No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Idaho

---

PETITION FOR WRIT OF CERTIORARI

Jonah J. Horwitz
Counsel of Record
Nicole R. Gabriel
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Jonah_Horwitz@fd.org
Nicole_Gabriel@fd.org
208-331-5530

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

Idaho is currently the only state in the country seeking to execute prisoners who were sentenced to death by judges alone, without the assistance of juries. Based on that fact, Thomas Creech filed a post-conviction petition in state court challenging the practice of judge-sentenced executions under the Eighth Amendment as barred by the evolving standards of decency. The Idaho Supreme Court dismissed the claim as untimely on the ground that "nothing unusual occurred" recently to trigger the claim, without recognizing that this Court's evolving-standards cases center on the *absence* of executions and death sentences. The question presented is:

Whether it comports with due process for a state court to reject as untimely an evolving-standards claim on a theory that would never allow for such a claim to be reviewed in a successive posture.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are all listed in the caption.

RELATED PROCEEDINGS

Ada County District Court
Case No. 10252
State v. Creech
Findings imposing death penalty, Jan. 25, 1982
Judgment of conviction, Mar. 17, 1983
Order denying motion to withdraw guilty plea, June 24, 1983

Idaho Supreme Court
Case Nos. 14480/15000
State v. Creech, 670 P.2d 463 (Idaho 1983)
Opinion issued denying relief, May 23, 1983
Petition for rehearing denied, Sept. 21, 1983

Idaho Supreme Court
Case No. 15114
State v. Creech
Order dismissing appeal, Jan. 24, 1984

United States Supreme Court
Case No. 83-5818
Creech v. State, 465 U.S. 1051 (1984)
Petition for certiorari denied, Feb. 27, 1984

Idaho Supreme Court
Case No. 15475
State v. Creech
Denial of motion to withdraw guilty plea affirmed, June 20, 1985
Petition for rehearing denied, Dec. 31, 1985

United States District Court, District of Idaho
Case No. 86-1042
Creech v. State
Habeas petition denied, June 18, 1986

United States Court of Appeals, Ninth Circuit
Case No. 86-3983
Creech v. State, 947 F.2d 873 (9th Cir. 1991) (en banc)
Affirmed in part, reversed in part, remanded, Oct. 16, 1991

United States Supreme Court
Case No. 91-1160
State v. Creech, 507 U.S. 463 (1993)
Reversed and remanded, March 30, 1993

Ada County District Court
Case No. 10252
State v. Creech
Judgment of Conviction, Apr. 17, 1995

Ada County District Court
Case No. SPOT-95-00154-D
Creech v. State
Post-conviction petition denied, Dec. 12, 1996

Idaho Supreme Court
Case Nos. 22006/23482
State v. Creech, 966 P.2d 1 (Idaho 1998)
Opinion issued denying relief, Aug. 19, 1998
Petition for rehearing denied, Oct. 23, 1998

United States Supreme Court
Case No. 98-8278
Creech v. State
Petition for certiorari denied, June 4, 1999

Ada County District Court
Case No. SPOT0000403D
Creech v. State
Post-conviction petition denied, Jan. 25, 2001

Idaho Supreme Court
Case No. 27309
Creech v. State, 51 P.3d 387 (Idaho 2002)
Opinion issued dismissing appeal, June 6, 2002
Petition for rehearing denied, Aug. 1, 2002

Ada County District Court
Creech v. State
Case No. SPOT0200712D
Post-conviction petition denied, Apr. 25, 2003

Idaho Supreme Court
Case Nos. 29681/29682
State v. Creech
Appeal dismissed, Dec. 23, 2005

United States District Court, District of Idaho
Case No. CV 99-0224-S-BLW
Creech v. Hardison
Judgment of dismissal, March 31, 2010
Order denying relief on remand, Jan. 29, 2016

Ada County District Court
Case No. CV PC 2008-6064
Creech v. State
Order dismissing petition for post-conviction relief, Mar. 30, 2011

United States Court of Appeals, Ninth Circuit
Case No. 10-99015
Creech v. State
Order vacating and remanding, June 20, 2012
Opinion denying relief July 20, 2022
Order denying petition for rehearing and amending opinion, Feb. 6, 2023

United States Supreme Court
Case No. 23-5039
Creech v. Richardson, 144 S. Ct. 291 (2023)
Petition for certiorari denied, Oct. 10, 2023

Ada County District Court
Case No. CV01-22-9424
Creech v. State
Judgment dismissing petition for post-conviction relief, Dec. 1. 2022

United States District Court, District of Idaho
Case No. 1:23-cv-463
Creech v. Richardson
Petition dismissed, Jan. 12, 2024

Idaho Supreme Court
Case No. 50336
Creech v. State
Opinion issued denying relief issued, Feb. 9, 2024

United States Court of Appeals, Ninth Circuit
Case No. 24-275
Creech v. Richardson
Appeal pending

United States District Court, District of Idaho
Case No. 1:24-cv-066
Creech v. Idaho Commission of Pardons & Parole
Case pending

United States District Court, District of Idaho
Case No. 1:20-cv-114
Creech v. Tewalt
Case pending

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Federal Court Opinions

Federal Statutes and Constitutional Provisions

State Cases

State Statutes and Rules

Other

INTRODUCTION

Petitioner Thomas E. Creech respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court for the State of Idaho.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, App. 1–9, and is available at *Creech v. State*, No. 51229, 2024 WL 510142 (Idaho Feb. 9, 2024).[1]

JURISIDICTIONAL STATEMENT

On February 9, 2024, the Idaho Supreme Court denied Mr. Creech relief and issued an opinion disposing of the appeal. *See id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

This case also involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

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

STATE STATUTE INVOLVED

This case involves the Idaho Code § 19-2719, which provides in pertinent part:

> Within forty-two (42) days of the filing of the judgment imposing the punishment of death . . . the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known.
>
> . . .
>
> If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

I.C. §§ 19-2719(3), (5).

STATEMENT OF THE CASE

Mr. Creech has never been sentenced to death by a jury of his peers. He was first sentenced to death for the killing of David Jensen on January 25, 1982.[2] App. 11. Due to issues with his first sentencing that are not relevant to the instant case, he was resentenced, and a new death sentence was imposed on April 17, 1995. *Id.* at 11–12. Both death sentences were imposed solely by a judge, sitting alone. *Id.* In fact, both sentences were imposed by the very same judge: the Honorable Robert Newhouse.[3] *Id.*

---

[2] Since his original death sentence was imposed in 1982, Mr. Creech has been engaged in continual litigation, covering numerous proceedings and issues. Here, he will only set forth the events relevant to the question presented.

[3] Judge Newhouse has subsequently realized that no purpose would be served by an execution and he supported Mr. Creech's bid for clemency. *See* Ruth Brown, *Emotional commutation hearing held for Idaho's longest-serving man on death row*,

During the decades since Mr. Creech was initially sentenced to death, America's willingness to put to death those sentenced by a single judge without any involvement by a jury has slowly dwindled. When this Court deemed judge-sentencing unconstitutional under the Sixth Amendment, there were five states that allowed it: Arizona, Colorado, Idaho, Montana, and Nebraska. *See Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002). Colorado has abolished the death penalty and Arizona has imposed a moratorium on executions. *See* App. 19. Thus, these two states are included on Mr. Creech's side of the scale for evolving-standards purposes. *See Hall v. Florida*, 572 U.S. 701, 716 (2014). Tallying up the three remaining states, only 0.68% of inmates on death row in the United States were sentenced to death by judges.[4] App. 22, 27–28. Those states have not carried out an execution in more than five years, and only one in the last ten. *Id.* at 24. Mr. Creech's data is as strong as any of the statistics in the cases where this Court

---

Idaho Capital Sun, Jan. 21, 2024, available at https://idahocapitalsun.com/2024/01/21/emotional-commutation-hearing-held-for-idahos-longest-serving-man-on-death-row/. The clemency proceedings led to a three-three tie, with one member of the Parole Commission recusing himself. *See* Rebecca Boone, *Idaho inmate nearing execution wants a new clemency hearing. The last one was a tie.*, AP, Feb. 7, 2024, available at https://apnews.com/article/thomas-creech-idaho-death-row-lethal-injection-appeal-dba9cd7ed5ea43b5b5278b1060859d88. The three Commissioners who voted in favor of clemency relied in part on Judge Newhouse's changed position and on the fact that the original prosecutor who sought the death penalty likewise no longer feels an execution is necessary. *See* https://parole.idaho.gov/wp-content/uploads/2024/01/Creech-Decision-with-signatures_Redacted.pdf.

[4] The numbers above were assembled in October 2023. None have changed in such a way as to substantively affect the analysis, particularly since no judge-sentenced inmates have been added to death rows or executed in the interim.

struck down sentencing practices as inconsistent with the evolving standards of decency. *See infra* at Part II.

Because the execution of such individuals has only now become obsolete, Mr. Creech filed a successive petition for post-conviction relief in Idaho district court on October 13, 2023, arguing for the first time that—as a judge-sentenced man—the Eighth Amendment bars his execution. *See generally* App. 10–186. The very next business day, without a hearing or a response from the State, the Idaho district court dismissed the petition as untimely under Idaho Code § 19-2719. App. 187–92.

Mr. Creech timely appealed to the Idaho Supreme Court, which affirmed the state district court's dismissal of Mr. Creech's petition for post-conviction relief. App. 1. The Idaho Supreme Court explained that, under Idaho Code § 19-2719(5), capital petitioners must bring successive petitions for post-conviction relief within forty-two days of when they know, or reasonably should have known, of the claim they assert. *Id.* at 6–7. "For his petition to be timely when it was filed in October," the Idaho Supreme Court stated, "something giving rise to Creech's claim must have surfaced in the forty-two days before his filing on October 13. No such facts exist." *Id.* at 7. The Idaho Supreme Court also squarely rejected the proposition that a dismissal on timeliness grounds was inconsistent with due process. It held that Mr. Creech "could have satisfied" the limitations period "by bringing his claim within forty-two days of when he knew or reasonably should have known of the facts supporting his claim, even if the facts to sustain his claim developed" later. *Id.* at 8.

REASONS FOR GRANTING THE WRIT

Mr. Creech is asking the Court to provide clarity on the question of when a state's post-conviction regime affords so little meaningful review to legitimate federal constitutional claims that it violates due process. That is a question the Court first flagged as important enough to justify certiorari review in 1965. *See Case v. Nebraska*, 381 U.S. 336, 337 (1965) (per curiam) (noting that certiorari had been granted "to decide whether the Fourteenth Amendment requires that the State afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees"). In *Case*, however, the question was mooted after the granting of certiorari by Nebraska's passage of a post-conviction statute. *See id.* Nearly fifty-five years later, it has still not been answered. *See Kyles v. Whitely*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring) (remarking that the scope of state's obligation to provide collateral review of federal constitutional claims remained "shrouded in [] much uncertainty").

The question is more urgent now than it has ever been. Over the last several years, this Court has in several important ways narrowed the access state prisoners have to federal habeas review over constitutional challenges to their convictions and sentences. *See, e.g.*, *Shinn v. Ramirez*, 596 U.S. 366, 382 (2022) (establishing demanding restrictions on the development of the habeas record to support ineffective-assistance claims where state post-conviction counsel failed to do so); *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021) (eliminating the watershed exception to non-retroactivity rules); *White v. Woodall*, 572 U.S. 415, 420 (2014) (prohibiting

the granting of federal habeas relief unless the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (limiting federal review to the record compiled in state court); *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (applying extremely deferential review even to unreasoned state-court decisions).

Through these various restrictions, the Court has consciously made it more difficult for prisoners to obtain federal habeas relief on the premise that "[t]he States possess primary authority . . . for adjudicating constitutional challenges to state convictions." *Ramirez*, 596 U.S. at 376; *Harrington*, 562 U.S. at 103 (reiterating that "state courts are the principal forum for asserting constitutional challenges to state convictions"). When the Court constricts habeas review, the federal judiciary naturally becomes less of a backstop to state post-conviction schemes. It therefore becomes even more essential that state courts truly are serving as a meaningful forum "for adjudicating constitutional challenges" to convictions and sentences. *Ramirez*, 596 U.S. at 376.

One insightful observer who saw as much was Professor Paul M. Bator. Several Justices on this Court have turned to Professor Bator to bolster the limitations imposed on federal habeas review in recent decades. *See, e.g.*, *Brown v. Davenport*, 596 U.S. 118, 129 (2022) (citing Professor Bator in a discussion of how confined federal habeas review should be); *Edwards*, 593 U.S. at 277 (Gorsuch, J., concurring) (same); *Montgomery v. Louisiana*, 577 U.S. 190, 232 (2016) (Thomas, J.,

dissenting) (same). But the article by Professor Bator upon which these writings rely itself stressed how his conception of federal habeas review only worked if states satisfied their own due process obligations to fully review constitutional claims. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 456 (1963) (commenting that it is "the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case" and if a state "fails in fact to do so, the due process clause itself demands that its conclusions of fact or law should not be respected" and "federal habeas is clearly an appropriate remedy").

Given the reenergized focus on state courts as the final arbiters of federal constitutional claims, it is critical for the Court to take up the question left unanswered after *Case*, genuinely bring Professor Bator's framework to bear, and determine how far states can go under the Due Process Clause in imposing limits on the consideration of federal constitutional claims. The present case gives the Court the perfect opportunity to draw the line.

I. Due process scrutiny of state post-conviction schemes is needed.

There are numerous signs that state post-conviction regimes around the country are not offering the kind of full and fair review that this Court's federal habeas cases presume, and that more guidance is therefore in order.

As one leading commentator has observed, "modern postconviction review schemes are often so complicated and confusing that indigent criminal defendants

have no realistic prospect of complying with the procedural rules." Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 Mich. L. Rev. 75, 77 (2017). A few examples suffice to illustrate the general nature of the dysfunction, which range from systemic underfunding to more procedural mechanisms that make it effectively impossible to have certain types of claims considered in state court.

On the systemic side, in California, more than 300 death-row inmates are waiting for the appointment of initial state post-conviction counsel, and more than 100 of them have been waiting for more than twenty years. *See* 2023 Annual Report, Habeas Corpus Resource Center, available at https://www.hcrc.ca.gov/documents/HCRC%20Annual%20Report%202023.pdf. As for more claim-specific rules, a post-conviction petitioner in Montana might see his claim rejected because he failed to provide an affidavit from his attorney, who could well have refused to sign one. *See Godfrey v. Mahoney*, No. CV 09-35, 2009 WL 5371196, at *6 (D. Mont. Nov. 24, 2009). An inmate in Florida might have his claim rejected in post-conviction on the ground that he should have raised it on direct appeal when state precedent gave the exact opposite instruction. *See Brown v. Sec'y for Dept. of Corrs.*, 200 F. App'x 885, 886–88 (11th Cir. 2006). A petitioner in Alabama could see his entire post-conviction petition dismissed for failing to marshal every smidge of evidence into his initial petition—such as identifying not only an expert, but the contents of that expert's potential testimony—from the confines of his death row prison cell without the assistance of an attorney. *See*

Woods v. State, 221 So.3d 1125, 1136–37 (Ala. Crim. App. 2016); Ala. Crim. R. 32.7(c). Colorado and Tennessee refuse to extend their statutes of limitations for newly discovered evidence, so such claims will never be heard. *See People v. Ambos*, 51 P.3d 1070, 1073 (Colo. Ct. App. 2002); *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999). Three other states—Ohio, Mississippi, and Virginia—have been "unwilling to look at the merits of unpreserved constitutional claims," meaning that ineffective trial counsel can doom a viable issue to limbo. *See* Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 30 (1990).

The excessive restrictiveness in many state post-conviction systems is constitutionally problematic under the Court's existing precedent. When a state provides a mechanism to collaterally attack a criminal sentence, that mechanism must comport with constitutional due process. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."). This includes, at an absolute minimum, the opportunity to be heard. *See Ford v. Wainwright*, 477 U.S. 399, 413 (1986). In the states listed above, and a number of others, cognizable constitutional claims are completely left in the cold without that modest degree of process.

In sum, there are widespread deficiencies in the state post-conviction ecosystem and there is already an established rule of law for addressing them: the

Due Process Clause. What is missing is a blueprint to the lower courts on what the Clause demands in the state post-conviction context, and that is the gap the present case can fill.

II. This case presents the perfect facts to consider.

Mr. Creech's certiorari petition provides the ideal chance for the Court to drawing a due process line for state post-conviction schemes, as it falls on the far side of the continuum. That is because Mr. Creech asserted a claim that has long been recognized by the Court as valid: an appeal to the evolving standards of decency. Yet the decision below adopted a rule that by definition bars every such claim from review by insisting that it be brought when it was known, which will always be years before it is viable. If the Due Process Clause imposes any kind of limitation on successive post-conviction cases, it would do so here. Mr. Creech's case consequently gives the Court a clean, simple set of facts for it to set down a due process boundary in the state post-conviction realm.

Time and time again, this Court has held that changing social mores and values may render a punishment—even one once accepted—unconstitutional under the Eighth Amendment. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (per curiam); *Trop v. Dulles*, 356 U.S. 86 (1958). There is no question, then, that the evolving standards of decency represent a valid constitutional theory under existing law.

What these evolving-standards claims have in common is that the social mores and values they relied upon have evolved *over time*. By their very nature, these claims exist on a spectrum of viability from frivolous to meritorious, depending on the time the claim is brought. Take the evolving-standards claim regarding the execution of sixteen- to eighteen-year-olds. In 1989, this Court declared that the Eighth Amendment did not outlaw such a practice because it "discern[ed] neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). Four years after the decision in *Stanford*, seventeen-year-old Christopher Simmons murdered a woman in Missouri, for which he was sentenced to death. *State v. Simmons*, 944 S.W.2d 165, 169 (Missouri 1997) (en banc). A decade after *Stanford*, Mr. Simmons's age-based attack on his death sentence was rejected. *See id.* at 191. However, the viability of the claim continued to change over time until it was meritorious. Mr. Simmons filed a new petition for post-conviction relief in state court, arguing that the Eighth Amendment barred his execution due to his age at the time of the crime based on evolving standards of decency. *Roper*, 543 U.S. at 559–60. This time—twelve years after the crime—this Court agreed: over the sixteen years since *Stanford*, the standards of decency had evolved such that the execution of those under eighteen years old at the time of their crimes offended the Eighth Amendment. *Id.* at 578.

Technically, the *Roper* claim existed in 1989—after all, this Court took up the claim on certiorari, even though it ultimately denied relief. *Stanford*, 492 U.S. at

364–65, 380. It also existed in 1993 when Mr. Simmons committed the murder, and it existed in 1997 when the Missouri Supreme Court upheld Mr. Simmons's sentence. *See Simmons*, 944 S.W.2d at 191. But although the claim *existed* years before this Court's decision in *Roper*, the claim was not *viable*. Only in 2005 did this Court proclaim that national standards of decency had evolved to the point where the execution of juveniles was barred as a constitutional matter. *Roper*, 543 U.S. at 578.

It is Idaho's fixation with when a claim theoretically exists, to the exclusion of when a claim is viable, that implicates due process. Idaho has elected to create an avenue for its inmates to bring collateral challenges in state court to their convictions and sentences under the U.S. Constitution. *See* Idaho Code § 19-4901(a)(1). It has also elected to build into its system a path for such claims in capital cases when they arise after the initial post-conviction petition has been resolved. *See* Idaho Code § 19-2719(5). But when an inmate wishes to carry an evolving-standards claim down that path, he is thrust in the middle of a Catch-22. If a petitioner wishes to bring a "timely" evolving standards claim in a successive petition in Idaho state court, he must do so within forty-two days of knowing the claim *exists*. App. 8 (concluding that Mr. Creech "could have satisfied" the limitations period "by bringing his claim within forty-two days of when he knew or reasonably should have known of the facts supporting his claim, even if the facts to sustain his claim developed" later). If, however, he wishes to *succeed* on that claim, he must wait to bring it until it is *viable*—that is, when he has enough evidence to

show the standards of decency have evolved such that his execution would offend the Eighth Amendment. As illustrated by the sixteen-year saga between *Stanford* and *Roper*, such evidence cannot possibly be marshaled within forty-two days of when a claim becomes conceivable.

Due process requires a petitioner to be given not just an opportunity to be heard, but a meaningful one: "The core of due process is the right to notice and a *meaningful* opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). The enormously accelerated timeline embraced by the Idaho Supreme Court is at odds with due process because it deprives petitioners like Mr. Creech of their right to a meaningful opportunity to be heard. *See Miller v. French*, 530 U.S. 327, 350 (2000) (explaining that "whether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question").

The Idaho Supreme Court likewise ran afoul of the Due Process Clause when it faulted Mr. Creech for failing to identify an "unusual" event occurring during the limitations period that was sufficient to give rise to his claim. App. 7. This Court's evolving-standards cases have never demanded any unusual event. To the contrary, evolving-standards precedent is largely about *absences*—that is, the non-occurrence of death sentences and executions. *See, e.g.*, *Kennedy*, 554 U.S. at 433 (indicating that "no individual ha[d] been executed for the" crime in question for many years); *Atkins*, 536 U.S. at 316 (referring to how certain states "authorize[d] executions" of the class of inmates at issue "but none have been carried out in decades"); *Enmund*, 458 U.S. at 794 (emphasizing how "juries have rejected the death penalty in cases

such as this one"). Of all the successful evolving-standards petitioners in this Court's history, none of them would have been able to satisfy the Idaho Supreme Court's insistence upon an "unusual" triggering event.

The invisible window of opportunity to raise the claim under Idaho's rule speaks to the due process difficulty here. Consider the view expressed below by the district court, which understood that Mr. Creech's evolving-standards claim had been "decades in the making by its very nature." App. 190. Nevertheless, the district court was untroubled by the time-bar: "[t]hat it is difficult to pinpoint the . . . claim's maturation date is no impediment to" a finding of untimeliness. *Id.* But the impossibility of identifying a maturation date under Idaho law is precisely what brings the Due Process Clause onto the table. Under the district judge's approach (which the Idaho Supreme Court "agree[d] with," App. 8), there is a period of "decades" in which the claim is supposedly available and yet it is impossible to say when during that time the forty-two-day window is open—even for the judge declaring the petition untimely. That is just another way of saying the claim can never be brought.

The Idaho courts' timelines are also notably out of sync with the evolving-standards caselaw. From the Idaho Supreme Court's perspective, there must be some discrete occurrence followed by the filing of a petition within the next forty-two days. By contrast, this Court's evolving-standards cases rely on years of data, sometimes decades of it. *See, e.g.*, *Graham*, 560 U.S. at 65 (stressing that the

empirical evidence surveyed by the Court "stretch[ed] back many years"); *Coker*, 433 U.S. at 593 (going back more than fifty years for one data point).

In short, the Idaho Supreme Court's confused analysis of how evolving standards claims operate fails to give effect to their core identity. To cut off the availability of such a claim before it has any chance of succeeding on the merits, as Idaho does, deprives capital petitioners of their day in court. Through longstanding evolving-standards jurisprudence, such petitioners clearly have a right, but they are left without a remedy in Idaho court, thereby crystallizing the due process issue for this Court's consideration.

III. Idaho is the perfect state to consider.

Apart from the strengths of Mr. Creech's individual case as a vehicle, his petition comes to the Court from a broader legal context that is also well-suited to the due process inquiry. That context is Idaho's limitations period for successive post-conviction petitions in capital cases, which is the posterchild of state contortionism engineered to avoid reviewing serious constitutional claims.

To begin, the limitations period at issue—forty-two days—"is the shortest in the nation." *Hoffman v. Arave*, 236 F.3d 523, 533 (9th Cir. 2001). It is also one of the most difficult to satisfy substantively. The forty-two days runs from when the inmate "should have known" about the claim, *Stuart v. State*, 232 P.3d 813, 826 (2010), a rule the Idaho Supreme Court has enforced so rigidly as to make it essentially a catechism for denying relief.

The story of this limitations period is a story of a court perpetually moving the goalposts to frustrate constitutional claims in capital cases. Section 19-2719, the

source of the limitations period, was enacted in 1984. *See Paradis v. State*, 912 P.2d 110, 114 (Idaho 1996). The statute generally requires that all claims be raised within forty-two days of the death judgment. *See* § 19-2719(3). From this statutory language, the Idaho Supreme Court has inferred another requirement that with respect to any claim that "could not have been known within 42 days" the petitioner must "assert the issue soon after the issue is known." *McKinney v. State*, 992 P.2d 144, 150 (Idaho 1999).

For twenty-four years, the Idaho Supreme Court did not tell petitioners what "soon" meant other than to vaguely describe it as "a reasonable time." *Rhoades v. State*, 17 P.3d 243, 245 (Idaho 2000). Instead of delineating a time period, the Idaho Supreme Court simply defined the triggering event in such a way that the filing date was always too late. One early example of this was the court's determination that a claim alleging ineffective assistance of appellate counsel became known at the time the opening brief was submitted. *See Paz v. State*, 852 P.2d 1355, 1357 (Idaho 1993). At that time, the petitioner was of course still represented by the potentially ineffective attorney, and would continue to be for some time longer as the inmate waited for the appeal to become fully briefed, argued, and decided. The federal district court in Idaho later recognized the "inherent difficulties arising from application of the rule" in light of the duty it forced on prisoners to challenge the lawyers who were still actively representing them. *Hairston v. Packett*, No. CV-00-303, 2008 WL 3874614, at *12 (D. Idaho Aug. 15, 2008).

The Idaho Supreme Court's commitment to implausible triggering dates did not lessen with time. Later cases suggested that the appointment of federal habeas counsel represented a sound triggering date. *See Hairston v. State*, 156 P.3d 552, 558 (Idaho 2007), *vacated on unrelated grounds*, 552 U.S. 1227 (2008); *Porter v. State*, 32 P.3d 151, 154 (Idaho 2001). The Idaho Supreme Court in such cases did not engage with how voluminous the records are in capital cases or the fact that counsel cannot investigate all potential claims simultaneously.

In 2008, the Idaho Supreme Court finally announced what a "reasonable time" consisted of: "forty-two days after the petitioner knew or reasonably should have known of the claim." *Pizzuto v. State*, 202 P.3d 642, 649 (Idaho 2008). The *Pizzuto* court addressed the merits of the claim—not, tellingly, because it was timely, but because the petitioner "did not have advance notice of" the new forty-two-day rule. *Id.* And it was the last time the Idaho Supreme Court would ever consider the merits of a capital successive post-conviction claim.

In the years since, the court has rigidly deployed the forty-two-day deadline to justify the dismissal of numerous claims. In one case, a prisoner was informed that he should have known that a police officer destroyed a critical piece of forensic evidence—and a court exhibit to boot—years before he actually discovered it. *See Fields v. State*, 298 P.3d 241, 243 (Idaho 2013). The same prisoner was later advised by the Idaho Supreme Court that he "should have known" about a key witness's recantation years before it took place. *See Fields v. State*, 314 P.3d 587, 590–92 (Idaho 2013). More recently, the Idaho Supreme Court blamed a prisoner for

supposedly waiting to bring a claim based on the fact that the case's lead detective had been suspended from duty during the middle of a trial in which he testified several times—it did not move the court that the inmate's whole theory was that the evidence had been wrongly suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Abdullah v. State*, 539 P.3d 947, 960 (Idaho 2023).

It is no coincidence that all of these cases involve claims asserting misconduct by state actors. This Court has taken pains to ensure that in federal habeas cases the usual procedural limitations are relaxed when it comes to *Brady* claims, so that the government cannot get the benefit of is own malfeasance after it suppresses evidence. *See Banks v. Dretke*, 540 U.S. 668, 691–92 (2004); *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). The Idaho Supreme Court has done the opposite—it has expressly held that that the suppression of evidence makes no difference to its absolutist interpretation of the limitations period. *See Abdullah*, 539 P.3d at 961 (pointing out that the "time-bar would have no teeth" if the court were to accept that the state's illegal suppression of evidence changes the calculus). At the same time, the Idaho Supreme Court has shut down one of the other main outlets that many post-conviction regimes (including the federal system) maintain: that of actual innocence. Just last year, the Idaho Supreme Court declared that for capital and non-capital cases alike actual innocence will never excuse a time bar. *See Hooley v. State*, 537 P.3d 1267, 1276 (Idaho 2023); *see also id.* at 1281, 1290 (Stegner, J., dissenting) (rebuking the 4-1 majority for "closing the doors of the courthouse for the petitioner who was wrongfully convicted" and "let[ing] innocence

take a back seat to finality" in an opinion that "was not only patently wrong but a miscarriage of justice").

The Idaho Supreme Court made it clear below that Mr. Creech's due process theory was being cast aside on the basis of these same broadly inflexible principles. In finding no due process violation, the court invoked its *Brady* precedent and the idea that the prosecution's unconstitutional suppression of evidence has no bearing on the timeliness of a post-conviction petition. App. 8. The message is plain: just as no exception will be made to hear *Brady* claims where the delay is caused by governmental wrongdoing, no exception will be made to hear evolving-standards claims where the delay is caused by the need for the evidence to accrue. No exceptions to the shortest, toughest deadline in the country will be made, period. Indeed, in the forty years that have elapsed since Idaho first codified its current statute, the state supreme court has never—to undersigned counsel's knowledge—vacated a conviction or sentence in a successive post-conviction case, despite dozens of opportunities. The dearth is not due to a lack of serious constitutional questions about the integrity of Idaho's death sentences. *See, e.g.*, *Pizzuto v. State*, 233 P.3d 86, 89–93 (Idaho 2010) (rejecting as time-barred a *Brady* claim where the prosecution withheld information about a secret plea deal struck between the prosecutor and a key government witness and facilitated by the trial judge). It is instead because the review of successive capital post-conviction petitions in Idaho is an illusion.

Simply put, Idaho law on capital post-conviction claims is as harsh and unyielding as any state's in the country. It has been written for the purpose of excluding constitutional claims from review. If the outer bounds of due process in this area of law are to be found, it is in Idaho. Mr. Creech's case deals with an extreme instance of post-conviction review being denied that arises from a state with a long and consistent track record of similar denials. Below, the Idaho Supreme Court directly resolved the due process issue, teeing it up for certiorari review. To summarize, the petition poses the simplest question in a complex area. It is the best place to answer the question that was put on hold more than fifty years ago and which the states are still waiting for today.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 20th day of February 2024.

Jonah J. Horwitz
Counsel of Record
Nicole R. Gabriel
Capital Habeas Unit
Federal Defender Services of Idaho
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Telephone: 208-331-5530
Facsimile: 208-331-5559