

NO. 23-6791

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 The State of Idaho

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI AND OPPOSITION TO
APPLICATION FOR STAY OF EXECUTION

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Thomas E. Creech (“Creech”) has raised the following question before this Court:

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 petition.

(Pet., p.i.)

Respondent State of Idaho wishes to rephrase the questions as follows:

1. Because the Idaho Supreme Court’s decision is not final, is this Court without jurisdiction to review Creech’s Petition?
2. Has Creech failed to establish a due process violation when he failed to meet his burden of establishing that his evolving standards of decency claim was timely filed after it was known or reasonably could have been known?

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STATEMENT OF THE CASE

The facts surrounding Creech's brutal murder of fellow inmate David Jensen on May 13, 1981, are not new to this Court. In 1993, this Court explained:

The facts underlying this case could not be more chilling. Thomas Creech has admitted to killing or participating in the killing of at least 26 people. The bodies of 11 of his victims – who were shot, stabbed, beaten, or strangled to death--have been recovered in seven States. Creech has said repeatedly that, unless he is completely isolated from humanity, he likely will continue killing. And he has identified by name three people outside prison walls he intends to kill if given the opportunity.

Creech v. Arave (Creech IV), 507 U.S. 463, 465-66 (1993).

The Idaho Supreme Court discussed the facts surrounding David's murder. *See State v. Creech (Creech I)*, 670 P.2d 463, 465 (Idaho 1983). Creech pled guilty to David's murder and, pursuant to state law at that time and over Creech's objection, was sentenced to death by a judge. *Id.* at 465-66. On appeal, Creech contended, "Idaho's death penalty provisions are unconstitutional, in that jury participation is not required in the sentencing decision, but rather the discretion to impose a death sentence is vested in a judge." *Id.* at 473. The Idaho Supreme Court rejected Creech's argument, stating, "We hold that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states," *id.* at 474, and affirmed his conviction and death sentence, *see generally Creech I*. Creech next sought collateral relief, which was denied; the Idaho Supreme Court affirmed. *See generally State v. Creech (Creech II)*, 710 P.2d 502 (Idaho 1985).

Creech then filed his first federal habeas petition, which the federal district court denied. Creech v. Arave (Creech III), 947 F.2d 873, 875 (9th Cir. 1991). On appeal, Creech continued to press his claim "that the Constitution guarantees a jury trial on the existence of aggravating

circumstances which may result in the imposition of a sentence of death.” Id. at 885. The Ninth Circuit rejected Creech’s claim, id. at 885-86, but granted sentencing relief on three other grounds, id. at 881-85. This Court granted certiorari regarding one issue and reversed, but remanded for further proceedings because Creech was entitled to resentencing pursuant to the Ninth Circuit’s ruling on the two other sentencing claims. Creech IV, 507 U.S. at 465, 478-79.

On remand, after hearing Creech’s additional mitigation evidence and pursuant to state law at that time, the trial court again sentenced him to death. State v. Creech (Creech V), 966 P.2d 1, 6 (Idaho 1998). Creech then sought post-conviction relief, which was denied. Id. The Idaho Supreme Court affirmed Creech’s death sentence and denial of post-conviction relief, *see generally Creech V*, including his renewed claim that Idaho’s death penalty scheme violates the constitution without jury participation, id. at 15 (citing Creech III, 974 F.2d at 885-86).

In June 1999, Creech returned to federal court initiating new federal habeas proceedings, but the district court granted him a stay to file his first successive post-conviction petition. Creech v. State (Creech VI), 51 P.3d 387, 388 (Idaho 2002). Pursuant to I.C. § 19-2719, the trial court dismissed Creech’s claims. Id. Recognizing “[t]he only issue before this Court is whether we should dismiss Creech’s appeal based upon the provisions of Idaho Code § 19-2719[(5)],” the Idaho Supreme Court dismissed his appeal because all the claims were known or reasonably could have been known when he filed his first post-conviction petition following his 1995 resentencing. Id. at 388-91. Before returning to federal court, Creech filed his second successive post-conviction petition, contending he was entitled to a jury sentencing because of Ring v. Arizona, 536 U.S. 584, 606-07 (2002), which held that judges could no longer determine statutory aggravating factors, but those factors must be found by a jury. (App., pp.2-3.) The trial court dismissed the successive petition, and the Idaho Supreme Court affirmed. (App., p.3) (Creech VII).

When Creech returned to federal court, he again raised several jury sentencing claims, which were dismissed pursuant to Teague v. Lane, 489 U.S. 288 (1989). Creech v. Hardison, 2006 WL 851113, *2 (D. Ct. Idaho 2006). The district court also denied habeas relief on his remaining claims. Creech v. Richardson (Creech VIII), 59 F.4th 372, 381 (9th Cir. 2023). The denial of habeas relief was affirmed on February 6, 2023.¹ *See generally* Creech VIII. Certiorari was denied on October 10, 2023. Creech v. Richardson, 2023 WL 6558513 (2023)

After this Court denied certiorari and the day after a new death warrant was issued, on October 13, Creech filed his fourth successive post-conviction petition raising an Eighth Amendment claim based upon evolving standards of decency that allegedly bar imposition of the death penalty without jury sentencing. (App., pp.10-57.) Numerous documents were attached to the successive petition that, according to Creech, support the contention that his successive petition is not untimely under I.C. § 19-2719, some of which he has provided to the Court. (App., pp.58-186.) The following Monday, on October 16, the trial court *sua sponte* dismissed Creech's successive petition because he failed to meet his burden of establishing it was timely filed under I.C. § 19-2719(5). (App., pp.187-92.) However, because the Idaho Commission of Pardons and Parole ("Commission") granted Creech a commutation hearing, the court issued a stay. (App., p.3.) After the Commission denied Creech's request for commutation, the court issued a new death warrant scheduling Creech's execution for February 28, 2024. (App., p.3.) On February 9, 2024, the Idaho Supreme Court affirmed the court's dismissal of Creech's fourth successive post-conviction petition because it was untimely under I.C. § 19-2719. (App., pp.1-9) (Creech IX).

¹ While Creech's appeal was pending, he filed his third successive post-conviction petition contending he should be permitted to raise ineffective assistance of trial and post-conviction counsel claims because of Shinn v. Ramirez, 142 S.Ct. 1718 (2022). The Idaho Supreme Court affirmed the trial court's summary dismissal of the petition because it was untimely under I.C. § 19-2719. Creech v. State (Creech X), 2024 WL 510105 (Idaho 2024).

REASONS FOR DENYING THE WRIT

I. This Court Is Without Jurisdiction To Hear Creech’s Case

This Court has limited authority to review questions made by state courts. Specifically, 28 U.S.C. § 1257(a), states:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

See also Atlantic Richfield Co. v. Christian, 590 U.S. ---, 140 S.Ct. 1335, 1349 (2020) (quoting 28 U.S.C. § 1257(a)) (brackets omitted) (“Congress has authorized this Court to review ‘final judgements or decrees rendered by the highest court of a State.’”). As explained in Jefferson v. City v. Tarrant, Ala., 522 U.S. 75, 81 (1997), “This provision establishes a firm final judgment rule.”

In determining finality, “[t]he designation given the judgment by state practice is not controlling.” Richfield Corp. v. State Bd. of Equalization, 329 U.S. 69, 72 (1946). Rather, “[t]he question is whether it can be said that there is nothing more to be decided, that there has been an effective determination of the litigation.” Id. (quotes and citations omitted). That question not only requires “an examination of the entire record but, where necessary, by resort to the local law to determine what effect the judgment has under the state rules of practice.” Id. (quotes and citations omitted). As more recently explained, “To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.”

Jefferson, 522 U.S. at 81 (quotes and citation omitted). The finality rule “is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.” Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

Decisions of the Idaho Supreme Court are not “final” until 21 days after” (1) “announcement of the opinion”; (2) “announcement of the opinion on rehearing”; or (3) “announcement of a modified opinion without a rehearing.” I.A.R. 38(b). “When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur. ... The remittitur shall advise the district court ... that the opinion has become final and that the district court ... shall forthwith comply with the directive of the opinion.” I.A.R. 38(c). Prior to issuance of the remittitur, “within 21 days after the filing date of the Court’s opinion,” either party may file a petition for rehearing. I.A.R. 42(a). However, “[g]enerally speaking, a remittitur terminates appellate jurisdiction and reinstates the lower court’s jurisdiction over a case.” State v Billups, 421 P.3d 220, 222 (Idaho Ct. App. 2018); *see also* Losser v. Bradstreet, 183 P.3d 758, 760 (Idaho 2008) (“After this Court has rendered a final decision in such an appeal, a remittitur is issued and filed with the district court.”); Farber v. State, 682 P.2d 630, 633 n.1 (Idaho 1984) (Bistline, J., concurring in the judgment to affirm, but not the opinion of the Court) (“It has been my impression over the last eight years that an opinion of this Court did not rely upon a prior decision which was not wholly a final judgment, i.e., that the remittitur had issued.”).

Here, the Idaho Supreme Court’s remittitur has not issued, and, therefore, not only is the court’s decision not final, but either party could still seek rehearing. Moreover, neither party has requested the court to issue the remittitur prior to the expiration of the 21-day period for filing a petition for rehearing. Indeed, as the case presently stands, Creech could file a petition for

rehearing the night before his scheduled execution. Consequently, the Idaho Supreme Court's decision is not final because it is still subject to "further review or correction" and is not "the final word of a final court," Jefferson, 522 U.S. at 485-86, until the remittitur is issued.

While this Court has explained that the finality rule should not be administered in a "mechanical fashion and that there [are] circumstances in which there has been a departure from this requirement," [t]hese circumstances are said to be very few." Cox Broadcasting Corp., v. Cohn, 420 U.S. 469, 477 (1975) (quotes and citations omitted). There are "at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." Id., However, none of those exceptions apply here. The first category involves cases "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." Id. at 479. That category does not apply here because the case is not yet "concluded" because the Idaho Supreme Court could still modify its decision until the remittitur is issued.

The second category involves a federal issue decided by the State's highest court that "will survive and require decision regardless of the outcome of future state-court proceedings." Id. at 480. Because there will be no future state-court proceedings following Creech's case, this second category has no application. "[T]he third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."

Id. at 481. This category has no application because there is not a final decision from the Idaho Supreme Court nor further proceedings on the merits.

Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant course of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. This category also has no application because there is no final decision from the Idaho Supreme Court and there are no future state court proceedings.

Therefore, because this Court is without jurisdiction, Creech's Petition for Certiorari must be denied.

II. Creech Has Failed To Establish A Compelling Reason To Grant Certiorari

Creech's principal argument to grant certiorari is "to provide clarity on the question of when a state's post-conviction regime affords so little meaningful review to litigate federal constitutional claims that it violates due process" (Petition, p.5), because "[t]here 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" (Petition, p.7). However, incorrectly explaining Idaho's capital post-conviction law (Petition, pp.15-18), Creech merely contends that the Idaho Supreme Court "ran afoul of the Due Process Clause when it faulted [him] for failing to identify an 'unusual' event occurring during the limitations period that was sufficient to give rise to his claim." (Petition, p.13.)

Merely providing "clarity" regarding an allegedly ambiguous standard is not a sufficient basis for granting certiorari. Rather, certiorari is granted only for "compelling reasons," which generally include: (1) "a state court of last resort has decided an important federal question in a

way that conflict with the decisions of another state court of last resort or of a United States court of appeals”; or (2) “a state court ... has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10. Even if Creech is contending this Court should “decide an important federal question that has not been, but should be settled by this Court,” his argument fails because he must first establish the Idaho Supreme Court’s decision failed to provide the requisite due process that Creech contends was absent.

A. Creech Misstates Idaho Law Governing Capital Post-Conviction Proceedings

Misstating Idaho capital post-conviction law, Creech contends Idaho’s limitation period for successive post-conviction petitions “is the posterchild of state contortionism engineered to avoid reviewing serious constitutional claims.” (Petition, p.15.)

Creech is initially correct that Idaho’s limitation period of 42 days “is the shortest in the nation.” (Petition, p.15) (quoting Hoffman v. Arave, 236 F.3d 523, 533 (9th Cir. 2011)); *see also* I.C. § 19-2719(3). However, Creech ignores the fact that state petitions can be, and regularly are, amended since any new claim relates back to the date the initial petition was filed, I.R.C.P. 15(c), because post-conviction cases are civil in nature and generally governed by Idaho’s rules of civil procedure, Rhoades v. State, 220 P.3d 1066, 1068 (Idaho 2009). Even in the context of successive post-conviction petitions, death-sentenced murderers have been permitted to file amended petitions. *See* Abdullah v. State, 539 P.3d 947, 951 (Idaho 2023).

Idaho Code § 19-2719 sets forth special appellate and post-conviction procedures in all capital cases. Fields v. State, 253 P.3d 692, 697 (Idaho 2011). Capital post-conviction proceedings, like non-capital post-conviction proceedings that are governed by the Uniform Post-Conviction Procedure Act (“UPCPA”), are civil in nature and governed by the Idaho Rules of Civil

Procedure. Pizzuto v. State, 903 P.2d 58, 59 (Idaho 1995). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases, but acts as a modifier and “supersedes the UPCPA to the extent that their provisions conflict.” McKinney v. State, 992 P.2d 144, 149 (Idaho 1999); *see also* Pizzuto, 903 P.2d at 59 (“Although I.C. § 19-2719 is not a part of the [UPCPA], it merely serves to modify post-conviction proceedings in capital cases.”). “Any remedy available by post-conviction procedure must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.” Pizzuto v. State, 233 P.3d 86, 91 (Idaho 2010) (quoting I.C. § 19-2719(4)) (ellipses omitted).

Specifically, I.C. § 19-2719 provides a capital defendant “one opportunity to raise all challenges to the conviction and sentence in a post-conviction relief petition,” which must be filed “within 42 days after the judgment is filed.” State v. Rhoades, 992 P.2d 665, 676-77 (Idaho 1991). The one exception is provided in I.C. § 19-2719(5), Dunlap v. State, 360 P.3d 289, 302 (Idaho 2015), which permits a successive petition in “those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute,” State v. Rhoades, 820 P.2d 665, 677 (Idaho 1991). *see also* McKinney, 992 P.2d at 150. “The statute requires an objective examination of whether a defendant should have known of a claim at the time of the filing of the first petition.” Hairston v. State, 156 P.3d 552, 557 (Idaho 2007). A capital defendant who brings a successive petition for post-conviction relief has a “heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute.” Pizzuto, 903 P.2d at 60. “Petitions are procedurally-barred when they are not timely brought under I.C. § 19-2719.” Rhoades v. State, 17 P.3d 243, 245 (Idaho 2000).

Claims which were not known or which could not have reasonably been known within forty-two days of judgment “must be asserted within a reasonable time after they are known or reasonably could have been known.” Paz v. State, 852 P.2d 1355, 1357 (Idaho 1993). “[A] reasonable time . . . is forty-two days after the petitioner knew or reasonably should have known of the claim, unless the petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.” Pizzuto v. State, 202 P.3d 642, 649 (Idaho 2008).

Even if the petitioner can meet these mandates, I.C. § 19-2719(5)(a) details the additional requirements that must be met before the successive petition may be heard:

An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

I.C. § 19-2719(5)(a). The heightened pleading requirement includes establishing when the claim was known or reasonably could have been known. Stuart v. State, 232 P.3d 813, 819-20 (Idaho 2010).

If a capital petitioner fails to comply with the requirements of I.C. § 19-2719, the issues are “deemed to have [been] waived” and “[t]he 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(5); *see also* McKinney, 992 P.2d at 149. However, the Idaho Supreme Court has construed I.C. § 19-2719 as “a statute of limitations rather than a jurisdictional bar.” Stuart, 232 P.3d at 823; *see also* Hairston v. State, 472 P.3d 44, 47-48 (Idaho 2020) (construing I.C. § 19-2719 as a statute of

limitation defense that may be waived if not affirmatively presented before the district court). Likewise, failure to meet the requirements of I.C. § 19-2719(5)(a) mandates dismissal of the successive petition. Fields v. State, 17 P.3d 230, 233-34 (Idaho 2000). “A court must summarily dismiss any successive petition that does not meet the requirements of I.C. § 19-2719(5).” McKinney, 992 P.2d at 150. “The merits of [Creech’s] claims could only be reached after the court had found that I.C. § 19-2719’s ‘not reasonably known’ requirement had been met.” Stuart, 232 P.3d at 820.

In State v. Beam, 766 P.2d 678, 683 (Idaho 1988), the Idaho Supreme Court discussed the purpose and policy behind the passage of I.C. § 19-2719:

The underlying legislative purpose behind the statute stated the need to expeditiously conclude criminal proceedings and recognized the use of dilatory tactics by those sentenced to death to “thwart their sentences.” The statute’s purpose is to “avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . .” We hold that the legislature’s determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719.

The Idaho Supreme Court “has strictly construed the waiver provision of I.C. § 19-2719,” McKinney, 992 P.2d at 150; *see also* Dunlap, 360 P.3d at 303, and followed the requirements of I.C. § 19-2719, strictly and regularly rejecting successive capital post-conviction relief claims because of petitioners’ failure to meet the narrow exception of I.C. § 19-2719(5), *see e.g.*, Abdullah v. State, 503 P.3d 182, 192 (Idaho 2021). This regular and consistent application of I.C. § 19-2719 has been recognized by the Ninth Circuit. *See* Rhoades v. Henry, 611 F.3d 1133, 1144 (9th Cir. 2010); Hoffman, 236 F.3d at 533.

However, while I.C. § 19-2719 is regularly and consistently applied, it is not absolute. For example, in Hairston v. State, 472 P.3d 44, 47-48 (Idaho 2020), the Idaho Supreme Court concluded that I.C. § 19-2719 is a statute of limitation that must be affirmatively pled if the state

files an answer or dispositive motion. Because the state did not affirmatively plead I.C. § 19-2719, the court determined it was waived and reviewed Hairston's successive petition under the edicts of the UPCPA. Id. Additionally, when this Court had created a new cause of action that is retroactive, the Idaho Supreme Court has determined that the claim could not have been known. In Pizzuto, 202 P.3d at 648, the court concluded that a claim of intellectual disability could not have been known when Pizzuto filed his first post-conviction petition because Atkins v. Virginia, 536 U.S. 304 (1989), which determined intellectually disabled murderers could not be issued, was not released until six years after Pizzuto was sentenced. Pizzuto, 202 P.3d at 648-49. And in Sivak v. State, 8 P.3d 636, 641-42 (Idaho 2000), the state court concluded that exculpatory evidence withheld by the prosecutor could be raised in a successive post-conviction petition unless that evidence could have been discovered by some other means, and the prosecutor's open file policy did not constitute a way that a defendant could reasonably obtain such evidence because "[d]efense attorneys are entitled to rely on the presumption that prosecutors have fully discharged their official duties, including the duty to disclose exculpatory material," id. at 642.

Citing three cases, Creech appears to contend otherwise. (Pet, pp.17-18.) In Fields v. State, 298 P.3d 241, 242 (Idaho 2013), after he was convicted and sentenced to death, he filed his first post-conviction petition in 1981. Nearly three decades later, he filed his fifth post-conviction petition contending evidence had been destroyed. Id. at 243. Recognizing the destruction of the evidence could have been discovered years earlier, the Idaho Supreme Court concluded the successive petition was untimely. Id. at 244-45. The same is true in Fields v. State, 314 P.3d 587, 590-92 (Idaho 2013), where the Idaho Supreme Court merely concluded that, because of information Fields already had, he could have readily discovered the alleged recantations years earlier. More importantly, the court concluded affirmed the dismissal of Fields' successive petition

because he failed to meet the pleading requirements of I.C. § 19-2719(5) by explaining when he became aware of the alleged recantation. *Id.* at 591. Finally, Abdullah, 539 P.3d at 960, involves these same principles. In his second successive petition, Abdullah contended the state withheld evidence regarding the alleged suspension of the lead detective during the trial that stemmed from an affair he had with one of the deputy prosecutors that was going to try the case. Because both the lead detective and deputy prosecutors were deposed during litigation of the first post-conviction petition that initially included a nearly identical claim in the first petition that was later omitted in the final amended petition, the Idaho Supreme Court concluded the claim was known or reasonably could have been known when the first petition was filed. *Id.* at 958-62.

Relying upon Hooley v. State, 537 P.3d 1267-1276 (Idaho 2023), Creech also contends, “the Idaho Supreme Court has shut down one of the main outlets that many post-conviction regimes, including the federal system) maintain: that of actual innocence.” (Petition, 18.) Creech’s argument is without merit. Actual innocence is not a basis for federal relief, but merely serves as a gateway to overcome procedurally defaulted claims, and claims filed beyond the one-year statute of limitation under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). Indeed, this Court has repeatedly explained, “We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.” *Id.* at 392 (citing Herrera v. Collins, 506 U.S. 390, 404 (1993)). “Nor has this Court ever held that [a petitioner] has a right to demand that his post conviction court consider a freestanding claim of actual innocence.” Williams v. Pennsylvania, 579 U.S. 1, 35-36 (2016) (Roberts, C.J., dissenting). The Idaho Supreme Court recognized these basic principles when, in Fields, 253 P.3d at 696, it reasoned, “The Supreme Court in *Schlup* and *House* was addressing the showing required for a federal habeas petitioner to avoid a procedural bar to the consideration of

his constitutional claims. The Court was not setting forth a requirement applicable to state claims for post-conviction relief.” In Hooley, 537 P.3d at 1276, the Idaho Supreme Court merely applied the principles of this Court that were discussed in Fields, and concluded that actual innocence would not toll a post-conviction statute of limitation because “[t]he right to post-conviction relief is proscribed by what the statute provides; we are not in the business of rewriting statutes.”

B. Idaho Code § 19-2719 Provides A Fair Opportunity To Litigate Constitutional Rights

Having this basic framework associated with I.C. § 19-2719, it is clear it provides all capital murderers a fair opportunity to litigate constitutional rights. In Young v. Ragen, 337 U.S. 235, 239 (1949), this Court implied prisoners must “be given some clearly defined method by which they may raise claims of denial of federal rights.” However, the Constitution “does not establish any right to collaterally attack a final judgment of conviction.” U.S. v. MacCollom, 426 U.S. 317, 323 (1976). This principle was reaffirmed in Murray v. Giarratano, 492 U.S. 1, 10 (1989) (footnote omitted), “State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.” *See also* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (rejecting the claim that “prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions”).

However, even if such a right exists, “States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post conviction relief.” Finley, 481 U.S. 559. Otherwise, the state would be forced to make “the difficult choice” between affording some mechanism for collateral relief or providing no means of collateral relief whatsoever. *See id.* Nevertheless, “when 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.” Evitts v. Lucey, 469 U.S. 387, 401 (1985). However, as

explained in Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009), "Federal Courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided."

The Idaho Supreme Court recognized the basic principle of due process Rhoades, 820 P.2d at 676, explaining that the fundamental principle of procedural due process is process that ensures an individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This hallmark requirement is met if the individual is provided notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Both the UPCPA and I.C. § 19-2719 provide petitioners with an opportunity to be heard, they must simply comply with the applicable statute of limitation.

As recognized in Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975), "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." "The test is whether the defendant has had a reasonable opportunity to have the issue as to the claimed right heard and determined by the State court." Michel v. Louisiana, 350 U.S. 91, 93, (1955) (upholding a statute requiring objections to a grand jury be raised within three days). However, "[a] state's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitation." Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988).

Therefore, logic dictates that a petitioner's constitutional rights cannot be violated when he is provided with post-conviction review, even though there is a specific time frame in which a

petition must be filed. Because it provides notice and an opportunity to be heard, I.C. § 19-2719 meets the fundamental requirements of due process.

C. Evolving Standards Of Decency Claims Fit Comfortably Within The Confines Of I.C. § 19-2719

Creech contends, “It is Idaho’s fixation with when a claim theoretically exists, to the exclusion of when a claim is viable, that implicates due process,” because if “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 that standards of decency have evolved such that his execution would offend the Eighth Amendment.” (Petition, pp.12-13) (emphasis omitted) However, Creech ignores the fact that his claim was “viable” when Ring was issued, or shortly thereafter, because judges could no longer find statutory aggravators. When Ring was decided everyone knew the number of judge-sentenced murderers would inevitably decline, resulting in fewer executions of those murderers. In other words, evolving standards of decency have nothing to do with the number of declining judge-sentenced executions, but is a natural consequence associated with Ring – a “last man standing” phenomena.

Nevertheless, the trial court and the Idaho Supreme Court gave Creech the benefit of the doubt, and merely computed the limitations period from the time he filed his successive petition on October 13, 2023, and looked to determine whether there were any data points 42 days earlier on September 1, 2023. (App., p.7.) The trial court reasoned that “[n]othing of import to the viability of the claim asserted in the petition is alleged to have either happened or come to light between September 1, and the filing of the petition” on October 13, 2023. (App., p.189.) Therefore, according to the trial court, Creech claim “could have been asserted before September 1, with no less force than it can be asserted now,” and “does not genuinely depend on anything that happened or come [sic] to light since September 1.” (App., p.190.) Not only did the Idaho

Supreme Court agree with these conclusions, but the court recognized that Creech “has admitted that nothing unusual occurred during the forty-two days prior to October 13 that would have triggered the commencement of the forty-two-day window on or after September 1.” (App., p.7.)

Before the Idaho Supreme Court, Creech relied extensively upon a so-called moratorium imposed by Arizona’s governor in January 2023, and the issuance of an Arizona death warrant in February 2023 that expired on April 5, 2023, contending the delay in bringing his petition was unclear because of the unsettled legal environment in Arizona. (App., p.6.) Nevertheless, the court recognized that Creech still waited until October 13, 2023, “the day after [his] latest death warrant was issued to file his petition.” (App. p.6.)² However, the trial court and Idaho Supreme Court rejected Creech’s argument because, irrespective of what happened in Arizona, there were no data points between September 1 and October 13. (App., pp7-8, 189-90.)

The Ninth Circuit was not as generous when Creech attempted to raise the claim in a successive federal habeas petition, and adopted the state’s “last man standing” argument, explaining, “It was clear, once *Ring* was decided, that the number of executions of judge-sentenced capital defendants would decrease in the years to follow as those defendants were executed, were granted clemency, or died of natural causes, or as their States imposed broader restrictions on executions generally.” Creech Richardson, 2024 WL 748385 (9th Cir. 2024). Further, as explained by the Ninth Circuit, “Creech does not claim that Arizona’s moratorium was motivated by standards-of-decency concerns about the execution of those judge-sentenced defendants.” Id. And even after addressing Creech’s arguments regarding this Court’s standards of decency precedent, the Ninth Circuit reasoned, “he has not shown that his claim was unripe in the years immediately

² As explained above, that warrant was stayed because the Commission granted Creech a commutation hearing.

following *Ring*, when judge-sentenced executions were practiced in only a small minority of jurisdictions, and when the Supreme Court in *Ring* had rejected judicial factfinding that exposes a capital defendant to death.” Id.

Consequently, this case makes a poor vehicle to resolve any alleged concerns regarding due process in post-conviction proceedings, because Creech clearly had the opportunity to be heard, even a “meaningful” opportunity. LaChance v. Erickson, 522 U.S. 252, 266 (1998). Whether judged from the issuance of Ring, or his failure to provide some data point between September 1 and October 13, he simply failed to file his successive petition within the confines of the 42-day window for the filing of a claim that was not known or could not reasonably have been known, *see Pizzuto*, 202 P.3d at 649, which does not violate due process.

Finally, Creech relies on this Court’s narrowing of access to federal habeas review to challenge state convictions and sentences. (Petition, pp.5-6.) However, there is nothing in this Court’s cases that require this Court to address, let alone expand, due process in state post-conviction proceedings. Rather, as explained in Davila v. Davis, 582 U.S. 521, 531 (2017) (quotes and citations omitted), “[t]he trial is the main event at which a defendant’s rights are to be determined, and not simply a tryout on the road to appellate review.”

Creech has failed to raise an important constitutional issue that should be addressed by this Court.

III. Creech’s Application For Stay Of Execution Should be Denied

Creech relies upon the four factors from Hilton v. Braunskill, 481 U.S. 770, 776 (1987), to contend he should be granted a stay of execution (Application, p.1), which generally regulate issuance of a stay:

- (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent

a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

However, this Court recognized that, because “the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.” Id. at 777. While those same four factors were reaffirmed in Nken v. Holder, 556 U.S. 418 (2009), the Court concluded, “The first two factors of the traditional standard are the most critical.” Id. at 434. Addressing those two factors, the Court explained, “It is not enough that the chance of success on the merits be better than negligible. . . . By the same token, simply showing some possibility of irreparable injury fails to satisfy the second factor.” Id. at 434-435. However, importantly, “Last-minute stays should be the extreme exception, not the norm[.]” Bucklew v. Precythe, 587 U.S. ---, 139 S.Ct. 1112, 1134 (2019); *see also* Barr v. Lee, 591 S.Ct. ---, 140 S.Ct. 2590, 2591 (2020).

As explained above, Creech’s claim clearly lacks merit because I.C. § 19-2719 and the Idaho Supreme Court’s interpretation of the statute provided Creech with all the due process required by the Constitution and this Court’s precedent. Irrespective of the second prong, the third and fourth Hilton factors also militate against issuance of a stay. The state’s interest in avoiding unwarranted delay in carrying out its judgments is exceptionally strong. As noted in Gomez v. Fierro, 519 U.S. 918 (1996) (footnote omitted) (Stevens, J., dissenting), “There are powerful reasons for concluding capital cases as promptly as possible. Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment.” “It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.” Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983) (quotes and citation omitted). “Only

with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike.” Shinn v. Ramirez, 142 S.Ct. 1718, 1731 (2022) (quotes and citation omitted).

Clearly, the public interest in the expeditious resolution of capital cases is not negligible; unnecessary delay substantially injures the public’s trust in the criminal justice system. Based upon the decades Creech’s case has been pending while he has engaged in piece meal litigation, both the third and fourth Hilton factors favor the state and scream for this Court to deny his request, particularly because of the claim he presents, which has not merit. Creech’s contention that “[a] brief stay of execution to allow the certiorari proceedings to reach their natural conclusion without the artificial pressure of a pending death warrant will do the State no harm” (Application, p.6), rings exceptionally hollow where David’s murder occurred in 1981. It is those “brief” delays that have resulted in over forty years of continuous litigation. And even if the delay started when Creech was resentenced in 1995, that is still nearly three decades of unwarranted delay. “[J]ustice delayed is justice denied.” Leazer v. Kiefer, 821 P.2d 957, 967 (Idaho 1991) (Bistline, J., specially concurring) (quoting Deshazer v. Tompkins, 460 P.2d 402, 409 (Idaho 1969) (Shepard, J. dissenting)). Nowhere is that statement more relevant than in capital cases, where the Idaho Supreme Court has “recognized the use of dilatory tactics by those sentenced to death to ‘thwart their sentences.’” Beam, 766 P.2d at 683; *see also* Rhines v Weber, 544 U.S. 269, 277-78 (2005) (“[C]apital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death”). Thus, “[t]he federal courts can and should protect States from dilatory or speculative suits[.]” Hill v. McDonough, 547 U.S. at 585 (2006).

Creech also raises the never-ending drum beat that “death is different.” (Application, p.7.) But he has failed to cite any case where a court has applied this worn-out edict to the question of whether a state court’s post-conviction scheme violates due process. And for good reason, because that never-ending mantra is not always true. As explained in Barefoot, 463 U.S. at, 887, “direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.” This principle was reaffirmed in Murray, 492 U.S. at 9, where the Court recognized its “death is different” “holdings, however, have dealt with the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment.”

Finally, invoking herculean efforts that demonstrate his true motive in filing this Petition is delay, Creech contends this Court should wait for its decision in City of Grants Pass v. Johnson, No. 23-175 (Application, pp.8-9), which will address the question of whether “generally applicable laws regulating camping on public property constitute ‘cruel and unusual punishment’ prohibited by the Eighth Amendment” (Grant’s Pass Petition for Certiorari, p.i.) Of course, that question is irrelevant to the issue before this Court which addresses the level of due process that states allegedly must provide prisoners in collateral challenges, particularly successive collateral challenges. Capital litigation should not mean endless litigation. Creech’s case has been litigated for over four decades, and he has now waited until the eve of his execution to file a successive petition that is barred by I.C. § 19-2719. He should not be rewarded for such unwarranted delay by staying his execution.

CONCLUSION

The state respectfully requests that Creech’s Petition for a Writ of Certiorari and Application for Stay of Execution be denied.

DATED this 26th day of February, 2024.

Respectfully submitted,
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