

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Thomas Creech v. Josh Tewalt

No. 22-35069, United States Court of Appeals for the Ninth Circuit (October 13, 2023)

SUMMARY

The Ninth Circuit addressed an Idaho death row inmate's challenge to the state's execution secrecy, focusing on the district court's denial of leave to amend. The court affirmed the dismissal of claims seeking execution drug information under the First Amendment (citing **First Amendment Coalition of Arizona v. Ryan**), as well as equal protection, psychological harm, and separation of powers claims, as futile. The court vacated dismissal of the procedural due process claim (Claim 4), the substantial risk of severe pain claim under the Eighth Amendment (Claim 9), and the claim regarding counsel's right to view the entire execution (part of Claim 1), holding these could potentially be cured by amendment. The court also held that the district court did not violate the rule of mandate by sua sponte dismissing the claims and addressing futility on remand.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Mark J. Bennett; Ronald M. Gould; Johnnie B. Rawlinson
JURISDICTION	Federal
DECIDED	October 13, 2023
DOCKET	22-35069
DISPOSITION	other
PROCEDURAL POSTURE	Appeal from the United States District Court for the District of Idaho's sua sponte dismissal of plaintiff's complaint for failure to state a claim under Rule 12(b)(6) and denial of leave to amend. The district court dismissed the original nine claims with prejudice (except one claim dismissed without prejudice). Plaintiff appealed, arguing violation of the rule of mandate and that amendment was not futile.
STANDARD OF REVIEW	De novo review of compliance with appellate mandate and futility of amendment.
PRECEDENTIAL VALUE	Published

PARTIES

Thomas E. Creech v. Josh Tewalt, Chad Page, Tim Richardson,
Unknown Employees, Agents, or Contractors of the Idaho Department
of Correction

TOPICS

civil procedure

appellate procedure

constitutional law

criminal procedure

standing

PRACTICE AREAS

Appellate litigation

Constitutional law

Death penalty

QUESTIONS PRESENTED

1. Whether the district court violated the rule of mandate by sua sponte dismissing the complaint and denying leave to amend.
2. Whether amendment of Claim One (First Amendment right of access to government proceedings and records) would be futile.
3. Whether amendment of Claim Two (First Amendment right of access to courts) would be futile.
4. Whether amendment of Claim Three (Eighth Amendment deliberate indifference to psychological harm) would be futile.
5. Whether amendment of Claim Four (procedural due process) would be futile.
6. Whether amendment of Claim Five (equal protection) would be futile.
7. Whether amendment of Claim Six (statutory right to counsel) would be futile.
8. Whether amendment of Claim Seven (separation of powers under Idaho Constitution) would be futile.
9. Whether amendment of Claim Eight (violation of Idaho Code § 19-2716) would be futile.
10. Whether amendment of Claim Nine (Eighth Amendment substantial risk of serious harm) would be futile.

HOLDINGS

1. The district court did not violate the rule of mandate because the mandate did not foreclose such action; futility of amendment was not addressed in the prior appeal.
2. Amendment of Claim One is futile except with respect to the claim that Creech's attorneys have a right to observe the entire execution.
3. Amendment of Claim Two is futile.
4. Amendment of Claim Three is futile.
5. Amendment of Claim Four is not futile; the claim is remanded for leave to amend.
6. Amendment of Claim Five is futile.
7. Amendment of Claim Six is futile.

8. Amendment of Claim Seven is futile.
9. Amendment of Claim Eight is moot; the claim is dismissed without prejudice.
10. Amendment of Claim Nine is not futile; the claim is remanded for leave to amend.

KEY QUOTATIONS

“We reject Creech's contention that the district court violated the rule of mandate by denying leave to amend in connection with the Rule 12(b)(6) dismissal of the complaint.” (at 15)

“In sum, we conclude that amendment of Claim One would be futile except with respect to Creech asserting that his attorneys have a right to observe the entire execution.” (at 22)

“We thus conclude that amendment of this claim would be futile and affirm the dismissal of this claim without leave to amend.” (at 23)

“We therefore hold that amendment of this claim would be futile and affirm the dismissal of this claim with prejudice.” (at 25)

“We vacate the dismissal of this claim with prejudice and remand with instructions to grant leave to amend or supplement the complaint.” (at 28)

“We conclude that amendment of this claim would be futile and affirm the dismissal of this claim with prejudice.” (at 30)

“We thus hold that amendment of this claim would be futile and affirm the dismissal with prejudice.” (at 31)

“We thus hold that amendment of this claim would be futile and affirm the dismissal with prejudice.” (at 32)

“The district court therefore properly dismissed this claim without leave to amend.” (at 33)

“We thus vacate the dismissal of this claim with prejudice and remand with instructions to grant leave to amend.” (at 34)

FACTUAL BACKGROUND

Thomas Creech is an Idaho prisoner facing execution by lethal injection. He challenges Idaho's execution practices, including the State's alleged failure to timely disclose information about execution drugs and procedures. Idaho Code § 19-2716 authorized the director of the Idaho Department of Correction (IDOC) to determine execution procedures. IDOC's standard operating procedure (SOP 135) specified four lethal injection alternatives. Creech alleged that IDOC has a history of questionable drug sourcing, last-minute protocol changes, and refusal to provide information, inhibiting his ability to challenge the execution method. He sought to compel IDOC to issue a revised protocol, provide detailed information about execution procedures, and grant his attorneys access to the execution chamber. Creech suffers from brain damage, diabetes, hypertension, and other health conditions, and takes multiple medications that could interact with execution drugs. In March 2021, IDOC issued a revised protocol specifying the same four alternatives. The state later scheduled executions and suspended the revised protocol, raising concerns about the ability to challenge the execution method.

PROCEDURAL HISTORY

Plaintiff Thomas Creech, an Idaho death row inmate, filed this civil action in 2020 challenging the state's execution practices. The district court initially dismissed for lack of jurisdiction, but the Ninth Circuit reversed in *Pizzuto v. Tewalt* (Pizzuto I), 997 F.3d 893 (9th Cir. 2021), holding the claims were ripe and directing that Creech should be permitted to amend. On remand, with co-plaintiff Pizzuto's execution imminent, the district court sua sponte dismissed the complaint for failure to state a claim and denied leave to amend, deeming amendment futile. Creech appealed.

DISPOSITION

other

REMAND INSTRUCTIONS

The district court is instructed to grant leave to amend Claims One (as to the claim that Creech's attorneys have a right to observe the entire execution), Four, and Nine. The dismissal of Claim Eight is clarified to be without prejudice. The dismissal of all other claims is affirmed. Creech may seek leave to amend in other respects in accordance with Rule 15. The mandate shall issue forthwith.

CASES CITED

- *Pizzuto v. Tewalt* (Pizzuto I), 997 F.3d 893 (9th Cir. 2021)
- *First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069 (9th Cir. 2019)
- *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002)
- *Wood v. Ryan*, 759 F.3d 1076 (9th Cir. 2014)
- *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1 (1986)
- *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)
- *Lewis v. Casey*, 518 U.S. 343 (1996)
- *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc)
- *Hudson v. McMillian*, 503 U.S. 1 (1992)
- *Farmer v. Brennan*, 511 U.S. 825 (1994)
- *Watson v. Carter*, 668 F.3d 1108 (9th Cir. 2012)
- *Bucklew v. Precythe*, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019)
- *Glossip v. Gross*, 576 U.S. 863 (2015)
- *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995)
- *Smith v. Mahoney*, 611 F.3d 978 (9th Cir. 2010)
- *Jones v. Commissioner*, 811 F.3d 1288 (11th Cir. 2016)
- *Phillips v. DeWine*, 841 F.3d 405 (6th Cir. 2016)
- *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (en banc) (per curiam)
- *Trottie v. Livingston*, 766 F.3d 450 (5th Cir. 2014) (per curiam)
- *Lopez v. Brewer*, 680 F.3d 1068 (9th Cir. 2012)
- *Beatty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011)

- Mathews v. Eldridge, 424 U.S. 319 (1976)
- Armstrong v. Manzo, 380 U.S. 545 (1965)
- Towery v. Brewer, 672 F.3d 650 (9th Cir. 2012) (per curiam)
- Arthur v. Thomas, 674 F.3d 1257 (11th Cir. 2012) (per curiam)
- State v. Osborn, 631 P.2d 187 (Idaho 1981)
- Pizzuto v. IDOC, 508 P.3d 293 (Idaho 2022)
- Leavitt v. Arave, 682 F.3d 1138 (9th Cir. 2012) (per curiam)
- Hall v. City of Los Angeles, 697 F.3d 1059 (9th Cir. 2012)
- S.F. Herring Ass'n v. Dep't of the Interior, 946 F.3d 564 (9th Cir. 2019)
- Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash., 173 F.3d 713 (9th Cir. 1999)
- Delgrosso v. Spang & Co., 903 F.2d 234 (3d Cir. 1990)
- Quern v. Jordan, 440 U.S. 332 (1979)
- Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)
- Exp. Grp. v. Reef Indus., Inc., 54 F.3d 1466 (9th Cir. 1995)
- City of Los Angeles v. Barr, 941 F.3d 931 (9th Cir. 2019)
- Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004)
- United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) (en banc)
- United States v. McAdory, 935 F.3d 838 (9th Cir. 2019)
- Enying Li v. Holder, 738 F.3d 1160 (9th Cir. 2013)
- Curry v. Yelp Inc., 875 F.3d 1219 (9th Cir. 2017)
- Gompper v. VISX, Inc., 298 F.3d 893 (9th Cir. 2002)
- Polich v. Burlington N., Inc., 942 F.2d 1467 (9th Cir. 1991)
- Eminence Cap., LLC v. Aspeon, Inc., 316 F.3d 1048 (9th Cir. 2003) (per curiam)
- Kroessler v. CVS Health Corp., 977 F.3d 803 (9th Cir. 2020)
- Doe v. United States, 58 F.3d 494 (9th Cir. 1995)
- Cook, Perkiss & Liehe v. N. Cal. Collection Serv. Inc., 911 F.2d 242 (9th Cir. 1990) (per curiam)
- Omar v. Sea-Land Serv., Inc., 813 F.2d 986 (9th Cir. 1987)
- Wong v. Bell, 642 F.2d 359 (9th Cir. 1981)
- Sessions v. Morales-Santana, 582 U.S. 47 (2017)
- Warth v. Seldin, 422 U.S. 490 (1975)
- Wilcox v. Commissioner, 848 F.2d 1007 (9th Cir. 1988)
- Frigard v. United States, 862 F.2d 201 (9th Cir. 1988) (per curiam)
- Guzman v. Polaris Indus. Inc., 49 F.4th 1308 (9th Cir. 2022)
- Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944)
- Pendergrast v. United States, 416 F.2d 776 (D.C. Cir. 1969)
- Patterson v. Alabama, 294 U.S. 600 (1935)

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