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Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

THOMAS EUGENE CREECH, Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV01-24-4845 MEMORANDUM DECISION AND ORDER ON MOTION FOR SUMMARY DISMISSAL

More than forty years ago, in an underlying criminal case, Petitioner Thomas Eugene Creech pleaded guilty to first-degree murder and was sentenced to death. Over the ensuing decades, Creech's conviction and death sentence have survived numerous challenges in state and federal court. Early this year, the State tried for the first time to carry out his death sentence, but medical personnel were unable establish an intravenous line through which to administer a lethal injection, so the planned execution was abandoned. Having survived one execution attempt, Creech contends in this latest post-conviction action that any further attempt to execute him would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the Idaho Constitution. Consequently, he says, his death sentence must be vacated. The State moves for summary dismissal. The motion was argued and taken under advisement on August 29, 2024. For the reasons that follow, it is granted.

I.

BACKGROUND

In an underlying Ada County criminal case (previously designated Case No. HCR-10252 but, in Idaho's current case-management system, redesignated Case No. CR-FE-0000-10252), Creech was sentenced to death on January 25, 1982, for the crime of first-degree murder. His death sentence was vacated twice but reinstated twice, last on April 17, 1995. It remains in effect now, more than forty years after it was first pronounced. The history of the underlying criminal case and Creech's many challenges to its outcome—including multiple post-conviction cases in state court and multiple habeas cases in federal court—is partly recounted in *Creech v. Richardson*, 59 F.4th 372, 376–82 (9th Cir. 2023), *cert. denied*, 2023 WL 6558513 (U.S. Oct. 10, 2023). It will not be recounted here, except to mention that, beyond the challenges described in the just-cited Ninth Circuit opinion, Creech filed in state court another two more recent post-conviction actions, both of which failed on timeliness grounds. *Creech v. State*, 173 Idaho 390, 543 P.3d 494 (2024); *Creech v. State*, 173 Idaho 396, 543 P.3d 500 (2024).

On February 28, 2024, shortly after those last two post-conviction actions were rejected on appeal, the State tried to execute Creech by lethal injection. The planned execution was abandoned, however, when medical personnel were unable to establish an intravenous line through which to administer the lethal injection. A few weeks later, on March 18, 2024, Creech initiated this latest post-conviction action, which presents yet another challenge to his death sentence. His latest

petition for post-conviction relief contains his rendition of the failed execution attempt, (Pet. Post-Conviction Relief ¶¶ 42–90), and claims that trying again to execute him would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the Idaho Constitution, (*id.* ¶¶ 34–167). On these theories, he asks that his death sentence be vacated. (*Id.* ¶ 168.f.)

In this action's early stages, Creech briefly sought to preliminarily enjoin the State from seeking the issuance of a death warrant authorizing a second attempt to carry out his death sentence, but he withdrew that motion and hasn't renewed it. In the several months that have passed in the meantime, the State has yet to seek the issuance of another death warrant. It turns out, then, that the briefly sought preliminary injunction wasn't needed.

In any event, the State now moves for the petition's summary dismissal. That motion, as already mentioned, was argued and taken under advisement on August 29, 2024. It is ready for decision.

II.

LEGAL STANDARD

A petition for post-conviction relief initiates a civil proceeding—not a criminal one—governed by the Idaho Rules of Civil Procedure. I.C. § 19-4907; *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like plaintiffs in other civil actions, the petitioner must prove by a preponderance of the evidence the allegations necessary

to support an award of the requested relief. *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). A petition for post-conviction relief differs from a complaint in an ordinary civil action, though, in that it must contain more than "a short and plain statement of the claim" satisfying I.R.C.P. 8(a)(2). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. Instead, as to facts within the petitioner's personal knowledge, a petition must be verified and accompanied by affidavits, records, or other evidence supporting its allegations, or it must state why it isn't. I.C. § 19-4903. A petition is subject to dismissal if it doesn't contain, or isn't accompanied by, admissible supporting evidence. *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

A petition may be summarily dismissed, either on a party's motion or the trial court's own motion, if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). When considering summary dismissal, the trial court must construe disputed facts in the petitioner's favor, but it need not accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman*, 125 Idaho at 647, 873 P.2d at 901.

Summary dismissal is proper if the petitioner's allegations are clearly disproved by the record of the underlying criminal case, if the petitioner hasn't presented evidence making a prima facie case as to each essential element of the petitioner's claims, or if the petitioner's allegations are insufficient as a matter of law to justify relief. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010); *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009); *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007); *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Murphy v. State*, 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006); *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996).

Conversely, if the petition and accompanying materials contain admissible evidence of facts entitling the petitioner to relief, summary dismissal is impermissible. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Berg*, 131 Idaho at 519, 960 P.2d at 740; *Stuart*, 118 Idaho at 934, 801 P.2d at 1285; *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008); *Roman*, 125 Idaho at 647, 873 P.2d at 901.

III.

ANALYSIS

Creech says his decades-old death sentence must be vacated because another attempt to carry it out, after the failed attempt in February, would violate the Fifth Amendment's Double Jeopardy Clause, the Eighth Amendment's prohibition against cruel and unusual punishments, and the corresponding provisions of the

Idaho Constitution. The double-jeopardy claim is the place to start. The Court concludes that it is legally untenable and must be dismissed. Next to be analyzed is the cruel-and-unusual-punishment claim. The Court concludes that it doesn't furnish grounds for vacating Creech's death sentence and, instead, amounts under the law to a mere method-of-execution challenge that simply isn't cognizable in a post-conviction action (though it is litigable through other legal vehicles). Hence, the cruel-and-unusual-punishment claim must be dismissed too. These conclusions are explained in detail below.

A. Double Jeopardy

Although Creech claims that a second attempt to carry out his death sentence would be a double-jeopardy violation under both the federal constitution and the Idaho Constitution, (Pet. Post-Conviction Relief ¶¶ 141–49), he doesn't discernably argue that the Idaho Constitution's double-jeopardy protections exceed those of the federal constitution. Consequently, his claim need only be analyzed under the federal constitution. *See, e.g.*, *State v. Lee*, 172 Idaho 106, ___ n.2, 529 P.3d 771, 774 n.2 (Ct. App. 2023).

"[T]he Double Jeopardy Clause consists of several protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (internal quotation marks omitted); *see also Lee*, 172 Idaho at ___, 529 P.3d at 774 (to the same effect). Only the last of these protections is arguably

implicated by this case. "[I]n the multiple punishments context," the interest protected by the Double Jeopardy Clause is "limited to ensuring that the total punishment did not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (internal quotation marks omitted). In other words, "[t]he purpose is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id.* Consequently, "the [Double Jeopardy] Clause does not prohibit a second attempt at execution . . . because . . . the state is [not] . . . attempting to impose a 'second' punishment beyond that permitted by the legislature." *Broom v. Shoop*, 963 F.3d 500, 514–15 (6th Cir. 2020).

Applying these precedents here, the Court concludes without hesitation that the Double Jeopardy Clause doesn't bar the State from trying a second time to carry out Creech's death sentence. The State has yet to administer the legislatively authorized (and judicially ordered) punishment of death for the crime Creech committed. Because a second attempt to carry out his death sentence wouldn't subject him to more punishment than the legislature authorized for his crime, it wouldn't abridge his rights under the Double Jeopardy Clause. Consequently, his double-jeopardy claim must be dismissed.

B. Cruel and Unusual Punishment

Although Creech claims that a second attempt to carry out his death sentence would be a cruel and unusual punishment in violation of the Eighth Amendment

and the corresponding provision of the Idaho Constitution, (Pet. Post-Conviction Relief ¶¶ 36–124), he doesn't discernably argue that the Idaho Constitution's protections against cruel and unusual punishments exceed those of the federal constitution. Consequently, his claim need only be analyzed under the Eighth Amendment. *See, e.g.*, *Hall v. State*, 172 Idaho 334, 533 P.3d 243, 272 (2023). Indeed, his argument against its summary dismissal centers on Eighth Amendment case law, neither mentioning the Idaho Constitution nor citing cases applying the Idaho Constitution's prohibition against cruel and unusual punishments. (*See* Pet'r's Resp. State's Mot. Summ. Dismissal 6–13.)

Creech's rendition of the failed execution attempt is set out in the petition. (Pet. Post-Conviction Relief ¶¶ 42–90.) He describes being poked with needles eight times, which hurt him enough to make him say "ouch" repeatedly and made him think, incorrectly, that a lethal injection had been administered. (*Id.* ¶¶ 79–90; Creech Decl.[1] ¶¶ 3–6.) He also describes the subsequent emotional upset and physical difficulties he attributes to the failed execution attempt. (Pet. Post-Conviction Relief ¶¶ 91–110; Creech Decl. ¶¶ 9–24.) And he denies dehydrating himself to complicate establishing an intravenous line and potentially sabotage the planned execution. (Pet. Post-Conviction Relief ¶ 61; Creech Decl. ¶ 7.)

The Court doesn't doubt that enduring one execution attempt and facing another has traumatized Creech. Despite his heinous crimes, Creech is a human

[1] The Creech declaration is Exhibit 4 to the petition.

being whose suffering is worthy of consideration. The Eighth Amendment does not, however, categorically prohibit, as a cruel and unusual punishment, a second attempt to carry out a death sentence. In *Louisiana ex rel. Francis v. Resweber*, a four-justice plurality concluded that a second attempt to execute the petitioner, after an attempted execution by electrocution ended in a mechanical failure, wouldn't be a cruel and unusual punishment:

> Petitioner's suggestion is that, because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

329 U.S. 459, 464 (1947) (emphasis added). A fifth justice regarded the Eighth Amendment as inapplicable to the states but considered the proposed second attempt at executing the petitioner to be constitutional because the failed attempt was "an innocent misadventure." *Id.* at 470.

Just four years ago in *Broom*, the Sixth Circuit considered *Resweber*'s implications for a case involving, like this one, a proposed second attempt to carry

out a death sentence after the first attempt failed because medical personnel were unable to establish an intravenous line for administering a lethal injection.[2] The Sixth Circuit's take on *Resweber*, a precedent seventy-three years old then and seventy-seven years old now, is as follows:

> For better or worse, five justices in *Resweber* agreed that the Constitution does not prohibit a state from executing a prisoner after having already tried—and failed—to execute that prisoner once, so long as the state (1) did not intentionally, or maliciously, inflict unnecessary pain during the first, failed execution, and (2) will not inflict unnecessary pain during the second execution, beyond that inherent in the method of execution itself.

Broom, 963 F.3d at 512. In other words, according to the Sixth Circuit, *Resweber* offers the survivor of an execution attempt two routes to showing that a second execution attempt would be a cruel and unusual punishment: (i) prove the State intentionally or maliciously inflicted unnecessary pain during the failed execution attempt; or (ii) prove the State would inflict unnecessary pain during a second execution attempt. The Court agrees with not only the Sixth Circuit's interpretation of *Resweber* but also its determination that *Resweber* is—for better or worse—the law of the land.

Applying the law of the land as outlined in *Reseweber* and *Broom* to this case leads the Court to reach three conclusions.

First, the State didn't intentionally or maliciously inflict unnecessary pain during the failed execution attempt. Rather than show intentional or malicious

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[2] The failed execution attempt at issue in *Broom* was, however, markedly less humane and more painful than the one Creech endured. *See* 963 F.3d at 504–06.

infliction of unnecessary pain, Creech's testimony in the petition and his lawyer's similar testimony, (*see* Pet. Post-Conviction Relief Ex. 5), instead show a humanely conducted, though unsuccessful, execution attempt (accepting the premise of our law that execution by lethal injection isn't inherently inhumane). Indeed, Creech doesn't argue that the failed execution attempt involved intentional or malicious infliction of unnecessary pain. Because Creech neither showed nor even contended that the State intentionally or maliciously inflicted pain during the failed execution attempt, the first route recognized in *Broom* for proving that a second attempt at execution by lethal injection would be a cruel and unusual punishment is unavailable to him. Left to consider, then, is the other route: proving that another execution attempt would entail inflicting unnecessary pain.

Second, even if a second attempt to execute Creech by lethal injection would, as he argues, entail inflicting unnecessary pain and, hence, be a cruel and unusual punishment, his death sentence stands. In that event, the law would mandate executing him by firing squad, *see* I.C. § 19-2716(5), rather than deem him immune from execution. Creech hasn't offered evidence or argument to show that executing him by firing squad would entail inflicting unnecessary pain and, hence, be a cruel and unusual punishment. So, even if the Court were to take as a given that a second attempt to execute Creech by lethal injection would be a cruel and unusual punishment, the Court has no grounds to conclude that a first attempt to execute him by firing squad would be likewise (or to conclude that there is no other method of execution, not currently recognized by Idaho law, that wouldn't be a cruel and

unusual punishment were Creech subjected to it). Put differently, Creech's death sentence itself can't be impugned as a cruel and unusual punishment and therefore isn't invalid, even if a method of carrying it out might be impugnable as such.

Third, because Creech's death sentence and underlying conviction are valid, whether a second attempt to execute him by lethal injection would be a cruel and unusual punishment isn't litigable in a post-conviction action. A post-conviction action—whether the underlying criminal case is capital a non-capital—is only a vehicle for attacking the validity of a conviction or sentence. *See* I.C. § 19-2719(5)(b) ("A successive post-conviction pleading . . . shall be deemed facially insufficient to the extent it alleges matters that . . . would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence."); I.C. § 19-4901(a) (creating the remedy of a post-conviction action to challenge a conviction or sentence); I.C. § 19-4901(b) (stating that the post-conviction remedy "takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence"). Nothing about the failed execution attempt renders Creech's underlying death sentence unreliable or invalid. Creech's claim that a second attempt to execute him by lethal injection would be a cruel and unusual punishment amounts, under the law, to a mere challenge to a proposed method of execution; it isn't a potentially viable challenge to his conviction or death sentence. Hence, it isn't litigable in a post-conviction action. In this way, Idaho's post-conviction law mirrors its federal analog; a method-of-execution claim

that doesn't truly call into question a death sentence's validity isn't litigable in a federal habeas case. *Nance v. Ward*, 597 U.S. 159 (2022).

That said, Creech isn't left with no available means, now or ever, of claiming that a second attempt to execute him by lethal injection would be a cruel and unusual punishment. Eighth Amendment method-of-execution claims like the one he, in substance, makes now are litigable under 42 U.S.C. 1983. *Id.* at 167–69. Further, although section 1983 doesn't allow him to make a method-of-execution claim arising under the provision of the Idaho Constitution that corresponds to the Eighth Amendment's prohibition against cruel and unusual punishments, *see, e.g.*, *Smith v. City & Cnty. of Honolulu*, 887 F.3d 944, 952 (9th Cir. 2018) ("A claim for violation of state law is not cognizable under § 1983.") (internal quotation marks omitted), Idaho's Uniform Declaratory Judgment Act, I.C. §§ 10-1201 to -1217, allows him to do so. Consequently, while this post-conviction action isn't a proper vehicle for determining whether a second attempt at executing Creech by lethal injection would be a cruel and unusual punishment, that question is reachable in an action of another kind.

Given these three conclusions, the Court must dismiss Creech's cruel-and-unusual-punishment claim.

Accordingly,

IT IS ORDERED that the State's motion for summary dismissal is granted. A judgment of dismissal will be entered along with this order.

Jason D. Scott 9/5/2024 9:49:39 AM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on September 5, 2024, I served a copy of this document as follows:

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