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 Idaho

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

EXECUTION SCHEDULED FOR FEBRUARY 28, 2024 AT 10 AM MST

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While the State attempts to fault Mr. Creech for being simultaneously too early and too late, it cannot change the fact that his petition presents this Court with the perfect opportunity to craft nationwide guidance on a pervasive issue.

I. The Court has jurisdiction.

Notwithstanding the State's creative arguments, this Court has jurisdiction over Mr. Creech's petition for certiorari because the Idaho Supreme Court's decision is final. In determining whether a judgment is final for purposes of 28 U.S.C. § 1257(a), "[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." *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946).[1]

The State complains that the Idaho Supreme Court's decision lacks finality because the court has not yet issued a remittitur and therefore "either party" may petition the court to rehear the case, which could alter the court's decision. Opp. 4–6. Though the usual rule is that a party may petition the Idaho Supreme Court to rehear a case within twenty-one days after the issuance of an opinion, *see* Idaho Appellate Rule 38, that is not the case here. Apparently forgotten by the State, the Idaho Supreme Court issued a scheduling order requiring that "[a]ny filings" in "any proceeding" regarding Mr. Creech's case before that court be "received . . . no later than Friday, February 9, 2024, at 5:00 p.m." *See* https://s3.us-west-

[1] Unless otherwise indicated, all internal quotations marks and citations are omitted and all emphasis is added.

2.amazonaws.com/isc.coi/ISC-51220-2023/2024/013024-Scheduling-Order.pdf.[2] Thus, if either Mr. Creech or the State were planning to request that the Idaho Supreme Court rehear his case, the deadline to do so has long passed. Contrary to the State's protestations, the Idaho Supreme Court has made it abundantly clear that Mr. Creech cannot "file a petition for rehearing the night before his scheduled execution." Opp. 5–6. With or without the remittitur, there is simply "nothing more to be decided" by the Idaho Supreme Court here. *See Richfield*, 329 U.S. at 72.

The futility of the State's reliance on the issuance of the remittitur rather than the opinion is further underscored by the timeline at issue in this case. Under the State's remittitur theory, this Court would not have jurisdiction to grant a writ of certiorari until twenty-one days after the Idaho Supreme Court issued its opinion on February 9, 2024. *See* Idaho Appellate Rule 38. That would be March 1, 2024—two days after Mr. Creech is scheduled to be executed. Were that to occur, Mr. Creech's case would be mooted before it had the chance to even be considered for certiorari by this Court. Such a rule would frustrate both the purpose of 28 U.S.C. § 1257(a) and the role of this Court as the final arbiter of federal constitutional rights.

Luckily, there is a simple solution to these problems with the State's theory: adherence to Supreme Court Rule 13(3). Under Rule 13(3), "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order

[2] The order above can be found on the Idaho Supreme Court's Cases of Interest website. *See* https://coi.isc.idaho.gov/.

sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." Sup. Ct. R. 13(3). The remittitur utilized by the Idaho Supreme Court is the local equivalent to a mandate issued by a federal circuit court. *Compare* Idaho Appellate Rule 38, *with* Fed. R. App. P. 41. Accordingly, the State's remittitur theory is foreclosed by this Court's own rules.

Additionally, although the State attempts to cherry-pick quotes from this Court's precedents to support its position, the actual reasoning set forth in the cases cited by the State support Mr. Creech's point of view instead. For example, in *Radio Station WOW v. Johnson*, the Nebraska Supreme Court's decision was not considered final because it had remanded the case and "not only directed a transfer of property, but also ordered an accounting of profits from such property." 326 U.S. 120, 124 (1945). Though it employed an exception to the finality rule and ultimately reviewed the issue, this Court explained the court's decision was not final because something "further remain[ed] to be determined by a State court[.]" *Id.* In *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997)—also relied upon by the State—this Court determined that a decision of the Alabama Supreme Court was not final when it was "avowedly interlocutory" and merely "answered a single certified question that affected only two of the four counts in petitioners' complaint." Far from leaving nothing left to be decided, the Alabama Supreme Court "remanded the case for further proceedings" which, "[a]bsent settlement or further dispositive motions," would "include a trial on the merits of the state-law claims." *Id.*

No such questions are left here. Mr. Creech could not seek rehearing before the Idaho Supreme Court even if he wanted to and he has no remaining claims or issues in any of the courts below, which rejected his petition in its entirety. Therefore, the Idaho Supreme Court's decision is final within the meaning of 28 U.S.C. § 1257(a), and this Court has jurisdiction over his petition for certiorari.

Finally, even if the State were correct on its jurisdictional theory about certiorari, it would not prevent the Court from granting a stay. The Court plainly has the authority to enter a stay to preserve its jurisdiction to later consider a petition for certiorari. *See, e.g.*, *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (per curiam) (staying an execution "pending the timely filing and disposition of a petition for a writ of certiorari" that had not yet been submitted). If the Court agrees with the State's view of jurisdiction, therefore, it should simply stay the execution until the remittitur issues below, at which point it can consider the certiorari petition.

II. The State's description of Idaho's post-conviction regime is wrong.

Opposing counsel strains against the odds to soften the image of a post-conviction regime that his office has successfully turned into the harshest in the country. To do so, he rattles off a list of supposed accommodations that have little if any bearing on the real-world situation for successive capital post-conviction claims, which are essentially never heard in Idaho.

First, the State points to the opportunity a petitioner ostensibly has to amend his petition such that new material relates back to the original claims. *See* Opp. 8. But in Idaho, as anywhere else, relation back only works if the "original pleading" is "timely filed." *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 247 P.3d 620, 623 (Idaho

2010). The problem in Idaho is that the original post-conviction petition in successive capital cases is *never* regarded as timely by the state courts. It is always rejected based on the Idaho Supreme Court's ability to invent an earlier triggering date. *See* Pet. 16–18. In none of the many cases cited by Mr. Creech's certiorari petition would amendment have helped inmates who were locked out of the post-conviction process by Idaho's draconian timeliness rules, and the State does not say otherwise.

Mr. Creech's case is the perfect example. The State continues to assert that Mr. Creech was required to bring his claim within forty-two days of *Ring v. Arizona*, 536 U.S. 584 (2002)—i.e., twenty-two years ago. *See* Opp. 16. At the same time, though, the State does not and cannot contend that the evidence existed to support Mr. Creech's claim at that time. Instead, the State's position is that in 2002 "everyone knew the number of judge-sentenced murderers *would* inevitably decline." *Id.* Under the State's approach, Mr. Creech would have been obligated to file his evolving-standards petition in 2002 and then amend it twenty-one years later, when he finally had the facts to back the claim up. The absurdity of such a suggestion highlights how amendment is no remedy for the systemic flaw at issue here.

At most, recourse to amendment is a meaningful outlet for death-row inmates pursuing their *first* post-conviction petitions. They can file a skeletal petition within forty-two days of the judgment, because they know they are on the clock, and afterwards they are able to seek amendment. *See* Idaho Code § 19-

2719(3). Nevertheless, successive petitioners have no such ability, because the Idaho Supreme Court has created a landscape in which their original pleadings will always be untimely. Thus, the State's reliance upon amendment would only serve opposing counsel's purpose if it were true that no successive claim is ever meritorious. Yet there are undoubtedly some situations in which the Constitution is violated and it was not possible to raise the claim earlier, as is true of the evolving standards of decency. Because amendment is irrelevant to such claims in Idaho's scheme, they do not change the bottom line.

The next saving grace in Idaho's regime offered by the Attorney General is that the time limit is an affirmative defense that must be pled by the State. *See* Opp. 11–12. Ironically, that is precisely the rule that opposing counsel successfully eviscerated just a few weeks ago in this very case. Below, the State persuaded the Idaho Supreme Court that it could affirm the district judge's decision even though he sua sponte dismissed the post-conviction petition three days after it was filed and in the absence of a single filing by the State. *See Creech v. State*, --- P.3d ----, 2024 WL 510142, at *4 (Idaho 2024). Consequently, the only conceivable utility this safety valve has is if an incompetent prosecutor files a motion to dismiss and asserts the wrong limitations period. *See Hairston v. State*, 472 P.3d 44, 47–48 (Idaho 2020). And even then, under the precedent opposing counsel managed to establish below, many district judges would presumably invoke their new power to sua sponte dismiss the petition based on the correct limitations period. In any event, this escape hatch has a vanishingly small application.

The State's discussion of actual innocence is even less helpful to its cause, because the doctrine is non-existent in Idaho. On that subject, the State inexplicably opines that in rejecting any role for actual innocence, "the Idaho Supreme Court merely applied the principles of this Court." Opp. 14. Mr. Creech doesn't follow. This Court *does* allow habeas petitioners to utilize actual innocence to have time-barred claims heard, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), and the Idaho Supreme Court *does not*, *see Hooley v. State*, 537 P.3d 1267–76 (Idaho 2023). How does that diametric opposition constitute a mere application? What is more, the State only proves Mr. Creech's point by focusing on how "[a]ctual innocence is not a basis for federal relief" but only "a gateway to overcome" untimeliness. Opp. 13. That is exactly what the Idaho Supreme Court has elected not to do in its state post-conviction system, and it is one of several reasons the regime strands every successive claim in limbo.

Finally, the State's careful parsing of various Idaho Supreme Court decisions on the forty-two-day rule doesn't change the big picture. *See id.* at 12–13. Whatever justifications the State can come up with for each individual case, the numbers tell the real story. The State has not identified a single case following the creation of the forty-two-day rule in 2008 in which a successive claim has even been considered on the merits by the Idaho Supreme Court. Nor has it provided a single case following the creation of the general time bar in 1984 in which the Idaho Supreme Court has granted relief in a successive case over the course of dozens of opportunities. The idea that Idaho's time-bar affords any meaningful review to capital successive

claims is one that lives only in the State's imagination. That is why Idaho's "postconviction relief procedures" are "fundamentally inadequate to vindicate the substantive rights provided," *Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009), which is in turn why Mr. Creech is both likely to succeed on his underlying claim for stay purposes and why certiorari is appropriate to consider the broader dysfunctions at play.

III. The State's account of the evolving standards in Idaho is wrong.

The State is equally off-base in its treatment of Mr. Creech's claim in particular, which the Attorney General characterizes as capable of being heard in Idaho state court while simultaneously advocating for an approach that would render it perpetually futile. It is the State's belief that Mr. Creech's claim "was viable when *Ring* was issued, or shortly thereafter." Opp. 16. This is so, according to the State, because "[w]hen *Ring* was decided everyone knew the number of judge-sentenced murderers would inevitably decline." *Id.* The State's error stems from its fundamental misunderstanding of what the word "viable" means. Viability refers to a claim that is "capable of succeeding." Black's Law Dictionary (11th ed. 2019). Even the State cannot manage to say with a straight face that an evolving-standards case was "capable of success" in 2002, when the necessary data wasn't there by any measure. The fact that an inmate can file a petition is meaningless if it is doomed to failure. As the State acknowledges, state post-conviction petitioners are entitled to "a reasonable opportunity to have the issue as to the claimed right heard *and determined* by the State court." Opp. 15 (quoting *Michel v. Louisiana*, 350 U.S. 91, 93 (1955)). A claim is not determined by a state court if the judge has no choice but

to dismiss it because the inmate was required by law to raise it at a time when he had no evidence.

The State's examination of the Ninth Circuit's handling of the evolving-standards claim at issue here likewise serves only to highlight the inadequacy of the system at present, and thus the need for certiorari. As the State rightly observes, the Ninth Circuit found the evolving-standards claim successive as a matter of federal habeas law on the thinking that it was ripe "in the years immediately following *Ring*." *Creech v. Richardson*, --- F.4th ----, 2024 WL 748385, at *2 (9th Cir. 2024) (per curiam). Although Mr. Creech doesn't concede that the Ninth Circuit properly construed habeas law, its opinion does reflect the current status of his claim in federal court. And that status strongly underscores the need for meaningful review in state court. If the claim could only be heard in federal court when it was patently meritless, then there must be a window for it to be heard in state court when it is supported. The alternative is that it can never be heard anywhere by any court, and that cannot be the law with respect to a constitutional theory that is valid under this Court's binding precedents.

IV. A stay is warranted.

The State protests a stay with reference to "the decades Creech's case has been pending while he has engaged in piece meal [sic] litigation," Opp. 20, but opposing counsel ignores how such piecemeal litigation is the result of his own highly effective advocacy at the Idaho Supreme Court. Twenty-four years ago, opposing counsel encouraged the Idaho Supreme Court to adopt the rule that

successive claims in capital post-conviction cases must be "brought within forty-two days after they were known." *Rhoades v. State*, 17 P.3d 243, 245 (Idaho 2000). Such a rule was not mandated by any statute or authority. The statute calls for *original* petitions to be filed within forty-two days of the judgment—it does not speak to the timeline for successive claims. *See* Idaho Code § 19-2719. It was a voluntary choice by opposing counsel to push for "the shortest" deadline "in the nation." *Hoffman v. Arave*, 236 F.3d 523, 533 (9th Cir. 2001). Opposing counsel prevailed in his effort, and his proposal was accepted. *See Pizzuto v. State*, 202 P.3d 642, 649 (Idaho 2008).

Afterwards, opposing counsel wielded the limitations period aggressively, prevailing upon the Idaho Supreme Court to adopt a rigid approach to enforcement under which it would examine extremely discrete facts to determine—with every presumption against the petitioner—whether it might in theory have been knowable at some earlier point in time. *See, e.g.*, *Fields v. State*, 298 P.3d 241, 243 (Idaho 2013). Death-row inmates responded the only way they could—by attempting to raise every supportive fact as rapidly as possible when it became available. *See, e.g.*, *Fields v. State*, 314 P.3d 587, 590–92 (Idaho 2013). That is the definition of piecemeal litigation. Idaho's post-conviction system is the product of the life's work of opposing counsel, not Mr. Creech, and it is not a reason to deny him a stay of execution.

Lastly, the State promotes "the public's trust in the criminal justice system" as a key factor in the Court's assessment of whether to grant a stay. Opp. 20. Mr. Creech agrees. The public's trust in the criminal justice system is fostered by rules

that allow for the full and fair adjudication of legitimate constitutional claims in post-conviction. Because Idaho's system is the harshest of many state regimes around the country that do not afford such review, Mr. Creech has a strong claim on the equities and a strong claim for certiorari, and a stay of execution is appropriate.

CONCLUSION

The Court should stay Mr. Creech's execution pending his petition for certiorari.

Respectfully submitted this 27th day of February 2024.

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