No. 19A1000

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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**GERALD ROSS PIZZUTO, JR.,**

**Applicant,**

**v.**

**KEITH YORDY**

**Respondent.**

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

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# REPLY IN SUPPORT OF APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

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The State's response to Mr. Pizzuto's application for an extension of time, filed March 9, 2020 (hereinafter "Resp.") is mistaken on both the facts and the law, and the sixty days should be granted.

Beginning with the facts, the State's quarrels with undersigned counsel's work obligations are insubstantial. First, it is irrelevant that extensions were obtained in the federal *Hairston* case, *see* Resp. at 5, since counsel were nevertheless laboring on the brief right up until it was filed, in keeping with the practice of lawyers everywhere. Second, although the State discounts counsel's need to prepare an amended habeas petition in *Hall* because of a pending proceeding in state court, *see* Resp. at 5–6, that proceeding will only toll the federal statute of limitations if it is deemed "propery filed," *see* 28. U.S.C. § 2244(d)(2), which obviously cannot be assumed in advance—especially in a capital case. Third, the State characterizes the issues in the state *Hairston* case as simple, *see* Resp. at 6, even though they involve detailed developments around the country and an area of law that has occasioned several lengthy opinions—replete with dissents—from this Court. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). Fourth, the State suggests that Mr. Pizzuto should have filed his civil rights complaint and clemency petition "years ago," Resp. at 6, without explaining why he could reasonably have expected

either a court or the Parole Commission to intervene without an execution in the foreseeable future.

The State's final objection to counsel's workload is to insist that Mr. Pizzuto can just convert his en banc pleadings into a certiorari petition. *See* Resp. at 6. A similar point could have been made about the State's eight extensions in the Ninth Circuit, when the Attorney General's Office presumably could have equally used its briefing in the district court as a template. *See* 9th Cir. Dkts. 17, 21, 23, 26, 28, 30, 32, 34. Just as the State did below, all litigants require time to research and craft pleadings specially designed for the courts they are in. The State received such time in ample measure below, and Mr. Pizzuto should be afforded his modest allotment of sixty extra days here.

The State's equitable appeal fares no better. In this case's extensive history, the State wrongly sees evidence that Mr. Pizzuto has "embarked upon an intentional practice of delay." Resp. at 6. Actually, the longevity of the case is merely a product of how long it takes attorneys and courts to litigate and adjudicate serious constitutional claims in a capital matter. As noted, the State itself took eight extensions in the Ninth Circuit. It also obtained twelve in the district court. *See* Dist. Ct. Dkts. 35, 65, 68, 205, 208, 210, 212, 213, 270, 272, 273, 275. The Ninth Circuit spent more than nine months writing a forty-eight page opinion after oral argument. *See* 9th Cir. Dkt. 60. Everyone associated with the case has,

appropriately, generated some delay by reviewing the issues with the care and attention they deserve. Sixty days now is perfectly consistent with the status quo.

Turning to the legal front, the State tries to sway the Court by threatening to obtain a death warrant before the certiorari petition is resolved. Such a death warrant would be plainly improper. As this Court stated more than twenty-five years ago, "approving the execution of a defendant before his [federal habeas petition] is decided on the merits would clearly be improper." *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

Moreover, while Mr. Pizzuto is technically here on a successive petition, it asserts a claim that could not have been brought earlier. The claim at issue is based on *Atkins v. Virginia*, 536 U.S. 304 (2002), which was decided in 2002. By then, Mr. Pizzuto's first habeas petition had been denied by the Ninth Circuit. *See Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002), *amended and superseded by* 385 F.3d 1247 (9th Cir. 2004). As a matter of necessity, Mr. Pizzuto brought the claim in a second petition, which was duly authorized by the Ninth Circuit after he met the rigorous threshold showing of 28 U.S.C. § 2244(b)(2)(A). *See Pizzuto v. Yordy*, 947 F.3d 510, 519 (9th Cir. 2019) (per curiam). Since Mr. Pizzuto advanced the claim as soon as it was viable and applicable to him, the case is most accurately conceived of as a *first* habeas proceeding. *See Panetti v. Quarterman*, 551 U.S. 930, 942–47 (2007) (concluding that a second habeas petition raising a

newly ripened claim was not successive); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641–45 (1998) (same). It follows that Mr. Pizzuto should be given federal habeas review just as thorough as that afforded to the more conventional first petition. Because such petitions are rightfully considered in the ordinary course of business without States using executions to create a false sense of urgency, so too should this one. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (elaborating on why a stay of execution should be routinely granted for a first habeas petition "to prevent the case from becoming moot"); *see also McDonald v. Missouri*, 464 U.S. 1306, 1307 (1984) (Blackmun, J., in chambers) (stating that the right of review "is rendered utterly meaningless" if an execution is set during the time specified for review in the Supreme Court and advising the State of Missouri that if it kept setting executions during the time for a petitioner to seek discretionary review by certiorari, then Justice Blackmun would stay the execution).

Finally, the State attacks Mr. Pizzuto's contemplated certiorari issue. *See* Resp. at 8–9. The State does not deny that *Smith v. Sharp*, 935 F.3d 1064, 1077 (10th Cir. 2019), concluded that "*Atkins* accepted clinical definitions" for intellectual disability, nor does it deny that *Hall v. Florida*, 572 U.S. 701, 720 (2014), described the standard error of measurement as "a fundamental premise of *Atkins*." Certainly, the State has colorable counterarguments to Mr. Pizzuto's position. Still, the merits of Mr. Pizzuto's substantial challenge to his death

sentence cannot be resolved on the basis of a one-page discussion in a response to an application for an extension—it can only be resolved after full certiorari proceedings.

In sum, the State's sudden haste to execute a man on hospice does not justify a departure from the Court's well-established practices, and the sixty-day extension should be granted.

Respectfully submitted this 10th day of March 2020.

*/s/ Bruce D. Livingston*
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