Local Rules provide for the appointment of counsel in death penalty cases prior to the filing of a petition for a writ of habeas corpus. D.Id.LR 9.4(D). The petitioner has requested the appointment of the Federal Public Defenders of Eastern Washington and Idaho. The Court therefore approves the appointment of the Capital Habeas Unit as lead counsel.

**4. Stay of Execution.**

As the Local Rules further provide, a stay of execution shall be granted during the pendency of a petition in this Court. Local Rule 9.4(f)(2). Accordingly, this Court will issue a stay of petitioner's execution for the duration of the proceedings before this Court.

**ORDER**

Based upon the foregoing, the Court being fully informed in the premises;

IT IS HEREBY ORDERED that petitioner's application to proceed in forma pauperis (docket # 2) is GRANTED.

IT IS FURTHER ORDERED that the Capital Habeas Unit of the Federal Public Defender's Unit of Eastern Washington and Idaho is appointed as lead counsel for petitioner in all proceedings in this court and shall be the designated attorney of record.

IT IS FURTHER ORDERED that petitioner's application for a stay of execution (docket # 3) is GRANTED and **A STAY OF EXECUTION IS IMPOSED** for the duration of the proceedings in this court.

IT IS FURTHER ORDERED that counsel for petitioner shall file a Petition for Writ of Habeas Corpus, raising all reasonably known federal constitutional issues, on or before September 20, 1999.

IT IS FURTHER ORDERED that the respondent shall file an Answer within 30 days of the filing of the petition.

IT IS FURTHER ORDERED that the petitioner may file a Traverse 30 days after the respondent has filed an Answer.

IT IS FURTHER ORDERED, pursuant to Local Rule 9.4(e)(6), that the respondent must state any intent to rely on the doctrine of procedural default to bar a claim in the Answer. If the respondent relies on the procedural default doctrine, the petitioner has 30 days from the filing of the Answer to file a brief containing any opposition to the procedural default bar. The respondent shall then have 20 days to file a response brief. The petitioner will then have


10 days to file a reply brief. The Court will take the matter under submission without oral argument.

IT IS FURTHER ORDERED that any request for evidentiary hearing shall be made within 60 days of the filing of the Answer.

IT IS FURTHER ORDERED that respondent shall file one copy of the state court record with this Court pursuant to Local Rule 9.4(e)(1).

IT IS FURTHER ORDERED that no extensions of time shall be granted by the Court except upon a showing of extraordinary circumstances.

DATED this 14~~th~~ day of June, 1999.

  
\_\_\_\_\_  
HONORABLE B. LYNN WINMILL  
UNITED STATES DISTRICT JUDGE

United States District Court  
for the  
District of Idaho  
June 14, 1999

\* \* CLERK'S CERTIFICATE OF MAILING \* \*

Re: 1:99-cv-00224

I certify that a copy of the attached document was mailed to the following named persons:

Joan M Fisher, Esq.  
FEDERAL DEFENDER'S OFFICE  
201 N Main  
Moscow, ID 83843

IMSI  
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L LaMont Anderson, Esq.  
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Ninth Circuit Court of Appeals  
FAX (415) 556-9721

Cameron S. Burke, Clerk

Date: 6/14/99

BY: *CS Burke*  
(Deputy Clerk)