No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

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

Respondents.

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

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APPLICATION FOR STAY OF EXECUTION

Directed to the Honorable Elena Kagan as Circuit Justice for the Ninth Circuit

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

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To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Thomas E. Creech respectfully requests a stay of execution while his petition for certiorari is pending pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f).

A STAY OF EXECUTION IS WARRANTED

In deciding the present application, the Court must apply four factors: 1) whether Mr. Creech "has made a strong showing that he is likely to succeed on the merits"; 2) whether he "will be irreparably injured absent a stay"; 3) whether a "stay will substantially injure" the State; and 4) "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[1] As set forth below, all four factors are satisfied.

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

To begin, Mr. Creech has made a strong showing that he is likely to succeed on the merits, i.e., there is "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and there is "a significant possibility of reversal of the lower court's decision." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

As set forth in his certiorari petition, the underlying claim here is that a prosecutor, Jill Longhurst, made two false bombshell allegations at a capital

[1] Unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

commutation hearing: 1) that the fifty-year-old murder of Daniel Walker in San Bernardino, California had just been solved and definitively attributed to Mr. Creech, who would get away with the crime if he escaped execution; and 2) that the murder weapon in the Idaho case bore Mr. Creech's name on it, which proved that he staged the prison fight leading to the offense, making it more calculated and thus more aggravated. The certiorari petition establishes in detail how both statements by Ms. Longhurst were lies. Nothing had been solved in the Walker case. Instead, Ms. Longhurst dusted off an outlandish "confession" given and rejected by law enforcement fifty years ago in which Mr. Creech took credit for various demonstrably fictitious murders, and she repackaged it as a smoking gun. And the photograph of the murder weapon wasn't of the murder weapon after all.

The certiorari petition further lays out how the prosecutors haven't disputed any of the above. They have declined to defend in court their claim that the Walker case was solved. And they have admitted that the photograph shown at the commutation hearing was not of the murder weapon. Rather than maintain the veracity of Ms. Longhurst's claims, the prosecutors have focused on establishing as a legal matter that they were permitted by the Due Process Clause to present false evidence at a clemency proceeding. Thus, the only issue for which Mr. Creech must establish "a reasonable probability" of certiorari being granted and "a significant possibility of reversal of the lower court's decision," *Barefoot*, 463 U.S. at 895, is on the legal question of whether the prosecutors are right in their interpretation of due process.

Although Mr. Creech acknowledges that the law is unsettled on the matter (which is why certiorari is warranted), he has the better of the two positions and consequently there is a significant possibility of reversal. The seminal opinion from the Court in this area of law is *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998). That was a fractured decision in which no opinion commanded a majority. It is commonly understood that the controlling opinion in the case is Justice O'Connor's concurrence. *See, e.g.*, *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014).

Justice O'Connor cited approvingly to two pages from Justice Stevens' writing in the case that contained the statement that "the deliberate fabrication of false evidence would [not] be constitutionally acceptable" at a clemency proceeding. *Woodard*, 523 U.S. at 289, 291. Justice Stevens explained that his view in that regard was shared by Justice O'Connor, and she did not disagree with the assessment. *See id.* at 291. Thus, Justice Stevens' stance on the presentation of false evidence in clemency was incorporated into Justice O'Connor's controlling writing there and it became the law. It follows that due process forbids the presentation of false evidence in clemency proceedings.

At a bare minimum, Mr. Creech's claims are surely "plausib[le]," and that should be enough to satisfy this factor for purposes of a stay of execution. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers).

II. The balance of harms weighs in Mr. Creech's favor.

The second and third factors—whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding—also weigh in Mr. Creech's favor. As for the harm to Mr. Creech, he will be executed in the absence of a stay, which obviously constitutes an irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (observing that this factor "is necessarily present in capital cases"); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice) (granting a stay of execution and noting the "obviously irreversible nature of the death penalty"). This Court has granted stays to prevent far less severe consequences. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (issuing a stay to stop a court from broadcasting a trial, as it would have chilled testimony). A stay to prevent a potentially unconstitutional execution is a fortiori warranted. In addition, the denial of a stay would cause irreparable harm by "effectively depriv[ing] this Court of jurisdiction to consider the" petition. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay because the absence of one "may have the practical consequence of rendering the proceeding moot").

Plus, a stay will not substantially injure the opposing parties. Mr. Creech has been on death row for this offense for more than forty years. *See State v. Creech*, 670 P.2d 463 (Idaho 1983). A brief stay of execution to allow the certiorari proceedings to reach their natural conclusion without the artificial pressure of a pending death

warrant will do the State no harm. *See Mikutaitis*, 478 U.S. at 1309 (Stevens, J., in chambers) (emphasizing that the government would not "be significantly prejudiced by an additional short delay").

When it comes to any questions of delay, Mr. Creech has acted with exceeding promptness in bringing this petition. From the point when this claim became ripe to the present, it has been less than a month. By no measure has Mr. Creech "delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). He filed his complaint with the district court on February 5, 2024, one week after the Idaho Commission of Pardons and Parole denied his petition for clemency on January 29, 2024. Ten days before that, on January 19, 2024, the Commission held Mr. Creech's commutation hearing when the prosecution presented false evidence—this was the first time Mr. Creech became aware of the false allegations, as that was when they were sprung on him. Before that day, there was not a single reference to Mr. Walker in his counsel's comprehensive file, and the prosecution had never made any such allegations in the fifty years since that murder. Dist. Ct. Dkt. 4-2 at 2. In short, counsel acted to pursue Mr. Creech's remedies in court for Ms. Longhurst's misrepresentations as soon as they possibly could have.

The balancing of harms should also take into account who is controlling the key information here and how they are using that control. That is, the State has a monopoly on everything, and it is abusing that monopoly to facilitate an execution while revealing as little information as possible. For instance, the State has possession of the murder weapon. Even now, the prosecutors are claiming that the

photograph shown to the Parole Commission was intended to make a point about the murder weapon and its connection to Mr. Creech. Yet the prosecutors have, remarkably, never shown the Commission, the courts, or Mr. Creech's counsel a photograph of that weapon, choosing instead to present everyone with two apparently random socks. In that same regard, it is relevant that undersigned counsel's predecessors sought access to examine the murder weapon back in 1999 and were refused by the State. Dist. Ct. Dkt. 5-11. The result being only the prosecution knows if there is any name on the actual murder weapon. If the Court denies a stay and Mr. Creech is executed, the prosecution will be able to destroy the murder weapon and hide the truth forever. *See Lonchar v. Thomas*, 517 U.S. 314, 319 (1996) (indicating that an execution will moot a death row prisoner's case in the habeas context).

The same is true about the Walker case. Ms. Longhurst and her colleagues have signaled that there is information about Mr. Creech's guilt in the Walker murder that only they possess. *See, e.g.*, Dist. Ct. Dkt. 4-3. At the same time, the prosecutors wish to use this supposed secret information to hasten Mr. Creech's trip to the execution chamber, by convincing the Commission that those in a position to know have deemed him guilty. The prosecutors here are essentially exploiting their position as law enforcement officers to put a man to death based on charges that have never even been filed, let alone proven. It is difficult to imagine a grosser abuse of power, and one that shifts the balance of equities more conclusively in an applicant's favor.

Mr. Creech has been diligent in pursuing information through public record requests and discovery, Dist. Ct. Dkts. 10, 11, but has either been denied or stonewalled everywhere he goes, Dist. Ct. Dkt. 4-10. He should not be punished with his life because the State has chosen to hide the information that would most definitively expose its own misconduct.

In balancing the equities, the Court should also consider the prosecutors' extraordinarily obstructionist course of conduct during the litigation of this case. The prosecutors chose not to include either the explosive Walker allegations or the sock photograph in the materials they made available to Mr. Creech's counsel prior to the hearing. They chose to reveal those items for the first time at the hearing. They chose that same day to issue a press release to the world claiming to have solved the Walker case. They chose to lay in the weeds during extensive correspondence after the hearing about the sock slide and acquiesce in characterizations of it as the murder weapon, thus leaving both Mr. Creech and the Commission with the impression the slide did depict the murder weapon. They then chose to describe the slide to the district court as the sock that matched the murder weapon. Later, they chose to describe the slide to the Ninth Circuit as a pair of socks that both came from Mr. Creech's cell. They chose to tell the Ninth Circuit that Mr. Creech shouldn't be able to file a single pleading on appeal. They chose to not produce a photograph of the actual murder weapon. They chose to not produce the information that supposedly led to Mr. Walker's murder being solved. And they

chose throughout not to produce any statement by the prosecutor, Ms. Longhurst, whose lies led to all of the above.

These were all choices made by the prosecutors. At every stage they have chosen evasion and gamesmanship over honesty and transparency. In doing so, the prosecutors made a calculated gamble. They thought they could get away with it because of the judicial system's current reluctance to stay executions under any circumstances. Thus, if they made enough absurd statements about what was on the PowerPoint slide it would muddy the waters such that that no court would step in, Mr. Creech would be executed, and any meaningful scrutiny of the prosecutor's misconduct would be buried along with him. Mr. Creech respectfully asks the Court to prove the prosecutors' gamble wrong.

III. The public has an interest in the claim being heard.

Turning to the final factor, the public has a powerful interest in this claim being heard.

The public's interest in finality now is outweighed by the "public interest in truth and fairness," *Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981), given the gravity of the presentation of false evidence by a prosecutor in a quasi-judicial arena where a man's fate was decided. Prosecutors ostensibly act on the public's behalf. For nearly a century, this Court has reminded prosecutors that when they do so their lawful aim is to not "win a case" at all costs but to ensure that "justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The public is severely harmed when, instead of heeding that higher calling, a prosecutor decides that it is more important to secure an execution than to play by the rules.

Mr. Creech acknowledges the Court's cases on the important interest victims have in the finality of judgments, but they cut a different way in this unusual scenario. Although the prosecutors here have loudly perpetuated the fiction that they are the ambassadors of all of the victims, they plainly are not. *See, e.g.*, Dist. Ct. Dkt. 5-12 at 2 (containing Deputy Attorney General L. LaMont Anderson's claim to be speaking on behalf of all of "the many victims in this case" and their families in opposing a brief delay of the commutation proceedings for Mr. Creech's counsel to examine the new Walker allegations).

There is certainly one significant victim the prosecutors are not representing. That is Mr. Walker's family. Mr. Walker's brother Doug has publicly made it clear that his chief desire, like that of anyone whose loved one is taken from them, is to know the truth about what happened. *See* Dist. Ct. Dkt. 15-11 at 3 (Doug Walker writing: "A twist of fate story of a life cut short, and an attempt to set the record straight."). There are ways to get to the truth of what happened to Daniel Walker. Prosecutors could charge Mr. Creech for his death. That is the principle avenue through which the American people have decided to settle facts about crimes: through public trials in court with a full adversarial process where evidence is screened by a judge and then weighed by a jury of one's peers that must vote unanimously to convict under the reasonable-doubt standard. Or there could be discovery in this very case, as Mr. Creech sought and was denied below.

But the prosecutors do not want a trial or discovery or any fact-finding, because the prosecutors' interest is not in determining what happened. The

prosecutors want Mr. Creech killed and they saw in the Walker case a tragedy to exploit to that end. They could casually announce on the spot at a hearing that Mr. Creech was guilty of the Walker murder with nothing to show for it to but a PowerPoint slide. They could reap all the benefits such a sensationalistic announcement would bring. And they could avoid anyone seriously looking into the matter because they knew that the day after clemency was denied they would ask a judge to schedule Mr. Creech's death for four weeks in the future. The prosecutors' attempt to charge, convict, and execute Mr. Creech for the Walker murder within the space of three months on the basis of bogus stale evidence and with no process whatsoever is entirely a product of their desire to put the plaintiff to death. They do not speak for Doug Walker in that crusade, or for anyone who actually wishes to uncover the truth of what happened to Daniel Walker. The State here is pursuing death solely because a single elected prosecutor made a decision thirty years ago that Mr. Creech should be executed and the Attorney General and Ada County now consider it the only outcome for which they get a "win." That is the prosecutors' own interest—it is not the public's.

CONCLUSION

Whatever one's views on the death penalty, if due process means anything it means that the government cannot use false evidence to put a man to death and through the execution ensure that no light is ever shined on its actions. The Court should grant the application and stay Mr. Creech's execution pending a decision on his certiorari petition.

Respectfully submitted this 26th day of February 2024.

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