No. 23-5039

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**THOMAS E. CREECH,**

**Petitioner,**

**v.**

**TIM RICHARDSON, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION**

**Respondent.**

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

# PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The respondent does his best to muddy the waters but cannot change the fact that two clear issues of national importance are neatly teed up by this case.

## I. The psychopathy issue warrants review.

In his brief, the respondent presents three unpersuasive reasons for the Court to decline review over the psychopathy issue: 1) that the question was unpreserved below; 2) that there is no meaningful conflict; and 3) that the case is not an optimal vehicle. *See* BIO at 12–31. Mr. Creech takes each in turn.

### A. The psychopathy issue is fully preserved.

The respondent's preservation challenge, *see id.* at 12–14, is founded on the illogical belief that a party must have articulated the question presented at the certiorari stage in precisely the same words to the lower courts. This Court has never imposed such a formalistic and irrational requirement. Rather, the rule is only that "the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Preservation in that sense is lacking when, as in several of the respondent's own cited cases, a litigant never presented below an entire federal constitutional position that it wishes to litigate at this Court. *See, e.g.*, *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) (declining to address the Eleventh Amendment where it had not been invoked below).

Nothing remotely like that has occurred here. The federal constitutional claim that is associated with the psychopathy issue is Mr. Creech's entitlement to the effective assistance of counsel at his resentencing under the Sixth Amendment. There is no question that Mr. Creech exhausted that claim, as the respondent acknowledges. *See* BIO at 13. If there is any more specific element of that general claim that Mr. Creech had to voice below, it would be that psychopathy is aggravating, since that is the substance of the question presented. And he did. *See id.* (reflecting the respondent's recognition that Mr. Creech told the Ninth Circuit that "psychopathology is properly considered an aggravator").

The respondent insists that Mr. Creech had an obligation to propose to the Ninth Circuit the "rule that psychopathy should always be considered aggravating evidence." *Id.* For starters, that is essentially what Mr. Creed did do, in the line just quoted. The respondent's complaint is apparently that Mr. Creech said "properly" instead of "always," which is far too fine a parsing. *See Nelson*, 529 U.S. at 469 (reiterating that preservation "does not demand the incantation of particular words"). More broadly, Mr. Creech composed his question presented with an eye to how courts around the country have dealt with psychopathy, since that is at the core of the certiorari calculus. *See* S. Ct. R. 10. At the Ninth Circuit, an error-correction court, Mr. Creech's aim was only to show that his rights were violated. Mr. Creech's duty there was to preserve a Sixth Amendment claim, and he did so.

The respondent's account of the purposes of the preservation rule confirm that Mr. Creech satisfied it. In the absence of preservation, the respondent cautions, "the record is very likely to be inadequate." BIO at 13. Yet the record in Mr. Creech's case on the psychopathy issue is plentiful, including the numerous statements from the experts quoted in the certiorari petition and the respondent's brief, as well as a Ninth Circuit opinion squarely addressing the matter. *See Creech* *v. Richardson*, 59 F.4th 372, 388–89 (9th Cir. 2023) (discussing how the psychopathy testimony in Mr. Creech's case constituted "mitigating evidence"). There is no doubt the issue is preserved.

**B. There is tension in the lower courts over psychopathy.**

Struggling to gloss over the obvious inconsistency in lower-court treatment of psychopathy, the respondent's chief tactic is to chalk it all up to the vagaries of each specific case. *See* BIO at 15–22. The flaw in the respondent's model is that none of the actual cases say anything of the sort. When the Eleventh Circuit described psychopathy as "not good mitigation" and "damaging" to defendants, it did not add, "in the context of this case" or some other comparable caveat. *Reed v. Sec'y, Fla. Dept. of Corrs.*, 593 F.3d 1217, 1246 (11th Cir. 2010). Likewise, when the Sixth Circuit announced that psychopathy is mitigating because it "helps diminish [the defendant's] moral responsibility for his actions," it did not tie its announcement to the particulars of the appeal at hand. *Esparza v. Sheldon*, 765 F.3d 615, 624 (6th Cir. 2014). There are nineteen lower-court decisions cited on this subject in Mr. Creech's certiorari petition. *See* Pet. at 9–12. The respondent does not identify any text in a single one of these opinions to suggest that the passages about psychopathy on which Mr. Creech relies are somehow tethered to case-specific facts. As the plain language of the quotes proves, they make universal declarations about psychopathy that simply cannot be reconciled. *Compare Evans v. Sec'y, Dept. of Corrs.*, 703 F.3d 1316, 1332 (11th Cir. 2013) (classifying psychopathy as a label "that is not mitigating but damaging"), *with Morton v. Sec'y, Fla. Dept. of Corrs.*, 684 F.3d 1157, 1168 (11th Cir. 2012) (calling psychopathy "a valid mitigating circumstance").

The respondent cherry-picks qualifying-sounding words from the circuit opinions[1] on psychopathy, but that does not alter the bottom line. For starters, statements need not be absolute to contradict one another. There is no conceivable world in which it is simultaneously true that "most jurors tend to look disfavorably upon [psychopathy]," *Evans*, 703 F.3d at 1332, and yet there "often will be cases where [psychopathy's] mitigation value exceeds its harmful effects," *Esparza*, 765 F.3d at 624. If most jurors look at something negatively, then it will often be aggravating—not mitigating. The respondent can italicize words like "most" and "often" all it wants to show that the decisions did not say "all" and "every." That only points to the judicial reluctance to unnecessarily make an all-encompassing judgment when a narrower one will do. It does not mean that manifestly incompatible statements are harmonious.

By stressing an adjective here and there, the respondent also loses sight of how the circuit courts actually made use of their clashing interpretations of psychopathy, i.e., the outcomes. In *Morton* and *Esparza*, ineffectiveness claims were rebuffed in light of assumptions by the circuit courts regarding the mitigating aspect of psychopathy. The former did so on deficient performance, finding that counsel performed reasonably in presenting psychopathy as mitigating. *See*

[1] Tellingly, the respondent speaks only to the federal opinions and does not even acknowledge—let alone engage with—the eight state-court opinions that Mr. Creech provided on the issue, which speak equally to the split. *See* Pet. at 12.

*Morton*, 684 F.3d at 1168. And *Esparza* did so on the prejudice prong, discounting the petitioner's argument that ineffectiveness led to a psychopathy diagnosis because the court saw the condition as mitigating. *See Esparza*, 765 F.3d at 624. Consider, by contrast, *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017), and *Guinan v. Armontrout*, 909 F.2d 1224 (8th Cir. 1990). *Atwood* absolved counsel of any deficiency because they were supposedly reasonable in avoiding mental health material lest it open the door to aggravating psychopathy evidence. 870 F.3d at 1063. For its part, *Guinan* concluded there was no prejudice because a mental-health presentation would have included psychopathy, which the court felt was aggravating. 909 F.2d at 1230.

These results flow from understandings about psychopathy in the Sixth and Eleventh Circuits that are not in keeping with assumptions on the same subject in the Eighth and Ninth Circuits. Regardless of the phraseology used, the understanding that psychopathy is primarily mitigating is the only thing that can make sense of a holding that counsel are competent when they present their client as a psychopath (*Morton*) or that there is no prejudice where the jury hears a psychopathy diagnosis from the defense (*Esparza*). And the competing understanding—that psychopathy is primarily aggravating—is the only thing that can make sense of a holding that counsel were competent by *avoiding* psychopathy (*Atwood*) or that prejudice is absent where the jury *does not hear* a psychopathy diagnosis (*Guinan*). The inescapable fact of the matter is that these cases view psychopathy through diametrically opposed lenses.

It is not persuasive for the respondent to fall back on the notion that some mental-health evidence is "two-edged." BIO at 20. None of the respondent's Supreme Court cases refer to *psychopathy* as two-edged. *See Cullen v. Pinholster*, 563 U.S. 170, 201 (2011); *Brewer v. Quarterman*, 550 U.S. 286, 289–90, 292–93 (2007); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002). Insofar as some lower courts are putting psychopathy in the two-edged bucket, *see* BIO at 16, they are acting improperly, and that is precisely why intervention from a higher authority is so urgent. Mr. Creech and the National Disability Rights Network have assembled a mountain of empirical evidence that uniformly stands for the proposition that psychopathy has only one edge to jurors—it is aggravating. *See* Pet. at 20–21; NDRN Amicus Br. at 9–19. The respondent does not put before the Court a single piece of paper from a single scholarly source to weigh on the other side of the scale. It is hard to picture a stronger basis for certiorari than widespread reliance by the circuit courts on a presumption that is easily disproven by social science.

What is more, the respondent's depiction of how the two-edged principal works in practice is itself a powerful reason to grant certiorari. Mr. Creech agrees with the respondent that this Court's two-edged cases could be read as categorizing essentially every type of mental-health evidence as potentially aggravating. *See* BIO at 20. Yet the Court has at the same time ruled repeatedly in favor of inmates on ineffectiveness claims where defense attorneys neglected such evidence. *See Andrus v. Texas*, 140 S. Ct. 1875, 1882–87 (2020) (citing five such cases). From the faces of these disparate opinions, it's impossible to divine when such material is just mitigating and when it is two-edged. That is a recipe for uncertainty and result-oriented judging in the lower courts. More guidance is in order.

The respondent misapprehends the consequences of a ruling in Mr. Creech's favor. BIO at 20. "[I]f the Court concluded a capital murderer could never present psychopathy as mitigation," the respondent warns, then there would no longer be "individualized sentencing." *Id.* Preliminarily, the respondent puts the cart before the horse. If the Court determines, after granting review, that a reversal of the Ninth Circuit would generate negative ramifications elsewhere, then it can instead affirm. That is no reason to avoid the issue altogether. Moreover, the respondent's catastrophizing is not well-founded. Recognition by this Court that psychopathy is damaging to defendants would no more eliminate individualized sentencing than have the many cases in which ineffective assistance of counsel has been found at penalty-phase trials, all of which by definition must evaluate what evidence is aggravating and what mitigating. Defendants would still be able to present whatever mitigating evidence they wished—their attorneys would just be on notice that one particular type of evidence is not mitigating at all.

The respondent's lament that a ruling against him would create the kind of "bright-line rule" for defense lawyers that was repudiated by *Strickland v. Washington*, 466 U.S. 668 (1984), BIO at 27, runs into the same wall. There may be "no particular *set* of detailed rules for counsel's conduct," *Strickland*, 466 U.S. at 688–89, but calling one's own client a "classic psychopath" is just as objectively unreasonable as, say, telling a client he won't be deported when he will, *see Padilla* *v. Kentucky*, 559 U.S. 356, 359 (2010). The need for flexibility doesn't include the freedom to be completely and obviously wrong.

A similar rebuttal is implicated by the respondent's assertion that a decision in Mr. Creech's favor "would be repudiating the individual assessment every attorney" is permitted to make under *Strickland*. BIO at 21. *Strickland* does not authorize defense attorneys to reach individual assessments that are objectively unreasonable "under prevailing professional norms." 466 U.S. at 688. In his certiorari petition, Mr. Creech emphasized that the defense community has with one voice and over decades condemned the use of psychopathy as "the kiss of death." Pet. at 22. As with the social science, the respondent has no rejoinder. His appeal to *Strickland* is consequently unavailing.

### C. The case is an ideal vehicle for the psychopathy issue.

The respondent takes issue with the case as a vehicle for the psychopathy issue. *See* BIO at 22–31. One of the respondent's themes is that the case might not be an optimal opportunity for the Court to assess whether counsel are generally ineffective for labeling their clients psychopaths because there are unique reasons *here* why the attorneys were reasonable for so doing. *See, e.g.*, *id.* at 28. Those reasons are, by the respondent's lights, that counsel could say that psychopathy had a "biological contribution" and that others had already classified Mr. Creech as a psychopath. *See, e.g.*, *id.* Yet Mr. Creech's attorneys could easily have dealt with the previous psychopath opinions while presenting the biological theory that would actually have been mitigating. That theory was brain damage, which they failed to explore, which was then thoroughly documented in federal habeas, and which shows Mr. Creech is *not* a psychopath. *See* Pet. at 5–6. The respondent's careful denial of the idea that defense experts in state court "never concluded that Creech did *not* suffer from organic brain syndrome," BIO at 30, is a red herring. There is no debate that counsel failed to *present* brain damage, which was readily available, making them the prototypically ineffective lawyers for certiorari purposes.

The respondent frames the Ninth Circuit opinion below as not reaching the psychopathy issue based on the same "biological" testimony, as well as on the fact that when the panel referred to psychopathy it also listed other components of the defense expert's presentation to the judge. *See* BIO at 29. In every capital case, there will be multiple species of aggravation and mitigation. Psychopathy will never surface as an entirely discrete issue. That said, the Ninth Circuit clearly put itself in one camp of the psychopathy divide here. The Ninth Circuit portrayed the testimony of the defense expert at resentencing, Dr. Steven Brown as, "on the whole, mitigating." *Creech*, 59 F.4th at 389. Dr. Brown told the judge that Mr. Creech was a "classic psychopath" with "psychopathic tendencies" more intense than that of "96 percent of the inmate population," including with respect to "lack of remorse." Pet. at 3. Those opinions are devastating enough for a defendant that they poison the testimony in its entirety. And as the Fourth Circuit has recognized in a case the respondent has no answer to, psychopathy with a supposed biological element is still "as damning as it could be" for a defendant. *United States v. Barnette*, 211 F.3d 803, 825 (4th Cir. 2000). The way in which the panel below minimized psychopathy as an aggravator is manifestly at odds with decisions like *Barnette* and the many others Mr. Creech has arrayed, making the case a perfect occasion to resolve the disagreement.

Next, the respondent critiques the psychopathy question as insufficiently isolated for certiorari review because of other aggravating evidence. *See* BIO at 24–25. In support, the respondent references a paragraph from the Ninth Circuit opinion concerning the *exhausted* iteration of Mr. Creech's ineffectiveness claim. *See id.* That analysis has no bearing here, where the issue has to do with Mr. Creech's new federal claim. The Ninth Circuit took that up in a separate section of its opinion under an entirely different heading. *See Creech*, 59 F.4th at 386–89.

In a related misstep, the respondent avers that certiorari review is complicated by the deferential standard of review spelled out in the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* BIO at 25. That standard is inapplicable here. The crucial language from the Ninth Circuit opinion appears in its discussion of whether Mr. Creech's federal claim has been fundamentally altered from its state analogue such that it became unexhausted and defaulted, and thus cognizable in habeas under *Martinez v. Ryan*, 566 U.S. 1 (2012). *See Creech*, 59 F.4th at 386–89. Because the evidence underlying the federal claim was not presented in post-conviction proceedings, there is no state-court judgment to defer to under AEDPA, and the matter is subject to a de novo standard that makes the case an ideal candidate for certiorari review. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (clarifying that AEDPA deference is only implicated when the state court has "adjudicated the claim on the merits").

To the respondent, the psychopathy issue is compromised by *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), *see* BIO at 25, which the Ninth Circuit mentioned as an additional barrier to its review of the new federal evidence, *see Creech*, 59 F.4th at 389. Mr. Creech has pending an appeal at the Idaho Supreme Court in which he is presenting the very same evidence in a post-conviction proceeding. *See* App. J. After that appeal is resolved, the evidence will be part of a state-court record. It will then be on the table for federal habeas purposes. The Ninth Circuit can take up any questions relating to *Ramirez* and the state-court record on a remand from this Court if necessary in light of those forthcoming developments. It is no reason to avoid the psychopath issue here and now.

The respondent objects to the plethora of articles brought to the Court in the certiorari petition and in the amicus brief. *See* BIO at 26–27. Since the respondent cannot question the unanimous conclusions in these myriad pieces that psychopathy is aggravating, he instead tries to exclude them from consideration altogether based on the fact that most of them postdate Mr. Creech's 1995 resentencing. *See id.* These publications need not be considered for purposes of adjudicating Mr. Creech's own claim on the merits, though he submits that they reflect a long and unbroken series of findings that do indeed stretch back to 1995, by which time the defense bar itself understood how devastating psychopathy was. *See* Pet. at 22 (citing a 1995 article). At any rate, the more salient import of the articles is that they underscore a serious problem in the lower courts across the country. Mr. Creech surveyed eight cases in his certiorari petition from state and federal courts that are on the wrong side of the split. Pet. at 10–12. These cases cover thirty-one years, ranging up to 2014. Regardless of whether Mr. Creech ultimately gets the benefit of a decision on the merits, the case for certiorari review is strengthened by the fact that numerous courts are grounding published decisions in capital cases on preconceptions that do not line up with the science.

## II. The *Lackey* issue warrants review.

The respondent takes three tacks in opposing the *Lackey* issue: 1) jurisdiction; 2) default; and 3) the merits. *See* BIO at 31–39. None are successful.

### A. The Court has jurisdiction.

The respondent believes the Court lacks jurisdiction based on its view that Mr. Creech failed to challenge here the Ninth Circuit's denial of a certificate of appealability (COA) on his *Lackey* claim. *See* BIO at 31–34. However, the respondent admits that the Court has jurisdiction "[w]hen the lower courts deny a COA and [the Supreme Court] conclude[s] that their reason for doing so was flawed." *Id.* at 32 (quoting *Ayestas v. Davis*, 138 S. Ct. 1080, 1088 n.1 (2018)). That is exactly what Mr. Creech is asking the Court to do here.

The respondent is dissatisfied with the fact that Mr. Creech focused on the merits of his *Lackey* claim in his certiorari petition rather than on the COA standards. *See id.* at 32–33. Unlike the respondent, this Court has never suggested that a prisoner is obligated to concentrate on the COA test in a certiorari petition instead of the merits. In *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), the Court granted certiorari and then released a major opinion on the merits of a significant constitutional issue. The certiorari petition in *Edwards*, as here, was centered on the merits of the claim and did not delve into the COA question. *See* Petition for Writ of Certiorari, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (No. 19-5807).

It makes sense that the Court has refrained from imposing the pleading requirement proposed by the respondent, for the merits of a constitutional claim are a—in fact, *the*—key part of the COA standard. *See Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining that a COA is proper when the inmate has made "a substantial showing of the denial of a constitutional right"). In other words, the COA inquiry is a merits inquiry, just with a lower bar. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (observing that "[t]he COA determination . . . requires an overview of the claims in the habeas petition and a general assessment of their merits"). If a claim is meritorious, the COA test is by definition satisfied. *See Buck v. Davis*, 580 U.S. 100, 127 (2017) (granting relief after accepting certiorari in a case where the circuit court denied a COA). The certiorari petition reflects that reality.

**B. The claim is not procedurally barred.**

The respondent mischaracterizes Mr. Creech as "not challenging" the procedural default found by the lower courts with respect to his *Lackey* claim. BIO at 34. That is inaccurate. Mr. Creech set forth in his certiorari petition why the Idaho Supreme Court's procedural bar was not adequate to preclude federal review. *See* Pet. at 32–33. The respondent does not engage with the passage. Instead, he settles for a boilerplate defense of Idaho's successiveness statute general. Apart from ignoring the fact that the Idaho Supreme Court *has* taken up successive *Lackey* claims under the statute, *see id.* at 32, the respondent's authority is inapposite. His sole citation is to *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001). *See* BIO at 35. Far from endorsing Idaho's rule, *Hoffman* explicitly deemed the statute *inadequate* to preclude federal review of the type of claim at issue there (ineffective assistance of counsel). *See Hoffman,*236 F.3d at 535. In any event, this Court is not bound by the Ninth Circuit's understanding of Idaho's procedural bars. It is able to assess for itself whether the default is adequate and independent. The Court can do so after granting certiorari if it becomes necessary and proper to do so, and the default issue is not a legitimate basis to decline review of the case.

### C. The merits of the claim call for resolution.

The respondent's pages on the merits of the *Lackey* issue, *see* BIO at 35–39, are mostly devoted to disproving the existence of an Eighth Amendment violation. At the certiorari stage, the principal question for the Court to consider is whether the issue would benefit from resolution—not the answer it would receive. As Mr. Creech outlined in his petition, multiple Justices have opined over the course of many years that Supreme Court consideration of the theory would be appropriate. *See* Pet. at 31–32. The issue is not going away. Indeed, if the respondent's true goal were to put an end to "sophistic" *Lackey* claims, as he purports, BIO at 37, the way to accomplish it would be for the Court to finally take up the issue and bring finality to the matter, not to deny review. *See Ohio v. Price*, 360 U.S. 246, 247 n.1 (1959) (opinion of Brennan, J.) ("[T]he grant . . . of certiorari, as we have often said, expresses no intimation as to the merits of a case.").

Finally, the respondent's meditations about the delays here are off base. First, in terms of the structural defects in Idaho's post-conviction regime, while it is true that ineffective assistance of *trial* counsel is pursued in most states in a first post-conviction petition, *see* BIO at 37, ineffective assistance of *appellate* counsel is typically pursued in the same proceeding, *see* Pet. at 35. Idaho is different because appellate ineffectiveness has to be brought in a second post-conviction case. *See id.* The distinction is between one case and two, which means double the delay.

Second, the respondent sees "hypocrisy" in the fact that Mr. Creech has highlighted both Idaho's draconian time limits and its delays as *Lackey* problems. BIO at 38. There is no contradiction—the draconian time limits breed successive petitions attempting to raise new claims. *See* Pet. at 36.

Third, the respondent places the responsibility for the delay on Mr. Creech. *See* BIO at 38. The single example identified by the respondent in support, *see id.*, took fourteenth months. *See* Dist. Ct. Dkts. 325, 365. Mr. Creech has been on death row for 499 months. The respondent has nothing to say about the *twelve years* injected into the proceedings by virtue of the fact that the State violated Mr. Creech's constitutional rights at his initial sentencing. *See* Pet. at 34. As for the respondent's more general perspective that an inmate's *Lackey* claim is diminished by the amount of time he spends vindicating his constitutional rights, that is another contention that is properly addressed after the Court grants certiorari.

## III. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted this 13th day of September.

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SEPTEMBER 2023

# APPENDIX J

**(App. 323–367)**

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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|---|---|---|
| **THOMAS EUGENE CREECH,** | ) | |
| | ) | **NO. 50336-2022** |
| **Petitioner-Appellant,** | ) | |
| | ) | **ADA COUNTY NO. CV01-22-09424** |
| **v.** | ) | |
| | ) | |
| **STATE OF IDAHO,** | ) | **APPELLANT'S BRIEF** |
| | ) | |
| **Respondent.** | ) | |
| | ) | **(Capital Case)** |

# BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**HONORABLE JASON D. SCOTT**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Thomas Creech asks this Court to decide whether he—a person sentenced to death—has an enforceable right to the effective assistance of trial counsel. The merits of Mr. Creech's claims that his trial attorneys were ineffective in their investigation and presentation of compelling mitigation evidence—evidence that should have spared his life—have never been addressed by any state court due to the ineffectiveness of Mr. Creech's initial post-conviction counsel. Whether Mr. Creech has an enforceable right to effective counsel is contingent on whether this Court agrees that the United States Supreme Court's decision in *Shinn v. Ramirez* triggers the forty-two-day deadline for a capital petitioner to file a successive petition for post-conviction relief premised on the ineffective assistance of both trial and post-conviction counsel. Mr. Creech also asks this Court to decide whether the state constitutional right to counsel is greater than the Sixth Amendment right to counsel, and if so, whether a petitioner's burden of proving violations of the state constitutional right to counsel is lower than the burden for proving violations of the Sixth Amendment right to counsel.

### Statement of Facts and Course of Proceedings

Thomas Creech was convicted of first-degree murder for the death of David Jensen, a fellow inmate at the Idaho State Penitentiary, and sentenced to death by Judge Robert Newhouse. But Tom's story began long before his conviction and death sentence, and to appreciate the facts and circumstances underlying this appeal requires an understanding of Tom's background.

#### *Tom's Background and History*

Tom endured a troubled childhood marred by extreme poverty, family abuse, mental illness, and addiction. Tom suffers from head injuries and mental illness, which date back to his early childhood. As a child, Tom suffered repeated head injuries, some of which were severe, including one horrific incident where he fell seven vertical feet, head-first onto a concrete floor. His injury was serious enough that doctors ordered he be hospitalized, but his mother defied hospital staff and took Tom home untreated. (Conf. Exs., p.533; R., p.1643.)[1]

In addition to traumatic head injuries, Tom has suffered throughout his life from mental health problems consistent with his own family's history of mental illness. His extended family was troubled by psychological, behavioral, and economic problems, and numerous relatives suffered from serious depression, including several who committed or attempted suicide. (R., pp.1634-35; Conf. Exs., pp.537, 560, 573-74, 589.) Others struggled with schizophrenia or related schizotypal disorders. (R., p.1634; Conf. Exs., pp.574, 579.) Nearly every member of Tom's family abused substances, including alcohol, cocaine, and other drugs. (R., p.1644; Conf. Exs., pp.543, 572-73, 576, 583, 589-90, 601.) In addition, physical and sexual child abuse were rampant throughout Tom's extended family. (R., pp.1634-35, 1641.)

Exacerbating these many struggles was the family's utter poverty. Tom grew up exceptionally poor, as did his parents and grandparents. (R., pp.1735-36.) For much of Tom's childhood, his family lacked running water and the only source of heat in the winter came from a coal-burning heater, which Tom and his brothers manually fed with broken blocks of coal. (R., pp.1736-38.) Tom's family life was typified by extreme instability, and his parents moved the children to and from 10 residences within three years. (R., p.1813.) Among the Creech children, their poverty made them feel ashamed and gave them a sense that their family were pariahs in the surrounding community. (*Id.*)

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[1] Exhibits that were sealed by the court are contained in a separate PDF document compiled by the Clerk and are cited herein as "Conf. Exs." followed by the PDF page number(s). Otherwise, the Clerk's Record is cited herein as "R.," followed by relevant PDF pages number(s).

Tom's parents were volatile, unreliable, and abusive. They constantly fought in front of the kids, often violently, and never expressed love or affection toward their children. (R., pp.1174, 1739-41.) Tom's mother struggled with intense depression and treated her immediate family with hostility and cruelty. (R., pp.1346, 1637-38, 1642; Conf. Exs., pp.609-10.) She frequently went away on drinking benders and extramarital affairs, which destabilized an already unstable family home. (R., pp.1637-38, 1640.) She became incapable of caring for herself or her children after suffering a nervous breakdown following the death of her youngest son, Robbie. (R., pp.1254, 1634, 1642, 1743; Conf. Exs., pp.609-10.) Tom's father routinely beat him and his siblings with switches, two-by-fours, and other objects, whipping one son so badly that blood soaked through his shirt. (R., pp.1172-74, 1639, 1739-40; Conf. Exs., pp.576, 628.) Tom's father generally withheld kindness and affection from Tom and his siblings. (R., p.1738.)

Tom's other close relatives compounded his childhood trauma, including an aunt and uncle who groomed and habitually sexually abused him when he was a child. (R., pp.515-16, 1639, 1815.) Tom's mental health disorders are reflective of childhood sexual abuse, including depression, anxiety, suicidal behavior, self-mutilation, arson, and bed-wetting. (R., pp.1775, 1800.) The troubles with Tom's aunt and uncle culminated when the aunt stormed into the Creech family home and fired several rounds from a pistol trying to shoot Tom's mother. (R., pp.1741-43, 1751-52.) Tom was in the room when it happened and fled out an open window to avoid being shot. (*Id.*) Tom's siblings remember this as a pivotal event in the family's life, and his brother recalls that Tom never acted "normal" again. (R., p.1173.)

Starting in his youth, people who knew Tom observed him to be disconnected from reality and sometimes delusional. (R., pp.1636-37, 1745, 1750-51; Conf. Exs., p.583.) As a child, he played with imaginary playmates and experienced "visual and auditory hallucinations," which his family noticed but failed to address. (R., pp.1815-16.) Tom was even committed to a mental institution as a child and then again as a young adult when he was involuntarily committed for mental illness: first to Ohio's infamous Lima State Hospital in 1971 and 1972 and later to the Oregon State Hospital. (R., p.1830; Conf. Exs., pp.176-88, 294, 636.) At Lima State Hospital, Mr. Creech was subjected to various forms of mistreatment and antiquated procedures.[2] (R., p.1709; Conf. Exs., pp.108, 309, 314.) Tom has a history of anxiety, manic depression, bipolar disorder, schizophrenia, poor emotional and impulse control, substance abuse, and learning disabilities (which are linked to frontal-subcortical dysfunction), all of which are consistent with brain damage and biologically based mental health disorders. (R., pp.29-32, 80, 160, 162, 165, 170, 262-82, 478, 480, 484, 506-26, 521, 582, 585, 648, 661-62, 666, 671, 674-76, 679, 684, 688, 1005-10, 1114-18, 1837.) Tom's mental health issues were serious enough to raise questions about his competency to stand trial in Oregon. (Conf. Exs., pp.176-88.)

In addition to his physical injuries, mental health struggles, and sexual abuse suffered at the hands of family members, as a young man, Tom was sexually assaulted by an adult male during basic training in the Army. (R., p.1640) Then, while serving time in prison in Ohio, Tom was raped. (R., p.1745.)

Although Mr. Creech's trial and post-conviction counsel did not investigate or present evidence of most of this evidence from Tom's background and history, it was readily available and verifiable at Tom's sentencing had they bothered to look. It was not until after his state post-conviction cases were resolved that Tom finally received comprehensive neuropsychological

[2] Lima State Hospital gained horrific notoriety for its violence and degradation against patients. The hospital became known as the "Chamber of Horrors" after it was eventually exposed for its mistreatment of patients, which included violent physical and sexual assault that could leave patients unconscious and with broken bones. (R., pp.1925-26, 1932, 1939, 1942.)

examinations confirming many of his mitigating conditions. Dr. Craig Beaver's neuropsychological assessment of Tom concluded that his brain damage was exacerbated by his chaotic childhood, and that his capacity for "emotional and behavioral regulation" was disrupted in a way that mitigates his conduct in Jensen's death. (Conf. Exs., pp.297, 315.) Dr. Beaver's findings are consistent with what a capable neuropsychologist could have discovered in 1995 (Conf. Exs., pp.315-16, 499-505), and are also consistent with the findings of Dr. Jonathan Pincus, the first neurologist who evaluated Tom, and who concluded he suffered from bilateral brain damage that directly affected his behavior. (R., pp.1718-25.) Dr. Michael Gelbort's conclusions were also consistent with those of Drs. Beaver and Pincus when he diagnosed Tom with organic brain damage that directly affects his behavior. (*Id.*) In particular, Tom's brain damage involves the anatomic circuits responsible for regulating a combination of emotional, behavioral, and cognitive responses, and compromises his capacity for planning, self-regulation, self-direction, and socially responsive behaviors, as well as insight, judgment, and the capacity to exercise social inhibitions. (Conf. Exs., pp.499-505; R., pp.1723-25.) In effect, Tom's brain damage causes him problems with poor impulse control and emotional instability. (R., pp.1965, 2586, 1712.) Evidence of Tom's substantial history of abuse, trauma, brain damage, and mental illness, was missing from his sentencing, depriving the sentencing judge of crucial information of the diverse frailties of humankind necessary to reach a just sentencing verdict.

*Procedural History*

In 1981, the Ada County Public Defender's Office (ACPD) was appointed to represent Mr. Creech, and Rolf Kehne was his counsel of record. (R., p.77.) Tom was Mr. Kehne's first capital client. (R., p.312.) Other members of the ACPD occasionally appeared for Tom as well, including Thomas Morden, August Cahill, Laird Stone, and David Nevin. (R., pp.176, 179, 181, 198.)

At the same time ACPD was representing Tom, it was simultaneously representing several of the State's witnesses against Tom, including fellow prison inmates who stood to benefit from testifying against him. (R., pp.80-81.) The prosecutor and judge all knew about the ACPD's concurrent representation of Tom and witnesses who testified against him in exchange for favorable treatment—including outright dismissal of charges and early release from prison—but did nothing about it. (*See* R., pp.225-26, 228, 230, 232, 323; Conf. Exs., pp.11, 72-73, 84.)

In addition, Tom received little to no information from his attorneys, and in a moment of desperation, he wrote to the trial judge asking to plead guilty, and then attempted suicide the next day. (Conf. Exs., p.62; R., pp.235-36, 243-47.) The day after his suicide attempt, Tom was transported to court to plead guilty. Mr. Kehne was caught completely off guard and was not even aware of Tom's letter or the plea hearing until after Tom had been brought to court. (R., pp.321, 896-97.) Mr. Kehne did not counsel Tom and had not "spent any significant time with him" prior to the guilty plea, having had only two brief conversations with Tom, far from what was necessary to build rapport. (R., pp.313, 315-15, 321, 895.) Mr. Kehne had not advised Tom of any available defenses because he had not prepared for the case nor had adequate time to communicate with Tom. (R., p.316.)

With Mr. Kehne present but providing little counsel, the district court accepted Mr. Creech's guilty plea to first degree murder. (R., p.276.) Mr. Kehne was unprepared to prevent the trial court's rush to take Tom's guilty plea and had failed to investigate the facts and circumstances of the offense, Jensen's history of violence, or Tom's mental status. (R., pp.280-84; Conf. Exs., pp.366-473, 475-97.) Mr. Kehne failed to uncover basic but key facts relating to Tom's available defenses, including Jensen's previous self-inflicted gunshot wound which would have been relevant to Jensen's aggressive behavior, along with attacks on Tom with a razor blade and a sock filled with batteries, which occurred just before Jensen's death.[3] (R., pp.240-41; Conf. Exs., pp.39-40.) In the absence of these essential investigations and the necessary attorney-client relationship, Tom pled guilty under the erroneous impression that he would be convicted and sentenced to death even if he had acted in self-defense. (R., p.244.)

Mr. Kehne failed to move to withdraw Tom's plea before sentencing or request a competency hearing, even after he learned that Tom had attempted suicide the day before his guilty plea. It would be another two years before Tom's attorneys even inquired about his medical status at the prison. (R., pp.344-45.) Mr. Kehne did not request Tom's medical records prior to the guilty plea but, if he had, he would have learned that Tom was prescribed Sinequan in 1971 and 1976; Thorazine in 1969 and 1974 for schizophrenia or manic depression; and Valium, Tranxene, and Vistaril for anxiety. (R., pp.478, 480, 484, 487; Conf. Exs., pp.30, 80, 162.) In the months leading up to his guilty plea, Tom had also been treated for depression in the county jail. (R., pp.389-90.)

At sentencing, Mr. Kehne presented brief expert testimony from Dr. John Stoner that Tom had signs of brain damage, but the testimony was limited and poorly articulated, and Dr. Stoner's advice to Kehne had ultimately been to consult with an expert more qualified than him. (R., pp.831, 1052, 1153-54; Conf. Exs., p.24.) Mr. Kehne failed to present any other substantive evidence of mitigating facts, and the court sentenced Tom to death on January 25, 1982.

In the post-conviction proceedings that followed, Mr. Kehne continued to represent Mr. Creech, even though he was the very attorney whose effectiveness should have been challenged.

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[3] Contrary to the State's 1981 position that Mr. Creech was the sole aggressor preying on a helpless, disabled fellow prisoner, the State of Idaho itself has characterized Mr. Jensen as at least partially responsible for his own death, alleging in a wrongful death suit that Jensen "assumed the risk" and was "guilty of negligent, careless and tortious misconduct" which proximately caused and contributed to his own death. (R., p.922.) The district court's summary dismissal of Mr. Creech's Petition has denied him access to discovery of the State's information and handling of the wrongful death suit, which would have been necessary to pursue his claims.

(R., p.931.) Predictably, Mr. Kehne did not raise any claims of his own ineffective representation of Tom. (R., pp.931-34.)

After unsuccessfully moving to withdraw his guilty plea and following this Court's affirmance of Tom's judgment and conviction, *State v. Creech*, 105 Idaho 362 (1983), Tom sought state post-conviction relief but was denied. *See State v. Creech*, 109 Idaho 592 (1985). Tom then filed a petition for Writ of Habeas Corpus in the federal district court which ultimately led to sentencing relief from the Ninth Circuit Court of Appeals on three separate grounds, *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), only one of which was reversed by the United States Supreme Court. *See Arave v. Creech*, 507 U.S. 463 (1993).

Returning to the trial court for resentencing, Tom was *again* represented by Mr. Kehne, along with co-counsel, John Adams. (R., pp.876-913.) Just as before, Mr. Kehne and Mr. Adams were swamped with an "extreme workload," which included two other capital cases, one of which paid twice what the attorneys received for Tom's trial and was therefore prioritized over the other cases. (R., pp.976-77, 979, 982-83.) Mr. Kehne felt financially constrained in his work for Tom because ACPD funded his investigations, and could terminate his contract without cause and hold him "personally liable" for expenses in Tom's case that ACPD did not endorse. (R., p.985.)

On April 21, 1994, Tom renewed his motion to withdraw his guilty plea in the trial court, which was again denied. In the meantime, despite having more than two-and-a-half years to prepare for his resentencing, counsel did not hire an expert until 18 months after their appointment. (R., pp.987, 989.) When the resentencing hearing began in March of 1995, counsel had no report from their one and only expert and had failed to share any discovery with the State—despite a court order requiring that expert disclosures and discovery be completed a year prior. (R., pp.997-98, 1002.) Counsel made no efforts to seek mitigation materials until the eleventh hour, and though they were completely unprepared, they went forward with the sentencing hearing without asking for a continuance. (R., pp.968, 1004.) Mr. Kehne and Mr. Adams presented four witnesses, who all testified briefly and superficially, and offered almost none of the available mitigating evidence described above. (*See supra, Tom's Background and History*; R., pp.993-98, 1112.) Despite describing Tom's mother as a "necessary and material witness," counsel did not even put her on the stand and presented no substantive evidence of Tom's organic brain damage. (R., p.982.)[4] This inexplicable failure occurred in spite of the fact that Mr. Kehne was personally aware of Tom's brain damage and had Dr. Stoner's 1981 report opining that "evidence of organic brain disorder" was "strong and should be examined further by a qualified examiner." (Conf. Exs., pp.149-53; R., pp.841-42.) Counsel also had received expert advice that "showing a brain injury in Creech would be a simple matter," yet they had obtained no follow-up reports and presented no such evidence at the resentencing hearing. (R., p.1117.)

Counsel failed to obtain any neuropsychological testing or imaging, despite clear signs of mental illness and brain damage. They retained a clinical psychologist, Dr. Steven Brown, but he was not trained or licensed in either neuropsychology or neurology, was unqualified to investigate brain damage, did not administer any neuropsychological tests, and had never testified at a capital sentencing. (R., p.991.) Moreover, counsel inexplicably put Dr. Brown on the stand to testify that Mr. Creech was a psychopath—an aggravating, not mitigating, opinion. (R., pp.1054, 1178, 1203, 1243.) Counsel also elicited testimony from Dr. Brown that Tom scored higher than 100 percent of inmates on a test measuring callousness and lack of remorse, and that there was a biological component to psychopathy, which had the aggravating effect of suggesting there was no chance

[4] Dr. John Stoner's testimony from the 1981 sentencing hearing was part of the 1995 resentencing record (R., p.831), but Dr. Stoner's brief 1981 testimony was inadequate to present a complete picture of Tom's brain damage.

of rehabilitation. (R., pp.1054, 1626-27.) Despite available evidence that Tom's brain damage could be the cause of behaviors Dr. Brown attributed to psychopathy, counsel offered no such evidence to the court.

Counsel similarly failed to investigate indications that Tom had mental health issues and diagnoses, even though those concerns and information about his hospitalization for a suicide attempt were documented in the PSI counsel had 16 months prior to resentencing. (Conf. Exs., pp.25, 35, 153.) Counsel never sought to have Tom evaluated by qualified experts and did not conduct the kind of in-depth family interviews that would have helped determine how Tom's childhood mental health issues may have affected his development. (R., pp.989, 1889, 1891.) Even when they did speak to Tom's ex-wife, counsel discussed only her travel arrangements but did not bother to ask her about any of the valuable mitigation information she could have shared. (R., pp.1893-95.) Enormous amounts of mitigation information were available to counsel, but they conducted almost no mitigation investigation at all, failed to seek or obtain records from Tom's former attorneys, family members, and institutions such as prisons and hospitals, and never hired a mitigation specialist. (R., pp.1893, 1960.)

In addition, counsel did not prepare their expert to testify at the resentencing, and failed to provide their retained psychologist with relevant documents such as military evaluations, state hospital records, and numerous psychological evaluations. (R., pp.1010, 1018, 1049, 1960.) Counsel did not even explore or attempt to explain the limited mitigating material included in the PSI. (R., pp.489-627.) As a result of counsel's many omissions and lack of investigation, the trial court was not presented with evidence of Tom's brain damage, his extensive family and personal history of mental illness, violence, child abuse, drug and alcohol abuse, and abject poverty. Instead, counsel presented aggravating evidence and inaccurately portrayed Tom as an incurable psychopath. Most of the aggravating evidence came from Tom's testimony in an earlier Valley County case, which was included in the PSI. Counsel did not challenge or counter that testimony with facts showing it was highly unreliable and objectively suspect, and at minimum, almost all of the "106 to 107" murders Tom testified about were uncorroborated.

It was under these circumstances, having heard next to nothing in mitigation but having read Tom's testimony of killing "106 to 107" people, that on April 17, 1995, the trial court sentenced Tom to death again. In his sentencing remarks, the trial judge spoke to the "possibility of a biological predisposition," but noted one had not been proven, as no neuropsychological testing had been done to explore brain damage. (R., p.2092.)

After sentencing, ACPD August Cahill represented Tom in post-conviction proceedings and raised some claims of ineffective assistance of original trial counsel—not resentencing counsel—but those claims were dismissed by the trial court. (R., pp.895-96, 936-44.) For his part, Mr. Cahill had never handled a capital post-conviction case and was juggling Tom's case along with a crushing ACPD caseload. (R., pp.507, 952-53, 958-61, 2070.) Like Mr. Kehne, Mr. Cahill had a conflict of interest based on ACPD's representation of witnesses adverse to Tom. (R., pp.966-67, 2072-73, 2075.) Mr. Cahill himself had even appeared as counsel for Tom in 1981. (R., p.179.) Because of this, Tom unsuccessfully objected to the ACPD representing him in post-conviction proceedings. (R., pp.963-64.)

The inadequate representation by counsel of Tom did not end with resentencing counsel and continued through his resentencing post-conviction litigation. Mr. Cahill waited 16 months before realizing he was unprepared for Mr. Creech's post-conviction evidentiary hearing and requested a continuance after the hearing had already begun. (R., pp.2077-78.) Mr. Cahill admitted that he failed to prepare and follow up on red flags, and that he failed to gather a host of important documents, including birth records, psychological records from childhood, school records, genealogical records, military records, and legal records from when Tom was a juvenile. (R., pp.604, 2083-85.) Cahill acknowledged having no tactical or strategic reason for not developing an ineffectiveness claim against Mr. Kehne and Mr. Adams for their failure to develop a coherent sentencing strategy. (R., p.956.) He never hired a mitigation specialist but instead used a fact investigator with no experience in mitigation and no formal training of any kind. (R., pp.2075, 2087-88.) Repeating all of the failures of resentencing counsel, he never hired experts to evaluate Tom or review his medical and mental health history. (R., pp.1949, 2087-88.) Mr. Cahill admitted that he failed "to do the very things" he faulted trial counsel for not doing, and he failed to corroborate what little mitigating evidence was presented. (R., pp.604, 2087-88.) Inexplicably, even while challenging the performance of Tom's previous ACPD attorneys, Mr. Cahill retained those very same attorneys to serve as his experts on the legal standard of care against which their representation of Tom should be assessed. (R., pp.541-42, 892, 956, 969, 971.)

Ultimately, the petition for post-conviction relief was filed on Mr. Creech's behalf on May 9, 1995, followed by a second petition on May 10, 1996. Mr. Cahill's post-conviction claims largely omitted and failed to develop resentencing counsel's failures to present mitigation (as described above) and were filed as brief, vague, perfunctory statements collectively amounting to eight pages without even a single exhibit attached in support. (R., pp.936-44, 973-74.) He likewise failed to introduce even a single exhibit at the evidentiary hearing, nor did he call any witnesses to discuss psychological tests or the connection between Tom's behaviors and his brain impairment. (R., p.2090.) This Court observed that Mr. Cahill "never stated what was not provided to the sentencing court for consideration." *State v. Creech*, 132 Idaho 1, 18 (1998). Mr. Cahill called only two lay witnesses at the evidentiary hearing, but their testimony was ill-prepared and both witnesses were incoherent and psychologically impaired. (R., pp.515-25.) It is no surprise that the district court denied Tom's post-conviction relief, and that this Court subsequently affirmed that decision on appeal. *Id.*

In summary, several categories of mitigation described above were never advanced in state court at all, including Mr. Creech's mother's abandonment of her children, violent altercations between Mr. Creech's parents, rampant alcoholism in the family, poverty, and Mr. Creech's father's physical abuse of his children. Other categories of mitigation received only cursory mention in state court, such as the family history of depression and Mr. Creech's childhood delusions, head injuries, self-mutilation and suicide attempts, and his repeated hospitalizations for mental illness.

On August 19, 1998, this Court affirmed Mr. Creech's conviction and death sentence, along with the district court's denial of post-conviction relief. *See State v. Creech*, 132 Idaho 1 (1998). Mr. Creech filed an additional petition for post-conviction relief, which was dismissed by the trial court and affirmed by this Court on appeal, without consideration of the merits. *See Creech v. State*, 137 Idaho 573 (2002).

Meanwhile, a federal habeas proceeding was making its way through federal district court and Tom was ultimately denied relief. He appealed that decision to the Ninth Circuit and was denied relief. *See Creech v. Richardson,* 59 F.4th 372 (9th Cir. 2023).

On June 29, 2022, Mr. Creech's counsel at the Federal Defender Services of Idaho, Capital Habeas Unit (CHU), filed a Petition for Post-conviction Relief (Petition) within forty-two days of the United States Supreme Court's decision in *Shinn v. Ramirez.*[5] The CHU also asked the district court to appoint the State Appellate Public Defender (SAPD) to represent Mr. Creech in the post-

[5] 142 S. Ct. 1718 (2022). *Shinn* was decided on May 23, 2022. *Id.*

conviction proceeding, which it did. Shortly thereafter, the SAPD filed a Notice of Need to File Amended Petition and For Additional Time (Notice), supported by an affidavit. The State objected to the Notice, moved for immediate dismissal, and asked for more time to file an Answer. The district court set briefing deadlines on the State's motion for immediate dismissal, and following argument, granted the State's motion, summarily dismissing Mr. Creech's Petition. This timely appeal follows.

## ISSUES

I. Whether the District Court Erred by Summarily Dismissing Mr. Creech's Timely Petition?

II. Whether the Ineffectiveness of Mr. Creech's Initial Post-Conviction Counsel Excuses His Failure To Timely Raise Trial IAC Claims?

## STANDARD OF REVIEW

Whether the summary dismissal of a successive petition for post-conviction petition is proper is a question of law, reviewed de novo. *Dunlap v. State,* 159 Idaho 280, 292 (2015); *Fields v. State,* 155 Idaho 532, 534 (2013). A capital petitioner must raise known or reasonably knowable challenges to his conviction or sentence within forty-two days of judgment. *Abdullah v. State,* 169 Idaho 711, 720-21 (2021). But claims outside the forty-two-day period are still cognizable so long as they are raised within a reasonable time of their discovery, which is generally forty-two days after a petitioner knows of—or reasonably should have known of—the claim. *Id.*; *Fields,* 155 Idaho at 535; *Pizzuto v. State,* 149 Idaho 155, 160 (2010). Summary dismissal of a petition for post-conviction relief is improper when the facts, viewed in the light most favorable to the petitioner, would entitle him to relief if true. *Abdullah,* 169 Idaho at 719; *Dunlap,* 159 Idaho at 295. This Court applies the same standard as the trial court, and if a genuine issue of material fact is shown, an evidentiary hearing is required. *Id.*

Although this Court has characterized the failure to timely raise claims under Idaho Code § 19-2719 as a *waiver* of those claims, it would be more accurate to characterize those claims as having been *forfeited*. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (recognizing waiver as an intentional relinquishment of a known right, while forfeiture is the failure to timely assert a right). This is especially true in Mr. Creech's case where he did not intentionally relinquish a *known* right, but was the victim of deficient lawyers who failed to timely assert his rights. To the extent this Court's consideration of claims under Idaho Code § 19-2719(5) has been contingent on the assumption that claims not raised within the forty-two-day timeframe were waived, this Court should reconsider those decisions based on forfeiture, not waiver. Forfeiture does not extinguish a claim, but waiver does. *Olano,* 507 U.S. at 733; *State v. Perry,* 150 Idaho 209, 225 (2010).

## ARGUMENT

I.

### Mr. Creech's Petition is Timely and Should Not Have Been Summarily Dismissed By the District Court

A. Introduction

Mr. Creech's Petition was filed within forty-two days of the United States Supreme Court's decision in *Shinn v. Ramirez,* 142 S. Ct. 1718 (2022). As a result, the Petition was timely and the district court's order summarily dismissing the Petition as time-barred is erroneous.

B. The District Court Erred by Summarily Dismissing Mr. Creech's Petition as Untimely

The district court erred when it dismissed Mr. Creech's Petition as untimely and rejected the United States Supreme Court's decision in *Shinn* as a triggering event for the forty-two-day deadline to file a successive petition under Idaho Code § 19-2719(5). (R., pp.2685-86.) Though a capital petitioner must generally pursue post-conviction relief within forty-two days of the entry of judgment, the rule is not without exception. *See* I.C. § 19-2719 (3), (4). A capital petitioner can raise claims outside this window so long as the claims are brought within a reasonable time after a petitioner knows, or should have known, about the claims. *See, e.g., Pizzuto v. State,* 146 Idaho 720, 727 (2008) (holding that absent extraordinary circumstances, a reasonable time for filing a capital post-conviction claim is forty-two days from when the claim is known or reasonably should be known). Because Mr. Creech filed his Petition within 42 days of *Shinn,* it was timely and the district court's order summarily dismissing his Petition was in error.

1. The Events Leading to the Court's Decision in *Shinn v. Ramirez* Supports the Argument That the Decision is a Triggering Event for the Forty-Two-Day Deadline to File a Successive Petition

The United States Supreme Court's decision in *Shinn v. Ramirez* newly prevents petitioners from developing facts in federal court to support state trial ineffective assistance of counsel (trial IAC) claims if those facts were not presented in state court due to the ineffective assistance of initial state post-conviction counsel (post-conviction IAC). *Shinn,* 142 S. Ct. at 1718. The reason the *Shinn* decision is a triggering event for § 19-2719's forty-two-day filing deadline requires a brief review of what led to that decision.

Prior to 2012, with few exceptions, federal courts could not consider a habeas petitioner's trial IAC claims if those claims had not been timely presented in state court. Those claims were procedurally defaulted and only if a petitioner could show "cause for the default and prejudice from a violation of federal law" would the federal courts review a claim not first presented in state court. *Martinez v. Ryan,* 566 U.S. 1, 10 (2012). That was true even if post-conviction counsel's incompetence or errors led to the default because petitioners were held responsible for their lawyers' deficiencies. *Coleman v. Thompson,* 501 U.S. 722, 752-53 (1991) (holding cause for procedural default must be something external and unattributable to petitioner, and attorney ignorance or inadvertence is not cause because the attorney is the petitioner's agent). During that era, the Supreme Court did not recognize post-conviction IAC as "cause" for defaulted trial IAC claims, and once those claims were lost, they were essentially lost forever. *Id.* at 8.

That changed in 2012 when the United States Supreme Court decided *Martinez v. Ryan. Id.* at 4-7. *Martinez* held that where the failure to timely raise a trial IAC claim in state court was due to ineffective or absent post-conviction counsel, that could "establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at 9 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial").

Though *Martinez* opened the door for federal habeas petitioners to resurrect meritorious trial IAC claims in federal court, it is an equitable rule not a constitutional one. *Id.* at 14, 16. *Martinez* vindicates the Sixth Amendment right to counsel by ensuring that a defendant has at least *one meaningful opportunity* to be heard after receiving ineffective assistance of counsel twice before (once at trial and again in post-conviction). "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system," and "the foundation for our adversary system." *Id* at 12. By allowing the federal court to hear a trial IAC claim when deficient initial post-conviction counsel (or the absence of counsel) causes the procedural default of a trial IAC claim acknowledges the initial post-conviction proceeding "may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.*

Two years after *Martinez,* the Ninth Circuit Court of Appeals allowed a petitioner to develop facts in federal court to support his cause and prejudice arguments under *Martinez* and, if successful, concluded "a federal court may hear this new claim **de novo**." *Dickens v. Ryan,* 740 F.3d 1302, 1320-21 (9th Cir. 2014) (en banc) (citation omitted, emphasis added). The *Dickens* decision recognized that "an inadequately supported claim that was decided on the merits in state court can become a 'new' procedurally defaulted claim on federal habeas review if the petitioner tries to offer new evidence that changes the factual basis of the claim such that it has become 'fundamentally altered.'" *Row v. Miller*, 591 F.Supp.3d 778, 782 (D. Idaho Sept. 30, 2021) (quoting *Dickens,* 740 F.3d at 1318-19).

In combination, *Martinez* and *Dickens* resurrected Mr. Creech's trial IAC claims in federal court. He then reasonably relied on this precedent to diligently pursue the factual development of his trial IAC claims. Mr. Creech could not have known the Supreme Court would clarify controlling federal law to prevent federal courts from considering newly developed facts to support the merits of his trial IAC claims under *Martinez*. *Shinn* is a substantial clarification of the law that had been applied for the past decade by both the Ninth Circuit Court of Appeals and the Idaho Federal District Court to the development of factual support for Mr. Creech's *Martinez* claims.

This Court has recognized that United States Supreme Court decisions can trigger post-conviction filing deadlines. *See, e.g., Pizzuto,* 146 Idaho at 727 (recognizing intellectual disability statute triggered forty-two-day deadline for petitioner to file successive post-conviction petition where statute was prompted by United States Supreme Court decision rendering intellectually disabled individuals ineligible for the death penalty); *Johnson v. State,* 162 Idaho 213, 225-26 (2017) (recognizing United States Supreme Court decision rendering mandatory fixed life sentences for juveniles unconstitutional and requiring consideration of a child's youth and circumstances before imposing a fixed life sentence was triggering event for timely successive petition); *Windom v. State,* 162 Idaho 417, 422-24 (2017) (recognizing United States Supreme Court decision prohibiting fixed life sentences for children and requiring consideration of child's youth and circumstances as triggering event for filing timely claim that child's fixed life sentence violated Eighth Amendment). *Shinn* represents such a decision. Mr. Creech does not claim *Shinn* creates or eliminates a new cause of action, but simply that *Shinn* triggered the state post-conviction filing deadline for his Petition and its factual development. Because Mr. Creech's Petition was filed within forty-two days of the *Shinn* decision, it is timely and consistent with the *Shinn* decision by seeking state court fact-finding on his trial IAC claim, rather than asking the federal court to bypass state court and conduct its own fact-finding. Accordingly, the district court's decision summarily dismissing Mr. Creech's successive petition on pure timeliness grounds was erroneous.

2. Other Courts have Recognized the Primacy of State Courts to Address State Time Bars Post-*Shinn*

Because of the relative newness of the *Shinn* decision, few courts have addressed its impact on state court post-conviction statutes of limitations or successiveness bars. There are indications other courts are carefully considering whether to allow further exhaustion in state courts and a few courts have already addressed the issue of whether to permit successive petitions that would otherwise be time-barred, recognizing the primacy of state courts to address the issue post-*Shinn*.

Last year, the Oregon Court of Appeals reversed a judgment denying a state post-conviction petitioner relief and remanded the case, relying in part on the *Shinn* decision. There, the Oregon courts recognized the importance of *Shinn*, and the fact that the new interpretation likely signals that state post-conviction will be a petitioner's final and only opportunity to litigate constitutional claims. In *Frost v. State*, 514 P.3d 1182 (Or. Ct. App. 2022), the state appellate court reviewed a post-conviction evidentiary hearing held without the petitioner. *Id.* at 1185. The state had argued that the petitioner's absence was not preserved for appellate review and that any error was not "plain." *Id.* Addressing the constitutional dimension of the error committed by trial counsel during the guilty plea, which was the subject of the evidentiary hearing, the court quoted *Shinn*, stating that "because there is no [federal] constitutional right to counsel in state postconviction proceedings, a prisoner ordinarily must bear responsibility for all attorney errors during those proceedings." *Frost*, 514 P.3d at 1188. However, the court noted that in reviewing his state claims, "at least as far as any opportunity for substantive relief for petitioner's post-conviction counsel's erroneous understanding of [state statute] or failure to preserve an appellate argument, state courts are likely the end of the line." *Id.*

The Superior Court of Pennsylvania has also commented that *Shinn* changes the groundwork from which courts ought to analyze state post-conviction review. In *Commonwealth v. Debois*, 281 A.3d 1062 (Pa. Super. Ct. 2022) (unpublished), the court considered the petitioner's claim that his rights were violated when he entered a guilty plea. He was originally appointed post-conviction counsel, and his counsel subsequently filed a "no-merit letter and a motion to withdraw as counsel." *Id.* at **1. When reviewing whether the petitioner's appeal of the court's subsequent dismissal order and denial to amend his petition was meritless, the court noted that the state trial court should have at least adequately addressed the petitioner's request for leave to amend his petition in accordance with the liberal standard established by statute. *Id.* at **6. The court noted that "an affirmance in this instance would effectively close off any avenue for additional state post-conviction collateral review. That result would **forever** cut off any opportunity for Appellant to create an evidentiary record for his ineffective claims in light of [*Shinn*.]" *Id.* at n.6 (emphasis added).

And finally, in *Powers v. State,* ___ So.3d ____, 2023 WL 3748557 (Miss. 2023), several justices of the Mississippi Supreme Court noted that there is a crucial distinction between state post-conviction matters and federal habeas corpus claims, in that there is a "difference of kind—not only degree." *Id.* at *73 (dissenting, J. Kitchens). The dissenting justices emphasized that federal time bars and procedural defaults are not applicable to claims brought under Mississippi's Post-Conviction Collateral Relief Act, with the critical difference being that the "federal court may review the claim based **solely** on the state-court record." *Id.* (citing *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (emphasis added)). This means that it is the state post-conviction attorney who must engage in "intensive factual investigation of the petitioner's claims," recognizing the "state constitutional right of death-sentenced petitioners […] to the effective assistance of post-conviction counsel." *Id.* (citing *Grayson v. State*, 118 So. 3d 118, 126 (Miss. 2013)).

Thus, those state courts that have addressed post-conviction dismissals post-*Shinn*, are recognizing that the *Shinn* decision represents a sea-change and has fundamentally altered a post-conviction petitioner's opportunity to *ever* vindicate their constitutional rights. Some federal courts have reached a similar conclusion.

In response to fresh litigation in state courts triggered by *Shinn,* some federal courts have been willing to issue orders to "stay and abey" federal habeas corpus litigation in capital cases under *Rhines v. Weber*, 544 U.S. 269, 273-77 (2005). *Rhines* grants federal district courts the authority to stay and hold petitions for habeas corpus relief in abeyance while the petitioner presents unexhausted claims to the state court without losing their right to federal habeas review. "Exhaustion" in federal court requires that a petitioner fairly present the claims to the highest available state court and must give that court the opportunity to address and resolve the issues presented. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (relying on *Picard v. Connor*, 404 U.S. 270, 275 (1971)). If a federal claim is unexhausted it will be procedurally defaulted, even where "state procedural rules would not bar the petitioner from bringing the claim in state court." *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (en banc). However, as stated elsewhere in this brief, where claims of ineffective assistance of trial counsel "must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan*, 566 U.S. 1, 17 (1012); *see also Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

For example, in *Guevara-Pontifes v. Baker*, 2022 WL 4448259 (D. Nev., Sept. 23, 2022), the federal district court issued a stay and abey order under *Rhines* even where the Nevada Supreme Court had already expressly declined to follow the *Martinez* exception to excuse state procedural bars in non-capital cases. *Id.* at *5; *Brown v. McDaniel*, 331 P.3d 867, 870-75 (Nev. 2014). The court acknowledged that the petitioner's only basis for "cause" to overcome a procedural default of his unexhausted claims in federal court was his overall reliance on ineffective assistance of both trial and post-conviction counsel. *Id.* However, there the court reasoned that the petitioner was still afforded the opportunity to argue to the Nevada Supreme Court, like Mr. Creech here, that "in light of the Supreme Court's decision in [*Shinn*], it should overrule [its precedent] and permit the use of the principles set forth in *Martinez* for purposes of overcoming state procedural bars." *Id.*

Similarly, in *Irish v. Cain*, No. CV 15-480, 2023 WL 2564397 (W.D. La. March 16, 2023), the federal habeas corpus court admitted that the legal questions of whether a claim would be procedurally barred under state law was ultimately an issue for the state courts to decide. The *Irish* court considered the legal issues presented by the petitioner, along with the gravity of its capital nature, and refused to conclude the petitioner's claims would be procedurally barred under *Shinn*. *Id.* at *2. Holding "in the interest of 'federal-state comity,'" it was appropriate for the state court of Louisiana to have the opportunity to weigh in on the procedural disputes. *Id.* at *4. It also approved of the petitioner's argument that the state courts "may be interested in considering the adequacy of post-conviction procedures post-[*Shinn*]." *Id.* This would preserve the underlying premise behind the exhaustion doctrine, which is "designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Id.*

Just as Mr. Creech has argued here, courts addressing state time bars post-*Shinn* have recognized it is primarily for the state courts to decide what issues will be procedurally barred under state statute, and federal courts will have to abide by those decisions.

3. *Shinn's* Deference to State Courts to Decide the Merits of Claims Arising from Criminal Proceedings Supports Recognition of *Shinn* as a Triggering Event for Successive Capital Post-Conviction Relief

Mr. Creech maintains recognition of *Shinn* as a triggering event for the forty-two-day filing deadline to seek successive state post-conviction relief is consistent with the Court's reasoning in *Shinn*. *Shinn* made clear the Court's preference for state courts to adjudicate trial IAC claims, not federal courts, 142 S. Ct. at 1739, and placed a premium on state courts enforcing their own criminal law, thereby limiting federal intrusion on state sovereignty. *Id.* at 1730-31. Importantly, *Shinn* did **not** overrule *Martinez*. Recognizing "that trial-ineffective-assistance claims are uniquely important," *Shinn*, 142 S. Ct. at 1737 (citing with approval *Martinez*, 566 U.S. at 12–13), *Shinn* still forgives Mr. Creech's initial failure to raise his trial IAC claim in state court but limits federal review to the facts and evidence presented in state court.

Prior to *Shinn,* this Court refused to allow post-conviction counsel's ineffectiveness to excuse a petitioner's failure to raise trial IAC in a *non-capital* case. *See Johnson v. State,* 162 Idaho 213, 226-27 (2017). Specifically, in *Johnson,* this Court was asked to overrule *Murphy v. State,* 156 Idaho 389, 394-95 (2014),[6] and find that post-conviction IAC in a *non-capital* case is a "sufficient reason" for failing to raise a trial IAC claim in an initial petition, and thereby allow a

[6] *Murphy* held that because the Uniform Post-Conviction Procedures Act (UPCPA) does not guarantee the right to counsel, post-conviction IAC does not constitute "sufficient reason" to permit a successive petition. 156 Idaho at 394-95.

successive petition under Idaho Code § 19-4908.[7] This Court declined the invitation: "[W]e decline to apply *Martinez* in our state courts. *Murphy* remains good law. *Martinez* simply means such claims will not be procedurally defaulted in federal habeas proceedings ***and the federal court will have to address those claims on the merits***." *Johnson,* 162 Idaho at 228 (emphasis added)(footnote & citations omitted).

The *Johnson* decision assumed the federal courts would address the merits of procedurally defaulted trial IAC claims under *Martinez.* This was also Mr. Creech's understanding, i.e., that he would be permitted to develop facts and litigate the merits of his trial IAC claims in federal court. Given this understanding, Mr. Creech did not return to state court after *Martinez* but instead continued litigating his claims in federal court. The *Shinn* Court announced a clear policy against this approach and a clear preference for state courts to address issues arising from state criminal proceedings on their merits in the first instance. Though *Johnson* assumed the merits of trial IAC claims would be addressed by the federal courts, that assumption has been destroyed and the federal courts have now said those claims must first be developed in state court. For these reasons, Mr. Creech maintains state court consideration of the merits of his trial IAC claims is consistent with *Shinn* and the primacy of state courts to resolve issues arising from state criminal proceedings. Accordingly, the district court erred by summarily dismissing his trial IAC claims and this Court should remand his case for consideration of his trial IAC claims on their merits.

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[7] This provision precludes successive petitions in non-capital cases "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." I.C. § 19-4908.

## II.

## The Ineffectiveness of Mr. Creech's Initial Post-Conviction Counsel Excuses His Failure To Timely Raise Trial IAC Claims

### A. Introduction

The district court's order summarily dismissing Mr. Creech's Petition did not address his argument that his post-conviction counsel's ineffectiveness excused his failure to timely raise trial IAC claims at the first opportunity. (R., pp.2683-89). This Court has recognized that when an issue is presented, supported by argument and authority, and noticed for hearing below, an adverse ruling is not required to preserve the issue for appellate review. *See State v. Miramontes,* 170 Idaho 920, 924-25 (2022). Because he has satisfied these requirements, this issue is preserved for appeal and Mr. Creech maintains his post-conviction counsel's ineffectiveness excuses his failure to timely assert the trial IAC claims which are the subject of his Petition in this case. (R., pp.2496-97, 2504-13, 2727-29; 11/30/22 Tr., *passim*.)

### B. Mr. Creech Was Entitled to Competent Counsel at Trial and Initial Post-Conviction

Mr. Creech was entitled to both effective trial and post-conviction counsel, but he received neither. Numerous conflicts of interest among his counsel, inadequate advisement of his rights and defenses, a near total lack of communication and trust between Mr. Creech and his counsel, minimal investigation and preparation, and a meager, incoherent presentation of mitigation evidence wholly failed to afford Mr. Creech effective assistance of trial counsel. In particular, counsel's failure to develop and present evidence of Mr. Creech's brain damage, emotional trauma, and other mental health issues, undermine confidence in his death sentence and violates the most fundamental dictates of the Supreme Court's Eighth Amendment jurisprudence: that capital sentencers "be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 246 (2007) (citing Supreme Court precedent dating back to 1976 for this foundational principle).

Trial counsel's shortcomings went unaddressed in state court—both at the time of sentencing and in post-conviction proceedings—due to the compounding injustice of Mr. Creech receiving both ineffective trial counsel **and** ineffective post-conviction counsel. Not only was Mr. Creech denied effective representation at trial, but those charged with catching and correcting counsel's trial errors also failed him in the very same way. Mr. Creech's first post-conviction attorney was one of the attorneys who inadequately represented him at trial, and not surprisingly, failed to raise a single claim of his own ineffectiveness. Mr. Creech's first two post-conviction attorneys were both overburdened and impaired by conflicts, and neither adequately investigated nor presented compelling mitigation evidence on Mr. Creech's behalf. They failed to gather essential documents, hire necessary experts, or hire a mitigation specialist. Mr. Creech's post-conviction counsel inadequately showed that trial counsel (including themselves) had failed to present mitigation, and never even articulated what evidence and information had not been provided to the sentencing court. *State v. Creech*, 132 Idaho 1, 18 (1998).

As explored more thoroughly below, Idaho's Constitution guarantees its citizens greater right to counsel protections than the Sixth Amendment, resulting in a less onerous standard for demonstrating trial IAC. In addition, Idaho guarantees a capital post-conviction petitioner the right to effective post-conviction counsel. Where Mr. Creech was denied both, this Court should excuse his failure to adequately raise his trial IAC claims in his initial petition and remand his case for consideration on the merits.

It bears emphasizing that Mr. Creech's Petition is *not* contingent on this Court concluding he has the right to appointed post-conviction counsel. As the *Martinez* Court explicitly recognized, initial state post-conviction proceedings may be insufficient to consider a substantial claim of trial IAC *either* because the state court did not appoint post-conviction at all, *or* the court appointed ineffective post-conviction counsel. *Martinez,* 566 U.S. at 14.

1. Idaho's Constitution Guarantees Idaho Citizens a Broader Right to Counsel Than the Sixth Amendment

Criminal defendants enjoy a greater right to counsel in Idaho than the Sixth Amendment guarantees. Adopted in 1890, article I, section 13 of Idaho's Constitution explicitly recognizes that "[i]n all prosecutions, the party accused shall have the right . . . to appear and defend in person and with counsel." IDAHO CONST. art. I, § 13. However, Idaho's recognition of the right to counsel precedes the state Constitution—and statehood—by decades, lending support for a broader right to counsel in Idaho than is guaranteed by the Sixth Amendment. *See State v. Clarke,* 165 Idaho 393, 397 (2019) (construing Idaho constitutional provisions in light of the principles and law existing at the time the constitution was adopted). This Court has recognized that even though the Sixth Amendment and the article I, section 13 right to counsel are superficially similar, "the Idaho constitution potentially *can* be read to afford a broader right to effective counsel than does the federal Constitution." *Aragon v. State,* 114 Idaho 748, 761 (1998) (citations omitted, emphasis in original); *State v. Newman*, 108 Idaho 5, 10 n.6 (1985) (recognizing federal and state constitutions derive power from independent sources and state courts are free to find their state constitutional provisions provide greater protection than the federal constitutional provisions, even if the provisions read the same).

This Court's primary goal when construing Idaho's Constitution is "to determine the intent of the framers." *Clarke,* 165 Idaho at 397 (internal quotations and citations omitted). Although the best source of the framers' intent is the debates at the constitutional convention, the right to counsel provision of article 1, section 13, was adopted without debate. Without convention debates to inform the framers' intent, courts turn to "practices at common law and the statutes of Idaho when our constitution was adopted and approved by the citizens of Idaho." *Id.* That is because many of our framers "were outstanding lawyers in their day," and the courts "presume that they knew and acted on such prior and contemporaneous interpretations of constitutional words which they used." *Id.*

In relevant part, Idaho's 1864 Territorial Act provided that "[i]n a criminal action the defendant is entitled . . . [t]o be allowed counsel, as in civil actions, or he may appear and defend in person, or with counsel." *See* Act of Feb.1, 1864, ch.2, § 10, 1863-64 Idaho (Terr.) Laws. Other provisions required an arrestee charged with committing a public offense be "immediately inform[ed]" by the magistrate "of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." *Id.* Ch. 3, § 143. The magistrate was required to give an accused "reasonable time to send for counsel," and upon an accused's request, "require a peace officer to take a message to such counsel . . . as a defendant may name," without delay or fee. *Id.* Ch. 3, § 144. Upon the appearance of counsel, the magistrate could then examine the case. *Id.* Ch. 3, § 145. And if a defendant was brought before the court for "arraignment without counsel, he shall be informed by the court that it is his right to counsel before being arraigned, and shall be asked if he desires the aid of counsel." *Id.* Ch. 5, § 267.

When the territorial provisions were amended in 1880, the right to counsel was expanded to include the appointment of counsel for an indigent accused. "Whenever upon the trial of a person upon an indictment it shall appear to the satisfaction of the Court that the accused is poor, and unable to procure the services of counsel, the court *may* appoint counsel to conduct the defense of the accused, for which service such counsel shall be paid out of the county treasury, upon the order of the Judge of the Court, the same sum allowed by law to the District Attorney in the same case." *See* Act of Feb.10, 1881, Creating the Office of District Attorney for Each of the Organized Counties of Idaho Territory, and Defining their Duties and Compensation, § 6, ¶ 9 (emphasis added), 1881 Territorial Laws.

By 1887, the Idaho Territory had solidified the right to appointed counsel: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court *must* assign counsel to defend him." 1887 Title VI, Ch.1 § 7721 (emphasis added). This was the state of Idaho's law and statutes when the constitutional convention was in session in July of 1889. *Toncray v. Budge,* 14 Idaho 621, 95 P. 26, 34 (1908) ("We must now determine the meaning of the language used in this section in the light of conditions as they existed, at the time the constitutional convention was in session, in July, 1889.").

In addition to this long-standing statutory recognition of the right to counsel in the territory of Idaho, this Court recognized the state constitutional and statutory right to appointed counsel existed seventy-six (76) years before the right was recognized under the Sixth Amendment in *Gideon v. Wainwright.*[8] *See Abercrombie v. State,* 91 Idaho 586, 589 (1967) (recognizing that "[e]ven before Idaho had been admitted to the Union our legislators enacted legislation relating to

[8] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

the right to counsel." (citations omitted)). And Idaho's statutory guarantee of the right to appointed counsel "predated by half a century the United States Supreme Court's pronouncement of the similar federal rule in *Johnson v. Zerbst.*" *Abercrombie,* 91 Idaho at 589 (citing *Johnson v. Zerbst,* 304 U.S. 458 (1938)).

As early as 1911, the Idaho Supreme Court recognized the constitutional and statutory right of an accused to counsel in Idaho. *Ex parte Dawson,* 20 Idaho, 178, 117 P.696, 699 (1911). That decision was not a fluke. Subsequent decisions of this Court recognized the state constitutional and statutory right to counsel in Idaho. *See, e.g., State v. Montroy,* 37 Idaho 684, 217 P. 611, 614 (1923). "It is the public policy of this state, disclosed by constitutional guaranties as well as by numerous provisions of the statutes, to accord to every person accused of crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial. In the case of indigent persons accused of crime, the court must assign counsel to the defense at public expense (C. S. § 8858)[.]" *Id.* at 614.

This Court also recognized the right to counsel in Idaho as an essential constitutional right that must be part of a waiver in order for a guilty plea to be knowingly, intelligently, and voluntarily entered. *State v. Lawrence,* 70 Idaho 422, 426 (1950); *see also State v. Thurlow,* 85 Idaho 96, 102–03 (1962) (recognizing Idaho Code § 19-1512 requires the court to inform an accused of his right to counsel prior to arraignment, and if he wants the aid of counsel but is unable to employ counsel, the court must assign counsel to defend him). Unless an accused is informed of his right to appointed counsel, he may be unaware of that right and would be denied "the opportunity to assert defenses to the charge in violation of his right to due process." *Thurlow,* 85 Idaho at 103. These decisions preceded the United States Supreme Court's decision in *Faretta v. California,* 422 U.S.

806 (1975), which recognized the right to counsel as an essential constitutional right an accused must knowingly, intelligently, and voluntarily waive in order to represent himself. *Id.* at 835.

The recognition of a state constitutional right was not extinguished or superseded by the Sixth Amendment's application to the states. Even after the United States Supreme Court recognized the Sixth Amendment right of individuals who are indigent to be represented by counsel in state criminal prosecutions in 1963 in *Gideon,* 372 U.S. at 342-44, the Idaho Supreme Court continued to recognize the vitality and strength of the independent constitutional and statutory right to counsel in Idaho. "Under the existing constitutional and statutory requirement of this state, every person charged with a felony is entitled to be represented by counsel, and if he is unable, because of indigency, to retain his own counsel, counsel must be appointed for him by the court." *Pharris v. State*, 91 Idaho 456, 458 (1967) (citing IDAHO CONST. art.1, § 13; I.C. §§ 19-1512, 19-1513; *Bement v. State*, 91 Idaho 388 (1966); *Thurlow*, 85 Idaho at 96; *cf. State v. Poglianich*, 43 Idaho 409 (1927)). In light of this history and precedent, Idaho's constitutional right to counsel provides broader protections than the Sixth Amendment and has existed independently long before those rights were extended to the States via the Fourteenth Amendment.

Given the broader constitutional protection in Idaho of the right to counsel, the test for evaluating whether counsel satisfies his duty to provide effective representation to a client in a criminal proceeding is also different, and more exacting, than the Sixth Amendment test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Prior to *Strickland,* Idaho courts applied a stricter standard to the evaluation of whether counsel's representation was ineffective. The Idaho Supreme Court rejected a standard which defined ineffective counsel as "the circumstances must be so inadequate as to render appellant's trial 'a farce or mockery of justice,'" *State v. Tucker,* 97 Idaho 4, 7 (1975) (citation omitted), because it "places an undue burden upon the defendant and is vague and difficult to apply." *Id.* Instead, this Court adopted the "reasonably competent assistance of counsel" standard. *Id.* at 8-9. To be successful "on the grounds of ineffective assistance of counsel, the defendant also must show 'that the conduct of counsel contributed to the conviction or to the sentence imposed.'" *Id.* at 12 (citation omitted). Whether the conduct of counsel "contributed" to a sentence or conviction is a far less onerous standard than showing that but for counsel's errors, there is a reasonable probability the result would have been different under *Strickland*. *Compare, e.g., Napue v. Illinois,* 360 U.S. 264 (1959) (holding state's presentation of false testimony or evidence is material when there is *any* reasonable likelihood it *could have* affected the judgment of the jury) *with Brady v. Maryland,* 373 U.S. 83 (1963) (holding that favorable evidence suppressed by the state is material or prejudicial if there is a reasonable probability of a different result had the evidence been disclosed, i.e., suppression undermines confidence in the verdict). When the United States Supreme Court issued its decision in *Strickland*, it established a bar under the Sixth Amendment that was far more stringent than the standard already in place under the Idaho Constitution's Article I, section 13 "guaranties in criminal actions." This less onerous standard under the Idaho Constitution for reviewing IAC claims—that counsel's conduct contributed to the conviction or sentence—is the standard that ought to be applied by this Court in its analysis of whether Mr. Creech received effective counsel as guaranteed by our state constitution. Mr. Creech now invokes both the state Constitution and the Sixth Amendment in advancing his claims of ineffective assistance of counsel.

2. Idaho Criminal Rule 44.2(1) Provides Capital Petitioners the Right to Effective Post-Conviction Counsel

In addition to the state constitutional right to counsel, which is broader than the Sixth Amendment, Idaho also guarantees capital petitioners effective counsel in post-conviction proceedings. The existence of this right should be taken into consideration when evaluating the landscape of Idaho law regarding Mr. Creech's right to counsel at the various stages of trial, appeal, *and* other collateral challenges.

More than two decades ago, this Court declined to permit post-conviction IAC to excuse a capital petitioner's failure to raise a trial IAC claim in an initial petition. *See Row v. State,* 135 Idaho 573, 578 (2001) (holding that the ineffectiveness of initial post-conviction counsel is not a basis for relief in subsequent post-conviction proceedings); *McKinney v. State,* 133 Idaho 695, 703-04 (1999) (holding ineffective assistance of initial post-conviction counsel did not excuse petitioner's failure to raise claims that should reasonably have been known). Since that time, however, this Court has issued two decisions suggesting this precedent is no longer valid. First, in *Hall v. State,* the Court recognized that "petitioners seeking post-conviction relief from a death sentence are entitled to conflict-free counsel under I.C.R. 44.2(1)," which was evaluated through a Sixth Amendment framework. 155 Idaho 610, 627 (2013). The Court's decision "ensure[d] that a petitioner's right to counsel under I.C.R. 44.2(1), as well as the corresponding right to conflict-free counsel, is not a hollow right." *Id.*

Then in 2014, this Court decided *Murphy v. State* and held that post-conviction counsel's ineffectiveness was not a "sufficient reason" to excuse a *non-capital* petitioner's failure to timely raise (or adequately raise) trial errors because if "there is no right to counsel, there can be no deprivation of the effective assistance of counsel." 156 Idaho at 395. The discretionary right to counsel for non-capital post-conviction petitioners was central to the decision in *Murphy,* which this Court distinguished from the right to counsel afforded capital petitioners. *Id.* at 394-95 ("Idaho Criminal Rule 44.2 provides for the mandatory appointment of counsel for post-conviction review after the imposition of the death penalty."); *Hall,* 155 Idaho at 616 (recognizing I.C.R. 44.2

provides capital post-conviction petitioners a statutory right to counsel to pursue post-conviction remedies in I.C. § 19-2719).

When Mr. Creech was originally sentenced to death in 1982, he was guaranteed the right to post-conviction counsel by Idaho Code § 19-4904. Later, Mr. Creech's original death sentence was vacated and he was re-sentenced to death in April 1995. With the assistance of appointed counsel, Mr. Creech timely sought post-conviction relief from that death sentence in May of 1995.[9] While his 1995 post-conviction petition was pending, ICR 44.2 was adopted and became effective on August 8, 1995. At that time, Mr. Creech had not yet amended his petition, no evidentiary hearing had been held, and the district court had not decided whether to grant or deny his petition. Because Rule 44.2 became effective while Mr. Creech's post-conviction case was pending, it transformed his discretionary right to post-conviction counsel under Idaho Code § 19-4904, into a mandatory one under ICR 44.2. Accordingly, Mr. Creech is entitled to the assistance of counsel in state post-conviction by right. And just as the holdings in *Hall* and *Murphy* clarified that capital petitioners' right to post-conviction counsel under Idaho Criminal Rule (ICR) 44.2(1) entitles them to *effective*, conflict-free post-conviction counsel, so too does Mr. Creech's right to counsel—whether by statute or rule—entitle him to *effective* counsel. *See, e.g., Crump v. Warden,* 934 P.2d 247, 253 (Nev. 1997) (holding where a post-conviction petitioner is appointed counsel by statutory mandate, the petitioner is entitled to effective assistance of counsel). Where initial post-conviction counsel's IAC prevents a capital petitioner from raising (or adequately raising) trial IAC claims,

[9] At that time, Mr. Creech was not statutorily entitled to counsel. In the spring of 1993, the Idaho Legislature amended Idaho Code § 19-4904, giving the district court discretion to appoint post-conviction counsel. *See* I.C. § 19-4904 (1993); Idaho Laws Ch. 165, S.B. 1116. Prior to the 1993 amendment, the appointment of post-conviction counsel was mandatory. *See* I.C. § 19-4904 (1992) ("If the applicant is unable to pay court costs and expenses of representation . . . a court-appointed attorney shall be made available to the applicant . . . .").

that ineffectiveness precludes forfeiture of trial IAC claims under Idaho Code § 19-2719(3).[10] *See Crump,* 934 P.2d at 253 (recognizing ineffective assistance of initial post-conviction counsel can provide good cause for petitioner's failure to raise all available issues in his first petition). As a capital post-conviction petitioner, Mr. Creech clearly has a right to counsel. And once he has that right, he has the attendant right to effective assistance of counsel. Consistent with these principles, and to prevent Mr. Creech's right to post-conviction counsel from being a hollow one, this Court should vacate the district court's order summarily dismissing his case and remand for consideration of the merits of Mr. Creech's trial IAC claims.

3. Idaho Guarantees Capital Petitioners the Right to Effective Post-Conviction Counsel

Though Mr. Creech also relies on his Sixth Amendment right to counsel, he maintains the broader right to counsel guaranteed by Idaho's Constitution article I, section 13, coupled with ICR 44.2(1), entitle him to effective post-conviction counsel and a more exacting standard for reviewing his claims of trial and post-conviction IAC.

[10] The Idaho Supreme Court's rationale in *Murphy* and *Johnson* suggests capital post-conviction counsel's ineffectiveness *would be* a "sufficient reason" for filing a successive petition asserting a ground for relief that was not previously raised, or which was inadequately raised, under Idaho Code § 19-4908.

## CONCLUSION

This Court should vacate the district court's order and excuse Mr. Creech's failure to raise, or adequately raise, his trial IAC claims, where that forfeiture is directly attributable to the ineffectiveness of his post-conviction counsel. This Court should remand Mr. Creech's case to the district court for consideration of the merits of his trial IAC claims applying the heightened protections and standards identified above. Even if this Court does not adopt the broader state constitutional right to counsel, or acknowledge the impact of Mr. Creech's right to effective post-conviction counsel under ICR 44.2(1) on his post-conviction claims, *Martinez* and *Shinn* still compel state court evaluation of the merits of his trial IAC claims as presented in his Petition.

DATED this 8th day of September, 2023.

/s/ Shannon Romero
Shannon Romero

/s/ Ian Thomson
Ian Thomson

/s/ Garth McCarty
Garth McCarty

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2023, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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