No. 21-________

In The
# Supreme Court of the United States

---

JOE CLARENCE SMITH, JR.,

*Petitioner,*

v.

DAVID SHINN, DIRECTOR OF THE ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION AND REENTRY; LANCE HETMER, ACTING ASSISTANT DIRECTOR FOR PRISON OPERATIONS; STEPHEN MORRIS, WARDEN, ARIZONA STATE PRISON COMPLEX—EYMAN; JEFF VAN WINKLE, WARDEN, ARIZONA STATE PRISON COMPLEX—FLORENCE, IN THEIR OFFICIAL CAPACITIES ONLY,

*Respondents.*

---

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

DAN R. WAITE
ARI HOFFMAN
LEWIS ROCA ROTHGERBER CHRISTIE LLP

KENNETH F. ROSSMAN, IV
*Counsel of Record*
LEWIS ROCA ROTHGERBER CHRISTIE LLP
1601 19th Street, Suite 1000
Denver, CO 80202
303.623.9000
krossman@lewisroca.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

**CAPITAL CASE**
**NO EXECUTION DATE SCHEDULED**

## QUESTIONS PRESENTED FOR REVIEW

This case concerns Arizona's longest-serving, death-row prisoner alive today. Petitioner, Joe C. Smith, Jr., was first sentenced to death in 1977. After one reversal for constitutional error, a second reversal for ineffective assistance of counsel, and unsuccessful attempts at post-conviction and habeas relief, Mr. Smith brought a complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 because respondents' conduct constitutes excessive, gratuitous, cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The questions presented are:

1. Whether Mr. Smith's method-of-execution challenge is cognizable under 42 U.S.C. § 1983.

2. Whether a method of execution involving 44 years of mostly solitary confinement on death row prior to execution constitutes cruel and unusual punishment in violation of the Eighth Amendment.

## PARTIES TO THE PROCEEDING

Mr. Smith was the plaintiff-appellant in the court of appeals. Respondents were the defendants-appellees below. They are David Shinn, in his official capacity as Director of the Arizona Department of Corrections, Rehabilitation, and Reentry ("ADCRR"); Lance Hetmer, in his official capacity as Acting Assistant Director for Prison Operations at the ADCRR; Jeff Van Winkle, in his official capacity as warden of Arizona State Prison Complex—Florence; and Stephen Morris, in his official capacity as warden of Arizona State Prison Complex—Eyman.

## RELATED PROCEEDINGS

*Smith v. Ducey*, No. 20-cv-02012-ROS (JFM), U.S. District Court for the District of Arizona. Judgment entered Nov. 30, 2020.

*Smith v. Shinn*, No. 20-17404, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Nov. 16, 2021.

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Parties to the Proceeding | ii |
| Related Proceedings | ii |
| Table of Contents | iii |
| Table of Authorities | v |
| Opinions in the Case | 1 |
| Jurisdiction | 1 |
| Constitutional Provisions Involved | 1 |
| Statement of the Case | 2 |
| Argument | 6 |
| I. Mr. Smith's method-of-execution challenge is cognizable under 42 U.S.C. § 1983 | 6 |
| II. The court of appeals' affirmance of the district court's dismissal incorrectly forecloses § 1983 claims | 11 |
| A. Mr. Smith's § 1983 claim is distinct from his prior habeas claim | 13 |
| B. If the court of appeals' order stands, it would improperly eviscerate challenges to cruel and unusual conditions | 16 |
| Conclusion | 18 |

TABLE OF CONTENTS—Continued

Page

APPENDIX

United States Court of Appeals for the Ninth Circuit, Memorandum, Filed Nov. 16, 2021 .... App. 1

United States District Court for the District of Arizona, Order, Filed Nov. 30, 2020 ................. App. 5

## TABLE OF AUTHORITIES

Page

CASES

*Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ........................11
*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) ....11, 12
*Elledge v. Florida*, 525 U.S. 944 (1998) ......................12
*Foster v. Florida*, 537 U.S. 990 (2002) ....................8, 12
*Gomez v. Fierro*, 519 U.S. 918 (1996)............................8
*Harrington v. Richter*, 562 U.S. 86 (2011) .................13
*Heck v. Humphrey*, 512 U.S. 477 (1994) .....................10
*Hill v. McDonough*, 547 U.S. 573 (2006) ......................6
*In re Medley*, 134 U.S. 160 (1890).................................7
*Johnson v. Bredesen*, 558 U.S. 1067 (2009) ................12
*Jones v. Bock*, 549 U.S. 199 (2007).............................11
*Knight v. Florida*, 528 U.S. 990 (1999) .......................12
*Lockett v. Ohio*, 438 U.S. 586 (1978) ............................3
*Muhammed v. Florida*, 571 U.S. 1117 (2014)............12
*Nelson v. Campbell*, 541 U.S. 637 (2004)......................6
*Preiser v. Rodriguez*, 411 U.S. 475 (1973)..............9, 15
*Ring v. Arizona*, 536 U.S. 584 (2002) ............................3
*Smith v. Arizona*, 522 U.S. 985 (2007)......................4, 8
*Smith v. Ryan*, 137 S. Ct. 1283 (2017).............8, 12, 14
*Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999)..........3
*State v. Ring*, 65 P.3d 915 (Ariz. 2003).........................3
*State v. Smith*, 599 P.2d 187 (Ariz. 1979).....................3

TABLE OF AUTHORITIES—Continued

Page

*State v. Watson*, 586 P.2d 1253 (Ariz. 1978) ................. 3

*Teague v. Lane*, 489 U.S. 288 (1989) ........................... 13

*Wilhelm v. Rotman*, 680 F.3d 1113 (9th Cir. 2012) ........................................................................ 11

*Wilkinson v. Dotson*, 544 U.S. 74 (2005) ................. 9, 10

STATUTES AND CONSTITUTION

28 U.S.C. § 1915A ......................................... 2, 5, 11, 12

28 U.S.C. § 1983 ................................................. *passim*

28 U.S.C. § 2554 ........................................................ 13

U.S. Const. amend. VIII ................................................ 1

U.S. Const. amend. XIV ................................................ 1

TREATISES

Michael P. Connelly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 New Eng. J. on Crim. & Civ. Confinement 101 (1997) ................................. 9

Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychol. Rev. 141 (1979) ........................................ 9

## OPINIONS IN THE CASE

The Opinion from the United States Court of Appeals for the Ninth Circuit is unreported and is in the Appendix at App. 1. The United States District Court for the District of Arizona Order dismissing Mr. Smith's § 1983 claim is unreported and is in the Appendix at App. 5.

## JURISDICTION

The court of appeals issued its opinion and entered judgment on November 16, 2021. There was no order respecting rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV, § 1, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1915A(a) provides:

> The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

## STATEMENT OF THE CASE

Mr. Smith was sentenced to death in 1977, and due to unconstitutional sentencing proceedings and repeated State delays remains on Arizona's death row to this day, more than 44 years after his original sentencing.

In 1979, the Arizona Supreme Court affirmed Mr. Smith's convictions, but remanded for resentencing because the trial court had sentenced Mr. Smith under a statute limiting a defendant's ability to present mitigating circumstances that was subsequently determined to be unconstitutional. *State v. Smith*, 599 P.2d 187, 199 (Ariz. 1979); *see also State v. Watson*, 586 P.2d 1253, 1256-57 (Ariz. 1978); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

After unsuccessful efforts to obtain post-conviction relief in state court from 1983 to 1991, Mr. Smith petitioned the United States District Court for the District of Arizona for a writ of habeas corpus. The district court denied his petition, but in 1999, the Ninth Circuit reversed after determining that Mr. Smith's resentencing counsel was ineffective. *Smith v. Stewart*, 189 F.3d 1004, 1014 (9th Cir. 1999).

While Mr. Smith awaited his second resentencing, the United States Supreme Court invalidated Arizona's judge-sentencing procedure in capital cases. *Ring v. Arizona*, 536 U.S. 584, 609 (2002). This caused further delay as the Arizona Legislature scrambled to conform the State's death penalty statute to *Ring*'s directive. *See State v. Ring*, 65 P.3d 915, 926, ¶ 13 (Ariz. 2003).

Mr. Smith has spent almost all of this time alone in a cell that, according to the Arizona Department of Corrections, measures 86.4 square feet,[1] or roughly the

[1] Arizona Dep't of Corr., Death Row Info and Frequently Asked Questions, https://corrections.az.gov/public-resources/death-row/

size of a compact parking space. Each day for more than four decades, Mr. Smith has been forced to sit alone in this cell enduring the combined torment of prolonged solitary confinement and the omnipresent threat of execution. Not only has Mr. Smith endured severe mental anguish, anxiety, and depression as a result of the circumstances of his confinement, but he is now elderly, infirm, and incontinent.

In 2007, Justice Breyer said of Mr. Smith's case: "I am unaware of other executions that have taken place after so long a delay, particularly when much of the delay at issue seems due to constitutionally defective sentencing proceedings." *Smith v. Arizona*, 522 U.S. 985 (2007) (Breyer, J., dissenting from denial of certiorari). Nearly fifteen years later, the injustice identified by Justice Breyer is even more pronounced. Mr. Smith has the unenviable distinction of serving one of the longest tenures on death row of any prisoner in history. There are only four other prisoners in the United States that have been on death row longer than Petitioner.[2]

---

death-rowinformation-and-frequently-asked-questions (last visited Jan. 6, 2017).

[2] Virgil Presnell was sentenced to death in May 1976 and has been on Georgia's death row for 45 years and 9 months. Georgia Department of Corrections, Inmates Under Death Sentence, http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Roster_death_row_CY_2021.pdf. William Thompson, Florida, was initially sentenced to death June 24, 1976 and has been on death row in Florida for 45 years and 8 months. UPI, Pair Sentenced to Death in Torture-Murder Case, June 25, 1976, https://www.newspapers.com/image/212170992, *Thompson v. State*, 389 So.2d 197 (Fla. 1980).

Mr. Smith has unsuccessfully raised Eighth Amendment claims in state and federal court through collateral postconviction proceedings. With no other remedies remaining, Mr. Smith brought a challenge in the district court under 28 U.S.C. § 1983 seeking declaratory and injunctive relief. Unlike his previous federal habeas petition, Mr. Smith's § 1983 claim does not challenge the validity of his sentence. Rather, Mr. Smith now challenges the State's method of execution—namely subjecting him to more than four decades of delay spent in solitary confinement prior to execution. Arizona's method of execution is cruel and unusual in violation of the Eighth and Fourteenth Amendments, and furthers no legitimate penological interest.

The district court dismissed Mr. Smith's complaint with prejudice for failure to state a claim under 28 U.S.C. § 1915A, erroneously conflating Mr. Smith's method-of-execution challenge with his previous habeas claims. The court of appeals compounded this error by upholding the district court's dismissal. Mr. Smith timely filed the instant petition.

William Zeiger was sentenced to death on June 25, 1976 and has been on Florida's death row for 45 years and 7 months. Florida Department of Corrections, Death Row Roster, http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited, February 8, 2022). Henry Sireci was sentenced to death on November 15, 1976 and has been on Florida's death row for 45 years and 3 months. *Id*.

## ARGUMENT

### I. Mr. Smith's method-of-execution challenge is cognizable under 42 U.S.C. § 1983.

This Court should grant certiorari because the lower court rulings dismissing Mr. Smith's claim erred in finding that it was not cognizable under § 1983. "[C]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus[,]" while "[a]n inmate's challenge to the circumstances of his confinement . . . may be brought under § 1983." *Hill v. McDonough*, 547 U.S. 573, 579 (2006) (internal citations omitted). Here, Mr. Smith does not challenge the validity of his confinement or the particulars of its duration.

Instead, he challenges Arizona's method-of-execution: delaying almost four and a half decades—due to repeated constitutionally defective sentencing proceedings—prior to execution. This Court has historically recognized other method-of-execution challenges as cognizable under § 1983. *See Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself[.]"). While Mr. Smith's claim may not be identical to other method-of-execution challenges, it is nonetheless solely a challenge to the circumstances of his confinement.

Mr. Smith does not seek to be released from prison, nor does he challenge the validity of the death sentence imposed upon him. Mr. Smith will die behind bars

regardless of the outcome of this case. The question at issue in Mr. Smith's claim is whether he will do so under cruel and unusual conditions; trapped in solitary confinement in a tiny box with the looming prospect of execution haunting him.

The outcome is not only of personal significance to Mr. Smith but to other people who are on death row. At present Mr. Smith's time on death row is among the longest in history. A failure by the district court to address the constitutional violations inherent in a method of execution that entails multiple decades on death row would all but ensure that future death row prisoners are subject to still longer delays.

As a result, Mr. Smith's petition implicates this Court's longstanding debate over the constitutionality of prolonged delays in execution. Over 130 years ago, this Court observed that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). The "most horrible feelings" at issue in the four-week delay in *Medley* have been compounded for Mr. Smith over more than four decades.

Justices Stevens and Breyer later found a 21-year and 22-year delay so inordinate that execution would "frustrate[] the public interest in deterrence and eviscerate[] the only rational justification for that type of punishment[,]" warning that such delays "can become

so excessive as to constitute cruel and unusual punishment prohibited by the Eighth Amendment." *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens and Breyer, JJ., dissenting from denial of certiorari). In *Foster v. Florida*, Justice Breyer explained that a 27-year time period on death row as "unusual by any standard[,]" reiterating that "the combination of uncertainty of execution and long delays is arguably 'cruel.'" 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari).

Further, and in response to Mr. Smith's initial petition to this Court following direct appeal 14 years ago, Justice Breyer acknowledged that Mr. Smith "c[ould] reasonably claim that his execution at this late date would be 'unusual'" and that it is "a serious constitutional question" "whether it is 'cruel' to keep an individual for decades on death row or otherwise under threat of imminent execution." *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J., dissenting from denial of certiorari).

Finally, in response to Mr. Smith's petition to this Court following his federal habeas petition nearly five years ago, Justice Breyer noted Mr. Smith's "40 years in prison under threat of execution," spent mostly "in solitary confinement," and reiterated the Supreme Court's "[l]ong ago" observation that such confinement "was 'considered . . . an additional punishment of . . . a severe kind[.]'" *Smith v. Ryan*, 137 S. Ct. 1283 (2017) (Breyer, J., respecting the denial of certiorari). These conclusions are well-supported by numerous scholars who have analyzed the effects of long-term

confinement on death row. *See*, *e.g.*, Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychol. Rev. 141 (1979); Michael P. Connelly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 New Eng. J. on Crim. & Civ. Confinement 101, 119 (1997) ("[D]elays in the process of carrying out a death sentence can be so brutalizing and degrading as to constitute psychological torture.") (internal citations omitted).

Nevertheless, the lower courts incorrectly held that Mr. Smith's claims were cognizable solely under habeas, and not under § 1983. In so doing, it acknowledged that Mr. Smith's claims are "hybrid" because they challenge the circumstances of his confinement, and correctly noted that method-of-execution claims are cognizable under § 1983; however, it failed to even consider that Mr. Smith's claims challenge the method of carrying out his execution.

The lower courts' decisions to rigidly bifurcate Mr. Smith's claim as cognizable solely under habeas or § 1983 were erroneous. This Court has repeatedly acknowledged that habeas corpus and § 1983 claims often overlap, and that some claims may legitimately be asserted under both. *See*, *e.g., Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973); *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (2005). Put differently, even if the district court was correct to describe Petitioner's § 1983 as a "hybrid" claim, it does not follow that the claim must fall within the exclusive province of habeas.

The lower courts justified their decisions to pigeonhole Mr. Smith's method-of-execution challenge into the exclusive purview of habeas by erroneously focusing on the remedy sought. Namely, they found that because Mr. Smith seeks injunctive relief to prevent the state from executing him after so many decades on death row, his claims must sound in habeas. Yet this Court has never imposed such a rigid standard based solely on the remedy sought.

For example, in *Heck v. Humphrey*, this Court found that a prisoner's § 1983 action for damages sounded in habeas irrespective of the fact that damages were not available under habeas. 512 U.S. 477, 481-83 (1994). And in *Wilkinson v. Dotson*, this Court held that the cognizability of a § 1983 claim is not dependent on whether it seeks damages or equitable relief; rather, the inquiry centers on whether the claim would "demonstrate the invalidity of confinement or its duration." 544 U.S. 74, 81-82, (2005) (permitting claimant to bring a § 1983 action for declaratory and injunctive relief even though such relief was available through habeas).

Even if this Court doubts that a method-of-execution claim like Mr. Smith's is cognizable under § 1983, certiorari is appropriate if for no other reason than to clarify that a cause of action should not be categorized as either a habeas claim or a § 1983 claim based on a rigid assessment of the remedy sought. And, should this Court grant certiorari and rule in Mr. Smith's favor, such a ruling would only require the district court to consider the merits of Mr. Smith's claim.

### II. The court of appeals' affirmance of the district court's dismissal incorrectly forecloses § 1983 claims.

The district court summarily dismissed Mr. Smith's claim under 28 U.S.C. § 1915A, based on the faulty conclusion, repeated by the court of appeals, that Mr. Smith's claim was cognizable only as a habeas claim. Both lower courts relied heavily upon a lack of caselaw setting forth an Eighth Amendment claim for pre-execution delay. This dismissal precluded any briefing or argument on the substance of Mr. Smith's claims.

Regardless of this Court or the lower courts' opinions of the merits of Mr. Smith's claim, the district court's summary dismissal of Mr. Smith's claim was premature. Section 1915A(b)(1) permits a district court to summarily dismiss a claim if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted." Dismissal under § 1915A "incorporates the familiar standard . . . [of] Federal Rule of Civil Procedure 12(b)(6)." *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012). *See also Jones v. Bock*, 549 U.S. 199, 215 (2007). Mr. Smith was therefore not required to prevail on the merits of his claims, only to state factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As this Court has noted elsewhere, Mr. Smith's complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,

550 U.S. at 570). That is why a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Twombly*, 550 U.S. at 556.

A shortage of clear supporting caselaw does not mean a claim is frivolous or malicious, nor does it mean that Mr. Smith has not stated a claim for relief. A lengthy history of vigorous dissents from this Court have indicated claims like Mr. Smith's are subject to ongoing debate among the Justices. *See*, *e.g.*, *Smith v. Ryan*, 137 S. Ct. 1283 (2017), (Breyer, J., dissenting from denial of certiorari); *Muhammed v. Florida*, 571 U.S. 1117 (2014) (Breyer, J., dissenting from denial of certiorari); *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J., statement respecting the denial of certiorari); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting). Such debate indicates that Mr. Smith's claim for relief rises well above the "speculative level" and should properly clear the low bar of § 1915A.

Certiorari is therefore appropriate to remand this case to allow for briefing and argument on the merits of Mr. Smith's petition. Any question as to Mr. Smith's likelihood of success on the merits of his case can be resolved only by granting him his day in court to plead as much. Further, should this Court believe that it has recently settled the debates discussed above surrounding complaints like Mr. Smith's, it should accept certiorari and so state.

### A. Mr. Smith's § 1983 claim is distinct from his prior habeas claim

The district court's decision, as affirmed by the court of appeals, relied upon the faulty conclusion that Mr. Smith's § 1983 claims are duplicative of, and only cognizable under, the framework of Mr. Smith's prior habeas claims. This conclusion belies key distinctions between the two which make certiorari appropriate. Rather, the history of Mr. Smith's previous habeas claims highlights the importance and cognizability of his present § 1983 claims.

As previously discussed, Mr. Smith's current claim is a method-of-execution challenge, not a challenge to the validity of his sentence. Additionally, Mr. Smith's previous federal habeas claims were subject to strict limitations under 28 U.S.C. § 2554 (the Antiterrorism and Effective Death Penalty Act of 1966 ("AEDPA")), which grants substantial deference to lower court rulings on habeas claims. *See also Harrington v. Richter*, 562 U.S. 86, 100 (2011). The AEDPA prevents courts from announcing new rules of constitutional law on habeas review. *Teague v. Lane*, 489 U.S. 288, 316 (1989) ("[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated."). These AEDPA requirements formed the basis of the district court's decision to reject Mr. Smith's earlier federal habeas arguments. *Smith v. Ryan*, No. CV-12-00318-PHX-PGR, 2014 WL 1247828, at *39 (D. Ariz. Mar. 24, 2014).

As a result, in order for the courts to have considered Mr. Smith's claims under habeas corpus, Mr. Smith would have had to point to pre-existing, clearly established precedent in this Court recognizing such claims. While well-founded principles of law support Mr. Smith's claims, there is admittedly no precedent that would meet the deferential requirements of the AEDPA. His present claims are therefore not only distinct from habeas claims but would not be cognizable under habeas.

The fact that Mr. Smith lacks any other avenue to challenge the constitutionality of the circumstances of his confinement supports an order granting certiorari. Such an order is necessary to ensure that the AEDPA is not used to prevent this Court from considering urgent, novel constitutional issues, especially those affecting the right to be free of cruel and unusual punishment.

Indeed, when Mr. Smith petitioned this Court for certiorari following his federal habeas proceedings, Justice Breyer expressly acknowledged that "procedural obstacles" presented by AEDPA made it "difficult" for the Court to grant certiorari. *Ryan*, 137 S. Ct. at 1283 (Breyer, J., respecting the denial of certiorari). Nevertheless, Justice Breyer noted that "Smith's confinement reinforces the need for this Court, or percolation in the lower courts, to consider in an appropriate case the underlying constitutional question." *Id*. The fact that these same "procedural obstacles" are not present here not only highlights the differences between Mr. Smith's present § 1983 claims and his previous

habeas claims, but also highlights the appropriateness of certiorari to either "consider . . . the underlying constitutional question" or to remand to ensure that the district court does so.

Further, Mr. Smith's previous state and federal proceedings ameliorate the principal concerns that have previously led this Court to distinguish between § 1983 claims and habeas claims. Namely, this Court has historically justified its distinctions between habeas and § 1983 claims as being necessary to prevent state prisoners from using § 1983 from circumventing the AEDPA's exhaustion requirements. *See, e.g.*, *Preiser*, 411 U.S. at 490 ("[T]he reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation[.]").

The reasons for drawing such sharp lines are inapplicable to Mr. Smith because he has already exhausted his state remedies. Although Mr. Smith's current claim is distinct from his previous habeas claim because it does not challenge his underlying conviction, the fact that Mr. Smith has previously presented his Eighth Amendment claim in state and federal court remedied these concerns by giving state courts an opportunity to resolve Mr. Smith's complaint. Had they done so, Mr. Smith would not need to resort to this final remedy for the unconstitutional circumstances of his confinement.

### B. If the court of appeals' order stands, it would improperly eviscerate challenges to cruel and unusual conditions.

The district court's refusal to evaluate Mr. Smith's method-of-execution claim based in part on a prior unsuccessful petition for habeas places Mr. Smith in an impossible position. By its very nature, Mr. Smith's § 1983 claim ripens the longer he spends in solitary confinement on death row. Mr. Smith first brought his habeas petition to the district court in 2012. In the intervening decade, Mr. Smith's tenure on death row has gone from merely extraordinarily long to historically long, all the while compounding Mr. Smith's needless suffering.

If allowed to stand, the lower courts' decisions would illogically and unjustly penalize petitioners like Mr. Smith for not bringing an unripe claim before attaining his current, historically lengthy death row tenure. Such a decision would eviscerate any difference between a prompt, constitutionally sound execution and one carried out after nearly half a century of solitary confinement due to repeated state errors and constitutional violations. And such a result would be unjust. The fact that Mr. Smith has spent such a historically lengthy period on death row, and the number of errors responsible and constitutional violations makes his case a particularly ripe one for certiorari to allow this Court to resolve these issues.

Certiorari is further appropriate because the lower court's decision would render Eighth Amendment

rights unenforceable in a wide array of cases unrelated to the method-of-execution claim at issue here. For example, a prisoner incarcerated not on death row but in a cell subject to increasingly unsanitary or cruel conditions would be left in an impossible position. If such a prisoner were to file either a habeas claim or a § 1983 claim as soon as he believed the conditions to be cruel and unusual, he would risk not only losing that claim, but also subsequent § 1983 claims no matter how much the same conditions worsen, even if they later reach a level the court would consider cruel and unusual. In this scenario, the parties responsible for the inhumane or cruel conditions of the prisoner's confinement could worsen these conditions without consequence.

Yet this prisoner's only alternative would be to refrain from exercising his constitutional rights and continue to suffer worsening conditions until he believes they are sufficiently cruel and unusual to justify expending his sole opportunity to challenge them. Even in the unlikely event that this hypothetical prisoner has the dedicated assistance of experienced counsel, it would be impossible for them to gauge with certainty when to expend the prisoner's sole opportunity to challenge worsening conditions. Certiorari is therefore appropriate to close the broad loophole left open by the lower courts' decisions.

## CONCLUSION

The petition for a writ of certiorari should be granted. The historic length of Mr. Smith's confinement on death row makes this case particularly appropriate to resolve a number of important legal and constitutional questions. At stake are crucial issues regarding the distinctions between habeas and § 1983 claims, as well as the constitutionality of a method of execution that entails over four solitary decades on death row. This Court should grant certiorari not only to prevent Mr. Smith from needless further suffering, but also to prevent future petitioners from petitioning this court after even longer tenures on death row.

Respectfully submitted,

KENNETH F. ROSSMAN, IV

LEWIS ROCA ROTHGERBER CHRISTIE LLP
1601 19th Street, Suite 1000
Denver, CO 80202
303.623.9000
krossman@lewisroca.com

DAN R. WAITE
ARI HOFFMAN
LEWIS ROCA ROTHGERBER CHRISTIE LLP

March 16, 2022