No. 24-5142

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

TIM RICHARDSON,

Respondent.

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

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REPLY IN RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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In the face of an important issue on which the circuits themselves and others have recognized a split, the State elects to relabel Mr. Creech's claim with terminology more convenient to its own perspective, suggest alternative vehicles that would be far muddier, and blame a death-row inmate for obstructing a death warrant that does not exist. The State's efforts fail, and certiorari review remains appropriate.

I. The State has failed to disprove a circuit split.

The State makes a misguided attempt to distinguish between ripeness on the one hand and the discovery of the factual predicate upon which a claim is based on the other. But it is a distinction without a difference for the purposes of this petition for certiorari. For in the cases the States cites, the ripeness determination *turns on* the circuit court's interpretation of the discovery of the factual predicate. *See, e.g.*, *In re Hill*, 81 F.4th 560, 570 (6th Cir. 2023) (en banc) (concluding that a claim had been ripe earlier because the evidence at issue had "always been available to" the inmate); *Buntion v. Lumpkin*, 31 F.4th 952, 961 (5th Cir. 2022) (per curiam) (finding a claim ripe when the previous habeas petition was filed because it related to "facts in existence at the time of the assessment" (emphasis removed)). It is not simply the categorization of claims as ripe or unripe that matters here, but rather the steps involved in reaching the ripeness decision—steps that the circuit court are split on. Far from proving the absence of a circuit split, the State's discussion thus serves instead to highlight the circuit split this Court should take the opportunity to resolve here.

The history of *Panetti v. Quarterman*, 551 U.S. 930 (2007), provides helpful context. In *Panetti*, the petitioner's competence was an issue throughout his case as

a whole. 551 U.S. at 935–42. At trial, "[t]he court ordered a psychiatric evaluation, which indicated that petitioner suffered from a fragmented personality, delusions, and hallucinations." *Id.* at 936. Though the trial court ultimately concluded that the petitioner was "competent to be tried and to waive counsel" during trial, he was found "incompetent to waive the appointment of state habeas counsel" less than two months after he was sentenced to death. *Id.* at 936–37. Petitioner's competence to stand trial and to waive counsel were issues raised during both state and federal post-conviction proceedings. *Id.* at 937.

However, despite the fact that the petitioner's competence had been at issue for over a decade, and despite the fact that the petitioner had previously failed to raise incompetence to be executed as a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court did not consider his second-in-time federal habeas petition raising the *Ford* claim to be "second or successive." *Panetti*, 551 U.S. at 945–47. Rather, the petitioner's *Ford* claim was timely brought. *Id.*

Well before he filed his second-in-time petition, the petitioner in *Panetti* knew that he was incompetent and that, due to his death sentence, he would very likely be executed. However, despite both of these things, it was the late-evolving occurrence of the factual predicate that his claim was based on—the issuance of a death warrant—which rendered his *Ford* claim ripe and enabled him to avoid the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") "second or successive" bar. *Id.*

It is this reasoning that the circuit courts are split in applying. The State contends that the circuit court decisions Mr. Creech pointed to in his initial petition are based upon whether the claims at issue were "ripe at the time of the first petition." Opp. 18. That is true, but it misses the mark: it is how *Panetti* applies to the ripeness determination that matters here. And outside the *Ford* context, the circuit courts disagree on how *Panetti* should be applied—if at all—to the question of ripeness and, subsequently, the question of whether a claim is barred as "second or successive" under 28 U.S.C. § 2244.

As Mr. Creech explained in his initial petition, the Second, Seventh, and (sometimes) Ninth Circuits have all expanded the reasoning utilized in *Panetti* to non-*Ford* claims. Pet. 7. At least one panel of the Eleventh Circuit has agreed that *Panetti* is to be read in an expansive way but was prevented from doing so due to an internal rule. *Id.* On the other side of the scales are the Fifth and Sixth Circuits, which categorically decline to apply *Panetti* in a non-*Ford* context. Though it attempts to reframe the question, the State has failed to show that the rulings from these circuits may be reconciled. Furthermore, despite the State's insistence that there is no split here, Justices on this Court have recognized that the Fifth Circuit, at least, has erroneously declined to apply *Panetti* outside the *Ford* context. *See Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 n.1 (2022) (Sotomayor, J., respecting the denial of certiorari). Tellingly, the State can only fit its portrayal of Fifth Circuit law into its warped account by accusing the *Buntion* panel of "ignor[ing]" prior precedent from

the same court. *See* Opp. 16. That captures the confusion and uncertainty in the lower courts as well as anything Mr. Creech himself has said.

In sum, regardless of the State's belief that it has single-handedly managed to reconcile the conflicts that this Court and legal scholars have recognized, *see* Pet. 13–15, the fact remains that a circuit split exists based on the question Mr. Creech actually presented to this Court, no matter how the State "wishes to rephrase the question[,]" Opp. i.

II. This petition presents an important issue.

The State's misapprehension of the question Mr. Creech has presented pervade its arguments that there is no important federal issue here. The divergent applications of *Panetti* utilized by the circuit courts to determine ripeness and, therefore, whether a claim is barred by § 2254 or not, have sweeping implications.

While the State is correct that Mr. Creech pointed to cases involving changes in forensic evidence, such cases simply serve to illustrate that answering the question in the petition would foster clarity in successiveness contexts far beyond the evolving standards of decency. That is to say, if late-evolving facts do not render an evolving-standards claim successive, they likewise would presumably not render a due process claim or any other kind successive. The far-reaching nature of Mr. Creech's question, coupled with its narrowness and the procedural sleekness of this case as a vehicle, provide compelling reasons for this Court to grant Mr. Creech's petition and resolve this matter here and now. The expenditure of this Court's valuable time and resources promotes judicial economy because it will offer the federal judiciary clear guidance on an issue that affects multiple kinds of claims. Further, to resolve the

question presented would be to do no more than answer whether or not claims based upon late-evolving facts are to be heard under AEDPA—this Court need not delve into the specifics of any one kind of claim.

III. This case cleanly tees up the question presented.

Relying on conjecture and faulting Mr. Creech for failing to argue the merits of his underlying claim in his petition for certiorari—a consideration rarely, if ever, taken into account by this Court in deciding whether to grant certiorari, *see* S. Ct. Rule 10—the State complains that Mr. Creech's case is a poor vehicle for this Court to resolve the question presented, Opp. 21–24. Given the State's misconstruction of the question at issue here, as discussed in Part I, *supra*, its contentions should be given little weight by this Court.

Notwithstanding the State's protestations, this Court is not being called upon to wade into a quagmire of contested facts and evidence before it even reaches the question presented. The singular question raised by Mr. Creech's petition is clear and straightforward: Is a federal habeas petition based on late-evolving facts second or successive when it is not based on a *Ford* claim?

It is the State, not Mr. Creech, that attempts to distract the Court with contested "facts" that have no bearing on the outcome of the question presented. The State attempts to attack Mr. Creech's reliance on Arizona's moratorium, arguing that "[i]t is entirely possible that, at the end of [Arizona's] comprehensive study, new procedures will be implemented, and executions will resume in Arizona." Opp. 21. Certainly, anything is possible. In any evolving-standards case, the practice at issue might resume in one jurisdiction or another. Yet that has never prevented the Court

from calculating the data as it exists at the time of its decision. Instead of attempting to discern the future from a crystal ball, this Court deals with the legal landscape as it finds it. *Cf. Pulley v. Harris*, 465 U.S. 37, 45 (1984) ("We take statutes as we find them."). The State has no way of knowing whether or not the moratorium in Arizona will continue or for how long. The fact of the matter is that Arizona is currently refusing to execute judge-sentenced inmates, no crystal ball required.

Similarly, the State's insistence that it should have been obvious that the executions of judge-sentenced inmates would dwindle toward zero after this Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002) also disregards the need to deal with the legal landscape as it is now. Events after *Ring* could have easily played out differently. Rather than a slow-march toward zero, as is what occurred, it's entirely possible that states could have determined that justice required they commute death sentences imposed by judges to life-sentences or hold new sentencing hearings involving juries. Or this Court could have changed its mind and overruled *Ring*, as was the case when *Ring* itself overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in which this Court upheld judge-sentencing. In short, though the State paints the aftermath of *Ring* as "obvious," it was anything but.

Most significantly of all, the State's appeal to inevitability is effectively a theory designed for an alternative reality. If judge-sentenced executions really had dwindled to zero *because* of *Ring*, the State would have a point. But that is not the world we live in. There are dozens of judge-sentenced inmates on Arizona's death row. *See* Michael L. Radelet & G. Ben Cohen, *The Decline of the Judicial Override*, 15 Ann.

Rev. L. & Soc. Sci. 539, 551 (2019). The reason none of them have been executed since January 20, 2023 has nothing to do with *Ring*. *See Schriro v. Summerlin*, 542 U.S. 348 (2004) (deeming *Ring* non-retroactive, and consequently leaving in place every judge-imposed death sentence in the country). Instead, the reason is the moratorium, a factor that unquestionably weighs on a prisoner's side in the evolving-standards calculus. *See Hall v. Florida*, 572 U.S. 701, 716 (2014). The State's discussion of inevitability is a red herring.

Additionally, following the State's suggestion that this Court wait for a forensic science case to determine the question presented, Opp. 21, would likely place it in the midst of a factual battleground. Such a case would undoubtedly involve experts on both sides, arguing over whether the "science" was right or wrong—just the kind of contested facts the State urges this Court to avoid. No such contested facts exist here—it is undeniable that judge-sentenced executions have dried up entirely.

Finally, it strains credulity to term this petition a "last-minute" gamble to prevent Mr. Creech's execution. As the State concedes, there is currently no warrant to carry out Mr. Creech's death sentence. Opp. 3, n.1. As such, the State's reliance on decisions regarding stay applications is inapposite. Additionally, had Mr. Creech brought the present petition before this Court in February 2024, when there was a death warrant pending, the State would have inevitably given us the same, tired refrain that granting his petition would reward him "for invoking a strategy of piecemeal litigation that has resulted in decades of delay through the filing of multiple successive post-conviction petitions in state courts and years of delay in

federal courts." *Compare* Opp. 24 *with* Br. in Opp. at 20, *Creech v. Idaho*, No. 23-6791 (U.S., Feb. 26, 2024) (complaining of "piece meal litigation" that "scream[ed] for this Court to deny [Mr. Creech's stay] request" and end "decades of unwarranted delay").

Indeed, it is ironic that the State would accuse Mr. Creech of being interested only in a stay of execution when he *forewent* the opportunity to file the certiorari petition during a pending death warrant and instead submitted it under the typical timeline for every litigant. It seems that when Mr. Creech brings a petition for certiorari is of no import to the State, for its real objection is that Mr. Creech dares to bring a petition at all. There is also something unseemly about the State focusing on the role played by a potential death warrant when its own lawyers are the ones who control that timing. What the State really wants is to have the unilateral power to schedule an execution whenever it wishes and to then accuse Mr. Creech of somehow prospectively interfering with its plans—an illogical framework that offends basic notions of fair play.

Despite those feelings on the part of the State, the fact remains that Mr. Creech filed a strong certiorari petition in the absence of either a scheduled execution or a request for a stay, and he is entitled to the same consideration as any other party. The State's contrary approach is essentially an invitation to offer death-row inmates a lesser version of constitutional review merely by virtue of their sentences, a notion that is antithetical to the principle of equal justice under the law and one that flips on its head the well-established rule that in capital case "the Court has been

particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 11th day of September 2024.

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