No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

***IN RE* GERALD ROSS PIZZUTO, JR.,**

Petitioner.

On Petition for Extraordinary Writ and Original Petition for Writ of Habeas Corpus

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APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR JUNE 2, 2021

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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:

Simultaneously with the instant stay motion, Gerald Ross Pizzuto Jr. is filing a Petition for Extraordinary Writ and Original Petition for Habeas Corpus (hereinafter "the Petition" or "Pet."). For the reasons that follow, Mr. Pizzuto respectfully requests a stay of execution while the Petition is pending, including during any proceedings ordered to take place after a transfer to the district court.

MR. PIZZUTO IS ENTITLED TO A STAY OF EXECUTION

In deciding the present motion, the Court must apply four factors: 1) whether Mr. Pizzuto "has made a strong showing that he is likely to succeed on the merits"; 2) whether he "will be irreparably injured absent a stay"; 3) whether a "stay will substantially injure" the State; and 4) "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[1] As set forth below, all four factors are satisfied.

I. Likelihood of Success on the Merits

First, Mr. Pizzuto has made a strong showing that he is likely to succeed on the merits. As set forth in the Petition, the prosecutor and trial judge in Mr. Pizzuto's case secretly orchestrated a key witness's devastating testimony against him in return for an undisclosed promise to mete out a lenient sentence. *See* Pet. at

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

4. The witness—James Rice—was the only one who directly tied Mr. Pizzuto to the killing of the victims. *See id.* at 2–3. Under questioning by the prosecutor, Mr. Rice told the jury that he "could spend the rest of [his] life in prison." *Id.* at 12. That was false. In fact, three months earlier, Mr. Rice had been promised that he would serve no more than fifteen years at a secret 6:00 AM breakfast meeting between his attorney, the prosecutor, and the trial judge. *See id.* at 4. As Mr. Rice later said, when he testified, he "knew" he "was not going to get a life sentence." *Id.* at 12. No record was made of the meeting and it was never disclosed to Mr. Pizzuto's attorney. *See id.* at 4. The prosecutor—the same one who was at the secret breakfast and elicited the false testimony from Mr. Rice—later ensured that the lie would infect the result of the trial. In his closing argument, he insisted that Mr. Rice might "spend the rest of his natural life in prison" and dismissed the possibility of a negotiation affecting his testimony by asking: "Got a great deal, didn't he?" *Id.* at 10.

These facts make out a textbook transgression of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). *See* Pet. at 9–15. As Judge Betty Fletcher of the Ninth Circuit observed in a powerful dissent regarding these issues, "no fair legal system—and certainly not our American legal system—should allow a conviction and death sentence based in part on perjured testimony procured by the collusion of the judge, the prosecutor, and counsel for Pizzuto's co-defendant." *See Pizzuto v. Blades*, 673 F.3d 1003, 1011 (9th Cir. 2012) (Fletcher, J., dissenting).

Although Mr. Pizzuto diligently raised these claims as soon as his investigation revealed the secret deal long hidden by the State, various procedural obstacles outside his control were invoked to prevent them from being reviewed on the merits. *See* Pet. at 5.[2] His original petition is the last opportunity for any court to correct this miscarriage of justice before he is executed. "When faced with the corruption of our legal system, we must start over." *Pizzuto*, 673 F.3d at 1013 (Fletcher, J., dissenting). That is especially true in the capital context, with the heightened standards that apply there for reliability. *See generally Woodson v. North Carolina*, 428 U.S. 280 (1976). At a bare minimum, Mr. Pizzuto's claims are "plausib[le]," and that should be enough to satisfy this factor for purposes of a stay of execution. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers).

For those reasons, which are elaborated on in the Petition, Mr. Pizzuto has made a strong showing that he is likely to succeed on the merits and obtain habeas relief as to his convictions or sentence, or at least an evidentiary hearing.

II. The Balance of Harm Weighs in Mr. Pizzuto's Favor.

The second and third factors—whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding—weigh in Mr. Pizzuto's favor. As for the

[2] The citation above also explains why Mr. Pizzuto cannot seek a stay of execution in connection with the issue presented here in any other court. *See* Sup. Ct. R. 23.3.

harm to Mr. Pizzuto, he will be executed in the absence of a stay, which obviously constitutes an irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (observing that this factor "is necessarily present in capital cases"). The Court has granted stays to prevent far less severe problems. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (issuing a stay to stop a court from broadcasting a trial, as it would have chilled testimony). A stay to prevent a potentially unconstitutional execution is a fortiori warranted. In addition, the denial of a stay would cause irreparable harm by "effectively depriv[ing] this Court of jurisdiction to consider the" Petition. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay because the absence of one "may have the practical consequence of rendering the proceeding moot").

Turning to the third factor, a stay will not substantially injure the opposing party. Mr. Pizzuto has been on death row for more than thirty-four years. *See Pizzuto v. State*, 10 P.3d 742, 743 (Idaho 2000). A stay of execution for a few more months to allow Mr. Pizzuto to litigate the substantial issues in this case will do the State no harm. *See Mikutaitis*, 478 U.S. at 1309 (emphasizing that the government would not "be significantly prejudiced by an additional short delay").

Furthermore, the public's interest in finality now is substantially diminished by the fact that the State is responsible for a significant amount of the delay that has occurred in carrying out Mr. Pizzuto's death sentence. The reason that Mr.

Pizzuto has not yet been executed is that he has had challenges pending in court to his convictions and death sentence for the last thirty-four years, including his initial state post-conviction proceeding, his first federal habeas action, and—later—timely attacks based on the ground that he is intellectually disabled, which were lodged in both state and federal court. *See State v. Pizzuto*, 810 P.2d 680 (Idaho 1991) (direct appeal and initial state post-conviction proceeding); *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002) (first federal habeas action); *Pizzuto v. State*, 202 P.3d 642 (Idaho 2008) (state case regarding intellectual disability); *Pizzuto v. Yordy*, 947 F.3d 510 (9th Cir. 2019) (per curiam), *cert. denied* 141 S. Ct. 661 (2020) (federal case regarding intellectual disability).

Over the course of that lengthy history of litigation, the State has taken numerous extensions. In the most recent federal habeas case alone (that involving the intellectual-disability issue), the State sought and obtained at least twenty-three separate enlargements of time. *See* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-8598.html (reflecting three); *Pizzuto v. Yordy*, 9th Cir., No. 16-36082, Dkts. 17, 21, 23, 26, 28, 30, 32, 34; *Pizzuto v. Blades*, D. Idaho, No. 1:05-cv-516, Dkts. 35, 65, 68, 205, 208, 210, 212, 213, 270, 272, 273, 275.[3] And that does not even account for the deadlines the State pushed in the various state cases or the first round of federal habeas review.

[3] To the extent it is necessary, Mr. Pizzuto respectfully asks the Court to take judicial notice under Federal Rule of Evidence 201 of the pleadings from the other cases referenced here.

With each due date it moved in this way, the State put off the day that Mr. Pizzuto's death sentence could be carried out. It did so because its interest in being fully heard on its arguments outweighed its interest in a speed-at-any-cost approach. The same calculus applies now. Mr. Pizzuto's interest in receiving thorough consideration of his *Brady* claim outweighs any interest in hastening the case to its end.

III. The Public Has an Interest in the Claims Being Heard.

Finally, the public has an interest in the claims being heard. "[T]he appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). In Mr. Pizzuto's case, the prosecutor and trial judge arranged a secret deal with the State's star witness, and then falsely told the jury no such agreement existed. Even though Mr. Pizzuto asserted the claim in every avenue available to him as soon as he uncovered it, no court has addressed it on the merits. If Mr. Pizzuto is executed as a result of this "shock[ing]" scheme, *Pizzuto*, 673 F.3d at 1011 (Fletcher, J., dissenting) before any court considers the issue, there will not be impartial justice, either in "appearance" or in "reality," *Williams*, 136 S. Ct. at 1909. Moreover, the public interest is always served when the Constitution is vindicated, *see Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979), which in this instance requires a consideration of Mr. Pizzuto's serious *Brady* claim. The public interest therefore favors a stay.

CONCLUSION

Accordingly, the Court should stay Mr. Pizzuto's execution until the Petition is fully disposed of, including any evidentiary hearing and related proceedings ordered to take place below.

Respectfully submitted this 10th day of May 2021.

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