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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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