No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the
Idaho Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jonah J. Horwitz
Counsel of Record
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Jonah_Horwitz@fd.org
208-331-5530

Garth S. McCarty
Ian H. Thomson
Office of Idaho State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
208-334-2712

Counsel for Petitioner

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IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 52327

THOMAS CREECH,	)	
	)	**Boise, November 2024 Term**
Petitioner-Appellant,	)	
	)	
v.	)	**Opinion Filed: November 5, 2024**
	)	
STATE OF IDAHO,	)	
	)	**Melanie Gagnepain, Clerk**
Respondent.	)	

Appeal from the District Court of the Fourt Judicial District of the State of Idaho, Ada County. Jason D. Scott District Judge.

The decision of the district court is affirmed.

Erik R. Lehtinen, State Appellate Public Defender, Boise, for Appellant Thomas Eugene Creech. Garth S. McCarty submitted argument on the briefs.

Raúl R. Labrador, Idaho Attorney General, Boise, for Respondent State of Idaho. L. LaMont Anderson submitted argument on the briefs.

MEYER, Justice.

Thomas Eugene Creech appeals from the district court's September 5, 2024, order dismissing his petition for post-conviction relief and the district court's October 16, 2024 order denying his motion for reconsideration. Creech was sentenced to death in 1995. Earlier this year, the State of Idaho attempted to execute Creech by lethal injection, but the process failed due to the inability to establish reliable intravenous access. The execution team spent nearly an hour attempting to establish venous access in various parts of Creech's body, including his arms, hands, and ankles, but each attempt resulted in vein collapse. After numerous failed attempts, the procedure was halted.

Following the failed execution, Creech filed a petition for post-conviction relief on March 18, 2024, arguing that any further attempt to carry out his death sentence would violate his constitutional rights. Specifically, Creech argued that a second attempt to execute him by any means would violate the United States Constitution's Fifth Amendment's Double Jeopardy Clause and the Eighth Amendment's prohibition against cruel and unusual punishment. Creech timely

appealed both district court orders. We affirm the district court's summary dismissal of Creech's petition for post-conviction relief because he did not raise a genuine issue of material fact and summary dismissal of his Fifth and Eighth Amendment claims was proper as a matter of law. A second execution attempt in this case does not amount to cruel and unusual punishment nor does it amount to imposing multiple punishments for the same offense.

I. FACTUAL AND PROCEDURAL BACKGROUND

Creech's prior cases are complex and began in the 1970s. The history is partly recounted in *Creech v. Richardson*, 59 F.4th 372, 376–82 (9th Cir. 2022). We will only summarize the most recent appeals and post-conviction claims relevant to this appeal.

Creech was scheduled for execution on February 28, 2024. His appeal relates to his petition for post-conviction relief following the failed execution in February. The Warden called off the first execution attempt after the execution team was unable to locate a suitable vein to administer the pentobarbital. Shortly after the failed execution, Creech filed a petition for post-conviction relief, arguing that any further attempts to execute him would constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, section 6 of the Idaho Constitution. Alternatively, Creech contended that any further attempts to execute him would violate his constitutional protections against double jeopardy under the Fifth Amendment and Article I, section 13 of the Idaho Constitution because it would constitute "multiple punishments for the same offense."

The State moved for summary dismissal of Creech's petition for post-conviction relief, which the district court granted. The district court construed Creech's Eight Amendment argument as a challenge to the method of execution. It determined Creech could not litigate his claim in a post-conviction action under Idaho Code sections 19-2719 and 19-4901 to -4911. The district court surmised that Creech could pursue his Eighth Amendment challenge to the method of execution "in an action of another kind." It suggested Creech could have a cause of action under 42 United States Code section 1983 and Idaho's Uniform Declaratory Judgment Act, Idaho Code sections 10-1201 to -1217.

Alternatively, the district court also addressed Creech's petition on the merits. First, it declined to address Creech's state constitutional arguments because Creech failed to argue that the Idaho Constitution's protections exceeded those of the federal constitution. Second, the district court determined that a second execution attempt did not violate the Fifth Amendment because

Creech would not be subject to "more punishment than the legislature authorized for his crime." Third, it determined that a second execution attempt would not violate the Eighth Amendment because the "Eighth Amendment does not . . . categorically prohibit, as cruel and unusual punishment, a second attempt to carry out a death sentence." The district court noted that "the State didn't intentionally or maliciously inflict unnecessary pain during the failed execution attempt," facts which, if they existed, potentially could have established a meritorious Eighth Amendment claim. It also held that Creech had not established that a second execution attempt would inflict unnecessary pain because it indicated that the alternative to lethal injection is execution by firing squad.

Creech moved for reconsideration, which was denied. Following the denial of the motion for reconsideration, the State obtained a new death warrant that reset Creech's execution for November 13, 2024.

Creech now appeals the district court's summary dismissal of his petition for post-conviction relief.

II. STANDARDS OF REVIEW

A petition for post-conviction relief is a civil proceeding—rather than criminal—governed by the Idaho Rules of Civil Procedure. *Rodriguez v. State*, 171 Idaho 634, 642, 524 P.3d 913, 921 (2023) (citation omitted). Summary dismissal of an application for post-conviction relief is the procedural equivalent of summary judgment under Rule 56 of the Idaho Rules of Civil Procedure. *Takhsilov v. State*, 161 Idaho 669, 672, 389 P.3d 955, 958 (2016) (quoting *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008)). "On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file" and liberally construes the facts and reasonable inferences in favor of the petitioner. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (citations omitted).

Constitutional issues are purely questions of law over which this Court exercises free review. *Thumm v. State*, 165 Idaho 405, 412, 447 P.3d 853, 860 (2019) (citing *State v. Abdullah*, 158 Idaho 386, 417, 348 P.3d 1, 32 (2015)).

III. ISSUES ON APPEAL

1. Is a post-conviction relief action the proper vehicle for Creech to assert his Eighth Amendment claim?
2. Did Creech make a sufficient presentation to justify an evidentiary hearing?

3. Has Creech raised a meritorious claim?

IV. ANALYSIS

Creech requests that this Court vacate the district court's order dismissing his petition for post-conviction relief and remand the case for consideration of his claims on the merits. First, we will address Creech's argument that his claims are properly raised under Idaho Code section 19-2719 and the Uniform Post-Conviction Procedure Act, Idaho Code sections 19-4901 to -4911 (UPCPA). Second, we will address whether the district court erred when it summarily dismissed Creech's petition instead of allowing an evidentiary hearing on Creech's claims. Third, we will address the merits of Creech's constitutional arguments.

A. Creech's claims were properly raised under Idaho Code section 19-2719.

Post-conviction proceedings in capital cases are primarily governed by Idaho Code section 19-2719. *Sivak v. State*, 134 Idaho 641, 646, 8 P.3d 636, 641 (2000) (citation omitted). The UPCPA applies where Idaho Code section 19-2719 is silent. *Id.* at 646, 8 P.3d at 641 (citation omitted). Post-conviction relief is available to defendants who claim, "among other things, that their convictions or sentences violate the federal or state constitutions, that material facts not previously presented require vacating them, or that they are otherwise subject to collateral attack under common law or statute." *Id.* (citations omitted). Idaho Code section 19-2719(3) requires the defendant to file "any legal or factual challenge to the sentence or conviction" under this section." I.C. § 19-2719. It also provides that "[a]ny remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section." *Id.* Generally, if a successive post-conviction petition "alleges matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence," then it will be deemed "facially insufficient." I.C. § 19-2719(5)(b).

The district court determined that a post-conviction petition is not the proper vehicle for Creech's claims because it determined that Creech's constitutional objections to a second execution attempt do not cast doubt on the reliability of his underlying death sentence. The district court characterized Creech's challenge to a second execution attempt as "a mere challenge to a proposed method of execution" that did not amount to "a potentially viable challenge to his conviction or death sentence." Creech contends on appeal that the district court mischaracterized his challenge to a second execution attempt as limited to execution by lethal injection instead of a

constitutional challenge to a second execution attempt by any means. Creech posits that his claim is a challenge to the validity or reliability of the sentence because, if he prevails, the State will be foreclosed from carrying out his death sentence. As a result, he argues a post-conviction petition for relief is the proper vehicle for raising his constitutional challenges to a second execution attempt. Creech also maintains that if this Court determines a post-conviction petition is not the proper vehicle to raise his claims, then he will be left with "no path to challenge the cruel and unusual nature of a second execution attempt" in state court.

On appeal, the State argues the district court did not err in its determination that Creech's claims are not properly raised in a post-conviction petition because his claims do not cast doubt on the reliability of his underlying conviction or sentence—he only challenges the method of execution. The State maintains that challenges to the validity of an underlying conviction and sentence in post-conviction proceedings "look back to prior proceedings," whereas Creech's claims are prospective, focusing on a future proceeding—the second execution attempt. Thus, the State maintains that "whatever happens as a result of his future execution cannot change the lawfulness of his death sentence that was imposed in 1995."

The district court's interpretation of the UPCPA and the Idaho Code section 19-2719 is too narrow. Even if post-conviction actions, including successive petitions for post-conviction relief, generally "look back" to prior proceedings to challenge the reliability or validity of a sentence, *see, e.g.*, *Row v. State*, 145 Idaho 168, 177 P.3d 382 (2008); *Sivak*, 134 Idaho at 641, 8 P.3d at 636 (successive petitions for post-conviction relief based on alleged new evidence), the gravamen of a post-conviction claim is the challenge to the reliability or validity of a conviction or sentence. The district court erred when it characterized Creech's claims as a mere challenge to the method of execution. It is our view that Creech's claims necessarily implicate the validity of the death sentence previously imposed, because Creech's Eighth Amendment challenge to a second execution attempt by any means, if successful, would prevent the State from carrying out his death sentence. Therefore, even though his claims "look forward" to a future proceeding instead of "looking back" to prior proceedings, Creech is challenging the *current* validity of his sentence in light of events that occurred in the *recent past*—his first unsuccessful execution. As a result, we hold that Creech's claims are properly raised through a petition for post-conviction relief.

We disagree with the district court's suggestion that Creech pursue his Eighth Amendment and Fifth Amendment claims through Idaho's Uniform Declaratory Judgment Act, (UDJA), Idaho

Code section 10-1201 to -1217. While the UDJA vests courts with the ability to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed," it does not clearly apply to judgments of conviction or sentences in criminal cases. *See* I.C. § 10-1202. Idaho Code section 10-1202 references determining rights or statuses for persons interested in or affected by deeds, wills, written contracts and statutes, municipal ordinances, and franchises. Judgments of conviction and sentences in criminal cases are conspicuously absent from this list. Further, the UPCPA generally "takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them." I.C. § 19-4901(b).

The special concurrence is premised on the understanding that Creech challenges *how* he is to be executed in the future given the failed execution attempt that occurred in February 2024. In our view, both the district court and our esteemed colleagues misperceive Creech's argument, which is that it would be cruel and unusual punishment to execute him using *any method*. Distilled to its essence, Creech argues that the death sentence imposed decades ago is *no longer valid* and *no longer reliable* given the circumstances of the failed execution attempt. While Creech's death sentence is facially valid and has indeed been affirmed by this Court and the United States Supreme Court, his Eighth Amendment claim casts doubt on the continued validity and reliability of the death sentence.

The special concurrence criticizes our decision as creating an avenue for Creech and similarly situated future individuals when neither the UPCPA nor Idaho Code section 19-2719 provides relief for his claim. The special concurrence, however, glosses over the very language in the UPCPA which expressly sets forth who can institute a claim under the Act:

> (a) Any person who has been convicted of, or sentenced for, a crime and who claims:
> (1) That the conviction or the sentence was in violation of the *constitution of the United States or the constitution or laws of this state*;
> . . .
> (4) That there *exists evidence of material facts*, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> . . .
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error *heretofore available* under any common law, statutory or other writ, motion, petition, proceeding, or remedy: *may institute, without paying a filing fee, a proceeding under this act to secure relief.*

I.C. § 19-4901(a)(1), (4), and (7) (emphasis added).

Importantly, the UPCPA also expressly provides that it takes the place of all other common law, statutory, or other remedies that were available prior to the passage of the act:

> Except as otherwise provided in the act, it comprehends and takes the place of all other common law, statutory, or other remedies *heretofore available for challenging the validity of the conviction or sentence*. It shall be used exclusively in place of them.

I.C. § 19-4901(b) (emphasis added).

The emphasized words in the opening section of Idaho's Uniform Post-Conviction Procedure Act demonstrate that it contemplates constitutional challenges to a sentence or conviction; that presently existing evidence of material facts might require vacation of the conviction or sentence; and significantly, that all procedures previously available to individuals ("heretofore available") to challenge the validity of the conviction or sentence are comprehended in the UPCPA, which "shall be used exclusively in place of" them. Thus, the UPCPA is not strictly limited to looking back to the validity of the sentence or conviction at the time they were entered. Indeed, under section 19-4901(a)(4), the present existence of material facts, not previously presented and heard, that require vacating the sentence in the interest of justice, reveals the fallacy of such a limited view.

An example of new facts that call into question the continued validity and reliability of a death sentence involves individuals with mental illness, dementia, or similar conditions that render them unable to "reach a rational understanding of the reason for [his] execution." *Madison v. Alabama*, 586 U.S. 265, 273 (2019) (brackets in original) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)). In *Madison*, the Supreme Court reiterated that "an execution lacks retributive purpose when a mentally ill prisoner cannot understand the societal judgment underlying his sentence [and] an execution offends morality in the same circumstance." *Id*. at 279 (citations omitted). Key to this case is that Madison, sentenced to death for the 1985 murder of a police officer, decades later had a series of strokes and developed vascular dementia with disorientation, confusion, cognitive impairment, and memory loss. *Id*. at 269. The Supreme Court of the United States vacated the Alabama judgment and remanded the matter for a redetermination of Madison's competency based on the principles articulated in its decision. *Id*. at 282–83. A similar factual scenario would fall within the scope of the UPCPA because it would necessarily involve "*evidence of material facts*, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]" I.C. § 19-4901(a)(4).

And the relief that could be granted under the UPCPA, which the special concurrence laments is not something this Court can create on its own, is revealed in subsection (a)(4) itself: "vacation of the. . . sentence in the interest of justice[.]" If the death sentence were vacated, that would leave Creech with a fixed life sentence under Idaho Code section 18-4004.

The special concurrence laments that the Court's opinion is "long on empathy for post-conviction petitioners and short on the legal authority." We respectfully disagree, based on our view that the UPCPA does not limit post-conviction relief as strictly as the special concurrence suggests. We cannot accept the conclusion that we have to agree to a result that "some might view as harsh" when the matter before us concerns the harshest possible consequences, particularly when there is an avenue for relief without rewriting the very statutory provisions upon which Creech relies.

Were this Court to adopt the district court's narrow interpretation of the UPCPA and Idaho Code section 19-2719, it would foreclose Creech and similarly situated petitioners from seeking relief in state court. Even if Creech may be able to proceed in federal court, either through a federal writ of habeas corpus under 28 United States Code section 2254 or a claim under 42 United States Code section 1983, it is our view that he and future defendants, are authorized by the plain language of the UPCPA to seek relief in state court through a petition for post-conviction relief.

B. The district court did not err by summarily dismissing Creech's claims without affording him an evidentiary hearing.

Moving to the merits, Creech argues that the district court erred in dismissing the petition without granting an evidentiary hearing, as the issues he has raised warranted further examination.

"Idaho Code section 19-4906 authorizes summary dismissal of a post-conviction petition" either pursuant to a party's motion or upon the trial court's own initiative. *Rodriguez*, 171 Idaho at 641, 524 P.3d at 920 (citation omitted); I.C. § 19-4906(b)-(c). Summary dismissal is appropriate "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Creech emphasizes that his petition presented sufficient evidence to merit a hearing and criticizes the district court's decision to dismiss without considering all material facts. The State counters, arguing that Creech's petition for post-conviction relief did not meet the criteria for an evidentiary hearing because the claims lacked merit and were not legally cognizable, justifying summary dismissal.

We agree that Creech's petition did not meet the criteria for an evidentiary hearing. An application for post-conviction relief differs from a complaint in an ordinary civil action. *Id.* (citation omitted). The application must contain much more than a short and plain statement of the claim that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). *Id.* Instead, to justify a post-conviction evidentiary hearing, the application must make a factual showing based on admissible evidence. *State v. Dunlap*, 155 Idaho 345, 391, 313 P.3d 1, 48 (2013) (citation omitted). It must also be supported by a statement that "specifically set[s] forth the grounds upon which the application is based." *Rhoades*, 148 Idaho at 249–50, 220 P.3d at 1068–69 (first citing *Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008), and then citing I.C. § 19-4903).

Creech's petition for post-conviction relief asserts two claims for relief. His first claim alleges that a second execution attempt by any means after a failed execution, violates the Eighth Amendment's prohibition against cruel and unusual punishment. His second claim alleges that a second execution attempt after a failed execution violates the Double Jeopardy Clause of the Fifth Amendment. Creech's second claim fails as a matter of law, as we discuss below. Therefore, we will only address whether the district court erred in dismissing Creech's first claim in his petition without an evidentiary hearing.

Creech's petition narrates the events that occurred on February 28, 2024. The failed execution involved eight attempts to insert needles into his body. Each attempt "hurt pretty bad" and heightened his anticipation of imminent death. Creech also described the psychological anguish he experienced, noting that he had to look through the glass at his wife, believing each needle stick could be his last moment. He maintains that his psychological strain continued after the failed execution, including nightmares and ongoing trauma he faces in anticipation of a second execution attempt. Due to the procedural posture of this case, we will accept as true Creech's allegations that he experienced the pain and ongoing psychological distress that he described. Still, Creech's allegations in his petition do not entitle him to relief because the pleadings and affidavits submitted do not raise a genuine issue of material fact. A genuine issue of material fact exists when "the appellant has alleged facts in his petition that if true, would entitle him to relief." *Wheeler v. State*, 162 Idaho 357, 359, 396 P.3d 1239, 1241 (2017) (citation omitted). While courts must liberally construe the facts and draw reasonable inferences in favor of the applicant, the applicant's conclusions need not be accepted. *See Hooley v. State*, 172 Idaho 906, 912–13, 537 P.3d 1267, 1273–74 (2022).

As discussed in more detail below, to prevail on his Eighth Amendment claim, Creech's application for post-conviction relief must have alleged that the State intentionally or maliciously inflicted unnecessary pain during the first failed execution, or the State is pursuing the second to intentionally or maliciously inflict unnecessary pain. *See Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 464, 463–64 (1947); *see also Broom v. Shoop*, 963 F.3d 500, 512–13 (2020) (discussing *Resweber* before rejecting the defendant's Eighth Amendment claim after concluding that no unnecessary pain was intentionally or maliciously inflicted during the failed execution). In this regard, Creech's petition is devoid of evidence that the Department of Correction intended to cause him unnecessary pain or that the execution team maliciously inflicted pain—physical or psychological—during the failed execution. To be sure, Creech does not allege this fact in his application for post-conviction relief. On the contrary, Creech's petition shows that the Warden halted the execution after it became clear that the medical team was unable to proceed. Josh Tewalt, the Director of the Idaho Department of Correction, explained during a press conference held that day that the execution team "did their level best, in a professional way that was respectful of the process. And when it appeared those efforts were going to be unsuccessful, they . . . opted to stop additional efforts so that [the Department] could evaluate [the] next steps."

Based on the pleadings and affidavits submitted, the trial court did not err in dismissing Creech's petition for post-conviction relief. To survive summary dismissal, Creech was required to establish a genuine issue of material fact regarding his Eighth Amendment claim. Absent such a showing, a trial court does not err in dismissing a petition post-conviction relief. We address the merits of Creech's constitutional claims next.

C. Creech's constitutional claims lack merit.

1. A second execution attempt does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

This case presents an issue of first impression in Idaho; namely, whether a second execution attempt after a failed execution violates the Eighth Amendment's prohibition against cruel and unusual punishment. We hold that when applied to the facts of this case, it does not.

"We begin with the principle . . . that capital punishment is constitutional." *Baze v. Rees*, 553 U.S. 35, 47 (2008). The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. The United States Supreme Court addressed the applicability of an Eighth Amendment challenge to a second execution attempt in *Resweber*, 329 U.S. at 464–65. There, the defendant's first execution was

unsuccessful because the electric chair he was sentenced to die in malfunctioned. He alleged that the psychological strain from preparing for two executions "subjects him to a lingering or cruel and unusual punishment." *Id.* at 464. In a four-justice plurality decision, the Court explained that although the defendant previously experienced a failed execution, that "does not make his subsequent execution any more cruel in the constitutional sense than any other execution." *Id.* The plurality emphasized that "[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution." *Id.* It noted that the purpose of a second execution attempt was not "to inflict unnecessary pain." *Id.* The plurality held that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.*

Here, Creech similarly argues that a second execution attempt by any means would violate the Eighth Amendment's prohibition against cruel and unusual punishment based in part on the psychological trauma he experienced both during and after the failed execution. Creech asserts that he continues to experience "pain and non-physical suffering . . . in anticipation of a second attempt." While we accept his assertions of mental pain and suffering as true, they do not amount to cruel and unusual punishment. As the Supreme Court has noted, "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." *Baze*, 553 U.S. at 47. "[T]he Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id.*

Similar to the failed execution in *Resweber*, the failed execution in this case could be the result of human error or it could be the result of Creech's veins collapsing on every attempt. The Director of the Department of Correction stated that "this isn't a do it at all costs process" and explained that the execution team "did their level best, in a professional way that was respectful of the process. And when it appeared those efforts were going to be unsuccessful, they did the right thing and opted to stop additional efforts so that we could evaluate [the] next steps." The record shows the Warden promptly halted the execution after the execution team spoke with him once it became clear they were unable to proceed. Like the situation experienced by the defendant in *Resweber*, the psychological strain Creech experienced preparing for the failed execution, and the subsequent nightmares and trauma he now faces in anticipation of a second execution attempt, do

not by themselves amount to cruel and unusual punishment in the constitutional sense. Such distress is necessarily and unavoidably part of any method of execution.

Creech contends that *Resweber* is a harsh decision and a relic of a bygone era almost eighty years distant; therefore, this Court's reliance on it would be misplaced. For example, he argues that when the Supreme Court decided *Resweber*, Eighth Amendment jurisprudence had yet to incorporate "evolving standards of decency" into its analysis. Nevertheless, *Resweber*, for all of Creech's misgivings, remains good law. The district court's rejection of Creech's Eighth Amendment arguments relied on *Resweber* and looked to *Broom*, 963 F.3d at 514–15 (discussing *Resweber*). The district court determined that Creech did not argue the Department of Correction intentionally or maliciously inflicted unnecessary pain during the failed execution, in contrast to the defendant in *Broom*, and that the record also did not support such a finding. We agree that Creech has not established that the Department of Correction intentionally or maliciously inflicted unnecessary pain during the failed execution, nor has he shown that a second execution attempt would cause him unnecessary pain. Therefore, we hold that Creech has not established that a second execution attempt by any means would violate his Eighth Amendment rights because he has not shown that a second attempt would cause him to unnecessary pain.

2. A second execution attempt does not violate the Double Jeopardy Clause of the Fifth Amendment.

Creech's next argument raises another issue of first impression for this Court. This Court has never addressed whether a second execution attempt after a failed execution violates the Double Jeopardy Clause of the Fifth Amendment. Creech contends that the failed execution attempt constitutes "punishment;" thus, a second attempt would be an impermissible multiple punishment for the same offense. Creech explains that the physical and psychological suffering he experienced during the first failed execution attempt qualifies as part of the punishment, which means a second execution for the same offense would be a violation of his constitutional rights. The State counters that the protections afforded by the Double Jeopardy Clause do not apply in this context because the Clause aims to prevent multiple punishments exceeding what the legislature intended.

Relying on *Jones v. Thomas*, 491 U.S. 376, 381 (1989), and *Broom*, 963 F.3d at 514–15, the district court concluded that Creech's double jeopardy claim was "legally untenable and must be dismissed." The court reasoned that double jeopardy does not prevent the State from attempting

to carry out Creech's death sentence a second time when he has not yet received the punishment authorized for his crime.

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. CONST. amend. V; *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (incorporating right through the Fourteenth Amendment). The prohibition against double jeopardy provides protection in three circumstances: "(1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense." *State v. Passons*, 163 Idaho 643, 646, 417 P.3d 240, 243 (2018) (citations omitted). The only protection relevant here, however, is the protection against multiple punishments for the same offense. The protection against multiple punishments for the same offense serves a limited purpose "to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government[.]" *Jones*, 491 U.S. at 381 (citing *Ohio v. Johnson*, 467 U.S. 493, 499 (1984)).

The United States Supreme Court has not addressed whether the Double Jeopardy Clause acts as a bar to a second execution attempt. Although the issue was raised in *Resweber*, the Court declined to apply the Fifth Amendment Double Jeopardy Clause because, at the time, it did not apply to the states. *See Resweber*, 329 U.S. at 462–63. To be sure, this factual scenario is rare, and *Resweber* is the only Supreme Court precedent to address the constitutionality of a second execution attempt. Nevertheless, given that "the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature," we need only consider whether the punishments imposed are unconstitutionally multiple by determining what punishments the legislative branch has authorized. *See id.* at 383.

Here, Creech pled guilty to the crime of first-degree murder under Idaho Code section 18-4003(e). Idaho authorizes that "every person guilty of murder of the first degree shall be punished by death or by imprisonment for life." *See* I.C. § 18-4004. As punishment for his crime, Creech was sentenced to death by the district judge, pursuant to Idaho Code section 19-2515. Attempting a second execution following a failed first attempt does not impose a second punishment beyond that authorized by the legislature because the State authorizes punishment by death for first-degree murder, and Creech's death sentence was not carried out. While we acknowledge the pain and ongoing psychological distress that Creech has faced, his claim does not give rise to double

jeopardy concerns. Therefore, the district court did not err in dismissing Creech's double jeopardy claim.

3. Creech failed to preserve his state constitutional claims for appeal.

It is well-established that "this Court is free to interpret [the Idaho] constitution as more protective than the United States Constitution." *State v. Delling*, 152 Idaho 122, 128, 267 P.3d 709, 715 (2011) (quoting *Garcia v. State Tax Comm'n of Idaho*, 136 Idaho 610, 614, 38 P.3d 1266, 1270 (2002)). It is also well-established that this Court will not hear arguments that a party has failed to preserve for appeal. *State v. Miramontes*, 170 Idaho 920, 924, 517 P.3d 849, 853 (2022). In *State v. Frederick*, 149 Idaho 509, 513, 236 P.3d 1269, 1273 (2010), we held that a defendant failed to preserve his state constitutional arguments on appeal when he "made no mention of the state constitution" in his arguments before the trial court, even though he referenced the Idaho Constitution in his motion to suppress. *See also State v. Wheaton*, 121 Idaho 404, 406–07, 825 P.2d 501, 503–04 (1992) (declining to consider whether the state constitution afforded the defendant greater protection from a warrantless search than the federal constitution because, though he mentioned specific articles from the state constitution in his motion, defendant failed to further clarify his state constitutional argument to the district court).

Although Creech referenced Article I, Section 6 and Article I, Section 13 of the Idaho Constitution in his petition for post-conviction relief, he failed to develop an argument below as to how the state constitution provided greater protection than the federal constitution. At oral argument on the State's motion for summary dismissal, Creech did not argue that the state constitution provides greater protections than the federal constitution. In its written decision, the district court determined that Creech failed to argue how the Idaho Constitution provides greater protection under the Article I, Sections 6 and 13 than the United States Constitution. It only analyzed Creech's Fifth and Eighth Amendment arguments under the federal constitution. Therefore, we agree with the State that Creech failed to preserve his state constitutional arguments. We will not consider those arguments for the first time on appeal.

V. CONCLUSION

This district court's judgment dismissing Creech's petition is affirmed.

Justices BRODY and MOELLER CONCUR.

BEVAN, C.J., specially concurring.

I join in the result of the majority opinion to affirm the decision of the district court, denying Thomas Creech relief. But I would hold that neither Creech's double jeopardy, nor his cruel and unusual punishment claims are cognizable under the Uniform Post Conviction Procedure Act (UPCPA) or Idaho Code section 19-2719. Neither of Creech's claims cast doubt *on his underlying conviction or death sentence*, but challenge how Creech will be executed in the future. Granting Creech, or some other similarly situated defendant the relief the majority creates would play havoc with the plain reading of the statute and provide a remedy that is not available to post-conviction petitioners in Idaho – at least until today.

Two Idaho statutes govern Creech's right to seek post-conviction relief: First is the UPCPA itself, Idaho Code section 19-4901; the second is Idaho Code section 19-2719, applicable to capital cases like Creech's. But both statutes are limited to challenges directed at either the conviction or the sentence received after the trial, which, in Creech's case, occurred decades ago. "Courts are constrained to follow [the] plain meaning [of a statute], and neither add to the statute nor take away by judicial construction." *Datum Constr., LLC v. RE Inv. Co., LLC*, 173 Idaho 159, 540 P.3d 330, 334 (2023) (brackets in original).

The plain meaning of the statutes before us do not provide the relief which the majority opens the door for today. First, as imparted under section 19-4901(a)(1), a person who claims "[t]hat the *conviction or the sentence* was in violation of the constitution of the United States or the constitution or laws of this state," may have a right to relief. (Emphasis added). Section 19-4901(a)(7) provides limited relief similarly for "the *conviction or sentence*, [which] is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy." I.C. §§ 19-4901(a)(1) and (7) (emphasis added). The relief Creech now seeks has nothing to do with the conviction or death sentence that he received in 1982, and which was put into force in 1995, but instead, with what may happen during another attempt by the State to carry out the sentence again.

Idaho Code section 19-2719 is titled "Special appellate and post-conviction procedure for capital cases. . . ." It, too, is limited to relief based on the original conviction or sentence. *See* I.C. §19-2719(4), (5) ("A successive post-conviction pleading asserting the exception *shall be deemed facially insufficient* to the extent it alleges matters that are cumulative or impeaching or would not,

even if the allegations were true, cast doubt on the *reliability of the conviction or sentence*." (Emphasis added").

First, it should be noted that any alleged claim that does not "cast doubt on the reliability of the conviction or sentence[,]" is "facially invalid." Today's majority opinion inexplicably violates this tenet of the law at hand. Second, Creech's claims on their face do nothing to challenge the reliability of the conviction or sentence.

Application of both statutes cited above supports the district court's decision: neither of Creech's two claims is cognizable under the UPCPA or Idaho Code section 19-2719, because Creech is not challenging his *underlying sentence* but is challenging the method of the execution of his sentence. I would thus hold that Creech's attempt to raise his constitutional challenges to a second execution attempt through a petition for post-conviction relief is *not* legally cognizable, since no relief for such a claim is provided in the statute.

I understand that the claims Creech is now making could not have been known at the time he was sentenced, but that is not the focal point of the analysis; otherwise, potentially anything that might happen after a conviction and sentence could be raised as an issue in a post-conviction case. This is not the law in Idaho.

The majority's decision is long on empathy for post-conviction petitioners and short on the legal authority to transform our post-conviction statute in such a way. Our Court is not tasked with building avenues, creating new rights, or providing remedies that don't exist in statutes governing post-conviction relief in Idaho. We are tasked with simply reading the law and applying it to the allegations at hand. That leads to what some might view as harsh results sometimes — but that is our task, not stretching to provide new boulevards for presenting claims for which there is no remedy.

The end point of any decision we make in this area must address *what relief* this Court is prepared to grant such a petitioner. Would the Court rule the death sentence issued in this (or another similar case in the future) unconstitutional because the state was unwittingly unable to carry-out the execution appropriately on its first attempt? The avenue created today has nothing to do with Creech's conviction or sentence. Thus, we have no authority to enter such a judgment. The sentence as originally pronounced for Creech has been tested by well over ten appellate decisions. It has been upheld in every such decision since 1995. Thus, there is no logical way to create a remedy where the avenue for relief is not based on a defect with the sentence itself. Secondarily,

would the majority see the end point of the new avenue it is fashioning today as a ruling that Creech's original conviction was somehow invalid because of "cruel and unusual punishment" that *might* take place at some future time in this (or another) capital case? Again, we have no authority to enter such an order, nor would there be any grounds to do so.

Our statute is plain: challenges are limited to those focused on the *conviction or sentence*. The "avenue" being created today leads to nowhere; the relief at the end of this ride is not something this Court can create on its own for something that occurred in the manner of execution of the sentence. The Statute's "unusual case" exception applies only to new evidence that bears on *the original criminal proceeding or the original sentence*. Nothing in this exception allows the forward-looking path the majority creates today.

Creech relies on both *Sivak v. State*, 134 Idaho 641, 648 8 P.3d 636, 643 (2000), and *Row v. State*, 145 Idaho 168, 177 P.3d 382 (2008), to support his claims. But neither case provides relief for forward-looking claims like Creech asserts here. Both *Sivak* and *Row* were direct challenges to each defendant's underlying convictions or sentences. In other words, both cases *look back* to prior proceedings, while Creech focuses on what will happen at his next execution – a future proceeding. And whatever happens because of his future execution cannot change the lawfulness of his death sentence that was imposed in 1995.

The district court here recognized that since Creech's death sentence and conviction are valid, his claim asserting cruel and unusual punishment under the post-conviction statute is not litigable:

> [B]ecause Creech's death sentence and underlying conviction are valid, whether a second attempt to execute him by lethal injection would be a cruel and unusual punishment isn't litigable in a post-conviction action. A post-conviction action—whether the criminal case is capital or non-capital—is only a vehicle for attacking the validity of a conviction or sentence. *See* I.C. § 19-2719(5)(b) ("A successive post-conviction pleading . . . shall be deemed facially insufficient to the extent it alleges matters that . . . would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence."); I.C. § 19-4901(a) (creating the remedy of a post-conviction action to challenge a conviction or sentence); I.C. § 19-4901(b) (stating that the post-conviction remedy "takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence"). Nothing about the failed execution attempt renders Creech's underlying death sentence unreliable or invalid. Creech's claim that a second attempt to execute him by lethal injection would be a cruel and unusual punishment amounts, under the law, to a mere challenge to a proposed

> method of execution; it isn't a potentially viable challenge to his conviction or death sentence. Hence, it isn't litigable in a post-conviction action.

(Emphasis original). I agree. Nothing about the failed execution attempt renders Creech's underlying death sentence unreliable or unsound. I would thus affirm on these grounds without creating an avenue to seek relief under the UPCPA that our legislature hasn't chosen to grant them. As the district court recognized, such petitioners may have other avenues for relief, including before executive branch agencies or in the federal courts, but I do not interpret our post-conviction statutes in a way that enlarges their plain reading to preserve a right for some future, yet unknown, petitioner in Idaho's state courts under our post-conviction structure.

Justice *pro tem* BURDICK, joins in this Special Concurrence.

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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Deputy Clerk - Sims-Douglas, Linda

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS EUGENE CREECH,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV01-24-4845

MEMORANDUM DECISION AND ORDER ON MOTION FOR SUMMARY DISMISSAL

More than forty years ago, in an underlying criminal case, Petitioner Thomas Eugene Creech pleaded guilty to first-degree murder and was sentenced to death. Over the ensuing decades, Creech's conviction and death sentence have survived numerous challenges in state and federal court. Early this year, the State tried for the first time to carry out his death sentence, but medical personnel were unable establish an intravenous line through which to administer a lethal injection, so the planned execution was abandoned. Having survived one execution attempt, Creech contends in this latest post-conviction action that any further attempt to execute him would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the Idaho Constitution. Consequently, he says, his death sentence must be vacated. The State moves for summary dismissal. The motion was argued and taken under advisement on August 29, 2024. For the reasons that follow, it is granted.

I.

BACKGROUND

In an underlying Ada County criminal case (previously designated Case No. HCR-10252 but, in Idaho's current case-management system, redesignated Case No. CR-FE-0000-10252), Creech was sentenced to death on January 25, 1982, for the crime of first-degree murder. His death sentence was vacated twice but reinstated twice, last on April 17, 1995. It remains in effect now, more than forty years after it was first pronounced. The history of the underlying criminal case and Creech's many challenges to its outcome—including multiple post-conviction cases in state court and multiple habeas cases in federal court—is partly recounted in *Creech v. Richardson*, 59 F.4th 372, 376–82 (9th Cir. 2023), *cert. denied*, 2023 WL 6558513 (U.S. Oct. 10, 2023). It will not be recounted here, except to mention that, beyond the challenges described in the just-cited Ninth Circuit opinion, Creech filed in state court another two more recent post-conviction actions, both of which failed on timeliness grounds. *Creech v. State*, 173 Idaho 390, 543 P.3d 494 (2024); *Creech v. State*, 173 Idaho 396, 543 P.3d 500 (2024).

On February 28, 2024, shortly after those last two post-conviction actions were rejected on appeal, the State tried to execute Creech by lethal injection. The planned execution was abandoned, however, when medical personnel were unable to establish an intravenous line through which to administer the lethal injection. A few weeks later, on March 18, 2024, Creech initiated this latest post-conviction action, which presents yet another challenge to his death sentence. His latest

petition for post-conviction relief contains his rendition of the failed execution attempt, (Pet. Post-Conviction Relief ¶¶ 42–90), and claims that trying again to execute him would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the Idaho Constitution, (*id.* ¶¶ 34–167). On these theories, he asks that his death sentence be vacated. (*Id.* ¶ 168.f.)

In this action's early stages, Creech briefly sought to preliminarily enjoin the State from seeking the issuance of a death warrant authorizing a second attempt to carry out his death sentence, but he withdrew that motion and hasn't renewed it. In the several months that have passed in the meantime, the State has yet to seek the issuance of another death warrant. It turns out, then, that the briefly sought preliminary injunction wasn't needed.

In any event, the State now moves for the petition's summary dismissal. That motion, as already mentioned, was argued and taken under advisement on August 29, 2024. It is ready for decision.

II.

LEGAL STANDARD

A petition for post-conviction relief initiates a civil proceeding—not a criminal one—governed by the Idaho Rules of Civil Procedure. I.C. § 19-4907; *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like plaintiffs in other civil actions, the petitioner must prove by a preponderance of the evidence the allegations necessary

to support an award of the requested relief. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). A petition for post-conviction relief differs from a complaint in an ordinary civil action, though, in that it must contain more than "a short and plain statement of the claim" satisfying I.R.C.P. 8(a)(2). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. Instead, as to facts within the petitioner's personal knowledge, a petition must be verified and accompanied by affidavits, records, or other evidence supporting its allegations, or it must state why it isn't. I.C. § 19-4903. A petition is subject to dismissal if it doesn't contain, or isn't accompanied by, admissible supporting evidence. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

A petition may be summarily dismissed, either on a party's motion or the trial court's own motion, if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). When considering summary dismissal, the trial court must construe disputed facts in the petitioner's favor, but it need not accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman*, 125 Idaho at 647, 873 P.2d at 901.

Summary dismissal is proper if the petitioner's allegations are clearly disproved by the record of the underlying criminal case, if the petitioner hasn't presented evidence making a prima facie case as to each essential element of the petitioner's claims, or if the petitioner's allegations are insufficient as a matter of law to justify relief. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009); *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007); *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Murphy v. State*, 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006); *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996).

Conversely, if the petition and accompanying materials contain admissible evidence of facts entitling the petitioner to relief, summary dismissal is impermissible. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Berg*, 131 Idaho at 519, 960 P.2d at 740; *Stuart*, 118 Idaho at 934, 801 P.2d at 1285; *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008); *Roman*, 125 Idaho at 647, 873 P.2d at 901.

III.

ANALYSIS

Creech says his decades-old death sentence must be vacated because another attempt to carry it out, after the failed attempt in February, would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the

Idaho Constitution. The double-jeopardy claim is the place to start. The Court concludes that it is legally untenable and must be dismissed. Next to be analyzed is the cruel-and-unusual-punishment claim. The Court concludes that it doesn't furnish grounds for vacating Creech's death sentence and, instead, amounts under the law to a mere method-of-execution challenge that simply isn't cognizable in a post-conviction action (though it is litigable through other legal vehicles). Hence, the cruel-and-unusual-punishment claim must be dismissed too. These conclusions are explained in detail below.

A. Double Jeopardy

Although Creech claims that a second attempt to carry out his death sentence would be a double-jeopardy violation under both the federal constitution and the Idaho Constitution, (Pet. Post-Conviction Relief ¶¶ 141–49), he doesn't discernably argue that the Idaho Constitution's double-jeopardy protections exceed those of the federal constitution. Consequently, his claim need only be analyzed under the federal constitution. *See, e.g.*, *State v. Lee*, 172 Idaho 106, ___ n.2, 529 P.3d 771, 774 n.2 (Ct. App. 2023).

"[T]he Double Jeopardy Clause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (internal quotation marks omitted); *see also Lee*, 172 Idaho at ___, 529 P.3d at 774 (to the same effect). Only the last of these protections is arguably

implicated by this case. "[I]n the multiple punishments context," the interest protected by the Double Jeopardy Clause is "limited to ensuring that the total punishment did not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (internal quotation marks omitted). In other words, "[t]he purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.* Consequently, "the [Double Jeopardy] Clause does not prohibit a second attempt at execution . . . because . . . the state is [not] . . . attempting to impose a 'second' punishment beyond that permitted by the legislature." *Broom v. Shoop*, 963 F.3d 500, 514–15 (6th Cir. 2020).

Applying these precedents here, the Court concludes without hesitation that the Double Jeopardy Clause doesn't bar the State from trying a second time to carry out Creech's death sentence. The State has yet to administer the legislatively authorized (and judicially ordered) punishment of death for the crime Creech committed. Because a second attempt to carry out his death sentence wouldn't subject him to more punishment than the legislature authorized for his crime, it wouldn't abridge his rights under the Double Jeopardy Clause. Consequently, his double-jeopardy claim must be dismissed.

B. Cruel and Unusual Punishment

Although Creech claims that a second attempt to carry out his death sentence would be a cruel and unusual punishment in violation of the Eighth Amendment

and the corresponding provision of the Idaho Constitution, (Pet. Post-Conviction Relief ¶¶ 36–124), he doesn't discernably argue that the Idaho Constitution's protections against cruel and unusual punishments exceed those of the federal constitution. Consequently, his claim need only be analyzed under the Eighth Amendment. *See, e.g.*, *Hall v. State*, 172 Idaho 334, 533 P.3d 243, 272 (2023). Indeed, his argument against its summary dismissal centers on Eighth Amendment case law, neither mentioning the Idaho Constitution nor citing cases applying the Idaho Constitution's prohibition against cruel and unusual punishments. (*See* Pet'r's Resp. State's Mot. Summ. Dismissal 6–13.)

Creech's rendition of the failed execution attempt is set out in the petition. (Pet. Post-Conviction Relief ¶¶ 42–90.) He describes being poked with needles eight times, which hurt him enough to make him say "ouch" repeatedly and made him think, incorrectly, that a lethal injection had been administered. (*Id.* ¶¶ 79–90; Creech Decl.[1] ¶¶ 3–6.) He also describes the subsequent emotional upset and physical difficulties he attributes to the failed execution attempt. (Pet. Post-Conviction Relief ¶¶ 91–110; Creech Decl. ¶¶ 9–24.) And he denies dehydrating himself to complicate establishing an intravenous line and potentially sabotage the planned execution. (Pet. Post-Conviction Relief ¶ 61; Creech Decl. ¶ 7.)

The Court doesn't doubt that enduring one execution attempt and facing another has traumatized Creech. Despite his heinous crimes, Creech is a human

[1] The Creech declaration is Exhibit 4 to the petition.

being whose suffering is worthy of consideration. The Eighth Amendment does not, however, categorically prohibit, as a cruel and unusual punishment, a second attempt to carry out a death sentence. In *Louisiana ex rel. Francis v. Resweber*, a four-justice plurality concluded that a second attempt to execute the petitioner, after an attempted execution by electrocution ended in a mechanical failure, wouldn't be a cruel and unusual punishment:

> Petitioner's suggestion is that, because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. <u>There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution</u>. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

329 U.S. 459, 464 (1947) (emphasis added). A fifth justice regarded the Eighth Amendment as inapplicable to the states but considered the proposed second attempt at executing the petitioner to be constitutional because the failed attempt was "an innocent misadventure." *Id.* at 470.

Just four years ago in *Broom*, the Sixth Circuit considered *Resweber*'s implications for a case involving, like this one, a proposed second attempt to carry

out a death sentence after the first attempt failed because medical personnel were unable to establish an intravenous line for administering a lethal injection.[2] The Sixth Circuit's take on *Resweber*, a precedent seventy-three years old then and seventy-seven years old now, is as follows:

> For better or worse, five justices in *Resweber* agreed that the Constitution does not prohibit a state from executing a prisoner after having already tried—and failed—to execute that prisoner once, so long as the state (1) did not intentionally, or maliciously, inflict unnecessary pain during the first, failed execution, and (2) will not inflict unnecessary pain during the second execution, beyond that inherent in the method of execution itself.

Broom, 963 F.3d at 512. In other words, according to the Sixth Circuit, *Resweber* offers the survivor of an execution attempt two routes to showing that a second execution attempt would be a cruel and unusual punishment: (i) prove the State intentionally or maliciously inflicted unnecessary pain during the failed execution attempt; or (ii) prove the State would inflict unnecessary pain during a second execution attempt. The Court agrees with not only the Sixth Circuit's interpretation of *Resweber* but also its determination that *Resweber* is—for better or worse—the law of the land.

Applying the law of the land as outlined in *Reseweber* and *Broom* to this case leads the Court to reach three conclusions.

First, the State didn't intentionally or maliciously inflict unnecessary pain during the failed execution attempt. Rather than show intentional or malicious

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[2] The failed execution attempt at issue in *Broom* was, however, markedly less humane and more painful than the one Creech endured. *See* 963 F.3d at 504–06.

infliction of unnecessary pain, Creech's testimony in the petition and his lawyer's similar testimony, (*see* Pet. Post-Conviction Relief Ex. 5), instead show a humanely conducted, though unsuccessful, execution attempt (accepting the premise of our law that execution by lethal injection isn't inherently inhumane). Indeed, Creech doesn't argue that the failed execution attempt involved intentional or malicious infliction of unnecessary pain. Because Creech neither showed nor even contended that the State intentionally or maliciously inflicted pain during the failed execution attempt, the first route recognized in *Broom* for proving that a second attempt at execution by lethal injection would be a cruel and unusual punishment is unavailable to him. Left to consider, then, is the other route: proving that another execution attempt would entail inflicting unnecessary pain.

Second, even if a second attempt to execute Creech by lethal injection would, as he argues, entail inflicting unnecessary pain and, hence, be a cruel and unusual punishment, his death sentence stands. In that event, the law would mandate executing him by firing squad, *see* I.C. § 19-2716(5), rather than deem him immune from execution. Creech hasn't offered evidence or argument to show that executing him by firing squad would entail inflicting unnecessary pain and, hence, be a cruel and unusual punishment. So, even if the Court were to take as a given that a second attempt to execute Creech by lethal injection would be a cruel and unusual punishment, the Court has no grounds to conclude that a first attempt to execute him by firing squad would be likewise (or to conclude that there is no other method of execution, not currently recognized by Idaho law, that wouldn't be a cruel and

unusual punishment were Creech subjected to it). Put differently, Creech's death sentence itself can't be impugned as a cruel and unusual punishment and therefore isn't invalid, even if a method of carrying it out might be impugnable as such.

Third, because Creech's death sentence and underlying conviction are valid, whether a second attempt to execute him by lethal injection would be a cruel and unusual punishment isn't litigable in a post-conviction action. A post-conviction action—whether the underlying criminal case is capital a non-capital—is only a vehicle for attacking the validity of a conviction or sentence. *See* I.C. § 19-2719(5)(b) ("A successive post-conviction pleading . . . shall be deemed facially insufficient to the extent it alleges matters that . . . would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence."); I.C. § 19-4901(a) (creating the remedy of a post-conviction action to challenge a conviction or sentence); I.C. § 19-4901(b) (stating that the post-conviction remedy "takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence"). Nothing about the failed execution attempt renders Creech's underlying death sentence unreliable or invalid. Creech's claim that a second attempt to execute him by lethal injection would be a cruel and unusual punishment amounts, under the law, to a mere challenge to a proposed method of execution; it isn't a potentially viable challenge to his conviction or death sentence. Hence, it isn't litigable in a post-conviction action. In this way, Idaho's post-conviction law mirrors its federal analog; a method-of-execution claim

that doesn't truly call into question a death sentence's validity isn't litigable in a federal habeas case. *Nance v. Ward*, 597 U.S. 159 (2022).

That said, Creech isn't left with no available means, now or ever, of claiming that a second attempt to execute him by lethal injection would be a cruel and unusual punishment. Eighth Amendment method-of-execution claims like the one he, in substance, makes now are litigable under 42 U.S.C. 1983. *Id.* at 167–69. Further, although section 1983 doesn't allow him to make a method-of-execution claim arising under the provision of the Idaho Constitution that corresponds to the Eighth Amendment's prohibition against cruel and unusual punishments, *see, e.g.*, *Smith v. City & Cnty. of Honolulu*, 887 F.3d 944, 952 (9th Cir. 2018) ("A claim for violation of state law is not cognizable under § 1983.") (internal quotation marks omitted), Idaho's Uniform Declaratory Judgment Act, I.C. §§ 10-1201 to -1217, allows him to do so. Consequently, while this post-conviction action isn't a proper vehicle for determining whether a second attempt at executing Creech by lethal injection would be a cruel and unusual punishment, that question is reachable in an action of another kind.

Given these three conclusions, the Court must dismiss Creech's cruel-and-unusual-punishment claim.

Accordingly,

IT IS ORDERED that the State's motion for summary dismissal is granted. A judgment of dismissal will be entered along with this order.

Jason D. Scott 9/5/2024 9:49:39 AM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on September 5, 2024, I served a copy of this document as follows:

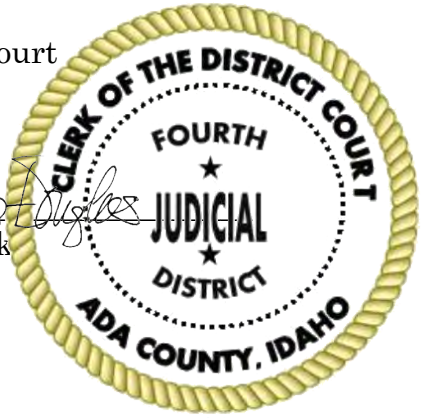
Garth S. McCarty
Ian H. Thomson
DEPUTY STATE APPELLATE PUBLIC DEFENDERS
CAPITAL LITIGATION UNIT
documents@sapd.idaho.gov

Dayton P. Reed
Deputy Prosecuting Attorney
Ada County Prosecuting Attorney — Civil Division
civilpafiles@adacounty.id.gov

TRENT TRIPPLE
Clerk of the District Court

9/5/2024 10:47:04 AM

By: _____
Deputy Court Clerk



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Fourth Judicial District, Ada County
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By: Deputy Clerk - Stokes, Sabrina

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THOMAS EUGENE CREECH, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV01-24-4845 ORDER DENYING MOTION TO RECONSIDER

After surviving an attempt in February 2024 to carry out the death sentence imposed against him decades ago for the crime of first-degree murder, Petitioner Thomas Eugene Creech filed this post-conviction action, claiming that any further attempt to carry out his death sentence would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the Idaho Constitution. The Court rejected these claims in a written decision issued on September 5, 2024. A judgment of dismissal was entered that day.

On September 17, 2024, Creech moved for reconsideration. Two days later, the Court issued a procedural order that set a briefing schedule on the motion and told the parties that a decision on the briefs, without a hearing, was probable. The State filed and served its opposing brief on October 2, 2024. Under the procedural order, Creech wasn't required to file a reply brief, but he was permitted to file one within seven days after service of the State's opposing brief or, in other words, by

October 9, 2024. To the Court's surprise, Creech forwent the opportunity to file a reply brief. In any event, after reviewing Creech's moving papers and the State's opposing brief, the Court elects, in its discretion under I.R.C.P. 7(b)(3)(F), to decide the motion on the briefs. For the reasons that follow, the motion is denied.

Creech's lead argument for reconsideration involves his actual post-conviction claims. His second argument, by contrast, involves unasserted habeas claims he evidently would assert if given a mulligan on pleading his claims.

The Court begins with the lead argument. Hoping to reinvigorate his actual post-conviction claims, Creech seems to say the Court was wrong to conclude that (i) his surviving a humanely conducted execution attempt doesn't render him constitutionally immune from being executed, so his death sentence is valid, and (ii) Idaho's post-conviction statutes don't allow him to challenge the as-applied constitutionality of lethal injection as a method of executing his valid death sentence. (Mem. Supp. Mot. Recons. 3–6.) But, as the Court explained in the decision at issue, Creech's surviving an execution attempt doesn't give him the constitutional right, on either a double-jeopardy theory or a cruel-and-unusual-punishment theory, not to be executed, so his death sentence remains as valid now as it was before the failed execution attempt. (Mem. Decision & Order Mot. Summ. Dismissal 6–12.) And, as the Court also explained in that decision, a challenge to the constitutionality of a particular method of executing a valid death sentence isn't a cognizable post-conviction claim because such a challenge is <u>not</u> to either the

death sentence itself or the underlying conviction. (*Id.* at 12–13.) Creech fails to show that either of these conclusions is erroneous.

Creech's second argument for reconsideration involves, rather than his actual post-conviction claims, unasserted habeas claims supposedly secreted within his petition for post-conviction relief. (Mem. Supp. Mot. Recons. 6–14.) As he says, the statute governing post-conviction proceedings in capital cases states that "[a]ny remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section." I.C. § 19-2719(4). So, he could've sought habeas remedies along with post-conviction remedies. But that doesn't mean he did so. Creech sought no habeas remedies, having envisioned, as the State says, (Opp'n Mot. Recons. 9–15), a post-conviction action, not a dual-purpose action seeking both post-conviction and habeas remedies. His petition—tellingly entitled "PETITION FOR POST-CONVICTION RELIEF," (Pet. Post-Conviction Relief 1)—doesn't satisfy the statutory requirements for habeas petitions, *see* I.C. § 19-4205(2), (5), doesn't cite any habeas statute, and doesn't say he is challenging "[t]he conditions of his confinement," as the habeas statute allows, I.C. § 19-4203(2)(a), and as he claims to have done in his petition, (Mem. Supp. Mot. Recons. 8, 11–14). Indeed, the word "habeas" scarcely passed his lips before judgment was entered against him, and never in articulating a present request for or entitlement to any habeas remedy. Not having sought any habeas remedy before judgment was entered against him, Creech has no grounds to

complain that no habeas remedy was considered or awarded. The Court won't pretend that he asserted habeas claims he simply didn't assert.

Further, a challenge to a sentence's validity seeks a post-conviction remedy, not a habeas remedy. *E.g.*, I.C. § 19-4901(b) (stating that the post-conviction remedy "takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence"); I.C. § 19-4203(4) ("Habeas corpus shall not be used as a substitute for, or in addition to, . . . proceedings under . . . the uniform post-conviction procedures act, chapter 49, title 19, Idaho Code . . . ."); *Lake v. Newcomb*, 140 Idaho 190, 196, 90 P.3d 1272, 1278 (Ct. App. 2004) ("Idaho law provides a number of avenues by which a convicted defendant may challenge a sentence as violating the Eighth Amendment; a habeas corpus action is not one of them."). The invalidation of Creech's death sentence is a remedy that isn't available on a habeas theory.

What's left of the habeas claim he seems to propose, now that judgment has been entered against him, is the notion that lethal injection is a constitutionally impermissible means of executing his death sentence, an attempt at lethal injection having failed. Even if that sort of claim is cognizable under section 19-2403(2)(a) as a challenge to the conditions of his confinement, Creech has never manifested the intention to go where this logic inevitably takes him. If he had brought a habeas claim challenging the as-applied constitutionality of executing him by lethal injection, and were such a claim to succeed, a legal mandate would arise to execute him by firing squad. *See* I.C. § 19-2716(5). Creech has never, even in connection

with his motion to reconsider, reckoned with that reality. It's entirely unclear that Creech actually wishes to assert a claim that, if successful, would set in motion, as a matter of Idaho law, his execution by firing squad. This is a powerful reason not to read into his petition a habeas claim that just isn't there.

Every claim asserted in Creech's post-conviction petition has been adjudicated and properly rejected. Hence, his motion to reconsider is denied.

IT IS SO ORDERED.

Jason D. Scott 10/16/2024 8:54:40 AM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on 10/16/2024, I served a copy of this document as follows:

Garth S. McCarty
Ian H. Thomson
DEPUTY STATE APPELLATE PUBLIC DEFENDERS
CAPITAL LITIGATION UNIT
documents@sapd.idaho.gov

Dayton P. Reed
Deputy Prosecuting Attorney
Ada County Prosecuting Attorney — Civil Division
civilpafiles@adacounty.id.gov

TRENT TRIPPLE
Clerk of the District Court

10/16/2024 9:04:52 AM

By: Sabrina Stokes
Deputy Court Clerk

Electronically Filed
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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Eric Rowell, Deputy Clerk

Nicole Owens
Executive Director
Jonah J. Horwitz, ID Bar No. 10494
Assistant Federal Defender
Federal Defender Services of Idaho
Capital Habeas Unit
702 W. Idaho, Suite 900
Boise, Idaho 83702
Telephone: (208) 331-5530
Facsimile: (208) 331-5559
Email: Jonah_Horwitz@fd.org

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, Petitioner, v. **STATE OF IDAHO**, Respondent.	**CAPITAL CASE** **CASE NO.** CV01-24-04845 (Related to Ada Cnty. No. HCR 10252) **PETITION FOR POST-CONVICTION RELIEF**

1. Pursuant to Idaho Code §§ 19-2719 and 19-4901, Petitioner Thomas Eugene Creech seeks post-conviction relief because it would be cruel and unusual to attempt to execute him after the psychological torture the State recently subjected him to at his botched execution.

I. Procedural Background

2. Mr. Creech was charged with first-degree murder in Ada County

District Court for the murder of David D. Jensen in case number 10252.[1]

3. On August 28, 1981, Mr. Creech entered a guilty plea for the crime.

4. Mr. Creech was originally sentenced to death on January 25, 1982, by Judge Robert Newhouse.

5. The Idaho Supreme Court affirmed the judgment and conviction on May 23, 1983. *See State v. Creech*, 670 P.2d 463 (Idaho 1983).

6. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

7. Relief on a subsequent post-conviction petition was denied by the Idaho Supreme Court on June 20, 1985. *See State v. Creech*, 710 P.2d 502 (Idaho 1985).

8. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

9. On March 27, 1991, the Ninth Circuit granted Mr. Creech habeas relief with respect to his death sentence. *See Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991).

10. The issues raised in those proceedings are summarized in the Ninth Circuit's opinion.

11. The U.S. Supreme Court reversed the Ninth Circuit's judgment in part

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[1] Ada County District Court case no. 10252 has been assigned the current case number of CR-FE-0000-10252.

on March 30, 1993 on claims not relevant now, but left the grant of relief in place. *See Arave v. Creech*, 507 U.S. 463 (1993).

12. As a result of the federal rulings, a new penalty-phase proceeding was held, and a new death sentence was imposed by Judge Newhouse on April 17, 1995.

13. On August 19, 1998, the Idaho Supreme Court upheld the death sentence and affirmed the denial of post-conviction relief. *See State v. Creech*, 966 P.2d 1 (Idaho 1998).

14. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

15. Relief on a subsequent petition for post-conviction relief was denied by the Idaho Supreme Court on June 6, 2002. *See Creech v. State*, 51 P.3d 387 (Idaho 2002).

16. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

17. On August 2, 2002, Mr. Creech filed in Ada County District Court a petition for post-conviction relief combined with a motion to reduce illegal sentence under Idaho Criminal Rule 35, both challenging judge-sentencing under the Sixth Amendment.

18. The petition received case number SPOT-200712D, later converted to CV-PC-2002-22017.

19. The Rule 35 motion was filed in the underlying criminal case number.

20. On April 25, 2003, the Ada County District Court denied relief in the

Rule 35 case.

21. The Idaho Supreme Court dismissed Mr. Creech's appeal from the district judge's decision in the Rule 35 case in a one-page unpublished order issued December 23, 2005.

22. On June 30, 2022, Mr. Creech filed a post-conviction petition in Ada County District Court, which was assigned case number CV-01-22-9424.

23. In that petition, Mr. Creech alleged that his right to effective assistance of counsel was violated at his guilty-plea proceedings and at his resentencing, and that the claims were appropriately reviewed in light of the U.S. Supreme Court's decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

24. The district court dismissed the post-conviction petition as untimely under Idaho Code § 19-2719.

25. On February 9, 2024, the Idaho Supreme Court affirmed the dismissal of the petition. *See Creech v. State*, --- P.3d ----, 2024 WL 510105 (Idaho 2024).

26. On October 13, 2023, Mr. Creech filed a post-conviction petition in Ada County District Court, which was assigned case number CV01-23-16641.

27. In that petition, Mr. Creech alleged that judge-sentencing is unconstitutional under the Eighth Amendment in violation of the evolving standards of decency.

28. On February 9, 2024, the Idaho Supreme Court affirmed the dismissal of the petition. *See Creech v. State*, --- P.3d ----, 2024 WL 510142 (Idaho), *cert. denied*, --- S. Ct. ----, 2024 WL 821349 (2024).

29. After Mr. Creech's resentencing in 1995, he initiated a new federal habeas proceeding in U.S. District Court.

30. The case was assigned number 1:99-cv-224.

31. Relief on the petition as a whole was later denied by the district court and then the Ninth Circuit in *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023).

32. The issues raised in those proceedings are summarized in the Ninth Circuit opinion.

33. On October 10, 2023, the U.S. Supreme Court denied certiorari. *See Creech v. Richardson*, 144 S. Ct. 291 (2023).

II. Claims for Relief

34. Mr. Creech's claims for relief are as follows.

35. Every statement in this petition is incorporated by reference into every part of it.

A. First Claim: It would be cruel and unusual to carry out Mr. Creech's death sentence after the botched execution.

36. It would be cruel and unusual to carry out Mr. Creech's death sentence after the botched execution. *See* U.S. Const., Ams. VIII, XIV; Idaho Cons., Art. I, § 6.

1. Supporting Facts and Argument

37. The State of Idaho has obtained twelve separate death warrants for Mr. Creech. *See* Ex. 1.

38. Those warrants were obtained on March 25, 1976; January 25, 1982; March 24, 1983; September 23, 1983; April 3, 1984; January 10, 1986; July 11,

1986; January 2, 1997; June 9, 1998; November 3, 1998; October 12, 2023; and January 30, 2024.

39. With the exception of the final two warrants, each of them were obtained by the State at a time when it was legally impossible for an execution to be carried out because Mr. Creech had pending a first-round appeal or collateral challenge.

40. In other words, the State of Idaho secured ten death warrants between 1976 and 1998, every single one of which was inevitably destined to be—and was—stayed.

41. Each of the twelve warrants signed in Mr. Creech's case set a specific date for him to be executed on. *See id.*

42. On January 30, 2024, the State obtained the most recent death warrant for Mr. Creech, setting his execution for February 28, 2024. *See* Ex. 2.

43. The Idaho Department of Correction (IDOC) scheduled Mr. Creech's execution to begin at 10:00 AM on February 28, 2024. *See* Ex. 3 at 1.

44. IDOC intended to use a single-drug cocktail of pentobarbital to execute Mr. Creech. *See id.*

45. Mr. Creech was aware in advance of the execution that IDOC intended to use a single-drug cocktail of pentobarbital. *See id.*

46. After the death warrant was issued, Mr. Creech was moved to a cell at F-Block, the freestanding building at IMSI that houses the execution chamber. *See* Ex. 4 at 1.

47. While under warrant, Mr. Creech had to make a number of arrangements for his death.

48. For example, prison staff asked Mr. Creech repeatedly what his autopsy plans were. *See id.* at 4.

49. Mr. Creech found it upsetting to be asked such questions, as he did not wish for anyone to cut into his body. *See id.*

50. Additionally, Mr. Creech was asked to select witnesses for his execution. *See id.*

51. Mr. Creech was likewise asked to select a spiritual advisor for his execution. *See id.*

52. Along the same lines, Mr. Creech was asked how he wished to dispose of his property. *See id.* at 5.

53. On February 7, 2024, the Warden escorted Mr. Creech to the execution chamber to give him a "tour." *Id.* at 3.

54. There, the Warden showed Mr. Creech the spot where his wife of more than twenty-five years, LeAnn Creech, would be sitting and watching her husband be killed. *See id.*

55. The day before his execution, virtually all of Mr. Creech's property was removed from the prison and taken to the offices of his legal team. *See* Ex. 3 at 1.

56. On the day and night leading up to the scheduled execution, Mr. Creech was visited by members of his legal teams and by his wife. *See id.* at 1–2.

57. During those visits, Mr. Creech had in-person goodbyes with thirteen

different members of his legal teams, including attorneys, investigators, and paralegals. *See id.*

58. On the morning of the execution, on February 28, 2024, Mr. Creech called his legal team at the Federal Defenders at 8:07 AM. *See id.* at 2.

59. Mr. Creech's legal team advised him then that all of his requests for stays of execution had been denied. *See id.*

60. For the next twenty-four minutes, Mr. Creech said goodbye to the members of his legal team on the phone. *See id.*

61. Mr. Creech did not attempt to dehydrate himself prior to the execution. *See* Ex. 4 at 1.

62. To the contrary, Mr. Creech drank normally prior to the execution. *See id.*

63. At approximately 10:00 AM on February 28, 2024, Mr. Creech was brought into the execution chamber on a gurney. *See* Ex. 5 at 1.

64. Mr. Creech was placed on the table in the execution chamber where inmates are put to death. *See id.*

65. IDOC had assembled at least fourteen people in two witness rooms to watch Mr. Creech die. *See* Idaho Department of Correction, News, Execution updates, available at https://www.idoc.idaho.gov/content/news/execution-updates.

66. The State's witnesses included Ada County Prosecuting Attorney Jan Bennetts and Idaho Attorney General Raul Labrador, whose offices have been attempting to put Mr. Creech to death for more than forty years. *See id.*

67. Also present for the State were Ada County Sheriff Matt Clifford, counsel for the Governor Jared Larsen, and Dodds Hayden from the Idaho Board of Correction. *See id.*

68. Four members of the media were in the witness gallery to watch the execution. *See id.*

69. Mr. Creech's execution witnesses were his wife, her son, his spiritual advisor, and his counsel. *See* Ex. 5 at 2.

70. When Mr. Creech was placed on the table, he was sure he was going to die. *See* Ex. 4 at 1.

71. Straps were placed on Mr. Creech's arms and across his mid-section. *See* Ex. 5 at 1.

72. At the execution, Mr. Creech was able to make eye contact with his wife while on the table. *See* Ex. 4 at 3.

73. Mr. Creech saw in his wife's face a look of "total devastation." *Id.* at 4.

74. During the execution, Mr. Creech reached his hand out to where his wife was sitting and she placed her own hand on the glass separating the two of them. *See* Ex. 5 at 4.

75. As Mr. Creech explains in his attached declaration, he "can't bear to think of her going through this again." Ex. 4 at 4.

76. The execution team used a blood pressure cuff to try to make Mr. Creech's veins accessible. *See* Ex. 5 at 4.

77. For the same purpose, the execution team applied a warm dressing

and palpitated Mr. Creech's right arm and hand. *See id.*

78. After taking the dressing off, the execution team used a device to search for a vein. *See id.* at 2.

79. The execution team then made at least eight unsuccessful attempts to set an IV line. *See id.* at 2–6.

80. For each attempt, the execution team cleaned Mr. Creech's arm with an alcohol wipe and applied a numbing agent. *See id.*

81. With respect to each attempt, the execution team poked Mr. Creech with a needle at least once. *See id.*

82. During the eight unsuccessful attempts, the execution team jabbed Mr. Creech with needles in both arms, both hands, and both legs. *See id.*

83. While Mr. Creech was being pricked with the needles, he thought the lethal chemicals were being pumped into his body. *See* Ex. 4 at 1.

84. That is, Mr. Creech did not realize that the execution team had failed to set the IV line. *See id.*

85. Mr. Creech believed he could taste the lethal chemicals being injected into his body. *See id.*

86. The needles hurt Mr. Creech. *See id.*

87. Mr. Creech's right elbow was especially pained by the needles. *See id.*

88. Mr. Creech said "ouch" several times. *See id.*

89. However, Mr. Creech tried to conceal his pain for LeAnn's benefit, since she was watching. *See id.*

90. The Warden announced at approximately 10:58 that IDOC was calling off the execution. *See* Ex. 5 at 6.

91. After the failed execution, Mr. Creech has been struggling with the following symptoms.

92. First, Mr. Creech has been dealing with severe paranoia. *See* Ex. 4 at 2.

93. Mr. Creech has been worried that people at the prison will poison his food. *See id.*

94. Similarly, Mr. Creech has been anxious that the State will send a fellow prisoner to attack him and "finish the job." *Id.*

95. Second, Mr. Creech has been having extreme difficulty in sleeping. *See id.* at 4.

96. Mr. Creech has some kind of nightmare every night. *See id.*

97. In many of Mr. Creech's nightmares, he is strapped down on the execution gurney. *See id.*

98. Some of Mr. Creech's nightmares center around an image of his wife LeAnn's face and the way it looked during the execution. *See id.*

99. Third, Mr. Creech has been suffering from delusions.

100. For instance, Mr. Creech will sometimes see people "oozing" through his cell door. *Id.*

101. Other times, Mr. Creech will see lights become brighter when no one else does. *See id.*

102. Fourth, Mr. Creech's memory has been adversely affected.

103. For instance, Mr. Creech does not remember visits that occurred on the day of the execution. *See id.* at 2.

104. Fifth, Mr. Creech has not been eating as much since the execution and has been losing weight. *See id.*

105. Sixth, Mr. Creech has been more on-edge and irritable since the execution. *See id.* at 3.

106. Certain sounds startle and distress Mr. Creech when they did not before. *See id.*

107. For example, the sound of a guard brushing Mr. Creech's door triggers memories of his aunt and uncle molesting him when he was a child. *See id.*

108. The world now feels unreal to Mr. Creech and he often believes he actually died at his execution. *See id.* at 5.

109. Mr. Creech is drawn to the window overlooking the death house, which he watches constantly. *See id.* at 3.

110. The failed execution has traumatized Mr. Creech.

111. It is cruel and unusual for the government to subject a prisoner to "the unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).[2]

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[2] In this petition, all internal quotation marks and citations are omitted, and all alterations are in original unless otherwise noted.

112. "Punishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890).

113. It would constitute the unnecessary and wanton infliction of pain on Mr. Creech to attempt to execute him by any method after subjecting him to the psychological torment of the botched execution on February 28, 2024 and the events leading up to it.

114. Such an attempt would also represent torture and a lingering death.

115. To seek to execute Mr. Creech after the ordeal IDOC put him through in February 2024 would be to "superadd . . . terror, pain, [and] disgrace" to the execution, which is unconstitutional. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

116. It is cruel and unusual to force a man to spend twenty-nine days preparing for his involuntary death, unsuccessfully attempt to kill him in front of a crowd of people, and then try to do the whole thing over again.

117. Thus, it would be cruel and unusual to subject Mr. Creech to another execution attempt.

118. A subsequent execution attempt is made even crueler by the fact that the State of Idaho has previously obtained ten death warrants for Mr. Creech that it knew or should have known would never be carried out, thereby unnecessarily subjecting him to the torture of being told numerous times the date on which he would supposedly be put to his involuntary death.

119. A subsequent execution attempt would be "unusual" in the sense of the Eighth Amendment and Article I, Section 6 in part because of how uncommon it is for a state to attempt to put a prisoner to death after trying and failing to do so previously.

120. Only five other inmates have survived attempted lethal injection executions: Romell Broom, Alva Campbell, Doyle Hamm, Alan Miller, and Kenneth Smith. *See* Death Penalty Information Center, Botched Executions, available at https://deathpenaltyinfo.org/executions/botched-executions.

121. Of those five, only Mr. Smith was later executed, when the State of Alabama used nitrogen gas for the first time in American history. *See* Death Penalty Information Center, Execution Database, available at https://deathpenaltyinfo.org/database/executions.

122. By contrast, more than 1,400 inmates have been successfully executed by lethal injection. *See id.*

123. Thus, if the State of Idaho attempted to execute Mr. Creech again, it would be subjecting him to a punishment that only one other person in the relevant class has suffered, and which more than 99.9% of relevant inmates have been spared.

124. That is an unusual punishment within the meaning of the Eighth Amendment and Article I, Section 6.

2. Claim One is timely.

125. Under Idaho Code § 19-2719(5), a successive post-conviction petition is only permitted where the inmate establishes that he is raising the claim within forty-two days of when he "knew or reasonably should have known of" it. *Pizzuto v. State*, 202 P.3d 642, 649 (Idaho 2008).

126. Mr. Creech can make that showing here.

127. Claim One arises from the unsuccessful attempt to execute Mr. Creech on February 28, 2024.

128. As such, Mr. Creech did not know of Claim One, nor could he have reasonably known of Claim One, until February 28, 2024.

129. Mr. Creech is raising Claim One within forty-two days of February 28, 2024.

130. Claim One is therefore timely.

3. Claim One is not barred by retroactivity rules.

131. Idaho Code § 19-2719(5)(c) provides that a successive post-conviction petition "shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law."

132. The constitutional prohibition against torture and a lingering death is not a new one. *See In re Kemmler*, 136 U.S. at 447; *see also Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (concluding that "punishments of torture . . . are forbidden" by the Eighth Amendment).

133. Because Claim One does not invoke a new rule, § 19-2719(5)(c) is irrelevant.

134. Alternatively, if Claim One is regarded as invoking a new rule, it would be a substantive one.

135. "[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016).

136. A rule is substantive if it "prohibit[s] a certain category of punishment for a class of defendants because of their status." *Welch v. United States*, 578 U.S. 120, 132 (2016).

137. The rule at issue here protects from execution inmates who were already subjected to torturous failed executions.

138. As a consequence, the rule is substantive and retroactive.

139. Under the Supremacy Clause of the U.S. Constitution, *see* U.S. Const., Art. 6, cl. 2, "Idaho Code § 19-2719(5)(c) cannot prevent the" rule of law implicated here "from being applied retroactively in this case." *State v. Pizzuto*, 202 P.3d 642, 650 n.4 (2008).

140. Insofar as Mr. Creech is seeking the benefit of a retroactive rule, he is entitled to do so.

B. Second Claim: It would violate double jeopardy principles to carry out Mr. Creech's death sentence after the botched execution.

141. It would violate double jeopardy principles to carry out Mr. Creech's death sentence after the botched execution. *See* U.S. Const., Am. V, XIV; Idaho Cons., Art. I, § 13.

1. Supporting Facts and Argument

142. The Double Jeopardy Clause of the Fifth Amendment to the United State Constitution provides as follows: "No personal shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

143. The Double Jeopardy Clause in Article I, Section 13 of the Idaho Constitution provides as follows: "No person shall be twice put in jeopardy for the same offense."

144. The Double Jeopardy Clauses prohibit "multiple punishments for the same offense" and bar the government from "attempting a second time to punish criminally . . . for the same offense." *United States v. Halper*, 490 U.S. 435, 441, 442 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93, 101–03 (1997).

145. As set forth above, the State of Idaho began the process of executing Mr. Creech on February 28, 2024 and attempted to put him to death.

146. The State therefore put Mr. Creech "in jeopardy of life or limb" for the murder of Mr. Jensen.

147. As a consequence, another execution attempt using any method would constitute "multiple punishments for the same offense." *Id.* at 441.

148. It would therefore violate double jeopardy principles for the State to again attempt to execute Mr. Creech for the same offense.

149. Because a subsequent execution attempt would violate double jeopardy, Mr. Creech's death sentence is unconstitutional.

2. Claim Two is timely.

150. Under Idaho Code § 19-2719(5), a successive post-conviction petition is only permitted where the inmate establishes that he is raising the claim within forty-two days of when he "knew or reasonably should have known of" it. *Pizzuto*, 202 P.3d at 649.

151. Mr. Creech can make that showing here.

152. Claim Two arises from the unsuccessful attempt to execute Mr. Creech on February 28, 2024.

153. As such, Mr. Creech did not know of Claim Two, nor could he reasonably have known of Claim Two, until February 28, 2024.

154. Mr. Creech is raising Claim Two within forty-two days of February 28, 2024.

155. Claim Two is therefore timely.

3. Claim Two is not barred by retroactivity rules.

156. Idaho Code § 19-2719(5)(c) provides that a successive post-conviction petition "shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law."

157. Claim Two is based on the plain language of the Double Jeopardy Clauses of the U.S. and Idaho Constitutions.

158. As such, Claim Two does not invoke a new rule of law.

159. Section 19-2719(5)(c) is accordingly irrelevant.

III. Amendment may be necessary.

160. This Court has the authority to give Mr. Creech a reasonable amount of time to amend his petition. *See* Idaho Code §§ 19-2719(8), 19-4906(a); *see also* Idaho R. Civ. P. 15(a).

161. Mr. Creech requests that time now and will seek amendment at a later date if necessary.

IV. Discovery may be necessary.

162. In a successive capital post-conviction proceeding, the district court has the authority to allow discovery when it "is necessary to protect an applicant's substantial rights." *Fields v. State*, 17 P.3d 230, 235 (Idaho 2000).

163. Here, as demonstrated above, Mr. Creech has presented all of the information in support of his claims that was reasonably available within the timeframes established by law.

164. However, Mr. Creech anticipates that discovery may be necessary to further support his claims.

165. That is particularly true if the State contests the admissibility of any of Mr. Creech's evidence or questions whether it can be considered for any other reason.

166. For if that occurs, Mr. Creech may well need to access discovery in order to provide further evidence that satisfies the State's demands.

167. Mr. Creech will request that discovery at the appropriate time if it becomes necessary.

V. Relief Sought

168. Based on the foregoing, Mr. Creech respectfully prays for the following forms of relief:

a. That the Court permit amendment within a reasonable time as Mr. Creech continues to investigate and obtain discovery on the claims herein, which he has presented within the demanding timeframes established by law.

b. That the Court set a briefing schedule that allows the claims raised here to be fully litigated with the thorough arguments they require in this capital case.

c. That the Court allow for discovery for the reasons set forth above, which will be elaborated upon further in subsequent pleadings.

d. That the Court hear oral argument on the claims and on any other pleadings that are filed in this case.

e. That the Court, if it is not prepared to grant relief to Mr. Creech on the papers alone, order an evidentiary hearing.

f. That, after considering the pleadings and oral argument, the Court grant the petition and vacate Mr. Creech's death sentence because it

would be unconstitutional for the State to seek to put him to death after the failed execution attempt.

g. That the Court order any other relief that it deems appropriate.

Respectfully submitted this 18th day of March 2024.

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

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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Eric Rowell, Deputy Clerk

ERIK LEHTINEN, I.S.B. #6247
State Appellate Public Defender

GARTH S. McCARTY, I.S.B. #11088
IAN H. THOMSON, I.S.B. #8327
Deputy State Appellate Public Defenders
Capital Litigation Unit
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.idaho.gov

Attorneys for Petitioner Thomas Creech

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

THOMAS EUGENE CREECH, Petitioner, v. STATE OF IDAHO, Respondent.	Case No. CV01-24-4845 (Related to Ada Cty. No. HCR 10252) PETITIONER'S RESPONSE TO STATE'S MOTION FOR SUMMARY DISPOSITION JUDGE JASON D. SCOTT **(CAPITAL CASE)**

Petitioner Thomas Creech, through counsel, responds and objects to the State's *Motion for Summary Disposition* (*hereinafter* State's Motion). This Court should deny the State's Motion and schedule an evidentiary hearing on Mr. Creech's *Petition for Post-Conviction Relief* (*hereinafter* Petition). As grounds:

I. FACTUAL BACKGROUND

On February 28, 2024, Tom Creech survived his execution. When the execution team's efforts to establish peripheral intravenous lines repeatedly failed, the Idaho Department of Correction (IDOC) had to call off the execution after nearly an hour of

attempts.[1] Less than 42 days later, on March 18, 2024, Tom's attorneys at the Capital Habeas Unit (CHU) of the Federal Defender Services of Idaho filed a timely *Petition for Post-Conviction Relief* (*hereinafter* Petition), based on claims arising from Tom's failed execution. The CHU also filed a *Motion for Appointment of the State Appellate Public Defender* and, on March 22, this Court granted that motion and appointed the State Appellate Public Defender (SAPD) to represent Tom in this matter. The State filed its *Answer* to the Petition on April 18, 2024.

This Court held a scheduling hearing on May 9, 2024, and ordered that any motions for summary disposition be filed by July 11, 2024. The State's Motion was timely filed, along with a *Memorandum in Support of Motion for Summary Disposition* (*hereinafter* State's Brief). Pursuant to the Court's scheduling order, Tom's response to the State's Motion is due August 8, 2024, and is thus timely filed.

All other pertinent facts are found in Tom's Petition and are hereby incorporated by reference.

II. ARGUMENT

A. Legal Standards.[2]

At its outset, the State's Brief cites the proper standards for evaluating a motion to summarily dismiss a post-conviction petition, but then abandons those standards and encourages the Court to instead reach a conclusion on the merits. Due to the civil nature of post-conviction proceedings, the fact that the Petitioner is the party making the application, and because the Petition is verified, the "allegations in an application for post-conviction relief **must be deemed to be true** until those allegations are controverted by the State."[3] In evaluating the State's Motion, this Court "must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief **if accepted as**

[1] *See* Petition, pp.6-11.
[2] The Petition accurately states the legal standards to support Tom's claims and those assertions are hereby incorporated by reference. *See* Petition, pp.15-16, 18-19.
[3] *Hall v. State*, 126 Idaho 449, 451 (Ct. App. 1994) (citing *King v. State*, 114 Idaho 442, 445 (Ct. App. 1988) (emphasis added).

true."[4] This remains the legal standard "no matter how incredible [the allegations] may appear."[5]

A mere challenge to Tom's allegations is not sufficient to "controvert" what is contained in his verified petition. "[A] motion to dismiss unsupported by affidavits or other materials, does not controvert the allegations of the petition."[6] And only when a petition's allegations—even if true—"**would not entitle the applicant to relief**, the trial court may dismiss the application without holding an evidentiary hearing."[7] While Tom's allegations must be accepted as true at the summary disposition stage, the Court need not accept his conclusions.[8] "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law."[9]

In this case, the State's Motion is not supported by affidavits or other fact- or evidence-based materials and thus the State has failed to controvert the facts and allegations in Tom's Petition. The only remaining questions, therefore, are whether the Petition's allegations **in the light most favorable to Tom**, are "clearly disproved by the record of the original proceedings" or whether they "do not justify relief as a matter of law." In making these determinations, not only should this Court consider uncontroverted facts to be true, but "[d]isputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party."[10] Therefore, even if this Court identifies facts it considers disputed by the State's Motion, it must still draw all inferences in Tom's favor, which ultimately makes any such

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[4] *Hall v. State*, 172 Idaho 334, 533 P.3d 243, 252 (2023) (citing and quoting *Dunlap v. State* (*Dunlap VI*), 159 Idaho 280, 294 (2015) and *Charboneau v. State*, 140 Idaho 789, 793 (2004)) (internal quotation marks omitted) (emphasis added). *See also Rodriguez v. State*, 171 Idaho 634, 641 (2022); *Thumm v. State*, 165 Idaho 405, 412 (2019).
[5] *Tramel v. State*, 92 Idaho 643, 646 (1968).
[6] *Clark v. State*, 92 Idaho 827, 830 (1969); *see Phillips v. State*, 108 Idaho 405, 407 (1985).
[7] *Kelly v. State*, 149 Idaho 517, 521 (2010) (emphasis added); *also Cooper v. State*, 96 Idaho 542, 545 (1975).
[8] *Kelly*, 149 Idaho at 521.
[9] *Id.*
[10] *Vavold v. State*, 148 Idaho 44, 45 (2009); *accord State v. Dunlap*, 155 Idaho 345, 383 (2013); *Rhoades v. State*, 135 Idaho 299, 300 (2000).

disputed facts the very kinds of "**genuine issues of material fact**" that require proper consideration in an evidentiary hearing.[11]

B. Tom's Petition is Not Time-Barred.

The allegations contained in Tom's Petition arise directly and indisputably from his failed execution on February 28, 2024. At no time prior to that date did he know—nor could he have known—that he was anatomically unsuitable to be executed by lethal injection without the unnecessary and wanton infliction of pain and suffering, nor that the State's designated and chosen procedure would be inadequate and would inflict such pain and suffering. Therefore, he did not know—and could not have known—that his death sentence would result in the State seeking to put him through the execution experience more than once. This knowledge was hard-earned by surviving his failed execution. Thus, because his Petition was filed less than 42 days after that event, he has satisfied the requirements of Idaho Code § 19–2719(3) and (5).

C. Tom's Petition Raises Genuine Issues of Material Fact That Cast Doubt on the Reliability of his Sentence to Death.

The State's argument seems to be that petitions for post-conviction relief may never raise challenges to a death sentence if based on "later factual developments" because they "cannot change the outcome of the proceedings" leading to the original sentence.[12] This argument is quickly dispatched because constitutional challenges to a death sentence that could or should have been made at trial obviously would have changed the outcome of the sentence if they had prevailed. Such challenges are clearly within the scope of post-conviction litigation. The reliability of Tom's sentence is not narrowly limited to the aggravation and mitigation evidence considered by his sentencing judge. It is also a function of the unique facts that render lethal injection unconstitutional in Tom's case. (Besides, it should be noted that a "later factual development" such as the February 28, 2024, determination that Tom's anatomy does not allow for a humane lethal injection execution

[11] *Charboneau v. State*, 140 Idaho, 789, 792 (2004); *see also West v. State*, 123 Idaho 250, 252 (Ct. App. 1993) ("Where the allegations of the pleadings frame a material issue of fact, it is improper to summarily dispose of the case."); *see also Nellsch v. State*, 122 Idaho 426, 430 (1992) ("[W]here issues of material fact exist, an evidentiary hearing must be held.").
[12] State's Brief, pp.5-7.

undoubtedly would have qualified as mitigating evidence had it been known at the time of sentencing.) In this case, it was not known until February 28, 2024, that Tom's body is not anatomically fit for lethal injection or that multiple attempts to execute him would be attempted but—now that these facts are known—it is clear that the death sentence **as applied to Tom** is unconstitutional under the Eighth Amendment and Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

There is no case to support the State's contention that a post-conviction claim challenging the constitutionality of the death sentence fails to meet the "reliability" requirement of Idaho Code § 19–2719(5)(b). Ironically, the State cites *Pizzuto v. State*, 149 Idaho 155 (2010), to establish that I.C. § 19–2719(5)(b) controls post-conviction cases.[13] Two years before that ruling, in *Pizzuto v. State*, 146 Idaho 720 (2008), the Court addressed the very same petitioner's fifth petition for post-conviction relief (filed 17 years after he was sentenced to death) claiming that his death sentence was unconstitutional due to his intellectual disability. While it ultimately denied relief on other grounds, nowhere in its ruling did the Court suggest that I.C. § 19–2719(5)(b) precluded the claim because the challenge to the constitutionality of the death sentence could not have changed the outcome of the original sentencing proceedings. The State also cited *Row v. State*, 145 Idaho 168 (2008), but that case addressed a post-conviction claim that the State had withheld evidence that a prosecutor and detective were present when a witness conducted a recorded phone call with Row prior to trial.[14] The Court found the evidence to be immaterial and insignificant and thus not reasonably probable to have affected the outcome had it been disclosed.[15] The *Row* case did **not** address a claim alleging that her imposed death sentence was unconstitutional. The State's only other citations to authority on this argument are perplexing because they appear to relate to claims alleging withheld evidence and/or ineffective assistance of counsel.[16] At any rate, the State's assertion that Tom's claims, even if true, cannot change the outcome of his sentence are just that: mere assertions unsupported by any authority.

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[13] State's Brief, p.6.
[14] *Row v. State*, 145 Idaho 168, 169-70 (2008).
[15] *Id.* at 173.
[16] *See* State's Brief, p.6.

Although it could not have been known at the time Tom was originally sentenced, it is now known that, as applied to Tom, the state of Idaho's method of execution renders his death sentence unconstitutional in violation of the Eighth Amendment and—now that the state has failed in its first attempt—the Fifth Amendment's Double Jeopardy Clause. The post-conviction framework is the one and only method available for Tom to raise these issues in state court, and the State's argument that he is foreclosed from doing so erroneously infers that no method at all is available to a prisoner whose sentence cannot be carried out without violating the Constitution.

D. The Eighth Amendment: Tom's Petition Raises Genuine Issues of Material Fact That Are Not Disproved by the Record or Precluded as a Matter of Law.

The State argues that Tom's Eighth Amendment claim should be summarily dismissed because of a 77-year-old United States Supreme Court plurality decision that pre-dates the application of the Eighth Amendment to the states.[17] Particularly at the summary disposition stage where this Court must (1) view Tom's claims in the light most favorable to him, (2) presume his factual assertions to be true, and (3) draw inferences in his favor, the State's argument falls well short of establishing a clear legal precedent that would preclude Tom's claim as a matter of law.

In *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the U.S. Supreme Court did **not** find second execution attempts were permissible under the Eighth Amendment. Rather, it was a 4-1-4 plurality decision in which the four-justice plurality engaged in a due process analysis to reach its decision, based on its understanding that the Eighth Amendment was not applicable to the states.[18] The four dissenting justices favored a remand to allow for additional fact finding to determine whether a second execution attempt would violate the Fourteenth Amendment.[19] Casting the deciding vote, Justice Frankfurter concurred with the plurality **only** because he said a second attempt would not violate the Fourteenth Amendment.[20] Justice Frankfurter voiced profound doubts about the humanity

[17] State's Brief, pp.7-13.
[18] *Francis v. Resweber*, 329 U.S. at 462.
[19] *Id.* at 472-81 (Burton, J., with whom Douglas, J., Murphy, J., and Rutledge, J. concur, dissenting).
[20] *Id*. at 469, 471-472 (Frankfurter, J., concurring).

of Louisiana's intent to make a second attempt to execute Willie Francis but said the state's policy was not subject to Eighth Amendment review.[21] Justice Frankfurter thus cast his deciding vote contingent upon his later-nullified belief that the Eighth Amendment was not applicable to the states.[22] It seems extremely probable that his deciding vote would not have even been cast with the plurality at all had he the clairvoyance to know the Supreme Court would rule 15 years later that the Eighth Amendment did indeed apply to the states.[23] Thus, as none of the plurality believed the Eighth Amendment was even applicable to the states, *Francis v. Resweber* makes no Eighth Amendment decision at all with regard to second execution attempts.

In addition, as a plurality decision, *Francis v. Resweber*'s application must be very narrowly limited to the specific points of agreement among the concurring justices.[24] Therefore, at most, *Francis v. Resweber* stands for the narrow agreement between the plurality and Justice Frankfurter that the Eighth Amendment was not applicable to the states—which is no longer the law—and that a second attempt at executing Willie Francis was not prohibited by the Due Process Clause of the Fourteenth Amendment. The State erroneously urges this Court to (1) treat *Francis v. Resweber* as a majority decision and (2) conflate its holding on Fourteenth Amendment grounds with a holding that a second execution attempt does not violate the Eighth Amendment—both of which are false.[25]

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[21] *Id*. at 470, 471 (Frankfurter, J., concurring) ("Strongly drawn as I am to some of the sentiments expressed by my brother Burton, … were I to [join the dissenting opinion,] I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoyed by the Constitution."); *see also* A. Miller and J. Bowman, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS, at pp.126-27 & n.18 (Greenwood Press 1988) (the Willie Francis case weighed "'so heavily on [Justice Frankfurter's] conscience'" that he convinced a former Harvard law school classmate, a leading member of the Louisiana bar, to seek clemency on Francis's behalf), cited in *State v. Broom*, 146 Ohio St. 3d at 84 (O'Neill, J., dissenting.).

[22] *Francis v. Resweber*, 329 U.S. at 470 (Frankfurter, J., concurring).

[23] *Robinson v. California*, 370 U.S. 660 (1962) (holding incarceration to be excessive punishment for the crime of "addiction" to a controlled substance by applying the Eighth Amendment to the states); *see also Estelle v. Gamble*, 429 U.S. 97, 101-02 (1976).

[24] *Marks v. United States*, 430 U.S. 188, 193 (1977).

[25] Even if reading *Francis v. Resweber* in the light most favorable to the State (instead of in the light most favorable to Tom, as the law requires at this stage), the holding only excused (on Fourteenth Amendment grounds) a second execution following a "mechanical

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." To be constitutional, a prisoner's punishment must not be "incompatible with the evolving standards of decency that mark the progress of a maturing society" and may not "involve unnecessary or wanton infliction of pain."[26] To establish that a future harm will violate the Eighth Amendment, "the conditions presenting the risk must be '**sure or very likely** to cause serious illness and needless suffering,' and give rise to 'sufficiently **imminent** dangers.'"[27] Furthermore, punishments are unconstitutionally cruel "when they involve torture or a lingering death"[28] or "involve the unnecessary and wanton infliction of pain."[29]

Tom's Petition includes the claim that the pain, suffering, and distress to which he was subjected on February 28, 2024, to which he will be subjected again in a second execution attempt, and to which he continues to be subjected in the interim, exceeds that which is tolerated by the U.S. Constitution in imposing criminal punishment. It constitutes both physical and psychological torture as it involves the physical pain of repeated needle jabs and vein collapse, as well as the crippling fear of suffering a slow, lingering, and painful death. If the state attempts another intravenous lethal injection on Tom, there is an unacceptably high risk that he will once again experience significant unnecessary pain and suffering in violation of the Eighth Amendment.

Tom's (legally-presumed-to-be-true) allegations include that he endured almost an hour of sustained pain and terror, suffering physically, emotionally and psychologically

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difficulty" with the electric chair during the first attempt, because the "fact of an unforeseeable accident prevented the prompt consummation of sentence." 329 U.S. 459, 461, 464. In Tom's case, there was no "unforeseeable accident," "isolated mishap," or equipment malfunction that can be remedied for the second attempt. In fact, all reports were that the execution team performed as planned. Instead, Tom's anatomy proved unfit for the lethal injection protocol, which is a factual scenario inapt to the facts in *Francis v. Resweber*.

[26] *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *see also* *In re Kemmler*, 136 U.S. 436, 447 (1890) ("[P]unishments are cruel when they involve torture or a lingering death."); *see also Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.'").

[27] *Baze v. Rees*, 553 U.S. 35, 50 (2008) (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)) (emphasis added).

[28] *In re Kemmler*, 136 U.S. 436, 447 (1890).

[29] *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

throughout his failed execution, while a team of masked executioners whose specific purpose was to kill him caused his veins to collapse while probing under his skin for veins suitable to carry lethal chemicals to his heart, with the expectation that by the end of their efforts, Tom would be dead. The procedure resulted in Tom's physical and emotional torture in which Tom was exposed to the prospect of a slow, lingering death. The trauma inflicted on Tom continues and metastasizes in the aftermath as he is forced to remain on death row and anticipate a second attempt to kill him. Now faced with the prospect of a repeated execution, Tom suffers compounding traumatization, concern and anguish about the next execution attempt, which necessarily means he anticipates further complications and a slow, lingering death in the near future.[30]

According to the facts as they currently stand, uncontroverted by the State, there is no alternative method of execution available except to repeat the same process that has already proven to be inhumane—and futile—in Tom's case, with Tom's anatomy. As the state has already demonstrated its incapability of accessing Tom's veins, if it attempts to execute Tom again, there is a "substantial risk of serious harm" that is "objectively intolerable," in violation of the Eighth Amendment.[31] While IDOC's first attempt was arguably conducted in ignorance of Tom's anatomical incompatibility with the lethal injection methods used in this state, the second attempt would be conducted with full knowledge and deliberation. By definition, the State's second attempt to execute Tom would be deliberately indifferent to the certain pain, terror and trauma it now knows will occur. Therefore, the second attempt to execute Tom involves additional, super-added pain and trauma, building on the pain and trauma he already suffered in the first attempt and exacerbating the fear and distress of a second attempt. And the state of Idaho cannot claim to be ignorant of it this time. Having chosen already to inflict significant physical and psychological pain on Tom, a second attempt to do so would deliberately violate his constitutional rights. This time, it would be a foreseeable, deliberate, and intentional

[30] *See* Petition, pp.11-14.
[31] *Baze*, 553 U.S. at 50.

infliction of the very "unnecessary and wanton infliction of pain" that the Eighth Amendment was intended to prohibit.[32]

The State's Brief emphasizes that the sites of the needle-sticks were prepped with a numbing agent, and that Tom was provided a sedative and was "snoring" during the failed execution attempt.[33] The argument that Tom suffered nothing worse than mild discomfort is, of course, audacious coming from a prosecutor writing a brief from the comfort and safety of his government office and who is seeking to end Tom's life. But more to the point of the constitutional implications, Eighth Amendment law does not require the Court to engage in some kind of pain-gradation computation. Rather, the Eighth Amendment prohibits prisoners from being subjected to unnecessary pain, suffering, and/or torture, and does **not** limit unconstitutional conduct to only **physically** painful acts.

The Eighth Amendment indisputably bars some punishments that subject prisoners to psychological suffering as well.[34] In *Trop v. Dulles*, the U.S. Supreme Court held that "denationalization as a punishment"—a purely non-physical form of punishment—violated the Eighth Amendment because "[i]t subjects the individual to a fate of ever-increasing fear and distress."[35] It further entrenched the principle that Eighth Amendment concepts are rooted in "nothing less than the dignity of man," and are subject to "the evolving standards of decency that mark the progress of a maturing society."[36] The Eighth Amendment also forbids both subjecting a prisoner to "circumstance[s] of degradation," and "circumstances of terror, pain or disgrace superadded" to a sentence of death.[37] Accordingly, "[t]here may

[32] *Estelle*, 429 U.S. at 103.
[33] State's Brief, pp.2-3, 10-12.
[34] *See Trop v. Dulles*, 356 U.S. 86 (1958).
[35] *Id*. at 101-02.
[36] *Id*. at 101; *see also, e.g., Hall v. Florida*, 572 U.S. 701, 708 (2014) ("The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' To enforce the Constituion's protection of human dignity, this Court looks to the 'evolving standards of decency that mark the progress of a maturing society.'")
[37] *Weems v. United States*, 217 U.S. 349, 366, 370 (1910).

be involved no physical mistreatment, no primitive torture," nor may a prisoner be forced to endure a "fate of ever-increasing fear and distress."[38]

Tom claims that the effect of the first execution attempt, the distressing anticipation of the second attempt, and the second attempt itself, individually and collectively inflict upon him exactly the kind of psychological and emotional trauma and suffering prohibited as cruel and unusual in *Trop*. The punishment now at issue in Tom's case is a prolonged, cruel and unusual execution after a failed, torturous, traumatic execution attempt—and the ever-increasing fear and distress caused by having to await and face his executioners a second time, followed by another prolonged and traumatic execution attempt. In essence, the State's attempted execution of Tom amounts to a single protracted episode that only began on February 28, 2024, and will last until Tom finally dies after an uncertain number of failed trips to the execution chamber in between.

Society has undergone tremendous change over the last century, and especially since the plurality decision in *Francis v. Resweber*, which was issued only two years after World War II, a decade prior to the end of Jim Crow laws, and 21 years before the moon landing. The several decades since have ushered in widespread understanding of the impact of trauma and corresponding standards of decency in identifying and managing people suffering from trauma. Post Traumatic Stress Disorder (PTSD) itself was not even recognized as a mental health diagnosis until 1980.[39] Psychological trauma such as that which Tom suffered and continues to suffer is better understood in today's matured society, and it requires this Court's consideration through the presentation of evidence. It directly relates to the kind of harm prohibited by the Eighth Amendment and identified in previous cases as impermissible non-physical punishment. Disregarding the psychological cruelty of forcing Tom to face a

[38] *Trop*, 356 U.S. at 101-02 (condemning punitive denationalization); *see also Hudson v. McMillian*, 503 U.S. 1, 26 (1992) ("That is not to say that the injury [violating the Eighth Amendment] must be, or always will be, physical.") (Thomas, J., dissenting); *Weems*, 217 U.S. at 372 ("[I]t must have come to [framers of the Eighth Amendment] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.").

[39] *See* U.S. Department of Veterans Affairs website for "PTSD: National Center for PTSD," https://www.ptsd.va.gov/understand/what/history_ptsd.asp#:~:text=PTSD%20became%20a%20mental%20health,a%20part%20in%20this%20progress. (last visited 8/1/24.)

second execution attempt would be an unreasonable, premature presumption of both the facts and the law in this case.

As society changes, determining what constitutes cruel and unusual punishment also changes. The determination "necessarily embodies a moral judgment" and "must change as the basic mores of society change" with "the evolving standards of decency that mark the progress of a maturing society."[40] Even if Tom's original death sentence was lawful when the trial judge imposed it, it would now, after February 28, 2024, be unlawful and in violation of Tom's constitutional rights for the State to seek again to carry it out. The failed execution attempt alone constituted cruel and unusual punishment in violation of the Eighth Amendment, but several other factors have augmented the "circumstances of terror, pain, or disgrace superadded" to Tom's death sentence.[41] For more than 40 years, Tom has suffered the degrading conditions associated with living on death row awaiting execution, during which time his health has deteriorated. Now, the compounding trauma caused by the relocation to the Death House upon the issuance of every death warrant, the psychological pain and suffering Tom has endured in the aftermath of the failed execution attempt, and the torturous anticipation of the entire procedure repeating itself at some unknown time all combine to cause and amplify Tom's severe physical and mental anguish, constituting a "great increase" of his punishment, contrary to his constitutional rights.[42]

Today, based on the clear holdings of more recent cases that are more pertinent to Tom's case than any surviving significance of *Francis v. Resweber*, these core and sacrosanct fundamental principles are the law of the land: (1) the Eighth Amendment's protection extends to more than just "physically barbarous punishments," but also to punishments that impose psychological cruelty or "subject[] the individual to a fate of ever-increasing fear and distress"; (2) the Constitution's Eighth Amendment prohibition against "cruel and unusual punishments" is binding upon the states; (3) the Eighth Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency, because "the basic concept underlying the Eighth Amendment is nothing less than

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[40] *Kennedy v. Louisiana*, 554 U.S. 407, 419, 420 (2008) (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)); *see also Trop* at 101.
[41] *Weems*, 217 U.S. at 366.
[42] *In re Medley*, 134 U.S. 160, 172 (1890).

the dignity of man"; (4) the gauge of compliance with the Eighth Amendment's protection against a criminal punishment is the "evolving standards of decency that mark the progress of a maturing society."[43] In addition, the U.S. Supreme Court has contemplated that "a series of abortive attempts" to execute a prisoner does indeed raise an Eighth Amendment claim.[44]

The State's Brief relies heavily on a Sixth Circuit Court of Appeals case[45] that embraced *Francis v. Resweber* as grounds to conclude a second execution attempt would not violate the Eighth Amendment.[46] Tom's execution will not occur in the Sixth Circuit and, just as it would be merely an intellectual exercise to criticize the legal wisdom and accuracy of a non-binding case from another federal circuit, it is equally unhelpful for the State to herald it. This is particularly true in determining the issue of summary disposition, where this Court is charged with viewing Tom's claims in the light most favorable to him, and only dismissing Tom's Petition if the clearly settled law explicitly precludes his claims. A tangential comparison to a non-binding Sixth Circuit case may one day make for a persuasive argument on the merits of the Petition, but it does not establish, as a matter of law, that Tom's claims fail to even articulate an arguable basis for relief.

Likewise, whether or not Idaho courts will follow the dubious "precedent" the State claims *Francis v. Resweber* stands for, this is not a ripe argument for the purposes of summary disposition. And when that argument does occur on the merits of Tom's Petition, then this Court will have an opportunity to analyze the significant differences in facts and law between the case of Willie Francis and Tom Creech. In the meantime, the State has failed to establish that settled law precludes Tom from relief when presuming his alleged facts are true as applicable legal standards require.

E. <u>The Double Jeopardy Clause of the Fifth Amendment: Tom's Petition Raises Genuine Issues of Material Fact That Are Not Disproved by the Record or Precluded As a Matter of Law.</u>

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[43] *Robinson*, 370 U.S. at 666; *Trop*, 356 U.S. at 100-02; *see also Estelle*, 429 U.S. at 102.
[44] *Baze*, 553 U.S. at 50; *see also Glass v. Louisiana*, 471 U.S. 1080, 1085-86 (1985) (noting the potential unconstitutionality that "would be presented… if the Court were confronted with 'a series of abortive attempts.'").
[45] *Broom v. Shoop*, 963 F.3d 500 (6th Cir. 2020).
[46] State's Brief, pp.7-15.

The Fifth Amendment mandates that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The U.S. Supreme Court has held that "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; **and multiple punishments for the same offense**."[47] "The Double Jeopardy Clause … 'prohibits … punishing twice, or attempting a second time to punish criminally, for the same offense.'"[48]

Of course, every death sentence inherently involves and legally permits not only the infliction of death, but the legally prescribed process used by the state to inflict death. But there are constitutional limits on how much pain and suffering a prisoner must be forced to endure. Similarly, there are constitutional limits on how prisoners **not sentenced** to death may be treated; the law certainly would not permit such prisoners (not sentenced to death) to be told they will be killed, strapped to a table, surrounded by masked executioners, and poked with needles while anticipating imminent death. This form of punishment is clearly unlawful when imposed upon prisoners not sentenced to death, and it is not constitutionally permissible **except** when conducted as part of a lawful execution. Thus, the fact that Tom has already endured this treatment—which is only lawful for the purpose of carrying out his execution—means he has already been subjected to this part of his death sentence, and a greater punishment than the state would be permitted to impose upon a prisoner not sentenced to death.

The state of Idaho has tried to execute Tom and failed. He has already been placed "in jeopardy of life or limb" once, as a result of the state's failed execution attempt. Tom is blameless for the failure. He was cooperative throughout the process and did nothing to obstruct or delay the process or cause it to fail. Another execution attempt would subject Tom, for the second time and for the same criminal conviction, to the loss of life or limb. Even if Tom's original death sentence was lawful when the trial judge imposed it, it would

[47] *United States v. Halper*, 490 U.S. 435, 441 (1989) (emphasis added); *see also North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds.*
[48] *Halper*, 490 U.S. at 442.

now, after February 28, 2024, be unlawful and in violation of Tom's constitutional rights for the State to seek again to carry it out.

III. CONCLUSION

The State betrays its real strategy in the very first paragraphs of its Brief. By leading with a dramatic emphasis that "[t]he facts underlying this case could not be more chilling,"[49] the State obviously wishes to lure this Court's attention away from the legal standards of summary disposition, which have nothing at all to do with the tragic underlying crime—no matter how chilling it may be. Instead of standing on the laurels of its summary disposition argument, the State simply wants Tom to lose because it views him as undeserving of any consideration of leniency at all. But this is not a sentencing hearing or a clemency review. Here, at the summary disposition stage, the Court is charged simply with determining, in the light most favorable to Tom, drawing all inferences in Tom's favor, and presuming all of Tom's factual assertions to be true, whether there are any genuine issues of material fact upon which to schedule further proceedings for **future consideration** of the merits of his claims. No doubt, this Court has not heard the last of the State's characterizations of Tom's underlying crime as chilling and inexcusable, and those arguments may find a proper home in the later stages of litigation, but they have no place in the argument for summary disposition.

As this Court (1) views the Petition's allegations in the light most favorable to Tom, (2) draws all inferences in Tom's favor, and (3) deems it to be true (for dispositional purposes) that Tom was inflicted with undue physical and psychological pain and suffering, and that repeating the execution will deliberately superadd that pain and suffering, there is no question that this is a genuine issue of material fact as to whether a future execution attempt will constitute cruel and unusual punishment. By the same standards, there is a genuine issue of material fact that Tom has already been subjected to enough of the execution punishment to prohibit a second attempt, pursuant to the Double Jeopardy Clause. Nothing in the record clearly disproves these claims. And finally, drawing all inferences in Tom's favor, his allegations invoke the Eighth Amendment's and the Double Jeopardy Clause's protections, and no settled law explicitly precludes his claims from being heard and

[49] State's Brief, p.2.

considered on their merits. The Court should therefore deny the State's Motion and set this matter for an evidentiary hearing.

DATED this 1st day of August, 2024.

/s/ GARTH S. McCARTY
Garth S. McCarty
Counsel for Mr. Creech

/s/ IAN H. THOMSON
Ian H. Thomson
Counsel for Mr. Creech

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2024, I caused a true and correct copy of the foregoing *Petitioner's Response to State's Motion for Summary Disposition* to be served as follows:

JAN M. BENNETTS
DAYTON REED
ADA COUNTY PROSECUTOR
E-Service: acpocourtdocs@adacounty.id.gov

/s/ Lorena Tapia-Yang
LORENA TAPIA-YANG
Administrative Assistant

Electronically Filed
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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Melanie Gagnepain, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS EUGENE CREECH, **Petitioner-Appellant,** **v.** **STATE OF IDAHO,** **Respondent.**	**NO. 52327-2024** **ADA COUNTY NO. CV01-24-04845** **RESPONDENT'S BRIEF** **(Capital Case)**

RESPONDENT'S BRIEF

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

HONORABLE JASON D. SCOTT
District Judge

RAÚL R. LABRADOR
Attorney General
State of Idaho

JEFF NYE
Deputy Attorney General
Chief, Criminal Law Division

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4539

ATTORNEYS FOR RESPONDENT

ERIC D. FREDERICKSEN
State Appellate Public Defender
322 E. Front Street, Suite 570
Boise, Idaho 83702
(208) 334-2712

IAN THOMSON
GARTH MCCARTY

E-mail: documents@sapd.state.id.us

ATTORNEYS FOR PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant Thomas Eugene Creech ("Creech"), who has been sentenced to death for the 1981 first-degree murder of fellow inmate David Jensen, appeals from the district court's Memorandum Decision and Order on Motion for Summary Dismissal, and Order Denying Motion to Reconsider, dismissing the two claims in his successive Petition for Post-Conviction Relief ("Petition") because they are not cognizable under the Uniform Post-Conviction Procedures Act ("UPCPA") or I.C. § 19-2719, and fail on the merits.

Statement Of Facts And Course Of Proceedings

The facts associated with David's murder, which the Supreme Court stated, "could not be more chilling," Arave v. Creech (Creech IV), 507 U.S. 463, 465 (1993), and the decades of appeals, are well known to this and other courts. *See* Creech v. State (Creech IX), 173 Idaho 396, ---, 543 P.3d 500, 502-03 (2024), Creech v. State (Creech VIII), 173 Idaho 390, ---, 543 P.3d 494, 496-07 (2024), Creech v. Richardson (Creech VII) 59 F.4th 372, 376-82 (9th Cir. 2023), Creech v. State (Creech VI), 137 Idaho 573, 574, 51 P.3d 387, 388 (2002) State v. Creech (Creech V), 132 Idaho 1, 5, 966 P.2d 1, 5 (1998), (Creech IV), 507 U.S. at 465-66, Creech v. Arave (Creech III), 947 F.2d 873, 875 (9th Cir. 1991), State v. Creech (Creech II), 109 Idaho 592, 592-43, 710 P.2d 502, 502-04 (1985), State v. Creech (Creech I), 105 Idaho 362, 364, 670 P.2d 463, 465 (1983).

In 1981, Creech was incarcerated at the maximum security unit of the Idaho State Penitiary serving life sentences for two murders ("Valley County murders").[1] Creech I, 105 Idaho at 364,

[1] Creech was originally sentenced to death for the two murders, State v. Creech, 99 Idaho 779, 780, 589 P.2d 114, 115 (1979), but his death sentences were found to be unconstitutional, and he was resentenced to fixed life, Creech I, 105 Idaho at 364, 670 P.2d at 465.

670 P.2d at 465. On the day in question, "Creech attacked [David], repeatedly hitting him in the head with a battery-filed sock until the plate embedded in his skull shattered, his skull caved in, and blood was splashed on the floors and walls." Creech VII, 59 F.4th at 376-77 (citing Creech I, 105 Idaho 365, 670 P.2d at 465). Creech took breaks during the beating and, after the batteries fell out of the sock, kicked David in the throat while he laid sprawled on the floor. Id. at 377. David died at the hospital as a result of the injuries inflicted by Creech. Id.

Creech pled guilty to David's first-degree murder and was sentenced to death in 1982. Creech VIII, 173 Idaho at ---, 543 P.3d at 496. After this Court affirmed his conviction, death sentence, and denial of post-conviction relief, *see generally* Creech II, 109 Idaho 592, 710 P.2d 502, Creech I, 105 Idaho 362, 670 P.2d 463, Creech sought federal habeas relief, sentencing relief was granted by the Ninth Circuit, *see* Creech III, 947 F.2d at 881-82. Creech was again sentenced to death and filed for post-conviction relief, which was denied, the death sentence and denial of post-conviction relief were affirmed by this Court. *See generally* Creech V, 132 Idaho 1, 966 P.2d 1. Creech sought federal habeas relief, which was denied, with the Ninth Circuit affirming. *See generally* Creech VII, 59 F.4th 372.

On January 30, 2024, the district court signed a death warrant, scheduling Creech's execution for February 28, 2024. (R., pp.56-58.) Josh Tewalt, Director of the Idaho Department of Correction ("IDOC"), reported that, prior to the scheduled execution, Creech took a "mild sedative" "and "actually was able to sleep for at least a little bit prior to" the scheduled execution. (R., p.195.) That morning, members of IDOC's medical team examined Creech and advised Director Tewalt "that they believed and had confidence that they would be able to establish venous access on [ ] Creech." (R., pp.180, 201, 212-13, 223-24.) Once Creech was taken to the execution chamber, at approximately 10:04 a.m., the medical team began attempting to obtain peripheral IV

access. (R., p.185.) Eight times, using different limbs and appendages, the team attempted IV access but were unsuccessful because of "a vein quality issue that made them not confident in their ability to administer chemicals through the IV sight once established." (R., pp.180-81.) Media witnesses confirmed Director Tewalt's account of what occurred once Creech was in the execution room and provide greater details regarding the medical team's attempts to obtain peripherical vein access. (R., pp.185-94.) Because the team was unable to locate a viable peripheral vein to administer the necessary lethal injection, the execution was halted at approximately 10:58 a.m. (R., pp.180-81, 188, 191.)

With the assistance of the Federal defender Services of Idaho, on March 18, 2024, Creech filed another post-conviction petition ("Petition") with several attachments, contending that any attempt to conduct another execution by any method would violate the Double Jeopardy Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause. (R., pp.6-74.) The State Appellate Public Defender ("SAPD") was appointed to represent Creech. (R., pp.80-81.)

The state filed an answer (R., pp.82-100) and a Motion for Summary Dismissal with a supporting brief (R., pp.286-304). After Creech responded (R., pp.305-321), the state replied (R., pp.322-32), and the district court heard oral argument (8-29-2024 Tr., pp.13-57), the court granted the state's motion and denied post-conviction relief because the claims were not cognizable under the UPCPA, I.C. § 19-4901 *et seq.*, and I.C. § 19-2719, the court also denied relief on the merits. (R., pp.348-62). Judgment was entered on September 5, 2024. (R., pp.363-64.) Creech sought reconsideration but only of the district court's determination that the claims were not cognizable under the UPCPA. (R., pp.365-383.) On October 16, 2024, the district court denied Creech's motion. (R., pp.402-07.) Creech filed a timely Notice of Appeal the same day. (R., pp.408-35.)

ISSUES

Creech has stated the issues on appeal as follows:

I. Whether a Post-Conviction Action was the Proper Vehicle for Mr. Creech's Cruel-and-Unusual Punishment Claim[.]

II. Whether Mr. Creech Made a Sufficient Presentation to Justify an Evidentiary Hearing[.]

III. Whether Mr. Creech's Claims are Meritorious[.]

(Brief, p.8.)

The state wishes to rephrase the issues on appeal as follows:

> Because Creech is not challenging his underlying conviction or death sentence, has he failed to establish that his Eighth Amendment and double jeopardy claims are cognizable under the UPCPA or I.C. § 19-2719?

Alternatively,

> Has Creech failed to establish the district court erred by concluding Creech failed to establish a genuine issue of material fact and dismissing his Eighth Amendment and double jeopardy claims?

ARGUMENT

Creech Has Failed To Establish The District Court Erred By Summarily Dismissing His Claims Because They Are Noncognizable Under The UPCPA Or I.C. § 19-2719 And, Alternatively, Because They Fail As A Matter Of Law

A. Introduction

Creech's brief reads like an emotional appeal to prevent the state from carrying out a lawful judgment of death that was initially entered in 1982 and again in 1995. It is unsupported by and, in places contrary to, accepted legal principles. First, while Creech cites the correct standard of review for review of a post-conviction petition that was summarily dismissed (Brief, p.9), he has a fundamental misunderstanding of the standards for summary dismissal and when a petitioner

should receive an evidentiary hearing (Brief, pp.19-20, 23). Second, his arguments regarding the cognizably of his claims under the UPCPA and I.C. § 19-2719, ignore the plain language of the statutes. Third, his arguments regarding his Eighth Amendment claim are not supported by any case from any jurisdiction and fail on the merits. Finally, his cursory argument regarding his double jeopardy claim ignores the purpose behind the Double Jeopardy Clause and is unsupported by direct authority from any jurisdiction.

B. Standard Of Review

Citing State v. Gomez, 126 Idaho 83, 86, 878 P.2d 782, 785 (1994), Creech contends that "[t]he analysis of whether a post-conviction petition is the appropriate vehicle for a claim is conducted independently on appeal." (Brief, p.9.) That is not a standard of review, but merely a recognition that this Court reviews claims of error independently. Nevertheless, that determination appears to be a question of law, and questions of law are reviewed de novo. Pizzuto v. State, 134 Idaho 793, 795, 10 P.3d 742, 745 (2000).

In State v. Hall, 163 Idaho 744, 815, 419 P.3d 1042, 1113 (2018) (quotes and citation omitted), this Court reaffirmed the standard of review in post-conviction cases where summary dismissal is granted:

> In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if accepted as true. A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions. The standard to be applied to a trial court's determination that no material issue of fact exists is the same type of determination as in a summary judgment proceeding.

C. Creech's Claims Are Not Cognizable Under The UPCPA Or I.C. § 19-2719

In its Motion for Summary Dismissal, the state asserted that neither of Creech's claims are cognizable under the UPCPA or I.C. § 19-2719. (R., pp.293-95.) The district court appears to have concluded only Creech's Eighth Amendment claim is non-cognizable. (R., pp.359-60.) The state continues to assert neither claim is cognizable under the UPCPA or I.C. § 19-2719 because neither cast doubt on the underlying conviction or death sentence but challenge the method in which Creech will be executed.

Idaho Code § 19-4901 lists the claims that can be raised in a post-conviction petition. There are only two possible bases for Creech's claims: (1) "That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state", and (2) "That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy." I.C. §§ 19-4901(a)(1) and (7). Creech does not contend his claims are cognizable under I.C. § 19-4901(a)(1), and for good reason, he is not contending either his underlying conviction or death sentence violate the United States or Idaho constitutions. Rather, although it is far from clear, it appears Creech's focus is upon I.C. § 19-4901(a)(7). (Brief, pp.11-18.) In a similar vein, Creech relies upon I.C. § 19-2719(4), which states, "Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section." (Brief, pp.11-18.) He also relies upon I.C. § 19-2719(5), which governs successive post-conviction petitions, and states, "A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the

reliability of the conviction or sentence." However, all three statutes support the state's assertion that his two claims are not cognizable under the UPCPA or I.C. § 19-2719, because Creech is not challenging his underlying sentence but is challenging the fact of his execution by any method.[2]

Creech relies upon Sivak v. State, 134 Idaho 641, 648 8 P.3d 636, 643 (2000), to contend that "reliability" "goes to how strong a petitioner's evidence is – not to whether the claim is categorically suited to post-conviction." (Brief, pp.11-12.) However, Sivak actually supports the state's position. The question in Sivak was whether a claim under Brady v. Maryland, 373 U.S. 83 (1963), was merely cumulative, and therefore, could not be raised in a successive post-conviction case because of I.C. § 19-2719(5)(b). Sivak, 134 Idaho at 647-49, 8 P.3d at 642-44. While this Court held that defense counsel had prior notice of the claim and that the withheld evidence did not "cast doubt on the reliability of Sivak's conviction or sentence under the meaning of I.C. § 19-2719(5)(b)," id. at 648, 8 P.3d at 644, that decision was not based upon the strength of the Brady claim, it was based upon counsel having prior knowledge of the claim. The same was true in Row v. State, 145 Idaho 168, 177 P.3d 382 (2008). In Row, while it appears this Court made a merits determination on another Brady claim, the real issue was whether the claim was known or reasonably could have been known when the first post-conviction petition was filed. Id. at 170-73, 177 P.3d at 384-87. Regardless, both Pizzuto and Row were direct challenges to their underlying convictions and/or sentences, which as explained above, is not what Creech is challenging. In other words, both cases look back to prior proceedings, while Creech is focused

[2] While the state suggests there is no significant difference between I.C. §§ 19-4901(a)(1) and (7) from I.C. §§ 19-2719(4) and (5), should the Court conclude there is a difference, I.C. § 19-2719 acts as modifier and "supersedes the UPCPA to the extent that their provisions conflict." McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999); *see also* Pizzuto v. State, 127 Idaho 469, 470, 903 P.2d 458, 59 (1995) ("Although I.C. § 19-2719 is not part of the [UPCPA], it merely serves to modify post-conviction proceedings in capital cases.").

upon what will happen at his next execution – a future proceeding. And whatever happens as a result of his future execution cannot change the lawfulness of his death sentence that was imposed in 1995.

Creech also relies upon Pizzuto v. State, 146 Idaho 720, 202 P.3d 642 (2008), which involved the filing of a successive petition based upon Atkins v. Virginia, 536 U.S. 304 (2002), which abolished the death penalty for first-degree murderers who are intellectually disabled. (Brief, p.12.) However, because Atkins was retroactive even on collateral review, Pizzuto, 146 Idaho at 728 n.4, 202 P.3d at 650 n.4, this Court had no choice but to review the successive petition. Creech also relies upon several cases that involve a defendant's competency to be executed, which generally cannot be raised until the eve of an execution. (Brief, p.13.) However, none of those cases involve a post-conviction statute akin to Idaho's statutes. And while it is unclear how such a claim could be raised in Idaho, that is a question for another day since Creech is not contending he is incompetent to be executed.

Finally, Creech contends that he utilized a post-conviction petition because of I.C. § 19-2719(4), I.C. § 19-4203(4), and I.C. § 19-4901(b). (Brief, pp.15-17.) However, I.C. § 19-2719(4) involves the initial post-conviction petition, not a successive petition. The same is true with I.C. § 19-4901(b). Regardless, following Creech's argument to its logical conclusion would mean that death-sentenced murderers could never file any kind of challenge in a death penalty case except by direct appeal and post-conviction, which is not true as evidenced by Idaho State Appellate Public Defender v. Fourth Judicial District Court, 173 Idaho 140, 540 P.3d 311 (2023), where this Court granted a writ of mandamus when a district judge refused to appoint a conflict attorney chosen by the SAPD. Moreover, Creech's argument ignores the pleading and service requirements

associated with other causes of action, including habeas and Idaho's Declaratory Judgment Act under I.C. § 10-1201, et seq.

D. Creech's Claims Fail As A Matter Of Law

1. General Legal Standards In Post-Conviction Cases And For Summary Dismissal

"Generally, the Uniform Post-Conviction Procedure Act (UPCPA), I.C. §§ 19-4901 to 4911, applies to post-conviction proceedings." Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376 (2004). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases but acts as a modifier and "supersedes the UPCPA to the extent that their provisions conflict." McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999).

A petition for post-conviction relief initiates a proceeding which is civil in nature. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 149 (1983). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008).

However, a post-conviction petition differs from a complaint in an ordinary civil action because the petition must contain much more than "a short and plain statement of the claim." Dunlap, 141 Idaho at 56. Rather, a post-conviction petition must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached or the petition must state why such supporting evidence is not included with the petition. Hayes v. State, 143 Idaho 88, 91, 137 P.3d 475, 478 (Ct. App. 2006) (citing I.C. § 19-4903). "In other words, the petition must present or be accompanied by admissible evidence supporting its allegations, or it will be subject to dismissal." Id. The district court may also take judicial notice of the records, transcripts and exhibits from the underlying criminal case. Hays v. State, 113 Idaho 736, 739, 747 P.2d 758, 761 (Ct. App. 1987), *aff'd*, 115

Idaho 315, 766 P.2d 785 (1988), *overruled on other grounds*, State v. Guzman, 122 Idaho 981, 842 P.2d 660 (1992), Matthews v. State, 122 Idaho 801, 808, 839 P.2d 1215, 1222 (1992).

Idaho Code § 19-4906(c) provides:

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

"Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56." Yakovac, 145 Idaho at 444, 180 P.2d at 483. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003). "A 'prima facie case' means the 'production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor.'" Pizzuto, 146 Idaho at 728, 202 P.3d at 650 (quoting *Black's Law Dictionary* 1209 (Bryan A. Garner ed., 7th ed., West 1999)). "However, summary dismissal may be appropriate even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (internal quotes and citations omitted). Further, as recently reaffirmed by the supreme court:

> [W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial court is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Id.

Where petitioner's affidavits or other evidence is based upon hearsay rather than personal knowledge, or is otherwise inadmissible, summary disposition is appropriate. Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1993), State v. LePage, 138 Idaho 803, 807, 69 P.3d 1064, 1068 (Ct. App. 2003). Summary dismissal is also appropriate if the allegations do not justify relief as a matter of law. Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

2. Creech Has Waived Any Arguments Based Upon The Idaho Constitution

Creech contends he is entitled to greater protections under the Idaho Constitution. (Brief, pp.27-28, 30.) However, the district court declined to address Creech's claims under the Idaho Constitution because "he doesn't discernably argue that the Idaho Constitution's protections against cruel and unusual punishments exceed those of the federal constitution." (R., p.355.) While Creech has now provided limited argument and authority to support his state constitutional arguments, he is not permitted to raise claims for the first time on appeal that were not presented to the district court. Hairston v. State, 167 Idaho 462, 466, 472 P.3d 44, 48 (2020), Blewett v. Klauser, 129 Idaho 612, 613, 930 P.2d 1357, 1358 (1997) (declining to address a double jeopardy claim under Idaho's Constitution that was raised for the first time on appeal). Moreover, by failing to address the district court's decision, Creech has waived any argument that the court erred by declining to address his state constitutional arguments. Idaho Department of Health and Welfare v. Doe, 163 Idaho 707, 713, 418 P.3d 1216, 1222 (2016) ("Ms. Brennan did not acknowledge the court's reasoning, much less address it. Therefore, this issue is waived, and we will not address it.") Likewise, because Creech failed to present his state constitutional argument in his briefing before the district court and failed to address the court's reasoning rejecting his claim before this Court, any argument regarding greater protections that may be available under Idaho's constitution have been waived.

3. The District Court Properly Dismissed Creech's Eighth Amendment Claim

Creech's argument focuses upon his contention that he has presented sufficient facts in his Petition to establish a genuine issue of material fact that warrants an evidentiary hearing and that his Eighth Amendment claim is not barred as a matter of law. (Brief, pp.19-28.) Creech has misunderstood the standards for summary dismissal of his claim, which are detailed above, particularly since the district court assumed the facts presented in his Petition were true, but still failed as a matter of law.

The only Supreme Court decision to expressly address this issue is Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). Resweber involved a second execution by use of the electric chair, 329 U.S. at 460-61, and involves exceptionally disturbing facts. As explained in copies of affidavits from official witnesses:

> Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: "Take it off. Let me breath." Affidavit of official witness Harold Resweber, dated May 23, 1946.
>
> I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out "Take it off. Let me breath." Then they took the hood from his eyes and unstrapped him.
>
> This boy really got a shock when they turned that machine on. Affidavit of official witness Ignace Doucet, dated May 30, 1946.
>
> After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: "Goodby Willie". At that very moment, Willie Francis' lips puffer out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: "Take it off. Let me breath." Then the switch

> was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve.

Id. at 480 n.2 (Burton, J., dissenting).

Despite these gruesome facts, a plurality of the Court concluded there was no Eighth Amendment violation where the state wanted to use the same method of execution by using an electric chair. Initially, the plurality assumed the Fifth and Eighth Amendments "would be violative of the due process clause of the Fourteenth Amendment," id. at 462, which means the plurality merely assumed those amendments applied to the state through the Fourteenth Amendment, *see* Robinson v. California, 370 U.S. 660 (1962) (Douglas, J. concurring) ("The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1688. *See State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 [1947]. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment."), Hampton v. California, 83 F.4th 754, 765 n.6 (9th Cir. 2023) ("The cruel-and-unusual-punishments clause is incorporated against the states by the Due Process Clause of the Fourteenth Amendment."). The plurality recognized that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." Resweber, 329 U.S. at 463. Nevertheless, and despite the gruesome facts surrounding Francis' first execution attempt, the plurality rejected his Eighth Amendment claim, explaining:

> Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain

> in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

Resweber, 329 U.S. at 464.

Creech discounts the value of Resweber by contending it is a plurality decision and that the concurrence from Justice Frankfurter does not make it binding authority that this Court is required to follow. (Brief, p.24.) However, while Justice Frankfurter's concurrence was based upon the Due Process Clause and not the Eighth Amendment, he still agreed that "this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights." Id. at 468 (Frankfurter, J., concurring). Ultimately, Justice Frankfurter reasoned, "I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice [r]ooted in the traditions and conscience of our people." Id. at 470 (quotes and citation omitted). Nevertheless, Justice Frankfurter recognized his "conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions." Id. at 471. "Since I cannot say that it would be repugnant to the conscience of mankind," Justice Frankfurter agreed a second execution did not violate the Constitution. Id. at 471-72.

While the state acknowledges the fact that the primary decision was based upon a plurality, Justice Frankfurter's concurrence results in the same conclusion: a second execution does not violate the Eighth Amendment because the standards he used are so similar to Eighth Amendment standards. More importantly, irrespective of Creech's speculation that Justice Frankfurter would

not have cast his vote with the plurality if he had known that Eighth Amendment would eventually apply to the states (Brief, p.24), every court to address this issue has relied upon Resweber to conclude that a second execution does not violate the Eighth Amendment. For example, in Broom v. Shoop, 963 F.3d 500, 510-11 (6th Cir. 2020), the court meticulously examined Resweber, and then reasoned:

> For better or for worse, five justices in *Resweber*, agreed that the Constitution does not prohibit a state from executing a prisoner after having already tried—and failed—to execute that prisoner once, so long as the state (1) did not intentionally, or maliciously, inflict unnecessary pain during the first, failed execution, and (2) will not inflict unnecessary pain during the second execution, beyond that inherent in the method of execution itself.

Id. at 512.

More recently, in Smith v. Alabama, 2023 WL 8506490, *2 (Ala. Crim. App. 2023) (unpublished), the defendant raised an Eighth Amendment claim based upon allegations nearly identical to those raised by Creech. Specifically, the defendant contended "that a second attempt to execute him, by any means, would constitute cruel and unusual punishment in violation of the United States and Alabama Constitutions because, he said, the failed attempt to execute him in November 2022 had 'cause[ed] him severe and ongoing physical and psychological distress, including post-traumatic stress disorder.'" Id. Smith continued:

> In an unsuccessful attempt to establish IV lines by the standard procedure, the IV Team jabbed him repeatedly, sliding the catheter needle continuously in and out of his arms and hands, while ignoring his complaints that they were penetrating his muscles, causing severe pain.
>
> Having failed to establish IV access by the standard procedure, the IV Team next tried to do so using a central line procedure.
>
> Sometime before midnight, the IV Team returned to the execution chamber and he was informed that the execution had been aborted.
>
> Mr. Smith continues to be in a great deal of physical and emotional pain from the attempted execution in November.

> DOC's failed attempt to execute Smith has had chronically severe psychological consequences, including severe post-traumatic stress disorder. In addition to difficulty sleeping, Smith's symptoms include nightmares, hypervigilance, hyperarousal, and disassociation (a defense mechanism to suppress threatening thoughts).

Id. at *3 (quotes and brackets omitted).

Relying upon the plurality decision in Resweber, the court concluded the claim was "meritless." Id. at *4. "If it is not cruel and unusual punishment to execute an inmate who has been subjected to a current of electricity in a previous failed execution attempt, then it is certainly not cruel and unusual punishment to execute an inmate after the failure to insert an IV line in a previous failed execution attempt." Id.

Not only has Creech failed to provide any contrary authority (because there is none), the Supreme Court has continued to approvingly cite Resweber. In Baze v. Rees, 553 U.S. 35, 50 (2008), the Court discussed the constitutionality of lethal injection and explained, "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies a cruel and unusual punishment." This is virtually the same language from the plurality decision in Resweber. Indeed, the Court discussed the plurality decision from Resweber, and Justice Frankfurter's concurrence, and concluded "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm." Baze, 553 U.S. at 50 (quotes and citation omitted).

In discussing a claim regarding whether conditions of confinement violated the Eighth Amendment, the Court again relied upon Resweber. *See* Wilson v. Seiter, 501 U.S. 294, 297

(1991). In Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of certiorari), Justice Brennan relied on Resweber to address the question of whether electrocution violates the Eighth Amendment. In Bartkus v. Illinois, 359 U.S. 121, 128 (1959), the Court cited Resweber, and concluded, "Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment." Even in the landmark case of Gregg v. Georgia, 428 U.S. 153, 170-71 (1976), the Court noted Resweber, 329 U.S. at 459, and concluded it held that a second attempt at electrocution did not violate the Eighth Amendment "since failure of [the] initial execution attempt was 'an unforeseeable accident' and '(t)here (was no purpose to inflict unnecessary pain nor any unnecessary pain involved int eh proposed execution)."

As a result of the numerous Supreme Court decisions approving Resweber, this Court is bound by its holding that a second execution does not violate the Eighth Amendment. However, even if Resweber does not bind this Court, it is exceptionally persuasive, especially since Creech has failed to cite any contrary authority, every court to address the issue has relied upon Resweber to conclude a second execution does not violate the Eighth Amendment, and it has been cited approvingly in subsequent Supreme Court decisions.

Creech also contends that, because Resweber is a "77-year-old plurality decision" and Broom is "a nonbinding Sixth Circuit decision," the district court erred by granting summary dismissal because they are not "a settled matter of law." (Brief, pp.23-24.) However, Idaho's summary dismissal standards say nothing about "a settled matter of law." Rather, the question is only whether the allegations do not justify relief as a matter of law. Stuart, 118 Idaho at 869, 801

P.2d at 1220 (1990). Based upon Resweber and the numerous cases upon that rely upon it, Creech's contentions do not justify relief as a matter of law.

Creech contends that this Court should "stop this slow-moving horror show." (Brief, p.28.) However, the attempted execution was anything but a "horror show," especially when considered against the facts in Resweber, which are virtually ignored by Creech. Creech submitted the statements of Director Tewalt, who explained that prior to Creech being taken into the execution room, the medical team did a physical assessment of Creech and communicated that the team "believed and had confidence that they would be able to establish venous access of Mr. Creech." (R., p.180, *see also* pp.223-24.) Creech was provided a sedative prior to the execution and "was very tired when he was brought into the execution chamber." (R., p.195.) Creech's attorney, Deborah Czuba, explained that, after Creech was taken to the execution table and strapped onto the table, the lead execution team member asked Creech if the "restraints were too tight, asked if he had any problems breathing, and asked him if there were any numbness or tingling in his arms." (R., pp.69-70.) "They applied a blood pressure cuff to his right arm to 'get the veins to come up,'" "applied a warm dressing to [his] arm, then palpitated his right arm and hand" and "started using a light device to confirm a vein." (R., p.70.) Each time the team attempted to gain peripheral access, this same procedure was used, which also included cleaning the IV sight with an alcohol prep, applying a numbing agent, and agitating the skin to help the numbing agent take affect. (R., pp.70-76.) "During the process Mr. Creech was making intermittent 'snoring' noises." (R., p.,71.) During the seventh attempt, Creech said "ow," and after the eighth attempt he "was complaining of pain in his legs." (R., pp.73-74.)

Independent media witnesses confirmed these procedures and some of Creech's reactions to the medical team attempting to gain peripheral vein access (R., pp.184-94), especially that

Creech made a "snoring noise," "would go in and out of his sleep," "didn't seem like he was in pain," and, at best, had "[m]ild discomfort … from time to time" (R., pp.190-91, 193.) Yes, toward the end of the process, Creech experienced some discomfort in his leg, which Director Tewalt explained was a "leg cramp. And the medical team worked to try to assuage that." (R., p.195.)

Rather than continue the process, a decision was made to terminate the execution approximately 45 minutes after it commenced. (R., p.74, 188, 191.) As explained by Director Tewalt:

> I think the process worked as intended to prevent a failure. The worst thing the State could have done is to try to proceed with an execution without having confidence or the ability to administer those chemicals in a way that honored our comment and responsibility to adhere to the 8th amendment and preventing cruel and unusual punishment.

(R., p.214.)

Contrary to Creech's repeated claims that the attempted execution was "botched," at worst the attempted execution was merely a failed execution. Botched means something was unsuccessful because it was poorly done or spoiled by mistakes. https://www.merriam-webster.com/dictionary/botched. There is no evidence supporting the notion that the attempted execution was "poorly done or spoiled by mistakes." Indeed, Director Tewalt recognized the possibility that continuing with the execution could result in a "botched execution," stating it was necessary "to establish an IV that they have confidence in that we'll be able to deliver the quantity of chemicals necessary to carry out death by lethal injection without having infiltration, without having other adverse effects that will and has led to botched executions that have been noted across the country." (R., p.233.) More importantly, Creech's "evidence" fails to establish the state "intentionally, or maliciously, inflict[ed] unnecessary pain during the first, failed execution," Broom, 963 F.3d at 512, let alone "the unnecessary and wanton infliction of pain," Wilson, 501

U.S. at 298, or "torture or a lingering death," In re Kemmler, 136 U.S. 436, 447 (1890). Rather, this was a situation where Creech experienced mild discomfort from the medical team attempting to find a peripheral vein after he was given a sedative and numbing agent.

The state acknowledges that Creech's declaration describes the events in a slightly different manner. Specifically, Creech contends, "All the times they stuck me with needles hurt pretty bad. When they were sticking my right elbow they really dug into my arm. I remember saying 'ouch' a few times and once the pain made my leg jump." (R., p.63.) However, Creech's recollection months after the attempted execution should be taken with a grain of salt. Not only is it contrary to his attorney's and the independent witnesses' recollections, but he has "been forgetting lots of other things." (R., p.64.) Indeed, he contends he could not even remember meeting with his wife immediately after the failed attempt. (R., pp.63-64.) However, even if Creech's declaration is taken at face value, it fails to establish that what occurred was done intentionally or maliciously. *See* Broom, 963 F.3d at 512. At best, Creech was just the "unfortunate victim" of an "accident," akin to a prisoner injured by a "fire in the cell block." Resweber, 329 U.S. at 464.

Creech also failed to provide any evidence that the state will inflict unnecessary pain during a second execution. *See* Broom, 963 F.3d at 512. Indeed, he has failed to even address this issue in his opening brief. To the extent Creech is relying upon Trop v. Dulles, 356 U.S. 86, 101-02 (1958), it involves an entirely different situation.[3] Specifically, it involved the question of "whether [the] forfeiture of citizenship comports with the Constitution." Id. at 87. Relying upon facts unique to citizenship, the Court explained:

[3] Creech also appears to rely upon the contention that he suffers from Post Traumatic Stress Disorder ("PTSD"). (Brief, p.27.) This is the first time Creech has made such an allegation and there is absolutely nothing in the record establishing anyone, let alone an expert, has made such a diagnosis.

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

Id. at 101-02 (footnote omitted).

Of course, this rationale has never been extended to a case involving the death penalty, let alone a second execution. Rather, Creech's case is more appropriately governed by Baze, 553 U.S. at 48 (quotes and brackets omitted), where the Court explained that the only "forbidden punishments" require "the deliberate infliction of pain for the sake of pain superadding pain to the death sentence through torture and the like." Creech has failed to establish that a second execution will result in superadded pain or torture and the like. Indeed, it appears the state will not even be using peripheral veins, but a central line, which is a significantly different procedure than was used at the attempted execution. *See* Clark Corbin, Idaho Capital Sun, Oct. 15, 2024.

Finally, Creech contends "[t]here is nothing stopping this Court from having the same foresight and the same courage of its convictions when it comes to *Resweber* and the cruelty of state actors killing a man after failing to do so once before." (Brief, pp.26-27.) However, real "foresight and courage" requires the Court to follow the law as established by the Supreme Court and other jurisdictions, something this Court has previously done with Eighth Amendment claims. *See e.g.*, State v. Abdullah, 158 Idaho 386, 455-56, 348 P.3d 1, 70-71 (2015) (rejecting a claim that the death penalty violates the Eighth Amendment), Hairston v. State, 167 Idaho 462, 466-67, 472

P.3d 44, 48-49 (2020) (rejecting a claim that evolving standards of decency prohibit the execution of murderers under the age of twenty-one).

Because Creech has failed to demonstrate the district court erred by summarily dismissing his Eighth Amendment claim, the court's decision must be affirmed.

4. The District Court Properly Dismissed Creech's Double Jeopardy Claim

Creech ignores the underlying legal principles and policies associated with the Double Jeopardy Clause and focuses almost exclusively, in very cursory fashion, upon the district court's reliance on Broom, 963 F.3d at 514-15. (Brief, pp.28-30.) Stating the obvious, the state recognizes that Broom is not binding on this Court, but its analysis is soundly based and provides very persuasive authority, especially since this is an issue of first impression before this Court, and this Court often relies upon cases from other jurisdictions when addressing issues of first impression. *See e.g.*, Schriver v. Raptosh, --- Idaho ---, 2024 WL 4395178, *6 (2024), State v. Rodriguez, 173 Idaho 487, ---, 545 P.3d 1, 8 (2024), State v. Pendleton, 172 Idaho 825, ---, 537 P.3d 66, 73-75 (2023).

"[T]he Double Jeopardy Clause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Schiro v. Farley, 510 U.S. 222, 229 (1994) (quotes omitted), *see also* Jones v. Thomas, 491 U.S. 376, 380-81 (1989). Although unstated by Creech, only the third protection applies in this case. As explained in Jones, 491 U.S. at 381, in addressing the third protection, the "answer turns on the interest that the Double Jeopardy Clause seeks to protect." The Court explained, "Our cases establish that in the multiple punishments context, that interest is limited to ensuring that the total punishment did not exceed that authorized by the legislature. The purpose is to ensure that

sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." Id. (quotes and citations omitted). "[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Missouri v. Hunter, 459 U.S. 359, 366 (1983).

Here, the punishment for first-degree murder includes the death penalty, I.C. § 18-4004, which obviously cannot be completed until an execution takes place and the murderer has been pronounced dead. To circumvent this conclusion, Creech contends he "underwent actual suffering as punishment that goes above and beyond anything that would be legally permissible except as part of an execution." (Brief, p.29) (emphasis omitted). But he fails to cite any authority that the alleged suffering associated with an execution is "punishment" as contemplated by the Double Jeopardy Clause, and failing to cite authority results in a waiver of the argument. Abdullah, 158 Idaho at 487, 348 P.3d at 102. Regardless, the argument is nonsensical because most, if not all, defendants endure "actual suffering" associated with the sentence, whether it be incarceration or even probation.

In Broom, 963 F.3d at 514-15, the court concluded that it would rely upon the "logical application of the more general Double Jeopardy Clause precedent," which "suggests that the Clause does not prohibit a second attempt at execution," "because, when a capital-punishment state attempts to execute a death-row inmate a second time, … the state is neither (1) attempting to subject that defendant to a second trial following an acquittal, nor (2) attempting to impose a 'second' punishment beyond that permitted by the legislature."

Here, the state is not asking to impose a greater punishment beyond what was prescribed by the Legislature but is merely seeking to comply with a lawful judgment imposed in 1995 that

did not exceed the punishment prescribed by I.C. § 18-4004. In short, Creech has failed to cite any case (because none exists) that holds a second execution violates the Double Jeopardy Clause. Indeed, Creech shows his true colors when he contends that "[t]he district court's reliance on a non-binding Sixth Circuit case to dispense with the claim as if there was no possible basis for relief was insufficient to justify dismissal without a hearing," (Brief, p.30.) In other words, even though this is a question of law, Creech wants to further delay his execution so the district court can conduct an unwarranted evidentiary hearing. This Court should not tolerate Creech's attempts at further delay and affirm the district court.

CONCLUSION

The state respectfully requests that the district court's decision denying relief and dismissing Creech's Petition be affirmed on appeal.

DATED this 24th day of October, 2024.

/s/ *L. LaMont Anderson*
L. LaMONT ANDERSON
Lead Deputy Attorney General,
Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 24th day of October, 2024, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Ian Thomson Garth McCarty 322 E. Front Street, Suite 570 Boise, Idaho 83702 Phone: (208) 334-2712 Fax: (208) 334-2985 E-mail: documents@sapd.idaho.gov	_____ U.S. Mail _____ Hand Delivery _____ Overnight Mail _____ E-mail __X__ Electronic Court Filing

/s/ *L. LaMont Anderson*
L. LaMONT ANDERSON
Lead Deputy Attorney General,
Capital Litigation Unit