NO. 20-8001

IN THE SUPREME COURT OF THE UNITED STATES

IN RE GERALD ROSS PIZZUTO, JR.,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT AND ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Gerald Ross Pizzuto, Jr. ("Pizzuto") has raised the following question before this Court:

> [W]hether Mr. Pizzuto is entitled to habeas relief or an extraordinary writ because the State suppressed evidence of a secret deal brokered by his trial judge promising a key witness a lenient sentence and then presented false testimony denying the agreement, all in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959).

(Pet., p.i.)

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INTRODUCTION

Pizzuto's case stands as a classic example of why Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Idaho State Legislature enacted I.C. § 19-2719.[1] As reaffirmed in Holland v. Florida, 560 U.S. 631, 648 (2010), one of the basic purposes of AEDPA is to "eliminate delays in the federal habeas review process." *See also* Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"). Likewise, in State v. Beam, 766 P.2d 678, 683 (Idaho 1988), the Idaho Supreme Court explained the purpose and policy behind the passage of I.C. § 19-2719 is to alleviate "dilatory tactics by those sentenced to death."

Despite the express intent of Congress and the Idaho State Legislature, Pizzuto has engaged in a long-standing tactic of challenging his death sentence through a strategy of piece-meal litigation resulting in excessive and unwarranted delay and costs. To date, he has filed six post-conviction petitions in Idaho's courts, three motions to file successive habeas petitions before the Ninth Circuit Court of Appeals, and multiple motions to have the Ninth Circuit intervene in pending federal district court proceedings.

With the assistance of new attorneys, Pizzuto now attempts to invoke this Court's jurisdiction through the All Writs Act, codified at 28 U.S.C. § 1651, by requesting the issuance of extraordinary relief from an original writ of habeas corpus for alleged acts that were litigated and rejected by the Idaho courts and Ninth Circuit more than nine years ago.

[1] Idaho Code § 19-2719(3) requires the filing of "any legal or factual challenge[s] to the sentence or conviction that [are] known or reasonably should be known" within forty-two days of the filing of the judgment. Claims that were known or reasonably should have been known are waived if not filed within the "time limits specified." I.C. § 19-2719(5).

STATEMENT OF THE CASE

The Idaho Supreme Court detailed the facts leading to Pizzuto's convictions and death sentence for the brutal murders of Berta Herndon and her nephew, Delbert Herndon:

> On July 25, 1985, while camping in the Ruby Meadows area, Berta Louise Herndon and her nephew, Delbert Dean Herndon were murdered and various items of their property were stolen. Gerald R. Pizzuto and his accomplices, James Rice, William Odom and Lene Odom were camping together in a cabin in this same area. Based on testimony given at trial it was determined that on July 25, 1985, William Odom and Pizzuto were planning to rob two fishermen, Stephen Crawford and Jack Roberts, when the Herndons drove by in their pickup truck. However, they abandoned that plan and shortly thereafter Pizzuto left Odom and Rice and walked off in the same direction that the Herndon truck had been headed. At that time Pizzuto stated that he was going "hunting" and walked toward the Herndon cabin, carrying a .22 caliber rifle. Approximately twenty to thirty minutes later Rice and Odom got into their truck and drove up the road looking for Pizzuto. Rice testified that as he and Odom were driving past the Herndon cabin they saw Pizzuto step from the doorway of the cabin holding a holstered pistol. Pizzuto approached the truck and told Rice and Odom to "give me half an hour and then come back up." Rice and Odom drove back to their cabin, parked the truck, and then walked back to the Herndon cabin. As Rice and Odom approached the cabin they heard what Rice described as "bashing hollow sounds" like that of "thumping a watermelon." After these sounds had ceased, Pizzuto walked out of the cabin carrying the .22 caliber rifle and a hammer and handed Odom a "wad of hundred dollar bills." Odom testified that Pizzuto indicated the Herndons had not believed they were being robbed, and that Pizzuto made Mr. Herndon drop his pants and crawl to the cabin. According to Odom, Pizzuto stated that he "put those people to sleep permanently." Odom also testified that "Pizzuto told the guy and lady that he was a highwayman and that he was going to rob them and the guy didn't believe him and that Jerry said he stuck the gun up to his face and said, '[d]oes this look like a cannon from where you are standing at?'" Rice testified that he took the rifle from Odom and was about to return to their cabin when he heard a "deep snort and some scuffling" sounds from the Herndon cabin. Rice went inside the cabin and saw Berta Herndon lying on the floor of the cabin with blood on the back of her head. Delbert Herndon was lying on the floor, his "feet were shaking on the floor in rapid succession" and he had blood on his face and the side of his head. Rice shot Delbert Herndon in the head because he "didn't want him to suffer."
>
> The bodies of Berta Herndon and Del Herndon were buried in shallow graves that Rice, Odom and Pizzuto dug near the scene of the murders. After the bodies were buried the money taken from the Herndons

was divided between the three men. Shortly thereafter the men packed their belongings and placed them into Odom's pickup truck. They then left Ruby Meadows and headed for McCall, Odom driving his truck and Pizzuto and Rice traveling in the Herndon truck. They camped that evening at a nearby hot springs and the next morning deposited the Herndon truck in a wooded area, drove into Cascade and rented a motel room. Several days later Rice boarded a bus and returned to Orland, California. Upon arriving in Orland, Rice notified law enforcement officials which ultimately lead to the discovery of the bodies.

Gerald R. Pizzuto Jr., James Rice, William Odom, and Lene Odom were all charged with murder in connection with the victims' deaths. James Rice and William and Lene Odom all pled guilty to lesser charges or lesser sentence recommendations in return for their cooperation with the state. They all testified against Pizzuto at his trial.

An autopsy was performed on the bodies by Dr. Koenen, a pathologist, who testified at trial that Delbert Herndon's wrists had been bound with a shoe lace and a piece of wire. Although Dr. Koenen stated that Delbert Herndon suffered two fatal blows to the head and a gun shot between the eyes which would also be fatal, he was unable to determine which occurred first. Dr. Koenen testified that the injuries to Delbert Herndon were consistent with a hammer blow to the head. In Dr. Koenen's examination of Berta Herndon's body, he noted that her hand and wrist were tied behind her back using a shoe lace and a ligature which was wrapped several times around her right thumb. Berta Herndon's death was caused by two blows to the back of the head by a blunt object, consistent with hammer blows.

. . . .

The trial court admitted testimony that Pizzuto had intended to rob Stephen Crawford, who was fishing near the Herndon cabin, immediately prior to the time the Herndon vehicle arrived at the scene. The trial court ruled that the evidence of this incident was admissible to show motive, intent, scheme or plan "so closely related to the Herndon's [sic] that proof of their involvement with Steven Crawford, tends to demonstrate the robbery of the Herndons."

The trial court also admitted evidence that subsequent to the Herndon murders Pizzuto approached Roger Bacon, threatened him with a weapon, told him that he was a "highwayman" and that he intended to steal his money and his car. Pizzuto then used Bacon's shoelaces to tie his hands behind his head, interlocking Bacon's fingers and tieing his two index fingers together. He then gagged Bacon and tied him to a tree. The trial court concluded that the circumstances of the Bacon incident closely

> paralleled the circumstances of the Herndon murders because Pizzuto had also advised one of the victims that he was a "highwayman" and had tied the victims' hands with shoelaces in a manner similar to the way Bacon's hands had been tied. The evidence relating to the Bacon incident was admitted as relevant to show motive, intent and common scheme or plan closely related to the Herndon murders.

State v. Pizzuto (Pizzuto I), 810 P.2d 680, 686-688 (Idaho 1991), *cert denied*, 503 U.S. 908 (1992), *overruled on other grounds by* State v. Card, 825 P.2d 1081 (Idaho 1991); *see also* Pizzuto v. Arave, 280 F.3d 949, 952-53 (9th Cir. 2002), *amended in part by* 385 F.3d 1247 (9th Cir. 2004).

Pizzuto was convicted of two counts of felony murder, two counts of premeditated murder, robbery and grand theft. Pizzuto I, 810 P.2d at 686. After finding the state had proven five statutory aggravating factors, and weighing the collective mitigation evidence against the statutory aggravating factors individually, the trial court sentenced Pizzuto to death. Pizzuto, 280 F.3d at 954. Pizzuto filed his first post-conviction petition in July 1986, which the PCR court denied. Pizzuto I, 810 P.2d at 688. In 1991, the Idaho Supreme Court vacated Pizzuto's robbery conviction, concluding it merged as a lesser-included offense of felony-murder, id. at 695-96, but affirmed the remaining convictions, sentences and denial of post-conviction relief, id. at 716.

Pizzuto filed his first federal habeas petition in September 1992. Pizzuto, 280 F.3d at 954. During litigation of that petition, Pizzuto returned to state court and filed a successive post-conviction petition, which the PCR court dismissed pursuant to I.C. § 19-2719 because the claims in the successive petition were known or reasonably should have been known at the time he filed his first post-conviction petition. Pizzuto v. State (Pizzuto II), 903 P.2d 58, 59 (Idaho 1995). Based upon I.C. § 19-2719, the Idaho Supreme Court

dismissed Pizzuto's appeal because he failed to establish the claims were not known and reasonably could not have been known when he filed his first petition. Id. at 60-61.

Upon returning to federal court, the district court denied habeas relief. Pizzuto, 280 F.3d at 954. While his appeal before the Ninth Circuit was pending, Pizzuto returned to state court and filed his third successive post-conviction petition, alleging the state withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), involving co-defendants Odom and Rice, which the PCR court dismissed based upon I.C. § 19-2719 because Pizzuto failed to establish the claims could not have been raised in his first petition for post-conviction relief. Pizzuto v. State (Pizzuto III), 10 P.3d 742, 744-45 (Idaho 2000). The Idaho Supreme Court affirmed. Id. at 745-48. Before the Ninth Circuit, Pizzuto twice sought to enlarge the record, and move for a remand to amend his habeas petition with the Brady claim, all of which the Ninth Circuit denied. Pizzuto, 280 F.3d at 954 n.1. He also filed his first motion to file a successive habeas petition, which the Ninth Circuit denied. (App., p.1.)

In February 2002, the Ninth Circuit affirmed the denial of habeas relief. Pizzuto, 280 F.3d 949. This Court denied certiorari. Pizzuto v. Fisher, 546 U.S. 976 (2005). However, while the mandate was stayed, Pizzuto v. Arave, 280 F.3d 1217 (9th Cir. 2002), Pizzuto returned to state court and filed his fourth post-conviction petition contending his death sentence violated Ring v. Arizona, 536 U.S. 584 (2002), because he was not sentenced by a jury. Pizzuto v. State (Pizzuto V), 202 P.3d 642, 645 (Idaho 2008). The

PCR court denied the petition, and the Idaho Supreme Court affirmed. Rhoades et al. v. State (Pizzuto IV), 233 P.3d 61 (Idaho 2010).[2]

In June 2003, Pizzuto filed his fifth post-conviction petition contending his death sentence violated Atkins v. Virginia, 536 U.S. 304 (2002), where this Court concluded intellectually disabled murderers cannot be executed. Pizzuto V, 202 P.3d at 645. The petition was dismissed because it was untimely under I.C. § 19-2719 and, alternatively, because Pizzuto "failed to raise a genuine issue of material fact supporting his claim of mental retardation." Id. at 646. While the Idaho Supreme Court agreed that Pizzuto's Atkins petition was untimely, id. at 648-49, the court affirmed because he failed to establish a genuine issue of material fact regarding two Atkins prongs – an intelligence quotient ("IQ") of 70 or below and onset of his IQ score before age 18, id. at 650-55. Pizzuto was permitted to file a successive federal habeas petition raising the Atkins claim, which the district court denied under AEDPA and *de novo* review, Pizzuto v. Blades, 2016 WL 6963030 (D. Idaho 2016); the Ninth Circuit affirmed, Pizzuto v. Yordy, 947 F.3d 510 (9th Cir. 2019). Nevertheless, Pizzuto returned to state court, attempting to resurrect his Atkins claim ten years after the state courts rejected the claim, by filing a motion under I.R.C.P. 60(b)(6), which the PCR court denied, and the Idaho Supreme Court affirmed because it was untimely. Pizzuto v. State (Pizzuto VII), 2021 WL 358204 (Idaho 2021).

In November 2005, while litigating his Atkins claim, Pizzuto filed his sixth post-conviction petition, which was amended, contending, (1) the state allegedly withheld exculpatory evidence; (2) prosecutorial misconduct for allegedly withholding exculpatory

[2] Pizzuto's appeal was consolidated with other death-sentenced murderers that had raised the Ring issue.

evidence; (3) judicial misconduct; (4) denial of a fair and impartial judge; (5) cumulative error; and (6) actual innocence. Pizzuto v. State (Pizzuto VI), 233 P.3d 86, 89 (Idaho 2010). The majority of Pizzuto's claims involved an "alleged secret plea deal between the prosecutor and [ ] Rice" that allegedly came to fruition during a meeting between Rice's attorney, the prosecutor, and the trial judge where it was agreed that Rice would plead guilty to second-degree murder and receive "a twenty year sentence, which with good time credits, would amount to fourteen years, eight months and sixteen days behind bars," if Rice testified against Pizzuto. Id. Pizzuto further contended that, during Rice's plea hearing, Rice, his attorney, the prosecutor, and the trial judge, "took steps to conceal the nature of his plea agreement," and during Pizzuto's trial, "Rice appeared more credible because the prosecution elicited testimony from Rice that he was facing up to life in prison and that the prosecutor emphasized this point in his closing argument." Id. at 89-90.

Prior to Pizzuto's trial, after an extensive plea colloquy with the trial court and Rice's attorney, Rice pled guilty to two counts of aiding and abetting second-degree murder. (Pet. App., pp.240-56.) During that colloquy, Rice was advised that second-degree carried a maximum penalty of fixed life with the possibility of parole; he repeatedly affirmed his understanding of the potential penalties. (Id., pp.245-50.)

During Pizzuto's trial, Rice explained that he pled guilty to two counts of second-degree murder, which could result in him "spend[ing] the rest of [his] life in prison." (Id., pp.84-85.) During cross-examination, Rice reaffirmed why he had pled guilty and the number of additional charges that were dismissed. (Id., pp.189-94.) During his closing argument, the prosecutor noted, "[he] didn't believe every single word [Rice] said" (id., p.200), and spoke about the plea agreement with Rice, stating, "Jim Rice expects, and he

told you from the witness stand, that he may spend the rest of his natural life in prison. Got a great deal, didn't he?" (id., p.202.)

On June 4, 1986, after Pizzuto's trial, Rice was given a unified indeterminate life sentence with the first twenty years fixed for both murders, to be served concurrently; he was also given credit for time served totaling 305 days. (Id., pp.291-92.) Having "completed all the time required to be served," Rice was discharged from the Idaho Department of Correction on December 25, 1998. (Id., p.294.)

Like all of his prior successive post-conviction petitions, the new PCR court[3] rejected Pizzuto's claims based upon the dictates of I.C. § 19-2719. Likewise, in March 2010, the Idaho Supreme Court affirmed, reasoning that all of the evidence supporting Pizzuto's claims – Rice's affidavits, his wife's affidavit, and notes and billing statements from Rice's attorney – were known or could have been known when Pizzuto filed his first post-conviction petition. Pizzuto VI, 233 P.3d at 93. This Court denied certiorari. Pizzuto v. Idaho, 562 U.S. 1182 (2011).

On March 2, 2011, Pizzuto filed another motion with the Ninth Circuit to file a successive habeas petition based upon the allegations in his sixth post-conviction petition. Pizzuto v. Yordy, 673 F.3d 1003, 1007 (9th Cir. 2012). After reviewing its prior opinion that detailed the circumstances of Berta and Delbert's murders, the court discussed the standards associated with 28 U.S.C. § 2244(b)(2)(B)(ii).[4] Id. at 1004-09 (quoting Pizzuto

[3] Prior to the filing of the sixth post-conviction petition, the judge presiding over Pizzuto's cases was the Honorable George R. Reinhardt, III. Two new judges presided over Pizzuto's sixth post-conviction case, the Honorable Darla Williamson and the Honorable Patrick H. Owen. Pizzuto VI, 233 P.3d at 89.

[4] 28 U.S.C. § 2244(b)(2)(B)(ii) states, "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

280 F.3d at 952-54). Meticulously reexamining the trial evidence, crediting Pizzuto's new evidence, and discounting the testimony from his sister, Angelinna, the court concluded that Pizzuto failed to meet his burden under § 2244(b)(2)(B)(ii), reasoning, "Pizzuto has not shown by clear and convincing evidence that no reasonable fact finder would have found him guilty as required by § 2244(b)(2)(B)(ii)." Pizzuto, 673 F.3d at 1008-10. The court declined to address due diligence under § 2244(b)(2)(B)(i). Id. at 1010. Judge Betty Fletcher dissented. Id. at 1011-13 (Fletcher, J., dissenting). Pizzuto failed to seek certiorari or file a request for an extraordinary writ and original petition from the Ninth Circuit's March 8, 2012 opinion until May 10, 2021, more than ten years after the Ninth Circuit's decision and 23 days before his scheduled execution on June 2, 2021.[5] (App., pp.2-4.)

REASONS FOR DENYING THE WRIT

"Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the grant of any such writ, the petition must show that the writ will aid in the Court's jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary power, and that adequate relief cannot be obtained in any other form or from any other court." S.Ct. R. 20.1. The All Writs Act "'is to be used 'sparingly and only in the most critical and exigent circumstances.'" Wisconsin Right to Life, Inc. v. Federal Election Com'n, 542 U.S. 1305, 1306 (2004) (Rehnquist, C. J., in chambers) (quoting Ohio Citizens for Responsible Energy Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). Accordingly, it is only

evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

[5] Pizzuto's June 2, 2021 execution was stayed on May 18, 2021. (App., p.5.)

properly exercised "when it is '[n]ecessary or appropriate in aid of our jurisdiction' and 'the legal rights at issue are indisputably clear.'" Hobby Lobby Stores, Inc. v. Sebellius, 568 U.S. 1401 (2012) (Sotomayor, J., in chambers) (quoting Wisconsin Right to Life, 542 U.S. at 1306).

While the "Great Writ" has been "the instrument by which due process could be insisted upon, its power has never been limitless." Edwards v. Vannoy, #19-5807, slip op. at 2 (S.Ct. May 17, 2021) (Gorsuch, J., concurring) (quotes, citation, brackets omitted). Even after Brown v. Allen, 344 U.S. 443 (1953), where the Court "effectively recast habeas as another way for federal courts to redress practically any error of federal law they might find in state court proceeding," Edwards, 19-5807, slip op. at 5 (Gorsuch, J., concurring), the Court "refocused its attention on the terms of the federal habeas statute" and "began to develop doctrines aimed at returning the Great Writ closer to its historical office," id. at 8. These standards include "procedural default rules to prevent habeas petitioners from evading independent and adequate state law grounds for sustaining their convictions," id. (citing Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977)), and "abuse-of-the-writ rules to prevent an endless cycle of petition and re-petition by prisoners with nothing but time on their hands," id. at 8-9 (citing McCleskey v. Zant, 499 U.S. 467, 489-493 (1991)).

In this case, Pizzuto concedes his Petition is successive and the claims are procedurally defaulted, but contends the underlying merits of his Brady claim meets the cause and prejudice to overcome the abuse of the writ doctrine and procedural default. However, curiously, Pizzuto completely fails to explain how his Petition meets the exceptionally high standards required for an original writ that are described above,

particularly considering the delay associated with the filing of his Petition and the ordinary, run-of-the-mill nature of his Brady and Napue claims.

A. Delay Associated With Pizzuto's Petition Is Why Relief Is No Longer Available

As detailed above, the state acknowledges Pizzuto raised the question before the Idaho Supreme Court and the Ninth Circuit – more than ten years ago. The state also recognizes that under AEDPA the Ninth Circuit's denial of Pizzuto's request to file a successive habeas petition "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). However, absolutely nothing prevented Pizzuto from filing his current Petition ten years ago after the Ninth Circuit denied his request to file a successive habeas petition. In Felkner v. Turpin, 518 U.S. 651, 661 (1996), this Court reasoned that AEDPA "has not repealed our authority to entertain original habeas petitions." Presumably, the only reason Pizzuto filed the Petition was because of his imminent execution, which has now been stayed. Irrespective of the merits of his question, the delay in filing his Petition, which is all attributable to Pizzuto, is sufficient alone to deny his request for extraordinary relief.

This Court recently discussed the problems associated with applying new rules of criminal procedure retroactively to cases on collateral review years after the direct review has been completed. *See generally* Edwards, #19-5807, slip op. "As the Court has explained, applying constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 6 (quotes and citation omitted). "Moreover, conducting scores of retrials years after the crimes occurred would require significant state resources. And a state may not be able to retry some defendants at all because of lost evidence, faulty

memory, and missing witnesses." Id. (quotes and citation omitted). "When these convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims." Id.

These same basic principles apply in Pizzuto's case with even more force because "[f]inality has special importance in the context of a federal attack on a state conviction." McCleskey, 499 U.S. at 491-92. This is especially true considering Pizzuto's strategy of engaging in piece-meal litigation for more than 35 years and, more importantly, to wait and file his Petition from a claim that was adjudicated in the Idaho and federal courts over ten years ago when he had the opportunity at that time to raise the same question he now presents to this Court. In short, this is not a case – which involves a mere run-of-the-mill Brady claim – that falls within this Court's criteria for issuing an Extraordinary Writ and Original Petition for Writ of Habeas Corpus. Rather, this "is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless." Price v. Dunn, 139 S.Ct. 1533, 1540 (2019) (Thomas, J., concurring in the denial of certiorari). Indeed, Pizzuto's claims do not even "meet the Court's traditional criteria for granting certiorari" under Sup. Ct. Rule 10. Calvert v. Texas, #20-701, slip op., pp.2-3 (S.Ct. May 17, 2021) (Sotomayor, J., respecting the denial of certiorari).

Based upon Pizzuto's overall strategy of conducting piece-meal litigation associated with his convictions and death sentence, coupled with the specific delay associated with the filing of his Petition, the Court should deny his request.

B. Pizzuto's Petition Should Be Denied Because It Is A Successive Petition And Procedurally Defaulted

This is a successive petition, and the disruptions from such petitions are "[f]ar more severe." McCleskey, 499 U.S at 492. Because this is a successive habeas petition, Pizzuto assumes he must demonstrate "cause and prejudice" (Petition, p.8); the state does not disagree with Pizzuto's assertion. *See* Id. at 493. Cause, in the context of procedural default, "requires the petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court," which can include "interference by officials that makes compliance with the State's procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to counsel." Id. at 493-94 (quotes and citations omitted). "Once the petitioner has established cause, he must show actual prejudice resulting from the errors of which he complains." Id. at 494 (quotes and citations omitted). These same principles have been adopted for successive petitions where Pizzuto has the burden to disprove abuse of the writ. Id.

To circumvent this basic habeas requirement, Pizzuto relies upon a single Tenth Circuit case, Douglas v. Workman, 560 F.3d 1156, 1188-89 (10th Cir. 2009), to contend, "it is improper to reward the government's misconduct by barring the claim on successiveness grounds." (Petition, p.8.) However, Douglas makes no such pronouncement, and did not even involve a successive habeas petition. Rather, the Tenth Circuit noted the "unique circumstances of this case" and that the case was "unusual" in concluding that the Brady claim would be treated as a "supplement to his initial habeas petition." Id. at 1188-89. Irrespective, Pizzuto completely ignores the fact that, in his case, the Idaho Supreme Court reasoned the underlying facts supporting his Brady claim could have been known when he filed his first post-conviction petition years earlier, Pizzuto VI,

233 P.3d at 92-93, which he does not challenge before this Court. Indeed, Pizzuto has failed to make any showing that the factual and legal bases for his Brady claim were not reasonably available years ago and, therefore, has failed to prove cause to overcome the abuse of writ doctrine.

In a related argument, Pizzuto contends his claim is not procedurally defaulted because a Brady claim automatically establishes cause and prejudice "by a showing on the merits." (Petition, p.8). Admittedly, in Strickler v. Green, 527 U.S. 263, 282 (1999), this Court explained, "In this case, cause and prejudice parallel two of the three components of the alleged *Brady* violation" – suppression of exculpatory evidence and Brady prejudice.

1. Pizzuto Has Failed To Establish Materiality[6]

Under Brady, 373 U.S. at 87, and its progeny, the prosecution has a duty to disclose evidence that is both favorable to the defense and material to either guilt or punishment. The suppression of such evidence violates due process. Id. at 86-87. To prove a Brady violation, the defendant must show three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler, 527 U.S. at 281-82. The Court discussed the issue of prejudice or materiality in Kyles v. Whitley, 514 U.S. 419, 434 (1995):

[6] By focusing upon Brady's prejudice prong, the Court should not conclude the state is admitting there was ever any "secret plea agreement." To be clear, the state adamantly denies such an agreement was ever negotiated or otherwise existed. Indeed, Pizzuto has not provided this Court with any declarations from the prosecutor, trial judge, or even Rice's attorney corroborating Rice's allegation. And of particular interest is Pizzuto's assertion that the prosecutor, trial judge, and Rice are still alive without any mention of Rice's attorney still being alive. (Petition, p.14.) Consequently, Brady's first two prongs also fail because the state did not withhold any exculpatory or impeaching evidence.

> *Bagley*'s[7] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678.

However, as recognized by the Ninth Circuit, "Even if we credit Pizzuto's claim that no reasonable juror would have found Rice credible, had the newly discovered evidence been available and presented at trial, and even if we discount Angelinna's testimony, other unchallenged evidence provides a sufficient basis of which a reasonable fact finder could find Pizzuto guilty of murdering the Herndons." Pizzuto, 673 F.3d at 1009 (quotes and ellipses omitted). That evidence was extremely powerful, and included the following:

> Lene Odom testified that Pizzuto went camping with her family and Rice and that she overheard the three men discussing robbing two fishermen. She also testified that, after the men decided not to do so because one of the fishermen had a gun, Pizzuto took the gun they had brought with them and went off in the direction of the Herndons' pickup and that Odom and Rice followed about an hour later. Later, Pizzuto drove the Herndons' pickup back to the cabin the Odoms, Rice, and Pizzuto were using, and the three men divided up money.
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> Odom testified that Pizzuto came out of the Herndons' cabin with a hammer in his hand, and that he reported to Odom that he had told "the guy and lady that he was a highwayman" and that he "put those people to sleep permanently." Carl Koenen, who performed the autopsies, testified that both of the Herndons' injuries were caused by something small and dense, like a hammer. Though Rice admitted to shooting Delbert in the head, Koenen testified that Delbert had three fatal injuries—crushing fractures on the right and left sides of his head and the gunshot wound—any of which were individually fatal. He further testified that both Herndons were found with their wrists tied behind their backs with shoelaces.

[7] United States v. Bagley, 473 U.S. 667 (1985).

> Sheriff Baldwin testified that he went to Great Falls, Montana to pick up Pizzuto and transport him back to the state of Idaho. Sheriff Baldwin also picked up evidence—including a pistol, a ring, and boots. Joe Herndon, Delbert Herndon's brother, testified that those items belonged to Delbert.
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> Bacon's description of the manner in which Pizzuto robbed him was similar to Pizzuto's robbery of the Herndons. During both robberies Pizzuto described himself as a "highwayman." Bacon testified that Pizzuto tied his hands with shoelaces in a manner similar to that in which the Herndons' hands were tied. Both the binding in shoelaces and the use of the term "highwayman" are not so commonplace as to suggest that a reasonable factfinder could not have thought Pizzuto committed the murders. Instead, a reasonable factfinder could think that such evidence helped to prove guilt of the murders beyond a reasonable doubt.
>
> Even if the testimony of Rice and Angelinna were completely removed from consideration, there was very strong evidence of guilt: Pizzuto had Delbert Herndon's belongings. He tied Bacon up with shoelaces in a similar manner as the Herndons had been tied, calling himself a "highwayman" in both cases. Odom testified that Pizzuto claimed to "put those people to sleep permanently." Both victims had deadly blows to the head consistent with being caused by a hammer, and Odom saw Pizzuto with a hammer. Considering the weight of this other evidence, we conclude that Pizzuto has not shown by clear and convincing evidence that no reasonable factfinder would have found him guilty as required by § 2244(b)(2)(B)(ii).

Pizzuto, 673 F.3d at 1009-10.

The state recognizes the Ninth Circuit examined the evidence under the standard of § 2244(b)(2)(B)(ii). However, based upon that same evidence, Pizzuto has failed to establish Brady's materiality prong based only upon cumulative impeachment evidence stemming from the alleged secret plea agreement. Moreover, in analyzing Brady's materiality prong, there is no reason to discount Angelinna's testimony, which was discussed by the Ninth Circuit:

> Sometime in early August Pizzuto visited his sister, Angelinna Pizzuto, in Great Falls, Montana. Pizzuto arrived with cowboy boots, a revolver, and a two-tone gold wedding band in his possession, all of which were subsequently identified as belonging to Delbert Herndon. Pizzuto told

> her that he was a "highwayman" and that he had robbed and murdered a man and a woman (with the man's gun, which he had) after he had tied them to some trees.

Pizzuto, 673 F.3d at 1005-06. At least twice before visiting his sister – first when he murdered the Herndons and then when he left Bacon for dead tied to a tree – Pizzuto had used the term, "highwayman," making the evidence from Angelinna particularly compelling and corroborative of Rice's testimony.

Moreover, Rice was repeatedly impeached during his cross-examination, admitting to taking drugs with Odom (Pet. App, pp.91-92), admitting he had prior felonies including robbery, burglary and receiving stolen property (id., pp.102-08), discussing the alcohol consumed by the parties at Ruby Meadows (id., pp.110, 121), and acknowledging he had previously lied regarding the events that transpired prior to, during and after the murders (id., pp.77-83, 122-26, 183-84). Rice further admitted he did not have good eyesight and was not wearing his glasses at the Herndons' cabin. (Id., p.194.) Finally, the jury learned that Rice had pled guilty to only second-degree murder so that he could avoid the death penalty and that he was facing a fixed life sentence. (Id., pp.84-85; 189-92.) Based upon the exhaustive manner in which Rice's credibility was challenged, coupled with all the corroborative evidence presented at trial and the cumulative nature of the new impeachment evidence, not only has Pizzuto failed to establish cause and prejudice by proving a Brady claim, but it is difficult to understand how he has established "exceptional circumstances" or a legal right that is indisputably clear that warrants any basis for this Court to exercise its discretionary power to issue an original writ of habeas corpus.

Pizzuto next contends, based upon the concept of "residual doubt, that "[e]ven if the Court is unpersuaded on materiality as to guilt, it remains as to sentence." (Petition,

p.11.) In Franklin v. Lynaugh, 487 U.S. 164, 174 (1988), this Court explained, "lingering doubts are not over any aspect of a petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor." More recently, the Court distinguished Lockett v. Ohio, 438 U.S. 586 (1978) (plurality), and Eddings v. Oklahoma, 455 U.S. 104 (1982), explaining that the evidence in those cases "was traditional sentence-related evidence, evidence that tended to show *how*, not *whether*, the defendant committed the crime." Oregon v. Guzek, 546 U.S. 517, 524 (2006) (emphasis in original); *see also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 250-51 (2017) ("we have never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing"). Not only would there have been no basis for Pizzuto's trial attorney to argue residual doubt at sentencing, but the trial court was not constitutionally permitted to consider such evidence.

2. Pizzuto's *Napue* Claim Is Not Meritorious

In Napue v. Illinois, 360 U.S. 264, 269 (1959), this Court explained the state cannot obtain a conviction through the use of evidence known to the state to be false. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," and "does not cease to apply merely because the false testimony goes only to the credibility of the witness." Id. Prejudice is based upon "the well-established rule that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678 (citation omitted).

Pizzuto's claim is based upon questioning of Rice by the prosecutor regarding what the maximum penalty was for aiding and abetting second-degree murder. (Petition, p.12.) Specifically, the prosecutor asked, "[W]hat is your understanding, Mr. Rice, of the maximum penalty you could receive for aiding and abetting in the killing of Berta Herndon." (Pet. App., p.1776.) Rice responded, "I could spend the rest of my life in prison." (Id.) The same question was asked regarding Delbert with Rice giving the same response. (Id.) These answers were not false. In Idaho, aiding and abetting a second-degree murder "is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life." I.C. § 18-4004; *see also* I.C. § 18-204 (explaining that aiders and abettors are treated as "principals in any crime so committed").

Irrespective, for the same reasons that the third prong of his Brady claim fails, Pizzuto has failed to establish the third prong in Napue. Even assuming there was a "secret deal," based upon all the evidence corroborating Rice's testimony and the manner in which Rice was impeached, Pizzuto has failed to establish any reasonable likelihood that the false testimony could have affected the verdicts of the jury or the judgment of the trial judge based upon the mere fact that Rice was allegedly promised a sentence of less than life.

3. Pizzuto Has Failed To Establish Any Basis For An Evidentiary Hearing

The state acknowledges this Court has previously transferred a writ of habeas corpus to the federal district court, but that was to allow the court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." In re Davis, 557 U.S. 952 (2009). The state is unaware of any case, and none has been cited by Pizzuto, where this Court has granted an original writ and then transferred the case to the federal district court for an

evidentiary hearing on Brady and Napue claims that stem from cumulative impeachment evidence that was litigated before the state courts ten years earlier, and those same courts reasoned the claim and supporting evidence were known or could have been known when the petitioner's first post-conviction petition was filed nearly thirty-five years ago,

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"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," Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983) (quotes and citation omitted). Both the state and the victims are entitled to a speedy and final resolution of the litigation associated with Pizzuto murdering two innocent victims. Considering the underlying facts of Pizzuto's claims, coupled with the inordinate delay associated with raising the claim before this Court, Pizzuto has failed to establish "exceptional circumstances" warranting use of the Court's discretionary power to issue an Extraordinary Writ and Original Petition for Writ of Habeas Corpus.

CONCLUSION

The state respectfully requests that Pizzuto's Petition for Extraordinary Writ and Original Petition for Writ of Habeas Corpus be denied.

DATED this 21st day of May, 2021.

/s/ *L. LaMont Anderson*
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