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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	**Supreme Court Docket Nos. 49489-2022 & 49531-2022**
Plaintiff-Appellant,	)	
	)	**Idaho County District Court Nos. CR-1985-22075 & CV25-22-0004**
v.	)	
	)	**CAPITAL CASE**
GERALD ROSS PIZZUTO, JR.,	)	
	)	**MOTION TO RECALL REMITTITUR AND STAY EXECUTION AND BRIEF IN SUPPORT**
Defendant-Appellee.	)	

For the reasons detailed below, Defendant-Appellee Gerald Ross Pizzuto, Jr. respectfully asks for an order recalling the remittitur and staying his execution until proceedings are complete at the U.S. Supreme Court in his challenge to *State v. Pizzuto*, 518 P.3d 796 (Idaho 2022).

I. Background

Mr. Pizzuto was convicted of murder and sentenced to death in Idaho County District Court in 1986. *See State v. Pizzuto*, 810 P.2d 680, 687 (Idaho 1991), *overruled on other grounds by State v. Card*, 825 P.2d 1081, 1088 (Idaho 1991). His death sentences were affirmed on direct appeal. *See id.* at 716. After further collateral litigation in state and federal court, which is not relevant to the present motion, Mr. Pizzuto applied for a commutation from the Idaho Commission of Pardons and Parole ("the Commission"). *See Pizzuto*, 518 P.3d at 798. A majority of the Commissioners voted to reduce Mr. Pizzuto's death sentences to life in prison without the possibility of parole. *See id.* Governor Little considered the Commission's determination a recommendation pursuant to Idaho Code § 20-1016, and purported to reject it. *See id.* at 799. Mr. Pizzuto challenged the Governor's intervention on the ground that Article IV, Section 7 ("Section 7") of the Idaho Constitution confers the commutation power on the Commission alone. *See id.* The district court agreed with Mr. Pizzuto and granted him sentencing relief. *See id.* On appeal, this Court reversed. A three-Justice majority found that the Governor's action was constitutional. *See id.* at 809. Two Justices concurred, concluding that the Commission enjoys the sole commutation power under the state constitution, but that no remedy was available. *See id.* at 809–13 (Horton, J., concurring).

On October 25, 2022, Mr. Pizzuto submitted a timely brief in support of rehearing, arguing in part that this Court's opinion violated his due process rights because all five Justices acknowledged that the commutation power was

constitutionally vested in the Commission, but nevertheless upheld the Governor's action. The Court denied the petition for rehearing on October 28, 2022, and issued its remittitur the same day. On November 16, 2022, the district court signed a death warrant, scheduling Mr. Pizzuto's execution for December 15, 2022. Mr. Pizzuto filed a motion to stay his execution pending U.S. Supreme Court proceedings on the same day the warrant was issued. *See* Ex. 1. After hearing argument, the district court denied the motion on November 22, 2022. *See* Ex. 2.

II. Argument

Turning to the substantive arguments, recalling the remittitur and granting a stay are both permissible under Idaho law and necessary as a practical matter to allow Mr. Pizzuto to present a substantial question to the U.S. Supreme Court before it is mooted by his premature execution. Mr. Pizzuto will first explain why the remittitur should be recalled; then why a stay is warranted; and finally why Idaho law allows the stay.

A. Recalling the remittitur is permissible and appropriate.

This Court does not appear to have set out a precise test for when it is appropriate to recall the remittitur. However, it provided guidance in this area of law in *State v. Ramirez*, 203 P. 279 (Idaho 1921). There, the Court recalled the remittitur in a direct capital appeal in order to reduce the jury's sentence from death to life in prison. *See id.* at 283–84. In surveying the practices of other jurisdictions, the *Ramirez* Court cited approvingly to the idea that "[a]gainst an order or judgment improvidently granted, upon a false suggestion, or under a

mistake as to the facts of the case, this court will afford relief after the adjournment of the term[1]; and will, if necessary, recall a remittitur." *Id.* at 280–81.[2] This is because "an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity." *Id.* at 281. The Court in those circumstances "may take such steps as may be necessary to make the fact and law agree." *Id.* Because *Ramirez* dealt with capital punishment, the Court gave the motion especially searching scrutiny: "The questions involved here are of the utmost importance to appellant, and every consideration of justice demands that this court determine its power both to recall the remittitur and to reduce the punishment in this case, and that the punishment be reduced if the facts do not warrant the imposition of the death penalty." *Id.* Applying those principles, the Court in *Ramirez* granted the motion to recall the remittitur because the evidence was "not sufficient to warrant the extreme penalty of the law," leaving the Justices with "grave misgivings about the infliction of the death penalty." *Id.* at 284.

Although Idaho's capital regime has changed since *Ramirez*, the power to recall the remittitur survives. *See State v. Beam*, 766 P.2d 678, 691–92 (Idaho

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[1] In *Ramirez*, the motion to recall the remittitur was filed during the same term the appeal had been decided. 34 Idaho at 626. Consequently, the Court did not have the occasion to determine whether such a motion could be entertained later. Nevertheless, the language quoted above suggests that it can be, and none of the equitable concerns discussed above disappear with the ending of the term.

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

1988) (Bistline, J., dissenting). Indeed, other states continue to exercise the power in capital cases. For example, in *Wertz v. State*, 493 S.W.3d 772 (Ark. 2016), the Arkansas Supreme Court recalled a mandate that had been entered in a capital case in 2008. *See id.* at 773. The *Wertz* court indicated that a recall of the mandate is triggered "in extraordinary circumstances," and that relevant factors include "the presence of a defect in the appellate process" and whether the matter is capital and therefore "requires heightened scrutiny." *Id.* at 775. Considering those factors, the court granted Mr. Wertz's motion because a mistake in his jury forms violated the Eighth Amendment, which led to "a defect in the appellate process" and therefore justified recall of the remittitur. *Id.* at 777.

Mr. Pizzuto is seeking a recall of the remittitur here to the extent it is necessary to secure the stay of execution that he describes below. When Mr. Pizzuto last sought a stay of execution at this Court, the motion was denied in a one-page order indicating that there was no "jurisdiction to entertain it." *Pizzuto v. State*, No. 47709, entered May 19, 2021.[3] The order did not explain why the Court determined that jurisdiction was lacking. Mr. Pizzuto suspects it may have been because the remittitur had already issued. *See State v. Billups*, 421 P.3d 220, 222 (Idaho 2018) ("Generally speaking, a remittitur terminates appellate jurisdiction and reinstates the lower court's jurisdiction over a case."). Therefore, Mr. Pizzuto is

[3] To the extent it is necessary, Mr. Pizzuto respectfully requests that judicial notice be taken of any court filings cited here. *See* I.R.E. 201(c)(2).

in this case requesting that the remittitur be recalled, to forestall any potential jurisdictional problems he might otherwise face. For the reasons already outlined, the Court has jurisdiction to recall the remittitur. Such a recall would, to the extent necessary, re-vest jurisdiction in this Court. *See In re Grunau*, 86 Cal. Rptr. 3d 908, 911 (Ct. App. 2008) (describing how an appellate court, "[b]y recalling the remittitur, . . . reasserts jurisdiction"). And for the reasons set forth below, a recall under those circumstances would be proper, because it would allow for a meritorious stay motion to be decided. In all events, Mr. Pizzuto respectfully asks the Court to explain the law regarding recall of the remittitur, as it has not been addressed in the last hundred years and the bench and bar would benefit from guidance.

B. A Stay Of Execution Is Appropriate.

Mr. Pizzuto has a right to seek certiorari review at the U.S. Supreme Court of any matters of federal constitutional law that were resolved by decisions in his case. *See* 28 U.S.C. § 1257(a); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006). As discussed below, Mr. Pizzuto has a substantial federal constitutional question to present to the U.S. Supreme Court in a certiorari petition. If Mr. Pizzuto is executed, he obviously cannot vindicate his entitlement to certiorari consideration at the U.S. Supreme Court. It is consequently proper to stay the execution.

In some contexts, the Idaho courts consider the likelihood of success in ruling on stay requests. *See, e.g.*, *Gordon v. U.S. Bank Nat'l Assoc.*, 455 P.3d 374, 384 (Idaho 2019). It is unclear whether the factor is relevant here, which is another

matter calling for explication from the Court. In any event, if the factor is relevant, Mr. Pizzuto can satisfy it.

The claim that Mr. Pizzuto wishes to present in a certiorari petition is that his federal due process rights were violated when this Court recognized that the state constitution vests the commutation power in the Commission and yet refused to honor a majority vote by the Commissioners.

Five U.S. Supreme Court Justices have agreed that the Due Process Clause of the Fourteenth Amendment applies to clemency proceedings. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring); *see also id.* at 290–91 (Stevens, J., concurring). As a consequence, that conclusion is precedential here as a matter of federal constitutional law. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (adopting the same reading of *Woodard*).

Thus, the only question is whether Mr. Pizzuto has received the quantity of process to which he is due. The minimal due process required in the clemency context is that "a death row prisoner . . . receive the clemency procedures explicitly set forth by state law." *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998); *accord Baze v. Thompson*, 302 S.W.3d 57 (Ky. 2010). That is precisely what this Court's opinion deprives Pizzuto of.

In deciding Mr. Pizzuto's appeal, all five sitting Justices unanimously agreed that Article IV, Section 7 ("Section 7") of the state constitution vests the commutation power in the Commission. The majority recognized as much by writing that "[t]he powers to pardon and commute sentences are grounded in

constitutional authority that may only be exercised within the executive branch, *and those powers are vested in the Commission*." *Pizzuto*, 518 P.3d at 805; *see id.* at 804 (explaining that "when Idaho voters adopted the 1986 amendment, they preserved the constitutional power *of the Commission* to grant a commutation"); *id.* at 807 (remarking that "the commutation power remains wholly vested in the executive branch *through the Commission*"). Two concurring Justices read Section 7 the same way. They stated, even more strongly, that "[t]he plain language of Article IV, section 7 grants commutation and pardon powers only to the Commission." *Id.* at 810 (Horton, J. concurring).

In so concluding, all five Justices enshrined a particular expectation in the state constitution—that the Commission render commutation decisions. However, the court then promptly refused to effectuate that same understanding in Mr. Pizzuto's case, by depriving him of the benefit of a majority vote by the Commission in favor of commutation. The court's actions therefore violated the Due Process Clause.

In rejecting a due process challenge in another case arising in the same area of law, the U.S. Supreme Court explained that a "commutation statute" that had "no definitions, no criteria, and no mandated 'shalls,' create[d] no . . . duty or constitutional entitlement." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). Section 7 does have a "shall." The Commission "*shall* have power to remit fines and forfeitures, and, only as provided by statute, to grant commutations."

Justice O'Connor's concurrence in *Woodard*, which represents the binding rule of law in the field, provides as an example of a due process violation a situation where "the State arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289. That is effectively what occurred here. The clemency process contemplated by Section 7, as construed by this Court, is one in which the commutation power is conferred on the Commission. That process was complete when the Commission voted for life. This Court had no basis for adding an extra step beyond what the Constitution envisions. It was arbitrary for the Court to admit that the Commission is the constitutionally empowered commutation actor and to then strip Mr. Pizzuto of the benefit of a decision rendered by that very body. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government."). Mr. Pizzuto has therefore demonstrate a likelihood of success on the merits.

To the extent the Court balances the harms to the parties and the public interest in determining the propriety of a stay, these factors all militate in favor of granting the instant motion. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (reciting the traditional stay factors in federal court, which include harm to the movant, injury to the other parties, and the public interest). Mr. Pizzuto will be executed absent a stay, which is the greatest and most irrevocable harm imaginable. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.) ("There is no question that death as a punishment is unique in its severity and irrevocability."); *see also*

Wainwright v. Booker, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (observing that irreparable harm in the absence of a stay of execution "is necessarily present in capital cases").

By contrast, the State would suffer no measurable prejudice if the stay were issued. Mr. Pizzuto has been on death row for more than thirty-six years. *See Pizzuto v. State*, 10 P.3d 742, 743 (Idaho 2000). A stay of execution for a few more months[4] to allow Mr. Pizzuto to litigate the substantial issues in this case will do the State no harm. *See Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay and emphasizing that the government would not "be significantly prejudiced by an additional short delay").

Finally, the public interest favors a stay. Although Mr. Pizzuto acknowledges the view that the public has an interest in carrying out death sentences, a stay will not interfere with that interest. If Mr. Pizzuto is granted a stay pending certiorari,

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[4] Under the U.S. Supreme Court's rules, Mr. Pizzuto has until January 26, 2023 to file a petition for certiorari. *See* Sup. Ct. R. 13(1), (3) (establishing that a certiorari petition is due ninety days from when a timely request for rehearing is denied below); https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf (extending the ninety days to 150 because of the pandemic). The State will then have thirty days to respond. *See* Sup. Ct. R. 15(1) (requiring responses to certiorari petitions in all capital cases); Sup. Ct. R. 15(3) (providing parties thirty days to respond to a certiorari petition). Roughly fourteen days after the brief in opposition is filed, the certiorari petition will be distributed to the Justices for them to conference. *See* Sup. Ct. R. 15(5). There is consequently a tightly circumscribed timetable for the certiorari process. *See* Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, The New Law, and Rule 19*, 38 U. Kan. L. Rev. 863, 865 n.4 (1990) ("The average length of time that petitions for writs of certiorari remain pending is six weeks from filing or two to three weeks after the brief in opposition to grant of the petition is filed.").

his death sentence will remain in effect. The only purpose of a stay is to enable the appellate process to run its normal course and for Mr. Pizzuto's challenges to receive a full airing at the U.S. Supreme Court. Should his due process claim fail on appeal, the State can still execute Mr. Pizzuto, assuming no other legal obstacles are in place.

Furthermore, the public's interest in finality now is also substantially diminished by the fact that the State is responsible for a significant amount of the delay that has occurred in carrying out Mr. Pizzuto's death sentence. The reason that Mr. Pizzuto has not yet been executed is that he has had challenges pending in court to his convictions and death sentence for the last thirty-six years, including his initial state post-conviction proceeding, his direct appeal, his first federal habeas action, and—later—timely attacks based on the ground that he is intellectually disabled, which were lodged in both state and federal court. *See Pizzuto*, 810 P.2d 680 (direct appeal and initial state post-conviction proceeding); *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002) (first federal habeas action); *Pizzuto*, 202 P.3d 642 (state case regarding intellectual disability); *Pizzuto*, 947 F.3d 510 (federal case regarding intellectual disability).

Over the course of that lengthy history of litigation, both parties took numerous extensions. They did so because their interest in being fully heard on their arguments outweighed their interest in a speed-at-any-cost approach. The same calculus applies now. Mr. Pizzuto's interest in receiving thorough appellate consideration of his due process claim outweighs any interest in hastening the case

to its end based on the artificially compressed timeline created by the State's choice to obtain a death warrant. Just as the State did in the collateral cases challenging Mr. Pizzuto's convictions and death sentence, all litigants require time to research and craft pleadings to raise the arguments they are entitled to raise in court. The State received such time in ample measure in the prior proceedings, and Mr. Pizzuto should be afforded his modest allotment here so that he can obtain meaningful appellate review of his claim, as any party is entitled to do.

Moreover, Mr. Pizzuto submits that the public has a stronger investment in an execution being constitutional than in the trivial difference between the event taking place 445 months after the sentencing instead of 450 months after the sentencing. *See Zagorski v. Haslam*, No. 3:18-cv-1035, 2018 WL 4931939, at *2, *4 (M.D. Tenn. Oct. 11, 2018) ("[I]t is always in the public interest to prevent violation of a party's constitutional rights.").

A stay merely "preserve[s] the status quo during the pendency of an appeal." *Haw. Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983). The consequences of a denied stay—an irreversible and involuntary death at the hands of the State—are far more severe than making the prosecutor wait a few more months to carry out an execution that has already been postponed for more than three decades.

C. A Stay Of Execution Is Permissible.

Idaho Code § 19-2715(1) purports to limit the circumstances in which stays of execution can be granted. However, in the event the Court reads the provision as

prohibiting the issuance of a stay, the statute would violate the separation of powers and thus cannot be so interpreted and enforced.[5]

By virtue of the Idaho Constitution, the legislature has "no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government." Idaho Const., Art. V, § 13. If a statute can be construed to avoid a separation-of-powers problem, it must be so construed. *See State v. Olivas*, 347 P.3d 1189, 1195 (Idaho 2015). When an act by a coordinate branch infringes upon the judiciary's inherent powers, the courts will nullify it. *See Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n*, 637 P.2d 1168, 1173 (Idaho 1981).

Under those principles, any statute purporting to take away the judiciary's ability to stay an execution is unenforceable. The authority to interpret the Constitution is at the core of the judiciary's responsibilities. *See Lanham v. Fleenor*, 429 P.3d 1231, 1236 (Idaho 2018) ("This function, determining the applicable law, is a bedrock of judicial decision-making. As Chief Justice John Marshall wrote in the landmark decision *Marbury v. Madison*, it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must necessarily expound and interpret that rule."). The planned certiorari proceedings present a constitutional challenge to Mr. Pizzuto's death

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[5] This Court's cases discussing § 19-2715(1) have not dealt with the separation of powers, and therefore do not foreclose the argument above. *See Leavitt v. Craven*, 302 P.3d 1 (Idaho 2012); *State v. Leavitt*, 280 P.3d 169 (Idaho 2012).

sentence. If § 19-2715 effectively requires the courts to order Mr. Pizzuto executed before the case is resolved, by stripping them of the power to grant a stay, it deprives the judiciary of the ability to fully and meaningfully adjudicate his constitutional rights, and consequently runs afoul of the separation of powers.

Additionally, courts have the inherent authority to manage their own dockets. *See, e.g.*, *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016). That authority carries with it the power to stay judicial proceedings where appropriate. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (reiterating that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket"). In Idaho, an execution is essentially a judicial event. That is, the inmate is executed by order of the judge who signs the death warrant. *See* Idaho Code § 19-2705. Idaho courts therefore have the inherent power to stay the execution, as they themselves have ordered it. *Cf. State v. Robert*, 814 N.W.2d 122, 124–25 (S.D. 2012) (describing the stay of an execution as "com[ing] within th[e] Court's inherent authority to preserve the status quo" "pending the appeal" and therefore as requiring no "express statutory authority").

In *State v. Moore*, 730 N.W.2d 563, 564 (Neb. 2007), the Nebraska Supreme Court went so far as to sua sponte stay an execution based on its "inherent judicial power" to "do all things that are reasonably necessary for the proper administration of justice." The court remarked upon its "supervisory power over the courts and the power to temporarily stay execution on judgments rendered by them whenever it is reasonably necessary to accomplish the ends of justice and prevent injustice." *Id.* at

564–65. "Obviously," the court concluded, "that inherent power extends to our own judgments and orders, including the death warrant in this case." *Id.* at 565. In fact, *Moore* deemed it especially appropriate to invoke the power in a capital case, where the court's "unique constitutional responsibilities impose a heightened standard of vigilance as [the court] administer[ed] and supervise[d] implementation of the death penalty." *Id.*

The rationales from these well-reasoned opinions apply with equal measure here. As in South Dakota and Nebraska, the courts in Idaho have an inherent power to stay executions, and the legislature cannot remove it. Were it otherwise, an Idaho court would have to sign a death warrant and then could do nothing about stopping the resulting execution, even when it would cause a man to be killed by the State unconstitutionally. That cannot be the law. *See Tate v. State Bd. of Med. Examiners*, 356 P.3d 506, 510–11 (Nev. 2015) (striking down a statute under the separation of powers where it purported to deprive courts of the ability to issue stays pending judicial review because judges always have "the power to preserve the status quo" and the statute impermissibly made appeals "a meaningless and merely ritualistic process"); *Ardt v. Ill. Dep't of Prof. Reg'n*, 607 N.E.2d 1226, 1232 (Ill. 1992) (coming to the same conclusion and reasoning that "to allow a court the ability to right a possible wrong by granting an appeal while denying it the power to defer imposition of a penalty attached to that wrong would be to deny the court its inherent right to make effective its constitutional grant of power"); *Smothers v. Lewis*, 672 S.W.2d 62, 65 (Ky. 1984) (reaching the same result on the ground that

the challenged ban on stays "pay[s] lip service to" the party's appellate rights "while eradicating any practical reason for taking the appeal").

Reflecting their well-entrenched authority in this regard, trial judges around the country routinely stay a variety of actions pending certiorari proceedings at the U.S. Supreme Court. *See, e.g.*, *State v. Penwell*, 875 N.E.2d 365, 366 (Ind. Ct. App. 2007) (noting that the judge stayed a criminal trial so the defendant could seek certiorari review of a suppression issue); *Frazier v. State*, 761 So. 2d 337, 338–39 (Fla. Dist. Ct. App. 1999) (describing how the judge stayed a criminal trial so the State could seek certiorari consideration of an asserted instructional error); *Davidson v. Commonwealth*, 432 S.E.2d 178, 179 (Va. 1993) (mentioning that the judge stayed the inmate's execution "so that he could file a petition for writ of certiorari in the United States Supreme Court"). The legislature has no constitutional license to deprive this Court of its basic power to issue stays pending certiorari—and one should be granted here. At a minimum, Mr. Pizzuto encourages the Court to explain its position on the separation-of-powers question in a reasoned opinion, rather than disposing of the motion in a summary order, so that parties and judges have the benefit of precedent on a serious constitutional matter with life-and-death stakes.

III. Conclusion

For the reasons outlined above, Mr. Pizzuto respectfully asks for the Court to recall the remittitur issued on October 28, 2022 and for his execution to be stayed until proceedings at the U.S. Supreme Court are complete.

Dated this 28th day of November 2022.

/s/ Jonah J. Horwitz
Jonah J. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November 2022, I caused to be served a true and correct copy of the foregoing document by the method indicated below:

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Exhibit 1

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

STATE OF IDAHO Plaintiff, v. GERALD ROSS PIZZUTO, JR., Defendant.	**Case Nos. CR-1985-22075** **MOTION TO STAY EXECUTION PENDING U.S. SUPREME COURT PROCEEDINGS** **EXECUTION SCHEDULED FOR DECEMBER 15** **Oral Argument Requested** **(CAPITAL CASE)**

For the reasons detailed in the accompanying memorandum in support, Defendant Gerald Ross Pizzuto, Jr. respectfully asks for an order staying his execution until proceedings are complete at the U.S. Supreme Court in his challenge to *State v. Pizzuto*, 518 P.3d 796 (Idaho 2022).

DATED this 16th day of November 2022.

/s/ Deborah A. Czuba
Deborah A. Czuba

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 2022 I served the foregoing document on all interested parties via iCourt file and serve:

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

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

STATE OF IDAHO Plaintiff, v. GERALD ROSS PIZZUTO, JR., Defendant.	**Case Nos. CR-1985-22075** **MEMORANDUM IN SUPPORT OF MOTION TO STAY EXECUTION PENDING U.S. SUPREME COURT PROCEEDINGS** **(CAPITAL CASE)** **EXECUTION SCHEDULED FOR DECEMBER 15, 2022**

For the reasons detailed below, Defendant Gerald Ross Pizzuto, Jr. respectfully asks for an order staying his execution until proceedings are complete at the U.S. Supreme Court in his challenge to *State v. Pizzuto*, 518 P.3d 796 (Idaho 2022) (hereinafter referred to sometimes as "the Opinion").

I. Background

Mr. Pizzuto was convicted of murder and sentenced to death in Idaho County District Court in 1986. *See State v. Pizzuto*, 810 P.2d 680, 687 (Idaho 1991), *overruled on other grounds by State v. Card*, 825 P.2d 1081, 1088 (Idaho 1991). His death sentences were affirmed on direct appeal. *See id.* at 716. After further collateral litigation in state and federal court, which is not relevant to the present motion, Mr. Pizzuto applied for a commutation from the Idaho Commission of Pardons and Parole ("the Commission"). *See Pizzuto*, 518 P.3d at 798. A majority of the Commissioners voted to reduce Mr. Pizzuto's death sentences to life in prison without the possibility of parole. *See id.* Governor Little considered the Commission's determination a recommendation pursuant to Idaho Code § 20-1016, and purported to reject it. *See id.* at 799. Mr. Pizzuto challenged the Governor's intervention on the ground that Article IV, Section 7 ("Section 7") of the Idaho Constitution confers the commutation power on the Commission alone. *See id.* This Court agreed with Mr. Pizzuto and granted him sentencing relief. *See id.* On appeal, the Idaho Supreme Court reversed. A three-Justice majority found that the Governor's action was constitutional. *See id.* at 809. Two Justices concurred, concluding that the Commission enjoys the sole commutation power under the state constitution, but that no remedy was available. *See id.* at 809–13 (Horton, J., concurring).

II. Argument

Turning to the substantive argument, a stay is both permissible under Idaho law and necessary as a practical matter to allow Mr. Pizzuto to present a substantial question to the U.S. Supreme Court before it is mooted by his premature execution. Mr. Pizzuto will first explain why the stay is warranted, and then why Idaho law allows it.

A. A Stay Of Execution Is Appropriate.

Mr. Pizzuto has a right to seek certiorari review at the U.S. Supreme Court of any matters of federal constitutional law that were resolved by decisions in his case. *See* 28 U.S.C. § 1257(a); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006). As discussed below, Mr. Pizzuto has a substantial federal constitutional question to present to the U.S. Supreme Court in a certiorari petition. If Mr. Pizzuto is executed, he obviously cannot vindicate his entitlement to certiorari consideration at the U.S. Supreme Court. It is consequently proper to stay the execution.

In some contexts, the Idaho courts consider the likelihood of success in ruling on stay requests. *See, e.g., Gordon v. U.S. Bank Nat'l Assoc.*, 455 P.3d 374, 384 (Idaho 2019). It is unclear whether the factor is relevant here. If it is, Mr. Pizzuto can satisfy it.

The claim that Mr. Pizzuto wishes to present in a certiorari petition is that his federal due process rights were violated when the Idaho Supreme Court recognized that the state constitution vests the commutation power in the Commission and yet refused to honor a majority vote by the Commissioners.

Five U.S. Supreme Court Justices have agreed that the Due Process Clause of the Fourteenth Amendment applies to clemency proceedings. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring); *see also id.* at 290–91 (Stevens, J., concurring). As a consequence, that conclusion is precedential here as a matter of federal constitutional law. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (adopting the same reading of *Woodard*).

Thus, the only question is whether Mr. Pizzuto has received the quantity of process to which he is due. The minimal due process required in the clemency context is that "a death row prisoner . . . receive the clemency procedures explicitly set forth by state law." *Duvall v.*

Keating, 162 F.3d 1058, 1061 (10th Cir. 1998); *accord Baze v. Thompson*, 302 S.W.3d 57 (Ky. 2010). That is precisely what the Idaho Supreme Court's opinion deprives Pizzuto of.

In deciding Mr. Pizzuto's appeal, all five sitting Justices on the Idaho Supreme Court unanimously agreed that Article IV, Section 7 ("Section 7") of the state constitution vests the commutation power in the Commission. The majority recognized as much by writing that "[t]he powers to pardon and commute sentences are grounded in constitutional authority that may only be exercised within the executive branch, *and those powers are vested in the Commission*." *Pizzuto*, 518 P.3d at 805. Two concurring Justices read Section 7 the same way. They stated, even more strongly, that "[t]he plain language of Article IV, section 7 grants commutation and pardon powers only to the Commission." *Id.* at 810 (Horton, J. concurring).

In so concluding, all five Justices enshrined a particular expectation in the state constitution—that the Commission render commutation decisions. However, the court then promptly refused to effectuate that same understanding in Mr. Pizzuto's case, by depriving him of the benefit of a majority vote by the Commission in favor of commutation. The court's actions therefore violated the Due Process Clause.

In rejecting a due process challenge in another case arising in the same area of law, the U.S. Supreme Court explained that a "commutation statute" that had "no definitions, no criteria, and no mandated 'shalls,' create[d] no . . . duty or constitutional entitlement." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). Section 7 does have a "shall." The Commission "*shall* have power to remit fines and forfeitures, and, only as provided by statute, to grant commutations."

Justice O'Connor's concurrence in *Woodard*, which represents the binding rule of law in the field, provides as an example of a due process violation a situation where "the State

arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289. That is effectively what occurred here. The clemency process contemplated by Section 7, as construed by the Idaho Supreme Court, is one in which the commutation power is conferred on the Commission. That process was complete when the Commission voted for life. The Idaho Supreme Court had no basis for adding an extra step beyond what the Constitution envisions. It was arbitrary for the court to admit that the Commission is the constitutionally empowered commutation actor and to then strip Mr. Pizzuto of the benefit of a decision rendered by that very body. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government."). Mr. Pizzuto has therefore demonstrate a likelihood of success on the merits.

To the extent the Court balances the harms to the parties and the public interest in determining the propriety of a stay, these factors all militate in favor of granting the instant motion. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (reciting the traditional stay factors in federal court, which include harm to the movant, injury to the other parties, and the public interest). Mr. Pizzuto will be executed absent a stay, which is the greatest and most irrevocable harm imaginable. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (observing that irreparable harm in the absence of a stay of execution "is necessarily present in capital cases").

By contrast, the State would suffer no measurable prejudice if the stay were issued. Mr. Pizzuto has been on death row for more than thirty-six years. *See Pizzuto v. State*, 10 P.3d 742,

743 (Idaho 2000). A stay of execution for a few more months[1] to allow Mr. Pizzuto to litigate the substantial issues in this case will do the State no harm. *See Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay and emphasizing that the government would not "be significantly prejudiced by an additional short delay").

Finally, the public interest favors a stay. Although Mr. Pizzuto acknowledges the view that the public has an interest in carrying out death sentences, a stay will not interfere with that interest. If Mr. Pizzuto is granted a stay pending certiorari, his death sentence will remain in effect. The only purpose of a stay is to enable the appellate process to run its normal course and for Mr. Pizzuto's challenges to receive a full airing at the U.S. Supreme Court. Should his claims fail on appeal, the State can still execute Mr. Pizzuto, assuming no other legal obstacles are in place.

Furthermore, the public's interest in finality now is also substantially diminished by the fact that the State is responsible for a significant amount of the delay that has occurred in carrying out Mr. Pizzuto's death sentence. The reason that Mr. Pizzuto has not yet been executed is that he has had challenges pending in court to his convictions and death sentence for the last thirty-six years, including his initial state post-conviction proceeding, his direct appeal,

[1] Under the U.S. Supreme Court's rules, Mr. Pizzuto has until January 26, 2023 to file a petition for certiorari. *See* Sup. Ct. R. 13(1), (3) (establishing that a certiorari petition is due ninety days from when a timely request for rehearing is denied). The State will then have thirty days to respond. *See* Sup. Ct. R. 15(1) (requiring responses to certiorari petitions in all capital cases); Sup. Ct. R. 15(3) (providing parties thirty days to respond to a certiorari petition). Roughly fourteen days after the brief in opposition is filed, the certiorari petition will be distributed to the Justices for them to conference. *See* Sup. Ct. R. 15(5). There is consequently a tightly circumscribed timetable for the certiorari process. *See* Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, The New Law, and Rule 19*, 38 U. Kan. L. Rev. 863, 865 n.4 (1990) ("The average length of time that petitions for writs of certiorari remain pending is six weeks from filing or two to three weeks after the brief in opposition to grant of the petition is filed.").

his first federal habeas action, and—later—timely attacks based on the ground that he is intellectually disabled, which were lodged in both state and federal court. *See Pizzuto*, 810 P.2d 680 (direct appeal and initial state post-conviction proceeding); *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002) (first federal habeas action); *Pizzuto*, 202 P.3d 642 (state case regarding intellectual disability); *Pizzuto*, 947 F.3d 510 (federal case regarding intellectual disability).

Over the course of that lengthy history of litigation, both parties took numerous extensions. They did so because their interest in being fully heard on their arguments outweighed their interest in a speed-at-any-cost approach. The same calculus applies now. Mr. Pizzuto's interest in receiving thorough appellate consideration of his claims outweighs any interest in hastening the case to its end based on the artificially compressed timeline created by the State's choice to obtain a death warrant. Just as the State did in the collateral cases challenging Mr. Pizzuto's convictions and death sentence, all litigants require time to research and craft pleadings to raise the arguments they are entitled to raise in court. The State received such time in ample measure in the prior proceedings, and Mr. Pizzuto should be afforded his modest allotment here so that he can obtain meaningful appellate review of his claims, as any party is entitled to do.

Moreover, the public interest is always served when the Constitution is vindicated, *see Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979), which in this instance requires a consideration of Mr. Pizzuto's serious claims before he is executed.

A stay merely "preserve[s] the status quo during the pendency of an appeal." *Haw. Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983). The consequences of a denied stay—an irreversible and involuntary death at the hands of the State—are far more severe than making the

prosecutor wait a few more months to carry out an execution that has already been postponed for more than three decades.

B. A Stay Of Execution Is Permissible.

Idaho Code § 19-2715(1) purports to limit the circumstances in which stays of execution can be granted. However, in the event the Court reads the provision as prohibiting the issuance of a stay, the statute would violate the separation of powers and thus cannot be so interpreted and enforced.[2]

By virtue of the Idaho Constitution, the legislature has "no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government." Idaho Const., Art. V, § 13. If a statute can be construed to avoid a separation-of-powers problem, it must be so construed. *See State v. Olivas*, 347 P.3d 1189, 1195 (Idaho 2015). When an act by a coordinate branch infringes upon the judiciary's inherent powers, the courts will nullify it. *See Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n*, 637 P.2d 1168, 1173 (Idaho 1981).

Under those principles, any statute purporting to take away the judiciary's ability to stay an execution is unenforceable. The authority to interpret the Constitution is at the core of the judiciary's responsibilities. *See Lanham v. Fleenor*, 429 P.3d 1231, 1236 (Idaho 2018) ("This function, determining the applicable law, is a bedrock of judicial decision-making. As Chief Justice John Marshall wrote in the landmark decision *Marbury v. Madison*, it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must necessarily expound and interpret that rule."). The planned certiorari

[2] Idaho Supreme Court cases discussing § 19-2715(1) have not dealt with the separation of powers, and therefore do not foreclose the argument above. *See Leavitt v. Craven*, 302 P.3d 1 (Idaho 2012); *State v. Leavitt*, 280 P.3d 169 (Idaho 2012).

proceedings present a constitutional challenge to Mr. Pizzuto's death sentence. If § 19-2715 effectively requires the courts to order Mr. Pizzuto executed before the case is resolved, by stripping them of the power to grant a stay, it deprives the judiciary of the ability to fully and meaningfully adjudicate his constitutional rights, and consequently runs afoul of the separation of powers.

Additionally, courts have the inherent authority to manage their own dockets. *See, e.g.*, *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016). That authority carries with it the power to stay judicial proceedings where appropriate. *See Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (reiterating that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket"). In Idaho, an execution is essentially a judicial event. That is, the inmate is executed by order of the judge who signs the death warrant. *See* Idaho Code § 19-2705. Idaho courts therefore have the inherent power to stay the execution, as they themselves have ordered it. *Cf. State v. Robert*, 814 N.W.2d 122, 124–25 (S.D. 2012) (describing the stay of an execution as "com[ing] within th[e] Court's inherent authority to preserve the status quo" "pending the appeal" and therefore as requiring no "express statutory authority").

In *State v. Moore*, 730 N.W.2d 563, 564 (Neb. 2007), the Nebraska Supreme Court went so far as to sua sponte stay an execution based on its "inherent judicial power" to "do all things that are reasonably necessary for the proper administration of justice." The court remarked upon its "supervisory power over the courts and the power to temporarily stay execution on judgments rendered by them whenever it is reasonably necessary to accomplish the ends of justice and prevent injustice." *Id.* at 564–65. "Obviously," the court concluded, "that inherent power extends to our own judgments and orders, including the death warrant in this case." *Id.* at 565.

In fact, *Moore* deemed it especially appropriate to invoke the power in a capital case, where the court's "unique constitutional responsibilities impose a heightened standard of vigilance as [the court] administer[ed] and supervise[d] implementation of the death penalty." *Id.*

The rationales from these well-reasoned opinions apply with equal measure here. As in South Dakota and Nebraska, the courts in Idaho have an inherent power to stay executions, and the legislature cannot remove it. Were it otherwise, an Idaho court would have to sign a death warrant and then could do nothing about stopping the resulting execution, even when it would cause a man to be killed by the State unconstitutionally. That cannot be the law. *See Tate v. State Bd. of Med. Examiners*, 356 P.3d 506, 510–11 (Nev. 2015) (striking down a statute under the separation of powers where it purported to deprive courts of the ability to issue stays pending judicial review because judges always have "the power to preserve the status quo" and the statute impermissibly made appeals "a meaningless and merely ritualistic process"); *Ardt v. Ill. Dep't of Prof. Reg'n*, 607 N.E.2d 1226, 1232 (Ill. 1992) (coming to the same conclusion and reasoning that "to allow a court the ability to right a possible wrong by granting an appeal while denying it the power to defer imposition of a penalty attached to that wrong would be to deny the court its inherent right to make effective its constitutional grant of power"); *Smothers v. Lewis*, 672 S.W.2d 62, 65 (Ky. 1984) (reaching the same result on the ground that the challenged ban on stays "pay[s] lip service to" the party's appellate rights "while eradicating any practical reason for taking the appeal").

When it ruled against a similar motion in 2021, this Court remarked that the U.S. Supreme Court was "not precluded from issuing a stay" pending certiorari. *See* Order, entered May 14, 2021, at 7. While true, the statement does not cut against a stay here. To the contrary, the U.S. Supreme Court's own rules require that "[a]n application for a stay" must "set out with

particularity why the relief sought is not available from any other court or judge." Sup. Ct. R. 23(2). The rule further provides that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges therefrom." Sup. Ct. R. 23(3). Thus, the U.S. Supreme Court plainly envisions parties pursuing stays pending certiorari from lower tribunals. Reflecting their well-entrenched authority in this regard, trial judges around the country routinely stay a variety of actions pending certiorari proceedings at the U.S. Supreme Court. *See, e.g.*, *State v. Penwell*, 875 N.E.2d 365, 366 (Ind. Ct. App. 2007) (noting that the judge stayed a criminal trial so the defendant could seek certiorari review of a suppression issue); *Frazier v. State*, 761 So. 2d 337, 338–39 (Fla. Dist. Ct. App. 1999) (describing how the judge stayed a criminal trial so the State could seek certiorari consideration of an asserted instructional error); *Davidson v. Commonwealth*, 432 S.E.2d 178, 179 (Va. 1993) (mentioning that the judge stayed the inmate's execution "so that he could file a petition for writ of certiorari in the United States Supreme Court"). The legislature has no constitutional license to deprive this Court of its basic power to issue stays pending certiorari—and one should be granted here.[3]

III. Conclusion

For the reasons outlined above, Mr. Pizzuto respectfully asks for his execution to be stayed until proceedings at the U.S. Supreme Court are complete.

[3] Mr. Pizzuto acknowledges that this Court denied a motion to stay his execution pending certiorari proceedings in an unrelated post-conviction proceeding. *See* Order, entered May 14, 2021. However, law of the case only applies when the litigation again raises "the same issues." *ParkWest Homes, LLC v. Barnson*, 302 P.3d 18, 23 (Idaho 2013). Here, Mr. Pizzuto is asking for a stay regarding a different claim, and so the same issue is not presented. Furthermore, Mr. Pizzuto respectfully submits that the Court did not meaningfully engage with his separation-of-powers argument in its prior order, and that it is therefore necessary to revisit the question now.

DATED this 16th day of November 2022.

/s/ Deborah A. Czuba
Deborah A. Czuba

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 2022 I served the foregoing document on all interested parties via iCourt file and serve:

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/s/ Heidi Thomas
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Exhibit 2

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

STATE OF IDAHO Plaintiff, v. GERALD ROSS PIZZUTO, JR., Defendant.	**CASE NO.** CR-1985-22075 CV-2003-34748 **MEMORANDUM OPINION AND ORDER ON MOTION TO STAY EXECUTION PENDING U.S. SUPREME COURT PROCEEDINGS**

This matter came on before the Court on the Defendant's Motion to Stay Execution Pending U.S. Supreme Court Proceedings. The Defendant was represented by Jonah Horwitz, of the Federal Defender Services of Idaho. The State was represented by LaMont Anderson, of the Idaho Attorney General's Office. The Court heard argument on November 22, 2022. The Court, being fully advised in the matter, hereby renders its decision.

PROCEDURAL BACKGROUND

The procedural background of this case, including commutation proceedings, has been set forth most recently by the Idaho Supreme Court in *State v. Pizzuto*, 518 P.3d 796 (Idaho 2022), *reh'g denied* (Oct. 28, 2022). A remittitur was issued on October 28, 2022. Following the remittitur, Pizzuto filed a motion to preclude the issuance of a death warrant to allow for All Writs Act litigation to continue in the federal court. This motion

was denied by this Court on November 15, 2022. A death warrant was entered on November 16, 2022. Immediately thereafter the Defendant filed the pending motion to stay execution until proceedings are complete at the U.S. Supreme Court regarding his due process challenge of the recent Idaho Supreme Court decision.

ANALYSIS

Pizzuto asserts that a stay is both permissible under Idaho law and necessary as a practical matter to allow him to seek review at the United States Supreme Court of any matter of federal constitutional law, specifically a due process challenge of the recent Idaho Supreme Court opinion. Chapter 27, Title 19 of the Idaho Code sets forth the procedural requirements for execution of judgments, including sentence of death, in the State of Idaho. On November 16, 2022 this Court issued a death warrant after inquiring of the State whether there was an existing death sentence and valid stay of execution, as required by I.C. § 19-2715. Given the circumstances of an existing death sentence and the absence of a valid stay of execution, this Court was required to sign the death warrant. *See State v. Leavitt*, 153 Idaho 142, 147, 280 P.3d 169, 174 (2012)(holding the trial court did not err in failing to inquire beyond the requirements of I.C. §19-2715(4) prior to issuing a death warrant). By signing the death warrant, this Court confirmed there was no valid stay of execution in place.

1. This Court's ability to issue a stay of execution is limited to the provisions of Chapter 27, Title 19, Idaho Code.

I.C. § 19-2708 states "No judge, court or officer, can suspend the execution of a judgment of death, except as provided in sections 19-2715 and 19-2719, Idaho Code." I.C. § 19-2715(1) sets forth limited reasons for the issuance of a stay of execution:

> Hereafter, no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted during an appeal taken pursuant to section 19-2719, Idaho Code, during the automatic review of judgments imposing the punishment of death provided by section 19-2827, Idaho Code, by order of a federal court or as part of a commutation proceeding pursuant to section 20-240, Idaho Code.

Id. At this time, none of these reasons for a stay are present in this case.[1]

In 2021, following the appeal and remittitur issued in Pizzuto's post-conviction action in Idaho County Case CV2003-34748, this Court issued a death warrant. However, the execution was stayed when the Commission of Pardons and Paroles agreed to consider commutation of Pizzuto's sentence. As noted above, commutation proceedings are a basis to enter a stay of execution.

The results of the commutation proceedings were appealed, and considered by the Idaho Supreme Court. The Idaho Supreme Court reversed this Court's determination on the issue of whether Pizzuto's sentence was illegal following the Governor's decision regarding commutation. Remittitur was issued following that appeal.[2] Following the remittitur, this Court was required to sign a death warrant if it was presented by the state. At this time, Pizzuto is deemed to have exhausted all state remedies.[3] As a result, there is

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[1] I.C. § 19-2719 addresses special appellate and post-conviction procedure for capital cases, including the application of an automatic stay while those reviews are in process. The "special procedures shall be interpreted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence." *Id.* I.C. § 19-2719(10) explains that when the review procedures have concluded, the defendant is deemed to have exhausted all state remedies. The special appellate and post-conviction procedures pursuant to I.C. § 19-2719 and the review of death sentence pursuant to I.C. § 19-2827 have been carried out in this case.

[2] I.C. § 19-2715(2) requires the state to apply for a warrant upon remittitur:

> Upon remittitur or mandate after a sentence of death has been affirmed, the state shall apply for a warrant from the district court in which the conviction was had, authorizing execution of the judgment of death. Upon such application, the district court shall set a new execution date not more than thirty (30) days thereafter.

[3] There are four reasons that a stay may be issued pursuant to I.C. §19-2715(1). Following the conclusion of the commutation proceedings, the only basis this Court may have to issue a stay is if a federal order is entered requiring the Court to do so. No other avenues for a stay are available to Pizzuto following the lengthy litigation process of this case.

no basis for a stay pursuant to I.C. § 19-2715 or § 19-2719. Therefore, pursuant to I.C. § 19-2708, this Court is precluded from issuing a stay of execution in this matter.

2. I.C. § 19-2715(1) does not violate the separation of powers.

Pizzuto contends that if this Court finds that I.C. §19-2715(1) prohibits the issuance of a stay in this matter, the statute would violate the separation of powers and thus cannot be so interpreted and enforced. Separation of powers was addressed by the Idaho Supreme Court in *State v. Olivas*, 158 Idaho 375, 347 P.3d 1189 (2015).

> "This [C]ourt has in the past been very circumspect in protecting the autonomy envisioned for the judiciary within our constitution." *State v. McCoy*, 94 Idaho 236, 240, 486 P.2d 247, 251 (1971).
>
> > The Idaho Constitution prohibits any branch of government from exercising powers that properly belong to another branch, unless the constitution expressly so directs or permits. Idaho Const. art. II, § 1. The power to define crimes and prescribe penalties belongs to the legislative department whereas the authority to sentence offenders who have been found guilty of those crimes lies with the judiciary. *Spanton v. Clapp*, 78 Idaho 234, 237, 299 P.2d 1103, 1104 (1956).
>
> *Gibson v. Bennett*, 141 Idaho 270, 276, 108 P.3d 417, 423 (Ct.App.2005). "This [C]ourt always must be watchful, as it has been in the past, that no one of the three separate departments of the government encroach upon the powers properly belonging to another." *McCoy*, 94 Idaho at 241, 486 P.2d at 252.
>
> In "direct recognition and reiteration of the separation of powers provided by Art. 2, § 1," Article V, Section 13 "forbids the legislature from exercising powers rightly pertaining to the judicial department." *R.E.W. Constr. Co. v. Dist. Court of the Third Judicial Dist.*, 88 Idaho 426, 437, 400 P.2d 390, 397 (1965). In this respect, Article V, Section 13 states: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government...." Idaho Const. art. V, § 13.

Id. 379-80, 347 P.3d at 1193–94. The Court is obligated to seek an interpretation of the statute that upholds its constitutionality.

> [T]he Court will critically review the statute to avoid an untenable encroachment on judicial power. We are "obligated to seek an

> interpretation of a statute that upholds its constitutionality." *In re Bermudes*, 141 Idaho 157, 159, 106 P.3d 1123, 1125 (2005).
>
> > Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts; and it is held by many courts that where there is room for two constructions of a statute, both equally obvious and equally reasonable, the court must, in deference to the Legislature of the state, assume that it did not overlook the provisions of the Constitution, and designed the act to take effect.
>
> *Grice v. Clearwater Timber Co.*, 20 Idaho 70, 77, 117 P. 112, 114 (1911) (citation omitted) (internal quotation marks omitted). Thus, to maintain the separation of powers, we will narrowly construe a sentencing statute against an infringement on the judiciary's inherent sentencing authority. Any other method of construction could permit the legislature to exercise powers properly belonging to the judiciary without invoking the appropriate constitutional authority.

Id. at 380, 347 P.3d at 1194.

As explained in I.C. § 19-2719, the Legislature enacted Chapter 27, Title 19 of the Idaho Code with the intent "to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence." The Idaho Supreme Court has not addressed a separation of powers claim with respect to Chapter 27, Title 19, Idaho Code.

At argument, Pizzuto argued the Court has the power to stay a judicial order because the Court has the fundamental power to stay its own orders and to maintain the status quo. The Court recognizes its inherent powers, however, in this case, where Pizzuto has exhausted all state remedies, the Court will not issue a stay of execution without one of the reasons enumerated in I.C. § 19-2715(1).

3. **The United States Supreme Court is not precluded from issuing a stay in this matter.**

Pizzuto is seeking a stay of execution on the basis that he has the right to seek review of the Idaho Supreme Court decision at the U.S. Supreme Court, specifically arguing due process violations from the commutation proceedings. *See* 28 U.S.C. §

1257(a); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006). Both Pizzuto and the State argued regarding a traditional four-part test that the U.S. Supreme Court discussed with respect to federal habeas corpus practice in *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

> Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed.Rule Civ.Proc. 62(c); Fed.Rule App.Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776, 107 S. Ct. at 2119. This Court will not engage in this analysis where it has already determined that the federal courts are not precluded from issuing an order which would result in a stay in this case. Should the federal court issue an order, Pizzuto may then seek a stay pursuant to I.C. § 19-2715(1).

ORDER

The Defendant's Motion to Stay Execution Pending United States Supreme Court Proceedings is hereby DENIED.

IT IS SO ORDERED.

DATED November 22, 2022

JAY P. GASKILL – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON MOTION TO STAY U.S. SUPREME COURT PROCEEDINGS was delivered via electronic court filing by the undersigned at Grangeville, Idaho, this 22 day of November, 2022, on:

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