No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

TIM RICHARDSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Is a federal habeas petition based on late-evolving facts second or successive when it is not based on a claim that the inmate is incompetent to be executed?

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 denying relief issued, Feb. 9, 2024

United States Court of Appeals, Ninth Circuit

Case No. 24-275
Creech v. Richardson
Order denying petition for rehearing en banc, Feb. 24, 2024
Opinion denying relief issued Feb. 29, 2024

United States Supreme Court
Case No. 23-6791
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INTRODUCTION

Petitioner Thomas E. Creech respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINION BELOW

A copy of the Ninth Circuit's February 29, 2024 opinion is attached as Appendix A, App. 1–8, and is available at *Creech v. Richardson*, 94 F.4th 847 (9th Cir. 2024) (per curiam). A copy of the January 12, 2024 order of the United States District Court for the District of Idaho is attached as Appendix B, App. 9–21.

JURISIDICTIONAL STATEMENT

On January 12, 2024, the Ninth Circuit Court of Appeals issued an opinion affirming the district court's order dismissing Mr. Creech's October 2023 habeas petition. On May 9, 2024, Justice Kagan extended Mr. Creech's deadline for seeking certiorari review to July 23, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION 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.[1]

FEDERAL STATUTE INVOLVED

This case involves 28 U.S.C. § 2244, which provides in pertinent part:

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

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. § 2244(a), (b)(1).

STATEMENT OF THE CASE

On January 20, 2023, Arizona imposed a moratorium on executions, including the executions of those sentenced to death by a single judge without any involvement by a jury. *See* Dist. Ct. Dkt 2-1 at 11. When it instituted that moratorium, Arizona, which had by far the biggest death row in the class, exited the group of five states that were willing to execute judge-sentenced inmates at the time this Court deemed capital judge sentencing unconstitutional under the Sixth Amendment.[2] *See Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002).

Mr. Creech is a judge-sentenced inmate; the question of whether the death penalty should be imposed upon him was never submitted to a jury of his peers.[3] Instead, he was sentenced to death twice by a single judge: the Honorable Robert

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[2] In this petition, the term "judge sentencing" and the like refers to sentencing schemes of the type held unconstitutional in *Ring*: where a statute provides that "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by [state] law for imposition of the death penalty." *Ring*, 536 U.S. at 588. The petition does not deal with regimes in which juries play reduced roles at sentencing, such as judicial override and so forth.

[3] Mr. Creech pled guilty to first-degree murder. *See State v. Creech*, 670 P.2d 463, 465 (Idaho 1983). No jury was involved at any stage of the proceedings.

Newhouse. *See* Dist. Ct. Dkt. 2-1 at 3–4. Mr. Creech was first sentenced to death for the killing of David Jensen on January 25, 1982. *See id*. Due to issues with his first sentencing not relevant to the question presented here, he was resentenced to death again on April 17, 1995. *See id*. Mr. Creech responded to the 2023 Arizona moratorium by filing the current petition for writ of habeas corpus in Idaho's federal district court on October 13, 2023. *See generally* App. 53–65. In this petition (his third-in-time), he argued evolving standards of decency rendered his sentence unconstitutional because it is cruel and unusual under the Eighth Amendment to execute a person whose punishment was determined by a single judge, without a jury. *See id*.

Arizona was the second state to extricate itself from the group of five states that still allowed judge-sentenced inmates to be executed at the time of *Ring*, as Colorado had abolished the death penalty in 2020. *See* Dist. Ct. Dkt. 2-1 at 11. Notably, Arizona has been home to the largest number of judge-sentenced death-row inmates in the years since this Court decided *Ring*. *See generally* Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann. Rev. L. & Soc. Sci. 539, 551 (2019). Looking to the three remaining states that still allow executions of such inmates—namely, Idaho, Montana, and Nebraska—only 0.68% of inmates on death row in the United States were sentenced to death by judges.[4] Dist.

[4] The numbers above were assembled in October 2023, when the federal habeas petition was filed below. None have subsequently 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.

Ct. Dkt. 2-1 at 16, 19–20. More than five years have passed since any of those three remaining states have carried out an execution, and only one state has executed a judge-sentenced inmate in the last decade. *See id*. at 16.

Mr. Creech is a member of the 0.68%. Since his original death sentence was imposed, Mr. Creech has been engaged in continual litigation covering numerous proceedings and issues. He filed his first petition for habeas relief in federal court in 1986. App. 10. After the federal district court denied the petition, the Ninth Circuit reversed, granting Mr. Creech a resentencing hearing in 1995. *Id*. In 2000, Mr. Creech filed a second-in-time habeas petition in federal court; all remaining claims in this petition were denied in March of 2017. *See Creech v. Hardison*, No. CV-99-0224-S-BLW, 2017 WL 1129938 (D. Idaho Mar. 24, 2017). Mr. Creech appealed this denial, which was ultimately affirmed by the Ninth Circuit in February 2023. App. 4. This Court denied certiorari in October 2023. App. 59.

Although this Court decided *Ring* in 2002, that decision did not apply retroactively to cases already final on direct review, like Mr. Creech's. *See generally Schriro v. Summerlin*, 542 U.S. 348 (2004). Instead, judge-sentenced inmates remained on death row in five states after *Ring* was decided. *See* Dist. Ct. Dkt. 2-1 at 10, 15–16. Executions of judge-sentenced inmates continued. *See id*. at 16–19. For example, seven judge-sentenced inmates were executed in 2012 alone. *See id*. at 24. Arizona was home to thirty-six of the forty-six judge-sentenced inmates executed in the last thirty years. App. 62; Dist. Ct. Dkt. 2-1 at 22. All of these executions

occurred during the pendency of Mr. Creech's first and second federal habeas petitions.

This landscape changed with the 2023 Arizona moratorium. Consequently, Mr. Creech filed his federal habeas petition below in the wake of that moratorium. However, despite the late-evolving fact of Arizona's moratorium on executions, lower courts refused to entertain Mr. Creech's current petition. The district court rejected the petition as second or successive, reasoning that Mr. Creech "could have moved to amend his [second-in-time] petition to allege an evolving-standards claim at any time during [its pendency] *once he had a reasonable quantity of data on which to premise it*," but failed to identify a moment in time where that reasonable quantity of data would have existed to support the claim. App. 18, 21. The Ninth Circuit affirmed, concluding Mr. Creech's Eighth Amendment claim became ripe during the pendency of his previous petition and could have been brought in 2002 after *Ring* was decided, at a juncture where executions of judge-sentenced inmates remained common. App. 5–8; *see generally Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/database/executions (last visited July 16, 2024). This certiorari petition followed.

REASONS FOR GRANTING THE WRIT

Mr. Creech is asking this Court to provide clarity on the question of whether a petition based on new facts unrelated to competency can survive the § 2244(b) bar on second or successive petitions. While this Court provided guidance on the question of successiveness in the competency context in *Panetti v. Quarterman*, 551

U.S. 930 (2007), a circuit split has developed on the proper interpretation of the holding in that case, with some courts expanding *Panetti* beyond the competency context and others declining to allow petitioners to bring claims based on new facts that are unrelated to competency.

I. There is a split among the circuits on whether a non-competency claim based on late-evolving facts can be successfully brought.

Guidance from this Court is needed to resolve a circuit split on the question of whether the bar on second or successive habeas petitions applies to second-in-time petitions based on facts that did not exist at the time the initial petition was brought. Section 2244(b)(2), a product of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), requires that "[a] claim presented in a second or successive [28 U.S.C. § 2254] application . . . that was not presented in a prior application be dismissed" unless one of two exceptions applies. (The two exceptions are strict and rarely satisfied—for the remainder of this petition, Mr. Creech will for simplicity's sake treat successiveness as an absolute obstacle to proceeding.) But as this Court has explained, if an application is not second or successive, it is not subject to the strictures of § 2244(b). *See Magwood v. Patterson*, 561 U.S. 320, 331 (2010). It is well-settled that the phrase second or successive does not simply refer "to all § 2254 applications filed second or successively in time." *Panetti*, 551 U.S. at 944. This Court has described the phrase "second or successive" as a "term of art[.]" *Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

Thus far, this Court has identified three circumstances when a petition is second-in-time but isn't "second or successive:" when a petition challenges a new

state-court judgement, when a petition contains a claim which was raised in a previous petition but was unexhausted at that time and not decided on the merits, and when a petition contains a competency-to-be-executed claim that would have been unripe at the time of the filing of the first petition, i.e., a claim brought under *Ford v. Wainwright*, 477 U.S. 399 (1986). *See Magwood*, 561 U.S. at 331; *Slack*, 529 U.S. at 486–87, 489; *Panetti*, 551 U.S. at 947; *Stewart v. Martinez–Villareal*, 523 U.S. 637, 639 (1998). To be clear, Mr. Creech is not raising the issue of late-evolving facts in the form of a new state-court judgment (*Magwood*), or the recent exhaustion of claims (*Slack*); rather, his petition includes constitutional claims based on other kinds of facts that evolved after his initial petition was brought—the diminution in executions of prisoners sentenced to death solely by judges.

As detailed below, the courts to have considered the issue of whether newly developed non-*Ford* claims can be non-successive are split as to its resolution. The Second and Seventh Circuits have declined to apply the § 2244(b) bar to a petition that is not chronologically first if that petition raised non-*Ford* claims based on late-evolving facts, and the Ninth Circuit has generally taken the same approach. The Eleventh Circuit has indicated its agreement with the Second, Seventh, and Ninth Circuits on this issue, but is prevented from applying a permissive interpretation of the second-or-successive bar without approval from this Court because of an internal rule. There is an entrenched, long-standing, and clear disagreement between these four circuits and the Fifth and Sixth Circuits, which treat second-in-

time petitions based on late-evolving facts as always successive when they do not raise competency claims.

In general, the Ninth Circuit has not applied the § 2244(b) bar to claims based on factual predicates that have accrued only after the conclusion of the initial federal habeas proceedings, even when they are non-*Ford* claims. In the Ninth Circuit, "[p]risoners may file second in time petitions based on events that do not occur until a first petition is concluded[.]". *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011). Under the Ninth Circuit's approach, "*Martinez* and *Panetti* do not apply only to *Ford* claims." *Buenrostro*, 638 F.3d at 725. As a result, the considerations this Court identified in support of its holding in *Panetti* "are not specifically limited to *Ford* claims, and therefore must be considered in deciding whether other types of claims that do not survive a literal reading of AEDPA's gatekeeping requirements may nonetheless be addressed on the merits." *United States v. Lopez*, 577 F.3d 1053, 1063–64 (9th Cir. 2009). "A prisoner whose conviction and sentence were tested long ago may still file petitions relating to denial of parole, revocation of a suspended sentence, *and the like because such claims were not ripe for adjudication at the conclusion of the prisoner's first federal habeas proceeding*." *Buenrostro*, 638 F.3d at 725.

In *Brown v. Atchley*, the Ninth Circuit applied the abuse-of-the-writ doctrine to rule that successiveness depended on whether the events that gave rise to the inmate's constitutional claims had occurred before either of his first two petitions were denied or dismissed. 76 F.4th 862, 872 (9th Cir. 2023). If those events had

occurred before his petitions were denied or dismissed, "[they] could have been brought in either petition and— consistent with pre-AEDPA abuse of the writ doctrine requiring claims to be brought at the earliest opportunity— . . . [would be] second or successive." *Id*. The Ninth Circuit held Brown's claims "did not become ripe until . . . his application for resentencing was denied, which occurred well after the district court denied his first and dismissed his second habeas petitions," because Brown had alleged a due process violation resulting from his continued confinement, ineffective assistance of counsel in the form of a failure to prepare properly for the hearing on his application for resentencing, and an equal protection violation based on how the results of his resentencing differed from those of other prisoners. *Id*. Accordingly, his third- and fourth-in-time petitions were not second or successive. *See id*. at 873.

But the Ninth Circuit's analyses have been inconsistent with one another. The Ninth Circuit denied Mr. Creech the benefit of its rule that "[p]risoners may file second in time petitions based on events that do not occur until a first petition is concluded[,]" *Buenrostro*, 638 F.3d at 725, without any acknowledgment of *Brown*, *Buenrostro*, or *Lopez*. App. 1–8. While the Ninth Circuit has extended the benefit of that general rule to other prisoners, *see, e.g.*, *Hill v. Alaska*, 297 F.3d 895, 898–99 (9th Cir. 2002); *Brown*, 76 F.4th at 87s, its decision in Mr. Creech's case fell in line with circuits on the opposite side of the split.

The Seventh Circuit effectively shares the Ninth Circuit's typical approach, since it has elected not to apply the second or successive bar in a non-*Ford* context

in which a prisoner was unable to raise certain claims in his initial habeas petition. *See United States v. Obeid*, 707 F.3d 898, 903 (7th Cir. 2013). In *Obeid*, the Seventh Circuit characterized a second-in-time petition as not successive where the factual predicate—a motion for reduction of sentence on behalf of another prisoner excluding the petitioner even though the government had promised to treat both the same for sentencing purposes—had not occurred until several months after the initial petition was denied. *See id.*

In *James v. Walsh*, the Second Circuit agreed with the Ninth and Seventh that a second-in-time petition based on late-evolving facts unrelated to competency should be treated as a first petition instead of being barred by AEDPA's gatekeeping provisions. *See* 308 F.3d 162, 165–68 (2d Cir. 2002). Petitioner argued, and the Second Circuit agreed, that his claim that the New York Department of Corrections had miscalculated his release date and thus was holding him illegally, could not have been brought until April 1999, when his correct release date came and went. *See id*. at 168. "Because the claim asserted in the 1999 petition did not exist when [Petitioner] filed his [initial] 1997 petition, the 1999 petition was not second or successive for the purposes of AEDPA's gatekeeping provisions." *Id.*

Finally, while the Eleventh Circuit has joined the Ninth, Seventh, and Second in recognizing that late-evolving facts may render a petition non-successive, its prior-panel-precedent rule calls for approval from this Court before lifting the

AEDPA bar. *See Scott v. United States,* 890 F.3d 1239, 1257 (11th Cir. 2018).[5] The Eleventh Circuit announced in *Scott* that this Court's analysis in *Panetti* was not restricted to second-in-time petitions involving only *Ford* claims. 890 F.3d 1239, 1254 (11th Cir. 2018). The Eleventh Circuit arrived at this conclusion first by reasoning that had *Panetti* been limited to *Ford* claims, this Court would have specified competency claims were the singular *exception* to AEDPA's second or successive bar, instead of doing what it did and articulating a generally applicable rule and then stating that there are *exceptions*—plural—to the bar. *See id.* Secondly, it noted *Panetti*'s holding was derived from "three different generally applicable factors," namely "implications for habeas practice, AEDPA's purposes, and the abuse-of-the-writ doctrine," none of which "[applies] in such a way as to allow only *Ford* claims through." *Id*. Nevertheless, the circuit court's own internal prior-panel-precedent rule prevented it from applying the *Panetti* factors in a non-*Ford* context in the manner it thought to be proper without the go-ahead from this Court. *See id*. at 1256–57. The prior-panel-precedent rule means that absent a Supreme Court or en banc ruling to the contrary, subsequent panels of a court must follow the precedent of the first panel to address the relevant issue, even when a

[5] Courts have analyzed successiveness in the same manner for applications filed under both § 2254 and § 2255. *See, e.g., Gallagher v. United States*, 711 F.3d 315, 315 (2d Cir. 2013) (per curiam); *In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016) (per curiam); *In re Bourgeois*, 902 F.3d 446, 447 (5th Cir. 2018); *Winarske v. United States*, 913 F.3d 765, 768–69 (8th Cir. 2019). As a result, this petition cites § 2254 and § 2255 cases without drawing any distinction between the two.

later panel is convinced the earlier panel is wrong, which the Eleventh Circuit panel was in this case according to *Scott*. *See id.*

On the other side of the circuit split from the Second, Seventh, Ninth and Eleventh Circuits are the Fifth and Sixth Circuits. The Sixth Circuit applies the § 2244(b) gatekeeping criteria to petitions based on late evolving facts outside the competency context. *See In re Hill*, 81 F.4th 560 (6th Cir. 2023) (en banc), *cert. denied*, 2024 WL 2116359 (2024). In *Hill*, the petitioner sought habeas relief in a second-in-time application which relied on a new 2013 scientific report from the American Board of Forensic Odontology ("ABFO"). *See id.* at 566. The ABFO report, which was created twenty-four years after petitioner's direct appeal became final and seventeen years after he filed his initial habeas petition, recommended that forensic odontologists refrain from testifying that they can identify bite marks as belonging to specific individuals. *See id.* Because the state's expert at trial had presented exactly this type of testimony, the petitioner claimed his due process rights had been violated. *See id.* The Sixth Circuit admitted the petitioner had presented "*new evidence*—evidence that wasn't available to him at the time of trial" and had raised a new claim on that new evidence. *Id.* at 571–72. But the court still ruled "any new evidence undermining the government's trial testimony could go toward meeting the gatekeeping provisions under § 2244(b)(2)(B) . . . but couldn't go toward showing the claim wasn't second or successive." *Id.* at 571.

The Sixth Circuit stated in a footnote that this Court seemed to "cabin" its *Panetti* ruling to the "unusual posture of *Ford* claims"—nevertheless, the circuit

court had extended *Panetti* to other types of claims. *Id.* at 568 n.6. The court cited one example of such a claim. *See id.* (citing *In re Salem*, 631 F.3d 809, 812–13 (6th Cir. 2011)). In *Salem*, the court declared that because the inmate's entrapment claim was based on evidence from a hearing that had yet to occur at the time his initial petition was filed, the second-in-time petition in which it was raised was not successive. 631 F.3d at 812–13. But the Sixth Circuit concluded without further explanation that *Salem* was not relevant in *Hill* for the sole reason that it dealt with entrapment rather than scientific developments. 81 F.4th at 568 n.6. Despite this observation, the Sixth Circuit did not address why the logic of *Salem* was inapplicable to the ABFO report.

Likewise, the Fifth Circuit has adopted such an extreme interpretation of this Court's decision in *Panetti* as to completely foreclose the possibility that it could apply to non-*Ford* claims. In *Buntion v. Lumpkin*, 31 F.4th 952, 961 (5th Cir. 2022), the circuit court made extraordinarily short work of dismissing the possibility that *Panetti* applied, devoting exactly three sentences of its opinion to its conclusion that no reasonable jurist could argue for that possibility. The only reasoning the Fifth Circuit offered in those three sentences was that this Court has never explicitly proclaimed that *Panetti could* apply in a non-*Ford* context. *See id*.

Legal scholars have recognized the circuit split on the question presented in this petition and the implications it holds for habeas practice and the constitutional rights of prisoners across this country. *See* Kyle P. Reynolds, *"Second or Successive" Habeas Petitions and Late-Ripening Claims After Panetti v. Quarterman*, 74 U. Chi.

L. Rev. 1475, 1499–1500 (2007); *see also* Mark T. Pavkov, *Does "Second" Mean Second?: Examining the Split Among the Circuit Courts of Appeals in Interpreting AEDPA's "Second or Successive" Limitations on Habeas Corpus Petitions*, 57 Case W. Res. L. Rev. 1007 (2007). "The majority of the lower courts facing this issue have held that, once an initial petition is adjudicated on the merits, a petition containing a claim that has ripened in the meantime is not necessarily 'second or successive' under AEDPA," but not every court has taken this permissive approach to chronologically successive petitions. Reynolds, 74 U. Chi. L. Rev. at 1487–90.

Reynolds postulated in 2007 that a situation exactly like Mr. Creech's would arise. *See id*. at 1499–1500. He imagined a case in which a decision creating a constitutional category restriction on the death penalty would be handed down while a covered prisoner was awaiting execution. *See id*. Even if such a decision was not made retroactive on collateral review, he argued, it was possible it would still come to result in a valid constitutional challenge to a death sentence itself while the prisoner was waiting for the sentence to be carried out. *See id*. Reynolds sounded the alarm sixteen years ago, warning the courts that the division over the interpretation of AEDPA's gatekeeping provisions "[had] the potential to foreclose review of meritorious constitutional claims" which "do not become ripe until after the prisoner has been convicted and sentenced, and perhaps after one habeas petition has been presented and denied on the merits." *See id*. at 1475, 1499–1500.

In addition to pointing out, as Reynolds did, that "case law is replete with different and inconsistent interpretations of AEDPA's second or successive

limitations[,]" Pavkov argued that adopting a more permissive interpretation of the second-or-successive bar "ensures that claims that are not available to a habeas petitioner at the time of their first habeas petition, because the claims are not known or do not yet exist, can be heard in a subsequent habeas petition if raising the claim does not abuse the writ of habeas corpus." Pavkov, 57 Case W. Res. L. Rev. at 1009, 1024. "In contrast, a literal reading or plain meaning interpretation of second or successive forecloses federal review of all constitutional claims that could not have been raised in a petitioner's initial habeas petition." *Id*. at 1024.

The Fifth Circuit is correct that this Court has never explicitly expanded *Panetti*. Nor did *Panetti*'s predecessors, *Martinez-Villareal* and *Ford*, clarify how to resolve the issue of late-evolving facts outside of the realm of competency. This Court has not spoken to whether a petition based on new facts can be brought outside of the competency realm as a non-successive case. Considering the widening chasm between the circuits, there is no realistic proposition that the conflict will resolve itself without this Court's intervention.

II. This petition presents an important issue.

Because late-evolving facts are often brought to the attention of the courts, the issue of successiveness is a common one, and additional guidance from this Court is needed. There are many similar capital cases which rely on new facts unrelated to competency that have evolved following the denial or dismissal of initial petitions. *See supra at* Part I. Quite apart from death-row inmates who invoke recently discovered but previously existing evidence, these cases involve new

facts which are not just freshly discovered but also only came into being after an initial habeas petition was filed.

For example, the field of forensic science does not cease to advance when the initial habeas petition in a capital case involving forensic evidence is filed. Significant new facts in the form of scientific research and reporting continue to evolve after initial habeas litigation concludes. For example, in *McCrory v. Alabama*, 144 S. Ct. 2483, 2483 (2024) (Sotomayor, J., respecting the denial of certiorari), as in *Hill,* 81 F.4th at 560, new scientific reports demonstrating that bite mark matching techniques were unreliable did not evolve until the late stages of litigation. In *Rhodes v. Smith,* 950 F.3d 1032, 1036 (8th Cir. 2020), and *Feather v. United States*, 18 F.4th 982, 985 (8th Cir. 2021), other types of new medical literature, including cause of deaths studies, called the states' theories into question.

Similarly, the situation in which a prisoner is serving their sentence may change drastically after the filing of their initial petition, resulting in new facts on which to base claims in a chronologically second petition. For example, the fact that an inmate has filed a petition does not eliminate the possibility that the Department of Corrections could incorrectly calculate his release date, meaning an inmate might go from being held legally to being held illegally once the correct release date has passed. *See James*, 308 F.3d at 168. Or, in a death penalty case, the state's plan for carrying out an execution may be fundamentally altered after an inmate's initial habeas petition has been brought. Consider, for example, *In re*

Provenzano, a case in which a Florida inmate raised a claim that his execution by lethal injection would violate the Eighth Amendment. 215 F.3d 1233 (11th Cir. 2000). At the time Provenzano's initial habeas petition was filed, executions by means of lethal injection did not exist in Florida. *See id*. at 1235–36.

Without additional guidance from this Court, even those circuits like the Ninth, Second, Seventh and Eleventh, which have stated their willingness to entertain chronologically second petitions based on late-evolving facts, are likely to prevent some petitioners, as they have prevented Mr. Creech, from bringing meritorious constitutional claims. Any further delay in resolving the question presented would only allow for additional claims based on new facts to be thrown out. The question Mr. Creech raises has percolated sufficiently in the lower courts to merit this Court's review. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 398 (1985) (Stevens, J., dissenting) (quoting with approval the principle that the Court declines to intervene "in the absence of a fully percolated conflict"). It is time to resolve it.

III. Mr. Creech's case presents an ideal vehicle for settling the issue.

Mr. Creech's case presents an ideal vehicle for settling the issue. It is especially appropriate for this Court to grant a petition for certiorari in a case like Mr. Creech's, which reveals an internal inconsistency in a single circuit, in addition to highlighting entrenched, long-standing, and clear disagreement between at least six different circuit courts. *See supra at* Part I.

Moreover, the question of the successiveness of Mr. Creech's petition is the only issue in this case, because successiveness is a prerequisite to any other issue. *See* App. 1–21; *contra Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 (2022) (Sotomayor,

J., respecting the denial of certiorari) (criticizing the Fifth Circuit's approach to successiveness and late-evolving facts but voting against certiorari because the procedural posture of the proceedings made them "a poor fit for this Court's review"). Furthermore, both the Ninth Circuit and the district court below resolved the case based entirely on successiveness. App. 1–21. The case therefore tees the question up as cleanly as possible. In addition, Mr. Creech has consistently argued below that the claim is not successive, and no procedural or jurisdictional barriers would prevent this Court from reaching the question presented.

Mr. Creech's certiorari petition provides a chance for this Court to clarify whether its holding in *Panetti* applies to non-*Ford* cases, and if so, to which types of cases *Panetti* applies. Because it is entirely unrelated to competency, Mr. Creech's claim plainly falls outside of the *Ford* context. But the Ninth Circuit did not hold that Mr. Creech's petition was successive because it fell outside of the realm of competency. *Compare* App. 1–8, *with Buntion*, 31 F.4th at 961. Instead, the Ninth Circuit ruled that Mr. Creech's claim was "predictable," as *Ring* inevitably brought about fewer judge-sentenced executions, and thus the claim could have been brought during the pendency of a prior petition. App. 6–8. The Ninth Circuit has given this Court one model of how it might construct a framework for determining whether a non-competency petition based on new facts is successive, that of predictability, which makes it a helpful platform for clarifying the issue.

IV. The § 2244(b) bar does not apply to Mr. Creech's petition.

Although Mr. Creech's petition is made certiorari-worthy based on the circuit split and the attractiveness of his case as a vehicle, reviewing the matter would also allow this Court to correct legal errors that infected the proceedings below and that have plagued many other successiveness cases. Both the general approach by the Fifth and Sixth Circuits of only allowing *Ford* claims to survive the second or successive bar and the Ninth Circuit's specific opinion below are erroneous because they ignore *Panetti*'s specific language and broader analysis. *See* App. 1–8; *Buntion*, 31 F.4th at 961; *Hill* 81 F.4th at 568 n.6. Because it treats the *Panetti* opinion carelessly, the Ninth Circuit's opinion below represents an outlier within the circuit that looks more like the Fifth and Sixth Circuit precedent, rather than the Ninth Circuit's usual approach. *Compare* App. 1–8, *Buntion*, 31 F.4th at 961, *and Hill*, 81 F.4th at 568 n.6, *with Buenrostro*, 638 F.3d at 725, *and Lopez*, 577 F.3d at 1064. Had the Ninth Circuit properly applied its own previously established framework, it would not have ruled that Mr. Creech's petition was successive.

Mr. Creech has asserted a claim that this Court has not foreclosed: an Eighth Amendment evolving-standards claim based on new statistics that did not exist at the time he filed his initial petition *because standards had not yet evolved*. Instead of treating that claim on its own terms, the Ninth Circuit analogized it to *Lackey*. *See generally Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari). *Lackey* claims challenge death sentences on the ground that the inmate has been on death row for so long that it would violate the Eighth Amendment to carry out an execution. *See, e.g.*, *Knight v. Florida*, 120 S. Ct. 459, 461–65 (1999)

(Breyer, J., dissenting from the denial of certiorari). In finding a late-blooming *Lackey* claim successive, the Ninth Circuit has reasoned that "[t]here is no fluctuation or rapid change at the heart of a *Lackey* claim, but rather just the steady and predictable passage of time." *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006). In other words, a *Lackey* claim is inevitably available in every capital case. As soon as an inmate is on death row, he knows he will have a *Lackey* claim because he knows he will age. The same cannot be said of Mr. Creech's claim. Mr. Creech did not know that Arizona would impose a moratorium on executions. If Arizona were carrying out executions now, Mr. Creech would not have his claim. His claim depended not on the steady and predictable passage of time, but on the vicissitudes of execution rates.

The Ninth Circuit panel found that Mr. Creech's claim is successive solely on the basis that it should have been brought "in the years immediately following" this Court's decision in *Ring*, without acknowledging the fact that executions of judge-sentenced individuals continued after *Ring* was decided. *See* App. 1–8; *see generally Execution Database*, *supra*. This Court's evolving-standards precedent places a premium on execution rates. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 716 (2014); *Kennedy v. Louisiana*, 554 U.S. 407, 432–34 (2008); *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005); *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 832 (1988); *Enmund v. Florida*, 458 U.S. 782, 794–95 (1982). But in the years immediately following *Ring*, at the time the Ninth Circuit would have had Mr. Creech bring his claim, no data existed that was as strong as

any of the statistics in the cases where this Court struck down sentencing practices as inconsistent with evolving standards of decency. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 485–87 (2012); *Graham v. Florida*, 560 U.S. 48, 62–66 (2010); *Kennedy*, 554 U.S. at 407; *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 304; *Enmund*, 458 U.S. at 782; *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (per curiam).

As this court has made plain, it is not the reason behind a reduction in executions, nor whether petitioners' counsel could have predicted such a reduction, that determines the viability of such a claim: it is the execution data itself. *See Roper*, 543 U.S. at 551; *Hall*, 572 U.S. at 701. Execution data as it exists now did not exist at the time Mr. Creech's prior habeas proceedings concluded in 2017. When Arizona left the group of states still engaged in the practice of executing judge-sentenced inmates, new execution data was created. *See* Dist. Ct. Dkt. 2-1 at 11 (describing the moratorium). At that point in time, there existed facts upon which Mr. Creech could rely, facts which rendered his petition non-successive. The moratorium was critical to the viability of Mr. Creech's claim under this Court's binding precedent. But the Ninth Circuit shrugged off the moratorium, ruling that Mr. Creech's claim was ripe when *Ring* was decided because "judge sentenced executions" were practiced in "only a small minority of jurisdictions." App. 6. This Court has never suggested that alone is sufficient to support an evolving-standards claim.

The purposes of AEDPA and implications for habeas practice that this Court used in *Panetti* to confirm that the *Panetti* petitioner's claim was not second or

successive resonate here. *See Panetti*, 551 U.S. at 930, 943–47. Had Mr. Creech's claim been raised earlier, there would have been no choice but to dismiss it. To obligate petitioners like Mr. Creech to try to predict which claims will become viable and to file factually unsupported claims, or, in the alternative, to never have their claims heard, would be to the detriment of all parties involved in habeas practice. By the Ninth Circuit's reasoning, when Mr. Creech failed to divine that his evolving-standards claim would arise decades in the future, he foreclosed the possibility that it would ever be heard. But future developments in execution practice in the five states that executed judge-sentenced inmates were outside of Mr. Creech's field of knowledge and control. Petitioners like Mr. Creech should not be punished for their lack of clairvoyance, nor should the successiveness of their petitions turn on speculation in lower courts about whether the evolution of the facts underlying their claims was predictable.

Because the claims in Mr. Creech's petition rely on late-evolving facts, his petition is not second or successive.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 23rd day of July 2024.

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