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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS EUGENE CREECH,	)	
	)	**NO. 52373-2024**
Petitioner-Appellant,	)	
	)	**ADA COUNTY NO. CV01-24-18351**
v.	)	
	)	
RANDY VALLEY, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION,	)	**APPELLANT'S BRIEF**
	)	
Respondent.	)	
	)	**(Capital Case)**

BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Thomas Creech, a prisoner sentenced to death and facing an imminent execution, appeals the district court's dismissal with prejudice of Claim Two of his application for a writ of habeas corpus. Tom submits that he adequately stated a claim of constitutional violation upon which the district court could have granted relief, and the district court abused its discretion by dismissing the claim pursuant to Idaho Code § 19-4209(1)(c), and further by dismissing his application with prejudice.

Statement of Facts and Course of Proceedings

In 1981, Tom pled guilty to the first-degree murder of David Jensen in Ada County case number 10252 and was subsequently sentenced to death by Judge Newhouse. This Court originally affirmed the judgment and conviction in May of 1983, *see State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), and affirmed the district court's denial of post-conviction relief in June of 1985. *See State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985). Tom's federal petition for writ of habeas corpus was filed in January of 1986, and relief was quickly denied. *See Creech v. A.J. Arave*, D. Idaho Case No. 86-1042. However, the Ninth Circuit later granted Tom sentencing relief in March of 1991. *See Creech v. Arave*, 94 F.2d 873 (9th Cir. 1991). The United States Supreme Court reversed the Ninth Circuit's judgment in part, but left the grant of sentencing relief in place. *See Arave v. Creech*, 507 U.S. 463 (1993).

Tom renewed a previous motion to withdraw his guilty plea, as well as other new grounds for relief, but the state district court denied his motion, and instead imposed a new death sentence on April 17, 1995. In May of 1995, Tom sought post-conviction relief, which was denied by the district court, *see Creech v. State*, Ada County Case No. SPOT9500154D, and affirmed by this

Court in *State v. Creech*, 132 Idaho 1, 966 P.2d 1 (1998). Tom's efforts to challenge the ineffective assistance of counsel he had received from his trial attorneys—but which his post-conviction attorneys failed to raise due to their own ineffectiveness—were turned away by this Court. *See Creech v. State*, 137 Idaho 573, 51 P.3d 387 (2002). Following the United States Supreme Court decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), Tom filed a successive petition for post-conviction relief on June 30, 2022. *See* Ada County Case No. CV01-22-9424. The district court summarily dismissed that petition as time-barred without reaching the merits of his claims and, on appeal, this Court denied relief on February 9, 2024. *See Creech v. State*, 173 Idaho 390, 543 P.3d 494 (2024). Nineteen days later, on February 28, 2024, the State attempted to execute Tom but failed to establish any peripheral intravenous (IV) lines to inject the lethal chemicals. (R., pp.9, 11-13.)

Leading up to that moment, Tom had endured four weeks isolated from other prisoners and awaiting his death on F-Block, colloquially known as the "death house." Immediately upon issuance of the death warrant, pursuant to prison policy, he had been evicted from his home on J-Block and relocated there to await his execution. (R., pp.9-11.) Tom made arrangements for his own death, including autopsy plans, the disposal of his body, selecting a spiritual advisor for his execution, selecting those who would witness his execution, and planning for the final disposition of his property. (R., p.10.) While awaiting his execution, Tom engaged in protracted goodbyes with family, spiritual advisers and members of his defense team. (R., pp.10-11). He also participated in a tour and preview of everything that would transpire on the morning of his death. (R., p.10.)

As time ran out, emotional farewells were exchanged, and Tom was escorted to the execution chamber. (R., p.11.) At approximately 10:00 am on February 28, 2024, he was strapped

to a backboard and carried into the execution chamber. (R., p.11.) He was bound to a table on display for an audience that included his distraught wife and stepson on one side, and various dignitaries of state government on the other side, including the Attorney General and the Ada County Prosecuting Attorney. (R., pp.11-12.) Members of the execution team applied dressings, palpitated his arms and hands, and used a device to search for his veins. (R., p.12.) Tom looked through the plexiglass and saw the total devastation of his wife, reaching out his hand as if to take his wife's hand through the glass as they attempted to find a vein. (R., p.12.) They repeatedly poked his arms and hands looking for a suitable vein, eventually making eight unsuccessful attempts in both his arms, both hands, and both legs. (R., pp.12, 17.) With each needle prick causing him pain, he was convinced that the lethal drugs were being pumped into his body. (R., p.13.) But, after nearly an hour of his veins failing—an hour of anticipating his imminent death with each stick of a needle—prison officials deemed the execution was unable to proceed. (R., p.13.)

The State's unsuccessful attempt to kill Tom became **only the sixth failed execution in modern American history**, and the **only one** to ever occur in Idaho. (R., p.16.)[1] Only Tom and these other five individuals know firsthand the physical and psychological agony associated with surviving an attempted execution. As a result of the failed execution attempt in February, Tom suffers from profound and life-changing trauma. He deals with severe paranoia and accompanying anxiety; has extreme difficulty sleeping; suffers from memory loss, nightmares, delusions, and haunting hallucinations; has experienced loss of appetite; and has become isolated and withdrawn. (R., pp.14-15.)

[1] *See also* Death Penalty Information Center, Botched Executions, available at https://deathpenaltyinfo.org/executions/botched-executions (last visited 11/6/2024).

On March 18, 2024, based on the unsuccessful execution attempt, its circumstances, and its impacts on him, Tom filed a petition for post-conviction relief pursuant to Idaho Code §§ 19-2719 and 19-4901 seeking relief from any further execution attempts on the grounds of federal and state constitutional protections against cruel and unusual punishment and on Tom's double jeopardy and due process rights. (Order Re: Judicial Notice, *hereinafter* J.N. Order, issued November 5, 2024, pp.1-69.[2]) Following oral arguments on the State's motion, which took place August 29, 2024, the district court granted summary dismissal on September 5, 2024. (J.N. Order, pp.70-86.) In doing so, the court conceded that Tom suffered during the failed execution and in its aftermath: "[t]he Court doesn't doubt that enduring one execution attempt and facing another has traumatized Creech. Despite his heinous crimes, Creech is a human being whose suffering is worthy of consideration." (J.N. Order, pp.77-78.) Nevertheless, the district court determined Tom's post-conviction petition was the improper vehicle in which to address his claims. (J.N. Order, p.82.) Tom filed a motion to reconsider but the district court denied that motion on October 16, 2024. (*See* J.N. Order, pp.87-89, 106-111.)

There is nothing in the record indicating that Tom's situation, physiology, or circumstances have changed since February. Nevertheless, minutes after the district court's denial of Tom's motion for reconsideration on October 16, 2024, the State obtained a new warrant for his

[2] This Court issued an order in the underlying case taking Judicial Notice of a number of documents in the related case, Supreme Court Case Number 52327-2024, Ada County District Court No. CV01-2404845. The citations used here will reference the contents of that order as "J.N. Order," reference the paragraph number of the document, and the internal page number of the document delivered by the Court.

execution.[3] (R., pp.9, 36-38; J.N. Order, pp.112-14.) That death warrant scheduled Idaho's second attempt to execute Tom for November 13, 2024.[4] (R., pp.36-38.)

Notably, lethal injection is still the default method of execution in Idaho. *See* I.C. § 19-2716(3). Current law provides that, within five days of the issuance of a death warrant, the director must certify that lethal injection is "available" to the Department of Correction, and only in the absence of that certification does execution by firing squad become a permissible method of execution. *See* I.C. § 19-2716(2), (4). Shortly after Tom's current death warrant was signed, the Department certified that lethal injection was available.[5] This means that, regardless of its last bungled attempt, the State will yet again try to establish an intravenous line for the administration of the lethal drugs into Tom's body at the next attempted execution.

On October 11, 2024, the State of Idaho adopted and issued a new Standard Operating Procedure for lethal injection.[6] Along with revised execution procedures, the State also issued an accompanying document, "Execution Chemical Preparation and Administration." That document

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[3] On October 11, 2024, the State of Idaho adopted and issued a new Standard Operating Procedure for lethal injection. That new procedure can be found at https://forms-idoc.idaho.gov/WebLink/DocView.aspx?id=283090&dbid=0&repo=LFICHE (last visited 11/6/2024.) Only five days later the State sought and obtained a new death warrant. Just moments before the district court had filed its order denying Mr. Creech's Motion for Reconsideration.

[4] As of the filing of this Brief, undersigned counsel is in possession of a stay of execution, signed on 11/6/2024, by the Honorable G. Murray Snow, Senior United States District Judge in the District of Idaho, regarding Mr. Creech's scheduled execution of November 13, 2024, in Case No. 1:24-cv-00485-GMS. That stay is granted "pending this Court's order addressing Creech's habeas petition" and includes filing deadlines of the parties through November 29, 2024. That federal district court stay has been previously submitted to the Court as an attachment to the Emergency Stipulation to Extend Time for Filing, filed on 11/6/2024.

[5] *See* https://www.idoc.idaho.gov/content/news/idoc-serves-death-warrant-thomas-creech-1 (*last visited* 11/6/2024.)

[6] The new procedure is available online and can be found at https://forms-idoc.idaho.gov/WebLink/DocView.aspx?id=283090&dbid=0&repo=LFICHE (last visited 11/6/2024.)

includes a discussion of how to establish intravenous lines, including peripheral and central intravenous lines.[7] (R., p.45.)

Tom filed a notice of appeal regarding the denial of his post-conviction petition. (J.N. Order, pp.115-19.) Then, twelve days after the death warrant was issued, on October 28, 2024, Tom filed an *Application for Writ of Habeas Corpus* (*hereinafter* Application) in the Fourth Judicial District of Idaho. (R., pp.3-86.) Tom's Application raised three constitutional claims for habeas relief. (R., pp.9-31.) Claim One alleged it would be cruel and unusual to carry out Tom's death sentence through a second attempt after the botched execution, considering the resulting psychological impact and trauma caused by the first failed attempt. (R., pp.9-16.) Claim Two argued the use of a central venous line would be cruel and unusual, given the evolving standards of decency, its extraordinarily infrequent use, and its being prone to failure and painful complications. (R., pp.17-30.) And Claim Three raised a double jeopardy challenge based on the prolonged events leading up to and following the botched execution attempt. (R., pp.30-31.)

At the close of the Application, Tom asked the district court to make findings in accordance with Idaho Code sections 19-4209(1)(a)-(e) and 19-4211(2), to enable the court to issue a writ of habeas corpus and set the matter for hearing. (*See* R., p.31.) Tom also asked that the matter be expedited to account for the pending execution date (which was sooner than the 30-day timeframe ordinarily provided for response), to permit Tom to file a reply to the warden's Response, and to consider a court-ordered stay of execution in the event an evidentiary hearing could not be conducted before the scheduled execution. (*See* R., p.32.)

[7] That document can be found at https://forms-idoc.idaho.gov/WebLink/DocView.aspx?dbid=0&id=982043&page=1 (last visited 11/6/2024).

The Application was captioned as Ada County Case No. CV01-24-18351 and reassigned to District Judge Jason D. Scott on October 29, 2024. (R., p.87.) The following day, the district court issued an order dismissing Tom's Application **with prejudice**, asserting that Tom failed to state any claim for which relief could be granted. (*See* R., pp.89, 95.)

Claim One was dismissed under the doctrine of issue preclusion, with the district court expressly finding that the fourth requirement of issue preclusion as set forth in *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007)—"a final judgment on the merits in the prior litigation"—had been satisfied despite the pending appeal.[8] (R., pp.90-91.) The district court also found "[t]he invalidation of Creech's death sentence is a remedy unavailable on a habeas theory[,]" stating that the challenge in Claim One "seeks not a habeas remedy but instead a post-conviction remedy." (R., pp.91-92 (emphasis in original).) The district court similarly dismissed Claim Three on the grounds of issue preclusion and for "seeking a remedy unavailable on a habeas theory." (R., p.92.)

With regard to Claim Two, the district court acknowledged that it had not been litigated in the post-conviction action and that it "doesn't seek the invalidation of Creech's death sentence." (R., p.93.) Instead, the Court understood Tom's habeas challenge as a "method-of-execution" challenge to the proposed method of execution through the placement of a central venous line. (R., p.93.) The district court found that the execution protocol's contemplation of the use of a central line is "a back-up plan to be implemented only if the primary plan of placing peripheral lines is unworkable," and further indicates that such a placement is a "back-up plan here too." (R., p.94.) The execution protocol specifically states "[p]eripheral venous access is the preferred

[8] This Court issued a decision in that case, Supreme Court Case Number 52327, late on November 5, 2024, affirming the district court's dismissal of his post-conviction claims. *See Creech v. State*, --- P.3d ----, 2024 WL 4678228 (November 5, 2024).

method of IV catheter placement, unless the Medical Team Leader determines it is not possible to place two reliable peripheral catheters." (R., p.45.) The court declared that placing a central venous line is "a common, simple medical procedure" and held that the data presented in the Application does not show that it is "a cruel and unusual punishment," finding more specifically that the data "has no tendency whatsoever to demonstrate the indecency or cruelty" of a central line, while saying nothing about its rare or unusual nature. (R., p.94.)

The district court also found it was fatal to his claim for Tom to challenge the use of a central venous line without proposing an alternative method of execution. (R., pp.94-95.) Upon dismissing Tom's Application for a writ of habeas corpus, the district court indicated it was doing so "with prejudice under section 19-4209(1)(c)." (R., p.95.) Tom filed a notice of appeal on November 5, 2024 and he was ordered by this Court to file his appellant's brief the next day. (*See* Order Expediting Appeal and Setting Briefing Schedule, Supreme Court Docket No. 52373-2024, issued November 5, 2024.) Following a federal district court's temporary stay of Tom's execution date, this Court granted an *Emergency Stipulation to Extend Time for Filing of Briefs* on November 6, 2024, extending the deadline for the filing of this brief to November 8, 2024.

ISSUE

Whether The District Court Erred By Dismissing With Prejudice Claim Two Of Mr. Creech's Application For Writ of Habeas Corpus?

STANDARD OF REVIEW

A trial court's decision to grant or deny a writ of habeas corpus is within its discretion and, on appeal, the reviewing court "conducts a multi-tiered inquiry to determine: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 729, 69 P.3d 146, 149 (2003); *Johnson v. State*, 85 Idaho 123, 127, 376 P.2d 704, 706 (1962). A habeas petitioner bears the burden of establishing error. *Id*.; *Hernandez v. State*, 100 Idaho 581, 602 P.2d 539 (1979). Furthermore, "[a] habeas corpus proceeding is a civil action and the Idaho Rules of Civil Procedure generally apply." *Matter of Writ of Habeas Corpus*, 168 Idaho 411, 416, 483 P.3d 954, 959 (2020).

ARGUMENT

The District Court Erred By Dismissing With Prejudice Claim Two Of Mr. Creech's Application For Writ Of Habeas Corpus

A. Introduction

The district court determined that Tom's Application must be dismissed with prejudice under I.C. § 19-4209(1)(c), for failure to "state a claim of constitutional violation upon which relief can be granted." (R., p.95.) The district court held that "a prisoner's habeas application may be dismissed with prejudice before it is even served on the respondent in certain circumstances" citing the factors in I.C. § 19-4209(1)(c). (R., p.89.) In particular, the court's ultimate determination on Claim Two was that it (1) failed to demonstrate that central venous line lethal injection was cruel and unusual (R., pp.93-94), and (2) failed to "propose a feasible execution method to be implemented as an alternative to the method he claims is unconstitutional." (R., pp.94-95.) The court abused its discretion because (1) allegations in habeas applications are to be treated as true and liberally construed; (2) Tom's claim, if true, **"can"** be granted relief; and (3) the court's immediate *sua sponte* dismissal of the claim based on federal caselaw was premature, as the Application needed only to state the claim, not to fully brief it. Under these facts, the dismissal was premature, and dismissing with prejudice was clear error and an abuse of the district court's discretion.

B. The District Court Erred By Failing To Treat The Allegations In Tom's Habeas Application As True And To Liberally Construe Them For The Purpose Of Dismissal

When reviewing the sufficiency of a habeas application, a trial court must accept all the applicant's allegations as true. *Johnson*, at 127, 376 P.2d at 706. "In general, liberality rather than strictness should control in considering an application for a writ of habeas corpus" and "even

though the issuance of a writ of habeas corpus is generally considered discretionary with the court, it should be liberally granted." *Id*. Historically, habeas corpus applications are often made *pro se*, which has been a primary reason behind liberally construing the sufficiency of their claims. *See id.* However, there is no reason to believe that a trial court may modify the standard for evaluating an application's sufficiency to be more rigorous when the applicant has the assistance of counsel.

In this case, Tom's Application was filed with the assistance of counsel, but he adequately stated the basis for his claim alleging that central venous lethal injection involved state actions that are both cruel and unusual. (*See* R., pp.18-24.) Tom's Application lays out the facts of nationwide central line executions. First, Tom has established that they are clearly **unusual**—according to both common sense and statistical calculation—because they are **so rarely** implemented. They are allowed in only ten states but are used in only 5.3 percent of the executions in those states—which amounts to 2.8 percent of total executions, and only 0.061 percent of the total executions occurring in the last 52 years. (R, pp.24-25.) Only six appear to have ever occurred. (*Id*.) Statistics such as these are informative as evidence that a punishment violates the Eighth Amendment. *See Coker v. Georgia*, 433 U.S. 584, 596-597 (1977) (plurality op.); *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). (*See* R., pp.23-24.)

Second, in at least five of the six known central line executions, the central line procedure resulted in harsh, agonizing, gruesome results, including but not limited to prolonged and calamitous struggles to access large veins and to administer poisons into them; medical errors injecting arteries instead of veins; infiltrated IV lines; dislodged IV connections; punctured arteries and organs; jagged incisions in prisoners' flesh to access veins in "cutdown" attempts; repeated stabbing with large needles into prisoners' chests, arms, necks, and groins; and prisoners enduring hours-long, torturous, and agonizing pain. (*See* R., pp.20-24, ¶¶101-07.) And these executions

have consistently been very bloody. (*Id*.) Thus, in addition to being unusual, substantial evidence in Tom's Application supports his claim that an execution by central venous line is also **cruel**.

The district court was obliged to consider these allegations as true. Instead, the court simply noted that central line lethal injection usually serves as "a back-up plan," and made a bare assertion that Tom failed to "demonstrate the indecency or cruelty of placing a central venous line." (R., p.94.) Based on the history of his case and the State's previous failure to establish peripheral line access for lethal injection on its prior attempt (*see* R., pp.11-13, ¶¶52-70), Tom has established that he is highly likely to be executed by a central line procedure. (*See* R., pp.17-20, ¶¶89, 94-100.) The court's characterization of a central line procedure as merely a "back-up" in Tom's case is therefore inaccurate. It should be noted that Tom's execution was the only one IDOC attempted in 2024. That failed execution attempt occurred on February 28, 2024. (R., pp.11, 13.) A new protocol including the option of a central venous line was issued or adopted on October 11, 2024, and the new death warrant for Tom was sought and obtained on October 16, 2024. (R., pp.40-86, 36-38.)

It is no coincidence that the execution team in February was unable to lay peripheral intravenous lines in Tom in February, and a new protocol was subsequently adopted—including the addition of a medical doctor to the execution team to place a central line if the team leader "determines [peripheral vein lethal injection] is not possible"—just five days before Tom's new death warrant was signed. (*See* R., pp.60-61, 45.) It does not require much deductive reasoning to conclude that the current execution team fully contemplates using the placement of a central venous line if it finds Tom's body in the same condition as it was in February. A central venous line was made possible, quite literally, to permit the State to proceed with Tom's second execution attempt. To argue that the State's use of a central venous line in a second execution attempt is merely a "back-up" plan is inaccurate and misleading in this instance. As a result, any subsequent

execution attempt will necessarily contemplate—and in all likelihood will include—the establishment of a central venous line.

Thus, the court was unreasonable to conclude summarily that Tom failed to assert facts in support of his claim that central line lethal injection amounts to cruel and unusual punishment. After all, as well stated by this Court, "the principles judicially established for the delimitation of habeas corpus action 'must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty.'" *Johnson*, 85 Idaho at 129, 376 P.2d at 707, *quoting Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

C. Tom's Claim Two, If True, **Can** Be Granted Relief

Thus, assuming Tom's allegations are true—as the district court was required to do—it is clear that **"relief can be granted"** on the constitutional violation Claim Two alleges. I.C. § 19-4209(1)(c) (emphasis added). It "can" be granted to the extent that it is within the judicial power of the district court to prevent Tom's execution where such an execution would be in contravention of the protections afforded him under the United States or Idaho constitutions. That is not to say the district court was required to provide relief, but it should have given Tom's claim a chance to be heard. Instead, the court erred by failing to acknowledge the potential for relief and by dismissing the claim with prejudice. Idaho Code § 19-4209(1) was intended to screen patently deficient petitions and prevent them from wasting court resources, but not to bar claims like Tom's. *See* H.B. No. 235, 55th Legis., First Reg. Sess. (Idaho 1999) (legislature updating statutory habeas procedure to "reduce the number of frivolous petitions **while expediting the due process review**

of valid petitions.") (emphasis added). Only if Tom had failed to state a cognizable[9] claim at all should the claim have been dismissed with prejudice.

Tom alleges that that method of execution—lethal injection through a central venous line—is cruel and unusual under the Eighth Amendment and Art. I, § 6 of the Idaho Constitution, and he asked the district court to relieve him from the unconstitutional death sentence that would result from a central line execution. In other words, Tom's Application (1) explicitly stated factual allegations that his execution by central line would be cruel and unusual, which must be deemed true; (2) identified his specific constitutional grounds, which do in fact provide relief in executions deemed to be cruel and unusual; and (3) specified the relief he sought, which the district court had the authority to provide. Indisputably, a violation of the Eighth Amendment of the United States Constitution resulting from the actions of government employees and affecting Tom's life while in a state institution is something a district court in Idaho is empowered and authorized to address. Therefore, Tom's Application did not fail "to state a claim of constitutional violation upon which relief can be granted." I.C. § 19-4209(1)(c).

It is notable that this Court recently upheld the dismissal of a habeas application on grounds that included the applicants' failure to raise a genuine issue of material fact, including because the applicants insufficiently supported their claims with admissible evidence. *Matter of Writ of Habeas Corpus*, 168 Idaho 411, 418-419, 483 P.3d 954, 961-962 (2020). But in that case, the district court's dismissal was not *sua sponte*, nor was the application dismissed before even serving the respondent-state officials, as it was in this case. Rather, the applicants were afforded access to the court, and state officials were served as respondents. It was only upon a motion for summary

[9] "Cognizable" is defined simply as "capable of being judicially tried or examined before a designated tribunal." BLACK'S LAW DICTIONARY 253, "cognizable" *at* (2.) (7th ed., 1999).

judgment that the district court dismissed the habeas action, pursuant to Idaho Rules of Civil Procedure 12 and 56. *Id*. at 416, 418, 483 P.3d at 959, 961. Prior to the dismissal, the prisoner applicants were provided a fair and meaningful opportunity to avail themselves of the rules of civil procedure, to counter the motion for summary judgment, and to brief the legal bases supporting their claims. *Id*. at 416, 483 P.3d at 959. Even though their claims fully failed to state a genuine issue of material fact and were inadequately supported by evidence, their initial application was still adequate to pass muster under I.C. § 19-4209.

Normally, once an application is determined to not be frivolous, malicious, lacking all merit, or to not address property issues, the case is served on the respondent-warden. *See* I.C. § 19-4209(2). The respondent is then ordered to file a response. *See* I.C. § 19-4209(2)(a),(b). In this case, the district court simply dismissed Tom's Application **as if** it were subject to summary judgment standards. But it abused its discretion by applying summary judgment standards in the absence of a motion for summary judgment by the respondent, and in the absence of a moving party's requirement to support its position, *see* I.R.C.P. 56(c)(1), and without providing Tom any opportunity to present argument or additional evidence, pursuant to I.R.C.P. 56(c)(2), (e)(1), to say nothing of the various other opportunities Tom should have had pursuant to the rules of civil procedure, such as to amend or supplement his application. *See* I.R.C.P. 15.

D. Even If The District Court Was Correct That, To Prevail, Tom Must Ultimately Propose A Feasible Execution Method As An Alternative To Central Veinous Line Injection, The Court's Permanent Preclusion Of The Claim Was Premature And The Application Was Only Required To State The Claim, Not To Fully Brief It

The district court deemed Tom's claim facially insufficient based on its analysis of federal caselaw in Eighth Amendment cases. Indeed, the federal courts have adopted a standard by which prisoners making "Eighth Amendment method-of-execution claims" must ultimately "identify a

readily available alternative method of execution that would significantly reduce the risk of severe pain." *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019) (quoting *Glossip v. Gross*, 576 U.S. 863, 867 (2015)) (internal quotation marks omitted). (*See* R., pp.94-95.) To prevail on federal grounds, at least, Tom would eventually have had to offer the court an alternative method of execution, and he would have attempted to do so if given the opportunity to be heard on this claim. However, the fact that Tom's claim would ultimately require additional legal briefing and/or argument to prevail on its merits does nothing to render the claim itself one "upon which relief can [not] be granted." At this stage, there is no requirement that a habeas applicant's entire legal argument be contained within his initial application. And to dismiss Tom's Application "with prejudice" not only denied him relief in this instance but precluded him from ever satisfying whatever burden the law might impose on him at any future date, irrespective of whether Tom would be able to meet that burden.

Furthermore, the district court summarily and unreasonably concluded that Tom's Application failed to "suggest" the Idaho Constitution's protections against cruel and unusual punishment were any different from the Eighth Amendment's. (R., p.93.) Tom clearly and sufficiently invoked his reliance on the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 6 of the Idaho Constitution (R., p.17), and it was not necessary in filing an initial application for a writ of habeas corpus to fully brief the interrelatedness of the federal and state constitutional protections. It strains credibility to imagine that state courts regularly expect such thorough and complex legal development of prisoners' claims in their initial habeas applications (particularly from *pro se* prisoner applicants). Moreover, the court's finding that Tom's claim was fatally flawed because he did not propose an alternative execution method presumes without authority that the federal standard for evaluating Eighth Amendment method-specific challenges would be the one and only standard applicable in state court.

Ultimately, the dismissal "with prejudice" of an application of a writ of habeas corpus such as Tom's indicates a fundamental misunderstanding of the purpose of the "Great Writ," which this Court has acknowledged "holds a revered place" in our nation's history and continues to serve a crucial purpose for prisoners seeking access to the courts. *Matter of Writ of Habeas Corpus*, at 417, 483 P.3d at 960. A writ of habeas corpus, according to Black's Law Dictionary, is a writ "to bring a person before a court, most frequently to ensure that the party's imprisonment, or detention is not illegal." BLACK'S LAW DICTIONARY 715 (7th ed., 1999). In its fundamental form, a writ of habeas corpus

> gives the judiciary a time-tested device to maintain the delicate balance of governance that is itself the surest safeguard of liberty and protects the rights of the detained by conferring the duty and authority on the judiciary to call the jailor to account. The essential purpose of a writ of habeas corpus is to subject imprisonment or any other restraint on liberty, for whatever cause, to judicial scrutiny.

39 Am. Jur. 2d Habeas Corpus I(A) § 1 (2nd Ed.). Importantly, "the purpose of a petition for writ of habeas corpus is not to correct errors of fact, but to determine whether a petitioner's constitutional rights have been violated." *Id.* The United States Supreme Court has described it as

> not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that injustices within its reach are surfaced and corrected.

Hensley v. Mun. Ct., San Jose Milpitas Jud. Dist., Santa Clara County, 411 U.S. 345, 350 (1973) (internal quotes and citations omitted). Consequently, "the limitations upon the remedy afforded by habeas corpus should be flexible and readily available to **prevent manifest injustice**[.]" *Johnson*, 85 Idaho at 128-29, 376 P.2d 704, 707 (emphasis added). Where a district court dismisses an application and bars any future raising of the issue due to "barriers of form and procedural mazes," then the district court has exhibited a fundamental misunderstanding of its very purpose.

The statute governing state habeas corpus in Idaho clearly indicates the writ may be used to challenge "conditions of confinement." *See* I.C. § 19-4203(2)(a). The legislature has very specifically defined "condition[] of confinement" as "a condition in any state or county institution . . . arising under state or federal law pertaining to the conditions of confinement **or the effect of actions by government officials or employees** . . . **on the life of a person confined in a state or county institution**." I.C. § 19-4203(7) (emphasis added). The unusual pain and cruelty exhibited during the establishment of a central venous line in a state-administered execution is clearly an action taken by a government employee which affects Tom's life while still in custody.

To dismiss with prejudice a claim premised on an allegation that there exists a condition of confinement in contravention of a prisoner's constitutional rights, it appears the district court would refuse to protect the right of the detained or to call the jailer to account regardless of how meritorious the claim or whether the applicant might be able to satisfy other legal requirements in order to establish a right to relief. As here, where the district court has found the applicant "may not do what he tries to do in Claim [II]: challenge the constitutionality under the Eighth Amendment of a method of executing his death sentence without proposing an alternative" (*see* R., p.95), the district court undermines the very nature of the writ of habeas corpus. Instead, it would bar Tom from ever exposing the conditions of his confinement to judicial scrutiny in the future due to some curable form or procedural hurdle irrespective of the constitutional nature of the claim.

The district court's rush to judgment on the merits bypassed the entire purpose of a writ of habeas corpus—to provide a prisoner the opportunity to raise his claim in court. The court conflated the federal standard for **evaluating** an Eighth Amendment claim with a habeas petitioner's simple requirement to **state** his claim in the initial application. Without giving Tom

access to the courts to seek relief for a constitutional violation, the district court erroneously put the cart before the horse and denied access based on an unreasonable presumption about how Tom would advance his claim if that access were provided. Importantly, once a cognizable claim has been made, the petitioner's actual burden is imposed in subsequent proceedings, pursuant to I.C. § 19-4209(7)(b) ("If the court issues a writ of habeas corpus and sets the matter for evidentiary hearing, the following shall apply: […] the burden of proof during an evidentiary hearing pursuant to a petition for writ of habeas corpus lies with the prisoner."). In fact, Tom's Application contains substantially more factual and legal content than would ordinarily be required in an initial application for a writ of habeas corpus. So, by dismissing it with prejudice—based on a legal argument not yet made but not yet required for the mere statement of the claim—it appears the court reacted to Tom's inclusion of factual and legal content **over and above what was required** of him by holding Tom's statement of claims to a higher standard, **over and above what is required** by I.C. § 19-4209.

The initial threshold for dismissal in I.C. § 19-4209(1) is to capture those cases that are frivolous, malicious, fail to even state a claim that a court could ever address, are truly *de minimis*, or involve issues of property. *See* I.C. § 19-4209(1)(a) through (e). In this case, however, the district court unreasonably used the statute to reach a decision on the merits of a cognizable claim, as if at the summary judgment stage. Instead of declaring the claim non-cognizable, an exercise of reason would have led the court to provide Tom an opportunity to argue his claim in court, or at the very least, to require the warden to be served and to refute the allegations. *See* I.C. § 19-4209(2). In so doing, Tom would have been able to make a full legal argument in response, address the court's concerns about an inadequate showing of alternative execution methods, and, if

necessary, amend or supplement his claim.[10] *See* I.R.C.P. 15, and I.C. § 19-4209(3) ("If the court orders a response to a petition for writ of habeas corpus under this section, the respondent may file any responsive motion or pleading allowed by Idaho rules of civil procedure."). At the very least, if the district court faulted Tom's Application for not fully briefing his claim and supporting it with legal argument addressing the standards of federal Eighth Amendment litigation, it could have dismissed the Application without prejudice and provided Tom a reasonable opportunity to cure it and refile. A dismissal **with prejudice** unreasonably bars Tom from doing so.

The district court unreasonably jumped the gun, which constituted an abuse of its discretion. The court's reasons for dismissing Tom's Application might have been valid had the Court been evaluating Tom's claim at the summary judgment stage, pursuant to I.R.C.P. 56. But Tom was never afforded an opportunity to advance his colorable claim in court. Thus, because he was provided no meaningful opportunity to be heard, he was denied due process. Such a denial was clear judicial error in this instance.

[10] In his Application, Tom clearly anticipated and explicitly sought to reserve his right to supplement facts and legal arguments as the action proceeded. (*See* R., p.17, n.7.)

CONCLUSION

This Court should vacate the district court's order dismissing Claim Two of Tom's Application with prejudice and remand Tom's case for consideration of his state habeas claim on its merits in district court. Tom has established that Claim Two adequately states a claim of constitutional violation upon which relief **can** be granted and should not have been dismissed. Furthermore, even if the district court was correct in faulting the claim for not yet proposing a feasible alternative method of execution, Tom should not have been prevented—forever—from making that showing in a subsequent filing or a curative reply.

DATED this 8th day of November, 2024.

/s/ Garth S. McCarty
GARTH S. McCARTY

/s/ Ian H. Thomson
IAN H. THOMSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 2024, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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