

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH

Applicant/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 No. 24-275**

**APPLICATION TO EXTEND THE TIME TO
FILE A PETITION FOR WRIT OF CERTIORARI**

Jonah J. Horwitz*
FEDERAL DEFENDER SERVICES OF IDAHO, INC.
702 West Idaho Street, Suite 900
Boise, Idaho 83702
Jonah.Horwitz@fd.org
208-331-5530

***Counsel of Record**

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Applicant Thomas E. Creech, through undersigned counsel, and pursuant to Supreme Court Rules 13.5, 22, and 30.3, moves for a sixty-day extension of time in which to file his petition for writ of certiorari, up to and including July 23, 2024.¹ Absent an extension of time, the petition for writ of certiorari would be due on or before May 24, 2024. This application is being filed more than ten days before that date.

The judgment for which review is sought was rendered by the Ninth Circuit on February 23. *See Creech v. Richardson*, 94 F.4th 847 (9th Cir. 2024) (per curiam) (attached as Exhibit 1). The next day, the Ninth Circuit denied Mr. Creech's petition for rehearing and issued its mandate. *See Exhibit 2*. This Court will have jurisdiction over any timely-filed petition for certiorari in the case pursuant to 28 U.S.C. § 1254(1).

REASONS JUSTIFYING AN EXTENSION OF TIME

1. Undersigned counsel states as follows:
2. I am lead counsel for Mr. Creech and have primary responsibility for overseeing the drafting of the certiorari petition in this case.
3. My workload prevents me from adequately preparing the petition for certiorari by the current deadline.

¹ All subsequent references to dates are to the year 2024.

4. All of the following cases are capital.

5. Since the Ninth Circuit denied the petition for rehearing below, I have had the following obligations.

6. I am lead counsel for the plaintiff in *Pizzuto v. Tewalt*, D. Idaho, No. 1:21-cv-359. In that case, I filed a motion to consolidate on March 14, a reply in support of the motion on April 1, responses to two motions to quash subpoenas on April 5, a response to a motion for a stay of a discovery order pending appeal on May 1, and a motion to preclude a death warrant and preserve evidence on May 3.

7. I am lead counsel for the plaintiff in *Creech v. Comm.*, D. Idaho, No. 1:24-cv-066. In that case, I filed an amended complaint on March 15 and a response to the defendants' motions to dismiss on April 17.

8. I am lead counsel for the appellant in *Row v. Clement*, 9th Cir., No. 23-99004. In that case, I filed on April 22 a 168-page opening brief and a motion for excess words. The motion was denied and the court ordered a shorter brief to be filed by May 30.

9. Apart from the *Row* brief, my significant upcoming deadlines are as follows.

10. In *Hall v. Richardson*, D. Idaho, No. 1:18-cv-218, in which I am lead counsel, I have calculated August 10 as the statutory deadline for an amended habeas petition.

11. In *Hairston v. Richardson*, D. Idaho, No. 1:00-cv-303, in which I am lead counsel, I have due a brief on various procedural-default issues on July 8.

12. In addition to those obligations, I have continuing duties to oversee investigations and conduct legal research in my other cases, almost all of which are capital.

13. Finally, the certiorari petition in this case will implicate serious and substantial issues. It challenges a published opinion in a capital case implicating an important question about whether judge-sentencing in death-penalty trials violates the Eighth Amendment, as well as the contours of second-or-successive law. *See generally Creech*, 94 F.4th 847. In short, I need the requested sixty days to give the petition the time and attention it deserves in this difficult capital matter.

Accordingly, Mr. Creech respectfully requests that the Court grant him an additional sixty days in which to file his petition for writ of certiorari.

Respectfully submitted this 7th day of May 2024.



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

*Counsel of Record

EXHIBIT 1

94 F.4th 847

United States Court of Appeals, Ninth Circuit.

Thomas E. CREECH, Petitioner-Appellant,

v.

Tim RICHARDSON, Warden, Respondent-Appellee.

No. 24-275

|

Argued and Submitted February
22, 2024 San Francisco, California

|

Filed February 23, 2024

Synopsis

Background: After affirmance, [105 Idaho 362, 670 P.2d 463](#), of state prisoner's murder conviction and death sentence, prisoner filed third-in-time petition for federal habeas relief, challenging constitutionality of his death sentence under Eighth Amendment. The United States District Court for the District of Idaho, [Brailsford, J., 2024 WL 149751](#), denied prisoner's motion to stay and abey consideration of his petition until his ongoing state post-conviction action was concluded, and dismissed the petition as unauthorized successive petition. Prisoner appealed and filed motion to stay his scheduled execution while appeal was pending.

The Court of Appeals held that prisoner's claim challenging constitutionality of his death sentence based on evolving standards of decency had been ripe and could have been brought in second-in-time petition, and thus, petition was precluded as successive petition.

Judgment of district court affirmed; motion for stay dismissed as moot.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

*848 Appeal from the United States District Court for the District of Idaho, [Amanda K. Brailsford](#), District Judge, Presiding, D.C. No. 1:23-cv-00463-AKB

Attorneys and Law Firms

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

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

Before: [William A. Fletcher](#), [Jay S. Bybee](#), and [Morgan B. Christen](#), Circuit Judges.

OPINION

PER CURIAM:

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

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

Creech filed two habeas petitions in federal court before filing the current petition. His first petition led to the vacatur of his sentence and a resentencing hearing in 1995. *See id.* at [378–79](#). At that hearing, the sentencing judge again imposed a death sentence, acting without a jury as authorized by then-applicable Idaho law. *See id.* at [379–80](#). Creech challenged his renewed death sentence in a second federal *849 habeas petition. Litigation of that petition ended in the district court in 2017. We affirmed the district court's denial of habeas in 2023. *Id.* at [394](#).

Creech filed the current petition in October 2023, shortly after his death warrant was issued and his execution date was set. His petition raises an Eighth Amendment claim that society's evolving standards of decency since [Ring v. Arizona](#), [536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 \(2002\)](#), have rendered unconstitutional a death sentence imposed by a judge rather than a jury. *Ring* held that the Sixth Amendment prohibits judicial factfinding of facts necessary to the imposition of the death penalty; such facts must instead be found by a jury. *See id.* at [609, 122 S.Ct. 2428](#). The Sixth Amendment

rule of *Ring* does not apply retroactively to sentences, like Creech's, that were final on direct review before *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Creech argues that the Eighth Amendment independently requires that a death sentence be imposed by a jury.

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

We affirm. A later-filed petition is precluded as second or successive under 28 U.S.C. § 2254 if the claim it raises was ripe and could have been brought in the prisoner's prior petition challenging the same judgment. *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). Our holding in *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006), makes clear that Creech's current petition is precluded as second or successive.

In *Allen*, we considered a so-called *Lackey* claim brought in a prisoner's second federal habeas petition—a claim that “suffering the ravages of death row for a lengthy duration violate[s] the Eighth Amendment.” *Id.* at 956 (citing *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (Stevens, J., respecting denial of certiorari)). Petitioner Allen argued “that his execution would violate the Eighth Amendment because of the inordinate length of time, twenty-three years, he has spent on death row and the ‘horrific’ conditions of his confinement.” *Id.* at 950.

We concluded in *Allen* that the petition was precluded as second or successive. We distinguished Allen's claim from the claim brought in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The Supreme Court held in *Ford* that “the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.” *Id.* at 409–10, 106 S.Ct. 2595. We wrote in *Allen* that, unlike a *Ford* claim, “a *Lackey* claim does not become ripe only after a certain number of years or as the final hour of the execution nears. There is no fluctuation or rapid change at the heart of a *Lackey* claim, but rather just the steady and predictable passage of time.” *Allen*, 435 F.3d at 958.

Much the same is true of Creech's current Eighth Amendment claim. The proposed factual predicate for Creech's claim is a national movement away from executions of judge-

sentenced prisoners since *Ring*, evidencing, in Creech's view, an evolving standard of decency.

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

Even when *Ring* was decided in 2002, only a small minority of jurisdictions authorized judge-imposed death sentences. *See* *850 *Ring*, 536 U.S. at 608 n.6, 122 S.Ct. 2428; *see also* *Walton v. Arizona*, 497 U.S. 639, 710–11, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (Stevens, J., dissenting), *overruled by* *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Woodson v. North Carolina*, 428 U.S. 280, 291–92, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion). It was clear, once *Ring* was decided, that the number of executions of judge-sentenced capital defendants would decrease in the years to follow as those defendants were executed, were granted clemency, or died of natural causes, or as their States imposed broader restrictions on executions generally.

Even though some judge-sentenced capital defendants are on death row in Arizona, Creech does not claim that Arizona's moratorium was motivated by standards-of-decency concerns about the execution of those judge-sentenced defendants. In support of his argument that the reason for Arizona's moratorium is irrelevant, Creech cites *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), in which the Supreme Court mentioned states that had entirely abolished or suspended their use of the death penalty as part of its discussion of the evidence indicating society's “rejection of the strict 70 [IQ] cutoff” for claims of incapacity to be executed under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Hall*, 572 U.S. at 716–18, 134 S.Ct. 1986. Creech also points to *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), in which the Court said, “a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles.” *Id.* at 574, 125 S.Ct. 1183.

Creech is correct that the Court has, at times, considered categorical death-penalty bans in assessing evolving standards of decency with respect to particular categories of death sentences. But even assuming the correctness of Creech's interpretation of the Supreme Court's caselaw, his argument rests entirely on the claim that Arizona's moratorium is evidence of evolving standards of decency

with respect to judge-imposed death sentences. Even on that assumption, he has not shown that his claim was unripe in the years immediately following *Ring*, when judge-sentenced executions were practiced in only a small minority of jurisdictions, and when the Supreme Court in *Ring* had rejected judicial factfinding that exposes a capital defendant to death. Moreover, even assuming that categorical execution moratoria can provide a basis for Creech's Eighth Amendment claim, several such bans had been imposed in the years before Creech's habeas proceedings ended in the district court. See, e.g., *Hall*, 572 U.S. at 716, 134 S.Ct. 1986 (noting Oregon's 2011 moratorium); *Cooper v. Newsom*, 13 F.4th 857, 861–62 (9th Cir. 2021) (discussing, *inter alia*, a moratorium on California executions imposed in 2006); *Commonwealth v. Williams*, 634 Pa. 290, 129 A.3d 1199, 1202 (2015) (discussing Pennsylvania's 2015 moratorium).

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

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

All Citations

94 F.4th 847, 2024 Daily Journal D.A.R. 1532

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 24 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THOMAS EUGENE CREECH,

Petitioner - Appellant,

v.

TIM RICHARDSON,

Respondent - Appellee.

No. 24-275

D.C. No.

1:23-cv-00463-AKB

District of Idaho,

Boise

ORDER

Before: MURGUIA, Chief Judge.

On February 23, 2024, Creech filed a petition for rehearing en banc from the panel's opinion affirming the district court's denial of his section 2254 petition.

The full court has been advised of the petition for rehearing en banc. Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's February 23, 2024, opinion should be reheard en banc. No judge requested a vote within the time period. Accordingly, the petition for rehearing en banc is denied. En banc proceedings with respect to the panel's opinion in Appeal No. 24-275 are concluded.

The mandate shall issue forthwith in Appeal No. 24-275.