NO. __________

IN THE SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO, JR.,

Petitioner,

v.

KEITH YORDY,

Respondent.

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

RESPONSE TO PETITIONER'S APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE FOR PETITION FOR WRIT OF CERTIORARI

LAWRENCE G. WASDEN
Attorney General of Idaho

L. LaMONT ANDERSON *
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-4539
Attorneys for Respondent
** Counsel of Record*

The facts leading to the 1985 brutal and vicious murders of Berta Herndon and her nephew, Delbert Herndon, that resulted in Pizzuto's convictions and death sentences were most recently detailed by the Idaho Supreme Court in Pizzuto v. State (Gerald Ross Pizzuto, Jr. Pizzuto IV), 202 P.3d 642, 645 (Idaho 2008), as follows:

> On July 25, 1985, the petitioner Gerald R. Pizzuto, Jr., (Pizzuto) murdered two innocent strangers, Berta Herndon and her nephew Del Herndon. Pizzuto approached them with a .22 caliber rifle as they arrived at their mountain cabin and made them enter the cabin. While inside, he tied the Herdons' [sic] wrists behind their backs and bound their legs in order to steal their money. Some time later, he bludgeoned Berta Herndon to death with hammer blows to her head and killed Del Herndon by bludgeoning him in the head with a hammer and shooting him between the eyes. Pizzuto murdered the Herdons [sic] just for the sake of killing and subsequently joked and bragged about the killings to his associates.

Pizzuto was convicted of two counts of first-degree murder. Id. The trial court concluded the state proved five statutory aggravating factors, State v. Pizzuto (Pizzuto I), 810 P.2d 680, 708 (Idaho 1991), and sentenced Pizzuto to death, id. at 687. Pizzuto filed his first post-conviction petition raising numerous claims, which the post-conviction court denied. Id. at 688. The Idaho Supreme Court affirmed Pizzuto's murder convictions, death sentences, and denial of post-conviction relief. *See generally* Pizzuto I.[1]

In 1992, Pizzuto filed his first federal habeas petition, which the district court rejected in 1997. Pizzuto v. Arave, 280 F.3d 949, 953-54 (9th Cir. 2002), *dissent amended and superseded in part by*, 385 F.3d 1247 (9th Cir. 2004). In 2002, the Ninth Circuit affirmed the denial of federal habeas relief. *See generally* Pizzuto, 280 F.3d 949.

While his federal petition was pending, Pizzuto filed multiple successive petitions for post-conviction relief, which were all rejected pursuant to I.C. § 19-2719 because the

[1] In 1987, Pizzuto was also found guilty of two other murders in the State of Washington that he committed in 1985. *See* State v. Pizzuto, 778 P.2d 42 (Wash. Ct. App. 1989).

claims were known or reasonable could have been known when he filed his first post-conviction petition. *See* Pizzuto v. State (Pizzuto V), 233 P.3d 86, 88-89 (Idaho 2010) (describing the six post-conviction petitions that Pizzuto filed).

In 2002, the Supreme Court issued Atkins v. Virginia, 536 U.S. 304 (2002), concluding the execution of intellectually disabled ("ID") murderers violates the Eighth Amendment.[2] While concluding there was a "national consensus" that had developed against executing ID murderers, id. at 316, the Court recognized any "serious disagreement about the execution of mentally retarded offenders" stems from "which offenders are in fact retarded," and "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," id. at 317. The Court declined to adopt a rigid test defining the parameters of ID, reasoning, "'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,'" id. at 317 (brackets in original) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

Responding to the Supreme Court's edict, the Idaho Legislature enacted I.C. § 19-2515A, prohibiting the execution of ID murderers and establishing substantive and procedural requirements that must be met and followed to prove an ID claim in Idaho. 2003 Idaho Sess. Laws, Ch. 136 §§ 4 & 6, p.398. Pizzuto then filed his fifth post-conviction petition on June 19, 2003, contending he is ID under the dictates of Atkins, 536 U.S. 304. Pizzuto v. State (Pizzuto IV) 202 P.3d 642, 645 (Idaho 2008). The post-

[2] At that time, "intellectual disability" was known as "mental retardation." Because the courts and authorities now use the term "intellectual disability," Hall v. Florida, 572 U.S. 701, 704 (2014), that is the phrase the state will use except when quoting material that expressly uses the phrase, "mental retardation."

conviction court summarily dismissed Pizzuto's petition, concluding it was not timely filed and that he failed to raise a genuine issue of material fact supporting his ID claim. Id. Addressing the merits of Pizzuto's ID claim, the Idaho Supreme Court concluded he failed to present sufficient evidence establishing he had an IQ of 70 or below before his eighteenth birthday. Id. at 723-33.

While his Atkins post-conviction petition was pending, Pizzuto obtained permission from the Ninth Circuit to file a successive habeas petition based upon the contention that he was ID.[3] Pizzuto v. Blades, 2012 WL 73236, *3 (D. Idaho 2012) (unpublished). In preparation for an evidentiary hearing, the state obtained records from Dr. Craig Beaver revealing that in 1996, he completed a neuropsychological examination with Pizzuto that included IQ testing establishing that Pizzuto had a verbal IQ score of 91, a performance IQ score of 94, and a full scale IQ score of 92. *See* Id. at *13. After an evidentiary hearing, the federal district court initially denied habeas relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), concluding the Idaho Supreme Court's decision in Pizzuto IV, was not contrary to, or an unreasonable application of Atkins, or based upon an unreasonable determination of the facts from the evidence presented to the state's courts. Pizzuto, 2012 WL 73236 at *4-13. Reviewing the evidence presented at the evidentiary hearing, the court also denied relief under *de novo* review, concluding Pizzuto failed to establish his IQ was significantly subaverage (meaning an IQ of 70 or below) prior to age 18. Id. at *13-16. Based upon AEDPA deference, the Ninth

[3] Pizzuto also filed other requests with the Ninth Circuit to file successive habeas petitions. One such request was denied on March 8, 2012. Pizzuto v. Blades, 673 F.3d 1003 (9th Cir. 2012). He also filed post-judgment motions in federal court, which were denied by the district court and affirmed by the Ninth Circuit. Pizzuto v. Ramirez, 783 F.3d 1171 (9th Cir. 2015).

Circuit affirmed. Pizzuto v. Blades, 729 F.3d 1211 (9th Cir. 2013). However, because Hall v. Florida, 572 U.S. 701 (2014) was issued after the Ninth Circuit's decision was filed, the court withdrew its opinion, vacated the district court's order, and remanded for proceedings consistent with Hall. Pizzuto v. Blades, 758 F.3d 1178 (9th Cir. 2014).

On remand, the district court explained that, because the holding from Hall was not clearly established at the time of the Idaho Supreme Court's decision in Pizzuto IV in 2008, the state court was only bound by the holding from Atkins, and, therefore, it was neither contrary to, nor an unreasonable application of, Atkins. Pizzuto v. Blades, 2016 WL 6963030, *8-9 (D. Idaho 2016) (unpublished). Alternatively, the court reasoned the Idaho Supreme Court's decision, that Pizzuto failed to establish "any subaverage intellectual functioning developed *before* he turned eighteen–the third prong of the intellectual disability analysis," "was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent." Id. at *9 (emphasis in original). Finally, the court reexamined Pizzuto's ID claim *de novo*, and explained, "nothing in *Hall* renders suspect any of the Court's previous findings and conclusions on *de novo* review." Id. at *11.

Applying AEDPA's "deferential review" to Pizzuto IV, the Ninth Circuit affirmed, concluding the Idaho Supreme Court's decision was neither contrary to, nor an unreasonable application of, Supreme Court precedent because the only precedent available to the state court was Atkins; Hall and its progeny were decided after the Idaho Supreme Court filed its decision in Pizzuto IV, and the new requirement from Hall – that the legal determination of intellectual disability be informed by the medical communities diagnostic framework – was not mandated by Atkins. Pizzuto v. Yordy, 947 F.3d 510, 523-29 (9th Cir. 2019). The circuit also addressed each of Pizzuto's arguments under 28

U.S.C. § 2254(d)(2), and concluded that Pizzuto failed to establish the Idaho Supreme Court's decision was based upon an unreasonable determination of facts. Id. at 529-34. Based upon Pizzuto's failure to overcome the limitations associated with 28 U.S.C. § 2254(d), the circuit declined to address the district court's *de novo* review of Pizzuto's ID claim that was based on the evidentiary hearing evidence. Id. at 534. The Ninth Circuit denied Pizzuto's Petition for Rehearing En Banc, but granted his Motion for Stay of Issuance of the Mandate for a period not to exceed 90 days so he could file a Petition for Certiorari, which will be due on or before March 30, 2020. Although the Ninth Circuit entered an order staying issuance of the mandate, there are no stays in place that prevent the state from seeking a death warrant.

"For good cause, a Justice may extend the time to file a petition for certiorari for a period not exceeding 60 days," S.Ct. R. 13.5, provided the application is filed "at least 10 days before the specified final filing date as computed under these Rules," S.Ct. R. 30.2. While Pizzuto's application is timely, he has failed to demonstrate good cause. Pizzuto's argument is based primarily upon other "work obligations [that] prevent [his attorneys] from adequately preparing the petition for certiorari by the current deadline," which is March 30, 2020. (Application, p.1.) While the state acknowledges Pizzuto's attorneys filed a 62-page brief on February 20, 2020, in Hairston v. Blades, No. 1:00-cv-303, that brief was originally due December 24, 2019, and filed only after requesting three extensions of time. Pizzuto also contends one of his attorneys intends to file an amended federal habeas petition by April 29, 2020, in Hall v. Yordy, No. 1:18:-cv-218. However, a scheduling order for the filing of an amended petition has yet to be entered by the district court. Rather, it appears the court is awaiting completion of litigation in Hall's successive

post-conviction petition in state court before entering a scheduling order. Pizzuto further contends he must prepare for oral argument in Hairston v. State, Idaho S. Ct. No. 46665. However, that case involves the appeal of another successive post-conviction petition, and contains an exceptionally limited record because the issues are whether it was timely filed and whether the execution of a murderer under the age of 21 violates the Eighth Amendment. Pizzuto further notes he has recently filed a civil rights action challenging the state's method of execution, and a clemency petition "as his case is nearing end-stage litigation." (Application, pp.2-3.) However, Pizzuto has provided no explanation why the civil rights challenge and clemency petition could not have been filed years ago. Moreover, Pizzuto previously filed a Petition for Panel Rehearing and for Rehearing En Banc, which should have provided a basic framework for his petition for certiorari.

As demonstrated by the numerous successive petitions for post-conviction relief, requests to file successive habeas petitions, and other untimely collateral motions that have been filed since Pizzuto was convicted and sentenced in 1986, it appears he has embarked upon an intentional practice of delay. *See* Price v. Dunn, --- U.S. ---, 139 S.Ct. 1533, 1539 (2019) (Thomas, J., concurring in denial of certiorari) ("Given petitioner's weak position under the law, it is difficult to see his litigation strategy as anything other than an attempt to delay his execution."). In 1984, the Idaho Legislature enacted I.C. § 19-2719 to "accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence." I.C. § 19-2719. Nevertheless, ignoring I.C. § 19-2719, Pizzuto has filed six post-conviction petitions. The state's interest in avoiding unwarranted delay in carrying out its judgments is particularly strong in death penalty cases. As noted by Justice Stevens, "There are powerful reasons for concluding capital cases as promptly as possible. Delay

in the execution of judgment imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment." Gomez v. Fierro, 519 U.S. 918 (1996) (Stevens, J., dissenting). In Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983), the Court explained the state's interest in preventing unwarranted delay in carrying out its judgments:

> The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to litigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contributions these procedures make toward uncovering constitutional error. "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." [Citation omitted].

Addressing the prejudice continued delay has upon the state, the Court further explained, "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will merit." Id. at 888. For those who engage in a pattern of delay by filing last minute claims that will delay the execution, "[t]he proper response . . . is to deny meritless requests expeditiously." Price, 139 S.Ct. at 1540.

Additionally, there are currently no stays of execution in place, only a stay regarding issuance of the mandate. Consequently, pursuant to I.C. § 19-2715(4), the state can seek a death warrant at any time. Once a death warrant has been obtained, the execution must occur "not more than thirty (30) days thereafter." I.C. § 19-2705(1). It is only because the state agreed not to seek a death warrant until this Court rules on Pizzuto's

petition for certiorari or he fails to file a petition that a death warrant has not been sought. At the time the state advised Pizzuto of that decision, it was assumed he would file a timely petition on or before March 30, 2020. Therefore, should the state obtain a death warrant after March 30, 2020, and this Court grants Pizzuto a 60-day extension of time, he will be required to obtain a stay from this Court pending the filing of his petition, which requires meeting a burden much higher than "good cause" under S.Ct. R. 13.5. *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (outlining the four factors for a stay). It is unlikely Pizzuto will be able to meet even the first standard for a stay – "whether the stay applicant has made a strong showing that he is likely to succeed on the merits" – particularly since the Ninth Circuit's decision is based upon the rigorous standards under AEDPA.

Furthermore, Pizzuto's argument based upon Smith v. Sharp, 935 F.3d 1064, 1077 (10th Cir. 2019), is particularly unavailing because Smith did not mandate adoption of the entirety of the medical communities' diagnostic framework, actually noting, "*Atkins* clearly establishes that intellectual disability must be assessed, at least **in part**, under the existing clinical definitions applied **through expert testimony**." 935 F.3d at 1077 (emphasis added). Indeed, Smith is a sufficiency of the evidence case in which the court focused upon the expert testimony regarding the intellectual functioning prong of Atkins, and the fact that all three experts either opined Smith was intellectually disabled or could not say that he was not intellectually disabled. Id. at 1071, 1079. The court merely rejected the state's attempt to demonstrate Smith was malingering and lay witness testimony to overcome the experts' opinions. Id. at 1080-82.

More importantly, in Shoop v. Hill, --- U.S. ---, 139 S.Ct. 504, 505-06 (2019) (per curium), this Court reversed the Sixth Circuit's conclusion that the Ohio courts' decision

was contrary to Atkins, where the Circuit relied upon Moore v. Texas, --- U.S. ---, 137 S.Ct. 1039 (2017), to grant relief under Atkins. The Court ordered the Sixth Circuit to determine whether its conclusions could be "sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time." Id. at 509. Consequently, this Court has already determined that if a state court decision was issued prior to Atkins' progeny, such as Hall and Moore, those decisions do not apply in determining whether a state court decision is contrary to, or an unreasonable application of, Supreme Court precedent under AEDPA.

"The people of [Idaho], the surviving victims of [Pizzuto's] crimes, and others like them deserve better. . . . [T]he long delays that now typically occur between the time an offender is sentenced to death and his execution are excessive." Bucklew v. Precythe, --- U.S. ---, 139 S.Ct. 1112, 1134 (2019). Because Pizzuto has failed to establish any basis for a 60-day extension of time, the state respectfully requests that his Application for Extension of Time in Which to File Petition for Writ of Certiorari be denied.

Respectfully submitted this 9th day of March, 2020.

/s/ L. LaMont Anderson
L. LaMont Anderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 9th day of March, 2020, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Bruce D. Livingston	X	U.S. Mail
		Hand Delivery
Federal Defender Services of Idaho		Overnight Mail
702 West Idaho Street, Suite 900		Facsimile
Boise, ID 83702	X	Electronic Mail
Bruce_Livingston@fd.org		

L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit