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

PETITION FOR WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

At Petitioner's commutation hearing the prosecutor arguing against clemency—Jill Longhurst—told the Idaho Parole Commission that a fifty-year-old murder had been solved, Mr. Creech had been determined guilty based on new evidence, and if he wasn't executed he would be getting away with it. Those were all lies. The case hadn't been solved and there was no new evidence. There was only a bogus statement from Mr. Creech to law enforcement that had been fully vetted five decades earlier and rightly rejected as incredible, since it took credit for multiple murders that never happened.

At the same hearing, Ms. Longhurst also presented a photograph that purported to show that the murder weapon—a sock filled with batteries—bore Mr. Creech's name on it. The State now admits that the photograph depicted no such thing and instead reflected two random socks from Mr. Creech's cell that have no connection whatsoever to the weapon—which the prosecutors have never made available to anyone.

The questions presented are:

(1) Does the State's intentional presentation of false evidence at a clemency hearing violate due process?

(2) Under what circumstances, if any, does harmless-error analysis apply when constitutional challenges are brought to clemency proceedings?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are all listed in the caption.

RELATED PROCEEDINGS

Ada County District Court
Case No. 10252
State v. Creech
Findings imposing death penalty, Jan. 25, 1982
Judgment of conviction, Mar. 17, 1983
Order denying motion to withdraw guilty plea, June 24, 1983

Idaho Supreme Court
Case Nos. 14480/15000
State v. Creech, 670 P.2d 463 (Idaho 1983)
Opinion issued denying relief, May 23, 1983
Petition for rehearing denied, Sept. 21, 1983

Idaho Supreme Court
Case No. 15114
State v. Creech
Order dismissing appeal, Jan. 24, 1984

United States Supreme Court
Case No. 83-5818
Creech v. State, 465 U.S. 1051 (1984)
Petition for certiorari denied, Feb. 27, 1984

Idaho Supreme Court
Case No. 15475
State v. Creech
Denial of motion to withdraw guilty plea affirmed, June 20, 1985
Petition for rehearing denied, Dec. 31, 1985

United States District Court, District of Idaho
Case No. 86-1042
Creech v. State
Habeas petition denied, June 18, 1986

United States Court of Appeals, Ninth Circuit
Case No. 86-3983
Creech v. State, 947 F.2d 873 (9th Cir. 1991) (en banc)
Affirmed in part, reversed in part, remanded, Oct. 16, 1991

United States Supreme Court
Case No. 91-1160
State v. Creech, 507 U.S. 463 (1993)
Reversed and remanded, March 30, 1993

Ada County District Court
Case No. 10252
State v. Creech
Judgment of Conviction, Apr. 17, 1995

Ada County District Court
Case No. SPOT-95-00154-D
Creech v. State
Post-conviction petition denied, Dec. 12, 1996

Idaho Supreme Court
Case Nos. 22006/23482
State v. Creech, 966 P.2d 1 (Idaho 1998)
Opinion issued denying relief, Aug. 19, 1998
Petition for rehearing denied, Oct. 23, 1998

United States Supreme Court
Case No. 98-8278
Creech v. State
Petition for certiorari denied, June 4, 1999

Ada County District Court
Case No. SPOT0000403D
Creech v. State
Post-conviction petition denied, Jan. 25, 2001

Idaho Supreme Court
Case No. 27309
Creech v. State, 51 P.3d 387 (Idaho 2002)
Opinion issued dismissing appeal, June 6, 2002
Petition for rehearing denied, Aug. 1, 2002

Ada County District Court
Creech v. State
Case No. SPOT0200712D
Post-conviction petition denied, Apr. 25, 2003

Idaho Supreme Court
Case Nos. 29681/29682
State v. Creech
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United States District Court, District of Idaho
Case No. CV 99-0224-S-BLW
Creech v. Hardison
Judgment of dismissal, March 31, 2010
Order denying relief on remand, Jan. 29, 2016

Ada County District Court
Case No. CV PC 2008-6064
Creech v. State
Order dismissing petition for post-conviction relief, Mar. 30, 2011

United States Court of Appeals, Ninth Circuit
Case No. 10-99015
Creech v. State
Order vacating and remanding, June 20, 2012
Opinion denying relief July 20, 2022
Order denying petition for rehearing and amending opinion, Feb. 6, 2023

United States Supreme Court
Case No. 23-5039
Creech v. Richardson, 144 S. Ct. 291 (2023)
Petition for certiorari denied, Oct. 10, 2023

Ada County District Court
Case No. CV01-22-9424
Creech v. State
Judgment dismissing petition for post-conviction relief, Dec. 1. 2022

United States District Court, District of Idaho
Case No. 1:23-cv-463
Creech v. Richardson
Petition dismissed, Jan. 12, 2024

Idaho Supreme Court
Case No. 50336
Creech v. State
Opinion issued denying relief issued, Feb. 9, 2024

United States District Court, District of Idaho
Case No. 1:24-cv-066
Creech v. Idaho Commission of Pardons & Parole
Plaintiff's Motion for Preliminary Injunction Denied February 23, 2024

United States District Court, District of Idaho
Case No. 1:20-cv-114
Creech v. Tewalt
Plaintiff's Motion for Preliminary Injunction Denied February 23, 2024

United States Court of Appeals, Ninth Circuit
Case No. 24-275
Creech v. Richardson
Appeal dismissed February 25, 2024

United States Court of Appeals, Ninth Circuit
Case No. 24-1000
Creech v. Idaho Commission of Pardons & Parole
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INTRODUCTION

Petitioner Thomas E. Creech respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINION BELOW

A copy of the Ninth Circuit's opinion below is attached as Appendix A, App. 1–14 , and is available at *Creech v. Idaho Comm. of Pardons & Parole*, --- F.4th ----, 2024 WL 755720 (9th Cir. 2024) (per curiam).[1]

JURISIDICTIONAL STATEMENT

On February 25, 2024, the Ninth Circuit issued an opinion affirming the district court's judgment and an order denying Mr. Creech's petition for rehearing. *See* App. 1–14, 32–33. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition is timely filed.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

FEDERAL STATUTE INVOLVED

This case involves 42 U.S.C. § 1983, which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

[1] In this petition, unless otherwise noted, all internal quotation marks and citations are omitted, and all emphasis is added.

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Over the course of forty-two years of litigation, the State of Idaho has presented much evidence and made many claims about Mr. Creech. But there are two things that it never said from the time of the offense in 1981 until the commutation hearing in 2024: 1) that the murder weapon had Mr. Creech's name on it; and 2) that Mr. Creech was guilty of Daniel Walker's murder in San Bernardino in 1975. Those two bombshell claims were first made at the commutation hearing, an informal event where testimony and objections were prohibited, and the bombshell claims were supported by nothing more than a single PowerPoint slide each. To understand how significant these false claims were, some historical context is helpful.

A. The murder no one accused Mr. Creech of for fifty years

Mr. Creech was first arrested in Idaho in the 1970s for a double-homicide in Valley County, Idaho. The defense attorney in the Valley County case was a man named Bruce Robinson, who acquired the rights to Mr. Creech's life story, turned the case into a referendum on the existence of God and the devil, and induced his client to tell a fantastical tale from the stand about committing forty-two murders as part of a satanic motorcycle gang, including of various people who never existed or were never killed. *See generally Creech v. Ramirez*, D. Idaho, No. 1:99-cv-224,

Dkt. 362, at 61–66 (summarizing the Robinson saga with extensive exhibits in a recitation that has never been rebutted). Unfortunately, the fictional story Mr. Creech told from the stand in the 1970s has influenced a number of courts that have not had before them the facts they needed to review the testimony more judiciously. *See, e.g.*, *Arave v. Creech*, 507 U.S. 463, 465 (1993) (referring to the facts in the case as "chilling" on account of Mr. Creech's bogus claim to have killed "at least 26 people").

Mr. Creech's outlandish claims about his past murders inspired a parade of law enforcement officers to come to Idaho seeking to persuade him to take credit for their cold cases and clear their dockets. The first lie in this case relates to one such enterprise. Specifically, it concerns the death of Daniel Walker, who was killed in San Bernardino County, California in 1974. On April 27, 1975, a detective with the San Bernardino County Sheriff's Department interviewed Mr. Creech about the case. *See* Dist. Ct. Dkt. 4-5. In the interview, Mr. Creech claimed to have killed a man in the San Bernardino area and provided a number of details, some fed to him by his interlocutors, that connected it to widely publicized details about the Walker case. *See id.* at 22–27. Mr. Creech also told the officers in the same interview an elaborate story about dumping a number of bodies sacrificed by a vegetarian cult at a local ranch. *See id.* at 34–35. An extensive later search for bodies at the ranch revealed a single suspicious artifact: what a local officer described as "the only $40,000 cow bone in existence." Dist. Ct. Dkt. 15-10. The April 27, 1975 interview

also included claims by Mr. Creech to have murdered a couple who are still alive to this day. *See* Dist. Ct. Dkt. 15-7.

Mr. Creech was not named as a suspect or charged in the Walker case, no doubt because law enforcement rightly saw—at that time at least—that it would be improper to accuse someone of murder based entirely on a completely incredible statement by a single person.

B. The sock with the name no one mentioned for forty-three years

On May 13, 1981, fellow inmate David Jensen approached Mr. Creech in prison with a sock filled with batteries and attacked him. Dist. Ct. Dkt. 5-4 at 2. Mr. Creech took the sock from Mr. Jensen and shortly thereafter bludgeoned him to death with it. *Id.* Law enforcement reports describe the collection of four socks from the prison as evidence: 1) the murder weapon; 2) a pair of socks found in Mr. Creech's cell; and 3) an unmatched sock, the so-called "odd" one. *See id.* at 5, 8. The "odd" sock supposedly matched the murder weapon. *See id.* at 8. For forty-three years, that purported fact was the sole physical evidence the State of Idaho pointed to in support of its theory that Mr. Creech was the source of the murder-weapon sock, and that the entire altercation had been a set-up devised by Mr. Creech—which was the most aggravating feature of the offense. And for forty-three years, the State of Idaho never claimed that the murder weapon had Mr. Creech's name on it. Needless to say, that fact would have been powerful evidence to prove its theory about Mr. Creech's alleged scheme to orchestrate the fight. In the absence of that evidence, all the State had were accounts by inmates jockeying for favorable treatment from prosecutors and the fact that Mr. Creech was missing a sock that

looked like the murder weapon—hardly a smoking gun given how often socks go missing and the reality that most socks in a prison will look similar.

After he pled guilty, Mr. Creech was sentenced to death on January 25, 1982. *See State v. Creech*, 670 P.2d 463, 515 (Idaho 1983). In sentencing Mr. Creech to death, Judge Newhouse found that he did "not instigate the fight with the victim, but the victim, without provocation attacked him." *Id.* at 467. Mr. Creech's death sentence was upheld on direct appeal. *See id.* at 465.

Mr. Creech moved to withdraw his guilty plea on May 19, 1983 on the grounds that at the time of the plea he wrongly "believed he had no defenses to the charge" when in fact there was a viable self-defense theory. *See State v. Creech*, 710 P.2d 502, 502–05 (Idaho 1985). At a hearing on the motion held in February 1984, Mr. Creech testified that Mr. Jensen approached him on the day of the crime "and swung at [him] with a sock full of batteries." Dist. Ct. Dkt. 4-11 at 15. In response, the State's position was that Mr. Creech "did not kill in self-defense" in part because "he planned the murder in advance." *Creech*, 710 P.2d at 505. The Idaho Supreme Court determined that Mr. Creech's guilty plea was valid. *See id.* at 506–07.

After Mr. Creech obtained habeas relief in federal court, *see Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), *rev'd in part*, 507 U.S. 463 (1993), he was resentenced in 1995. At the resentencing, the lead prosecutor on the case for Ada County at the time, Roger Bourne, asserted that Mr. Creech "made a weapon out of a sock with batteries in it. He gave it to another inmate. He transferred it to Mr. Jensen." Dist. Ct. Dkt. 5-1 at 7. In advocating for the death penalty at the close of the

resentencing, Mr. Bourne asserted that the "crime was set up to look like a self-defense claim." Dist. Ct. Dkt. 5-2 at 3. A significant piece of evidence Mr. Bourne cited to support his description was that in one of Mr. Creech's conflicting versions of events he had stated to law enforcement that "the socks were mine." *Id.* at 4. As Mr. Bourne characterized it, Mr. Creech admitted that "the setup" was for him to pass the sock filled with batteries to another inmate who would in turn give it to Mr. Jensen, to set the stage for the fight. *Id.* The state district court accepted Mr. Bourne's account and relied on it in sentencing Mr. Creech to death, finding that "[t]he sock was later determined to be" his. Dist. Ct. Dkt. 5-3 at 5.

Mr. Creech's case moved into federal habeas. As they had in state court, the parties in federal habeas continued to vigorously contest the question of whether Mr. Creech had been the source of the sock—and thus the mastermind behind the whole incident—or whether he had not been the source, and had instead overreacted to an unprovoked attack. *See, e.g.*, *Creech v. Hardison*, No. CV 99-224, 2010 WL 1338126, at *16–17 (D. Idaho Mar. 31, 2010); *Creech v. Richardson*, 59 F.4th 372, 389–90 (9th Cir.), *cert. denied*, 144 S. Ct. 291 (2023). Again, through all those many years, the State never suggested that it had proof of its narrative in the form of Mr. Creech's name on the murder weapon.

C. The clemency proceedings where the murder weapon suddenly turned up and the Walker murder was miraculously solved.

After the habeas case concluded with this Court's denial of certiorari in 2023, *see Creech*, 144 S. Ct. 291, Mr. Creech sought and received a commutation hearing before the Parole Commission. The case against clemency was to be handled by the

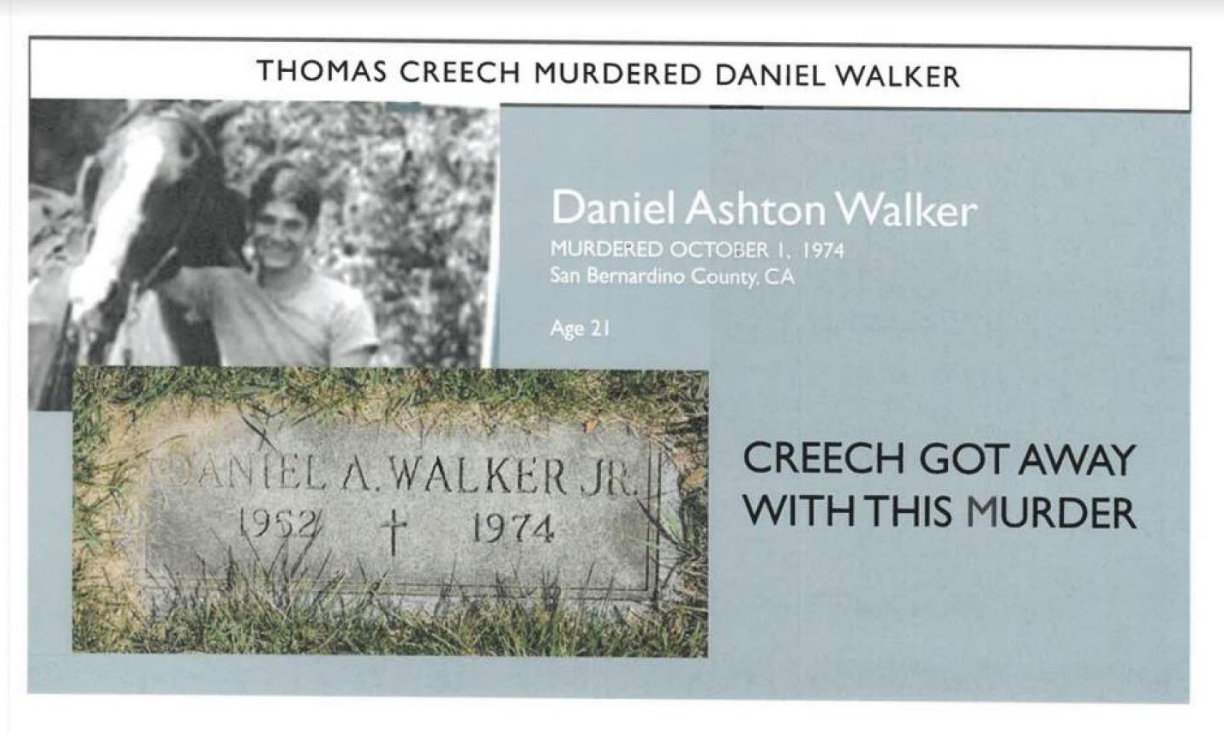
Ada County Prosecuting Attorney's Office (ACPA) and the Idaho Attorney General's Office. Ms. Longhurst represented the former and L. LaMont Anderson represented the latter.

The Commission asked both parties to provide to it in advance the documents they intended to rely on at the hearing, which would then—with the exception of victim-related material—be shared with all of the attorneys involved. Dist. Ct. Dkt. 5-7 at 4. During the same discussions, the Commission notified the parties that everyone was forbidden from recording the hearing or objecting to anything that was said by anyone. *Id.* at 3; Dist. Ct. Dkt. 15-2 at 2. From the prosecution, Mr. Creech's counsel received 2,952 pages. Dist. Ct. Dkt. 4-1 at 21. None of those pages contained a photograph of the murder weapon (or an image of any sock) and none of them contained a reference to Mr. Walker. *Id.* at 21–23; Dist. Ct. Dkt. 4-2 at 5, 7.

One document that was in the prosecutors' packet was a letter from former Ada County Deputy Sheriff Tom Taylor, lobbying for Mr. Creech to be put to death. Dist. Ct. Dkt. 4-2 at 5 ¶31. Mr. Taylor claimed in that letter to have been present for interviews with Mr. Creech in the 1970s where he described killing a man in a van in the Barstow, California area who had a diamond ring. *Id.* The packet does not contain any report from Mr. Taylor. Undersigned counsel's office, which has represented Mr. Creech for twenty-five years, has no records of any reports from Mr. Taylor. Dist. Ct. Dkt. 4-1 at 13. Thus, it appears that Mr. Taylor suddenly remembered an entirely undocumented conversation for the first time when he happened to be advocating for Mr. Creech's execution.

Mr. Creech was interviewed by Commission investigators before the commutation hearing. *Id.* at 21. During his interview, he told the investigators that the murder weapon had "Garza" written on it, which was the name of one of the inmates that he says talked Mr. Jensen into starting the fight without Mr. Creech's involvement. Dist. Ct. Dkt. 11 at 7.

At the January 29, 2024 commutation hearing, after more than four decades, the Walker case was suddenly solved, and the murder weapon finally made an appearance. Both of those items materialized in Ms. Longhurst's presentation. During her opening remarks, she told the Commissioners about the Walker case and informed them that it had been solved by San Bernardino authorities, who had conclusively determined Mr. Creech to be the guilty party. Dist. Ct. Dkt. 4-1 at 4–5. This was the slide she showed:



The murder weapon then showed up for the first time in forty-three years in Ms. Longhurst's closing remarks, when she presented the following image to the Commission:

On the day of the hearing, the prosecutors issued a press release, in which they claimed that the Walker case had been "solved" after a "thorough investigation" that "determined Mr. Creech had murdered Daniel A. Walker." Dist. Ct. Dkt. 4-3. The release was picked up by outlets around the country, many of which echoed the prosecutors' message that Mr. Creech's guilt in the Walker case was now settled. *See, e.g.*, Dist. Ct. Dkt. 15-13 at 18 ("After 50 years, investigators ID suspect who killed Good Samaritan in the Mojave Desert"). On January 24, 2024, the San Bernardino Sheriff's Department issued its own press release. There, however, it announced that Mr. Creech had been identified as the *suspect* in the Walker murder. Dist. Ct. Dkt. 4-4. The release announced that San Bernardino

authorities had been "able to corroborate intimate details from statements Creech made regarding Daniel's murder," *id.*, statements that no government agency in either California or Idaho has ever offered or even described in any way.

After the hearing, Mr. Creech's counsel wrote letters to the Commission on January 22, 25, and 29. *See* Dist. Ct. Dkts. 5-8; 5-9; 5-10. In each letter, counsel informed the Commission about the problems caused by the prosecution's attempt to convict Mr. Creech of a brand-new crime at the commutation hearing and to reveal a potentially fraudulent smoking-gun photograph of evidence at the same time. *See id.* Counsel requested in the letters that the Commission defer its decision on Mr. Creech's commutation petition for at least two months so that they could conduct the necessary investigation. *See id.*

Deputy Attorney General Anderson responded to two of the letters. Dist. Ct. Dkts. 5-12; 12-3 at 39–41. Speaking for himself and the ACPA, he claimed in one letter that the sock photograph "refute[d]" Mr. Creech's claim of "self-defense." Dist. Ct. Dkt. 5-12 at 3. According to Mr. Anderson, the sock was shown by the State to "debunk" Mr. Creech's "lie" to the Commission's investigators, i.e., that the *murder weapon* had Garza written on it. *Id.* Mr. Anderson expressed his offense at the suggestion the prosecutors had presented false evidence, but he did not deny that the sock in the slide was supposed to be the murder weapon. Dist. Ct. Dkt. 5-12.

After this exchange, the Commission refused to postpone the proceedings. Instead, it released its decision on January 29, 2024, ten days after the hearing. Idaho law requires that there be seven Parole Commissioners. *See* Idaho Code § 20-

1002(2). If a majority of the Commissioners vote for commutation, a favorable recommendation is forwarded to the Governor. *See* Idaho Const., Art. IV, § 7. Thus, each side must get to four votes to prevail before the Commission. In Mr. Creech's case, however, one Commissioner recused himself for unknown reasons. Dist. Ct. Dkts. 4-1 at 27; 4-2 at 6. The Commission then split three-three on the result. Dist. Ct. Dkt. 12-3 at 42–43. In the brief explanation for their vote, the three Commissioners opposed to clemency gave as their first reason the "coldblooded" nature of the Jensen murder. *Id.* at 43. They also emphasized Mr. Creech's prior crimes, which would have included most prominently the false evidence of the Walker murder. *Id*. The day after the decision was announced, the prosecutors obtained a death warrant for Mr. Creech, scheduling his execution for February 28, 2024. Dist. Ct. Dkt. 1 at 20.

D. The district court rules false evidence in clemency constitutional

On February 5, 2024, Mr. Creech filed a lawsuit in federal district court under 42 U.S.C. § 1983, challenging the clemency proceedings on due process grounds and naming the Parole Commission and the elected Ada County Prosecutor as the defendants. Dist. Ct. Dkt. 1. While gathering information to support his lawsuit, Mr. Creech requested from the Commission any evidence of what was said at the commutation hearing, such as recordings, transcripts, and so forth. In response, the Commission provided—for the first time—minutes from the hearing. There is no indication of who produced the minutes or what methods were used or whether they were edited after the Commission was sued. Dist. Ct. Dkts. 15-5; 12-2

at 20–33. The minutes do not purport to be a transcript and they contain obvious errors, such as a comment by Ms. Longhurst that was reported as a reference to herself when the statement at issue actually referred to the elected prosecutor, Jan Bennetts. Dist. Ct. Dkt. 15 at 15.

In the minutes, there is a brief description of what Ms. Longhurst said about the sock slide at the hearing: "Ms. Longhurst displayed a photograph of the matching sock that was found in Mr. Creech's cell. The name on the sock is 'Creech.'" Dist. Ct. Dkt. 11-1 at 20. As noted, this account—that the photograph was not of the weapon but of a "matching sock"—was not something the prosecutors had offered while the matter was being disputed extensively in correspondence before the Commissioners that saw the slide with their own eyes and made the decision to deny clemency.

In the only filing the ACPA made to the district court, where it was represented by the same office's civil division, counsel spoke very briefly to the facts involving the Walker case and the sock. *See* Dist. Ct. Dkt. 11. On the former issue, the prosecutors made no claim to have "solved" the case and offered no evidence beyond the interview that had been rejected by law enforcement fifty years earlier. *See id.* at 5. With respect to the latter, the prosecutors seized upon the suggestion in the Commission's minutes that the photograph did not depict the murder weapon but rather a "matching" sock. *See id.* at 7. Still, the prosecutors continued to maintain that the "matching" sock "rebut[ed]" Mr. Creech's statement to the Commission investigators that the murder weapon bore the name Garza. *See id.*

The prosecutors declined to explain how a photograph of a sock that was admittedly not the murder weapon could possibly refute a statement that the *murder weapon* said Garza. Mostly, the prosecutors focused on persuading the district court that the Constitution permitted them to present false evidence in clemency proceedings. *See id.* at 9–14.

The Commission was represented in the district court proceedings by the office of Idaho Attorney General Raul Labrador, who has aggressively politicized the death penalty. *See* https://www.ag.idaho.gov/newsroom/media-advisory-attorney-general-raul-labrador-obtains-new-death-warrant/ (reflecting Mr. Labrador's admission in a press release that he obtained a death warrant for another death-row inmate purely as a political stunt to push for the firing squad and with no means of carrying out an execution). In its own single substantive filing in the district court, the Commission did not address the falsity vel non of either the Walker allegations or the sock photograph. *See* Dist. Ct. Dkt. 12.

Mr. Creech sought a preliminary injunction to defer his execution until his claim could be fully and fairly adjudicated, and he also pursued expedited discovery to further prove the prosecutorial misconduct he had alleged. Dist. Ct. Dkts. 4, 10. The motion for a preliminary injunction became fully briefed on February 16. Dist. Ct. Dkt. 15. Then, the district court waited a full week before issuing its ruling in the late afternoon of Friday, February 23, five days before the scheduled execution. Dist. Ct. Dkt. 18. The ruling rejected the false-evidence claim, which made up the lion's share of Mr. Creech's complaint, by relying entirely on the district court's view

that it was precluded by law from considering the falsity of the prosecutor's claims. *See id.* at 9 (accepting whole-cloth the approach taken in *Workman v. Bell*, 245 F.3d 849, 852–53 (6th Cir. 2001)).

E. The Ninth Circuit ignores the prosecutors' new account

On appeal, the Ninth Circuit indicated it would largely rule on the basis of the district court filings and would not accept "additional *briefing*." *See* 9th Cir. Dkt. 2.1. The court scheduled oral argument for the next day, on February 24. *Id*. That morning Mr. Creech filed a motion to stay his execution pending appeal. *See* 9th Cir. Dkt. 7.2. In correspondence with the Ninth Circuit, the clerk's office made clear to the parties that its earlier order precluded briefs and not motions. Nevertheless, the prosecutors filed an opposition taking the position that Mr. Creech should not be entitled to file a single document in his capital appeal with an execution scheduled days later. *See* 9th Cir. Dkt. 12.1.

By the time of oral argument, the prosecutor had come up with yet a different stance on what would seem to be the fairly straightforward question of what was in the photograph of the two socks. No longer was the sock circled in the slide the sock that matched the murder weapon, i.e., the "odd" sock, as the prosecutors told the district court only eleven days earlier. Rather, it was now the case that the slide showed "a picture of *matching socks* taken from Mr. Creech's cell." Oral Arg. at 27:29–27:37 (available at https://www.youtube.com/watch?v=ukwrRqbAZIc) (hereinafter "Oral Arg."). In other words, according to the prosecutor's latest version, the slide showed a pair of matching socks both found in Mr. Creech's cell. Needless to say, that would mean that the circled sock is not in fact "the matching

sock" to the murder weapon at all, contrary to the account the prosecutor gave to the district court.

The Ninth Circuit panel repeatedly pressed the prosecutor on how a photograph of two matching socks would say anything about the murder weapon, or anything relevant about the crime generally. It is difficult to summarize the prosecutor's responses, given their incoherence, so Mr. Creech will instead quote them. At one point, the prosecutor characterized the photograph as simply "showing that the sock that matches the sock that was taken or was one of the matching socks taken from the cell displayed Creech on it." *Id.* at 29:20–29:30. Elsewhere, the prosecutor described "the point" of the slide as "to refute the allegation that there was some kind of other person's name *written on some sock somewhere*." *Id.* at 28:54–29:03. As a general matter, the prosecutor expressed a preference not to discuss the sock and to instead focus on establishing as a legal matter that his office was entitled to present false evidence at clemency proceedings. *See, e.g.*, *id*. at 31:10–32:10 (responding to a question about the sock by almost immediately returning to prepared remarks regarding why due process allows for false evidence at clemency). Multiple members of the panel voiced concern about the prosecutor's strategy. *See, e.g.*, *id.* at 27:03–27:22 (reflecting Judge Bybee inquiring of the prosecutor whether he was "telling" the court that "it doesn't matter if the prosecutor presented false evidence").

Perhaps the prosecutor's most notable statement at oral argument was that his office does in fact have access to the murder weapon. *See id.* at 28:33–28:42. He

did not offer any thoughts on why his office has failed to provide a photograph of *that* to the Commission, the courts, or Mr. Creech's counsel, since it would seem to actually prove the point the prosecutors claim was addressed by the slide: what was written on *the murder weapon*.

The Ninth Circuit issued its opinion just after 8:00 pm on February 24, roughly eight hours after oral argument. *See* 9th Cir. Dkt. In the panel's eyes, the Ninth Circuit had previously "assumed without deciding" that it violates due process for a government actor to present false evidence in a clemency proceeding and the appeal would ostensibly be decided on the same basis. *Creech*, 2024 WL 755720, at *2. The panel then found that Ms. Longhurst's false claim to have solved the Walker case did not violate due process because she restrained herself from making a further misrepresentation about Mr. Creech having "been found responsible in a formal, legal sense." *Id.* at *4.

On the sock issue, the panel seems to have uncritically accepted the statement in the minutes that the photograph showed the sock that matched the murder weapon. *See id.* The panel did not acknowledge that the prosecutors themselves had disclaimed the same position only eight or nine hours earlier at oral argument. From the panel's perspective, the prosecutors "introduced the slide with the labeled sock to refute Creech's pre-hearing assertion that the murder weapon never belonged to him." *Id*. However, the panel did not clarify how a photograph of a sock that was by the judges' own finding not the murder weapon could have refuted anything about the murder weapon.

When it issued its opinion, the Ninth Circuit simultaneously ordered that any petition for rehearing be filed approximately fourteen hours later, by 11:00 am PT. Mr. Creech filed a preemptive objection to memorialize his disagreement with any approach whereby the court would deny his petition for rehearing before the deadline for the response. 9th Cir. Dkt. 14.1. The Ninth Circuit then waited roughly three hours from the filing of the petition for rehearing, on a Sunday, before denying it, even though the scheduled execution was still three days away. *See* 9th Cir. Dkt.

REASONS FOR GRANTING THE WRIT

This Court has provided scant guidance on the question of whether and how the Due Process Clause applies in clemency proceedings, a matter of life-and-death importance in cases around the country. The leading case from the Court, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), was badly fractured and failed to yield a majority opinion. Lower courts have generally regarded Justice O'Connor's concurrence in *Woodard* as the controlling opinion in the case. *See, e.g.*, *Wellons v. Comm'r, Ga. Dep't of Corrs.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014). But Justice O'Connor's opinion was only two paragraphs long and offers few parameters other than the basic principle that some measure of due process must be guaranteed in clemency proceedings. *See Woodard*, 523 U.S. at 288–90 (O'Connor, J., concurring). The question is how much, and what framework courts should bring to bear to enforce the limitations.

Mr. Creech's case provides the Court with the perfect opportunity to begin offering the clear blueprint the judicial system has been lacking for the last twenty-six years. That is because it tees up one important issue that falls within the broader question of what due process rights fall within Justice O'Connor's opinion: namely, does it include the right to not have the State present false evidence at one's clemency proceedings. Mr. Creech's appeal also directly implicates another significant question of unsettled law regarding due process and clemency: if there is a violation, how should prejudice be assessed?

I. The circuits are split on the first question presented.

The circuits that have addressed the question are split as to whether false evidence may be presented during a state clemency hearing. The Sixth Circuit has answered that question with a resounding yes. *See Workman*, 245 F.3d at 852–53. The *Workman* court reasoned that it could not determine whether the evidence presented at a clemency hearing was false or not because doing so would be "to review the substantive merits of a clemency proceeding." *Id.* at 852. Thus, in the Sixth Circuit, claims that a prosecutor fabricated and presented false evidence during a clemency proceeding are not cognizable.

The Ninth Circuit, however, has answered the same question in the negative. *See Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002). Pointing to Justice Stevens' dissent in *Woodard*, the *Anderson* Court denied a petitioner's due process claim in part because it could not find that the challenged clemency "procedures [were] infected by . . . the deliberate fabrication of false evidence." *Id.* Accordingly, in direct contrast to the Sixth Circuit, claims that a prosecutor

fabricated and presented false evidence during a clemency proceeding are cognizable in the Ninth Circuit.

Additionally, there is a more general tension in the circuit courts that casts doubt on the proper resolution of the first question presented. The Eighth Circuit, for example, has held that "conduct on the part of a state official" that "unconscionably interferes with a process that the State itself has created" violates a clemency seeker's due process rights. *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). The conduct at issue in *Young* was the district attorney's threat to fire a line prosecutor if the prosecutor provided information favorable to the petitioner to the clemency decisionmaker. *Id.* at 851–52. The Eighth Circuit explained that "[s]uch conduct on the part of a state official is fundamentally unfair." *Id.* at 853. Subsequent writings by Eighth Circuit judges make clear that disagreements over *Woodard*'s reach remain at the court. In a later appeal, Judge Gruender opined that "*Young* misapplied Justice O'Connor's concurring opinion in" *Woodard*. *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (per curiam) (en banc) (Gruender, J., concurring). Judge Gruender added that he felt *Young* ran "counter to the weight of authority from other courts" and that it was "an outlier when compared to the narrower approaches adopted by our sister circuits." *Id.* at 632.

Like Judge Gruender, the Eleventh Circuit has declined to adopt the reasoning in the *Young* opinion, stating that "it cannot be squared with what Justice O'Connor's opinion actually says[.]" *Gissendaner v. Comm'r, Ga. Dep't of Corrs.*, 794 F.3d 1327, 1333 (11th Cir. 2015). Moreover, as the Sixth Circuit did in

Workman, the Tenth Circuit has held that its review of clemency proceedings "is limited to analyzing the procedures used during the clemency proceedings and not the substantive merits of the clemency decision." *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998).

Thus, apart from the discrete matter of false evidence, there is a bigger debate amongst the circuits about whether it is ever permissible for a federal court to consider the substance of information presented in clemency. On that question, the Sixth and Ninth Circuits are on one side, and the Tenth and Eleventh Circuits are on the other.

These differences of opinion between the circuits have been lingering for the twenty-six years that have passed since *Woodard*. To the extent more circuits haven't joined the fray, it is likely because clemency proceedings are not litigated at great frequency. That doesn't mean, however, that it's an area of law where clarity is unnecessary. Regrettably, the Court was unable to provide such clarity at the time of *Woodard*. It should do so now.

II. This case is an ideal vehicle for the first question presented.

Mr. Creech's appeal is the perfect one to resolve the uncertainty in the law. That is because there can be no serious question that the prosecutors here presented false evidence to the Parole Commission. Indeed, as explained below, they have admitted as much in regards to one of the two issues and are barely contesting it with the other.

A. The prosecutor lied about the Walker case.

The issue where the falsity of the evidence is undisputed is the Walker case. Mr. Creech's complaint and his motion for a preliminary injunction both asserted that the prosecutor, Ms. Longhurst, told the Commission at the commutation hearing that the Walker investigation was closed and the case had been solved. *See* Dist. Ct. Dkt. 1 at 9, 17; Dist. Ct. Dkt. 4-1 at 5, 15. The complaint and motion for a preliminary injunction both further asserted that Ms. Longhurst's claim was false: the Walker case wasn't closed and there was no evidence for the accusation apart from a statement Mr. Creech made fifty years earlier that led to him being *ruled out* as the suspect by law enforcement at the time. *See* Dist. Ct. Dkt. 1 at 12, 16; Dist. Ct. Dkt. 4-1 at 9, 14–15.

In the single filing the prosecutors have made about these claims in any court, they disputed none of them. *See generally* Dist. Ct. Dkt. 11. The prosecutors did not say they had proof of Mr. Creech's guilt. They did not say the case had in actuality been solved. And they notably did not even mention the single new piece of "evidence" that was before the Commission—the memory of details from an interview that came to Mr. Taylor fifty years later that were never documented in any form. Again at the Ninth Circuit, the prosecutors made no case for the truth of their claims about the Walker matter. There, the prosecutors declined to file anything that substantively addressed Mr. Creech's motion for a stay. *See* 9th Cir. Dkt. 12.1. Thus, the prosecutors engineered a situation on appeal where the only opportunity for anyone to get them on record about the Walker case was the oral argument. And at that argument the prosecutors said nothing at all about the

Walker case. The appeal therefore arrives at the Court in a posture such that there is no factual dispute about the prosecutors having lied regarding the Walker case at the commutation hearing. *See Planned Parenthood Ass'n. of Utah v. Herbert*, 828 F.3d 1245, 1261 n.7 (10th Cir. 2016) (accepting as true allegations that the plaintiff made and the defendant did not dispute in his opposition to a motion for a preliminary injunction). That is an unusual feature of the case that makes it an excellent candidate for certiorari review of the underlying issue, and it is a feature that will obviously not be true of most appeals in which prosecutors are accused of making misrepresentations in clemency proceedings, which will surely involve muddier records.

The Ninth Circuit's commentary about the Walker issue doesn't create any more murkiness about Ms. Longhurst's lie. Below, the panel did not defend Ms. Longhurst's claim to have solved the case as truthful. Instead, the panel suggested that the lie was less impactful because "the prosecutor correctly noted that Creech had not been tried for, nor convicted of, Walker's murder, so the prosecutor's statements did not mislead the Commission into assuming that Creech had been found responsible in a formal, legal sense." *Creech*, 2024 WL 755720, at *4. Preliminarily, the fact that Ms. Longhurst accurately said that no charges had been filed doesn't somehow make it less of a lie that she also told the Commission the Walker case was solved when it wasn't. Moreover, the Ninth Circuit misunderstood the purpose of Ms. Longhurst's comments. She spun the absence of formal charges not as any reason to doubt Mr. Creech's guilt for the Walker murder, as the panel

seemed to presume, but as a powerful reason to put him to death. As she explicitly said in her slide, the significance of the lack of process in San Bernardino was that it allowed Mr. Creech to "g[e]t away with this murder." *See supra* at 8. In other words, the lack of any "formal, legal" finding, *Creech,* 2024 WL 755720, at *4, was precisely why Ms. Longhurst wanted the Commission to send Mr. Creech to his death: so that his execution would serve as the punishment for the crime that she had just announced and convicted him of on the basis of a PowerPoint slide. Contrary to the panel's view, that hardly rehabilitates the lie. Indeed, it is difficult to imagine how a prosecutor can more egregiously use a lie than to facilitate an execution.

B. The prosecutor lied about the sock.

The record is also plain that Ms. Longhurst lied about the sock. Only two simply facts prove as much. The first is the image itself. *See supra* at 9. The unmistakable message of this slide was that the murder weapon bore Mr. Creech's name. There is only one conceivable purpose to the juxtaposition between the quote and the circled sock—to suggest that Mr. Creech was lying to the investigators, and that the weapon was in fact not labeled Garza but instead had the name Creech written on it. Throughout a month of constant debate and litigation, no one has offered any other remotely plausible explanation for what this slide was meant to convey apart from the obvious truth that anyone with eyes can see. And the second fact that proves the lie is that despite ping-ponging from one absurd account of the slide to another, the prosecutors have been consistent in court on one thing: the sock is not the murder weapon. *See generally* Dist. Ct. Dkt. 11; Oral Arg. Because the

slide plainly represented that the circled sock was the murder weapon, and because that was false, Ms. Longhurst lied. An image can be a lie just as much as a statement—if anything, it is a more powerful kind of lie. *See* Jules Epstein, *The 'Ohlbaum Paper,' and Advocacy Scholarship—Why Now?*, 88 Temp. L. Rev. 507, 511 n.24 (2016) (reporting on how most people "are visual learners who rely on their sense of sight to understand and process information").

The evolving series of implausible justifications the prosecutors have given for this lie do not change the clarity of the record. Working backwards, the prosecutors' latest version is that the slide showed "a picture of *matching socks* taken from Mr. Creech's cell." Oral Arg. at 27:29–27:37. That would mean that the circled sock is not in fact "the matching sock" to the murder weapon at all—contrary to both the Commission's minutes and the account the prosecutor gave to the district court. *See* Dist. Ct. Dkt. 11 at 7. And it would also mean that the slide as a whole is completely meaningless. What possible significance could a picture of two matching socks have when there is no connection the prosecution is even attempting to draw between them and the murder weapon, other than that they are all socks? The prosecutor's response to that key question reads like a parody on bureaucratic incoherence: Ms. Longhurst was simply "showing that the sock that matches the sock that was taken or was one of the matching socks taken from the cell displayed Creech on it." Oral Arg. at 29:20–29:30. Stringing together an incomprehensible sentence and occasionally inserting the word "sock" in it doesn't erase the patent lie that took place at the hearing.

The prosecutors' earlier story doesn't purge the lie either. To reiterate, that was that the slide showed "the matching sock that was found in Creech's cell." Dist. Ct. Dkt. 11 at 7. That is, the circled sock matched the murder weapon. But that would only make sense if the uncircled sock was the murder weapon and the two matched. The prosecutor expressly disclaimed the former at oral argument and the two socks in the slide plainly don't match one another. Plus, it adds nothing to the case that the sock found in Mr. Creech's cell had his name on it. Why would a sock in Mr. Creech's cell have any other name on it? Any attempt to square the circle ends up sounding just as farcical as the prosecutor's assurance to the Ninth Circuit that "the point" of the slide "was to refute the allegation that there was some kind of other person's name *written on some sock somewhere*." Oral Arg. at 28:54–29:03. At the risk of stating the obvious, we don't execute people because there is a "name written on some sock somewhere." It is not a capital crime for a prisoner to write his name on his socks. This is a murder case and the sole question is what was written on the murder weapon. At the end of the day, the lie is proven by the fact, standing alone, that neither of the prosecutors' outlandish explanations has anything to do with the murder weapon.

The same problem is underscored by the reality that neither of the prosecutors' accounts can be reconciled with either their own or the Ninth Circuit's characterization of the purpose of the image. The prosecutors justified the use of the sock image to the district court as "rebuttal as to Creech's statement to the investigator." Dist. Ct. Dkt. 11 at 7. That is likewise how Deputy Attorney General

Anderson defended the slide in correspondence to the Commission. *See* Dist. Ct. Dkt. 12-3 at 4 (maintaining that the sock "debunk[ed]" Mr. Creech's "lie" to the Commission's investigators). What Mr. Creech said to the investigator was that "the *weapon* was labeled 'Garza.'" Dkt. 5-5 at 3. It doesn't "rebut" or "debunk" that statement to show a completely different sock that was found in Mr. Creech's cell. The only thing that can refute a claim that the weapon had the name "Garza" on it is to show how the *weapon* had a different name on it.

Notably, the Parole Commission itself does not appear to share the prosecutors' newfound perspective on the slide. It never averred, either to the district court or to the Ninth Circuit, that the Commissioners understood the image in the PowerPoint slide as anything other than the murder weapon. One potential reason why the Commission may be incapable of joining any of the prosecutors' shifting equivocations about the photograph is that the Commissioners were deliberately left with the *false* impression by the State. During the exchange of letters between Mr. Creech's counsel and Deputy Attorney General Anderson the prosecutors repeatedly declined to correct the description being offered of the sock photograph—namely, that it depicted the murder weapon. *See* Dist. Ct. Dkt. 12-3 at 3–4, 39. The Commission was of course copied on all of that correspondence. There would have been no impetus for a Commissioner reading the letters to leap to the prosecutors' newfound view when both parties seemingly agreed on what was in the photograph.

As before, the Ninth Circuit's best efforts to sanitize Ms. Longhurst's lie do not alter the reality. Finding it more convenient to pretend the oral argument it had just conducted never occurred, the panel chose to ignore the description of the slide given to it hours earlier by the prosecutors and to instead credit the Commission's minutes from the commutation hearing: "the prosecutor displayed a photograph of the *matching* sock that was found in Mr. Creech's cell." *Creech*, 2024 WL 755720, at *4. As noted, that would only be coherent if the other sock in the photograph were the murder weapon and if the two socks matched. Neither of those propositions are true, and the prosecutors aren't saying otherwise. Nor did the panel even try to connect the dots with a straight face, electing to simply end its analysis of the photograph with an unexplained and unanalyzed quotation from the minutes. *See id.*

Finally, Mr. Creech asks the Court to consider the overall fashion in which the prosecutors have approached this litigation. The State produced a substantial amount of documentary material to the district court in support of its opposition to a preliminary injunction. *See, e.g.*, Dist. Ct. Dkt. 12-3, 12-3. Two things are conspicuously absent, though: 1) any photograph of the actual murder weapon, which the prosecutors admit to having; and 2) a sworn statement by the person in the best position to recall what was said about the sock—the prosecutor who said it, Jill Longhurst. Those items have never been provided. If the prosecutors truly wanted to prove a point about the murder weapon, as they have consistently

claimed, let's see the murder weapon that they completely control. And if Ms. Longhurst told the truth, let her say so under oath.

The State's litigation strategy goes to the same point. At the district court, the prosecutors devoted a handful of generic lines to Mr. Creech's factual allegations and three full pages to establishing the proposition that it is constitutional for the State to submit false evidence to a clemency decision-maker. *See* Dist. Ct. Dkt. 11 at 10–13. On appeal, the prosecutors, unlike Mr. Creech, deliberately chose two attorneys to argue who had *not* been at the commutation hearing and so had plausible deniability in answering the panel's questions about what was said there. *See* Oral Arg. at 33:30–33:37; 37:38–37:58. As he had in the district court, the ACPA lawyer at every juncture and despite repeated questions refused to speak in any comprehensible detail about the sock and instead returned again and again to the legal principle that it "doesn't matter" whether his colleague lied "because the substance of that hearing is not subject to judicial review." *Id.* at 26:43–26:55.

Since there is no question the photograph was not what it purported to be, the only thing short of a lie it could be is a mistake. The Ninth Circuit tried to give the prosecutors that out. Judge Christen asked the prosecutor at oral argument "what if somebody grabbed the wrong photo." *Id.* at 25:56–26:04. Sticking with the same refrain, the prosecutor declined the favor, responding only that it "doesn't matter." *Id.* at 26:43–26:55. If the prosecutors aren't chalking this up to a mistake, there is no reason for the Court to, and that means it was a lie.

Although Mr. Creech has spilled much ink on the sock, that is only because the prosecutors' statements are so improbable as to demand some unpacking. Nevertheless, it is ultimately a simple issue. If there is such a thing as the truth, these were lies. The Walker case wasn't solved. The slide was on its face presented to show the murder weapon and it didn't. Because there are two unambiguous lies in the case, it is the perfect vehicle for the Court to grant certiorari and resolve whether the Due Process Clause allows the presentation of false evidence at a clemency proceeding.

III. The role of harmless error is another reason to grant certiorari.

Mr. Creech's case is also an exemplary vehicle for another certiorari-worthy issue: whether a due process challenge to a clemency proceeding is subject to harmless-error review.

The Ninth Circuit below observed that "there is some uncertainty as to the proper harmlessness standard to apply in review of state commutation proceedings." *Creech*, 2024 WL 755720, at *3. Mr. Creech agrees that the law on the question is unsettled and therefore calls for clarity from this Court. It is also an issue of obvious import. As the Court knows, the matter of what test for prejudice applies in a given case is often outcome-determinative. It will accordingly give the lower courts considerable assistance to instruct them on what prejudice framework to apply when clemency proceedings are challenged.

Mr. Creech's case offers a good platform for providing that instruction because his facts highlight the difficulty in conducting a harmless-error analysis in

at least some clemency contexts. A harmless-error inquiry presumes a record compiled to a reasonable degree of comprehensiveness, so that the parties and the courts can intelligently assess how a different scenario might have affected the outcome. *See, e.g.*, *United States v. Samaniego*, 187 F.3d 1222, 1225 (10th Cir. 1999) (calling a record "abysmally inadequate for a harmless-error review" because a number of documents were missing, even though a transcript and several exhibits were available). The record of Mr. Creech's commutation hearing was hardly comprehensive. The Commission produced no transcript, forbade recordings, *see* Dist. Ct. Dkt. 15-2 at 2, barred objections, *see* Dist. Ct. Dkt. 5-7 at 3, and as a general matter imposed no rules whatsoever apart from those designed to ensure the absence of any definitive evidence of what happened. Consequently, the procedural history of Mr. Creech's case crystallizes all of the various issues that would have to be considered when the Court is determining whether harmless-error applies in clemency.

Lastly, this is not the sort of case where the petitioner would fail under any standard, making the point moot. The Ninth Circuit suggested that it would be using the harmless-error test from *Chapman v. California*, 386 U.S. 18 (1967) as an accommodation to Mr. Creech, *Creech*, 2024 WL 755720, at *3, but it wasn't one. Mr. Creech consistently argued below that no harmless-error test of any kind could be employed in the case given the insufficiency of the record. *See* Dist. Ct. Dkt. 15 at 28–29. If he is correct, he would automatically prevail, since there undoubtedly was false evidence presented. *See Young*, 218 F.3d at 852–54 (granting a stay of

execution on a due process challenge to a clemency proceeding without demanding a showing of prejudice).

And if Mr. Creech is incorrect and *Chapman* does apply, the Ninth Circuit's opinion would still not counteract the strengths of the case as a vehicle. Under *Chapman*, the burden is on "the State to prove that the defendant was not prejudiced by the error." *Kimmelman v. Morrison*, 477 U.S. 365, 382 n.7 (1986). The test uses the highest possible standard: "beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. At nearly every juncture, the panel switched the burden to Mr. Creech.

Perhaps nowhere is that more evident than in its statement that the sock did not make "the difference in the Commission's denial of commutation." *Creech*, 2024 WL 755720, at *5; *accord id.* at *4 ("Creech's alleged violations do not call into doubt the stated rationales for the Commissioners' votes."). That is nearly a perfect formulation of how the main *alternative* to *Chapman* works: the prejudice test from *Brecht v. Abrahamson*, 507 U.S. 619 (1993), under which the burden is on the prisoner. *See, e.g.*, *Yarborough v. Keane*, 101 F.3d 894, 899 (2d Cir. 1996) (denying relief with reference to *Brecht* because "[i]t would have made no difference whether" the error occurred or not).

The panel's more specific discussion of prejudice likewise strayed from *Chapman*.

First, the panel emphasized that the three Commissioners who opposed commutation in the tie vote "did not mention the sock." *Creech*, 2024 WL 755720, at *5. But such silence at best creates a doubt. In a *Chapman* analysis, any doubts

"must be resolved in favor of the" *inmate*. *McNeil v. Cuyler*, 782 F.2d 443, 447 (3d Cir. 1986).

Moreover, this reliance upon the Commission's silence with respect to the sock is misleading. The very first reason these Commissioners gave for their vote was "the coldblooded nature of" the offense. Dist. Ct. Dkt. 12-3 at 43. That is precisely why the sock photograph was so significant. The relevance of the sock to the prosecutors was that it supposedly proved that Mr. Creech was part of the scheme to induce Mr. Jensen to start the fight and then kill him. *See* Dist. Ct. Dkt. 4-1 at 16; *see also* Dist. Ct. Dkt. 11-1 at 15 (summarizing the prosecutors as telling the Commission that the account of Mr. Jensen "being the aggressor" was untrue). Using the sock, Ms. Longhurst convinced the Commission that Mr. Creech was the instigator and that the murder was "coldblooded" rather than an excessive reaction to an unprovoked attack. At a minimum, since this general aspect of the case plainly did feature into the Commissioner's determination, the burden is on the State to prove the sock in particular was *irrelevant*. Faulting Mr. Creech for the omission of this precise word from a one-paragraph statement by the Commission is not a faithful application of *Chapman*.

Relatedly, the panel believed that Mr. Creech would only be entitled to relief if the Commissioners had "discuss[ed] Creech's unwillingness to accept the 1995 factual findings that the murder weapon belonged to him." *Creech*, 2024 WL 755720, at *5. Under Idaho law, the Parole Commission can recommend commutation for any reason it regards as appropriate. *See generally* Idaho Const.,

Art. IV, § 7; Idaho Code § 20-1016. The Commission was in no way bound by Judge Newhouse's 1995 findings. It could have accepted them had it chose, but it was equally free to instead endorse the much different findings that Judge Newhouse made in 1982, when he wrote that Mr. Creech "did not instigate the fight with the victim, but the victim, without provocation, attacked him." Dist. Ct. Dkt. 4-1 at 25. The panel effectively treated the Commission like a court, asking whether it had sufficient evidence to disturb a particular judicial finding. That framework is doubly inapposite. Once because that is not how clemency works. And twice because, under *Chapman*, it would be the prosecutors' burden to prove that for some reason the 1995 findings are the only ones that would have mattered to the Commission—something they haven't even attempted to do.

The panel's handling of the Walker issue on harmlessness was also irreconcilable with *Chapman*. It again treated the matter as though Mr. Creech is challenging the sufficiency of the evidence in a criminal appeal, asking what would happen if the false evidence were removed from "the equation," *Creech*, 2024 WL 755720, at *4, rather than whether the prosecutors had proven by the highest possible standard that these bombshell allegations did *not* contribute to the result.

The panel's discounting of the false Walker evidence also overlooks the manner in which Ms. Longhurst herself used the allegations. Although the panel paints Mr. Walker as just one in a list of victims, that was not the prosecutors' own strategy. The prosecutors were so shrewdly focused on spreading the Walker disinformation that they mentioned only two victims' names in their press release:

Mr. Jensen, whose murder led to the death sentence, and Mr. Walker. *See* Dist. Ct. Dkt. 4-3. As intended, the prosecutors' sensationalistic accusations generated headlines from around the country conveying to the public—which includes the Parole Commission—that Mr. Creech's guilt in the Walker case was now settled. *See* Dist. Ct. Dkt. 15-13 (sampling nearly fifty pages of damning media coverage). None of that could be said about any crime other than Walker.

The panel also drifted from *Chapman* when it conducted the harmless-error inquiry by isolating each of Ms. Longhurst's falsehoods and weighing them in a vacuum without considering their cumulative impact. *See Creech*, 2024 WL 755720, at *4–5. *Chapman* requires courts to ask whether "the *cumulative error* [is] harmless beyond a reasonable doubt." *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002). And finally, the Ninth Circuit overlooked the fact that the Commission's vote was tied, which also cuts strongly against a finding of harmlessness. *Cf. United States v. Beckman*, 222 F.3d 512, 525 (8th Cir. 2000) (deeming an error harmful where a previous trial without the violation resulted in a hung jury).

Finally, there is a separate uncertainty about whether the burden should be on the State, as it would be under *Chapman*, or whether it should be on Mr. Creech, as it would be under certain administrative-law cases. The Commission argued below that the commutation context is akin to when a party is "attacking an agency's determination," in which event the burden falls upon the challenger. 9th Cir. Dkt. 12 at 16 (citing, inter alia, *Shinseki v. Sanders*, 556 U.S. 396 (2009)). Mr.

Creech believes commutation is more comparable to the criminal context, since it is a sentence at issue. But he realizes the point is debatable, and unsettled, which is another reason to grant certiorari.

At any rate, though, the Ninth Circuit applied *Chapman* and it did so wrongly. If the Ninth Circuit had stayed true to *Chapman*, a different result would have been inevitable. Ms. Longhurst's presentation to the Commission stressed at great length two aggravating features about Mr. Creech's case, to the virtual exclusion of all else: the brutality of the Jensen offense, and the prior murders. *See* Dist. Ct. Dkt. 11-1 at 12–16. The lies here significantly impacted both of those areas. They provided a false foundation to find the crime more coldblooded and they provided a false foundation to execute Mr. Creech as the only means to punish him for a murder that he would otherwise get away with. Contrary to the panel, those are not trivial consequences but go to the heart of the proceedings. At a minimum, Mr. Creech makes a compelling argument for why he would prevail on a harmless-error analysis, and his case is therefore a solid vehicle for the second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 26th day of February 2024.

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