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

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jonah J. Horwitz
Counsel of Record
Christopher M. Sanchez
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Jonah_Horwitz@fd.org
Christopher_M_Sanchez@fd.org
208-331-5530

Counsel for Petitioner

INDEX TO APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS E. CREECH, *Petitioner-Appellant*, v. TIM RICHARDSON, Warden, *Respondent-Appellee*.	No. 24-275 D.C. No. 1:23-cv-00463-AKB OPINION

Appeal from the United States District Court
for the District of Idaho
Amanda K. Brailsford, District Judge, Presiding

Argued and Submitted February 22, 2024
San Francisco, California

Filed February 23, 2024

Before: William A. Fletcher, Jay S. Bybee, and Morgan B. Christen, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's judgment dismissing Idaho death row inmate Thomas Eugene Creech's 28 U.S.C. § 2254 habeas corpus petition as barred by 28 U.S.C. § 2244(b), which mandates dismissal of most claims filed in "second or successive" federal habeas petitions.

Creech's execution is scheduled for February 28, 2024.

The panel held that *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006), makes clear that Creech's current petition, his third, is precluded as second or successive.

Creech's current petition raised an Eighth Amendment claim that society's evolving standards of decency since *Ring v. Arizona*, 536 U.S. 584 (2002), have rendered unconstitutional a death sentence imposed by a judge rather than a jury. *Ring* held that the Sixth Amendment prohibits judicial factfinding of facts necessary to the imposition of the death penalty; such facts must instead be found by a jury. *Ring* does not apply retroactively to sentences, like Creech's, that were final on direct review before *Ring* was decided. Creech argued that, in light of a national movement away from executions of judge-sentenced prisoners since *Ring*, the Eighth Amendment independently requires that a death sentence be imposed by a jury.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying *Allen*, the panel disagreed with Creech's argument that his evolving standards of decency claim became ripe only after a moratorium on all executions in Arizona was put in place in January 2023; the panel wrote that Creech did not show that his claim was unripe in the years immediately following *Ring*. The panel therefore concluded that Creech could have brought a ripe Eighth Amendment claim during the pendency of his previous petition in the district court.

COUNSEL

Jonah Horwitz (argued), Assistant Federal Public Defender, Capital Habeas Unit, Federal Public Defenders of Idaho, Boise, Idaho, for Petitioner-Appellant.

L. LaMont Anderson (argued), Deputy Attorney General, Idaho Office of the Attorney General, Boise, Idaho, for Respondent-Appellee.

OPINION

PER CURIAM:

Petitioner-Appellant Thomas Eugene Creech, a death row inmate in Idaho, appeals the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. His execution is currently scheduled for February 28, 2024, less than a week from now.

In 1981, while serving two life sentences for first-degree murder, Creech killed a fellow prisoner and was sentenced to death. The circumstances of the killing and Creech's previous post-conviction proceedings are discussed in our opinion in *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023).

Creech filed two habeas petitions in federal court before filing the current petition. His first petition led to the vacatur of his sentence and a resentencing hearing in 1995. *See id.* at 378–79. At that hearing, the sentencing judge again imposed a death sentence, acting without a jury as authorized by then-applicable Idaho law. *See id.* at 379–80. Creech challenged his renewed death sentence in a second federal habeas petition. Litigation of that petition ended in the district court in 2017. We affirmed the district court's denial of habeas in 2023. *Id.* at 394.

Creech filed the current petition in October 2023, shortly after his death warrant was issued and his execution date was set. His petition raises an Eighth Amendment claim that society's evolving standards of decency since *Ring v. Arizona*, 536 U.S. 584 (2002), have rendered unconstitutional a death sentence imposed by a judge rather than a jury. *Ring* held that the Sixth Amendment prohibits

judicial factfinding of facts necessary to the imposition of the death penalty; such facts must instead be found by a jury. *See id.* at 609. The Sixth Amendment rule of *Ring* does not apply retroactively to sentences, like Creech's, that were final on direct review before *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Creech argues that the Eighth Amendment independently requires that a death sentence be imposed by a jury.

The district court dismissed Creech's petition. The court concluded that the petition was barred by 28 U.S.C. § 2244(b), which mandates dismissal of most claims filed in "second or successive" federal habeas petitions.

We affirm. A later-filed petition is precluded as second or successive under 28 U.S.C. § 2254 if the claim it raises was ripe and could have been brought in the prisoner's prior petition challenging the same judgment. *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007). Our holding in *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006), makes clear that Creech's current petition is precluded as second or successive.

In *Allen*, we considered a so-called *Lackey* claim brought in a prisoner's second federal habeas petition—a claim that "suffering the ravages of death row for a lengthy duration violate[s] the Eighth Amendment." *Id.* at 956 (citing *Lackey v. Texas,* 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari)). Petitioner Allen argued "that his execution would violate the Eighth Amendment because of the inordinate length of time, twenty-three years, he has spent on death row and the 'horrific' conditions of his confinement." *Id.* at 950.

We concluded in *Allen* that the petition was precluded as second or successive. We distinguished Allen's claim from

the claim brought in *Ford v. Wainwright*, 477 U.S. 399 (1986). The Supreme Court held in *Ford* that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409–10. We wrote in *Allen* that, unlike a *Ford* claim, "a *Lackey* claim does not become ripe only after a certain number of years or as the final hour of the execution nears. There is no fluctuation or rapid change at the heart of a *Lackey* claim, but rather just the steady and predictable passage of time." *Allen*, 435 F.3d at 958.

Much the same is true of Creech's current Eighth Amendment claim. The proposed factual predicate for Creech's claim is a national movement away from executions of judge-sentenced prisoners since *Ring*, evidencing, in Creech's view, an evolving standard of decency.

Creech argues that his evolving standards of decency claim became ripe only after a moratorium on all executions in Arizona was put in place in January 2023. We disagree.

Even when *Ring* was decided in 2002, only a small minority of jurisdictions authorized judge-imposed death sentences. *See Ring*, 536 U.S. at 608 n.6; *see also Walton v. Arizona*, 497 U.S. 639, 710–11 (1990) (Stevens, J., dissenting), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002); *Woodson v. North Carolina*, 428 U.S. 280, 291–92 (1976) (plurality opinion). 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.

Even though some judge-sentenced capital defendants are on death row in Arizona, Creech does not claim that Arizona's moratorium was motivated by standards-of-decency concerns about the execution of those judge-sentenced defendants. In support of his argument that the reason for Arizona's moratorium is irrelevant, Creech cites *Hall v. Florida*, 572 U.S. 701 (2014), in which the Supreme Court mentioned states that had entirely abolished or suspended their use of the death penalty as part of its discussion of the evidence indicating society's "rejection of the strict 70 [IQ] cutoff" for claims of incapacity to be executed under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Hall*, 572 U.S. at 716–18. Creech also points to *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court said, "a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Id.* at 574.

Creech is correct that the Court has, at times, considered categorical death-penalty bans in assessing evolving standards of decency with respect to particular categories of death sentences. But even assuming the correctness of Creech's interpretation of the Supreme Court's caselaw, his argument rests entirely on the claim that Arizona's moratorium is evidence of evolving standards of decency with respect to judge-imposed death sentences. Even on that assumption, he has not shown that his claim was unripe in the years immediately 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. Moreover, even assuming that categorical execution moratoria can provide a basis for Creech's Eighth

Amendment claim, several such bans had been imposed in the years before Creech's habeas proceedings ended in the district court. *See, e.g.*, *Hall*, 572 U.S. at 716 (noting Oregon's 2011 moratorium); *Cooper v. Newsom*, 13 F.4th 857, 861–62 (9th Cir. 2021) (discussing, *inter alia*, a moratorium on California executions imposed in 2006); *Commonwealth v. Williams*, 129 A.3d 1199, 1202 (Pa. 2015) (discussing Pennsylvania's 2015 moratorium).

We therefore conclude that Creech could have brought a ripe Eighth Amendment claim during the pendency of his previous petition in district court. Once Creech's claim became ripe, the passage of time and later events were irrelevant to the ripeness determination. *See Allen*, 435 F.3d at 958 ("[T]hat the passage of time makes [Allen's] *Lackey* claim stronger is irrelevant to ripeness, because the passage of time strengthens any *Lackey* claim.").

The judgment of the district court is AFFIRMED. We DISMISS as moot Creech's motion to stay his execution while this appeal is pending.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,

Petitioner,

v.

TIM RICHARDSON, Warden, Idaho Maximum Security Institution,

Respondent.

Case No. 1:23-cv-00463-AKB

CAPITAL CASE

ORDER DISMISSING PETITION FOR LACK OF JURISDICTION

INTRODUCTION

On October 16, 2023, Petitioner Thomas Eugene Creech filed his third Petition for Writ of Habeas Corpus (Dkt. 1), under 28 U.S.C. § 2254, challenging the constitutionality of his death sentence. Pending before the Court is his motion to stay and abey consideration of his petition under *Rhines v. Weber*, 544 U.S. 269 (2005), until his ongoing state post-conviction action is concluded. (Dkt. 3). Having carefully reviewed the record, the Court finds oral argument is unnecessary. *See* D. Idaho Loc. Civ. R. 9.2(g)(4) ("Motions and petitions will be deemed submitted, and will be determined, upon the written pleadings, briefs, and record, unless the court, in its discretion, orders oral argument on any issue, claim, or defense."). For the reasons discussed below, the Court concludes that Creech's Petition for Writ of Habeas Corpus is an unauthorized successive petition under 28 U.S.C. § 2244(b) and that the Court lacks jurisdiction to grant Creech's requested relief.[1]

[1] Consistent with the Supreme Court's practice, this Court uses the word "petition" interchangeably with the word "application," despite that the applicable statute refers to an application. *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 324 n.1 (2010) (noting practice of using words "petition" and "application" interchangeably).

BACKGROUND

In 1981, Creech was serving two life sentences for multiple first-degree murder convictions when he brutally murdered a fellow inmate.[2] In 1982, an Idaho state court judge in a written opinion sentenced Creech to death for the inmate's murder. *See State v. Creech* (*Creech I*), 670 P.2d 463, 466 n.1 (Idaho 1983) (discussing sentencing proceedings). On appeal, the Idaho Supreme Court noted the sentencing judge was required to pronounce Creech's sentence in open court in Creech's presence and remanded for resentencing. *Id.* On remand, the judge declined to allow Creech to present new mitigating evidence at the sentencing hearing and sentenced him to death again. *Id.*; *Creech v. Arave* (*Creech II*), 947 F.2d 873, 881 (1991) (discussing sentencing judge's failure to allow new mitigating evidence). On appeal, the Idaho Supreme Court affirmed Creech's sentence holding, among other things, that "jury participation in the sentencing is not constitutionally required." *Creech I*, 670 P.2d at 474.

Following his death sentence, Creech embarked on a lengthy, complicated journey of collaterally attacking his conviction and death sentence in both state and federal courts. In federal court, Creech has now filed three petitions for habeas corpus relief. Creech filed his first petition in 1986. After the district court denied that petition, the Ninth Circuit reversed the denial, ruling Creech was entitled to another resentencing hearing to present "any and all" mitigating evidence. *Creech II*, 947 F.2d at 881. The Supreme Court reversed the Ninth Circuit's decision in part but did not disturb the ruling that Creech was entitled to another resentencing hearing to present mitigating evidence. *Arave v. Creech* (*Creech III*), 507 U.S. 463, 478-79 (1993). On remand in 1995, the sentencing judge conducted a multi-day sentencing hearing and again imposed the death penalty. *Creech v. Hardison* (*Creech IV*), No. 1:99-cv-00224-BLW, 2010 WL 1338126, at *3 (D. Idaho March 31, 2010) (discussing resentencing proceedings).

In January 2000, Creech filed his second habeas petition in federal court.[3] *Creech IV*, No. 1:99-cv-00224, at Dkt. 17 (Jan. 20, 2000). The district court stayed the case pending the

---

[2] The Idaho Supreme Court has previously set forth in detail the nature and circumstances of the inmate's murder. *See State v. Creech*, 670 P.2d 463, 465 (Idaho 1983) (discussing facts and affirming judge's resentencing); *see also Arave v. Creech*, 507 U.S. 463, 465-66 (1993) (describing facts).

[3] The record occasionally suggests Creech filed his second petition for habeas corpus relief in 1999. Although Creech initiated his second habeas action in late 1999, he did not actually file

resolution of Creech's state post-conviction proceedings, and in March 2005, Creech filed an amended second petition in federal court, alleging forty-five claims including that he had a constitutional right to have a jury determine his sentence. *Id.* at Dkt. 131, ¶ 355 (alleging claim 40). In support of this claim, Creech cited the Sixth, Eighth, and Fourteenth Amendments and *Ring v. Arizona*, 536 U.S. 584, 603-09 (2002), in which the Supreme Court held that, under the Sixth Amendment, a jury must decide beyond a reasonable doubt any aggravating fact making a defendant eligible for the death penalty.

Addressing Creech's March 2005 amended petition, the district court denied some of Creech's claims in March 2006, including his claim he had a constitutional right to have a jury determine his sentence. *Creech IV*, No. 1:99-cv-00224-BLW, 2006 WL 851113 (Mar. 29, 2006). In denying that claim, the district court noted the Supreme Court had concluded the holding in *Ring* did not retroactively apply to death sentences, such as Creech's, which were final before *Ring* issued. *Id.* at *2 (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (rejecting argument that *Ring* was either substantive or watershed procedural change in law)). In March 2010, the district court denied Creech's remaining claims alleged in his second petition. *Creech IV*, No. 1:99-cv-0224-BLW, 2010 WL 1338126 (Mar. 31, 2010) (denying non-dismissed claims); *Creech IV*, No. 1:99-cv-00224-BLW, 2010 WL 2384834 (June 9, 2010) (denying motion to alter or amend judgment).

Creech appealed the denial of his second petition to the Ninth Circuit. While the appeal was pending, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), which held that ineffective assistance of post-conviction counsel can excuse a default of an underlying claim for ineffective assistance of trial counsel. The Ninth Circuit remanded Creech's case to the district court to consider *Martinez*'s application to Creech's claims, and in January 2016, the district court concluded Creech failed to satisfy the requirements of *Martinez* and reaffirmed its previous dismissal of Creech's second petition. *Creech IV*, No. 1:99-cv-00224-BLW, 2016 WL 8605324 (Jan. 29, 2016). After reconsideration of this decision, the district court entered a judgment in March 2017. *See Creech IV*, No. 1:99-cv-00224-BLW, 2017 WL 1129938 (Mar. 24, 2017) (denying reconsideration).

---

his petition until January 2000. *Creech v. Paskett*, No. 1:99-cv-00224, at Dkt. 17 (D. Idaho Jan. 20, 2000).

In February 2023, the Ninth Circuit affirmed the district court's denial of Creech's second petition, and on October 10, the Supreme Court denied Creech's petition for writ of certiorari. *Creech v. Richardson*, 59 F.4th 372 (9th Cir. 2023), *cert. denied*, No. 23-5039, 2023 WL 6558513 (U.S. Oct. 10, 2023). Two days later, on October 12, an Idaho state district court issued a death warrant for Creech's execution. (Dkt. 7-1).

The following day, October 13, 2023, Creech filed a petition for post-conviction relief in state court, alleging his death sentence violates the cruel and unusual clauses of the United States and Idaho Constitutions because a judge imposed the sentence without any jury participation. (Dkt. 2-1 at ¶ 53). On October 16, the state post-conviction court dismissed Creech's petition as untimely under Idaho Code § 19-2719. (Dkt. 6 (Notice of Lodging) State's Lodging R.1, pp. 210-15). The state court reasoned that "Creech knew or reasonably should have known before September 1[, 2023,] of the ostensible basis for the claim asserted in the petition." (*Id.* at p. 213).[4]

On that same day—October 16—Creech filed his third federal habeas petition, which is at issue in this case.[5] (Dkt. 1). In this petition, Creech alleges an Eighth Amendment evolving-standards claim. Specifically, he alleges that "[e]volving standards of decency render [his death] sentence unconstitutional because it is cruel and unusual under the Eighth Amendment to execute a man whose punishment was determined by a single judge, without a jury." (Dkt. 1 at ¶ 1).

ANALYSIS

A. Legal Standard for Successive Petition Under § 2244(b)

The Eighth Amendment protects against cruel and unusual punishments and prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983). Federal habeas corpus relief under 28 U.S.C. § 2254 is available to petitioners who show they are held in custody under a state court judgment violating the United States Constitution, laws, or treaties. *See* 28 U.S.C. § 2254(a). Petitions for habeas

---

[4] Creech appealed the district court's denial of his post-conviction petition, and the Idaho Supreme Court ordered expedited briefing and scheduled oral argument for February 5, 2024. (Dkt. 14-1).

[5] On October 16, 2023, Creech also moved in this case for a stay of his execution. (Dkt. 2). The state district court, however, stayed Creech's execution on October 19, pending a commutation hearing before the Idaho Commission of Pardons and Parole, which is presently scheduled for January 19, 2024. (Dkt. 7-1). As a result, Creech has withdrawn his application in this case for a stay of his execution. (Dkt. 10).

corpus relief, including Creech's petition in this case, are subject to the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See United States v. Villa-Gonzalez*, 208 F.3d 1160, 1163-64 (9th Cir. 2000) (holding AEDPA's provisions governing second or successive petition apply to new petition filed after AEDPA's enactment, even if original petition was filed before its enactment).

AEDPA places stringent restrictions on federal habeas corpus relief, including prohibiting an inmate from filing more than one petition, except in limited circumstances. Section 2244(b) of AEDPA establishes the procedural and substantive requirements which govern "second or successive" habeas petitions. *See generally* 28 U.S.C. § 2244(b). Section 2244(b) acts as a "gatekeeper" to prohibit a petitioner from filing a "second or successive" petition in the district court without first obtaining an order from the Ninth Circuit authorizing the district court to consider the petition. *Allen v. Ornoski*, 435 F.3d 946, 955-56 (9th Cir. 2006). Specifically, the statute provides that "before a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). A district court "may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application." *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) (per curiam) (internal quotation marks omitted). The Ninth Circuit's authorization is jurisdictional—if a petition is a second or successive petition under § 2244, a district court has no authority to consider the petition's merits absent prior authorization. *Id*.

A petition, however, is not necessarily successive within the meaning of § 2244(b) simply because it is second-in-time. Rather, a "second or successive" petition is a legal term of art. *Allen*, 435 F.3d at 956. Although AEDPA does not define the phrase "second or successive," the Ninth Circuit and other courts have interpreted the concept as a derivative of the abuse-of-the-writ doctrine developed in pre-AEDPA cases. *Id.* "An abuse of the writ occurs when a petitioner raises a habeas claim that could have been raised in an earlier petition were it not for inexcusable neglect." *Id.* (quotations omitted).

The doctrine concentrates on a petitioner's acts to determine whether he has "a legitimate excuse for failing to raise the claim at the appropriate time." *Id.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 490 (1991)). "A petition for review of a new claim that could have been raised earlier may be treated as the functional equivalent of a second or successive petition for a writ of habeas

corpus." *Allen*, 435 F.3d at 957; *see also Cooper*, 274 F.3d at 1273 ("Generally, a new petition is 'second or successive' if it raises claims that were or could have been adjudicated on their merits in an earlier petition."). If the district court determines a petition is "second or successive" within the meaning of § 2244(b), then it lacks jurisdiction to address the petition's merits. *Cooper*, 274 F.3d at 1274.

Creech urges the Court to rule on his motion for a stay of these proceedings under *Rhines* without first considering whether his present petition is successive. (Dkt. 14 at pp. 2-3). In support, he argues that whether his petition is successive is not a factor for consideration under *Rhines*. Whether Creech's petition is "second or successive" under § 2244, however, is determinative of the Court's jurisdiction. If the Court lacks jurisdiction, it cannot address the merits of Creech's *Rhines* motion. Accordingly, the Court considers whether Creech's petition is successive under § 2244(b) to determine whether it has jurisdiction to consider Creech's present petition without Ninth Circuit authorization, and it concludes it does not have jurisdiction.

B. Creech's Petition is Successive Under § 2244(b)

In response to Creech's *Rhines* motion, the State asserts this Court lacks jurisdiction because Creech's present petition is "second or successive" under § 2244, and he did not obtain the Ninth Circuit's authorization for this Court to consider the petition. In reply, Creech cites to and relies, in part, on his arguments in support of his motion to stay his execution. (*See generally* Dkt. 3 (citing Dkt. 2)). In that motion, Creech acknowledges his "present habeas petition is not his first one" but asserts the "petition should not be regarded as successive." (Dkt. 2 at pp. 3, 5). In support, Creech argues, for example, that "the claim did not exist until the information supporting the theory had come into existence" (*id.* at p. 3); "existing precedent has not given him clear guidance as to when his theory became viable" (*id.*); and the claim is "based on the coming to fruition of a number of trends over the long period of time." (*Id.* at p. 5).[6]

Creech does not directly assert his evolving-standards claim was not ripe for review before he filed his present petition. Indeed, he never uses the terms "ripe," "unripe," or "ripeness" to describe his evolving-standards claim. Nevertheless, the case law on which Creech relies and the nature of his arguments—in both his motion for a stay of his execution and his *Rhines* motion—

[6] Creech makes similar arguments in support of his request to stay this case under *Rhines*. (*See generally* Dkt. 3-1). The Court also considers those arguments in resolving the jurisdictional question of whether Creech's petition is "second or successive" under 28 U.S.C. § 2244(b).

essentially assert his evolving-standards claim was not ripe before he filed his third petition. If a claim was previously not ripe, that fact can be a plausible basis on which to conclude a petition is not successive under § 2244(b). *See Brown v. Atchley*, 76 F.4th 862, 864 (9th Cir. 2023) (noting petition asserting claim not ripe for adjudication when prior habeas petition filed should not be dismissed as successive under § 2244(b)); *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) (same).

Creech only directly addresses the State's argument that his petition is successive under § 2244(b) briefly in his reply brief in support of his *Rhines* motion. (*See* Dkt. 14 at pp. 3-4 ("The State's successiveness argument is misplaced.")). In that reply, he asserts that "a habeas petition is not successive when changed circumstances render a sentence newly unconstitutional" and that "the key question is whether the circumstances in [Creech's] case have in fact changed in the way demanded by successiveness law."[7] (*Id.*). Creech, however, provides no specific factual analysis or citation to authority in support of these broad assertions in reply to the State's successiveness argument. Regardless, the Court considers Creech's arguments and citation to authorities in both his submissions in support of his motion to stay his execution and his *Rhines* motion, as they bear on his implicit assertion he could not have asserted his evolving-standards claim previously because it was not ripe. In these submissions, Creech offers three explanations why his evolving-standards claim was not ripe before he filed his present petition.

1. Creech's Reliance on *Enmund* is misplaced

First, Creech relies on *Enmund v. Florida*, 458 U.S. 782 (1982), and attempts to compare the data he alleges in support of his evolving-standards claim in this case to that which the Supreme Court analyzed in *Enmund* to affirm such a claim. (Dkt. 2 at pp. 3-5; Dkt. 3-1 at pp. 3-4). In

[7] Creech also argues the State "does not explain *when*—if not now—the evolving-standards claim ought to have been pursued." (Dkt. 14 at p. 4). The burden of establishing ripeness, however, "rests on the party asserting the claim." *Colwell v. HHS*, 558 F.3d 1112, 1121 (9th Cir. 2009). Creech further argues that he has not previously alleged an evolving-standards claim challenging his sentence and that the State does not assert otherwise. (Dkt. 14 at p. 3). That Creech has not previously alleged such a claim, however, only saves the claim from dismissal under § 2244(b)(1), which provides that "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(b)(1) (emphasis added). Creech's argument that he has not previously alleged an evolving-standards claim does not answer whether he could and should have alleged it in a prior petition. *See* 28 U.S.C. § 2244(b)(2) (addressing limited circumstances in which new claim may be raised in successive petition).

Enmund, the Court addressed "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." *Enmund*, 458 U.S. at 787. In other words, it considered whether the Eighth Amendment permits a defendant's execution for felony murder. *Id.* at 785-86 (discussing felony-murder rule).

In addressing this issue, the Supreme Court noted the Eighth Amendment "is directed, in part, against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* at 788 (quotation omitted). It then considered a survey of state statutes, juries' sentencing decisions, and the national death-row population in the context of death sentences for felony-murder convictions. *Id.* at 789-95. Based on this information, the Court concluded that "we are not aware of a single person convicted of felony murder over the past quarter century who did not intend the death of the victim, who has been executed" and that "only three persons in that category are presently sentenced to death." *Id.* at 796. Relying in part on this data, the Court held the Eighth Amendment prohibits the imposition of the death penalty for felony murder. *Id.* at 797 ("Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits the imposition of the death penalty.").

In his pending motions, Creech attempts to apply the analysis in *Enmund* (or one similar to it) to his evolving-standards claim. Relying in *Enmund*, he argues:

> If one goes back twenty-eight years from today's date, as in *Enmund*, there have been 1,261 executions nationwide. Of those, forty-two took place in Arizona, Idaho, Montana, or Nebraska and appear to have involved judge-sentenced inmates. That would constitute 3.3% of the overall executions. However, if Arizona is removed from the list, there would then be seven judge-sentenced executions in the last twenty-eight years, or .6%. In other words, if *Enmund*'s calculation is the north star, then the question of whether Mr. Creech's claim is meritorious now might depend on whether Arizona is or is not counted. Precedent does not unequivocally provide an answer to that question.

(Dkt. 2 at pp. 4-5 (footnote omitted); Dkt. 3-1 at p. 4 (footnote omitted)).

Creech premises this argument on the fact that Arizona imposed a moratorium on executions in January 2023. The gist of Creech's argument appears to be that excluding Arizona's judge-imposed death sentences (based on its moratorium) from a mathematical calculation results in his evolving-standards claim becoming ripe for review in November 2023. (Dkt. 3-1 at p. 3) (discussing Arizona moratorium and arguing "[g]iven the moratorium in Arizona, [Creech] has a

colorable argument that the state counts in his favor in the evolving-standards calculus"). According to Creech, because of the Arizona moratorium in January 2023, "November 2023 [was] the first time [he could] rightly say that it had been a full year without a judge-sentenced execution." (*Id.* at p. 5). Additionally, Creech also alleges other data supports his claim including "[e]xecution data," "death-row populations," "legislative decisions," and "sentencing decisions." (Dkt. 3-1 pp. 5, 7-8).

The Court is not persuaded either *Enmund* or any other authorities addressing evolving-standards claims precluded Creech from previously seeking relief from his death sentence under an evolving standards of decency theory or otherwise counseled that he should delay pursuing such a claim until a death warrant issued for his execution. Contrary to Creech's assertion that "existing precedent has not given him clear guidance as to when his theory became viable" (Dkt. 2 at p. 3), the Supreme Court acknowledged, as early as 1958, that the Eighth Amendment's meaning evolves with the "progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). By 1976, the Court had established an analysis to evaluate the Eighth Amendment under evolving standards of decency by considering "contemporary values concerning the infliction of a challenged sanction" based on "objective indicia [reflecting] the public attitude toward [that] sanction." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). Then in 1982, the Court in *Enmund* applied this analysis considering state statutes, jury sentencings, and death-row statistics. 458 U.S. at 789-95.

Thereafter, the Supreme Court has repeatedly held that the evolving standards under the Eighth Amendment prohibit a particular sanction including: (1) imposing a mandatory fixed-life sentence for juveniles who commit homicide, *Miller v. Alabama*, 567 U.S. 460, 479 (2012); (2) imposing a fixed-life sentence for juveniles who commit non-homicide crimes, *Graham v. Florida*, 560 U.S. 48, 75 (2010), *as modified* (July 6, 2010); (3) executing an individual for a non-homicide crime, *Kennedy v. Louisiana*, 554 U.S. 407, 413, *as modified* (Oct. 1, 2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008); (4) executing an individual under the age of eighteen at the time of the offense, *Roper v. Simmons*, 543 U.S. 551, 575 (2005); (5) executing an individual with an intellectual disability, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); and (6) executing an individual under the age of sixteen at the time of the offense. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

Based on these authorities, Creech should have been aware of the availability of an Eighth Amendment evolving-standards claim when he filed his second petition for habeas corpus relief

in January 2000—or at least at some point during the pendency of that second petition.[8] Although Creech asserts that a conclusion that his present petition is successive "would imply [his evolving-standards claim] must have been brought at the random moment in time when he happened to litigate his initial habeas proceedings," (Dkt. 2 at p. 5), this assertion is not accurate. Creech's second petition was pending before the district court for numerous years including from January 2000 through March 2010 and, again, on remand from June 2012 through March 2017. Creech could have moved to amend his second petition to allege an evolving-standards claim at any time during these timeframes once he had a reasonable quantity of data on which to premise it. *See Allen*, 435 F.3d at 958 (noting petitioner could have sought amendment of his petition "at any time during" the pendency of his habeas petition).

Although Creech's evolving-standards claim may have "evolved" more since March 2017 when the district court finally entered judgment on Creech's second petition, that fact does not establish Creech's claim was not ripe during the pendency of his second petition. *Cf. id.* (noting although "the passage of time makes [a] *Lackey* claim stronger," it is "irrelevant to ripeness").[9] Notably, neither *Enmund* nor any other authority of which the Court is aware required Creech to be able to allege a particular percentage of judge-sentenced executions in the last twenty-eight years (or some other specific timeframe) or that a "full year" had passed "without a judge-sentenced execution" to establish his evolving-standard claim was ripe for review. (*See* Dkt. 3-1

---

[8] Analysis of whether Creech's present petition for habeas corpus relief is "second or successive" is based on his second petition filed in January 2000. Creech's first petition filed in 1986 is not relevant because the state court judge resentenced Creech and entered a new judgment, on remand after Creech was granted relief under the first petition. A new state court judgment on resentencing may constitute a new judgment and a habeas petition challenging that new judgment is not second or successive under § 2244. *See Turner v. Baker*, 912 F.3d 1236, 1237 (9th Cir. 2019) (ruling amended judgment awarding credit for time served constitutes new judgment for purposes of habeas relief); *see also Magwood v. Patterson*, 561 U.S. 320, 331 (2010) (a new judgment entered after resentencing constituted new judgment to which second-or-successive bar did not apply). To the extent Creech relies on *Turner* to argue his present petition is "the same as an initial one," (*see, e.g.*, Dkt. 2 at p. 3), he is incorrect. *Turner* only applies in cases where a new judgment is entered following a grant of habeas relief, which did not occur after Creech's second January 2000 petition. Rather, the district court denied that petition and that denial has been affirmed. *Creech v. Richardson*, 59 F.4th 372 (2023) *cert. denied*, 144 S. Ct. 291 (Oct. 10, 2023).

[9] A "*Lackey* claim" is one which asserts a violation of the Eighth Amendment based on a long tenure on death row. *Allen v. Ornoski*, 435 F.3d 946, 948 (9th Cir. 2006) (citing *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari)).

at pp. 4-5 (asserting these facts)). While perhaps insightful, these allegations are not essential to Creech alleging a ripe evolving-standards claim, and Creech should have been aware of his evolving-standards claim before his second petition was resolved if not sooner.

2. Creech's Reliance on *Panetti* and *Martinez-Villareal* is also misplaced

In addition to suggesting his evolving-standards claim was not previously ripe under *Enmund* and related cases, Creech relies on *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), both of which conclude a subsequent habeas petition raising a *Ford* claim[10] is not "second or successive" under § 2244. In *Martinez-Villareal*, the petitioner had raised a *Ford* claim in a previous habeas petition. Because an execution date had not yet been set, the district court dismissed the claim as unripe. *Martinez-Villareal*, 523 U.S. at 640. Later, when an execution date was set—and his *Ford* claim was "unquestionably ripe"—the petitioner filed a new petition reasserting his *Ford* claim. *Martinez-Villareal*, 523 U.S. at 643.

Rejecting the state's argument that the new petition was successive, the Supreme Court in *Martinez-Villareal* explained the petitioner had a right "to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief," even though at the time of the filing of the first petition, the *Ford* claim was not ripe. *Id*. The Court construed the two petitions as a single application for habeas relief, thus rendering § 2244(b)(2) inapplicable, stating "[t]here was only one application for habeas relief, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. *Martinez-Villareal*, 523 U.S. at 643. Because the petitioner's *Ford* claim was not ripe when he first raised it, the claim was not successive within the meaning of AEDPA.

The Supreme Court addressed a different but related question in *Panetti*. In that case, the petitioner had previously filed a federal habeas petition but had not alleged a *Ford* claim. *Panetti*, 551 U.S. at 937. When the petitioner later faced execution, he filed a new petition asserting a *Ford* claim for the first time. *Id.* at 938. The Court addressed the timing issue left open in *Martinez-Villareal*—i.e., "where a prisoner raises a *Ford* claim for the first time in a petition filed after the

[10] In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court ruled that "the Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane," *id.* at 410, and held that a petitioner is entitled under 28 U.S.C. § 2254(d)(2) to an evidentiary hearing on the question of his competence to be executed. *Id.* at 418. Thus, a "*Ford* claim" is shorthand for a petitioner's claim that the Eighth Amendment prohibits his execution because he is mentally incompetent.

federal courts have already rejected the prisoner's initial habeas application." *Panetti*, 551 U.S. at 945 (internal quotation marks omitted).

The Supreme Court recognized that *Ford* claims, "as a general matter, are not ripe until after the time has run to file a first federal habeas petition." *Id.* at 943. As a result, the Court noted that "a prisoner would be faced with two options"—either to forgo raising a *Ford* claim in his first petition or to raise it prematurely in that petition—and that "conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) *Ford* claims." *Id.* To avoid this result, the Court concluded that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture [where] a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe" and that "the statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe." *Id*. at 947.

The Court is not persuaded Creech's Eighth Amendment evolving-standards claim is analogous to a *Ford* claim for purposes of evaluating successiveness under § 2244(b). A *Ford* claim challenging a petitioner's competency to be executed requires, by its very nature, the determination of his competency at the time of (or near) the execution date. *Martinez-Villareal*, 523 U.S. at 644-45 (noting petitioner's competency prior to that time). By contrast, an Eighth Amendment evolving-standards claim turns on data showing the "contemporary values concerning the infliction of a challenged sanction" based on "objective indicia [reflecting] the public attitude toward [that] sanction." *Gregg*, 428 U.S. at 173. Unlike determining a petitioner's mental condition at the time of his execution, nothing precludes the Court's consideration—prior to the State's scheduling of Creech's execution—of the objective evidence which has developed over time of the nation's values regarding judge-imposed death sentences. Although Creech's evolving-standards claim may have improved over time, that fact alone does not make the claim unripe before the State scheduled his execution on October 12, 2023. *See Allen*, 435 F.3d at 958 (noting that claim is not unripe because it may improve with passage of time).

3. Creech's Reliance on the Eighth Amendment's Plain Language is Misplaced.

Finally, Creech makes the argument that his Eighth Amendment evolving-standards claim was not ripe until the state court issued the death warrant based on the Eighth Amendment's use of the term "inflicted." Specifically, Creech asserts that "the Eighth Amendment prohibits the 'infliction' of cruel and unusual punishments"; "[t]he infliction of punishment is distinct from its

imposition"; and a death sentence is not inflicted until the death warrant issues. (Dkt. 3-1 at p. 6). Based on this reasoning, Creech argues it was "appropriate" for him to raise the evolving-standards claim only after the State scheduled his execution. (*Id.*). But a rule based on the Eighth Amendment's plain language that a death penalty challenge is only ripe after the execution is scheduled would be contrary to a significant number of authorities addressing challenges to death sentences long before the scheduling of an execution.

Based on the foregoing, the Court rejects Creech's assertion that his evolving-standards claim was not ripe until the state court issued the death warrant for his execution. Rather, Creech's present petition raising an Eighth Amendment evolving-standards claim is "second or successive" within the meaning of § 2244(b). Creech did not obtain the Ninth Circuit's authorization for this Court to consider the petition. Accordingly, the Court must dismiss this case for lack of jurisdiction.

ORDER

IT IS ORDERED:

1. Creech's Petition for Writ of Habeas Corpus (Dkt. 1) is DISMISSED for lack of jurisdiction as an unauthorized second or successive petition under 28 U.S.C. § 2244(b).
2. Creech's Motion to Stay and Abey under *Rhines v. Weber* (Dkt. 3) is DENIED as moot.
3. Under District of Idaho Local Civil Rule 9.2(f), the Clerk of Court will immediately provide notice of this decision to counsel for Creech, the Idaho Attorney General, the warden of the Idaho Maximum Security Institution, and the Clerk of the Idaho Supreme Court.
4. The Court GRANTS a certificate of appealability on the question whether Creech's instant petition is second or successive for purposes of 28 U.S.C. § 2244(b). *See* Rule 11 of the Rules Governing Section 2254 Cases.

DATED: January 12, 2024

Amanda K. Brailsford
U.S. District Court Judge

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

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

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

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

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

PARTIES TO THE PROCEEDINGS BELOW

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

RELATED PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Federal Court Opinions

Federal Statutes and Constitutional Provisions

State Cases

State Statutes and Rules

Other

INTRODUCTION

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

OPINION BELOW

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

JURISIDICTIONAL STATEMENT

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

STATE STATUTE INVOLVED

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

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

I.C. §§ 19-2719(3), (5).

STATEMENT OF THE CASE

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

---

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

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

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

---

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

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

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

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

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

REASONS FOR GRANTING THE WRIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. This case presents the perfect facts to consider.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Idaho is the perfect state to consider.

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 20th day of February 2024.

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

Nicole Owens
Executive Director
Deborah A. Czuba, ID Bar No. 9648
Jonah J. Horwitz, ID Bar No. 10494
Christopher M. Sanchez, ID Bar No. 12070
Mary E. Spears, IN Bar No. 27353-49
Assistant Federal Defenders
Federal Defender Services of Idaho
Capital Habeas Unit
702 W. Idaho, Suite 900
Boise, Idaho 83702
Telephone: (208) 331-5530
Facsimile: (208) 331-5559
ECF: Deborah_A_Czuba@fd.org
Jonah_Horwitz@fd.org
Christopher_M_Sanchez@fd.org
Mary_Spears@fd.org

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH Petitioner, v. **TIM RICHARDSON,** Warden, Idaho Maximum Security Institution, Respondent.	Case No. 1:23-cv-463 **CAPITAL CASE** PETITION FOR WRIT OF HABEAS CORPUS

1. Pursuant to 28 U.S.C. § 2254, Petitioner Thomas Eugene Creech seeks the writ of habeas corpus to relieve him from his unconstitutional death sentence. Evolving standards of decency render Mr. Creech's sentence unconstitutional because it is cruel and unusual under the Eighth Amendment to execute a man

whose punishment was determined by a single judge, without a jury. No state in the country other than Idaho is attempting to carry out these anachronistic death sentences.

I. Procedural Background

2. Mr. Creech is an indigent prisoner under sentence of death.

3. He is currently confined at Idaho Maximum Security Institution ("IMSI") in Kuna, Idaho, as Prisoner Number 14984.

4. Tim Richardson is the Warden of IMSI and therefore has custody over Mr. Creech.

5. Mr. Creech was convicted of first-degree murder in Ada County District Court in case number 10252.

6. He was originally sentenced to death on January 25, 1982.

7. In 1983, the Idaho Supreme Court affirmed the judgment and conviction.

8. The grounds asserted in those proceedings are described in *State v. Creech*, 670 P.2d 463 (Idaho 1983).

9. In the same opinion, the Idaho Supreme Court rejected Mr. Creech's argument that he was entitled to a jury at his sentencing under the Sixth Amendment. *See Creech*, 670 P.2d at 474.

10. Relief on a subsequent post-conviction petition was denied by the Idaho Supreme Court on June 20, 1985. *See State v. Creech*, 710 P.2d 502 (Idaho 1985).

11. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

12. On March 27, 1991, the Ninth Circuit granted Mr. Creech habeas relief with respect to his death sentence. *See Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991).

13. The issues raised in those proceedings are summarized in the Ninth Circuit's opinion.

14. In the same opinion, the Ninth Circuit rejected Mr. Creech's argument that he was entitled under the Sixth Amendment to the participation of a jury at his sentencing. *See Creech*, 947 F.2d at 16.

15. The Supreme Court reversed the Ninth Circuit's judgment in part on March 30, 1993, on claims not relevant now, but left the grant of relief in place. *See Arave v. Creech*, 507 U.S. 463 (1993).

16. As a result of the federal rulings, a new penalty-phase proceeding was held, and a new death sentence was imposed by Judge Newhouse on April 17, 1995.

17. On August 19, 1998, the Idaho Supreme Court upheld the death sentence and affirmed the denial of post-conviction relief. *See State v. Creech*, 966 P.2d 1 (Idaho 1998).

18. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

19. Relief on a subsequent petition for post-conviction relief was denied by the Idaho Supreme Court on June 6, 2002. *See Creech v. State*, 51 P.3d 387 (Idaho 2002).

20. The issues raised in those proceedings are summarized in the Idaho Supreme Court's opinion.

21. On August 2, 2002, Mr. Creech filed in Ada County District Court a petition for post-conviction relief combined with a motion to reduce illegal sentence under Idaho Criminal Rule 35.

22. The petition received case number SPOT-200712D, later converted to CV-PC-2002-22017.

23. The Rule 35 motion was filed in the underlying criminal case number.

24. Henceforth, the hybrid proceedings will be referred to as "the Rule 35 case."

25. In the Rule 35 case, Mr. Creech alleged that his death sentence was unconstitutional under the Sixth Amendment and Idaho's cognate constitutional protections for the right to a jury trial, all as a result of *Ring v. Arizona*, 536 U.S. 584 (2002).

26. On April 25, 2002, the Ada County District Court denied relief in the Rule 35 case.

27. The Idaho Supreme Court dismissed the ensuing appeal on December 23, 2005.

28. Although Mr. Creech referred in passing to the Eighth Amendment in his Rule 35 motion and post-conviction petition, he did not make an argument there about the evolving standards of decency.

29. The district court did not analyze the Eighth Amendment in its order denying relief in the Rule 35 case.

30. Even if Mr. Creech had made out an evolving-standards argument in the Rule 35 case in 2003, the vast majority of the data presented below did not exist at that time.

31. As set forth below, it is the current state of the data that makes Mr. Creech's claim meritorious.

32. The Idaho Supreme Court dismissed Mr. Creech's appeal from the district judge's ruling in the Rule 35 case in a one-page unpublished decision issued December 23, 2005.

33. On June 30, 2022, Mr. Creech filed a post-conviction petition in Ada County District Court, which was assigned case number CV-01-22-9424.

34. In that petition, Mr. Creech alleged that his right to ineffective assistance of counsel was violated at his guilty-plea proceedings and at his resentencing, and that the claims were appropriately reviewed in light of the U.S. Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

35. The district court dismissed the petition as untimely under Idaho Code § 19-2719.

36. Mr. Creech currently has pending an appeal from that order in the Idaho Supreme Court in case number 50336.

37. After Mr. Creech's resentencing in 1995, he initiated a new federal habeas proceeding in this Court.

38. The case was assigned number 1:99-cv-224.

39. In the fortieth ground for relief in the operative habeas petition (the second amended iteration, filed in March 2005), Mr. Creech cited *Ring* and alleged that his death sentence violated his rights under the Sixth, Eighth, and Fourteenth Amendments to have a jury determine his punishment.

40. The only factual allegation unique to the claim was that "[th]e statutory scheme in effect in Idaho is constitutionally significantly different from the sentencing scheme in effect in Arizona found not to be retroactive . . . in" *Schriro v. Summerlin*, 542 U.S. 348 (2004).

41. The forty-first ground for relief lodged a similar attack on judge-findings with respect to mitigation.

42. The forty-second ground for relief lodged a similar attack on judge-findings with respect to the weighing process.

43. Mr. Creech did not refer to the evolving standards of decency in Claims 40–42 or present any data about death-row populations, executions, etc.

44. The State moved to dismiss Claims 40–42 on the basis that *Ring* was not retroactive.

45. In Mr. Creech's response to the motion to dismiss with respect to Claims 40–42, he did not refer to the evolving standards of decency in Claims 40–42 or present any data about death-row populations, executions, etc.

46. In an order dated March 29, 2006, this Court dismissed Claims 40–42 on the basis that *Ring* was not retroactive.

47. Relief on the petition as a whole was later denied by the district court and then the Ninth Circuit in *Creech v. Richardson*. 59 F.4th 372 (9th Cir. 2023).

48. The other issues raised on appeal in those proceedings are summarized in the Ninth Circuit opinion.

49. On October 10, 2023, the Supreme Court denied certiorari. *See Creech v. Richardson*, --- S. Ct. ----, 2023 WL 6558513 (2023).

50. Mr. Creech does not believe that he has in any of the proceedings above alleged that judge-sentencing in capital cases violates the Eighth Amendment under the evolving standards of decency based on data about death-row populations, execution rates, etc.

51. On October 13, 2023, Mr. Creech filed a petition for post-conviction relief in Ada County District Court, which received case number CV01-23-16641, alleging that judge-sentencing in capital cases violates the Eighth Amendment under the evolving standards of decency based on data about death-row populations, execution rates, etc.

52. That petition remains pending.

II. First Ground for Relief: Mr. Creech's death sentence violates the Eighth Amendment because it was imposed by a judge and not a jury.

53. Mr. Creech's death sentence violates the Eighth Amendment under the evolving standards of decency because it was imposed by a judge sitting alone without any participation by a jury. *See* U.S. Const., Am. VIII, XIV; *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Coker v. Georgia*, 433 U.S. 584 (1977).

Supporting Facts:

54. Mr. Creech's current death sentence was imposed by Judge Newhouse on April 17, 1995.

55. No jury was involved in the determination of death as the punishment.

56. Evolving standards of decency have rendered it cruel and unusual for a defendant to be sentenced to death in a proceeding that involves no jury.

57. In 2002, the Supreme Court found that it violated the Sixth Amendment right to a jury trial for a defendant to be sentenced to death by a judge "sitting alone." *Ring*, 536 U.S. at 588–89.

58. The *Ring* Court identified five states that allowed for such sentencings: Arizona, Colorado, Idaho, Montana, and Nebraska. *See id.* at 608 n.6.

59. The number of inmates on death rows supports Mr. Creech's claim.

60. Arizona now has a moratorium on executions.

61. Thus, Arizona counts in Mr. Creech's favor in the evolving-standards calculus.

62. Similarly, there is no one on death row in Colorado because the state abolished capital punishment in 2020 and the governor then commuted the three existing death sentences to life in prison.

63. Colorado therefore falls on Mr. Creech's side of the scale as well.

64. Accordingly, the only states that matter for evolving-standards purposes are Idaho, Montana, and Nebraska.

65. Those states only have a total of sixteen inmates on death row who were sentenced by judges alone.

66. If Arizona is included in the count, the number still favors Mr. Creech.

67. Then there would be forty-nine judge-sentenced inmates.

68. There are roughly 2,333 inmates on death row in America.

69. Execution rates also favor Mr. Creech's claim.

70. Idaho, Montana, and Nebraska have collectively executed only a single inmate in the last ten years out of the 227 executions that have taken place nationwide.

71. In the last fifteen years, the three states have executed only three inmates out of the 453 executions that have taken place nationwide.

72. In the last twenty years, the three states have executed only four inmates out of the 701 executions that have taken place nationwide.

73. In the last twenty-five years, the three states have executed only four inmates out of the 1,095 executions that have taken place nationwide.

74. In the last thirty years, the three states have executed only ten inmates out of the 1,356 executions that have taken place nationwide.

75. If Arizona is included in the count, the execution numbers still support Mr. Creech's claim.

76. Arizona has executed four judge-sentenced inmates in the last ten years.

77. Arizona has executed sixteen judge-sentenced inmates in the last fifteen years.

78. Arizona has executed seventeen judge-sentenced inmates in the last twenty years.

79. Arizona has executed twenty-seven judge-sentenced inmates in the last twenty-five years.

80. Arizona has executed thirty-six judge-sentenced inmates in the last thirty years.

81. Statutory developments also support Mr. Creech's claim.

82. At the time of *Ring*, only five states had statutes in place that allowed for judge sentencing in capital cases, even though the Supreme Court had previously found such laws to be constitutional.

83. Several states have reduced the role of judges at capital sentencings relative to juries, including Alabama, Delaware, and Indiana.

84. Sentencing decisions also support Mr. Creech's claim.

85. Judicial override was used 125 times in the 1980s, 74 times in the 1990s, and then only 27 times between 2000 and 2013.

86. That practice has been geographically isolated, with twenty-six of the twenty-seven judicial overrides that occurred between 2000 and 2013 occurring in Alabama.

87. General trends in the death penalty also support Mr. Creech's claim.

88. Twenty-two states have abolished the death penalty.

89. Three states have moratoria on executions.

90. Eleven states authorize the death penalty but have not executed anyone in the last ten years.

91. International developments also support Mr. Creech's claim.

92. 112 countries have abolished the death penalty.

93. 90% of countries did not carry out executions in 2022.

94. In 2002, 90% of the executions in the world took place in Egypt, Iran, and Saudi Arabia.

95. Finally, the substantive nature of the Eighth Amendment supports Mr. Creech's claim.

96. That is because, under the Eighth Amendment, it is "the *jury's* task of expressing the conscience of the community on the ultimate question of life or death." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987).

Exhaustion of Claim:

97. The claim alleged here is currently unexhausted and is pending in ongoing state post-conviction proceedings.

III. Relief Sought

98. Based on the foregoing, Mr. Creech respectfully prays that the Court grant the writ of habeas corpus with respect to his death sentence.

Respectfully submitted this 16th day of October 2023.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Attorney for Petitioner

IV. Verification

I, Jonah J. Horwitz, authorized by Thomas Eugene Creech, Petitioner in this case, declare under penalty of perjury that the foregoing is true and correct to the best of my understanding, knowledge, and ability.

/s/ Jonah J. Horwitz
Jonah J. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October 2023, I served the foregoing document on all interested parties by emailing it to:

L. LaMont Anderson
Lamont.Anderson@ag.idaho.gov

/s/ Jonah J. Horwitz
Jonah J. Horwitz

JS 44 (Rev. 04/21)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Thomas Eugene Creech

(b) County of Residence of First Listed Plaintiff Ada
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Jonah J. Horwitz, FDSI, CHU, 702 W. Idaho St., Ste. 900, Boise, ID 83702 208-331-5530

DEFENDANTS

Tim Richardson

County of Residence of First Listed Defendant Ada
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

Lamont Anderson

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☒ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☒ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

INTELLECTUAL PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 United States Code, Section 2254

Brief description of cause:
Evolving standards of decency under the 8th Amendment render the death sentence unconstitutional.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE BLW DOCKET NUMBER 99-0224

DATE 10/16/2023

SIGNATURE OF ATTORNEY OF RECORD /s/ Jonah J. Horwitz

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE