No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO,

Petitioner,

v.

TYRELL DAVIS, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION

Respondent.

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

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

947 F.3d 510
United States Court of Appeals, Ninth Circuit.

Gerald Ross PIZZUTO, Jr., Petitioner-Appellant,
v.
Keith YORDY, Warden, Idaho Maximum Security Institution, Respondent-Appellee.

No. 16-36082
|
Argued and Submitted December 11, 2018 San Francisco, California
|
Filed August 14, 2019
|
Amended December 31, 2019

Synopsis

Background: Petitioner convicted of murder and sentenced to death, affirmed at 119 Idaho 742, 810 P.2d 680, and denied post-conviction relief, 146 Idaho 720, 202 P.3d 642, filed petition for writ of habeas corpus. The United States District Court for the District of Idaho, B. Lynn Winmill, Chief Judge, 2012 WL 73236, denied petitioner's successive petition, and denied petitioner's motion to alter or amend the judgment, 2012 WL 1189908. Petitioner appealed. The Court of Appeals, 729 F.3d 1211, affirmed. In light of the Supreme Court's subsequent opinion in *Hall v. Florida*, prohibiting execution of a person whose IQ score fell within test's margin of error unless he had been able to present additional evidence of intellectual disability, the Court of Appeals, 758 F.3d 1178, withdrew its prior opinion, vacated the District Court's order, and remanded. On remand, the District Court, Winmill, Chief Judge, 2016 WL 6963030, again denied the petition. Petitioner appealed.

Holdings: On denial of rehearing, the Court of Appeals held that:

[1] Idaho Supreme Court's decision that petitioner's execution was not barred was not contrary to Supreme Court law;

[2] Idaho Supreme Court's application of a hard IQ cutoff score of 70 under Idaho law prohibiting execution of intellectually disabled offenders was not contrary to, or an unreasonable application of, clearly established federal law at time of the decision;

[3] Idaho Supreme Court's decision that petitioner's execution was not barred was not unreasonable application of Supreme Court law;

[4] Idaho Supreme Court's factual determination that petitioner was not intellectually disabled was not unreasonable; and

[5] Idaho Supreme Court's factfinding process was not unreasonable.

Affirmed.

Opinion, 933 F.3d 1166, superseded.

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

West Headnotes (23)

[1] Habeas Corpus Review de novo

The Court of Appeals reviews de novo the district court's denial of a habeas petition.

[2] Habeas Corpus Federal or constitutional questions

A decision by a state court is contrary to the Supreme Court's clearly established law, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), if it applies a rule that contradicts the governing law set forth in the Supreme Court's cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent. 28 U.S.C.A. § 2254(d)(1).

[3] Habeas Corpus Federal Review of State or Territorial Cases

A state court decision involves an unreasonable application of the Supreme Court's precedent, as would warrant federal habeas relief under the

Antiterrorism and Effective Death Penalty Act (AEDPA), if the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. 28 U.S.C.A. § 2254(d)(1).

[4] **Habeas Corpus** Federal Review of State or Territorial Cases

For a state court decision to involve an unreasonable application of Supreme Court precedent, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), the record must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. 28 U.S.C.A. § 2254(d)(1).

[5] **Habeas Corpus** Federal Review of State or Territorial Cases

In determining whether a state court decision involves an unreasonable application of Supreme Court precedent, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), the question is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable, a substantially higher threshold. 28 U.S.C.A. § 2254(d)(1).

[6] **Habeas Corpus** Federal Review of State or Territorial Cases

A federal habeas court may only hold that a state court's decision was based on an unreasonable determination of the facts, as would warrant relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), if it is convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. 28 U.S.C.A. § 2254(d)(2).

[7] **Habeas Corpus** State Determinations in Federal Court

A federal habeas court reviews the last reasoned state court decision. 28 U.S.C.A. § 2254(d)(2).

[8] **Habeas Corpus** Reception of evidence; affidavits; matters considered

A federal habeas court's review under the Antiterrorism and Effective Death Penalty Act (AEDPA) is limited to the record that was before the state court. 28 U.S.C.A. § 2254(d).

[9] **Habeas Corpus** Federal Review of State or Territorial Cases

A federal court may grant habeas relief only if it concludes both that the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA) are satisfied and, on de novo review, that the petitioner is in custody in violation of the Constitution of the United States. 28 U.S.C.A. § 2254(d).

[10] **Habeas Corpus** Death sentence

Idaho Supreme Court's decision that petitioner's execution was not barred under Idaho law prohibiting execution of intellectually disabled offenders was not contrary to Supreme Court's ruling in *Atkins*, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), where Idaho Supreme Court identified applicable Supreme Court precedent and acknowledged its holding that the Eighth Amendment prohibited execution of intellectually disabled offenders. U.S. Const. Amend. 8; 28 U.S.C.A. § 2254(d)(1); Idaho Code Ann. § 19-2515A.

[11] **Habeas Corpus** Death sentence

Idaho Supreme Court's application of a hard cutoff of 70 IQ under Idaho law prohibiting execution of intellectually disabled offenders was not contrary to, or an unreasonable application of, clearly established federal law

at time of the decision, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), although Idaho Supreme Court's decision was inconsistent with Supreme Court's decisions that postdated state court's decision. 28 U.S.C.A. § 2254(d)(1); Idaho Code Ann. § 19-2515A.

[12] **Habeas Corpus** Death sentence

Idaho Supreme Court's decision that petitioner's execution was not barred under Idaho law prohibiting execution of intellectually disabled offenders was not unreasonable application of Supreme Court's ruling in *Atkins*, that Eighth Amendment prohibited execution of intellectually disabled offenders, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), although Idaho Supreme Court's application of hard cutoff of 70 IQ was inconsistent with clinical definitions of intellectual disability in place at time of state court's decision, where, at time of state court's decision, it was not yet apparent that states were required to define intellectual disability in accordance with prevailing clinical definitions. U.S. Const. Amend. 8; 28 U.S.C.A. § 2254(d)(1); Idaho Code Ann. § 19-2515A.

[13] **Habeas Corpus** Federal Review of State or Territorial Cases

A federal court may not characterize a state court's factual determinations as unreasonable, as would warrant habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), merely because it would have reached a different conclusion in the first instance. 28 U.S.C.A. § 2254(d)(2).

[14] **Habeas Corpus** Issues and findings of fact; historical facts; credibility

Antiterrorism and Effective Death Penalty Act (AEDPA) section providing for federal habeas relief if a state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding requires that the federal habeas court accord the state trial court substantial deference. 28 U.S.C.A. § 2254(d)(2).

[15] **Habeas Corpus** Federal Review of State or Territorial Cases

If reasonable minds reviewing the record might disagree about the finding in question, that does not suffice to supersede the trial court's determination under the Antiterrorism and Effective Death Penalty Act (AEDPA) section providing for federal habeas relief if a state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.A. § 2254(d)(2).

[16] **Habeas Corpus** Death sentence

Idaho Supreme Court's factual determination that petitioner was not intellectually disabled under Idaho law prohibiting execution of intellectually disabled offenders was not unreasonable, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), although Idaho Supreme Court failed to apply clinical standards to define intellectual disability in use at time of its decision, where it did not purport to determine whether petitioner was intellectually disabled under clinical definitions, but, rather, it found only that petitioner failed to make prima facie showing that his IQ was 70 or below prior to his 18th birthday. 28 U.S.C.A. § 2254(d)(2); Idaho Code Ann. § 19-2515A.

[17] **Habeas Corpus** Death sentence

Idaho Supreme Court's factual determination that petitioner failed to make prima facie showing that his IQ was 70 or below before his 18th birthday, such that he was not intellectually disabled under Idaho law prohibiting execution of intellectually disabled offenders, was not unreasonable, as would warrant federal habeas relief under the Antiterrorism and Effective

Death Penalty Act (AEDPA), even though petitioner's school records provided some evidence of subaverage intellectual functioning, where Idaho Supreme Court did not ignore that evidence, and its focus on petitioner's IQ score was consistent with his own contentions. 28 U.S.C.A. § 2254(d)(2); Idaho Code Ann. § 19-2515A.

[18] **Habeas Corpus** Federal Review of State or Territorial Cases

For purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) section providing for federal habeas relief if a state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, a state court fact-finding process is undermined when the court has before it, yet apparently ignores, evidence that supports the petitioner's claim. 28 U.S.C.A. § 2254(d)(2).

[19] **Habeas Corpus** Death sentence

Idaho Supreme Court's factual determination that petitioner's IQ could have declined in adulthood, and that he did not qualify as intellectually disabled under Idaho law prohibiting execution of intellectually disabled offenders because he failed to make prima facie showing that his IQ was 70 or below before his 18th birthday, was not unreasonable, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), where Idaho Supreme Court relied on evidence from petitioner's own experts regarding his drug abuse and epilepsy. 28 U.S.C.A. § 2254(d)(2); Idaho Code Ann. § 19-2515A.

[20] **Habeas Corpus** Death sentence

Idaho Supreme Court's denial of evidentiary hearing regarding petitioner's intellectual capacity was not unreasonable determination of facts, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), where Idaho Supreme Court did not find that petitioner failed to raise reasonable doubt regarding his intellectual capacity, but, rather, only that he failed to make prima facie showing of intellectual disability. 28 U.S.C.A. § 2254(d)(2).

[21] **Habeas Corpus** Death sentence

Idaho Supreme Court's failure to determine whether petitioner raised reasonable doubt regarding his intellectual capacity, in denying evidentiary hearing regarding petitioner's intellectual capacity, was not contrary to or unreasonable application of Supreme Court's ruling in *Atkins*, that Eighth Amendment prohibited execution of intellectually disabled offenders, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), where *Atkins* did not address legal standard applicable to request for evidentiary hearing. U.S. Const. Amend. 8; 28 U.S.C.A. § 2254(d)(1).

[22] **Habeas Corpus** Death sentence

Idaho Supreme Court's factfinding process, resulting in denial of evidentiary hearing and access to expert with respect to petitioner's alleged intellectual capacity, was not unreasonable, as would warrant federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), where central issue in the case was whether petitioner could establish IQ of 70 or below before his 18th birthday, and petitioner did not argue that, were he afforded opportunity to conduct further testing, he would develop additional evidence on that question. 28 U.S.C.A. § 2254(d)(2).

[23] **Habeas Corpus** Assignment of errors and briefs

On appeal from denial of federal habeas relief, Court of Appeals would not consider petitioner's claims that state court's denial of evidentiary hearing violated Idaho law, as well as requirements of Due Process and Equal Protection, where petitioner's brief did not

specifically and distinctly argue those claims. U.S. Const. Amend. 14.

Attorneys and Law Firms

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L. LaMont Anderson (argued), Chief, Capital Litigation Unit; Lawrence G. Wasden, Attorney General; Criminal Law Division, Office of the Attorney General, Boise, Idaho; for Respondent-Appellee.

Appeal from the United States District Court for the District of Idaho, B. Lynn Winmill, Chief District Judge, Presiding, D.C. No. 1:05-cv-00516-BLW

Before: Raymond C. Fisher, Ronald M. Gould and Johnnie B. Rawlinson, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing. Judge Gould and Judge Rawlinson have voted to deny the petition for rehearing en banc and Judge Fisher has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc, filed November 27, 2019 (Dkt. 71), are denied.

The opinion filed August 14, 2019, and reported at 933 F.3d 1166, is amended. An amended opinion is filed concurrently with this order.

No further petitions for rehearing may be filed.

OPINION

PER CURIAM:

Gerald Ross Pizzuto, Jr., appeals the district court's denial of his successive petition for a writ of habeas corpus, in which he sought relief based on the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled persons. [1] In response to *Atkins*, Idaho enacted a law prohibiting the execution of intellectually disabled offenders. *See* Idaho Code § 19-2515A. Pizzuto challenges the Idaho Supreme Court's decision that his execution is not barred under that state law. *See Pizzuto v. State* (*Pizzuto I*), 146 Idaho 720, 202 P.3d 642 (2008). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm the district court's denial of Pizzuto's petition. Because the record does not establish that the state court's adjudication of Pizzuto's *Atkins* claim resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," ***515** habeas relief may not be granted. *See* 28 U.S.C. § 2254(d). Because habeas relief is barred under § 2254(d), we do not address whether Pizzuto is intellectually disabled, nor whether his execution would violate the Eighth Amendment.

1 We use the current clinical terms, intellectually disabled and intellectual disability, except when quoting from sources using the former terms, mentally retarded and mental retardation.

BACKGROUND

In 1986, a state trial court judge sentenced Pizzuto to death for the murders of Berta Herndon and her nephew Del Herndon. *See Pizzuto I*, 202 P.3d at 645. The Idaho Supreme Court summarized the murders as follows:

> Pizzuto approached [the Herndons] with a .22 caliber rifle as they arrived at their mountain cabin and made them

> enter the cabin. While inside, he tied the Her[n]dons' 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 Her[n]dons just for the sake of killing and subsequently joked and bragged about the killings to his associates.

Id. [2]

2 The Idaho Supreme Court's 2008 decision attributes Del Herndon's shooting to Pizzuto. *See Pizzuto I*, 202 P.3d at 645. The Idaho Supreme Court's 1991 decision, by contrast, attributes the shooting to James Rice, one of Pizzuto's accomplices. *See State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680, 687 (1991), *overruled on other grounds by State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991). In his petition for rehearing, Pizzuto contends that the 1991 decision is factually accurate and the 2008 decision is not, and we have no reason to question Pizzuto's contention. The question is immaterial to our analysis.

Sixteen years later, the Supreme Court decided *Atkins*, holding that executions of intellectually disabled persons constitute "cruel and unusual punishments" prohibited by the Eighth Amendment to the United States Constitution. *See* U.S. Const. amend. VIII. Citing "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal," the Court concluded that "a national consensus has developed against" such executions. *Atkins*, 536 U.S. at 316, 122 S.Ct. 2242.

The Court, however, did not adopt any single definition of intellectual disability. It noted that states' "statutory definitions of mental retardation [we]re not identical, but generally conform[ed] to the clinical definitions set forth" by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association. *See id.* at 317 n.22, 122 S.Ct. 2242. At the time, the AAMR – now known as the American Association on Intellectual and Developmental Disabilities (AAIDD) – defined intellectual disability as follows:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Id. at 308 n.3, 122 S.Ct. 2242 (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992)). The American Psychiatric Association's definition was similar:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at ***516** least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

Id. (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000) (DSM-IV)). The Court noted that "an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," *id.* at 309 n.5, 122 S.Ct. 2242, and that " '[m]ild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70," *id.* at 308 n.3, 122 S.Ct. 2242 (quoting DSM-IV at 42–43).

Atkins, however, did not expressly adopt these clinical definitions of intellectual disability. The Court instead left that question to the states:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not 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. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416–417, 106 S.Ct. 2595.

Id. at 317, 122 S.Ct. 2242 (alterations in original).

Shortly after the *Atkins* decision, Idaho adopted a statute prohibiting imposition of the death penalty for intellectually disabled offenders. *See* 2003 Idaho Sess. Laws 399 (codified at Idaho Code § 19-2515A(3)). The statute defines intellectual disability as follows:

> (a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.
>
> (b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

Id. at 308, 122 S.Ct. 2242 (codified at Idaho Code § 19-2515A(1)).

In light of *Atkins*, Pizzuto filed a fifth petition for state post-conviction relief, challenging his death sentence on the ground that he was intellectually disabled. *See Pizzuto I*, 202 P.3d at 645. In July 2003, the state moved to summarily dismiss Pizzuto's petition. *See id.* at 646. In August 2003, Pizzuto moved to disqualify the state trial court judge. *See id.* In October 2004, Pizzuto moved for additional psychological testing, asking that he be transported to an appropriate medical facility for testing in connection with a neuropsychiatric evaluation by Dr. James R. Merikangas. Pizzuto did not notice the motion ***517** for a hearing, however. *See id.* at 655. [3] In January 2005, the state trial court denied the motion for disqualification. *See id.* at 646.

[3] It is not clear why Pizzuto did not notice the motion for a hearing. At an April 2005 hearing, "Pizzuto's counsel stated that she could not ask the district court to rule on her motion for testing, apparently because she believed the judge should be disqualified from presiding in the case and therefore from ruling on the motion." *Pizzuto I*, 202 P.3d at 655 & n.8. Counsel for Pizzuto apparently concluded that, because the court had erroneously denied the motion to disqualify, any order entered by the court on the question of testing would be void.

In seeking dismissal of Pizzuto's petition, the state argued that the petition was untimely under Idaho law and, alternatively, that Pizzuto had failed to establish a prima face case of intellectual disability under the new Idaho statute. [4] With respect to the latter contention, the state noted that there were three elements of intellectual disability – subaverage intellectual functioning, significant limitation in adaptive functioning and an onset before age 18. With respect to the first criterion, the state noted that Pizzuto had "a verbal IQ of 72" – based on an IQ test administered by Dr. Michael Emery in 1985 – but that "[t]he Statute says 70 or below," and "72 is not 70 or below." In addition, because Pizzuto's IQ score of 72 was obtained when he was 28 years old, the state argued that "we have no indication of what his IQ was – no testing, at least – what his IQ ... was before his 18th birthday." The state noted that the court had "no evidence of an IQ test prior to age 18."

[4] Initially, the state also argued for summary dismissal on the ground that, as a matter of state law, *Atkins* did not apply retroactively. *See Pizzuto I*, 202 P.3d at 646. The state subsequently abandoned that argument, however.

Pizzuto both opposed the state's motion for summary dismissal and, in September 2005, moved for summary judgment, arguing that he had, as a matter of law, established a prima facie case of intellectual disability. *See id.* Pizzuto argued that the state trial court should deny the state's motion for summary dismissal and grant his motion for summary judgment. In the alternative, Pizzuto argued that his October 2004 motion for additional testing should be granted and the matter set for trial. *See id.* at 655–56 & n.9.

In addressing whether Pizzuto had made a prima facie showing of intellectual disability under the Idaho statute, both sides recognized that Idaho's requirement of an IQ of 70 or below was inconsistent with the AAMR and American Psychiatric Association clinical standards in effect at the time. Counsel for Pizzuto, however, acknowledged that *Atkins* did not "dictate what retardation is," while counsel for the state emphasized that "[t]he United States Supreme Court said that the states were permitted to define mental retardation ... basically as they saw fit." The state recognized that the DSM and AAMR manual "talk[ed] about ... a 70 IQ plus or minus five," but the state emphasized that "the Idaho Statute doesn't say that. [Section] 19-2515A is very specific, 70 or below. It doesn't say plus or minus five. Seventy or below, period, end of story." The state observed that "some states have actually gone below the 70 and one state ... has gone to 75." But "Idaho chose 70."

The state argued, moreover, that the margin of error was of no use to Pizzuto, because his "actual" IQ was as likely to be 77 as 67:

> [Section] 2515A says that if the Court finds by a preponderance of the evidence that the defendant is mentally retarded – preponderance of the evidence, ***518** more likely than not, ... something over 50 percent. Well, isn't it just as likely that Pizzuto's IQ is 77 as opposed to 67? That's not a preponderance of the evidence. So, you have to go with the 72 and that's the only number that this Court has before it, the only number.

In December 2005, after a hearing on the motions, the state trial court dismissed Pizzuto's petition on the grounds that it had not been timely filed under state law and that Pizzuto had failed to raise a genuine issue of material fact supporting his claim of intellectual disability. *See id.* at 646. Pizzuto timely appealed to the Idaho Supreme Court. *See id.*

In a 2008 decision, the Idaho Supreme Court affirmed the state trial court's denial of Pizzuto's *Atkins* claim. *See Pizzuto I*, 202 P.3d 642. The court noted that, to survive summary dismissal, Pizzuto had to present evidence establishing a prima facie case – i.e., enough evidence to allow the factfinder to infer the fact at issue and rule in his favor – on each element of his claim under § 19-2515A(1). *See id.* at 650. The court interpreted the Idaho statute as requiring proof of three elements: "(1) an intelligence quotient (IQ) of 70 or below; (2) significant limitations in adaptive functioning in at least two of the ten areas listed; and (3) the onset of the offender's IQ of 70 or below and the onset of his or her significant limitations in adaptive functioning both must have occurred before the offender turned age eighteen." *Id.* at 651.

The court concluded that Pizzuto failed to establish a prima facie case as to the first element – an IQ of 70 or below. The record reflected only a single IQ test score for Pizzuto, a score of 72 on the test administered by Dr. Emery in December 1985, shortly before Pizzuto's 29th birthday. *See id.* The court acknowledged Pizzuto's argument that "an IQ score is only accurate within five points," but it found "two problems" with Pizzuto's argument that "his actual IQ could have been five points lower or higher than 72": first, it would be just as reasonable for the state trial court to infer that his actual IQ was 77 as it would be to infer that it was 67; second, the state trial court was permitted to infer that his IQ had decreased during the 11 years between his 18th birthday and the date of his IQ test. *Id.* [5]

[5] The Idaho Supreme Court noted that the state trial court was permitted to draw inferences in favor of the state when considering whether to grant summary judgment to the state. *See Pizzuto I*, 202 P.3d at 650 (citing *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 93 P.3d 685, 691–92 (2004)). It is not clear whether this line of

authority – *see, e.g.*, *Stafford v. Klosterman*, 134 Idaho 205, 998 P.2d 1118, 1119 (2000); *E. Idaho Agr. Credit Ass'n v. Neibaur*, 130 Idaho 623, 944 P.2d 1386, 1389 (1997); *Wells v. Williamson*, 118 Idaho 37, 794 P.2d 626, 629 (1990); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657, 661 (Idaho 1982) – applies where, as here, the nonmoving party has made clear that it does not consider the record fully developed. *See Pizzuto I*, 202 P.3d at 656 n.9; *cf.* 10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 (4th ed. 2019) (describing, in the text accompanying note 15, the comparable practice under federal procedure); *Int'l Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 362 (4th Cir. 2003); *Matter of Placid Oil Co.*, 932 F.2d 394, 398 (5th Cir. 1991); *Fox v. Johnson & Wimsatt*, 127 F.2d 729, 737 (D.C. Cir. 1942). It also is not clear whether the state trial court in fact drew inferences in favor of the state; the state trial court's ruling says only that "Pizzuto failed to raise a genuine issue of material fact supporting his claim of mental retardation." Pizzuto, however, does not raise these questions in his opening brief, and so we do not address them.

The court noted that Pizzuto "did not offer any expert opinion" showing that he "had an IQ of 70 or below at the time of the murders and prior to his eighteenth ***519** birthday." *Id.* at 655. Accordingly, the court held that the trial court did not err in granting summary judgment to the state. *See id.*

We granted Pizzuto permission to file a successive federal habeas petition on his *Atkins* claim. After additional testing and an evidentiary hearing, the federal district court denied Pizzuto's petition. *See Pizzuto v. Blades* (*Pizzuto II*), No. 1:05-CV-516-BLW, 2012 WL 73236, at *21 (D. Idaho Jan. 10, 2012). We initially affirmed. *See Pizzuto v. Blades* (*Pizzuto III*), 729 F.3d 1211, 1224 (9th Cir. 2013).

While Pizzuto's petition for rehearing was pending, however, the Supreme Court decided *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). In *Hall*, the Supreme Court considered a Florida law defining intellectual disability "to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed." *Id.* at 704, 134 S.Ct. 1986. The Court held that "[t]his rigid rule ... creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Id.*

At the outset, the Court held that, "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id.* at 710, 134 S.Ct. 1986. The Court explained that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id.* at 721, 134 S.Ct. 1986.

Next, once again turning to the clinical definitions established by the AAMR and the American Psychiatric Association, the Court explained that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Id.* at 710, 134 S.Ct. 1986 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013) (DSM-5)).

With respect to the first criterion, the Court recognized that IQ test scores may be "of considerable significance." *Id.* at 723, 134 S.Ct. 1986. The Court emphasized, however, that, "in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number." *Id.* Because "[e]ach IQ test has a 'standard error of measurement' " of plus or minus five points, "an individual's intellectual functioning cannot be reduced to a single numerical score." *Id.* at 713, 134 S.Ct. 1986. Thus, "IQ test scores should be read not as a single fixed number but as a range." *Id.* at 712, 134 S.Ct. 1986. "A score of 71, for instance, is generally considered to reflect a range between 66 and 76 ...." *Id.* at 713, 134 S.Ct. 1986. [6]

6 Although the standard error of measurement applicable here, as in *Hall*, is plus or minus five points, that is not always the case. *See* AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports 36 (11th ed. 2010) (AAIDD-11) (noting that the standard error of measurement "varies by test, subgroup, and age group .... For well-standardized measures of general intellectual functioning, the standard error of measurement is approximately 3 to 5 points.").

A court, therefore, may not cut off the inquiry when a defendant scores between 70 and 75 on an IQ test. Rather, "[f]or professionals to diagnose – and for the law ***520** then to determine – whether an intellectual disability exists once the [standard error of measurement] applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." *Id.* at 714, 134 S.Ct. 1986. The Court "agree[d] with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723, 134 S.Ct. 1986. [7]

[7] As the DSM-5 explains:

> Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 (70 ± 5).... IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

DSM-5 at 37.

The Court held that Florida's "strict IQ test score cutoff of 70" ran afoul of these requirements in two ways. First, it "disregard[ed] established medical practice" by "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." *Id.* at 712, 134 S.Ct. 1986. Second, it "relie[d] on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.*

In reaching this conclusion, the Court rejected any suggestion that *Atkins* had given states "unfettered discretion to define" intellectual disability. *Id.* at 719, 134 S.Ct. 1986. The Court said that "[t]he clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." *Id.* at 720, 134 S.Ct. 1986. The Court added:

> If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability.

Id. at 720–21, 134 S.Ct. 1986.

Finally, in conducting a survey of state laws respecting the execution of intellectually disabled offenders, *Hall* briefly distinguished Idaho law from Florida's strict IQ test score cutoff. Citing the Idaho Supreme Court's decision in Pizzuto's case, the Court characterized Idaho law as "allowing a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70." *Id.* at 717, 134 S.Ct. 1986 (citing *Pizzuto I*, 202 P.3d at 651). [8]

[8] Idaho's IQ requirement is less restrictive than the Florida requirement at issue in *Hall* because, whereas Florida required an IQ *test score* of 70, Idaho requires an "actual IQ" of 70. *See Pizzuto I*, 202 P.3d at 651. Under the Florida rule, an individual with an IQ test score of 71 is altogether barred from establishing intellectual disability. Under the Idaho rule adopted in Pizzuto's case, that individual could establish subaverage intellectual functioning if he could somehow show that his IQ test score overstated his "actual IQ." Ultimately, however, requiring an individual to establish an "actual IQ" of 70 in order to satisfy the intellectual functioning prong of the intellectual disability definition suffers from a similar infirmity as the Florida rule – it fails to recognize that "an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," *Atkins*, 536 U.S. at 309 n.5, 122 S.Ct.

> 2242, and it fails to recognize that, "when the lower end of [an IQ] score range falls at or below 70, [a court must] move on to consider [the individual's] adaptive functioning," *Moore v. Texas*, —— U.S. ——, 137 S. Ct. 1039, 1049, 197 L.Ed.2d 416 (2017).

***521** In light of *Hall*, we withdrew our opinion, vacated the judgment of the district court and remanded this case to the district court. *See Pizzuto v. Blades* (*Pizzuto IV*), 758 F.3d 1178 (9th Cir. 2014).

On remand, the district court concluded that *Hall* did not alter its previous decision. *See Pizzuto v. Blades* (*Pizzuto V*), No. 1:05-cv-00516-BLW, 2016 WL 6963030, at *11 (D. Idaho Nov. 28, 2016). The court reasoned that relief was not available under § 2254(d)(1), because *Hall* was not clearly established law at the time of the state court decision and, even if it were, the state court's alternative basis for denying relief was reasonable. *See id*. at *6–10. The court also incorporated its previous conclusion that the state court's decision was not based on an unreasonable determination of the facts under § 2254(d)(2). *See id*. at *10. Finally, after reviewing the evidence again on remand, the district court concluded that Pizzuto was not entitled to relief even under de novo review. *See id*. at *10–11. This timely appeal followed.

In briefing this appeal, the parties have discussed not only *Atkins* and *Hall* but also the Supreme Court's more recent decisions in *Brumfield v. Cain*, —— U.S. ——, 135 S. Ct. 2269, 192 L.Ed.2d 356 (2015), and *Moore v. Texas* (*Moore I*), —— U.S. ——, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017). In *Brumfield*, the Court reiterated that "an IQ test result cannot be assessed in a vacuum" and again held, as in *Hall*, that "it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an IQ above 70." 135 S. Ct. at 2277–78 (quoting *Hall*, 572 U.S. at 704, 134 S.Ct. 1986). The Court also concluded that the state court's rejection of the petitioner's request for an evidentiary hearing on his *Atkins* claim was based on an "unreasonable determination of the facts" under § 2254(d)(2). *See id.* at 2276.

In *Moore I*, the Court reaffirmed *Hall*'s holding that "adjudications of intellectual disability should be 'informed by the views of medical experts.' " 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 721, 134 S.Ct. 1986). The Court explained:

> Even if "the views of medical experts" do not "dictate" a court's intellectual-disability determination, ... the determination must be "informed by the medical community's diagnostic framework." .... *Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.

Id. at 1048–49 (citations omitted) (quoting *Hall*, 572 U.S. at 721, 134 S.Ct. 1986). Thus, the Court held that "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Id.* at 1053.

Moore I also reaffirmed *Hall*'s holding that courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." ***522** *Id.* at 1050. In *Moore I*, the petitioner's average score on six IQ tests was 70.66. *See id.* at 1045. Thus, the Court held that, "[b]ecause the lower end of Moore's score range falls at or below 70, the [state court] had to move on to consider Moore's adaptive functioning." *Id.* at 1049 (citing *Hall*, 572 U.S. at 723, 134 S.Ct. 1986).

After briefing for this appeal was completed, the Supreme Court has twice more reviewed *Atkins* claims. In *Shoop v. Hill*, —— U.S. ——, 139 S. Ct. 504, 202 L.Ed.2d 461 (2019) (per curiam), the Court "consider[ed] what was clearly established regarding the execution of the intellectually disabled in 2008." 139 S. Ct. at 506–07. The Court observed that "*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes"; although *Atkins* cited the definitions of intellectual disability adopted by the AAMR and the American Psychiatric Association approvingly, it "left 'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction' " on executing intellectually disabled persons. *Id.* at 507 (alteration in original) (quoting *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242).

In the second case, *Moore v. Texas* (*Moore II*), —— U.S. ——, 139 S. Ct. 666, —— L.Ed.2d —— (2019) (per curiam), the Court reaffirmed its holding in *Moore I* that the petitioner, with an average IQ score of 70.66, "had demonstrated sufficient intellectual-functioning deficits" under the first criterion of the clinical definition of intellectual disability "to require consideration of the second criterion – adaptive functioning." *Id.* at 668 (citing *Moore I*, 137 S. Ct. at 1048–50).

STANDARD OF REVIEW

[1] We review de novo the district court's denial of a habeas petition. *See Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016). Review of Pizzuto's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) because Pizzuto filed his petition after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 322, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Under AEDPA, habeas relief can be granted only if the state court proceeding adjudicating the claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

[2] **[3]** **[4]** **[5]** **[6]** "[A] decision by a state court is 'contrary to' [the Supreme Court's] clearly established law if it 'applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent.' " *Price v. Vincent*, 538 U.S. 634, 640, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "[A] state-court decision involves an unreasonable application of th[e Supreme] Court's precedent if the state court identifies the correct governing legal rule from th[e Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407, 120 S.Ct. 1495. To satisfy this requirement, the record "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." ***523** *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). The question "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (citing *Williams*, 529 U.S. at 410, 120 S.Ct. 1495). Turning to § 2254(d)(2), "we may only hold that a state court's decision was based on an unreasonable determination of the facts if 'we [are] convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.' " *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014) (alteration in original) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other grounds as stated in Murray*, 745 F.3d at 1000).

[7] **[8]** **[9]** We apply our review under § 2254(d) to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). Here, we review the Idaho Supreme Court's 2008 decision. *See Pizzuto I*, 202 P.3d 642. Because that court denied Pizzuto's *Atkins* claim on the merits, our review under § 2254(d) is limited to the record that was before the state court. *See Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). We may grant habeas relief only if we conclude both that § 2254(d) is satisfied and, on de novo review, that the petitioner is in custody in violation of the Constitution of the United States. *See Frantz v. Hazey*, 533 F.3d 724, 735–37 (9th Cir. 2008) (en banc). [9]

9 We may address these two questions – the § 2254(d) inquiry and de novo review of the constitutional claim under §§ 2241(c)(3) and 2254(a) – in any order. *See Frantz*, 533 F.3d at 736. Typically, we conduct the AEDPA inquiry first, and where, as here, § 2254(d) is not satisfied, we need not review the constitutional claim de novo.

DISCUSSION

Pizzuto invokes both prongs of § 2254(d). He contends that the Idaho Supreme Court's decision was "contrary to" or involved an "unreasonable application" of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Alternatively, he contends that the state court's decision was "based on an unreasonable determination of the facts." *See id.* § 2254(d)(2). We consider these contentions in turn.

A. Section 2254(d)(1)

We begin by addressing Pizzuto's argument that the Idaho Supreme Court's decision was "contrary to" or involved an "unreasonable application" of clearly established Supreme Court precedent under § 2254(d)(1).

After the *Atkins* decision, the Idaho legislature adopted the following definition of intellectual disability:

> (a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.
>
> (b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

Idaho Code § 19-2515A(1).

In 2008, the Idaho Supreme Court applied this definition for the first time in ***524** Pizzuto's case. *See Pizzuto I*, 202 P.3d at 650–55. The court began by noting that "the statutory definition ... requires proof of three elements: (1) an intelligence quotient (IQ) of 70 or below; (2) significant limitations in adaptive functioning in at least two of the ten areas listed; and (3) the onset of the offender's IQ of 70 or below and the onset of his or her significant limitations in adaptive functioning both must have occurred before the offender turned age eighteen." *Id.* at 651. Focusing on the first element, the court held that, "[i]n order for Pizzuto to have presented a *prima facie* case, there must be evidence showing that he had an IQ of seventy or below before age eighteen." *Id.*

The court then noted that the record included only one IQ test score for Pizzuto – a Verbal IQ of 72 on the Wechsler Adult Intelligence Scale, Revised, administered by Dr. Emery in December 1985, shortly before Pizzuto's 29th birthday. *See id.* This test score, the court concluded, was insufficient to establish an IQ of 70 or below before the age of 18:

> Pizzuto argues that an IQ score is only accurate within five points. He contends that his actual IQ could have been five points lower or higher than 72. There are two problems with that argument.
>
> First, when enacting Idaho Code § 19-2515A(1), the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below. Although Pizzuto argued that the district court should infer that Pizzuto's actual IQ was lower than his test score, the court could just as reasonably have inferred that it was higher. The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts. It would be just as reasonable to infer that Pizzuto's IQ on December 12, 1985, was 77 as it would be to infer that it was 67.
>
> Second, Pizzuto's argument also requires the district court to infer that Pizzuto's IQ had not decreased during the eleven-year period from his eighteenth birthday to the date of his IQ test. The district court, as the trier of fact, was not required to make that inference, especially in light of the opinions of Pizzuto's experts that his long history of drug abuse and his epilepsy would have negatively impacted his mental functioning.

Id. (citation omitted).

Pizzuto argues that the Idaho Supreme Court's decision was both "contrary to" and an "unreasonable application" of *Atkins*. His argument begins with the premise that *Atkins* "embraced the clinical definitions of intellectual disability set by the American Association on Mental Retardation ... and the American Psychiatric Association." Opening Brief at 26 (citing *Atkins*, 536 U.S. at 308 n.3, 317 n.22, 122 S.Ct. 2242). Then, relying on that premise, he argues that the Idaho court disregarded these clinical definitions by (1) applying a "hard IQ-70 cutoff" and (2) requiring him to provide the court with IQ testing completed before his 18th birthday. *Id.* at 31–36.

Specifically, Pizzuto contends that the Idaho Supreme Court's application of a "hard IQ-70 cutoff" disregarded the clinical definitions by: (1) "expressly confin[ing] the consideration of the first criteri[on] to an IQ score only," "tak[ing] the IQ score as final and conclusive evidence of a defendant's intellectual capacity when experts in the field would consider other evidence"; (2) "reject[ing] the scientific limitations of testing, including the standard of error measurement ... universally recognized by the medical and psychological professions"; (3) "completely misunderst[anding] ***525** the purpose and effect of the [standard error of measurement]"; and (4) "refus[ing] to consider the ... Flynn Effect." *Id.* at 31–32.

1. "Contrary to" Prong

[10] Initially, we reject Pizzuto's argument that the Idaho court's decision was "contrary to" *Atkins*. For purposes of § 2254(d)(1), "clearly established Federal law" includes only the holdings, as opposed to the dicta, of the Supreme Court's

decisions. *See White v. Woodall*, 572 U.S. 415, 419, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014). Here, the Idaho Supreme Court identified the applicable Supreme Court precedent – *Atkins* – and acknowledged its holding that the Eighth Amendment prohibits the execution of intellectually disabled offenders. *See Pizzuto I*, 202 P.3d at 648. The state court's decision, therefore, was not "contrary to" *Atkins*. Although Pizzuto argues that the state court failed to follow the clinical standards issued by the AAMR and the American Psychiatric Association, *Atkins* did not *hold* that these standards apply. *See Shoop*, 139 S. Ct. at 507 ("*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes."). The state court's decision, therefore, could not have been "contrary to" *Atkins* on this basis.

[11] We also reject Pizzuto's suggestion that the Idaho Supreme Court's application of a hard IQ-70 cutoff was "contrary to" or an "unreasonable application of" *Atkins*' "progeny" – a reference to *Hall*, *Brumfield* and *Moore I*. Opening Brief at 31. These three cases were decided in 2014, 2015 and 2017 respectively – years *after* the Idaho Supreme Court's 2008 decision in Pizzuto's case. "[U]nder ... § 2254(d)(1), habeas relief may be granted only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' *at the time of the adjudication*." *Shoop*, 139 S. Ct. at 506 (emphasis added); *see also Lockyer v. Andrade*, 538 U.S. 63, 71–72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (" '[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*." (emphasis added)). The Idaho Supreme Court's decision, therefore, could not have been "contrary to" or an "unreasonable application" of *Atkins*' "progeny."

2. "Unreasonable Application" Prong

[12] Pizzuto's contention that the Idaho Supreme Court's decision involved an "unreasonable application" of *Atkins* fails as well.

Pizzuto is correct that the Idaho Supreme Court's application of a "hard IQ-70 cutoff" was inconsistent with the clinical definitions in place at the time of the state court's decision. The DSM-IV, adopted in 2000, defined the diagnostic criteria for intellectual disability as:

> A. Significantly subaverage intellectual functioning: an IQ of *approximately 70 or below* on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
>
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
>
> ***526** C. The onset is before age 18 years.

DSM-IV at 49 (emphasis added). This standard does not require an IQ of 70 or below; it requires "an IQ of *approximately* 70 or below." *Id.* (emphasis added). Under the DSM-IV, therefore, "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." *Id.* at 41–42. [10]

10 Under the DSM-IV:

> Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65–75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning.

DSM-IV at 41–42.

The 10th edition of the AAMR manual, adopted in 2002, defined intellectual disability as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social,

> and practical adaptive skills. This disability originates before age 18.

AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002). Under the intellectual functioning prong, "[t]he criterion for diagnosis is *approximately* two standard deviations below the mean, considering the standard error of measurement for the specific assessment instrument used and the instrument's strengths and weaknesses." *Id.* at 37 (emphasis added). "In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error." *Id.* at 59.

In contrast to these clinical standards, the Idaho Supreme Court required an offender to establish an IQ of 70 or below under all circumstances, regardless of the offender's deficits in adaptive functioning. Although the Idaho court recognized that "[t]he alleged error in IQ testing is plus or minus five points," *Pizzuto I*, 202 P.3d at 651, it nonetheless required Pizzuto to establish an "actual IQ" of 70 or below. *See Pizzuto III*, 729 F.3d at 1217 n.2; *Pizzuto I*, 202 P.3d at 651 ("[T]he statutory definition ... requires proof of ... an intelligence quotient (IQ) of 70 or below .... Significant limitations in adaptive functioning alone will not bring an offender within the protection of the statute."); *id.* ("[W]hen enacting Idaho Code § 19-2515A(1), the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below."). In doing so, the court failed to recognize that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." DSM-IV at 41–42. Nor did the court consider whether Pizzuto satisfied this standard. The state court's decision, therefore, was contrary to the clinical definitions in place at the time.

This conclusion alone, however, does not establish that the Idaho Supreme Court unreasonably applied *Atkins* for purposes of § 2254(d)(1). At the time of the state court's decision in 2008, it was not yet apparent that states were required to define intellectual disability in accordance with these prevailing clinical definitions. To be sure, *Atkins* had cited these clinical definitions with approval, noting that statutory definitions generally conformed to ***527** them and explaining that "an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 308 n.3, 309 n.5, 317 n.22, 122 S.Ct. 2242. The Court, however, did not adopt these definitions or require states to follow them. On the contrary, the Court expressly "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317, 122 S.Ct. 2242 (alterations omitted) (quoting *Ford*, 477 U.S. at 416–17, 106 S.Ct. 2595).

It is *now* clear that "[t]he legal determination of intellectual disability ... is informed by the medical community's diagnostic framework," *Hall*, 572 U.S. at 721, 134 S.Ct. 1986, and that "[t]he medical community's current standards supply one constraint on States' leeway in this area," *Moore I*, 137 S. Ct. at 1053. It was not apparent in 2008, however, that states were required to adhere strictly to the AAMR's and American Psychiatric Association's clinical standards. We acknowledge *Hall*'s statements that *Atkins* "provide[d] substantial guidance on the definition of intellectual disability," that "[t]he clinical definitions of intellectual disability ... were a fundamental premise of *Atkins*" and that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 719–21, 134 S.Ct. 1986. The Supreme Court, however, has held that "*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop*, 139 S. Ct. at 507; *see also Bobby v. Bies*, 556 U.S. 825, 831, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009) (explaining that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall within *Atkins*' compass' " (alteration omitted) (quoting *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242)); *Ybarra v. Filson*, 869 F.3d 1016, 1024 (9th Cir. 2017) ("Significantly, *Atkins* 'did not provide definitive procedural or substantive guides' to determine who qualifies as intellectually disabled." (quoting *Bies*, 556 U.S. at 831, 129 S.Ct. 2145)); *Moormann v. Schriro*, 672 F.3d 644, 648 (9th Cir. 2012) ("The Supreme Court in *Atkins* did not define mental retardation as a matter of federal law.").

This is not a case in which the state court utterly disregarded the clinical definitions. To be sure, the Idaho Supreme Court erred by defining the significantly subaverage intellectual functioning criterion as an IQ of 70 or below, *see* Idaho Code § 19-2515A(1)(b); *Pizzuto I*, 202 P.3d at 651, rather than "an IQ of *approximately* 70 or below," DSM-IV at 49 (emphasis added), and it erred by disregarding the portions of the clinical standards recognizing that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior," *id.* at 41–42. In other respects, however, § 19-2515A(1) tracks the

clinical definitions cited by *Atkins*. *See Atkins*, 536 U.S. at 308 n.3, 122 S.Ct. 2242. In contrast to *Hall*, moreover, the Idaho court at least recognized the existence of a standard error of measurement of plus or minus five points and afforded Pizzuto an opportunity to "present additional evidence of intellectual disability even when an IQ test score is above 70." *Hall*, 572 U.S. at 717, 134 S.Ct. 1986.

In short, because it was not apparent in 2008 that states were required to adhere closely to the clinical definitions of intellectual disability, the Idaho Supreme Court's application of a "hard IQ-70 cutoff" was not an "unreasonable application" of *Atkins*. "[R]elief is available under § 2254(d)(1)'s unreasonable-application ***528** clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Woodall*, 572 U.S. at 427, 134 S.Ct. 1697 (quoting *Richter*, 562 U.S. at 103, 131 S.Ct. 770). We cannot say that this standard has been satisfied here.

Relatedly, it is *now* clear as a matter of federal law that "an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Hall*, 572 U.S. at 722, 134 S.Ct. 1986 (citation omitted) (quoting *Atkins*, 536 U.S. at 309 n.5, 122 S.Ct. 2242); *see id.* at 723, 134 S.Ct. 1986 ("[W]hen a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."); *Brumfield*, 135 S. Ct. at 2278 ("[I]t is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an IQ above 70." (quoting *Hall*, 572 U.S. at 704, 134 S.Ct. 1986)); *Moore I*, 137 S. Ct. at 1049 ("Because the lower end of Moore's score range falls at or below 70, the [state court] had to move on to consider Moore's adaptive functioning."); DSM-5 at 37 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 (70 ± 5)."); *id.* ("IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score."); AAIDD-11 at 35 ("[T]he intellectual functioning criterion for diagnosis of [intellectual disability] is approximately two standard deviations below the mean, considering the standard error of measurement .... The intent of this definition is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intellectual functioning criterion .... In addition, significant limitations in intellectual functioning is only one of the three criteria used to establish a diagnosis of [intellectual disability]."); *id.* at 40 ("A fixed point cutoff score for [intellectual disability] is not psychometrically justifiable."). The Idaho Supreme Court violated this principle by requiring an "actual" IQ of 70 or below. This point, however, was not beyond fairminded disagreement in 2008. We cannot say, therefore, that the Idaho Supreme Court's application of *Atkins* "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103, 131 S.Ct. 770.

We reach the same conclusion with respect to the Idaho Supreme Court's failure to apply the Flynn effect.[11] Although mentioned in recent clinical standards, *see* ***529** DSM-5 at 37; AAIDD-11 at 37, *Atkins* did not discuss the Flynn effect, and clinical standards in existence at the time of the Idaho Supreme Court's decision in 2008 did not discuss the need to adjust IQ test scores to account for the use of outdated test norms. Thus, "it cannot be said that the [state court's] failure to consider and apply the Flynn Effect is contrary to, or an unreasonable application of, clearly established federal law." *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012).

11 The Flynn effect refers to the observation that IQ scores have been increasing over time. *See* AAIDD-11 at 37; *Smith v. Ryan*, 813 F.3d 1175, 1184 (9th Cir. 2016) ("The basic premise of the Flynn effect is that because average IQ scores increase over time, a person who takes an IQ test that has not recently been normed against a representative sample of the population will receive an artificially inflated IQ score." (emphasis omitted)). In light of this effect, the AAIDD has indicated that "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11 at 37. "In cases where a test

with aging norms is used, a correction for the age of the norms is warranted." *Id.*; *see Smith*, 813 F.3d at 1185 (noting that the AAIDD-11 "recognizes the existence of the Flynn Effect and recommends correcting for the age of norms in outdated tests"). The DSM-5 likewise identifies the Flynn effect as one of several "[f]actors that may affect test scores." DSM-5 at 37. Here, Pizzuto argues that, when his IQ score of 72 is adjusted for the Flynn effect, "it becomes a score of 70." Opening Brief at 33 n.2.

Finally, we reject Pizzuto's contention that the Idaho Supreme Court's decision was contrary to or an unreasonable application of *Atkins* because the court required him to provide the results of an IQ test *administered* before his 18th birthday. With respect to this contention, we simply disagree with Pizzuto's reading of the Idaho Supreme Court's decision. If the state court had required Pizzuto to present a pre-18 IQ test score, it could have disposed of his claim simply by noting the absence of such a score in the record. Instead, it explained that "there must be evidence showing that [Pizzuto's] IQ was 70 or below prior to his eighteenth birthday," *Pizzuto I*, 202 P.3d at 651, regardless of when he was tested.

* * *

In sum, the record does not establish that the Idaho Supreme Court's decision was "contrary to" or involved an "unreasonable application" of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Although the state court's decision was contrary to clinical standards in place at the time, it was not obvious at that time that strict adherence to the clinical standards was required. Similarly, although the state court's requirement of an IQ of 70 or below is contrary to *Hall*, *Brumfield* and *Moore I*, these decisions all postdated the state court's decision, and it was not obvious under *Atkins* alone that, for Eighth Amendment purposes, "an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Hall*, 572 U.S. at 722, 134 S.Ct. 1986 (citation omitted) (quoting *Atkins*, 536 U.S. at 309 n.5, 122 S.Ct. 2242). *Cf. Shoop*, 139 S. Ct. at 508 ("Although the Court of Appeals asserted that the holding in *Moore* was 'merely an application of what was clearly established by *Atkins*,' the court did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation.' " (citation omitted)); *Ybarra*, 869 F.3d at 1024–25 ("[A]lthough Ybarra insists that the Nevada Supreme Court unreasonably applied *Atkins*, he relies almost exclusively on the Supreme Court's subsequent, more detailed decisions in *Moore*, *Hall*, and *Brumfield*. These decisions might redefine and expand *Atkins*, but they cannot show that the Nevada Supreme Court applied *Atkins* in a way that 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " (footnote omitted) (quoting *Richter*, 562 U.S. at 103, 131 S.Ct. 770)).

B. Section 2254(d)(2)

Pizzuto alternatively contends that the Idaho Supreme Court's decision "was ***530** based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

[13] **[14]** **[15]** Under § 2254(d)(2), we may not characterize a state court's factual determinations as unreasonable "merely because [we] would have reached a different conclusion in the first instance." *Brumfield*, 135 S. Ct. at 2277 (alteration in original) (quoting *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). "Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference." *Id.* "If '[r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's ... determination.' " *Id.* (alterations in original) (quoting *Wood*, 558 U.S. at 301, 130 S.Ct. 841).

Here, Pizzuto challenges the state court's factual determinations on several grounds. We address them in turn.

1. Pizzuto's Argument That the State Court's Determinations Are Unreasonable Because They Are Inconsistent with Clinical Definitions

[16] Pizzuto argues that the Idaho Supreme Court's factual determinations "are unreasonable because they are not consistent with clinical definitions and best practices in defining and diagnosing [intellectual disability] as guaranteed by the Eighth Amendment in *Atkins* and enforced in *Hall*." Opening Brief at 37. He maintains that "[t]he state court's factual findings are unreasonable in light of the record before it because they are in direct conflict with professional standards established to determine intellectual disability and thus, not 'informed by' them as instructed by *Hall*." *Id.* at 38.

As noted, we agree with Pizzuto that the Idaho Supreme Court failed to apply the clinical standards in use at the time of its decision. Those standards required an IQ of "approximately 70" and recognized that "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." DSM-IV at 41–42. The Idaho Supreme Court, by contrast, required an "actual" IQ of "70 or below," irrespective of "[s]ignificant limitations in adaptive functioning." *Pizzuto I*, 202 P.3d at 651. Pizzuto, therefore, is correct in arguing that the state court's determination that he failed to make a prima facie showing of intellectual disability is "not consistent with clinical definitions" discussed in *Atkins* and subsequently required by *Hall*.

Under § 2254(d)(2), however, we review a state court's factual determinations, not its legal conclusions. Here, the Idaho Supreme Court did not purport to determine whether Pizzuto was intellectually disabled under the clinical definitions. Instead, it determined only that Pizzuto failed to make a prima facie "showing that his IQ was 70 or below prior to his eighteenth birthday." *Id.* It is that factual determination, therefore, that we may review under § 2254(d)(2), not the state court's legal conclusion that an IQ of 70 or below was required. Accordingly, we must reject Pizzuto's contention that the state court's factual determinations are unreasonable merely because the state court did not apply the clinical definitions of intellectual disability.

2. Pizzuto's Argument That the State Court's Unreasonably Failed to Consider His School Records as Evidence of Subaverage Intellectual Functioning

[17] Pizzuto argues that the Idaho Supreme Court's determination that he failed ***531** to make a prima facie showing that his IQ was 70 or below before his 18th birthday was unreasonable because it focused exclusively on his single IQ test score while ignoring other evidence of subaverage intellectual functioning in the form of his "abysmal school record." Opening Brief at 39.

[18] Pizzuto is correct that a "state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." *Taylor*, 366 F.3d at 1001. Here, however, Pizzuto has not shown that the Idaho Supreme Court ignored such evidence.

First, although Pizzuto cites his "abysmal school record," the actual evidence in the record regarding his schooling is sparse and incomplete. It consists solely of affidavits from five educators, two of whom have no specific recollection of Pizzuto. Although some of these records show that Pizzuto received low grades and was held back, there are many reasons Pizzuto may have performed poorly in school, and no expert opined that this poor performance was evidence of significantly subaverage intellectual functioning or an IQ of 70 or below. Thus, even if Pizzuto's school records are some evidence of pre-18 significantly subaverage intellectual functioning, they do not render unreasonable the Idaho Supreme Court's determination that Pizzuto failed to make a prima facie showing that he had an IQ of 70 or below before the age of 18. School records can be strong evidence of intellectual disability. *See, e.g.*, *Moore I*, 137 S. Ct. at 1051; *Hall*, 572 U.S. at 705, 712, 134 S.Ct. 1986; *Smith*, 813 F.3d at 1186. Here, however, the records do not show that the state court's determination was objectively unreasonable under § 2254(d)(2)'s demanding standard.

Second, we cannot say that the Idaho Supreme Court *ignored* this evidence within the meaning of *Taylor* when it was Pizzuto himself who failed to bring the evidence to the court's attention. In state court, Pizzuto cited his school records to show limitations in adaptive functioning but not to establish subaverage intellectual functioning. To establish the latter, Pizzuto instead "relied solely upon Dr. Emery's IQ determination." *Pizzuto I*, 202 P.3d at 652. The state court's focus on Pizzuto's IQ test score, therefore, was consistent with Pizzuto's own contentions.

3. Pizzuto's Argument That the State Court Unreasonably Determined That His IQ Could Have Declined in Adulthood Due to Drug Abuse and Epilepsy

[19] Pizzuto argues that it was unreasonable for the Idaho Supreme Court to determine that his IQ could have declined between the time he was 18 (in 1974) and the time of Dr. Emery's IQ testing (in 1985).

The Idaho Supreme Court determined that the state trial court could have inferred that Pizzuto's IQ "decreased during the eleven-year period from his eighteenth birthday to the date of his IQ test ..., especially in light of the opinions of Pizzuto's experts that his long history of drug abuse and his epilepsy would have negatively impacted his mental functioning." *Pizzuto I*, 202 P.3d at 651.

Pizzuto contends that this determination was unreasonable. First, he argues that "incidents of drug use and epilepsy, if they occurred, would be documented," because he spent nine

of these 11 years in prison. Opening Brief at 40. Because his prison records do not show continued seizures or drug use, Pizzuto argues that a "more reasonable inference" would be that he was substantially drug free and not experiencing ***532** seizures after he turned 19. *Id.* at 41–42.

The Idaho Supreme Court's determination, however, was based on record evidence from Pizzuto's own experts. In 1988, Dr. James Merikangas noted that Pizzuto had "a life long history of almost continuous drug abuse including intravenous Heroin as well as cocaine, speed and marijuana"; that Pizzuto's "long history of polydrug abuse has caused him further neurological dysfunction and ... substantial defects of mind and reason"; and that "[w]e will probably not know to any scientific degree of accuracy what his state of mind was at the time of the alleged crimes." In 2004, Dr. Craig Beaver opined that Pizzuto would benefit from further neurological study in part because, "[o]ften, patients that have persistent seizure disorders ... will decline over time in their overall mental abilities":

> Mr. Pizzuto has continued to require pharmacological management of his seizure disorder since he was last examined by myself in 1996. He has continued to have neurological difficulties. Therefore, given that it has now been over eight years since his last comprehensive neuropsychological examination, I would strongly recommend that he undergo repeat neuropsychometric studies. Repeat neuropsychometric studies are needed to better determine Gerald Pizzuto's cognitive abilities. Often, patients that have persistent seizure disorders, for example, will decline over time in their overall mental abilities.

In light of this evidence, it was not unreasonable for the Idaho Supreme Court to determine that the state trial court reasonably could have inferred that Pizzuto's IQ may have declined as a result of drug abuse or epilepsy. Even if, as Pizzuto contends, a "more reasonable inference" would be that he was substantially drug free and not experiencing seizures after he turned 19, this does not render the state court's contrary determination objectively unreasonable under § 2254(d)(2).

Second, Pizzuto argues that it would have been unreasonable to infer from Dr. Beaver's 2004 affidavit that Pizzuto's mental functioning may have declined between 1974 and 1985, *see Pizzuto I*, 202 P.3d at 652, because "[t]here is no statement in the affidavit that Mr. Pizzuto's IQ had declined ... between 1996 and 2008," let alone "any statement that Mr. Pizzuto's IQ had declined ... from his 18th birthday to the time of Dr. Emery's testing." Opening Brief at 42. Dr. Beaver's affidavit, however, clearly gave the impression that Pizzuto's mental functioning may have declined between 1996 and 2004. It would not have been unreasonable, therefore, to infer that it also might have declined between 1974 and 1985. Dr. Beaver did not need to expressly state that a decline in IQ occurred for the Idaho Supreme Court to determine that it was possible. The very reason Dr. Beaver requested more testing was that those with persistent seizure disorders, like Pizzuto, tend to decline in their mental abilities over time. The Idaho Supreme Court's determination, therefore, was not unreasonable.

4. Pizzuto's Argument That the State Court's Denial of an Evidentiary Hearing Was Based on an Unreasonable Determination of the Facts

[20] Pizzuto argues that he "only needed to raise a reasonable doubt regarding his intellectual capacity to be entitled to an evidentiary hearing" and that the Idaho Supreme Court's determination that he "did not meet that low threshold was unreasonable" under § 2254(d)(2). Opening Brief at 46.

This argument is unpersuasive. First, although Pizzuto argues that the Idaho ***533** Supreme Court unreasonably determined that he did not raise a reasonable doubt regarding his intellectual capacity, the Idaho Supreme Court in fact never addressed that question. The only question the state court decided was whether Pizzuto had made a *prima facie showing* of intellectual disability, in particular whether he had made a prima facie showing of a pre-18 IQ of 70 or below. The court did not address whether Pizzuto had raised a "reasonable doubt" as to his intellectual disability. Accordingly, there is no "reasonable doubt" determination for us to review under § 2254(d)(2).

[21] Second, although Pizzuto contends that the Idaho Supreme Court's failure to apply a "reasonable doubt" standard was "contrary to, and an unreasonable application of *Atkins*," as "expressly addressed in *Brumfield*," we must disagree. Opening Brief at 46. *Atkins* did not address the legal

standard applicable to a request for an evidentiary hearing. In *Brumfield*, the *state courts* adopted a reasonable doubt standard, *see Brumfield*, 135 S. Ct. at 2274, and the Supreme Court *presumed* that this standard would be consistent with *Atkins*, *see id.* at 2276 ("[W]e do not question the propriety of the legal standard the trial court applied, and presume that a rule according an evidentiary hearing only to those capital defendants who raise a 'reasonable doubt' as to their intellectual disability is consistent with our decision in *Atkins*."). The Court, however, did not *adopt* a reasonable doubt standard. *See id.* The Idaho Supreme Court's failure to apply such a standard, therefore, was not "contrary to" or an "unreasonable application" of *Atkins*. *See* 28 U.S.C. § 2254(d)(1).

5. Pizzuto's Argument That the State Court's Factfinding Process Was Unreasonable

[22] Pizzuto argues more broadly that the denial of a hearing, as well as the denial of access to an expert, rendered the Idaho Supreme Court's factfinding process itself unreasonable under § 2254(d)(2).

As we explained in *Hibbler*, 693 F.3d at 1146, "[c]hallenges under § 2254(d)(2) fall into two main categories." "First, a petitioner may challenge the substance of the state court's findings and attempt to show that those findings were not supported by substantial evidence in the state court record." *Id.* Second, as relevant here, "a petitioner may challenge the fact-finding process itself on the ground that it was deficient in some material way." *Id.* In some circumstances, for instance, a "state court's failure to hold an evidentiary hearing may render its fact-finding process unreasonable under § 2254(d)(2)." *Id.* at 1147.

The Idaho Supreme Court did not specifically address whether the state trial court erred by granting summary judgment to the state on Pizzuto's *Atkins* claim without holding an evidentiary hearing. The court, however, addressed a related question – whether the state trial court erred by dismissing Pizzuto's petition without permitting further testing. *See Pizzuto I*, 202 P.3d at 655–56. The court concluded that the trial court did not err. First, the court noted that Pizzuto had not pursued the motion for testing. Pizzuto had moved for additional testing in October 2004 but he "did not notice this motion for a hearing." *Id.* at 655. Instead, "[w]ithout pursuing the motion for testing, Pizzuto moved for summary judgment on September 23, 2005." *Id.* He did so, moreover, even though, under Idaho law, "[i]f a trial court denies a party's motion for summary judgment, it has discretion to grant summary judgment to the opposing party." *Id.* at 656 (citing *Harwood v. Talbert*, 136 Idaho 672, 39 P.3d 612, 617 (2001)). Even in ***534** connection with the summary judgment proceedings, "Pizzuto did not ask the [state trial] court to rule on his motion for the specified additional testing." *Id.*

Second, as framed by the Idaho Supreme Court, the central issue in the case was whether Pizzuto could establish a pre-18 IQ of 70 or below. Pizzuto did not argue that, were he afforded the opportunity to conduct further testing, he would develop additional evidence on that question. The court reasoned:

> The definition of "mentally retarded" in Idaho Code § 19-2515A requires that the defendant have an IQ of 70 or below both at the time of the murder(s) and prior to age eighteen. In its briefing opposing Pizzuto's motion for summary judgment, the State argued that Pizzuto had failed to provide evidence that his IQ was 70 or below and failed to provide evidence showing it was 70 or below prior to his eighteenth birthday. Pizzuto's alleged IQ is obviously a matter requiring expert testimony. He did not offer any expert testimony opining that his IQ was ever 70 or below, *nor does he allege that the requested additional testing was intended to address that issue*.

Id. (emphasis added).

In short, Pizzuto did not pursue his motion for additional testing, and he did not contend that further factual development of the record would shed additional light on the dispositive issue – his ability to establish a pre-18 IQ of 70 or below. Under these circumstances, we cannot say that the denial of an evidentiary hearing rendered the state court's factfinding process unreasonable under § 2254(d)(2)'s highly deferential standard. *See Hibbler*, 693 F.3d at 1146–47 ("[W]hen the challenge is to the state court's procedure, mere doubt as to the adequacy of the state court's findings of fact is insufficient; we must be satisfied that *any* appellate court to whom the defect in the state court's fact-finding process is

pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." (alterations and internal quotation marks omitted)).

6. Pizzuto's Remaining § 2254(d)(2) Arguments

[23] The § 2254(d)(2) portion of Pizzuto's opening brief appears to fault the Idaho Supreme Court's decision on several other grounds. The brief says, for example, that the Idaho Supreme Court's decision "rests on an irregular application of Idaho law." Opening Brief at 37. It also asserts that the state court's denial of an evidentiary hearing violated Idaho Code § 19-2515A, as well as the "requirements of Due Process and Equal Protection." *Id.* at 44. Pizzuto's brief, however, does not "specifically and distinctly" argue these issues. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005). We therefore decline to address them. *See id.*

* * *

In sum, the record does not establish that the Idaho Supreme Court's decision was based on an unreasonable determination of the facts under § 2254(d)(2).

CONCLUSION

Because § 2254(d) is not satisfied, we hold that the district court properly denied habeas relief. We need not address Pizzuto's remaining appellate arguments or review his *Atkins* claim de novo. Accordingly, we do not address whether Pizzuto is intellectually disabled or whether his execution would violate the Eighth Amendment.

Our decision, however, does not preclude the Idaho courts from reconsidering those questions in light of intervening events. Although the Idaho courts rejected Pizzuto's ***535** *Atkins* claim in 2008, they did so without the benefit of an evidentiary hearing, without the benefit of the Supreme Court's decisions in *Hall*, *Brumfield* and *Moore I*, and without the benefit of the most recent iterations of the AAIDD and American Psychiatric Association clinical standards. Since 2008, the United States Supreme Court has made clear that "it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an IQ above 70," *Brumfield*, 135 S. Ct. at 2278 (quoting *Hall*, 572 U.S. at 704, 134 S.Ct. 1986), and the professional clinical standards now advise that "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score," AAIDD-11 at 37. The Idaho courts have not yet addressed whether, under these standards, Pizzuto's execution would violate the Eighth Amendment.

The judgment of the district court is affirmed. Each party shall bear its own costs on appeal.

AFFIRMED.

All Citations

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 12, 2020

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Gerald Ross Pizzuto, Jr.
v. Keith Yordy, Warden
Application No. 19A1000
(Your No. 16-36082)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on March 12, 2020, extended the time to and including May 29, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Redmond K. Barnes
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

GERALD ROSS PIZZUTO, JR.,

Petitioner,

v.

RANDY BLADES, Warden, Idaho Maximum Security Institution,

Respondent.

Case No. 1:05-cv-00516-BLW

CAPITAL CASE

MEMORANDUM DECISION AND ORDER ON REMAND

Petitioner Gerald Ross Pizzuto, Jr., is an Idaho state prisoner under a sentence of death. Before the Court is Pizzuto's Successive Petition for Writ of Habeas Corpus.[1] The Successive Petition asserts that Pizzuto is intellectually disabled and, therefore, that his execution is prohibited by the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304 (2002).[2] The Court previously denied the Successive Petition after a four-day evidentiary

[1] Pizzuto's initial federal petition was denied by this Court in 1997, and the judgment was affirmed by the Ninth Circuit Court of Appeals in 2006. *See Pizzuto v. Ramirez*, Case No. 1:92-cv-00241-BLW (D. Idaho) (Dkt. 90, 130.) This Court later denied Pizzuto's motion for relief from judgment, which was based on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (*See id*., Dkt. 149, dated March 22, 2013.) The Ninth Circuit affirmed that decision in April 2015. *Pizzuto v. Ramirez*, 783 F.3d 1171, 1173 (9th Cir. 2015).

[2] The Supreme Court initially used the term "mentally retarded" to describe those individuals whose execution is prohibited under *Atkins*. However, "intellectually disabled" is the currently-accepted term, which the Court uses in this decision. *See Hall v. Florida*, 134 S. Ct. 1986, 1990 ("This change in

hearing, concluding that Pizzuto was not entitled to habeas relief on his *Atkins* claim, either under 28 U.S.C. § 2254(d) or under de novo review.[3] (Dkt. 228.) The Court later denied Pizzuto's motion to alter or amend the judgment. (Dkt. 233.) Pizzuto appealed.

On September 9, 2013, the Ninth Circuit affirmed this Court's decision, holding that, under 28 U.S.C. § 2254(d), the Idaho Supreme Court's rejection of Pizzuto's *Atkins* claim was not contrary to, or an unreasonable application of, clearly-established Supreme Court precedent, nor was it based on an unreasonable determination of the facts. *Pizzuto v. Blades*, 729 F.3d 1211, 1224 (9th Cir. 2013), *op. withdrawn*, 758 F.3d 1178 (9th Cir. 2014). Shortly thereafter, the Supreme Court granted a writ of certiorari in *Hall v. Florida*, 134 S. Ct. 471 (cert. granted Oct 21, 2013). The Ninth Circuit then withdrew its opinion and deferred submission pending the *Hall* decision. (Dkt. 257.)

In May 2014, the Supreme Court issued its decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). In *Hall*, the Court held, on review of an *Atkins* claim, that Florida's intellectual disability rule—which prohibited further exploration of a petitioner's *Atkins* claim if the petitioner's intelligence quotient "IQ" test score was above a hard cut-off of 70, without taking into consideration the Standard Error of Measurement (SEM)—violated the Eighth Amendment. *Id*. at 1994-95. That is, the Eighth Amendment requires that if an individual asserting an *Atkins* claim has an IQ test score within the SEM of a

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terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders . . . .").

[3] The evidentiary hearing was held prior to the Supreme Court's decision, in *Cullen v. Pinholster*, that new evidence cannot be presented in federal court with respect to claims adjudicated on the merits in state court. 563 U.S. 170, 180 (2011).

score of 70, that individual must be allowed the opportunity to present other evidence of intellectual disability.

After *Hall*, the Ninth Circuit withdrew its previous opinion in this case, vacated this Court's decision on Pizzuto's *Atkins* claim, and remanded for consideration of the applicability, if any, of *Hall* to the Successive Petition. (Dkt. 261.)

This Court ordered the parties to file supplemental briefs addressing the following issues: "(1) whether *Hall v. Florida* applies retroactively to this case; (2) whether and to what extent *Hall* affects this Court's consideration of Petitioner's claim under 28 U.S.C. § 2254(d)(1) or under de novo review; and (3) whether the previous evidentiary hearing held in this action is sufficient to resolve the issues in this case, whether a new evidentiary hearing is permissible and warranted, what additional evidence should be considered, and what that evidence would show." (Dkt. 265 at 1-2.) The parties have filed their briefing, and the issue is now ripe for decision. (*See* Dkt. 268, 276, 279.)

Having carefully reviewed the record, including the state court record, the Court concludes that the parties have adequately presented the facts and legal arguments in the briefs and record and that oral argument is unnecessary. *See* D. Idaho L. Civ. R. 9.2(h)(5) ("Motions and petitions shall be deemed submitted and shall be determined upon the pleadings, briefs, and record. The court, at its discretion, may order oral argument on any issue or claim."). Accordingly, the Court enters the following Order concluding that the Supreme Court's decision in *Hall v. Florida* does not alter the Court's previous decision in this case.

STANDARDS OF LAW

1. Habeas Corpus Standard of Law

Federal habeas corpus relief may be granted on claims adjudicated on the merits in a state court judgment when the federal court determines that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under § 2254(d), as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal habeas relief is further limited to instances where the state court's adjudication of the petitioner's claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although a federal habeas court reviews the state court's "last reasoned decision" in determining whether a petitioner is entitled to relief. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), a state court need not "give reasons before its decision can be deemed to have been 'adjudicated on the merits'" under § 2254(d). *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

When a party contests the state court's legal conclusions, including application of the law to the facts, § 2254(d)(1) governs. That section consists of two alternative tests: the "contrary to" test and the "unreasonable application" test.

Under the first test, a state court's decision is "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court] [has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

Under the second test, to satisfy the "unreasonable application" clause of § 2254(d)(1), the petitioner must show that the state court—although identifying "the correct governing legal rule" from Supreme Court precedent—nonetheless "unreasonably applie[d] it to the facts of the particular state prisoner's case." *Williams (Terry) v. Taylor*, 529 U.S. 362, 407 (2000). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies [Supreme Court] precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (emphasis omitted).

A federal court cannot grant habeas relief simply because it concludes, in its independent judgment, that the decision is incorrect or wrong; rather, the state court's application of federal law must be objectively unreasonable to warrant relief. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Bell*, 535 U.S. at 694. If there is any possibility that fair-minded jurists could disagree on the correctness of the state court's decision, then relief is precluded by § 2254(d)(1). *Richter*, 562 U.S. at 102. The Supreme Court has emphasized that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. (internal citation omitted). To be entitled to habeas

relief under § 2254(d)(1), "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S. Ct. at 1702 (internal quotation marks omitted).

Though the source of clearly established federal law must come from the holdings of the United States Supreme Court, circuit precedent may be persuasive authority for determining whether a state court decision is an unreasonable application of Supreme Court precedent. *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000). However, circuit law may not be used "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013).

As to the facts, the United States Supreme Court has clarified "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). This means that evidence not presented to the state court may not be introduced on federal habeas review if a claim was adjudicated on the merits in state court and if the underlying factual determination of the state court was not unreasonable. *See Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014).

When a petitioner contests the reasonableness of the state court's factual determinations, the petitioner must show that the state court decision was based upon factual determinations that were "unreasonable . . . in light of the evidence presented in

the State court proceeding." 28 U.S.C. § 2254(d)(2). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

The United States Court of Appeals for the Ninth Circuit has identified five types of unreasonable factual determinations that result from procedural flaws that occurred in state court proceedings: (1) when state courts fail to make a finding of fact; (2) when courts mistakenly make factual findings under the wrong legal standard; (3) when "the fact-finding process itself is defective," such as when a state court "makes evidentiary findings without holding a hearing"; (4) when courts "plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim"; or (5) when "the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." *Taylor v. Maddox*, 366 F.3d. 992, 1000-01 (9th Cir. 2004). State court findings of fact are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

This strict deferential standard of § 2254(d) applies to habeas claims except in the following narrow circumstances: (1) where the state appellate court did not decide a properly-asserted federal claim; (2) where the state court's factual findings are unreasonable under § 2254(d)(2); or (3) where an adequate excuse for the procedural default of a claim exists. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). In those circumstances, the federal district court reviews the claim de novo and, as in the pre-

AEDPA era, may draw from both United States Supreme Court and circuit precedent, limited only by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

Under de novo review, if the factual findings of the state court are not unreasonable, the Court must apply the presumption of correctness found in 28 U.S.C. § 2254(e)(1) to any facts found by the state courts. *Pirtle*, 313 F.3d at 1167. On the other hand, if a state court factual determination is unreasonable, the federal court is not limited by § 2254(e)(1). Rather, the federal district court may consider evidence outside the state court record, except to the extent that § 2254(e)(2) might apply. *Murray*, 745 F.3d at 1000.

2. Standard of Law Regarding Claims of Intellectual Disability

The Eighth Amendment to the Constitution prohibits cruel and unusual punishment. U.S. Const., amend. VIII. In 2002, the United States Supreme Court determined that the Eighth Amendment forbids the execution of individuals who were intellectually disabled at the time of their crime. *Atkins*, 536 U.S. at 321. That is, intellectually disabled criminals are "categorically excluded from execution." *Id.* at 318.

A capital habeas petitioner may show that he was intellectually disabled at the time of the crime—and therefore not subject to execution—by establishing the following:

1. The petitioner has "significantly subaverage intellectual functioning"; and

2. The petitioner suffers from deficits in adaptive functioning in two of ten listed areas, which means that the petitioner is unable "to learn basic skills and adjust behavior to changing circumstances"; and

3. The onset of these first two factors—subaverage intellectual functioning and deficits in adaptive functioning—occurred "during the developmental period," which means before the age of eighteen.

Hall, 134 S. Ct. at 1994; *Atkins*, 536 U.S. at 308 n.3.

In *Atkins*'s wake, many states, including Idaho, passed legislation establishing procedures for capital defendants to assert that they are intellectually disabled. Although *Atkins* set forth the general, three-pronged analysis for intellectual disability, it left "to the States the task of developing appropriate ways to enforce" the rule prohibiting the execution of the intellectually disabled. 536 U.S. at 317 (internal quotation marks and alteration omitted). Specifically, *Atkins* did not address how a state must define "significantly subaverage intellectual functioning" or how such functioning could be proved. Further, the *Atkins* Court recognized that there was "serious disagreement" among the States as to the most appropriate method for determining whether a petitioner was, in fact, intellectually disabled. *Id*. *Atkins* did not attempt to resolve that disagreement.

The Supreme Court later clarified *Atkins* in *Hall v. Florida*. The state statute at issue in *Hall*, as interpreted by the Florida Supreme Court, had defined the first prong of the *Atkins* test—significantly subaverage intellectual functioning—as an IQ test score of 70 or below, *without* consideration of the SEM of plus or minus five points. *Hall*, 134 S. Ct. at 1994. If a petitioner could not show an IQ score of 70 or below, he would, as a matter of law, fail to establish intellectual disability. The Florida statute did not allow further inquiry into the petitioner's intellectual functioning to determine whether he

satisfied the first prong notwithstanding the IQ test score within the margin for measurement error, nor did it allow inquiry into the other two prongs of the intellectual disability definition. Florida courts took "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and relied "on a purportedly scientific measurement the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id*. at 1995. The Court will refer to this type of intellectual disability statute as establishing a "hard IQ score cutoff."

Pursuant to *Hall*, rejecting an *Atkins* claim based solely on a hard IQ score cutoff without consideration of the SEM is unconstitutional. Rather, "when a defendant's IQ test score falls within the IQ test's acknowledged and inherent [SEM], the defendant must be able to present additional evidence of intellectual functioning, including testimony regarding adaptive deficits." *Id.* at 2001.[4]

Three main points may be gleaned from *Hall*. First, subaverage intellectual functioning—the first prong of the intellectual disability analysis—can be established by evidence of an IQ score, and an IQ score of 70 or below will satisfy that prong. "Significantly subaverage intellectual functioning" is generally defined by the medical and scientific community as having an IQ that is "approximately two standard deviations below the population mean," which equates to an IQ score of 70 or below. *Hall*, 134 S.

[4] *Hall* did not address the Flynn effect, which refers to the phenomenon that a population's mean IQ score tends to increase over time. (Pet. Brief, Dkt. 268, at 18 n.5.) The Court previously "granted [Pizzuto] the[] adjustments [for both the Flynn effect and the SEM], for the sake of argument," but concluded that these adjustments "still d[id] not get him close to the threshold for significantly subaverage general intellectual functioning." (Dkt. 228 at 30.)

Ct. at 1994 (internal quotation marks and citation omitted). Therefore, the first *Atkins* prong is established by an IQ test score of 70 or below.

Second, an IQ score of 76 or higher means that the individual does not suffer from significantly subaverage intellectual functioning and, therefore, is not entitled to relief under *Atkins*. The medical and scientific community takes the SEM into consideration when determining whether an individual has significantly subaverage intellectual functioning. The SEM is "a unit of measurement" that equates to plus or minus five points on the IQ test score scale. *Id.* at 1995. For example, an IQ test score of 70 indicates a ranged score of somewhere between 65 and 75, *id.*, and a test score of 76 indicates a ranged score of 71 to 81. Thus, an individual with an IQ score of 76 or higher would not be diagnosed as intellectually disabled because, under the first prong of *Atkins*, that IQ score is outside the range of error contemplated by the SEM.

Finally, *Hall* resolved the conundrum of an IQ test score between 71 and 75. Because these scores are within the lower range of the SEM, petitioners with such scores might meet the first prong of the intellectual disability analysis—that is, they might have an IQ of 70 or below, which establishes significantly subaverage intellectual functioning—or they might not. What *Hall* makes clear is that petitioners with IQ scores of 71 to 75 must be allowed to present additional evidence of intellectual disability, including additional evidence of subaverage intellectual functioning and evidence of the second and third prongs of the analysis—deficits in adaptive functioning and onset before the age of eighteen. 134 S. Ct. at 2001. A state cannot constitutionally end the inquiry

into intellectual disability simply because the petitioner presents an IQ score of 71 to 75. The IQ test score that Pizzuto presented to the Idaho Supreme Court was a verbal score of 72, resulting from a test administered by Dr. Emery in 1985. Although not a full-scale score,[5] the verbal score of 72 is within the range of scores affected by the *Hall* decision.[6]

Just as important as what *Hall* decided is what *Hall* did not decide. *Hall* did not declare unconstitutional a statute describing the first prong of the intellectual disability test as evidenced by an *IQ* of 70 or below—that is precisely the same definition of significantly subaverage intellectual functioning that the medical and scientific community accepts. Rather, *Hall* decided that an IQ *test score* between 71 and 75, without consideration of the SEM, cannot conclusively establish that the petitioner's IQ is above 70 and that the petitioner therefore does not meet the first prong of *Atkins*. The *Hall* decision applies (1) only to the first prong of an intellectual disability analysis, (2) only to the extent that a petitioner presents an IQ test score of 71 to 75, and (3) only to the extent that the petitioner is prohibited from presenting evidence beyond an IQ test score to establish an IQ of 70 or below, or from presenting evidence as to the second and third prongs of the analysis.

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[5] As Dr. Emery testified at this Court's evidentiary hearing, considering that Pizzuto's verbal score was 72, Pizzuto's full-scale score "probably" would have been higher, "given his history." (Dkt. 194, Tr. at 26-27.) Although potentially relevant to the first prong of the intellectual disability analysis, this point is irrelevant to the second and third prongs.

[6] At the evidentiary hearing in this Court, there was also evidence of two additional IQ scores: (1) a full-scale score of 92, which was obtained as part of Dr. Beaver's 1996 neuropsychiatric testing, and (2) a full-scale score of 60 to 65 (adjusted upwards from 60 to take into consideration Pizzuto's medical problems, which could have caused his intellectual functioning to deteriorate later in life), which was obtained by Dr. Weinstein during a 2009 evaluation.

DISCUSSION

The parties are familiar with the factual and procedural background of this case. The Court specifically adopts its recitation of the factual and procedural background of this case as stated in its Memorandum Decision and Order dated January 10, 2012. (Dkt. 228.)

For the reasons that follow, *Hall v. Florida* does not affect the Court's previous decision in this case. The Court concludes—under both AEDPA and de novo review—that Pizzuto has failed to satisfy the first and third prongs of the intellectual disability analysis. Thus, Pizzuto is not entitled to relief on his *Atkins* claim.

1. Assuming without Deciding that *Hall* Is Retroactive, the Idaho Supreme Court's Decision Rejecting Pizzuto's *Atkins* Claim Was Not Objectively Unreasonable under AEDPA

In *Teague v. Lane*, 489 U.S. 288, 305-10 (1989), the United States Supreme Court held that, in general, new rules of constitutional law do not apply retroactively to cases on collateral review. There are two exceptions to this general rule. First, a new rule applies retroactively if it is a substantive rule—that is, the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (internal quotation marks omitted). Second, if a new rule is procedural rather than substantive, it applies retroactively only if it is a "watershed rule[] of criminal procedure" that "implicate[s] the fundamental fairness of the trial." *Id.* at 311-12.

The Supreme Court has held that the retroactivity inquiry of *Teague* is distinct from § 2254(d)(1)'s requirement that, to be objectively unreasonable, a state court's

decision must violate federal law that was clearly established at the time of that court's decision. *Horn v. Banks*, 436 U.S. 266, 272 (2002) (per curiam). Therefore, to be eligible for relief under AEDPA, a petitioner must show *both* that the rule he seeks to invoke is retroactive—either because it is not a new rule, it is a substantive rule, or it is a watershed rule of criminal procedure—*and* that the state court's decision violated Supreme Court precedent that was clearly-established at the time of that decision:

> The retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from . . . AEDPA; neither abrogates or qualifies the other. If § 2254(d)(1) was, indeed, pegged to *Teague*, it would authorize relief when a state-court merits adjudication 'resulted in a decision that *became* contrary to, or an unreasonable application of, clearly established Federal law, *before the conviction became final*.' The statute says no such thing, and we see no reason why *Teague* should alter AEDPA's plain meaning.

Greene v. Fisher, 132 S. Ct. 38, 44 (2011). *See also Demirdjian v. Gipson*, 832 F.3d 1060, 1076 n.12 (9th Cir. 2016) ("Even if applying a rule retroactively would comport with *Teague*, we still must ask whether doing so would contravene section 2254(d)(1) by granting relief based on federal law not clearly established *as of the time the state court render[ed] its decision*.") (internal citations and quotation marks omitted).

Both parties have fully briefed the *Teague* issue, and both make salient points. Neither the Supreme Court nor the Ninth Circuit have addressed whether *Hall* applies retroactively to cases on collateral review. That inquiry is difficult and complex. In this case, however, it is also unnecessary. Even if *Hall* does apply retroactively, Pizzuto still is not entitled to habeas relief on his *Atkins* claim.

A. The Decision of the Idaho Supreme Court

Idaho's intellectual disability statute requires that an individual seeking relief from a capital sentence based on intellectual disability show "significantly subaverage general intellectual functioning." Idaho Code § 19-2515A(1)(a). Like the medical and scientific community, the statute defines "significantly subaverage general intellectual functioning" as "an intelligence quotient of seventy (70) or below." *Id.* § 19-2515A(1)(b). The Idaho statute does not explicitly prohibit consideration of the SEM, nor does it explicitly state that the only way to prove an IQ is with evidence of an IQ test score. Therefore, on its face, the Idaho statute could have been interpreted to be consistent with *Atkins* and *Hall*. *See Hall*, 134 S. Ct. at 1994 ("On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement . . . .").

However, in adjudicating Pizzuto's *Atkins* claim, the Idaho Supreme Court appears to have interpreted the statute as prohibiting consideration of the SEM—that is, the Idaho statute established a hard IQ score cutoff of 70. *Pizzuto v. State*, 202 P.3d 642, 651 (Idaho 2008).[7] Noting that the only record evidence of Pizzuto's IQ was a verbal test score of 72,

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[7] As the Court has previously stated,

> while the Idaho Supreme Court noted that the literal language of the statute prohibited the consideration of a score above 70, it next hypothesized that even if a standard error of measurement were applied, '[i]t would be just as reasonable to infer that Pizzuto's IQ . . . was 77 as it would be to infer that it was 67.' [*Pizzuto*, 202 P.3d] at 651. It is not entirely clear whether the state court's opinion in Pizzuto's case precludes consideration of a standard error of measurement in all cases.

the Idaho Supreme Court stated that "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.* Thus, reasoned the court, Pizzuto had not established significantly subaverage intellectual functioning.

Notwithstanding its determination that Pizzuto had failed to establish a genuine dispute as to subaverage intellectual functioning under the first prong of the intellectual disability analysis, the Idaho Supreme Court then went on to consider the *third* prong of that analysis—onset before the age of eighteen. The court determined that the expert opinions in the record about Pizzuto's mental functioning reasonably supported an inference that his IQ was actually higher than 70 before he was 18 years of age and could have decreased before his IQ was first tested at age 29—which resulted in a verbal IQ score of 72. *Id.* at 651-55. These opinions included (1) Dr. Merikangas's opinion that Pizzuto's "long history of drug use" caused "further neurological dysfunction"; and (2) Dr. Beaver's opinion that Pizzuto's epilepsy and polysubstance abuse could have cause Pizzuto's mental functioning to decline over the nearly eleven years that passed between Pizzuto's eighteenth birthday (on January 11, 1974) and his verbal IQ test (taken on December 12, 1985).

The Idaho Supreme Court emphasized that, to be entitled to the protection of the *Atkins* rule, a petitioner was required to demonstrate that he was intellectually disabled "at the time of the murders and prior to his eighteenth birthday," which Pizzuto had not

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> But because both Pizzuto and Respondent seem to assume that to be the true [sic], the Court will likewise so assume for purposes of this decision.

(Dkt. 228 at 18 n.3.)

done.[8] *Id*. at 655; *see also id.* at 651 ("Pizzuto's argument also requires the district court to infer that Pizzuto's IQ had not decreased during the eleven-year period from his eighteenth birthday to the date of his IQ test. The district court, as the trier of fact, was not required to make that inference, especially in light of the opinions of Pizzuto's experts that his long history of drug abuse and his epilepsy would have negatively impacted his mental functioning."). Therefore, the Idaho Supreme Court denied Petitioner's *Atkins* claim.

B. At the Time of the Idaho Supreme Court's Decision, It Was Not Clearly Established that a Hard IQ Score Cutoff of 70 Violated the Eighth Amendment

After *Hall*, it is clear that the Idaho Supreme Court's interpretation of Idaho's intellectual disability statute as establishing a hard IQ score cutoff of 70 without considering the SEM is unconstitutional, to the extent that court held that no further evidence of intellectual disability could be presented. However, the question under AEDPA is not whether that interpretation is unconstitutional now, but whether it was *so obviously* unconstitutional, at the time of the Idaho Supreme Court's decision, that all fairminded jurists would have agreed that a hard IQ score cutoff of 70 was unconstitutional. *See Richter*, 562 U.S. at 103.

Before *Hall* was decided, this Court fully analyzed whether the interpretation of a hard cutoff of 70 violated AEDPA in its previous merits decision, as well as its denial of Pizzuto's motion to alter or amend the judgment, and the Court incorporates its reasoning

[8] The state court did not address whether Pizzuto had satisfied the second prong of the intellectual disability inquiry—deficits in adaptive functioning.

in those decisions into its analysis here. (Dkt. 228, 233.) The only applicable Supreme Court precedent issued after those decisions is *Hall*. Therefore, whether the state court's decision violated § 2254(d)(1) turns on whether *Hall*'s rejection of a hard IQ score cutoff of 70 was so clearly required by *Atkins* that it was, essentially, nearly a foregone conclusion.

As the Supreme Court later stated in *Hall*, *Atkins* itself did not provide "definitive procedural or substantive guides for determining when a person who claims [intellectual disability] falls within the protection of the Eighth Amendment." 134 S. Ct. at 1998 (internal quotation marks omitted). Specifically, *Atkins* did not hold that a hard IQ score cutoff was unconstitutional, nor did it plainly require consideration of an IQ test's SEM with respect to the first prong. *See White*, 134 S. Ct. at 1702 ("Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions.") (internal quotation marks and alteration omitted). As this Court previously explained, *Atkins* "did not constitutionalize any specific definition" of significantly subaverage intellectual functioning. (Dkt. 228 at 20.) The *Atkins* Court stated explicitly that it would leave "to the States the task of developing appropriate ways to enforce" the rule against the execution of intellectually disabled criminals. 536 U.S. at 317. *Hall* was essentially a clarification and an extension of *Atkins*. And, as the Supreme Court has instructed, AEDPA does not allow federal courts to extend Supreme Court precedent for purposes of applying clearly-established law. *White*, 134 S. Ct. at 1706.

The *Hall* majority did make several points indicating that its holding flowed directly from *Atkins*. The Court noted that *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Hall*, 134 S. Ct. at 1998. The *Atkins* Court relied on the definition in the DSM-IV that "mild [intellectual disability] is typically used to describe people with an IQ level of 50-55 to approximately 70," and noted that "an IQ *between 70 and 75 or lower* is typically considered the cutoff IQ score for the intellectual function prong of the [intellectual disability] definition." *Id*. at 1998-99 (emphasis added) (internal quotation marks and alteration omitted). Additionally, "*Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions." *Id*.

However, that the *Hall* majority determined that its repudiation of a hard IQ score cutoff of 70 flowed directly from *Atkins* does *not* necessarily mean that the unconstitutionality of such a cutoff was clearly established at the time of the Idaho Supreme Court's decision. *See Kilgore v. Sec'y, Florida Dep't of Corr*., 805 F.3d 1301, 1310-11 (11th Cir. 2015) ("[I]f *Hall* 'interpreted' or 'refined' *Atkins*, that does not mean [*Hall*'s] holding was 'clearly established Federal law' under § 2254(d)(1).").

As the Supreme Court emphasized in *Richter*, "[a] state court's determination that a claim lacks merit precludes federal habeas relief *so long as fairminded jurists could disagree* on the correctness of the state court's decision." 562 U.S. at 101 (emphasis added) (internal quotation marks omitted). In *Hall*, four Supreme Court justices would

have held that Florida's hard IQ score cutoff of 70 did *not* violate the Eighth Amendment. 134 S. Ct. at 2002 (Alito, J., dissenting). Both the majority and dissenting opinions in *Hall* are well-reasoned and well-supported, and this Court cannot say that every fairminded jurist would have agreed with the *Hall* majority at the time the Idaho Supreme Court rendered its decision on Pizzuto's *Atkins* claim.

The holding in *Hall* was by no means a foregone conclusion, and fairminded jurists could have concluded, at the time of the Idaho Supreme Court's decision, that a hard IQ score cutoff of 70 was indeed constitutional. That is, the constitutionality of such a cutoff was not "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Therefore, the Idaho Supreme Court's refusal to consider the SEM was not contrary to, or an unreasonable application of, the *Atkins* decision, and Pizzuto is not entitled to relief under § 2254(d)(1).

C. Even If It Was Clearly Established, at the Time of the Idaho Supreme Court's Decision, that a Hard IQ Score Cutoff of 70 Was Unconstitutional, the Idaho Supreme Court's Alternative Basis for Rejecting Pizzuto's Atkins *Claim Was Not Objectively Unreasonable under § 2254(d)(1)*

Even assuming that the Idaho Supreme Court's refusal to consider the SEM violated clearly-established federal law, Pizzuto still cannot demonstrate that he is eligible for relief under § 2254(d)(1). The state supreme court also held Pizzuto did not establish that any subaverage intellectual functioning developed *before* he turned eighteen—the third prong of the intellectual disability analysis. And this alternative conclusion was not contrary to, or an unreasonable application of, clearly-established Supreme Court precedent.

There is no clearly-established Supreme Court precedent as to how a petitioner may prove, or how a court must apply, the age-of-onset requirement. *Hall* did not address the third prong of the intellectual disability inquiry at all. Thus, even assuming Pizzuto satisfies the first prong and does, indeed, have significantly subaverage intellectual functioning, the state court's conclusion that Pizzuto did not satisfy the age-of-onset requirement is not objectively unreasonable under AEDPA, and he is not entitled to relief on his *Atkins* claim.

Pizzuto argues that the Idaho Supreme Court required him to present a "pre-18 70 IQ score" and that *Hall* makes clear that such a requirement unconstitutional. (Dkt. 268 at 15, ECF p. 21.) However, contrary to Petitioner's argument, the state court did not erect a "pre-18 IQ score barrier." (*Id*.) Instead, that court determined that Pizzuto had not provided sufficient evidence that his *IQ*—as opposed to his IQ test score—was 70 or below before he turned eighteen. *Pizzuto*, 202 P.3d at 651 ("[T]here must be evidence showing that [Pizzuto's] *IQ was 70 or below* prior to his eighteenth birthday on January 11, 1974." (emphasis added)). The state court's analysis of the third prong of the intellectual disability test was independent of its analysis of the first prong, and this Court has already rejected Pizzuto's argument on this issue. (Dkt. 228 at 25 n.5 ("Pizzuto also complains that the Idaho Supreme Court's opinion requires evidence of an IQ test score of 70 or below from before an offender's 18th birthday. This Court disagrees and interprets the state court's decision as instead requiring some evidence from which a factfinder could reasonably find that the offender's IQ score would have been 70 or

below before age 18, regardless whether he or she was tested as a child. This is a subtle but important distinction . . . .").)

Concluding that Pizzuto's adult drug use and medical problems were likely responsible for the decline in his intellectual functioning, the Idaho Supreme Court determined that Pizzuto did not suffer from significantly subaverage intellectual functioning prior to his eighteenth birthday. Pizzuto has simply not established that this determination was objectively unreasonable under 28 U.S.C. § 2254(d).

D. The Idaho Supreme Court's Decision Was Not Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented under § 2254(d)(2)

The Court previously concluded Pizzuto had not shown that the Idaho Supreme Court based its decision on an unreasonable finding of fact under § 2254(d)(2). Because the *Hall* question addressed in this decision is a pure question of law that does not alter the factual record, the Court incorporates and adopts its previous analysis on this issue. (*See* Dkt. 228 at 21-26.)

Pizzuto, however, claims that the state court misunderstood *Atkins* and that, when *Atkins* and *Hall* are considered together, it becomes clear that the court's factual findings are unreasonable because those findings were "necessarily skewed" by its mistaken interpretation of *Atkins*. (Dkt. 268 at 18, ECF p. 24.) Pizzuto states that "[t]he facts, summarily and inferentially found, are unreasonable because they are not consistent with clinical definitions and best practices in defining and diagnosing [intellectual disability] as guaranteed by the Eighth Amendment in *Atkins* and *Hall*." (*Id*.)

However, the Idaho Supreme Court carefully considered the evidence in the record and found Pizzuto had not established that any significant subaverage intellectual functioning developed before he turned eighteen years of age. As previously explained, the court relied on credible evidence that Pizzuto's medical problems and drug abuse could very well have caused his intellectual functioning to decline in the eleven years between his eighteenth birthday and the date of the IQ test resulting in a verbal score of 72. In doing so, the state court did not make any unreasonable findings of fact. *See Taylor*, 366 F.3d. at 1000-01 (describing types of unreasonable factual findings).

2. On De Novo Review, Pizzuto Has Not Shown Intellectual Disability and, Therefore, Is Not Entitled to Relief under *Atkins*[9]

In addition to concluding that AEDPA barred relief on Pizzuto's *Atkins* claim, this Court also denied Pizzuto's *Atkins* claim after a de novo review. Specifically, Petitioner did not establish the first and third prongs of the analysis—that he had an IQ of 70 or below considering the SEM, thereby suffering from significantly subaverage intellectual functioning, before he turned eighteen.[10] (Dkt. 228 at 26-32.) The Court was presented with three IQ scores: one below 70, one above 90, and one in the grey area between 71 and 75. Considering all the evidence presented, the Court resolved the conflict in that evidence and concluded that Pizzuto did not suffer from significant subaverage intellectual functioning before he turned eighteen. *Cf. Larry v. Branker*, 552 F.3d 356,

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[9] Again, for purposes of this decision, the Court assumes without deciding that *Hall* applies retroactively to Pizzuto's case.

[10] The Court also found that, prior to his eighteenth birthday, Pizzuto had significant deficits in adaptive functioning sufficient to meet the second prong of the intellectual disability analysis. (Dkt. 28 at 32-37.)

371 (4th Cir. 2009), *cert. denied*, 558 U.S. 953 (2009) (holding that a state court's rejection of an *Atkins* claim was reasonable where the state court had evidence of one IQ test score above 70 and one IQ test score below 70).

Pizzuto asks to reopen the evidentiary hearing and present further evidence of intellectual disability. (Dkt. 268 at 44, ECF p. 50.) However, Pizzuto has not convinced the Court that the previous evidentiary hearing was insufficient in any way. Petitioner had an adequate opportunity and a strong incentive to bring forward all his evidence at the evidentiary hearing. Not only has Pizzuto failed to prove that his IQ was 70 or below, but having reviewed all the evidence once again on remand, the Court finds that Pizzuto has also failed to prove that his IQ was *75* or below before he turned eighteen. (See Dkt. 228.) Thus, nothing in *Hall* renders suspect any of the Court's previous findings and conclusions on de novo review.

The Court need not re-invent the wheel and thus incorporates and adopts its previous de novo analysis. For the reasons explained in the Court's decision denying the Successive Petition, as well as its decision denying Pizzuto's motion to alter or amend the judgment (Dkt. 228 & 223), the Court concludes, on de novo review, that Pizzuto has not shown that he suffered from significantly subaverage intellectual functioning at the time of the crime, or that any subaverage intellectual functioning existed prior to Pizzuto's eighteenth birthday. Therefore, Pizzuto has not established that he is intellectually disabled and is not entitled to habeas relief under *Atkins* and *Hall*.

CONCLUSION

For the reasons set forth above, the Court concludes that *Hall v. Florida* does not alter the Court's previous decision denying the Successive Petition.

ORDER

IT IS ORDERED:

1. The Court's previous decision, concluding that Pizzuto is not entitled to habeas relief on his claim of intellectual ability (Dkt. 228), is CONFIRMED. The Supreme Court's decision in *Hall v. Florida* does not alter the Court's analysis in this case.
2. The Court reaffirms its previous issuance of a certificate of appealability as to the intellectual disability claim asserted in the Successive Petition. (*See* Dkt. 228.)
3. This case is hereby ordered closed.

DATED: **November 28, 2016**

B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

GERALD ROSS PIZZUTO, JR.,

Petitioner,

v.

RANDY BLADES, Warden, Idaho Maximum Security Institution,

Respondent.

Case No. 1:05-cv-516-BLW

MEMORANDUM DECISION AND ORDER

CAPITAL CASE

Before the Court is Petitioner's Successive Petition for Writ of Habeas Corpus, in which Petitioner claims that the State is prohibited from executing him under the Eighth Amendment because he is mentally retarded (an "*Atkins* claim"). *See Atkins v. Virginia*, 536 U.S. 304 (2002). The Court previously denied Respondent's Motion for Summary Judgment and held a four-day evidentiary hearing.

After reviewing the record and considering the parties' arguments in their post-hearing briefing, the Court concludes that Petitioner is not entitled to habeas relief, and the Successive Petition will be denied.

BACKGROUND

In 1986, Gerald Ross Pizzuto, Jr., was sentenced to death for the murders of Berta Herndon and her adult nephew Del Herndon. The Idaho Supreme Court has described the

relevant facts of the crimes against the Herndons as follows:

> Pizzuto approached [the Herndons] with a .22 caliber rifle as they arrived at their mountain cabin and made them enter the cabin. While inside, he tied the Herdons' 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 Herndons just for the sake of killing and subsequently joked and bragged about the killings to his associates.

Pizzuto v. State, 202 P.3d 642, 645 (Idaho 2008).

The Idaho Supreme Court affirmed Pizzuto's murder convictions, death sentence, and the district court's order denying post-conviction relief. *State v. Pizzuto*, 810 P.2d 680 (1991). Pizzuto's first federal habeas petition was denied by District Judge Alan J. McDonald, and the Ninth Circuit Court of Appeals affirmed. *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002), *dissent amended in part by* 385 F.3d 1247 (9th Cir. 2004). Pizzuto has also filed at least five additional petitions for post-conviction relief in the state courts, unsuccessfully challenging his convictions and sentences under various theories. *See Pizzuto v. State*, 233 P.3d 86, 88-89 (Idaho 2010) (reciting the case history).

In June of 2002, the United States Supreme Court held that the Eighth Amendment precludes the execution of convicted murderers who are mentally retarded.[1] *Atkins v. Virginia*, 536 U.S. 304 (2002). In so ruling, the Supreme Court left to the states the "appropriate ways to enforce the constitutional restriction." *Id.* at 317.

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[1] The Court recognizes that the favored term in the clinical community now appears to be "intellectual disability" or "ID," but to maintain consistency it will refer to the term that was used by the Supreme Court in *Atkins*.

The Idaho legislature responded to *Atkins* in March of 2003, enacting Idaho Code § 19-2515A, which contains a substantive definition of mental retardation and provides a procedural mechanism for adjudicating claims that are raised in cases in which the death penalty is an option. Under Idaho Code § 19-2515A(1), mental retardation is defined as (1) "significantly subaverage general intellectual functioning," meaning an intelligent quotient (IQ) of 70 or below, (2) accompanied by "significant limitations in adaptive functioning" in at least two of ten listed skill areas, and (3) with the onset of these mental deficits and adaptive functioning limitations before the age of 18. Idaho Code § 19-2515A(1)(a),(b).

In June 2003, Pizzuto filed a successive application for post-conviction relief in state district court, claiming that his execution is prohibited because he is mentally retarded. (State's Lodging J-1, pp. 1-10.) He supported his claim largely with evidence that was already in the record, including a 17-year-old opinion from psychologist Dr. Michael Emery. (*Id.* at p. 151.) Dr. Emery had evaluated Pizzuto before sentencing and concluded, among other things, that he had a verbal IQ score of 72 on the Weschler Adult Intelligence Scale, Revised (WAIS-R). (*Id.*) Pizzuto did not complete the performance portion of the test or receive a full scale score, and Emery offered an opinion only that Pizzuto's verbal WAIS-R score fell in the "borderline range of intellectual deficiency and probably reflects, at least to some extent, a history that has included little organization, predictability, or formal learning." (*Id.*)

Pizzuto alleged that the partial IQ score, when viewed within a standard margin of

error, placed him within the range of "significantly subaverage general intellectual functioning"; that is, with an IQ of 70 or below. (State's Lodging J-1, p. 5.) To bolster his claim, he pointed to evidence of serious head injuries from his childhood, deficits in educational performance and social interaction, a diagnosis of epilepsy, and the opinions of mental health experts, including a 1996 report from neuropsychologist Dr. Craig Beaver, that Pizzuto had serious "cognitive limitations." (*Id.* at pp. 5-9.) He also attached to his petition a new affidavit from Dr. Beaver (the "2003 Affidavit"), who had reviewed his prior evaluation and remarked that Pizzuto "demonstrated limited intellectual skills indicative of possible mild mental retardation." (*Id.* at p. 59.) In the 2003 Affidavit, Dr. Beaver concluded that Pizzuto "likely meets the standard recently enacted in Idaho Code, Section 19-2515A regarding defendants who are mentally retarded and involved in first degree murder proceedings." (*Id.* at p. 59.)

The State responded to the successive petition by filing a motion for summary dismissal on procedural grounds. (State's Lodging J-1, p. 114.) The State alternatively contended that Pizzuto had failed to raise a genuine issue of material fact that, if resolved in his favor, would establish that he was mentally retarded. (*Id.* at pp. 6-11.)

While the State's motion was pending, Pizzuto filed a motion requesting the district court to grant him permission to complete a neuropsychiatric examination, which his counsel asserted was "necessary and material" to proving the *Atkins* claim. (State's Lodging J-1, p. 131-32.) To support the request, Pizzuto offered another affidavit from Dr. Beaver (the "2004 Affidavit"), in which he concluded that in light of Pizzuto's

neurological problems, "[a] current evaluation of Gerald Pizzuto is indicated to determine if he meets the criteria of mental adaptability." (*Id.* at 176.) At a subsequent hearing, Pizzuto's counsel discouraged the judge from ruling on the testing issue until a separate motion to disqualify the judge had been resolved. (*Id.* at p. 52.) At that same hearing, the parties discussed the possibility of agreeing informally to authorize the testing, but the matter was not resolved. (*Id.* at pp. 52-53.)

After the motion to disqualify the judge and a motion to pursue an interlocutory appeal were denied, Pizzuto moved for summary judgment. (State's Lodging J-2, p. 280.) Although he relied on much of the same evidence that he had lodged previously, he added new affidavits and documentary evidence to the record that he alleged demonstrated significant limitations in adaptive functioning during his developmental years. (State's Lodging J-10, pp. 1-35.)

At the hearing on the parties' dispositive motions, Pizzuto's counsel argued that while she believed there was enough evidence in the record to prove that her client was mentally retarded, if the court disagreed, it should permit additional factual development before disposing of the case. (State's Lodging J-3, pp. 83-84, 105-06.) The state trial court took the matter under advisement and later issued a two-page decision granting the State's motion for summary dismissal and denying Pizzuto's motion for summary judgment. (State's Lodging J-2, pp. 309-10.) The trial court found that the petition was untimely and that Pizzuto had "failed to raise a genuine issue of material fact supporting his claim of mental retardation." (*Id.* at pp. 309-10.) The court's written ruling did not

mention Pizzuto's requests for additional testing or for an evidentiary hearing. (*Id.*)

On appeal, the Idaho Supreme Court concluded that the district court erred in finding the petition to be untimely, but it nonetheless affirmed the lower court's dismissal of the action on the ground that Pizzuto had not raised a genuine issue of material fact. *Pizzuto v. State*, 202 P.3d 642, 648 (Idaho 2008). In reaching that conclusion, the Idaho Supreme Court construed and applied the substantive definition of mental retardation in Idaho Code § 19-2515A(1) for the first time. *Id.* at 650-51. It found that Pizzuto had not presented a prima facie case that he was mentally retarded under the statutory standards, primarily because he had failed to offer evidence from which a factfinder could conclude that he had significantly subaverage general intellectual functioning – that his IQ was 70 or below – before he turned 18 years old. *Id.* at 650-55. Because it rejected the claim on the intellectual functioning prong, the state court did not address whether Pizzuto had significant limitations in adaptive functioning. *Id.*

While the post-conviction matter was pending, Pizzuto applied to the Ninth Circuit Court of Appeals for permission to raise his *Atkins* claim in a successive habeas proceeding in this Court. The Ninth Circuit granted his request to go forward, and the federal matter was then stayed until after the Idaho Supreme Court issued its final decision. (Dkts. 2, 7.)

After the stay was lifted, Respondent filed an Answer and a Motion for Summary Judgment. This Court denied the summary judgment motion without prejudice, and because Pizzuto had not been allowed to develop the facts completely in state district

court, it authorized him to engage in limited discovery and to complete neuropsychiatric testing. (Dkt. 52, p. 13.) The Court reserved its ruling on whether a full evidentiary hearing would be needed until after the period of investigation and discovery had concluded. (*Id.*)

Pizzuto then submitted an offer of proof, which included new declarations from two mental health professionals who opined that he was mentally retarded under both Idaho law and clinical definitions of the term. (Dkt. 61, Exhibit A; Dkt. 62.) After considering the offer of proof, the Court determined that Pizzuto had raised a "colorable claim" for relief and set the case for an evidentiary hearing. (Dkt. 74.)

The evidentiary hearing was held between November 15 and November 18, 2010. After receiving extensions of time, the parties have completed post-hearing briefing. The matter is now ripe, and the Court is prepared to issue its final ruling.

LEGAL FRAMEWORK FOR HABEAS REVIEW

1. Deference to the State Court Adjudications – 28 U.S.C. § 2254(d)

When a state court has denied a state prisoner's federal claim on the merits, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) requires the federal district court to afford the state court's findings and conclusions substantial deference on habeas review.

Under AEDPA, the Court cannot grant habeas relief on any federal claim that the state court adjudicated on the merits unless the adjudication of the claim:

1. resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has found that AEDPA's core purpose is to ensure that habeas relief functions as a "'guard against extreme malfunctions in the state criminal justice systems'" and not as a means of mere error correction. *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U. S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)).

The first sub-section, § 2254(d)(1), has two clauses, each with independent meaning. For a decision to be "contrary to" clearly established federal law, the petitioner must establish that the state court applied "a rule of law different from the governing law set forth in United States Supreme Court precedent, or that the state court confronted a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrived at a result different from the Court's precedent." *Williams v. Taylor*, 529 U.S. 362, 404-06 (2000).

To satisfy the "unreasonable application" clause, the petitioner must show that the state court was "unreasonable in applying the governing legal principle to the facts of the case." *Williams*, 529 U.S. at 413. A federal court cannot grant relief simply because it concludes in its independent judgment that the state court's adjudication of the claim is

incorrect or wrong; the state court's application of federal law must be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Bell v. Cone*, 535 U.S. 685, 694 (2002). The state court need not cite or even be aware of the controlling United States Supreme Court decision to be entitled to AEDPA deference. *Early v. Packer*, 537 U.S. 3, 8 (2002).

To be eligible for relief under § 2254(d)(2), the petitioner must show that the state court's decision was based upon factual determinations that were "unreasonable in light of the evidence presented in the State court proceeding." *Id.*

Only when the state court did not adjudicate a federal claim that was fairly presented to it will the federal court's review of the legal claim be *de novo*. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

Under all circumstances, state court findings of fact are presumed to be correct unless the petitioner can rebut those findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

2. New Evidentiary Development – 28 U.S.C. § 2254(e)

The AEDPA also contains restrictions on new evidentiary development in federal court. Evidentiary hearings are prohibited if the petitioner "failed to develop the factual basis" of a claim in state court, unless the petitioner can meet one of two narrow exceptions. 28 U.S.C. § 2254(e)(2). This restriction also applies when a petitioner seeks relief on new evidence in an expanded record without an evidentiary hearing. *See Holland v. Jackson*, 542 U.S. 649, 652 (2004); *accord Cooper-Smith v. Palmateer*, 397 F.3d 1236,

1241 (9th Cir. 2005).

A petitioner will be freed from the constraints on evidentiary development in § 2254(e)(2) only if the federal court finds that the petitioner exercised reasonable diligence and was not at fault for the lack of factual development in state court. *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

3. Harmonizing § 2254(d) and § 2254(e)(2) – *Cullen v. Pinholster*

Previously, this Court followed the prevailing view that requests for evidentiary hearings were assessed primarily under § 2254(e)(2). Under that view, if a petitioner could establish that he had pursued his claims diligently in state court but was unable to develop the facts, then an evidentiary hearing could be held in federal court if the petitioner stated a "colorable claim" for relief. In making the colorable claim determination, the court was permitted to take into account all of the evidence, including that which was proffered for the first time in federal court.

The Supreme Court has clarified this issue in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). There, the federal district court held an evidentiary hearing on an ineffective assistance of counsel claim and, after taking into consideration evidence that was not before the state court, concluded that the state court's decision involved an unreasonable application of clearly established federal law. *Id.* at 1397. The Ninth Circuit affirmed. *Id.*

The Supreme Court reversed and held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S.Ct. at 1398. The Court rejected, as an unwarranted "assumption," that if a petitioner

could overcome the restrictions on evidentiary hearings in § 2254(e)(2) and then present new evidence in federal court, the deferential standards in § 2254(d)(1) do not apply. *Id.* at 1400. The Court held instead that "that evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.*[2]

The Supreme Court noted that § 2254(e)(2) was not rendered superfluous by its holding because that provision "continues to have force where § 2254(d)(1) does not bar federal habeas relief." 131 S.Ct. at 1401. As an example, the Court remarked that not all federal claims fall within the scope of § 2254(d), such as claims that were not adjudicated on the merits by the state court. Under those circumstances, the petitioner would need to satisfy the standards in § 2254(e)(2), or establish that the provision is inapplicable, before the federal court could grant an evidentiary hearing.

4. Applying *Pinholster* to the Present Case

The Supreme Court decided *Pinholster* after the evidentiary hearing was completed in this case, and Respondent now relies on *Pinholster* to argue that this Court must review Pizzuto's claim under § 2254(d) based solely on the record that was before the Idaho Supreme Court. Respondent asserts that because Pizzuto can not satisfy the § 2254(d) standards, the analysis should end there.

Pizzuto disagrees and asks the Court to consider all of the evidence. He contends

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[2] Although *Pinholster* technically addressed the proper scope of review only under § 2254(d)(1), the Court noted that § 2254(d)(2) *expressly* requires a review of the state court's factfinding based on the evidence presented in the state court proceeding. 131 S.Ct. at n.7. It is now clear that both subsections limit review to the evidence that was before the state courts.

that *Pinholster* did not address whether a diligent petitioner, such as himself, who was unable to develop the factual record in state court is constrained from developing the facts in federal court. To hold that *Pinholster* prohibits factual development in those circumstances, according to Pizzuto, means that *no* forum has been made available for a diligent petitioner to develop his constitutional claim. He also contends that because he was denied an evidentiary hearing in state court, there has been no true adjudication on the merits of his claim or reasonable factfinding to which this Court must give deference. Alternatively, Pizzuto asserts that the Idaho Supreme Court's decision was based on an unreasonable application of clearly established federal law and that the state court made unreasonable findings of fact in light of the evidence presented.

The Court finds a helpful roadmap for navigating this particular thicket in the Ninth Circuit's recent decision in *Stokely v. Ryan*, 2011 WL 4436268 (9th Cir. Sept. 26, 2011). In *Stokely*, a capital case, the Ninth Circuit acknowledged that *Pinholster* left certain questions unresolved, including "'where to draw the line between new claims and claims adjudicated on the merits' by the state courts." *Id.* at *5. After recognizing that *Pinholster* "dramatically changed the aperture for consideration of new evidence," the Ninth Circuit addressed the petitioner's claim both on the state court record under § 2254(d) and, alternatively, based on the new evidence offered for the first time in federal court. *Id.* at *6-11.

Because many of the same concerns also exist in this case, the Court will follow that same prudent course and analyze Pizzuto's claim both under § 2254(d) based on the

record before the Idaho Supreme Court and with a *de novo* standard applied to all of the evidence. The Court sees no encroachment on the State's interests in comity and federalism because it finds the claim to lack merit under either standard, and the State's judgment will not be disturbed.

PIZZUTO IS NOT ELIGIBLE FOR RELIEF UNDER § 2254(d) BASED ON THE RECORD BEFORE THE IDAHO SUPREME COURT

1. Clearly Established Federal Law

In *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), the Supreme Court held that the Eighth Amendment did not bar the execution of mentally retarded offenders. Thirteen years later, the Court changed course and overruled *Penry* in *Atkins*. 536 U.S. at 324-26. The Court concluded that a national consensus had emerged that executing mentally retarded offenders was excessive and disproportionate because society had come to view such offenders as less culpable than offenders of normal intelligence. *Id.* at 316. Mentally retarded offenders are now categorically exempt from execution under the Eighth Amendment. *Id.* at 321.

Despite stating that categorical rule, the Court recognized that "to the extent that there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Atkins*, 536 U.S. at 317. The Court cited clinical definitions of mental retardation that required evidence of significant subaverage general intellectual functioning and significant limitations in adaptive functioning in two or more life skill areas, with an onset of these limitations before the age of 18. *Id.* at n.3.

After acknowledging that the "statutory definitions are not identical, but generally conform to the clinical definitions," *see id.* at n. 22, the Court chose to follow the same path that when it excluded from execution those offenders who are insane by leaving "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)).

2. Idaho's Legislative Response and the Idaho Supreme Court's Decision

In response to *Atkins*, the Idaho Legislature enacted Idaho Code § 19-2515A, which defines mental retardation as follows:

> (1) As used in this section:
>
> (a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.
>
> (b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

In Pizzuto's case, the Idaho Supreme Court interpreted Idaho Code § 19-2515A for the first time and applied its substantive definition to the evidentiary proffer that Pizzuto had presented in support of his post-conviction petition. *Pizzuto*, 202 P.3d at 650.

The Idaho Supreme Court concluded that Pizzuto had failed to offer sufficient evidence to create a disputed issue of material fact as to whether he had significantly

subaverage intellectual functioning before the age of 18. *Id.* at 655. The court rejected Pizzuto's argument that the Emery IQ score of 72 should be interpreted as being lower than 70 because of a standard error of measurement, concluding that "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.* at 651. The state court also found that other expert opinions in the record about Pizzuto's mental functioning reasonably supported an inference that his IQ was higher than 70 before he was 18 years of age and could have decreased before Emery tested him at age 29. *Id.* at 651-55. Finally, the court emphasized that, to be entitled to the protection of the *Atkins* rule, an offender was required to demonstrate that he was mentally retarded "at the time of the murders and prior to his eighteenth birthday," which Pizzuto had not done. *Id.* at 655.

Finding the evidence insufficient on the general intellectual functioning element, the Idaho Supreme Court did not discuss the adaptive functioning component of Idaho Code § 19-2515A(1).

3. The State Court's Decision Was Not Contrary to or an Unreasonable Application of Clearly Established Federal Law

Pizzuto argues that *Atkins* "set a constitutional floor" and "embraced the clinical definitions of mental retardation by the American Association of Mental Retardation ('AAMR') and the American Psychiatric Association ('APA') [in the Diagnostic and Statistical Manual of Mental Disorders (4th Ed. text rev. 2000) (DSM-IV-TR)]." (Dkt. 203, p. 7.) According to him, "under *Atkins*, the Eighth Amendment protects from

execution those individuals who meet the AAMR criteria, or the virtually identical criteria of the DSM-IV-TR." (*Id.* at 11.) He argues that the Idaho Supreme Court's interpretation of Idaho Code § 19-2515A(1) went below the floor set by the clinical definitions discussed in *Atkins* and is therefore contrary to or an unreasonable application of clearly established federal law.

Respondent counters that Pizzuto's argument is really a camouflaged attempt to raise new constitutional claims that were not properly exhausted in the Idaho Supreme Court and are now procedurally defaulted. (Dkt. 215, p. 38.) This Court disagrees. Pizzuto's claim for relief is that the Eighth Amendment bars his execution because he is mentally retarded. The Court construes Pizzuto's arguments here as containing the reasons why the Idaho Supreme Court's adjudication of the Eighth Amendment claim was contrary to or an unreasonable application of clearly established federal law, rather than offering new claims.

Chief among Pizzuto's complaints is that the Idaho Supreme Court's ruling seems to set a rigid cut-off for IQ test scores of 70 or below without allowing for statistical adjustments. These adjustments include the "Flynn effect" and a standard error of measurement for intelligence testing.

The Flynn effect is a theory that the IQ scores of a population will rise slightly over time until a particular test is re-normed. *See, e.g.*, *In re Salazar*, 443 F.3d 430, 433 (5th Cir. 2006) (discussing the theory); *United States v. Hardy*, 762 F.Supp.2d 849, 857-63 (E.D.La. 2010) (same). The mean or average score on a standardized IQ test is 100, but the

Flynn effect posits that scores rise slightly over time, approximately .33 points per year or 3 points per decade, until the test is recalibrated with a current population sample to create a new average of 100. *Hardy*, 762 F.Supp.2d at 858. According to this theory, an IQ score at a given point in time might be inflated, depending on when the test was last renormed, and should be adjusted downward to provide a more accurate assessment of the test-taker's IQ. *Id.* at 857-58.

Pizzuto is correct that many courts take the Flynn effect into consideration when assessing IQ scores as part of a claim of mental retardation. *See*, *e.g.*, *Thomas v. Allen*, 607 F.3d 749, 758 (11th Cir. 2010) (collecting cases). But this view is certainly not a universal one, and other courts have rejected the theory. *See Maldonado v. Thaler*, 625 F.3d 229, 238 (5th Cir. 2010) ("neither this court nor the [state court] has the Flynn effect as scientifically valid"); *Green v. Johnson*, 515 F.3d 290, 300 n.2 (4th Cir. 2008) ("neither *Atkins* nor Virginia law appears to require expressly that [the Flynn effect] be accounted for in determining mental retardation status"). Still other courts acknowledge that a factfinder should consider the Flynn effect but need not accept it as conclusively true. *See Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2008) (remanding to the district court to consider "the persuasiveness of the Flynn Effect evidence"). *Atkins* did not discuss the doctrine expressly, and there is otherwise no clearly established federal law regarding its applicability to IQ testing, generally, or to *Atkins* claims, specifically. At best, the matter is unsettled.

This Court is more troubled by the Idaho Supreme Court's apparent rejection of a

standard error of measurement on individual testing instruments. In turning aside Pizzuto's argument that the Emery score of 72 could be lower because of a five-point margin of error on that test, the state court remarked that, "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Pizzuto*, 202 P.3d at 651. Here the state court appears to have applied a strict interpretation of the language that the Idaho legislature chose to use, holding that any full scale score above 70 fails as a matter of law, without regard to a range of error.[3]

Common sense about the nature of human error suggests that no single number on a test can measure intellectual functioning with absolute pinpoint accuracy. This is why professionals in the field agree that scores on IQ tests fall within a small range on either side of the reported numerical score, usually plus or minus three to five points. *See* DSM-IV-TR, p. 41 ("[i]t should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument"); *see also*, *e.g.*, *State v. Anderson*, 996 So.2d 973, 989 (La. 2008) (noting possible margin or error); *Stripling v. State*, 401 S.E.2d 500, 504 (Ga. 1991) (same). Pizzuto argues that the Idaho Supreme Court's interpretation creates a risk that an individual with a full scale IQ score between 70 and 75 and significant limitations in adaptive functioning, both manifested

[3] This Court uses the term "appears" because, while the Idaho Supreme Court noted that the literal language of the statute prohibited the consideration of a score above 70, it next hypothesized that even if a standard error of measurement were applied, "[i]t would be just as reasonable to infer that Pizzuto's IQ on December 12, 1985, was 77 as it would be to infer that it was 67." *Id.* at 651. It is not entirely clear whether the state court's opinion in Pizzuto's case precludes consideration of a standard error of measurement in all cases. But because both Pizzuto and Respondent seem to assume that to be the true, the Court will likewise so assume for purposes of this decision.

before age 18, could be classified as mentally retarded under most clinical and statutory definitions and yet still be eligible for execution under Idaho law. The Idaho Supreme Court could have avoided this problem while remaining faithful to plain language of the statute by interpreting the phrase "IQ score of 70 or below" as allowing for a standard error of measurement. This is so because a person who receives a full scale IQ score of 72 on a test may have an *actual* IQ score on that test as low as 67 or as high as 77, and where on this continuum the most likely score lies – above or below 70 – is a question of fact to be decided on all of the evidence presented.

On the other hand, a line must be drawn somewhere, and this case illustrates that the marriage between clinical standards and legal rules is not always an easy one. A clinician may be overinclusive in borderline cases to offer support and treatment to those in need. But the law must provide workable rules that necessarily include and exclude. A prominent recent example is the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). There, the Court held that defendants who are under the age of 18 when they commit murder are categorically excluded from the death penalty, even though there may be little difference between the reasoning and judgment ability of a 17-year-old nearing his 18th birthday and a person who has just recently turned 18. *Id.* at 568.

Despite these concerns, the Court agrees with Respondent that the Idaho Supreme Court's failure to apply statistical adjustments for IQ scores does not amount to an objectively unreasonable application of clearly established federal law. The *Atkins* Court recognized that the most difficult question will be determining who is in fact mentally

retarded, and it gave states leeway to develop rules and procedures within a broad framework. 536 U.S. at 317. While the Supreme Court observed that existing statutes "generally conform" to clinical definitions, it did not constitutionalize any specific definition. *See Clark v. Quarterman,* 457 F.3d 441, 445 (5th Cir. 2006) ("it is not 'clearly established Federal law as determined by the Supreme Court of the United States' that state court analysis of subaverage intellectual functioning must precisely track the AAMR's recommended approach"). The Court has since reaffirmed that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass.]' " *Bobby v. Bies*, 129 S.Ct. 2145, 2150 (2009).

To be sure, a definition of mental retardation that falls well outside of the framework announced in *Atkins* would raise serious constitutional questions, but the Idaho Supreme Court's interpretation does not venture into that territory. Other states have also established bright line cut-off scores for IQ tests near two standard deviations below the mean (or 30 points below 100). *See*, *e.g.*, *Cherry v. State*, 959 S.2d 702, 713-14 (Fla. 2007) (applying a strict IQ cutoff of 70); *Bowling v. Commonwealth*, 163 S.W.3d 361, 374-75 (Ky. 2005) (stating that "*Atkins* did not discuss margins of error"); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004) (interpreting statute demanding "significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy or below" to impose a "bright line" cutoff at 70). Pizzuto has cited no case, and the Court is aware of none, holding that a state's failure to apply either

the Flynn effect or a standard error of measurement is contrary to or involves an unreasonable application of *Atkins*.

Most importantly, whatever risk might exist that the Idaho Supreme Court's interpretation of Idaho Code § 19-2515A(1) could allow for the execution of a person who would be classified as mentally retarded under most other definitions, Pizzuto does not fall within that class, as the Court explains in the *de novo* section of this Memorandum Decision.

For these reasons, the Court concludes that the Idaho Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

4. The State Court's Decision Was Not Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented

Earlier in this proceeding, Pizzuto argued that the Idaho Supreme Court's analysis of the evidence that he had offered in state court revealed a fundamental misunderstanding of mental retardation and resulted in skewed factfinding. (*See*, *e.g.*, Dkt. 30, pp. 14-16, 25-27.) Specifically, he pointed to the Idaho Supreme Court's emphasis in its opinion on requiring offenders to prove that they were mentally retarded both when the crime was committed and before the age of 18. (*Id.*) Given that Pizzuto was in his late 20s when the crimes were committed, the Idaho Supreme Court's discussion implies that mental retardation as a condition that can develop in adulthood. An illustrative example is the court's observation that if an offender's mental condition "deteriorated to the point of

becoming mentally retarded" in adulthood, he or she would not be exempt from execution. *Pizzuto*, 202 P.3d at 653-54 (noting that "[t]he issue in *Atkins v. Virginia* is not whether the offender is currently mentally retarded.").

Perhaps nowhere is this more apparent than in the state court's discussion of Dr. Beaver's 2003 Affidavit. In that affidavit, Dr. Beaver stated that Pizzuto had mental limitations that were "indicative of possible mild mental retardation" and that he "likely meets the standard recently enacted in Idaho Code, Section 19-2515A regarding defendants who are mentally retarded and involved in first degree murder proceedings." (State's Lodging J-1, p. 59.) The Idaho Supreme Court concluded that "an opinion that Pizzuto had *possible* mild mental retardation in 1996 is not an opinion that he had an IQ of 70 or below twenty-two years earlier." 202 P.3d at 652 (emphasis in original). The court underscored that Dr. Beaver "was talking about Pizzuto's present condition, not his condition at age eighteen." *Id.* at 653.

While this Court understands the Idaho Supreme Court's concern with not extending the rule in *Atkins* to protect offenders whose intellectual or cognitive decline in adulthood was caused by conditions other than mental retardation, it agrees with Pizzuto that the state court's focus on distinguishing between childhood and adult-onset mental retardation makes little sense. Mental retardation is, *by definition*, a condition that is manifested before the age of 18; it is a developmental intellectual disability that first appears in childhood. *See* DSM-IV-TR, pp. 41-49. Adults who have significant intellectual deficits and adaptive functioning limitations, but with an onset of these deficits *after* the

age of 18, may suffer from dementia, a brain injury, drug induced cognitive decline, or some other neurological disability – but they would not be diagnosed as mentally retarded. Idaho Code § 19-2515A(1) properly reflects this clinical understanding and requires proof of significant intellectual and adaptive deficits beginning before 18 years of age. Therefore, Dr. Beaver's opinion that Pizzuto "likely meets the standard recently enacted in Idaho Code, Section 19-2515A regarding defendants who are mentally retarded" should be construed to mean that he believed that Pizzuto "likely" had all of the conditions supporting a diagnosis of mental retardation before he turned 18.

Whatever else might be said about this apparent error, however, it simply did not lead to unreasonable findings of material fact in light of the evidence presented in state court. Dr. Beaver's 2003 Affidavit was conclusory and qualified, and he retreated from that tentative opinion when he suggested in a later affidavit that Pizzuto needed to be tested again before a definitive conclusion could be reached. More critically, Pizzuto's counsel effectively abandoned the 2003 Affidavit, admitting when questioned during oral argument that no expert had offered an opinion that Pizzuto meets the standards in Idaho Code § 19-2515A. 202 P.3d at 652 n.6.[4]

After excluding the 2003 Affidavit, the Idaho Supreme Court's material factual

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[4] Without the proper context, this concession would have been somewhat perplexing. Of course, we now know that the reason why Pizzuto's attorneys did not press the 2003 Affidavit as supporting the claim is because Dr. Beaver has since testified here that when he executed that affidavit he did not recall that he had given Pizzuto an IQ test in 1996, and Pizzuto scored well above the cut-off for mental retardation. Dr. Beaver has also since indicated that he would not have made the statement that he did in the 2003 Affidavit had he first reviewed the 1996 test scores. (Tr. Evid. Hearing ("Tr."), p. 618.)

finding was that Pizzuto's evidence did not establish a prima facie case that he had significantly subaverage general intellectual functioning, meaning an IQ of 70 or below, before the age of 18. This finding was not unreasonable.

Pizzuto's evidence was exceptionally thin on that aspect of the definition. His proffer was largely made up of bits and pieces of information that was already in the record, repackaged as an *Atkins* claim. He relied heavily on the 1985 verbal IQ test score of 72, but he ignored the fact that while Dr. Emery found that Pizzuto had "borderline" intelligence, Dr. Emery was not testing for mental retardation and did not record either a performance score or a full scale score. Dr. Emery also testified at the sentencing hearing that he believed that Pizzuto's "native intelligence" was probably higher than the verbal score indicated because he had grown up in an impoverished and abusive household that did not encourage verbal engagement:

> I think I need to qualify that though, a little bit, if I may; he showed more intelligence in his conversation, his choice of words, and very frequently individuals who come out of background similar to that of Mr. Pizzuto's, with the interrupted education, a family in which there is very little intellectual interchange, the testing would be spuriously low especially on the verbal scale. In fact, it reflects items such as what factual items were learned in school and that's the place where he did the least effective. So, I guess his native intelligence is probably a little higher than that and the limitations we see are a reflection of the circumstances he grew up in.

(State's Lodging A-18, p. 180.) Notably, neither Dr. Emery nor any other expert offered a opinion as to what Pizzuto's full IQ score or general intellectual functioning might have been years earlier, when Pizzuto was under the age of 18.

Further diminishing the probative value of the single IQ score was other evidence

that supported a finding that Pizzuto's cognitive functioning could have declined significantly in adulthood due to his drug use and other neurological problems. This included an opinion from Dr. Beaver in his 2004 Affidavit, in which he noted that the mental abilities of patients with persistent seizure disorders and organic brain dysfunction will often decline over time, and Dr. James Merikangas's opinion that Pizzuto's long history of drug use caused him "further neurological dysfunction and has caused him to have substantial defects of mind and reason." 202 P.3d at 652.

In short, Pizzuto needed to proffer sufficient evidence in state court from which a factfinder could find that his IQ was 70 or below and that this intellectual deficit was present before he turned 18. The Idaho Supreme Court reasonably concluded that he had failed to carry that burden. The value of the single IQ score in the record was undermined by several factors. And though Pizzuto's attorneys argued that a factfinder could infer lower intellectual functioning from the evidence of Pizzuto's adaptive deficits in childhood and his other alleged neurological disabilities, the state courts were not required to accept these speculative assertions. Because a finding of mental retardation requires both significant intellectual and adaptive functioning deficits, the Idaho Supreme Court was not required to assess the adaptive functioning prong of Idaho Code § 19-2515A(1).[5]

[5] Pizzuto also complains that the Idaho Supreme Court's opinion requires evidence of an IQ test score of 70 or below from before an offender's18th birthday. This Court disagrees and interprets the state court's decision as instead requiring some evidence from which a factfinder could reasonably find that the offender's IQ score would have been 70 or below before age 18, regardless whether he or she was tested as a child. This is a subtle but important distinction, as it would still allow those offenders, like Pizzuto, who were not tested before the age of 18 to prove their claims. An expert could test an adult offender and offer a retrospective opinion as to what his or her measurable general intellectual functioning likely would have been as a child. It is precisely that type of evidence that was missing in state court, but the Idaho

Pizzuto has not demonstrated that he is eligible for relief under either § 2254(d)(1) or (2) based on the record that was before the state court.

PIZZUTO IS NOT ENTITLED TO RELIEF UNDER A *DE NOVO* STANDARD OF REVIEW

Even if Pizzuto could show that he were eligible for relief under 28 U.S.C. § 2254(d), or that AEDPA's deferential standards do not apply, the Court alternatively concludes that he has not established by a preponderance of the evidence in this proceeding that he is mentally retarded such that his execution would be prohibited by the Eighth Amendment.

1. Standard of Law

A claim of mental retardation is governed by the state's substantive definition, and Pizzuto has not persuaded the Court that *Atkins* constitutionalized a specific clinical test or that the Court must disregard Idaho Code § 19-2515A(1). He must prove by a preponderance of the evidence that he (1) has significant subaverage general intellectual functioning, meaning an IQ of 70 or below, (2) accompanied by significant adaptive functioning deficits in two of ten listed skill areas, and (3) that these mental and adaptive functioning limitations existed before he turned 18. Idaho Code § 19-2515A(1).

2. Pizzuto Has Not Established that His General Intellectual Functioning Was Significantly Subaverage Before Age 18

Because the Court held a four-day evidentiary hearing in this matter, it has

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Supreme Court's more expansive interpretation of the type of evidence that can be used to prove the statutory element allowed proper consideration of the evidence Pizzuto did have.

considerably more evidence before it than was before the Idaho state courts with respect to Pizzuto's general intellectual functioning, as measured by intelligence testing. Three IQ scores are in the record: Dr. Emery's 1985 verbal score of 72 on the WAIS-R; a full scale score of 92 on the WAIS-R, taken as part of Dr. Beaver's 1996 neuropsychiatric testing (91 verbal, 94 performance); and, most recently, a full scale score of 60 on the WAIS-IV from Dr. Ricardo Weinstein during a 2009 evaluation. The challenge in this case is in reconciling the divergent scores into a coherent and accurate picture of Pizzuto's general intellectual functioning during the relevant time frame.

Of these scores, the Court finds the 2009 full scale score of 60 to carry the least weight. Dr. Weinstein tested Pizzuto 35 years after his 18th birthday and conceded that "one can assume, everything being the same, that the accuracy [of an IQ score] would be better the closer [to age 18]." (Tr., pp. 488, 535.) He acknowledged that "cognitive abilities certainly diminish with age" and that Pizzuto's advanced cardiovascular disease could have contributed to an overall decline in his mental acuity. (*Id.* at 488-89, 536.)

The Court also finds the testimony of Respondent's expert, Roger Moore, Ph.D., regarding Pizzuto's incentive to underperform during the most recent testing to be credible and persuasive. Dr. Moore gave Pizzuto a test to detect malingering – the Test of Memory Malingering (the TOMM) – and concluded that Pizzuto "was giving less than optimal performance" on that particular test. (Tr., p. 769.) According to Dr. Moore, the possibility of malingering is consistent with Pizzuto's other manipulative behavior in his past and "raised a specter that he was an individual who had the willingness or capacity to

volitionally underperform." (*Id.* at 770.) There can be little doubt that *Atkins* has raised the stakes for an offender to be classified as mentally retarded, offering an incentive to provide less than full effort on intelligence testing. There is also extensive evidence in this voluminous record that Pizzuto has a history of manipulative and deceitful behavior when it serves his purposes. Regardless whether some in the professional community may quibble about which test is the most appropriate one to expose malingering, *see*, *e.g.*, Tr., pp. 693-98, Dr. Moore's observations about Pizzuto's motivation not to perform well on the most recent intelligence testing ring true. On the other hand, the results of Dr. Weinstein's tests to measure Pizzuto's effort during his evaluation are ambiguous, at best, and the Court does not place significant weight on them.

As he did in state court, Pizzuto again relies heavily on the Emery verbal score of 72. Initially, Pizzuto is correct that this score does not suffer from the same weaknesses as the Weinstein results. It was much closer in time to Pizzuto's 18th birthday and there is no evidence that he suffered from cardiovascular disease at that time. The Court does not necessarily agree with Pizzuto that he had little incentive to perform poorly in 1985, but the Court will accept that his motivation to underperform may have been less acute because a diagnosis of mental retardation would not have automatically excluded him from a death sentence.

But the other serious flaws that the Court has already noted still exist. Dr. Emery did not record a full scale score and has since disposed of his raw data. Pizzuto's drug use and other neurological problems may have affected his cognitive functioning at the time.

Additionally, Dr. Emery testified at the sentencing hearing that Pizzuto probably had more "native intelligence" than the verbal score indicated. To the extent that Dr. Emery may have softened that opinion a bit during the recent evidentiary hearing – speaking of possibilities rather than probabilities – the Court credits his testimony at the time of the sentencing hearing as the best approximation of his opinion near the time of the evaluation. The Court does not entirely discount Dr. Emery's score as providing some data on the issue, but it finds the score to be a low estimation of Pizzuto's full intellectual functioning before he turned 18.

Dr. Emery's belief about Pizzuto's higher native intelligence is borne out by Dr. Beaver's testing from 1996, when Pizzuto achieved a full scale score of 92 on the WAIS-R. This is well above the cut-off for mental retardation in Idaho Code § 19-2515A(1) and all other statutory and clinical definitions of the condition.

Dr. Beaver's psychometrician at the time, Robyn Hurt (now Edwards) administered the battery of tests to Pizzuto, which included the WAIS-R, as part of the comprehensive 1996 neuropsychological evaluation, but Dr. Beaver reviewed the final scoring. (Tr., p. 572.) Edwards was a clinician with a master's degree who had been trained in the administration of psychological testing instruments, and she had conducted "hundreds" of IQ tests. (*Id.* at 572, 672.) Dr. Beaver testified at the evidentiary hearing that while Pizzuto did poorly on a few other tests in the battery, particularly those that assessed memory and recall, he had no reason to question the validity of the scores on the WAIS-R. (*Id.* at 596, 614, 628.) Edwards agreed. (*Id.* at 672.)

Pizzuto goes to great lengths to impeach and lower the 1996 score. He first argues that when the Flynn effect and a standard error of measurement are applied, the numerical range drops to between 82 and 92. (Dkt. 203, pp. 44-45.) The Court will grant him these adjustments, for the sake of argument, but they still do not get him close to the threshold for significantly subaverage general intellectual functioning.

In an effort to drive the score even lower, Pizzuto speculates that he may have been motivated to perform better than he otherwise would have because Dr. Beaver's "very attractive" female psychometrician administered the test. (Dkt. 203, p. 47.) He points to expert testimony at the evidentiary hearing about how external incentives, such as monetary rewards, can lead to an improvement in IQ test scores. Based on this, he claims that it would be appropriate to decrease the 1996 score by nearly a standard deviation, or 14 points, due to the presence of an attractive test administrator. (*Id.* at 50.)

The Court finds this theory to be wholly unsupported. Regardless whether incentives can increase IQ scores, Pizzuto has not offered any evidence that he was in fact motived to perform better out of a desire to impress the test administrator; he merely speculates, years after the fact, that this might have been the case.

Even if the theory did apply on these facts, Pizzuto has pointed to no evidence that an incentivized score would be an inaccurate assessment of his full intellectual ability. It is true that Dr. Beaver, Dr. Moore, and Dr. Greenspan have all testified that external factors can lead to higher IQ scores, but the Court understands this testimony to mean that, given incentives, a test-taker can perform considerably better than he or she would on average. A

higher score resulting from peak performance is not the same thing as a *false* score, and there is no evidence before the Court that a test-taker can "fake" a higher score on an objectively scored IQ test to impress a test administrator or to receive some other reward. Logically, incentives of this kind would lead to the test-taker's maximum effort, particularly among those who traditionally score in the low range, which appears to be the import of the study to which Dr. Greenspan referred at the hearing. (Tr., pp. 976-77.)

Aside from the specific IQ test results, a few achievement and aptitude tests are also contained in Pizzuto's school and military records. These tests offer mixed results. In the fifth grade, Pizzuto scored at the fourth grade level on the Stanford Achievement Test, but he was the age of a sixth grader when he took the test. (Plaintiff's Ex. 10.) He appears to have tested near the average on an unspecified standardized test that he took in the same grade, but he scored in the fifth percentile on another test in the seventh grade. (Plaintiff's Ex. 10; Tr., pp. 743-44, 901-04.) Pizzuto scored at the 46th percentile on the Armed Forces Qualifying Test, which he took at age 17. (Tr., p. 746.) Overall, these scores are variable but are generally in the average to below average range. The Court does not place much probative value on this evidence because the circumstances under which these tests were administered, and in two instances the identity of the tests themselves, is unknown.

For these reasons, the Court does not credit the Weinstein score of 60 as an accurate assessment of Pizzuto's measurable general intellectual functioning before he was 18 years of age. The Court instead finds that Pizzuto's intellectual functioning was likely higher than the Emery verbal score of 72 indicates but lower than the Beaver full scale score of

92. This would place him approximately one standard deviation below the mean (about 15 points), most likely somewhere in the 80s, but the Court need not determine a precise numerical score. It is sufficient to say that Pizzuto has not proven by a preponderance of the evidence that his general intellectual functioning at the relevant time was significantly subaverage; that is, that he had an IQ of 70 or below.

3. Pizzuto Had Significant Limitations in His Adaptive Functioning in Two or More Skill Areas Before He Was 18 Years Old

In addition to an IQ of 70 or below, Idaho Code § 19-2515A(1) also requires "significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." Ordinarily, a petitioner's failure to carry his burden on the intellectual functioning element would eliminate the need to assess whether he could prove significant limitations in adaptive functioning, because both elements must coexist to support a finding of mental retardation. But while these are separate legal elements, conceptually and clinically they can be interrelated, and evidence of adaptive behavior deficits may have some bearing on assessing a person's intellectual functioning in cases with borderline IQ scores. *See* DSM-IV-TR, p. 42 ("[i]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.") The Court does not find this to be a borderline case as to Pizzuto's intellectual functioning. But, out an abundance of caution it will move on to examining his adaptive behavior evidence.

A. *Standards for Assessing Adaptive Functioning*

Idaho Code § 19-2515A(1) does not define "adaptive functioning" or the ten listed skills areas, nor does it provide a standard for resolving when a person's limitations are "significant." The Idaho Supreme Court had no occasion to consider this element because it concluded that Pizzuto had not established that his IQ was 70 or below.

The DSM-IV-TR, which appears to contain the nearest clinical definition to the Idaho code definition, describes adaptive functioning as "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Id.* at 42. The DSM-IV-TR suggests that "it is useful to gather evidence for deficits from one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history)." *Id.* Standardized testing can also be used, but these tests are designed for assessing a person's current deficits, and "there is a debate among clinicians whether retrospective assessments are valid for determining adaptive functioning in an *Atkins*-related context." *Wiley v. Epps*, 625 F.3d 199, 217 (5th Cir. 2010).

Ultimately, an opinion about adaptive functioning relies to a greater degree on subjective clinical judgment than reviewing IQ test scores. *United States v. Hardy*, 762 F.Supp.2d 849, 883 (E.D. La. 2010). Although a person's IQ should remain relatively stable, absent a serious cognitive decline, "[e]valuating someone's adaptive behavior, on the other hand, is less stable even in theory, and difficult to assess in practice, and all the

more so when done retrospectively." *Id.* at 882.

B. *Discussion of Pizzuto's Adaptive Functioning*

Two of Pizzuto's mental health experts, Dr. Weinstein and Dr. James Patton, testified in this proceeding that he struggled with significant adaptive functioning limitations during his developmental years.

Dr. Weinstein administered a formalized test to Elsie Rado, Pizzuto's younger sister. This test was designed to be given to the parents of children who are suspected of having intellectual disabilities, but Dr. Weinstein determined that Elsie was the closest approximation to a parent because she was often left in charge of Pizzuto and the other children. (Tr., p. 492.) Based on this test, a review of records, and his interviews with Pizzuto, Elsie, and another sister, Dr. Weinstein found that Pizzuto's adaptive behavior in "conceptual, social, and practical skills" fell two standard deviations below the mean before he was 18 years old. (Tr., pp. 495-96.)

Dr. Patton, offered solely as an expert on adaptive functioning, testified that he found significant deficits in Pizzuto's childhood functioning in five areas or "domains": functional academics, communication, self-care, social or interpersonal, and leisure. (Tr., p. 320.) In reaching his conclusion, Dr. Patton interviewed family members and teachers who knew Pizzuto during his developmental years, and reviewed school and military records, but he limited the inquiry to potential deficits that exist before the age of 18. (Tr., p. 365.)

Respondent's expert, Dr. Moore, agreed that Pizzuto had adaptive limitations in his

childhood, but Dr. Moore did not believe that the evidence was conclusive enough to find that they were "significant." (Tr., p. 787.) Dr. Moore discounted the testing instrument used by Dr. Weinstein, which was not intended to assess functioning retrospectively and should not have been given to a sibling. (Tr., pp. 784.) Dr. Moore also examined Pizzuto's behavior over a wider time horizon, extending well into adulthood, and remarked that Pizzuto's functioning seemed to improve after he left the family home. (Tr., p. 728; Respondent's Ex. 2122, p. 10.) According to Dr. Moore, this suggested that his limitations could have been the result of the abusive and chaotic environment in which he was raised rather than deficits in his intellectual capability. (Tr., pp. 774; Respondent's Ex. 2122, p. 10.)

After considering these opinions in light of the other evidence before it, the Court finds that Pizzuto has established that he had significant adaptive limitations in the areas of (1) functional academics, (2) communication, and (3) social or interpersonal skills during his developmental years, but not in any other areas or domains. The Court is cognizant that the family members are relying on their recollections of Pizzuto's behavior from over four decades ago and that they might have an incentive to shade their recollections toward the most favorable conclusion. The Court is most persuaded by the lay testimony and expert opinions that are consistent with contemporaneous school records and the affidavits of educators who interacted with Pizzuto at the relevant time.

That evidence shows that Pizzuto grew up in a family that lived a transient and impoverished lifestyle, moving more than a dozen times during his childhood. Pizzuto and

his siblings were repeatedly and severely abused by their stepfather, Bud Bartholomew, and Pizzuto endured the brunt of this abuse. His mother, Pam, was often literally and figuratively absent, and she did not offer a supportive or nurturing role to counterbalance Bartholomew's abuse. Within this dysfunctional milieu, Elsie assumed a maternal role and cared for her siblings.

Elsie testified that Pizzuto had difficulty with basic school subjects, and she did homework for him when they were both in elementary school. (Tr., pp. 151-53.) Given the family's itinerant existence, school records from Pizzuto's youth are incomplete, but what exists confirms Elsie's recollection and shows that he significantly underperformed even when he was enrolled in classes that contained low-performing children. He was held back twice, and his school records show C's and D's and some failing grades. (Plaintiff's Ex. 10.) In at least two of the schools that he attended, grades that low were rarely given. (Plaintiff's Ex. 2, ¶ 6; Plaintiff's Ex. ¶ 7.) He also scored below the median on a standardized test in the fifth grade, even though he was the chronological age of sixth graders. (Plaintiff's Ex. 5.) Pizzuto attended elementary and secondary schools before special education programs were widespread, but his family members and a teacher who recalled him believed that he would have been an appropriate candidate for special education classes. (Plaintiff's Ex. 3, ¶ 17; Tr., p. 314.) When viewed within the standards expected of children of Pizzuto's relevant age, sociocultural background, and community setting, the Court finds that he has shown significant limitations in his functional academic skills.

There is also sufficient evidence to find that Pizzuto's communication and interpersonal or social skills were significantly behind his peers during his developmental years. His relatives testified that his vocabulary was still limited by the age of ten, and that he would point or gesture instead of speaking. (Tr., pp. 41-42, 132.) Elsie claimed that she had to be very direct with Pizzuto and would "talk down" to him so he could understand, almost as her son rather than her brother. (Tr., p. 166.) The counselor at an alternative high school that Pizzuto attended for the ninth grade described him as "emotionally very immature; developmentally behind other people; outgunned by his peers; annoying; did not appear to have any friends; probably talked out of turn; and was unorganized, unruly and inconsistent." (Plaintiff's Ex. 1, ¶ 6.) Another teacher claimed that he was immature, lacked the ability to interact with his peers, and did not have friends. (Plaintiff's Ex. 5, ¶ 9.)

While the Court believes that Pizzuto may have had limitations in other areas, the evidence is not strong enough to label them "significant." His claims that he had serious problems with self-direction, home living, work, leisure, health and safety relies primarily on anecdotal information from relatives who testified about selected incidents from his childhood. Much of this evidence is also vague as to his age when the incidents occurred, and age-related context is critical; a child in early elementary school may still need help bathing, dressing, playing games, or doing household chores, but a teenager who cannot accomplish these tasks would be far behind his or her peers. It is also not clear whether Pizzuto engaged in some behaviors that were inappropriate or unusual for his age because

of an intellectual deficit or because he simply chose to do so. A poor work history or a tendency to take risks, for example, may be the result of a maladaptive or anti-social personality rather than an intellectual impairment.

Moreover, the Court's finding of significant limitations in childhood adaptive functioning in two or more areas does not mean that Pizzuto is mentally retarded, as he has failed to established that his general intellectual functioning was significantly subaverage. Both limitations must coexist to support a diagnosis, and either one can be present independently of the other. According to Dr. Moore, "there may be some aspects of the – of the adaptive functioning that are due to, you know, personality or psychological factors, other psychological factors other than cognitive slowness." (Tr., p. 739.) Pizzuto's own adaptive functioning expert, Dr. Patton, admitted that one could have "pretty significant deficits in adaptive functioning that don't necessarily have, you know – that – that could be caused by any number of reasons," and he gave Autism Spectrum Disorder as but one example. (Tr., p. 337.)

The Court is also persuaded by Dr. Moore's opinion that a review of Pizzuto's adult behavior can shed some light on the nature of his childhood adaptive deficits. (Tr., p. 722-23.) Adult functioning is relevant because mental retardation is a lifelong intellectual disability, and significant limitations should be seen beginning in childhood and continuing into adulthood, adjusting for age-related expectations of average functional ability. (Tr., pp. 719, 722.) Pizzuto's experts all but ignored evidence of his functioning near the end of his childhood years and the beginning of his adult years, which was

provided perhaps most directly by the deposition testimony of his ex-wife, Pamela Relken. (Tr., p. 12; Respondent's Exhibit 2010c.) Pizzuto married Relken when he was 17 years old, and they began a two-year nomadic existence, wandering from California to Washington and eventually landing in Michigan. (Respondent's Ex. 2010c.)

Relken described Pizzuto as someone who initially was charismatic, warm, and gentle. (Respondent's Ex. 2010c, p. 14.) Relken claimed that Pizzuto could cook and would clean up the kitchen – "[h]e knew his way around the kitchen" – and that they would go shopping together for vintage clothing. (*Id.* at 15.) Pizzuto tried to be a father to Relken's young son, and he would read children's books to the boy. (*Id.* at 29.) According to her, Pizzuto brushed his own teeth, combed is hair, trimmed his mustache, and was "was very clean about himself." (*Id.* at 26.) His work history was spotty but he always seemed to have money, though she never asked where he got it. (*Id.* at 46, 81.) After Pizzuto got into a fistfight with Bartholomew, the relationship changed, and he became more controlling and violent with Relken. (*Id.* at 41.) Eventually, Pizzuto was arrested in Michigan on a rape charge, and he was sent to prison at the age of 19, where he remained for the next ten years. (*Id.* at 80.)

Later, when Pizzuto was prosecuted for the murders in this case, he spoke at court hearings, cross-examined witnesses, and provided a lengthy allocution at his sentencing hearing, demonstrating a fluency and proficiency in these matters. (Respondent's Ex. 2021, 2035.) He has held clerical jobs and taken educational courses in prison, and he has engaged in games of cribbage and pinochle with fellow inmates. (Tr., p. 867-68.) He reads

science fiction and fantasy novels, and he has written letters to family and friends that show "relatively adequate" communication skills. (Tr., p. 775, 868.)

Focusing on a person's strengths or areas of competence can be misleading, as a mildly mentally retarded person can learn and function very well in some areas, but Pizzuto's overall ability to function at an age-appropriate level across all of the life skill areas listed in Idaho Code § 19-2515A(1) appears to have been much better after he left home. While the evidence may not be conclusive, it lends at least some support to Dr. Moore's observation that "it is likely that environmental factors negatively impacted the progression of his adaptive skills during his developmental years, and that his relative adaptive functioning improved once he was away from these abuse-laden situations." (Respondent's Ex. 2122, p. 10.) Dr. Moore's observation harkens back to Dr. Emery's testimony at the sentencing hearing that Pizzuto's "native intelligence is probably a little higher [than the verbal IQ score] and the limitations we see are a reflection of the circumstances that he grew up in." (State's Lodging A-18, p. 180.)

There is no doubt that Pizzuto was raised in an abusive environment that stunted his ability to thrive. The Court is also aware that mental retardation can be *caused* by that type of environment, but there is no evidence before the Court that significant deficits in adaptive behavior exist *only* in those individuals whose intelligence is also significantly subaverage. If that were true, the definition of mental retardation would not include an intellectual functioning component. The numerous expert opinions through the years about Pizzuto's other psychological, personality, and neurological disorders further

complicate the analysis in this case.

The evidence of Pizzuto's adaptive behavior and intellectual functioning over time defies easy characterization, and the Court makes no specific finding as to cause and effect here. It merely concludes that despite the existence of significant limitations in two or more areas of adaptive functioning during his developmental years, he has not proven that he is mentally retarded and exempt from execution under the Eighth Amendment.

CONCLUSION

Pizzuto has failed to show that he is entitled to habeas relief, either under the standards set out in 28 U.S.C. § 2254(d) or, alternatively, based on a *de novo* review of all of the evidence in the record. The Successive Petition will be denied.

CERTIFICATE OF APPEALABILITY

As required by Rule 11 of the Rules Governing Section 2254 Cases, the Court evaluates this case for suitability of a certificate of appealability ("COA"). *See also* 28 U.S.C. § 2253(c).

A habeas petitioner cannot appeal unless a COA has issued. 28 U.S.C. § 2253. A COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The Court is satisfied that Pizzuto's claim of mental retardation is significant enough that he should at least be given the opportunity to convince the Court of Appeals of its merit. The Court will issue a certificate of appealability over its resolution of the claim. The certificate of appealabilty will also encompass the Court's ruling that required Pizzuto to disclose the 1996 Beaver IQ test results in discovery to Respondent, if a certificate of appealability is needed to appeal from that ruling.[6]

Pizzuto is advised that he must still file a timely notice of appeal in this Court if he intends to pursue an appeal.

ORDER

IT IS ORDERED:

1. Petitioner's Successive Petition for Writ of Habeas Corpus Seeking Relief Under *Atkins v. Virginia* (Dtk. 1) is DENIED.
2. The Court issues a certificate of appealability over its decision to deny relief on the merits on Petitioner's *Atkins* claim and over its Memorandum

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[6] The Court remains unpersuaded by Pizzuto's claim that he was entitled to assert a privilege under Rule 26(b)(4) of the Rules of Civil Procedure based on Dr. Beaver's supposed status as a non-testifying consultant. While the Court finds Respondent's ire at Pizzuto's counsel for failing to disclose that evidence in state court to be misplaced – because Respondent never requested discovery in state court and no evidentiary hearing was held – it finds counsel's privilege argument to be equally misguided. Pizzuto has used Dr. Beaver's opinions on many occasions in state and federal court when it has suited his purposes. More to the point, habeas offers an equitable remedy, and the Court has the flexibility in the manner in which it receives evidence so that it may dispose of a petition as law and justice require. Just as Pizzuto has a compelling interest in not being executed if he is mentally retarded, the State has a compelling interest in seeing that its judgment is enforced if he is not mentally retarded. The 1996 IQ testing is relevant to reaching a fair and accurate result on that critical issue.

Due to the novelty of the discovery issue, however, the Court will grant Pizzuto permission to appeal.

Decision and Order granting Respondent's Motion to Compel (Dkt. 103). Upon the filing of a timely notice of appeal in this case, and not until such time, the Clerk of Court shall forward the necessary paperwork to the Court of Appeals for the Ninth Circuit for the docketing of an appeal in a civil case.

DATED: **January 10, 2012**

Honorable B. Lynn Winmill
Chief U. S. District Judge

146 Idaho 720

Gerald Ross PIZZUTO, Jr., Petitioner–Appellant,

v.

STATE of Idaho, Respondent.

No. 32679.

Supreme Court of Idaho,
Boise, September 2007 Term

Feb. 22, 2008.

Rehearing Denied March 19, 2008.

Background: Following affirmance of his murder convictions and death sentence, 119 Idaho 742, 810 P.2d 680, and the denial or summary dismissal of four petitions for post-conviction relief, defendant filed his fifth petition for post-conviction relief. The District Court, Second Judicial District, Idaho County, George R. Reinhardt, III, J., dismissed the petition on summary judgment. Defendant appealed.

Holdings: The Supreme Court, Eismann, C.J., held that:

(1) defendant did not have right to disqualify post-conviction judge without cause;

(2) fact that post-conviction judge had found defendant's low intelligence to be an aggravating factor when imposing sentence was not a ground for disqualification;

(3) defendant was not required to file his petition for post-conviction relief within 42 days of when the United States Supreme Court released its opinion in *Atkins v. Virginia*; and

(4) Eighth Amendment did not prohibit imposition of death sentence against defendant on ground of his alleged mental retardation, absent expert opinion showing that he had an IQ of 70 or below at the time of the murders and prior to his 18th birthday.

Affirmed.

1. Criminal Law ⚿1409, 1570

Petitions for post-conviction relief are civil proceedings governed by the Idaho Rules of Civil Procedure.

2. Judges ⚿51(1)

Defendant who filed petition for post-conviction relief, seeking to prevent execution of death sentence, did not have right to disqualify without cause the presiding judge who had also entered his sentence, though the judge was not initially assigned to hear the post-conviction proceeding, and exception to right to disqualification applied only if the post-conviction proceeding was assigned to judge who entered the conviction or sentence being challenged by the post-conviction proceeding; presiding judge was assigned to proceeding after originally assigned judge was disqualified, and defendant's claim that his sentence should not be carried out was a challenge to the sentence within meaning of the exception. Rules Civ.Proc., Rule 40(d)(1)(I)(ii).

3. Constitutional Law ⚿3039

The first step in an equal protection analysis is to identify the classification at issue. U.S.C.A. Const.Amend. 14.

4. Criminal Law ⚿1130(5)

The Supreme Court will not consider assignments of error not supported by argument and authority in the opening brief.

5. Judges ⚿49(1)

Fact that post-conviction judge had, at time he sentenced defendant to death for murder convictions, found defendant's low intelligence to be an aggravating factor, rather than a mitigating factor, was not a ground for disqualifying judge from presiding over defendant's petition for post-conviction relief, in which he challenged his death sentence on the ground that he was mentally retarded; evidence of low intelligence was relevant to both aggravation and mitigation.

6. Sentencing and Punishment ⚿1713

Evidence of low intelligence offered by a defendant in a murder case is a "two-edged sword," relevant to both aggravation and mitigation.

7. Judges ⚿53

In seeking to disqualify for cause the judge assigned to hear his fifth petition for post-conviction relief, capital murder defendant waived any claim of bias based on statements of his father, mother, and sister alleging that the judge had made statements indicating bias during the time of defendant's criminal trial; defendant had known of the statements attributed to the judge since his trial, and he had ample opportunity to assert they were evidence of bias in his first and third post-conviction proceedings.

8. Criminal Law ⚿1668(9)

Defendant who filed successive petition for post-conviction relief, challenging his death sentence on the ground that he was mentally retarded, was not required to file his petition for post-conviction relief within 42 days of when the United States Supreme Court released its opinion in *Atkins v. Virginia*, which held the Eighth Amendment prohibited imposition of death sentence upon offenders who were mentally retarded at the time of their crime; defendant was required to bring his claim within a reasonable time after it was known or reasonably should have been known, which was after State enacted appropriate procedures to implement *Atkins*. U.S.C.A. Const.Amend. 8; West's I.C.A. §§ 19–2515A, 19–2719.

9. Criminal Law ⚿1668(9)

A "reasonable time" for filing a successive petition for post-conviction relief in capital cases is 42 days after the petitioner knew or reasonably should have known of the claim, unless the petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period; in that event, it still must be filed within a reasonable time after the claim was known or knowable. West's I.C.A. § 19–2719.

See publication Words and Phrases for other judicial constructions and definitions.

10. Criminal Law ⚿1668(9)

For purposes of determining whether a successive petition for post-conviction relief in a capital case has been filed within a reasonable time after the claim was known or knowable, the reasonable time at issue is the time necessary to develop sufficient facts to file the post-conviction proceeding, not the time necessary to develop all facts that will be offered in an attempt to prove the claim. West's I.C.A. § 19–2719.

11. Courts ⚿100(1)

The decision of the United States Supreme Court in *Atkins v. Virginia*, holding that the Eighth Amendment prohibits imposition of death sentence upon offenders who are mentally retarded at the time of their crime, must be applied retroactively. U.S.C.A. Const.Amend. 8.

12. Criminal Law ⚿1668(9)

When capital murder defendant filed motion for summary judgment on his successive petition for post-conviction relief, in which defendant challenged his death sentence on ground that he was mentally retarded, district court had discretion to grant summary judgment to the State on ground that defendant had failed to raise a genuine issue of material fact regarding his claim of mental retardation, even though the State did not move for summary judgment. Rules Civ. Proc., Rule 56(c).

13. Criminal Law ⚿1134.90

The Supreme Court reviews the grant of summary judgment to a nonmoving party under the same standard it would to the moving party.

14. Judgment ⚿185(6), 186

When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant summary judgment despite the possibility of conflicting inferences.

15. Criminal Law ⚿1158.1

The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences.

16. Criminal Law ⚿1652

To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each

element of the claims upon which the applicant bears the burden of proof.

17. Sentencing and Punishment ⚿1793

Eighth Amendment did not prohibit imposition of death sentence against capital murder defendant on ground of his alleged mental retardation, absent expert opinion showing that defendant had an IQ of 70 or below at the time of the murders and prior to his 18th birthday. U.S.C.A. Const.Amend. 8; West's I.C.A. § 19–2515A(1).

18. Sentencing and Punishment ⚿1642

In determining whether Eighth Amendment prohibits imposition of death sentence on ground of the offender's mental retardation, the issue is not whether the offender is currently mentally retarded; the issue is whether the offender was mentally retarded when he or she committed the murder and whether such mental retardation began prior to the offender's 18th birthday. U.S.C.A. Const.Amend. 8; West's I.C.A. § 19–2515A.

19. Judgment ⚿185(5)

A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact precluding summary judgment. West's I.C.A. § 19–2515A; Rules Civ.Proc., Rule 56(c).

20. Criminal Law ⚿1663

Trial court's decision to grant the State summary judgment, instead of denying defendant's motion for summary judgment and giving defendant guidance on how to further proceed with his post-conviction claim that his death sentence had to be vacated on the basis that he was mentally retarded, was not an abuse of discretion. West's I.C.A. § 19–2515A; Rules Civ.Proc., Rule 56(c).

21. Judgment ⚿183

If a trial court denies a party's motion for summary judgment, it has discretion to grant summary judgment to the opposing party. Rules Civ.Proc., Rule 56(c).

22. Criminal Law ⚿1147

When reviewing an alleged abuse of discretion by the trial court, appellate court's inquiry is: (1) whether the trial judge correctly perceived the issue as one of discretion; (2) whether the trial judge acted within the outer boundaries of his or her discretion and consistently with the legal standards applicable to the specific available choices; and (3) whether the trial judge reached his or her decision by an exercise of reason.

23. Criminal Law ⚿1668(3)

The Supreme Court was not required to address defendant's claim that the trial court's failure to hold an evidentiary hearing on the issue of mental retardation denied defendant equal protection of the law, in successive post-conviction proceeding in which defendant alleged that his death sentence had to be vacated due to his mental retardation, where defendant failed to raise the issue in the trial court. U.S.C.A. Const. Amend. 14; West's I.C.A. § 19–2515A(2).

24. Criminal Law ⚿1028, 1030(2)

The Supreme Court will not consider issues that are raised for the first time on appeal; the exception to this rule is that constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case.

25. Criminal Law ⚿1042.7(2)

The Supreme Court was not required to address defendant's post-conviction relief argument alleging that statute prohibiting the imposition of the death penalty upon a mentally retarded person violated the Eighth Amendment, where defendant failed to raise the claim in the trial court. U.S.C.A. Const. Amend. 8; West's I.C.A. § 19–2515A.

Federal Defenders Services of Idaho, Moscow, for appellant. Joan M. Fisher argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent. L. LaMont Anderson argued.

SUBSTITUTE OPINION

THE COURT'S PRIOR OPINION DATED NOVEMBER 23, 2007 IS HEREBY WITHDRAWN.

EISMANN, Chief Justice.

The petitioner was convicted of two murders and sentenced to death. In this case,

he filed his fifth petition for post-conviction relief, challenging his death sentence on the ground that he was mentally retarded. The district court dismissed his petition on summary judgment, holding that the petition was untimely and that the petitioner did not present evidence creating a genuine issue of material fact as to his mental retardation. The petitioner appealed, and we affirm.

I. FACTS AND PROCEDURAL HISTORY

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' 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 just for the sake of killing and subsequently joked and bragged about the killings to his associates.

A jury convicted Pizzuto of two counts of murder in the first degree, two counts of felony murder, one count of robbery, and one count of grand theft. In 1986, the district judge sentenced Pizzuto to fourteen years fixed for the grand theft, to a fixed life sentence for the robbery, and to death for the murders. On appeal this Court affirmed Pizzuto's convictions and his sentences, with the exception of his sentence for robbery. We held that the robbery was a lesser included offense of the felony murder, and therefore vacated the fixed life sentence. *State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680 (1991). Within forty-two days after entry of the judgment imposing the death sentence, Pizzuto also filed his first petition for post-conviction relief. The trial judge denied him any relief on his petition, and we affirmed the denial on appeal. *Id.*

In 1994, Pizzuto filed a second petition for post-conviction relief in which he raised numerous errors in the proceedings leading to his conviction and sentence. The trial judge denied the petition on the ground that the claims raised were known, or reasonably should have been known, when Pizzuto filed his first petition and that they were therefore barred by Idaho Code § 19–2719. This Court affirmed the summary dismissal of Pizzuto's second petition. *Pizzuto v. State,* 127 Idaho 469, 903 P.2d 58 (1995).

In 1998, Pizzuto filed a third petition for post-conviction relief, which the trial judge summarily dismissed pursuant to Idaho Code § 19–2719. On appeal, this Court affirmed the dismissal. *Pizzuto v. State,* 134 Idaho 793, 10 P.3d 742 (2000).

In 2002, Pizzuto filed a fourth petition for post-conviction relief based upon *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). He alleged that the *Ring* opinion should be applied retroactively to his case. He also filed a motion under Rule 35 of the Idaho Criminal Rules to correct an illegal sentence, alleging that under *Ring* his sentence was illegal because a judge rather than a jury had made the factual findings upon which imposition of the death penalty was based. The district court ultimately dismissed the petition and denied the motion, and Pizzuto appealed. This Court dismissed his appeal upon motion of the State because *Ring v. Arizona* did not apply retroactively to cases such as Pizzuto's that were already final on direct review.

On June 19, 2003, Pizzuto filed a fifth petition for post-conviction relief based upon the opinion of the United States Supreme Court in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins,* the Supreme Court held that the execution of a murderer who was mentally retarded at the time of the killing constituted cruel and unusual punishment in violation of the Eighth Amendment. Pizzuto alleged that he is mentally retarded and sought to have his death sentence "reversed and vacated."

Judge Reinhardt had been the presiding judge at Pizzuto's criminal trial and sentencing and in his prior post-conviction proceedings. He had retired, and Judge Bradbury took office as his replacement in January

2003. The State disqualified Judge Bradbury without cause pursuant to Idaho Rule of Civil Procedure 40(d)(1), and Judge Reinhardt, who was serving as a senior district judge, was appointed to preside over this case. On August 4, 2003, Pizzuto moved to disqualify Judge Reinhardt without cause under Rule 40(d)(1) or, in the alternative, to disqualify him for cause on the ground that he was allegedly biased and prejudiced against Pizzuto. On January 18, 2005, Judge Reinhardt denied the motion for disqualification.

On July 9, 2003, the State moved to have Pizzuto's fifth petition summarily dismissed on two grounds: (1) the petition was not filed within a reasonable time after the *Atkins* opinion was released and (2) the petition sought a retroactive application of new law announced in *Atkins,* in violation of Idaho Code § 19–2719(5)(c). On September 23, 2005, Pizzuto moved for a summary judgment granting his requested relief. After a hearing on the motions, Judge Reinhardt dismissed Pizzuto's petition on the grounds that it had not been filed within forty-two days after the Supreme Court's opinion in *Atkins* and that Pizzuto had failed to raise a genuine issue of material fact supporting his claim of mental retardation. Pizzuto then timely appealed.

II. ISSUES ON APPEAL

1. Did the district court err in denying Pizzuto's motion for disqualification without cause?
2. Did the district court err in denying Pizzuto's motion for disqualification for cause?
3. Did the district court err in summarily dismissing Pizzuto's petition on the ground that it was untimely?
4. Did the district court err in summarily dismissing Pizzuto's petition on the ground that he had failed to raise a genuine issue of material fact supporting his claim of mental retardation?
5. Did the district court err in dismissing Pizzuto's petition without permitting further testing?
6. Did the district court deny Pizzuto the equal protection of the law by failing to hold an evidentiary hearing on the issue of mental retardation?
7. Does Idaho Code § 19–2515A violate the Eighth and Fourteenth Amendments to the Constitution of the United States?

III. ANALYSIS

A. Did the District Court Err in Denying Pizzuto's Motion for Disqualification Without Cause?

[1, 2] "[P]etitions for post-conviction relief are civil proceedings governed by the Idaho Rules of Civil Procedure." *Storm v. State,* 112 Idaho 718, 720, 735 P.2d 1029, 1031 (1987). Rule 40(d)(1) of the Idaho Rules of Civil Procedures provides, "In all civil actions, the parties shall each have the right to one (1) disqualification of the judge without cause, except as herein provided." One of the exceptions stated in the rule is that the right of disqualification without cause does not apply to "[a] judge in a post-conviction proceeding, when that proceeding has been assigned to the judge who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding." I.R.C.P. 40(d)(1)(I)(ii). Judge Reinhardt denied Pizzuto's motion for disqualification without cause based upon this exception.

Pizzuto asserts that this exception to the right of automatic disqualification does not apply in this case for three reasons. First, he points out that the exception only applies when the post-conviction proceeding "has been assigned" to the judge who entered the conviction or sentence being challenged. He argues that this case was assigned to Judge Bradbury, not to Judge Reinhardt, and therefore the exception does not apply. This case was originally assigned to Judge Bradbury. However, after he was disqualified, the administrative district judge assigned Judge Reinhardt to preside over all further proceedings in the case. Thus, this post-conviction proceeding was assigned to Judge Reinhardt.

Second, Pizzuto contends that the exception does not apply in this case because he is not seeking to invalidate the death sentence;

he is only seeking to prevent execution of the sentence. He contends that these proceedings are therefore separate and distinct from the underlying criminal conviction and sentence. Rule 40(d)(1), by its terms, is not limited to proceedings challenging the imposition of a sentence. It applies to post-conviction proceedings in which the "sentence [is] being challenged." A contention that the sentence imposed should not be carried out is a challenge to the sentence.

[3, 4] Finally, Pizzuto claims that because the State disqualified Judge Bradbury without cause, it would be a denial of equal protection to deny him the right to disqualify Judge Reinhardt without cause. "The first step in an equal protection analysis is to identify the classification at issue." *McLean v. Maverik Country Stores, Inc.,* 142 Idaho 810, 814, 135 P.3d 756, 759 (2006). Pizzuto does not identify the classification he challenges. Rule 40(d)(1)(I)(ii) provides that in a post-conviction proceeding, a party may not disqualify without cause the judge "who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding." Neither the State nor Pizzuto was entitled to challenge Judge Reinhardt without cause. Both of them were entitled to challenge without cause any other judge to whom this case was assigned. Other than making the assertion, Pizzuto offers no analysis, argument, or authority as to how he was allegedly deprived of the equal protection of the law by not being permitted to disqualify Judge Reinhardt without cause. "We will not consider assignments of error not supported by argument and authority in the opening brief." *Hogg v. Wolske,* 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006).

B. Did the District Court Err in Denying Pizzuto's Motion for Disqualification for Cause?

In each of his post-conviction relief proceedings, Pizzuto sought unsuccessfully to disqualify Judge Reinhardt for cause. In this case, Pizzuto contended that Judge Reinhardt could not be impartial in this case because at Pizzuto's sentencing the Judge found that Pizzuto was of normal intelligence notwithstanding uncontroverted evidence to the contrary. Pizzuto supported his motion with an affidavit in which his counsel stated:

> b. At the sentencing of Petitioner, undisputed evidence presented by Dr. Michael Emery revealed that Petitioner's IQ was 71 which places petitioner in the borderline mental retardation range. See Petition here and supporting Affidavits.[1]
>
> c. Notwithstanding undisputed evidence to the contrary Judge George Reinhardt found that Petitioner was of normal intelligence.
>
> d. The factfinding of Petitioner's intellectual functioning unsupported by the evidence is directly contrary to Petitioner's assertions and expert opinions previously presented and likely to be presented herein.
>
> e. The Judge's commitment to a fact not supported by the evidence and contrary to the full weight of the evidence makes it impossible for this Court to fairly, impartially and neutrally consider the issue now raised.

[5, 6] Contrary to counsel's assertion in her affidavit, Judge Reinhardt did not find that Pizzuto was "of normal intelligence." He specifically found, "The Defendant is unintelligent." Counsel later realized that her affidavit was incorrect. In a supplemental brief in support of the motion for disqualification, she moved to amend the motion to allege that Judge Reinhardt should be disqualified because he considered Pizzuto's low intelligence as an aggravating factor instead of a mitigating factor, which made it impossible for him to preside further in the matter.[2]

1. Contrary to counsel's assertion in her affidavit, Dr. Emery did not state "that Petitioner's IQ was 71." In his letter, Dr. Emery stated, "Intellectually Mr. Pizzuto scored a verbal WAIS I.Q. of 72...."

2. If the requested amendment of the motion for disqualification had been granted, it would have alleged:

> That Judge George R. Reinhardt cannot fairly and impartially preside over the Petition for Postconviction Relief Raising *Atkins v. Virginia,* due to prior erroneous findings of fact

She did not notice that motion for hearing, and the district court did not rule upon it. Regardless, the proposed amendment did not state a ground for disqualification. Evidence of low intelligence offered by a defendant in a murder case is a "two-edged sword," relevant to both aggravation and mitigation. *See, Penry v. Lynaugh*, 492 U.S. 302, 324, 109 S.Ct. 2934, 2949, 106 L.Ed.2d 256, 281 (1989). The fact that Judge Reinhardt found it an aggravating factor is not a ground for disqualification.

[7] In his supplemental brief in support of the motion for disqualification, Pizzuto also attached copies of affidavits and a motion for disqualification filed in the trial court in 1994 in Pizzuto's second post-conviction relief case, *Pizzuto v. State,* 127 Idaho 469, 903 P.2d 58 (1995). The affidavits were of Pizzuto's father, mother, and sister, and they each alleged that Judge Reinhardt made statements indicating bias during the time of Pizzuto's criminal trial. Judge Reinhardt's refusal to disqualify himself was not addressed on the merits in that appeal because the Court decided the appeal without reviewing or referring to any determination made by Judge Reinhardt. 127 Idaho at 471, 903 P.2d at 60.

Pizzuto also sought to have Judge Reinhardt disqualify himself in Pizzuto's third petition for post-conviction relief. The motion was accompanied by the previously filed affidavits of his father, mother, and sister. Judge Reinhardt refused to disqualify himself, and Pizzuto raised that refusal on appeal. However, on appeal he argued another ground for disqualification and did not argue that the statements attributed to Judge Reinhardt by Pizzuto's father, mother, and sister were evidence of bias. *Pizzuto v. State,* 134 Idaho 793, 799, 10 P.3d 742, 748 n. 2 (2000).

Pizzuto has known of the statements attributed to Judge Reinhardt since his trial. He has had ample opportunity to assert they are evidence of bias in his first and third post-conviction proceedings, and he chose not to do so. He has therefore waived any claim of bias based upon those alleged statements. Judge Reinhardt did not err in refusing to grant the motion for disqualification.

C. Did the District Court Err in Summarily Dismissing Pizzuto's Petition on the Ground that It Was Untimely?

[8] In *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the United States Supreme Court held that the Eighth Amendment did not prohibit the execution of mentally retarded offenders. Thirteen years later in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the Supreme Court reversed itself and construed the Eighth Amendment to prohibit the imposition of a death sentence upon offenders who are mentally retarded at the time of their crime. The Supreme Court released its opinion in *Atkins* on June 20, 2002. Pizzuto filed his petition for post-conviction relief in this case on June 19, 2003. The district court held that Pizzuto failed to file his petition timely because he should have filed it within forty-two days after the Supreme Court released its opinion in *Atkins.* In so holding, the district court erred.

Within forty-two days after entry of the judgment, a defendant sentenced to death must file a petition for post-conviction relief raising any legal or factual challenge to the sentence or conviction that is known or reasonably should be known. For claims not known or knowable within that forty-two day period, "I.C. § 19–2719 still requires a defendant to bring the claims within a reasonable time after the claims were known or should have been known." *Pizzuto v. State,* 134 Idaho 793, 798, 10 P.3d 742, 747 (2000). Pizzuto obviously could not have known of his claim under *Atkins v. Virginia* within forty-two days after entry of his judgment since the *Atkins* opinion was released six years after Pizzuto was sentenced. Therefore, Pizzuto must have brought this claim within a reasonable time after it was known or reasonably should have been known.

in support of the death penalty, including an affirmative finding that Petitioner was "unintelligent under Findings in Aggravation" notwithstanding evidence which supports deficient intellectual functioning is mitigating in nature which finding skews the factfinding and application thereof in a manner which makes it impossible for Judge George R. Reinhardt to constitutionally preside further in this matter.

In *Atkins,* the Supreme Court left to the individual States " 'the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' " 536 U.S. at 317, 122 S.Ct. at 2250, 153 L.Ed.2d at 348 (quoting *Ford v. Wainwright,* 477 U.S. 399, 416–17, 106 S.Ct. 2595, 2605, 91 L.Ed.2d 335, 351 (1986)). Upon the release of the *Atkins* opinion, Pizzuto could begin accumulating the information and reports necessary to challenge his death sentence. Indeed, almost all of the material he filed with his petition had been accumulated by him years prior to the *Atkins* opinion. However, it would certainly be reasonable for him to delay actually filing this proceeding until Idaho enacted the appropriate procedures, including a definition of "mentally retarded." The legislature did so, and that statute took effect on March 27, 2003. Ch. 136, § 6, 2003 Idaho Sess. Laws. Pizzuto waited another eighty-four days until June 19, 2003, to file this proceeding. The issue is whether that delay was reasonable.

We have previously addressed what is a reasonable time on a case-by-case basis. For example, in *Dunlap v. State,* 131 Idaho 576, 961 P.2d 1179 (1998), we held that a petition filed within forty-two days after the petitioner knew or reasonably could have known of his claim was filed within a reasonable time. In *Rhoades v. State,* 135 Idaho 299, 17 P.3d 243 (2000), we held that a six-month delay in filing a petition was not a reasonable time. In *Rhoades,* the State argued that a reasonable time for filing a successive petition for post-conviction relief should not exceed forty-two days after the claim was known or reasonably knowable. We acknowledged that there "is logic to this position" and that it is supported by our "reference to the forty-two day time limit in *Dunlap.*" 135 Idaho at 301, 17 P.3d at 245. In the instant case the State renews its argument that a reasonable time for bring a successive petition for post-conviction relief should not exceed forty-two days after the claim was known or reasonably knowable. Conversely, Pizzuto argues that the "reasonable time" requirement is unconstitutionally vague because it is determined after the fact and does not give a petitioner adequate advance notice of when the petition must be filed.

[9] After considering these arguments, we hold that a reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless the petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.

[10] Pizzuto argues that his petition was filed within a reasonable time considering the complexity of the issue and the time required to develop the facts. The record does not support that assertion. The reasonable time at issue is the time necessary to develop sufficient facts to file the post-conviction proceeding, not the time necessary to develop all facts that will be offered in an attempt to prove the claim. When Pizzuto filed his petition on June 29, 2003, he submitted copies of a letter dated January 23, 1986, from Dr. Emery; an affidavit dated April 1, 1988, from Dr. Merikangas; a 1996 report from Dr. Beaver; and an affidavit dated June 18, 2003, from Dr. Beaver. The latter affidavit from Dr. Beaver was based upon his 1996 evaluation of Pizzuto. Assuming that this latter affidavit was necessary in order to file the petition,[3] there was no showing or allegation that it could not have been obtained within forty-two days after Idaho Code § 19–2515A went into effect.

However, because Pizzuto did not have advance notice of our further clarification of what is a reasonable time, we will not apply it to him in this case. We simply hold that the district court erred in holding that Pizzuto should have filed his claim within forty-two days after the Supreme Court released its opinion in *Atkins.* For the purposes of this appeal, we will consider Pizzuto's petition as being filed timely.

3. Pizzuto did not refer to it in the briefs and argument in the district court or in the briefing on appeal.

D. Did the District Court Err in Summarily Dismissing Pizzuto's Petition on the Ground that He Had Failed to Raise a Genuine Issue of Material Fact Supporting His Claim of Mental Retardation?

[11, 12] On July 9, 2003, the State moved to dismiss Pizzuto's petition on the grounds that it was untimely and would constitute the retroactive application of new law.[4] On September 23, 2005, Pizzuto moved for summary judgment. The district court granted summary judgment to the State on the grounds that Pizzuto's petition was untimely and that Pizzuto had failed to raise a genuine issue of material fact regarding his claim of mental retardation. Although the State did not move for summary judgment, "[t]he district court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court." *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001). Pizzuto moved for summary judgment on the same issue upon which the district court granted summary judgment to the State. Therefore, the district court could grant summary judgment to the nonmoving party on that issue. *Id.*

[13–15] We review the grant of summary judgment to a nonmoving party under the same standard we would to the moving party. *Id.* In this case, Pizzuto was not entitled to a jury trial. "When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2004). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.*

[16, 17] "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof." *State v. Lovelace*, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003). A "*prima facie* case" means the "production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor." *Black's Law Dictionary* 1209 (Bryan A. Garner ed., 7th ed., West 1999). Thus, Pizzuto had the burden of presenting evidence on each element of his claim under Idaho Code § 19–2515A(1).[5] *Raudebaugh v. State*, 135 Idaho 602, 21 P.3d 924 (2001).

The definition of the term "mentally retarded" in Idaho Code § 19–2515A(1) requires that the offender have "significantly subaverage general intellectual functioning" and that such functioning be "accompanied by significant limitations in adaptive functioning in at least two" of ten listed areas. Finally, the statute requires that "[t]he onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years." The statute defines "significantly subaverage general intellectual

4. Idaho Code § 19–2719(5)(c) provides, ''A successive post-conviction pleading asserting the exception [that the claim was not known or reasonably knowable within forty-two days after entry of the judgment imposing the death sentence] shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law.'' The decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), must be applied retroactively. *See, Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Schriro v. Smith*, 546 U.S. 6, 126 S.Ct. 7, 163 L.Ed.2d 6 (2005). Because of the Supremacy Clause, Idaho Code § 19–2719(5)(c) cannot prevent the *Atkins* opinion from being applied retroactively in this case.

5. Idaho Code § 19–2515A(1) provides:

(1) As used in this section:

(a) ''Mentally retarded'' means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.

(b) ''Significantly subaverage general intellectual functioning'' means an intelligence quotient of seventy (70) or below.

functioning" as "an intelligence quotient of seventy (70) or below." Thus, the statutory definition of "mentally retarded" requires proof of three elements: (1) an intelligence quotient (IQ) of 70 or below; (2) significant limitations in adaptive functioning in at least two of the ten areas listed; and (3) the onset of the offender's IQ of 70 or below and the onset of his or her significant limitations in adaptive functioning both must have occurred before the offender turned age eighteen. Significant limitations in adaptive functioning alone will not bring an offender within the protection of the statute. As stated by the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 2250, 153 L.Ed.2d 335, 347 (2002), "Not 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."

In order for Pizzuto to have presented a *prima facie* case, there must be evidence showing that he had an IQ of seventy or below before age eighteen. Pizzuto was born January 11, 1956. Therefore, there must be evidence showing that his IQ was 70 or below prior to his eighteenth birthday on January 11, 1974.

The record reflects only one IQ score for Pizzuto. He scored a Verbal IQ of 72 on the Wechsler Adult Intelligence Scale, Revised, administered to him by Dr. Emery on December 12, 1985. At that time, Pizzuto was thirty days short of his twenty-ninth birthday. There is no expert testimony opining what Pizzuto's IQ probably would have been eleven years earlier. Pizzuto argues that an IQ score is only accurate within five points. He contends that his actual IQ could have been five points lower or higher than 72. There are two problems with that argument.

First, when enacting Idaho Code § 19–2515A(1), the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below. Although Pizzuto argued that the district court should infer that Pizzuto's actual IQ was lower than his test score, the court could just as reasonably have inferred that it was higher. The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2004). It would be just as reasonable to infer that Pizzuto's IQ on December 12, 1985, was 77 as it would be to infer that it was 67.

Second, Pizzuto's argument also requires the district court to infer that Pizzuto's IQ had not decreased during the eleven-year period from his eighteenth birthday to the date of his IQ test. The district court, as the trier of fact, was not required to make that inference, especially in light of the opinions of Pizzuto's experts that his long history of drug abuse and his epilepsy would have negatively impacted his mental functioning.

In 1988 Dr. Merikangas reviewed Pizzuto's available medical records and various medical and psychological reports prepared by several experts during 1985 through 1987. Based upon his review of those records, Dr. Merikangas suggested that Pizzuto suffered a brain injury either when he sustained a fractured skull at age 2½ or when he had a motorcycle accident at age 14 and that Pizzuto's epilepsy is a symptom of that brain injury. The epilepsy was first diagnosed in 1983, but Pizzuto reported having seizures beginning in adolescence or early adulthood. Dr. Merikangas also noted, "Mr. Pizzuto has a life long history of almost continuous drug abuse including intravenous Heroin as well as cocaine, speed and marijuana." He opined that Pizzuto's long history of drug abuse has "caused him further neurological dysfunction and has caused him to have substantial defects of mind and reason." According to Dr. Merikangas, "We will probably not know to any any [sic] scientific degree of accuracy what his state of mind was at the time of the alleged crimes but we do know without any doubt that [he] is not a normal human being."

Dr. Beaver conducted a comprehensive neuropsychometric examination of Pizzuto on February 12, 1996, to evaluate his neurocognitive functioning and to assist in evaluating his mental status. He concluded, "The combination of Jerry Pizzuto having a seizure disorder, neurocognitive limitations that affect his impulse control and decision-mak-

ing, combined with the neurotoxic affects of polysubstance abuse would have significantly impacted his abilities to make appropriate decisions and to control his behavior in an appropriate and community acceptable manner." Pizzuto also submitted an affidavit of Dr. Beaver dated September 15, 2004. In that affidavit, Dr. Beaver stated, "[G]iven that it has been over eight years since his last comprehensive neuropsychological examination, I would strongly recommend that he undergo repeat neuropsychometric studies.... Often, patients that have persistent seizure disorders, for example, will decline over time in their overall mental abilities." Thus, Dr. Beaver felt that Pizzuto's mental functioning could have declined over an eight year period just due to his seizure disorder. The district court certainly could have inferred that it would also have declined during the eleven-year period from Pizzuto's eighteenth birthday to the date of his IQ testing, where Pizzuto was not only suffering from epileptic seizures but was also abusing various drugs.

Pizzuto relied solely upon Dr. Emery's IQ determination. Pizzuto did not disclose whether Dr. Beaver did IQ testing in connection with his comprehensive neuropsychometric examination on February 12, 1996. If Pizzuto desired further IQ testing, he should have obtained it. The district court did not err in relying upon the only IQ score in the record to conclude that Pizzuto had failed to show he met the statutory definition of mental retardation.

Although not argued by Pizzuto, there is one additional affidavit of Dr. Beaver that should be addressed. Pizzuto submitted with his petition an affidavit from Dr. Beaver dated June 18, 2003. In that affidavit (2003 Affidavit), Dr. Beaver stated as follows:

4. In 1996, I conducted comprehensive neuropsychological examination of Gerald R. Pizzuto, Jr. This included review of multiple records, interviews with Mr. Pizzuto and his mother. Also, he underwent comprehensive neuropsychological assessment.
5. Gerald R. Pizzuto, Jr. demonstrated limited intellectual skills indicative of possible of [sic] mild mental retardation. Additionally, he evidenced organic brain syndrome.
6. Gerald R. Pizzuto, Jr. likely meets the standard recently enacted in Idaho Code Section 19–2515A regarding defendants who are mentally retarded and involved with first degree murder proceedings.

The issue is whether this Affidavit would have precluded granting summary judgment to the State.

In the 2003 Affidavit, Dr. Beaver stated that his 1996 comprehensive neuropsychological examination of Pizzuto indicated "possible mild mental retardation." " 'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." *Atkins v. Virginia*, 536 U.S. 304, 308 n. 3, 122 S.Ct. 2242, 2245 n. 3, 153 L.Ed.2d 335, 342 n. 3 (2002) (quoting from the Diagnostic and Statistical Manual of Mental Disorders 42–43 (4th ed.2000)). An opinion that Pizzuto had *possible* mild mental retardation in 1996 is not an opinion that he had an IQ of 70 or below twenty-two years earlier.

In the 2003 Affidavit, Dr. Beaver also stated that Pizzuto "likely meets the standard recently enacted in Idaho Code Section 19–2515A regarding defendants who are mentally retarded." The question is whether this statement must be inferred as stating that Pizzuto had an IQ of 70 or below prior to his eighteenth birthday on January 11, 1974. For the following reasons, the trial court was not required to draw that inference.

First, Pizzuto did not argue to the trial court that the 2003 Affidavit should be so construed. He did not refer to this Affidavit in his "Statement of Material Facts in Support of Summary Judgment" filed on September 23, 2005; nor did he refer to it in oral argument. He likewise did not refer to the affidavit in his briefing and argument on appeal. If we relied upon the affidavit to hold that the district court erred, we would be deciding the appeal on an issue not raised or argued by Pizzuto. *See, Sprinkler Irr. Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 85 P.3d 667 (2004) (where the plaintiff did not argue to the trial court that its verified complaint provided sufficient ma-

terial facts to counter the defendant's motion for summary judgment, this Court would not consider that argument on appeal).

Second, Pizzuto admitted during oral argument on appeal that neither Dr. Beaver nor any other expert expressed any opinion as to whether Mr. Pizzuto meets the standard set forth in Idaho Code 19–2515A.[6] If we were to so construe the 2003 Affidavit, we would be giving it a construction that Pizzuto admits it should not be given.

Third, in the 2003 Affidavit Dr. Beaver opines that Pizzuto "likely meets the standard recently enacted in Idaho Code Section 19–2515A regarding defendants who are mentally retarded." In the context of Dr. Beaver's other statements in this case, it is clear that he was talking about Pizzuto's present condition, not his condition at age eighteen. As mentioned above, Dr. Beaver conducted a comprehensive neuropsychological examination of Pizzuto in 1996. In the 2003 Affidavit, Dr. Beaver stated that his 1996 examination of Pizzuto indicated *possible* mild mental retardation. He then stated that Pizzuto "likely meets the standard recently enacted in Idaho Code Section 19–2515A regarding defendants who are mentally retarded and involved with first degree murder proceedings." In an affidavit dated September 15, 2004, Dr. Beaver explained that patients, such as Pizzuto, who have persistent seizure disorders will often decline over time in their overall mental abilities and that a current evaluation of Pizzuto is indicated to determine if he meets the criteria announced in *Atkins v. Virginia.* Thus, Dr. Beaver stated that his 1996 comprehensive neuropsychological examination of Pizzuto indicated *possible* mild mental retardation; the mental abilities of persons like Pizzuto who have persistent seizure disorders often decline over time; and Pizzuto likely now meets the standard of Idaho Code § 19–2515A.

[18] The focus upon whether Pizzuto is currently mentally retarded is consistent with Pizzuto's claim that *Atkins v. Virginia* protects offenders who become mentally retarded at any time prior to execution. The issue in *Atkins v. Virginia* is not whether the offender is currently mentally retarded. The issue is whether the offender was mentally retarded when he or she committed the murder and whether such mental retardation began prior to the offender's eighteenth birthday.

The *Atkins* Court began by recognizing that its prior cases identified retribution and deterrence as the societal purposes served by the death penalty. It then analyzed those two purposes as to how they relate to the mentally retarded.

It first noted that retribution is based upon the culpability of the murderer. It determined that the mentally retarded have diminished culpability due to their mental impairments. The Court reasoned, "Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. at 318, 122 S.Ct. at 2250, 153 L.Ed.2d at 348. The Court added, "[T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* It concluded, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State [the death penalty], the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U.S. at 319, 122 S.Ct. at 2251, 153 L.Ed.2d at 349.

The Court also found that the existence of the death penalty would have little deterrent effect on the mentally retarded. It stated, "[I]t is the same cognitive and behavioral impairments that make these defendants less

6. During oral argument on appeal, the following exchange occurred:
Chief Justice Eismann: Q. Did he [Dr. Beaver] express any opinion as to whether Mr. Pizzuto meets the standard set forth in Idaho Code 19–2515A?
Ms. Fisher: A. He did not, your Honor.
Chief Justice Eismann: Q. Did any expert offer an opinion as to whether Mr. Pizzuto meets that standard of mental retardation?
Ms. Fisher: A. No.

morally culpable ... that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." 536 U.S. at 320, 122 S.Ct. at 2251, 153 L.Ed.2d at 349. It concluded, "Thus, executing the mentally retarded will not measurably further the goal of deterrence." *Id.*

The Court also added that because of their mental impairments, mentally retarded offenders may give false confessions, be unable to give meaningful assistance to their counsel, make poor witnesses, and project an unwarranted impression that they lacked remorse. In addition, mental retardation presented as a mitigating factor may support the aggravating factor of future dangerousness.

The rationale for exempting mentally retarded murderers from the death penalty is based upon their mental impairments at the time they committed the killings and, to a lesser extent, during their criminal trials and sentencing hearings. The exemption should be no broader than its supporting rationale. Thus, an offender would not be entitled to relief based upon *Atkins v. Virginia* if he was mentally impaired at the time of his crime, and possibly through his sentencing, but it was not until later that his mental condition deteriorated to the point of becoming mentally retarded.

In that respect, *Atkins v. Virginia* differs from *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). In the latter case, the Supreme Court held that the Eighth Amendment prevents the execution of a person who became insane after his trial and sentencing. The reasons for that holding were: (1) "For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" and (2) "Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today." 477 U.S. at 409, 106 S.Ct. at 2601, 91 L.Ed.2d at 346. There is no contention that Pizzuto's mental functioning has declined to that point. In *Penry v. Lynaugh*, the Supreme Court recognized the distinction between the insane and the mildly mentally retarded. It stated that the profoundly or severely retarded who are wholly lacking the capacity to appreciate the wrongfulness of their conduct would likely not be convicted or face the prospect of punishment. The mildly retarded, however, are usually competent to stand trial, to consult with counsel with a reasonable degree of rational understanding, and to have a rational and factual understanding of the proceedings against them.[7]

Pizzuto was found to be competent to stand trial in his criminal case. In Dr. Emery's opinion, "Mr. Pizzuto clearly understands the nature of the charges against him and their potential consequences and he is capable of assisting in his own defense" and "Mr. Pizzuto has the capacity to enter into a state of mind which could be an element of

7. In *Penry v. Lynaugh*, 492 U.S. 302, 333, 109 S.Ct. 2934, 2954–55, 106 L.Ed.2d 256, 287–88 (1989), the Supreme Court stated:

> The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment. See ABA Standards for Criminal Justice 7–9.1, commentary, p. 460 (2d ed.1980) (most retarded people who reach the point of sentencing are mildly retarded). Moreover, under *Ford v. Wainwright*, 477 U.S. 399[106 S.Ct. 2595] (1986), someone who is "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be executed. *Id.*, at 422[106 S.Ct. 2595] (Powell, J., concurring in part and concurring in judgment).
>
> Such a case is not before us today. Penry was found competent to stand trial. In other words, he was found to have the ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402[, 80 S.Ct. 788, 4 L.Ed.2d 824] (1960); App. 20–24. In addition, the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law.

the offense for which he is charged." Pizzuto did not challenge on appeal the finding that he was competent to stand trial. *State v. Pizzuto,* 119 Idaho 742, 810 P.2d 680 (1991). The jury found that he had the mental capacity to have the specific intents required for conviction of the crimes charged, and he did not challenge those findings on appeal. There is no contention that Pizzuto's execution would be barred by *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

[19] Pizzuto had the burden of showing that at the time of his murders he was mentally retarded as defined in Idaho Code § 19–2515A(1)(a) and that his mental retardation occurred prior to his eighteenth birthday. To prevent summary judgment from being granted to the State, he had to create a genuine issue of material fact on each element of his claim. A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. *Blickenstaff v. Clegg,* 140 Idaho 572, 577, 97 P.3d 439, 444 (2004). One requirement of proving mental retardation is that Pizzuto had an IQ of 70 or below at the time of the murders and prior to his eighteenth birthday. He did not offer any expert opinion showing that he did. He likewise did not offer any expert opinion stating that he was mentally retarded at the time of the murders or prior to age eighteen. The district court did not err in granting summary judgment to the State.

E. Did the District Court Err in Dismissing Pizzuto's Petition without Permitting Further Testing?

[20] On October 25, 2004, Pizzuto filed a motion seeking to be transported to an appropriate medical facility so that Dr. Merikangas could perform specific testing upon Pizzuto. The additional testing requested was as follows:

(1) Neuroprofile, five hour glucose tolerance test and a urinalysis,

(2) An electroencephalogram, to include photic stimulation and hyperventilation,

(3) A magnetic resonance image of the brain without contrast, and

(4) A positron emission tomography scan and a single photon emission computed tomography scan of the brain, which would include an injection of contrast material and a short time delay before the images were taken.

Pizzuto did not notice this motion for hearing.

The parties did briefly discuss the motion on April 22, 2005, when they argued Pizzuto's motions to file an interlocutory appeal of the district judge's refusal to disqualify himself and to strike the appointment of the Attorney General as a special prosecutor in this case. After the district court denied both motions, the parties discussed the briefing schedule for the State's motion for summary dismissal. During that discussion, Pizzuto's counsel stated that she could not ask the district court to rule on her motion for testing, apparently because she believed the judge should be disqualified from presiding in the case and therefore from ruling on the motion. She then asked whether the State would stipulate to the testing, and the State's attorney stated he would think about it. Pizzuto's counsel concluded the issue by stating that she and the State would discuss the matter further.[8] Without pursuing the motion for testing, Pizzuto moved for summary judgment on September 23, 2005.

At the conclusion of oral argument on Pizzuto's motion for summary judgment, his counsel asked the district court not to dis-

8. The dialogue was as follows:

Ms. Fisher: If we're going to move forward on a testing—I mean, on a briefing schedule—I guess I can't do that, Judge, because I don't think you can rule. So I guess I can't ask you to rule on my testing.

The Court: On your testing?

Ms. Fisher: For my client, right.

The Court: Oh, sure. I understand.

Ms. Fisher: All I want is a motion for access—an order for access to the client. Maybe the State would stipulate to the testing to take place while we're pending the interlocutory appeals and the briefing schedule, Lamont?

Mr. Anderson: I'm going to have to think about that.

Ms. Fisher: Okay. So the State and I will discuss the possibility of moving forward on access to my client for further testing in this regard.

miss the action if it did not grant the motion for summary judgment. Pizzuto's counsel requested that the court instead give further guidance as to what was required to prove a *prima facie* case and permit additional testing if the court believed an expert opinion was necessary.[9]

Pizzuto's counsel asserted below that there was no statutory or judicial definition of mental retardation applicable in post-conviction proceedings, and therefore she had little guidance as to the evidence necessary to make a *prima facie* case. She contended that the definition of mental retardation in Idaho Code § 19–2515A only applied when the issue of mental retardation was raised in pretrial proceedings and that it did not apply when the issue was raised in post-conviction proceedings. Subsection (6) of the statute states, "Any remedy available by post-conviction procedure or habeas corpus shall be pursued according to the procedures and time limits set forth in section 19–2719, Idaho Code." That subsection would be meaningless unless it contemplated that the statutory definition of "mentally retarded" also applied to post-conviction proceedings.

The definition of "mentally retarded" in Idaho Code § 19–2515A requires that the defendant have an IQ of 70 or below both at the time of the murder(s) and prior to age eighteen. In its briefing opposing Pizzuto's motion for summary judgment, the State argued that Pizzuto had failed to provide evidence that his IQ was 70 or below and failed to provide evidence showing it was 70 or below prior to his eighteenth birthday. Pizzuto's alleged IQ is obviously a matter requiring expert testimony. He did not offer any expert testimony opining that his IQ was ever 70 or below, nor does he allege that the requested additional testing was intended to address that issue. Whether or not a person is mentally retarded is obviously a matter requiring an expert's opinion. Pizzuto did not offer any expert testimony on that issue.

[21, 22] Pizzuto did not ask the district court to rule on his motion for the specified additional testing. He asked the district court to refrain from dismissing the petition if the court denied Pizzuto's motion for summary judgment and to give Pizzuto's counsel additional guidance as to what proof was lacking. If a trial court denies a party's motion for summary judgment, it has discretion to grant summary judgment to the opposing party. *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001); I.R.C.P. 56(c). The real issue presented by the facts is whether the district court abused its discretion by granting summary judgment to the State rather than by simply denying Pizzuto's motion and giving him the requested guidance on how to proceed further. When reviewing an alleged abuse of discretion by the trial court, our inquiry is:

> (1) whether the trial judge correctly perceived the issue as one of discretion; (2) whether the trial judge acted within the outer boundaries of his or her discretion and consistently with the legal standards applicable to the specific available choices; and (3) whether the trial judge reached his or her decision by an exercise of reason.

Hudelson v. Delta Int'l Machinery Corp., 142 Idaho 244, 248, 127 P.3d 147, 151 (2005). Pizzuto has not argued that the district court abused its discretion in this case.

F. Did the District Court Deny Pizzuto the Equal Protection of the Law by Failing to Hold an Evidentiary Hearing on the Issue of Mental Retardation?

[23] Pizzuto claims that the district court denied him the equal protection of the law

9. Pizzuto's counsel made the follow request:

> Ms. Fisher: . . . If the Court does come to the conclusion on the basis of the record of the prior proceedings and what we've submitted thus far is not sufficient to go forward, which I can't imagine it doing, but if you do, I would suggest that rather than dismiss us outright, that you give us the opportunity to—you know, that you rule on that motion for additional testing, and you permit us to go forward to develop the evidence so that we can, in fact, present, if you think, an expert—further expert opinion is necessary so we can present that, or that you at least give us some time to submit more—I mean, you know, there's sort of this place where I think we've reached a prima facie, well above it, but if we haven't because there's no standard that says what a prima facie case is, it's reasonable to give us sufficient notice of what you think a prima facie case is and see if we can meet it. Does that make sense, Judge?
>
> The Court: I think I understand what you have just said.

under both the Idaho and United States Constitutions by failing to give him an evidentiary hearing on the issue of mental retardation. He relies upon Idaho Code § 19–2515A(2) which requires the court to conduct a pretrial hearing regarding a capital defendant's claim of mental retardation upon receiving notice of the defendant's intention to raise the issue. That portion of the statute applies only to claims of mental retardation raised in pretrial proceedings, and the defendant does not have to make any preliminary showing to obtain the hearing. Pizzuto argues that if a defendant charged with a capital offense in a criminal case can obtain a hearing on mental retardation simply by requesting it, it is a denial of equal protection to fail to grant the same right to a petitioner in civil post-conviction proceedings.

[24] "The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal. The exception to this rule is that constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case." *Row v. State,* 135 Idaho 573, 580, 21 P.3d 895, 902 (2001) (citations omitted). No subsequent proceedings are necessary in this case, and therefore we will not address this issue.

G. Does Idaho Code § 19–2515A Violate the Eighth and Fourteenth Amendments to the Constitution of the United States?

[25] Pizzuto claims that Idaho Code § 19–2515A violates the Eighth Amendment because it fails to comply with the mandate set forth in *Atkins v. Virginia.* Pizzuto did not raise this issue below, and therefore we will not consider it on appeal. *Row v. State,* 135 Idaho 573, 21 P.3d 895 (2001)

IV. CONCLUSION

We affirm the judgment of the district court dismissing Pizzuto's petition in this case.

Justices BURDICK, W. JONES and Justices Pro Tem TROUT and JUDD concur.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO JR.,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV 03-34748

OPINION AND ORDER

In this matter, Petitioner (hereinafter "Pizzuto") filed a successive Petition for Post Conviction Relief (hereinafter "Atkins Petition") claiming that his intellectual defects bar his execution under *Atkins v. Virginia, 536 US 304 (2002)*. Respondent, (hereinafter "The State of Idaho") moved for Summary Dismissal of the Atkins Petition. Pizzuto moved for Summary Judgment granting said petition. Following oral argument and briefing by the parties, the Court took the matter under advisement.

Pizzuto argues that *Atkins* should be applied retroactively to his case. Assuming that Pizzuto is correct in this regard, the Atkins Petition was not timely filed and must therefore be dismissed. I.C.§ 19-2719.

Atkins issued on June 20, 2002. The instant petition should have been filed within forty-two (42) days thereafter. It was filed one day shy of a year following *Atkins*. Assuming that the Ring Petition should have been filed simply within a "reasonable period of time" following *Atkins*, the allegations supporting the Ring Petition were based upon facts know at the time of Pizzuto's sentencing. The instant Petition was not filed within a reasonable period of time following *Atkins*, and must therefore be dismissed.

Assuming that the Ring Petition is not governed by the provisions of I.C. §19-2719, or that it's dictates were met, the petition must nonetheless be dismissed because the Provisions of the UPCPA have not been met, i.e., Pizzuto failed to raise a genuine issue of material fact supporting his claim of mental retardation.

Based upon the foregoing, Pizzuto's Motion for Summary Judgment is HEREBY DENIED, and the State of Idaho's motion to summarily dismiss the Atkins Petition is HEREBY GRANTED.

Dated this 16th day of December, 2005

George Reinhardt, Senior District Judge

Certificate of Service

I certify that on the 16th day of December, 2005, a true copy of the foregoing was mailed to each of the following:

Joan M. Fisher
Capital Habeas Unit
Federal Defenders of Eastern Washington and Idaho
317 W. Sixth St. Ste 204
Moscow, Idaho 83843

L. LaMont Anderson
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

Rita Holman

Deputy Clerk

JOAN M. FISHER
Idaho State Bar No. 2854
Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
201 North Main
Moscow ID 83843
Telephone: 208-883-0180
Facsimile: 208-883-1472

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 12:10 O'CLOCK P .M.
JUN 19 2003
ROSE E. GEHRING
CLERK OF DISTRICT COURT
Cindy Dickson DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR.

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. CV34748

PETITION FOR POSTCONVICTION RELIEF RAISING *ATKINS V. VIRGINIA.*

Petitioner, Gerald Ross Pizzuto, an indigent inmate requesting leave to proceed *in forma pauperis*, files this his Petition for Postconviction Relief Raising *Atkins v. Virginia* and alleges:

I. INTRODUCTION

In *Atkins v. Virginia,* 536 U.S. 304 (2002), the United States Supreme Court held that the Eighth Amendment to the United States Constitution " 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender" and that executing mentally retarded individuals violates the Eighth and Fourteenth Amendments. 536 U.S. at 321 (quoting *Ford v. Wainwright,* 477 U.S. 399, 405 (1986)). *Atkins* is retroactively applicable to cases in collateral procedings. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("[I]f we held, as a

substantive matter that the Eighth Amendment prohibits the execution of mentally retarded persons . . . such a rule . . . would be applicable to defendants on collateral review"); *In re Holladay,* – F.3d – (11th Cir.(Case No. 03-12676) May 26, 2003) 2003 WL 21210330 *2 (*Atkins* . . . is a new rule of constitutional law made retroactive to case on collateral review by the Supreme Court that was previously unavailable"); *Bell v. Cockrell,* 310 F. 3d 330, 332 (5th Cir. 2002); *Hill v. Anderson,* 300 F. 3d 679, 681 (2002).

This petition is brought pursuant to *Atkins v. Virginia, supra,* Idaho Code §§19-2719, 19-4901 *et. seq.*, 19-4201 *et seq,* the Idaho Constitution Sections 1 (right to defend life and liberty), 2 (equal protection), 3 (United States Constitution as supreme law of the land), 5 (right to habeas corpus), 6 (cruel and unusual punishment), 13 (right to due process) and the United States Constitution Article 1, Section 9 (right to habeas corpus), and the Eighth and Fourteenth Amendments to the United States Constitution.

II. PRESENT CUSTODY

Petitioner is currently incarcerated at the Idaho Maximum Security Institution, Boise, Idaho.

III. COURSE OF PROCEEDINGS

A. Judgment and Sentence

Judgment and sentence were imposed by District Judge George Reinhardt, Second Judicial District, State of Idaho, County of Idaho, Grangeville, Idaho on May 27, 1986. *State of Idaho v. Gerald Ross Pizzuto Jr.*, Idaho County Case No. CR 85-22075.

B. Sentences for Which Relief Is Sought

The sentences imposed for which relief is sought are two sentences of death for two counts of murder in the first degree.

C. Jury Verdict

The jury in petitioner's case returned verdicts of guilty on two counts of murder in the first degree and two counts of first degree felony murder. The amended information under which petitioner was tried did not allege any aggravating circumstances making petitioner eligible for the death penalty and no aggravating circumstances were submitted to the jury.

D. Direct Appeal

Petitioner appealed to the Idaho Supreme Court from the Judgment and Conviction, the imposition of sentence, and the denial of postconviction relief. The conviction and sentence of death were affirmed. *State v. Pizzuto*, 810 P.2d 680, 119 Idaho 747 (1991), rehearing denied June 5, 1991, *cert. denied*, March 2, 1992.

On direct appeal the Idaho Supreme Court held that "...it was not error in the instant case for the trial judge rather than a jury to determine and impose Pizzuto's sentence." *Pizzuto*, 810 P.2d at 707. The Idaho Supreme Court based this holding on both the federal and state constitutions.

E. Prior Postconviction Proceedings

Following the denial of his appeal and initial petition for postconviction relief Petitioner has filed two other petitions for postconviction relief in state court. Both petitions for relief were denied. *Pizzuto v. State*, 903 P.2d 58, 127 Idaho 469 (1995); *Pizzuto v. State*, 10 P.3d 742, 134 Idaho 793 (2000).

Petitioner has currently pending a Petition for Postconviction Relief pursuant to Idaho Code Section 19-2719, *Gerald Ross Pizzuto vs. State of Idaho*, CV 02-33907, and a Motion to Correct Illegal Sentence under Idaho Criminal Rule 35, *State of Idaho vs. Gerald Ross Pizzuto*, Case No. CR 85-22075, both of which arise from the denial of jury factfinding at sentencing in violation of the principles of *Ring v. Arizona*.

F. Federal Habeas Corpus Proceedings

Petitioner sought federal habeas corpus relief. *Pizzuto v. Arave*, CV 92-0241-S-AAM. The District Court denied relief and the Ninth Circuit Court of Appeals affirmed the denial of relief. *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002). The *Pizzuto* court addressed the issue of the constitutionality of jury sentencing but concluded that the argument was foreclosed by *Walton v. Arizona*, 497 U.S. 639 (1990). *Pizzuto*, 280 F.3d. at 976. The time for petitioner to file a petition for rehearing was stayed pending the decision in *Ring v. Arizona*. On July 23, 2002, the Ninth Circuit issued an order requiring simultaneous briefing by the parties on the effect of *Ring*, if any, on petitioner's habeas corpus petition. Following oral argument on November 14, 2002, the Ninth Circuit Court of Appeals has the matter under advisement.

Petitioner is represented in the federal court by court-appointed counsel, Joan M. Fisher of the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho, located in Moscow, Idaho, and by Robert Gombiner of the Federal Defenders of Western Washington of Seattle, Washington, Idaho.

IV. GROUNDS FOR RELIEF

Petitioner alleges constitutional deprivations as follows:

PETITIONER'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§6, 13 OF THE IDAHO CONSTITUTION BECAUSE PETITIONER IS MENTALLY RETARDED AND HIS EXECUTION IS PROHIBITED UNDER *ATKINS V. VIRGINIA*.

Petitioner is mentally retarded. It is a matter of court record that Gerald Pizzuto's IQ is 72, which is within the plus or minus 5 point range, characterizing him as having significantly subaverage intellectual functioning. *See Atkins v. Virginia*, 536 U.S. at 308 n.3, 309, n.5, a copy of which is attached hereto and marked Appendix A.

Due to federal and state proceedings obstructing the same, Mr. Pizzuto has not yet been fully evaluated but upon this Court's granting of an Order of Access to Petitioner by qualified retained experts, a more definitive diagnosis will be made. The records in the state and federal proceedings noted above, reflect that Dr. James R. Merikangas, a Board Certified Neurologist/ Psychiatrist and Board Certified Neuro-psychologist, Craig Beaver of Boise, Idaho, and Dr. Michael Emery, court-appointed psychologist, previously submitted reports noting significant subaverage intellectual deficiency [72 IQ], resulting in "cognitive limitations." *See* Affidavit of Joan M. Fisher attaching Emery Report [Exhibit 1], Merikangas Report [Exhibit 2], and Beaver report [Exhibit 3], filed herewith.

Relying upon the, the diagnosis of mental retardation has three components. The diagnosis requires (a) significantly subaverage intellectual functioning, (b) that is accompanied by significant limitations in communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, leisure, health, and safety,

and (c) the onset must occur before age 18. Diagnostic and Statistical Manual, 4th Edition, ("DSM-IV")[Relevant Portion attached as Appendix B]; *see also, Atkins v. Virginia,* 536 U.S. at 308 n.3, 309, n.5, [Appendix A]; Idaho Code Section 19-2515A (Eff. March 27, 2003), a copy of which is attached hereto and marked Appendix C.

Though passage of time and a lack of any adequate state mechanism to raise and develop the claim of mental retardation have thus far precluded a definitive diagnosis of mental retardation, Petitioner does attach hereto an Affidavit of Dr. Craig Beaver, a recognized expert in mental health areas including mental retardation in which Dr. Beaver opines that Petitioner "likely meets the standard recently enacted Idaho Code Section 19-2515A regarding defendants who are mentally retarded" Appendix D.

There exists a factual basis in the records and pleadings of this matter in criminal and federal court, judicial notice of which relevant portions is requested, which support the factual criteria for such a diagnosis including serious head injuries at 2 ½ and 14 years of age, seizure disorders, education deficits terminating his education at the 8th grade level, a lack of any sustained personal relationships, employment or service and undersocialization. Much of the data produced at sentencing, postconviction and in habeas proceedings consists of Mr. Pizzuto's childhood records or interviews or testimony containing information about Mr. Pizzuto's childhood and confirms the onset of Mr. Pizzuto's subaverage intellectual functioning and accompanying limitations in adaptive behavior was manifested prior to age 18. *See* Affidavit of Joan M. Fisher, filed herewith.

Submitted in support of and simultaneously with this Petition for Postconviction Relief Under *Atkins v. Virginia,* and incorporated herein are the Affidavit of Craig W. Beaver, Ph.D.

ABPP-CN and Affidavit of Joan M. Fisher. Other and further affidavits will be filed in support of this petition and petitioner requests that they be incorporated herein by reference.

Petitioner requests the court take judicial notice of the entire files of the prior state proceedings, Idaho County Case Nos. CR 85- 22075, and *State v. Pizzuto*, Idaho Supreme Court Nos. 16489, 17534. *See State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991) including all transcripts and records of the Clerks, are incorporated herein, as well as Mr. Pizzuto's federal district court case, USDC Case No. CV 92-0241-S-AAM and Ninth Circuit, Case No. 97-99017, *Pizzuto v. Arave*, 280 F. 3d 1217 (9th Cir. Feb 6, 2002). Copies of which will be lodged with the Court as soon as practicable.

V. AFFIDAVIT OF INDIGENCY

Petitioner has been in the custody of the State of Idaho, Department of Correction since his sentences of death were imposed in May, 1986. He has at all times, and in every court in which relief has been sought, been determined by the courts, state and federal, to be indigent. Petitioner is not currently employed, has no income, no personal property of more than nominal value, no means of support and has been continually dependent upon the State of Idaho for care and sustenance since his arrest.

VI. RELIEF REQUESTED

WHEREFORE, Petitioner prays for the following relief:

1. For an Order granting Petitioner permission to proceed *In Forma Pauperis*;
2. For an Order taking judicial notice of the records and files in the prior related matters, both criminal and civil, in this Court, the Idaho Supreme Court, the United States District Court, and the Ninth Circuit Court of Appeals;

3. That this court order that access to Petitioner by Petitioner's experts to enable necessary testing, evaluation and diagnosis regarding Petitioner's claim herein;

4. That this court order that discovery be allowed, prior to an evidentiary hearing;

5. That this court permit amendment of this petition, if requested, within a reasonable time after discovery of any relevant material referenced in the preceding paragraph, or discovered as a result of petitioner's continuing investigation of his case;

6. That this court reverse and vacate the death sentences entered on May 27, 1986;

7. That this court order other and further relief deemed appropriate.

DATED this 18th day of June, 2003.

JOAN M. FISHER
Capital Habeas Unit,
Federal Defenders of Eastern
Washington & Idaho
201 North Main
Moscow ID 83843

VERIFICATION

STATE OF IDAHO)
:ss
County of Ada)

Gerald R. Pizzuto, JR., being duly sworn under oath, deposes and states as follows:

That he is the Petitioner in the above-entitled action; that he has read the foregoing Petition for Postconviction Relief to be filed on or about June 19, 2003; that he knows the contents thereof and that the facts stated herein are true and to the best of his knowledge and belief.

DATED this 18th day of June, 2003.

Gerald R. Pizzuto Jr.
Petitioner

SUBSCRIBED AND SWORN TO before me this 18th day of June, 2003.

NOTARY PUBLIC in and for the State of Idaho,
residing at Genesee, therein.
Commission expires: 6-16-06

CERTIFICATE OF SERVICE

I do hereby certify that a true, full and correct copy of the foregoing Petition for Postconviction Relief Raising *Atkins V. Virginia*, together with supporting affidavits and attachments, was this 19th day of June, 2003, served upon the following in the manner indicated below:

Jeff P. Payne
Prosecuting Attorney
114 S. Idaho Avenue
Grangeville, ID 83530

[✓] U.S. Mail
[ ] Hand Delivered
[ ] Facsimile Transmission
[ ] Overnight Delivery

John M. Fisher

APPENDIX D

APPENDIX D

58

Craig W. Beaver, Ph.D., ABPP - CN

Licensed Psychologist

250 Bobwhite Court, Suite 220 • Boise, Idaho 83706 • (208) 336-2972 • Fax (208) 336-4408

AFFIDAVIT

RE: Gerald Ross Pizzuto, Jr.

I, Craig W. Beaver, Ph.D., being duly sworn, deposes and states as follows:

1. Currently I am a licensed psychologist in the State of Idaho. I hold a Ph.D. in Clinical Psychology from an American Psychological Association (APA) approved program at Miami University (Ohio). I completed an APA approved clinical internship at the Ft. Miley V.A. Medical Center in San Francisco, California.

2. In addition to being licensed as a psychologist, I hold Diplomate status in Clinical Neuropsychology, recognized by the APA. this recognizes my expertise in neuropsychology and understanding of brain-behavior relationships. See attachment A my current curriculum vita describing in more detail my training and professional experiences.

3. I have been recognized in multiple states and in the Federal Courts as an expert in brain injury, epilepsy, mental retardation, drug and alcohol abuse and the effects of these conditions on human behavior. Please see attachment B.

4. In 1996, I conducted a comprehensive neuropsychological examination of Gerald R. Pizzuto, Jr. This included review of multiple records, interviews with Mr. Pizzuto and his mother. Also, he underwent comprehensive neuropsychological assessement.

5. Gerald R. Pizzuto, Jr. demonstrated limited intellectual skills indicative of possible of mild mental retardation. Additionally, he evidenced organic brain syndrome.

6. Gerald R. Pizzuto, Jr. likely meets the standard recently enacted in Idaho Code, Section 19-2515A regarding defendants who are mentally retarded and involved with first degree murder proceedings.

Craig W. Beaver, Ph.D.

Craig W. Beaver, Ph.D. ABPP-CN
Clinical Neuropsychologist

SUBSCRIBED AND SWORN to before me this 18th day of June, 2003.

ANNE KNITTLE NOTARY PUBLIC STATE OF IDAHO

Notary Public for Anne Knittle
Residing at Boise, Idaho
My Commission expires 10-02-2006

JOAN M. FISHER
Idaho State Bar No. 2854
Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
201 North Main
Moscow ID 83843
Telephone: 208-883-0180
Facsimile: 208-883-1472

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 12:13 O'CLOCK P .M.
JUN 19 2003
ROSE E. GEHRING
CLERK OF DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR.

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. CV34748

AFFIDAVIT OF JOAN M. FISHER IN SUPPORT OF PETITION FOR POSTCONVICTION RELIEF RAISING *ATKINS V. VIRGINIA*

STATE OF IDAHO)
: ss
County of Latah)

Joan M. Fisher, mindful of the penalty of perjury and being duly sworn under oath, declares and affirms as follows:

1. I am over the age of 18 and competent to testify.

2. I am an attorney with the Capital Habeas Unit of the Federal Defenders of Eastern Idaho and Washington, and was appointed as co-counsel to represent Gerald Ross Pizzuto, Jr. in

his appeal of the denial of his federal habeas petition and as such, am fully familiar with the records, files, pleadings, facts and circumstances and related legal issues surrounding the conviction, sentence, appeal and postconviction proceedings relating to the sentences of death under which Mr. Pizzuto finds himself.

3. To the extent possible under time constraints and the particular juncture of the case, as well as cooperation and consent of the opposing counsel and permission of the relevant courts, and relying on the ruling of the United States Supreme decision in *Atkins v. Virginia,* 536 U.S. 304 (2002) we have conducted a partial and on-going investigation relating Mr. Pizzuto's history of educational, medical and psychological problems, including the collection of records from prior counsel on the case, and from other sources, including but not limited to courts, schools, relatives, health care institutions, etc.

4. As part of my responsibilities as supervising attorney with the Capital Habeas Unit, I am familiar with the criterion for mental retardation in a number of forums including but not limited to the DSM-IV and am experienced in the investigation, development and litigation of a claim of mental retardation (via a claim of ineffective assistance of counsel).

5. I have attached hereto a true and correct copy of the letter by Michael P. Emery, Ph.D. to Hon. George Reinhardt dated January 23, 1986, prior to and in connection with Petitioner's trial and sentencing for two counts of first degree murder. Exhibit 1.

6. I have attached hereto a true and correct copy of a report dated April 1, 1988, prepared by James R. Merikangas, M.D., a Board Certified Neurologist and Psychiatrist, who, in the

course of the accelerated postconviction proceedings under 19-2719 reviewed the records of Mr. Pizzuto but was not permitted to evaluate him. Exhibit 2.

7. I have attached hereto a true and correct copy of the Affidavit of Craig W. Beaver, Ph.D. submitted in support of Petitioner's petition for writ of habeas corpus filed in the United States District Court. Exhibit 3.

8. Though the age of the case, the lack of access by Petitioner to qualified experts and the loss of destruction of critical relevant records have slowed the investigation concerning that investigation, together with the records and files already submitted in state and federal court proceedings illustrate, including serious head injuries at 2 ½ and 14 years of age, seizure disorders, education deficits terminating his education at the 8th grade level, a lack of any sustained personal relationships, employment or service and "undersocialization." Much of the data produced at sentencing, postconviction and in habeas proceedings consists of Mr. Pizzuto's childhood records or interviews or testimony containing information about Mr. Pizzuto's childhood and confirms the onset of Mr. Pizzuto's sub-average intellectual functioning and accompanying limitations in adaptive behavior was manifested prior to age 18.

9. Petitioner has retained the services of a mitigation specialist, Ms. Rosanne Dapsauski, whose access was finally granted to Petitioner over the State's objection on April 28, 2003. Exhibit 4. Upon completion of the full compilation of currently available records and interviews with relevant persons, Petitioner will submit a Report by Ms. Dapsauski.

10. We are in the process of compiling declarations under penalty of perjury from individuals who knew Mr. Pizzuto and can relate anecdotal evidence of Mr. Pizzuto's limited adaptive skills.

Dated this 19th day of June, 2003.

Joan M. Fisher

SUBSCRIBED AND SWORN TO before me this 19th day of June, 2003.

CYNTHIA M. BERTLESON NOTARY PUBLIC STATE OF IDAHO

Cynthia M. Bertleson
NOTARY PUBLIC FOR IDAHO
Residing at Moscow, Idaho
Commission expires 08-08-06

CERTIFICATE OF SERVICE

I do hereby certify that a true, full and correct copy of the foregoing Petition for Postconviction Relief Raising *Atkins V. Virginia*, together with supporting affidavits and attachments, was this 19th day of June, 2003, served upon the following in the manner indicated below:

Jeff P. Payne
Prosecuting Attorney
114 S. Idaho Avenue
Grangeville, ID 83530

[✓] U.S. Mail
[ ] Hand Delivered
[ ] Facsimile Transmission
[ ] Overnight Delivery

Joan M. Fisher

EXHIBIT 1

Michael P.Emery Ph.D.
P.O. Box 162
Ahsahka, ID 83520

January 23, 1986

Honorable George Reinhardt
District Judge
Idaho County Court House
Grangeville, ID 83530

Re: Gerald Pizzuto
Case NO. 22075

Dear Judge Reinhardt:

As per your order to Dr. White I examined Mr. Pizzuto in the Idaho County Jail on December 12, 1985. I saw him for approximately two hours and during that time held an interview of over an hour and administered the WAIS-R, Verbal Scale, The WRAT, Reading Scale, and the Rorschach and Bender - Gestalt Test.

I saw Mr. Pizzuto in his cell where he was dressed in undershorts. He presented as a short, well-muscled individual with long hair, moustache, irregular teeth and several apparently home done tatoos. He was cooperative and resistant by terms, changing both mood and mind frequently, cooperating with some procedures and questions, refusing to respond to others, and, in rapid turnabout, going into the subject at length. Affect was appropriate to content and mood varied from angry to wistful to resentful as he discussed a wide variety of circumstances. He demonstrated a constant preoccupation with self justification, whether around the issue of his intelligence, his adequacy, his manhood, or his innocence, and this led to distracting asides.

He described a personal history characterized by continual conflict with himself as a central character who was either a victim or a victimizer but one who had little control over the ultimate outcome of events. He showed no evidence of impaired reality testing, hallucinations, delusions, fragmented thinking, or suicidal ideation. There was little evidence of even situational anxiety or depression and, seeing no responsibility for any harm to others, he exhibited neither remorse nor guilt.

Intellectually Mr. Pizzuto scored a verbal WAIS I.Q. of 72 which falls in the borderline range of intellectual deficiency and probably reflects, at least to some extent, a history that has included little organization, predictability, or formal learning. Both his Rorschach and Bender-Gestalt suggest somewhat higher intellectual potential. In neither case is there evidence of thought disorder. There are cognitive limitations, however, especially in his capacity to anticipate the consequences of his behavior and the effects of his behavior on others. He sees his

151

91

Exhibit B

life to a large extent as determined externally by a capricious fate and has little capacity for understanding or accepting responsibility. He shows little ability to cognitively mediate emotions, little capacity to tolerate ambiguity, and a preoccupation with violence and confrontation which probably acturately reflects the victim role he found himself in during his own early history.

Diagnosis

Axis I - Borderline intellectual deficiency V-62.89

Axis II - Anti-social personality disorder 301.70

In response to the more specific questions addressed in your order it is my opinion that:

C. Mr. Pizzuto clearly understands the nature of the charges against him and their potential consequences and he is capable of assisting in his own defense.

D. Mr. Pizzuto has the capacity to enter into a state of mind which could be an element of the offense for which he is charged.

Thank you for your attention. If I may be of further assistance, please contact me.

Respectfully submitted,

Michael P. Emery, Ph.D.
Licensed Psychologist

000005

152

EXHIBIT 2

EXHIBIT 2

03

James R. Merikangas, M.D., F.A.C.P.
Professional Corporation

Temple Medical Center
40 Temple Street
New Haven, CT 06510
203/562-6272

Neurology
Psychiatry
EEG and
Electrodiagnosis

April 1, 1988

Gerald Ross Pizzuto, Jr.
also known as Jerry Pizzuto
Probable Date of Birth: 1/11/56
State of Idaho Case No: 22075

Mr. Pizzuto has been convicted of several violent crimes and has been sentenced to death. I have reviewed his entire available medical records as well as a series of medical and psychological reports which were prepared by a number of experts including S.S. Werner, M.D. in October of 1985, Michael Koerner, M.D., September 9 & 10, 1987 and November 9, 1987 and a report by Roger K. White, M.D. January 6, 1986 and a series of reports by Michael P. Emery, Ph.D. January 23, 1986, April 24, 1986 and an affadavit by Sarah S. Werner, M.D. March 8, 1987 as well as selections from the courtroom testimony of Dr. Emery.

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These practitioners rendered various opinions in this case in regard to the the criminal responsibility of Mr. Pizzuto. Roger K. White, M.D. states "I will, therefore, not be rendering an opinion in this particular case" but his record has been reviewed.

Dr. Koerner is an expert in epilepsy but his own report disclaims expertise in psychiatry and states "I cannot, however, answer the second part of your question because I am not a psychiatrist and am not qualified to comment on the issue of whether or not Mr. Pizzuto has any mental illness which might impair his impulse control".

Dr. Emery who is not a psychiatrist and not a neurologist and not a medical doctor of any sort expresses a lot of opinions which are at variance with commonly accepted data on violent behavior and the origins of sociopathy, antisocial behavior and crime. He does give some useful information including the fact that Mr. Pizzuto's IQ is only 72. Dr. Emery states in his report of January 23, 1986 "There are cognitive limitations, however, especially in his capacity to anticipate the consequences of his behavior and the effects of his behavior on others" and again "He shows little ability to cognitively meditate emotions, little capacity to tolerate ambiguity, and a preoccupation with violence and confrontations which probably accurately refelcts the victim role he found himself in during his own early history".

His mother, Pam Pizzuto, in March of 1987 gave a history that Jerry when 2½ years old suffered a fractured skull in a fall down

stairs as well as a fractured leg. He apparently was hospitalized in the state of Washington for that. Also in 1970 he was involved in a motorcycle accident which resulted in serious injuries to his face and head. He was treated at the Deaconess Hospital in Spokane, Washington for that. The records are very difficult to read as they are a poor copy but the part that I can make out states that he has contusions and abrasions, was lethargic and apparently spent three days in the hospital.

Following that accident his mother noticed definite changes in his behavior including some bizarre things. He was diagnosed as suffering from epilepsy while in the Michigan State Penitentiary in 1983 which documented seizures as well as Status Epilepticus. He has a family history of epilepsy including his sister who apparently has uncontrolled violence when she doesn't take her medicine.

Also relevant is the fact that he was beaten severely as a child by his step-father Bud Bartholomew.

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Dr. Koerner's report outlines these events as do multiple medical reports including those in the St. Joseph's Hospital of Lewiston, Idaho where Dr. Werner examined him. She maintained him on Tegretol and Phenobarbital for epilepsy despite her opinion that the episodes he suffered "Strongly suggest that this is a psuedoseizure".

Hardly mentioned by any of these experts is the fact that Mr. Pizzuto has a life long history of almost continuous drug abuse including intravenous Heroin as well as cocaine, speed and marijuana. Apparently he doesn't drink because of his epilepsy although at the time of these crimes he was supposedly taking Phenobarbital and Tegretol.

He has a juvenile criminal record as well and has been found guilty of rape (criminal sexual conduct in the first degree).

He was in the Army from January 1973 until August 1973 and was given an undesirable discharge after a very poor record. His social background is very poor. His school records are not available to verify that he completed the eighth grade. He alleges that he is a boxer with several episodes of having his nose broken.

The courts have determined that Mr. Pizzuto did commit the crimes with which he is charged and the question then remains of the appropriate disposition. The M'Naghten Rule is one traditional test of insanity which "Relieves actor of criminal responsibility if at time of commiting the act he was laboring under such

defective reason from disease of mind as not to know nature and quality of act he was doing or if he did know it that he did not know he was doing what was wrong". Various courts have found that persons "Should not be insulated from criminal liability for acts which result from mental state that is voluntarily self induced", and "the finding of voluntary intoxification would not prevent conviction of murder of the third degree" (Commonwealth of Pennsylvania Vs. Arthur G. Hicks, Supreme Court of Pennsylvania Argued September 22, 1978. Decided January 24, 1979. In other jurisdictions the "irresistable impulse" test which is broader than the M'Naghten Rule states that "A person may avoid criminal responsibility even though he is capable of distinguishing right and wrong and fully aware of the nature and quality of acts provided that he establishes that he was unable to refrain from acting" and an additional legal distinction was made of the doctrine of "Diminished capacity" which challenges the capacity of a criminal to posess a particular state of mind required by the legislature for the commission of a certain degree of crime (Commonwealth of Pennsylvania Vs. Michael Nickles Walzack, Appellate. Supreme Court of Pennsylvania Argued April 25, 1974. Decided July 6, 1976.)

Other jurisdictions have other rules of course and in Connecticut where I reside a person is innocent by reason of insanity if he were to suffer from a defective mind or reason which renders him substantially incapable of conforming his conduct to the requirements of the law. There is also in Connecticut a specific law which states that one cannot use the insanity defense it the approximate cause of the crime is the voluntary ingestion of alcohol to produce intoxication.

It is against this background on the facts of the case of Mr. Pizzuto that I would like to suggest that he is a brain damaged individual of which epilepsy is one of the symptoms and that as a result of a traumatic brain injury which occurred either when he fractured his skull at age 2½ or when this pre-existing condition was aggravated by another serious injury when he was about 14 that his brain is then defective and that his cognition and ability to control his impulses are not those of a "Normal" person. Further more a long history of polydrug abuse has caused him further neurological dysfunction and has caused him to have substantial defects of mind and reason. We will probably not know to any any scientific degree of accuracy what his state of mind was at the time of the alleged crimes but we do know without any doubt that is not a normal human being. Dr. Emery has found his IQ as only 72 (normal is 100) and to his defective brain he has added numerous poisonous drugs. Brain damaged people are less able than other people to control their impulses and to form specific intent. They are less able than normal people to consider the

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consequences of their actions and thus able to control them even when they know the consequences. They have been desribed as ships upon a stormy sea in the way they are tossed about be events and emotions. Several of the examiners have suggested that Mr. Pizzuto has an antisocial personality disorder. The evidence is now very strong that there is a genetic component to antisocial personality disorder and criminality and that someone with this problem is not entirely free. Although not predestined to be a criminal, it certainly is more difficult for someone with a predisposition to remain innocent especially if they are raised in violent and criminal surroundings.

According to Sidney Cohen, M.D. in his article "Aggression: The Role of Drugs" which appeared in the Drug Abuse and Alcoholism Newsletter of the Vista Hill Foundation, Vol. 8, No. 2, February 1979. There are many mechanisms of drug induced violence which for convenience I will simply quote "(1) The drug might diminish ego contorls over comportment, relasing submerged anger that can come forth as directed or diffuse outbursts. (2) It might impair judgement and psychomotor performance making the individual dangerous to mimself and others. (3) It might induce restlessness, irritability, impulsivity causing a hostile cobativeness. (4) The drug can produce a paranoid thought disorder with a misreading of reality. False ideas of suspicion or persecution may bring forth assaultive acts against the imagined tormentors. (5) The craving to obtain and sue the drug can result in a variety of criminal behaviors, some of them assaultive. (6) An intoxicated or delirial state may result in combativeness and outbursts of poorly directed hyperactivity and violence. (7) Drug induced feelings of bravado or omnipotence may obliterate one's ordinary sense of caution and prudence causing harm to oneself or others. (9) Amnesic or fugue state may occur during which unpredictable and irrational assaults may take place". Cocaine is one of the drugs that is most prone to produce violence as well as amephetamines and phencyclidine (Angel Dust).

We add to this brain damaged, drug abusing individual with a background of sociopathy and antisocial behavior, the complicating fact ofepliepsy and the ability of this person to modulate his behavior becomes even more unlikely.

In extenuation and mitigation we have many factors which render the death penalty inappropriate in this case in my my medical opinion.

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Please let me know if I may provide further information or if you wish me to personally examine Mr. Pizzuto.

Sincerely yours,

James R. Merikangas, M.D., F.A.C.P
Assistant Clinical Professor
Of Psychiatry, Yale University
School of Medicine
Attending in Neurology,
Yale New Haven Hospital

JRM:map

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Subscribed and sworn before me on this date April 5, 1988

JOANNE F. DEFALMA
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1990

98

EXHIBIT 3

EXHIBIT 3

Craig W. Beaver, Ph.D.
Licensed Psychologist

1471 Shoreline Drive, Suite 115 • Boise, Idaho 83702 • (208) 336-2972 • Fax (208) 336-0595

AFFIDAVIT

RE: Gerald Ross Pizzuto, Jr.

I, Craig W. Beaver, Ph.D., being first duly sworn, disposes and states as follows:

1. Currently, I am licensed as a psychologist in the State of Idaho. I was authorized to complete a neuropsychological evaluation of Gerald R. Pizzuto, Jr.

2. I currently hold a Ph.D. in clinical psychology from Miami University of Ohio. This is an accredited clinical psychology training program approved by the American Psychological Association. I completed clinical internship, with an emphasis in clinical neuropsychology, at the Ft. Miley VA Medical Center in San Francisco, California, and I also completed four years of additional supervised practice under Dr. Lloyd Cripe, Diplomate in Clinical Neuropsychology. In my formal training and experience, I have been educated and trained to evaluate patients with neurological disorders, specifically epilepsy and those patients who have history of brain injury.

3. I am a diplomate in clinical neuropsychology, recognized by the American Board of Professional Psychology and the American Board of Clinical Neuropsychology. This designation requires you have completed course work and supervision in the area of neuropsychology. It also requires that you submit credentials to verify your course work but also verify supervision and training specifically in neuropsychology. Diplomate status also requires formal oral and written examination as well as submission of work product. It is the highest level of certification that can be obtained in the practice of clinical neuropsychology. Currently, there are only approximately 300 boarded neuropsychologists practicing in the United States. At this time, I am one of them. In addition to being a diplomate in clinical neuropsychology, I am also recognized as an individual who is qualified to review work samples of applicants for boards in neuropsychology.

4. I have specialized training and experience in the area of seizure disorder and how it affects behavior. I have been on the professional advisory board for Epilepsy League of Idaho for many years. I also was the consulting neuropsychologist for the Epilepsy Evaluation Unit at St. Luke's Regional Medical Center located in Boise, Idaho. I have presented numerous talks and workshops to professionals and lay audiences on the cognitive, behavioral and emotional consequences of seizure disorders and the medications used to treat those disorders. Also, in the course of my clinical practice, I have been involved in several clinical field trial studies in which we have examined how new medications affect seizure disorder patients with regard to their affect, cognition and behavior. I have cared for and treated numerous patients who have seizure disorders.

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5. I also have many years of formal training and experience in treating and evaluating patients who have significant brain injury. Currently, I am the director of Neuropsychological Services at Idaho Elk's Rehabilitation Hospital. My duties include providing neuropsychological services and team leadership to the inpatient and outpatient Brain Injury Rehabilitation Treatment Programs. The Brain Injury Treatment Program at Idaho Elk's Rehabilitation Hospital is one of only a few accredited brain injury treatment programs in the Intermountain West. I helped found that program. I have also given multiple workshops and lectures to both professional and lay audiences on the effects of brain injury with regard to behavior, affect and cognition. I have also given multiple workshops and lectures on behavioral management and other treatment modalities with brain injury patients.

6. I have training and experience in drug and alcohol use and abuse and its effects on behavior, cognition and affect. I have served as a consulting psychologist and neuropsychologist for the inpatient drug/alcohol treatment at the VA Medical Center in San Francisco in the past and have been a consultant to outpatient drug/alcohol treatment programs in the Boise area over the past several years. I have also given numerous workshops and lectures on the neuropsychological effects of drug and alcohol abuse. I have also specifically talked about the interaction between drug/alcohol abuse and brain injury and its overall effect on behavior, cognition and emotion. I have also served on the Idaho Governor's Committee to review drug/alcohol treatment evaluations and to revise standards related to those evaluations.

7. During the course of my clinical experience, I have been qualified as an expert witness in multiple judicial districts around the State of Idaho and also in the Intermountain West. I have been specifically qualified to discuss issues related to brain injury and its effect on behavior. I have also been involved in testifying in the effects of seizure disorder on behaviors as well. I have been qualified in judicial districts to discuss issues of aggravation versus mitigating circumstances in capital sentencing cases.

8. During the course of my examination of Gerald R. Pizzuto, I did have the opportunity to review a number of records related to Mr. Pizzuto's current circumstances. This included review of a presentence investigative report filed in April of 1986 on the original sentencing of Mr. Pizzuto on his conviction of murder. I also reviewed the prior presentence report when he was sentenced in 1975 in Michigan. I also reviewed various records from his incarceration in the Michigan Correctional System and Idaho Correctional Systems. I had the opportunity to review the sentencing transcripts from Mr. Pizzuto's trial in which multiple individuals testified. I have also had the opportunity to review prior reports by Drs. White and Emery who examined Mr. Pizzuto for psychological factors in the original 1986 sentencing. I have also reviewed affidavits from various family members and physicians who have reviewed or been involved in the care and treatment or evaluation of Mr. Pizzuto.

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9. During the course of my evaluation of Mr. Pizzuto, I have had the opportunity interview him now on multiple occasions. Specifically, I have conducted diagnostic interviewing with Mr. Pizzuto on 1/12/96, 2/9/96, 2/16/96 and 3/7/96. In total, I have had an opportunity to interview Mr. Pizzuto for approximately 8 ½ hours. During the course of these interviews, we have reviewed his current status, reviewed his psychosocial history, particularly in this matter as it relates to his history of head injury and seizure disorder as well as polysubstance abuse.

10. On 2/12/96, Mr. Pizzuto underwent a comprehensive neuropsychometric examination under my supervision. Specifically, Mr. Pizzuto underwent approximately 9 hours of neuropsychological and psychological tests under my direction. Formal neuropsychometric testing was conducted at that time to evaluate Mr. Pizzuto's neurocognitive functioning and to assist in evaluating his mental status. The tests used and administered are commonly accepted as instruments to evaluate neurocognitive status in patients who are suspected of having possible neurological impairment secondary to brain injury, seizure disorder or drug/alcohol problems.

11. In reviewing prior records relating to Mr. Pizzuto, I note that he was examined by Dr. Michael Emery, psychologist, as described in reports from January 23, 1986 and April 24, 1986. Of particular importance is that Dr. Emery noted in those reports that he had conducted some intellectual and limited cognitive testing of Mr. Pizzuto. He described him as having "cognitive limitations." No formal neuropsychological testing or history related to neuropsychological status was obtained or reported in those reports. Dr. Emery went on to indicate in an affidavit apparently filed in February 1987 that, in fact, he had not conducted a neurological or neuropsychological evaluation of Mr. Pizzuto. He noted, in light of Mr. Pizzuto's history, in which Dr. Emery indicated he had an apparent history of seizure disorder, child abuse, and possible organic brain damage, neuropsychological examination could be helpful in detecting whether or not there were problems in those areas with Mr. Pizzuto. Further, Dr. Emery only evaluated Mr. Pizzuto for a total of 2.75 hours between the two evaluations conducted in January and April 1986.

12. At the time Mr. Pizzuto was originally evaluated for sentencing in January and April of 1986, neuropsychological services were available in the State of Idaho. These services were also available in Eastern Washington, close to the Lewiston area. A comprehensive neuropsychological evaluation of Mr. Pizzuto, at the time of his original sentencing, would have most likely revealed the same issues that are being discussed in the current Affidavit.

13.. I also reviewed an affidavit from Dr. Michael Koerner. He is a physician who is board certified in neurology who examined Mr. Pizzuto in September 1987. He indicated that as a result of his examination it was reasonable to make a working diagnosis of epilepsy with Mr. Pizzuto and to treat it accordingly. He felt that Mr. Pizzuto's seizure disorder was reasonably typical of complex partial seizure disorder. He went on to indicate that from what he knew of Mr. Pizzuto's history,

there is a family history of seizure disorder and Mr. Pizzuto had received multiple head injuries in the past.

14. I also reviewed an affidavit by Pam Pizzuto, Gerald Pizzuto's mother. She indicated in her April 1987 affidavit that her son, Gerald, had suffered at least two significant brain injuries in his youth. The first one occurred when he was 2 ½ years of age and fell down a flight of stairs and suffered a skull fracture and was hospitalized. She indicated also that around 1970 Gerald was involved in a serious bicycle accident in which he received significant brain injury. She noted there was a significant change in his behavior after that event, consistent with a patient who suffered a brain injury. She also went on to indicate he had been severely physically abused by his stepfather and others during his upbringing. She indicated she is aware that Gerald Pizzuto has been diagnosed in the past as having a seizure disorder and that he has been on medication for the seizure disorder in the past. I also interviewed Pam Pizzuto on 8/2/96. She confirmed her statements in the affidavit. Further, she described in more detail Mr. Pizzuto's changes in behavior after his head injuries. She also described the severity of abuse he suffered from his stepfather.

15. During the course of interviewing with Gerald Pizzuto in January, February and March of 1996, he provided me with a list of his current medications being prescribed at the Maximum Security Facility at the Idaho Correctional Institute. Mr. Pizzuto indicated that one of the medications he is currently being prescribed is Depakote which he understands is for seizure control. In my working with seizure patients, Depakote is one of the more common anticonvulsant medications used to treat this disorder.

16. In my review of the medical records from the Idaho Department of Corrections, Medical Services, I note that there have been multiple occasions, dating back to 1990, in which Gerald Pizzuto has reported or has been observed having seizure like behavior. Those records also indicate Mr. Pizzuto has had neurological workup by Dr. Thomas Henson, neurologist, in April 1990. He diagnosed the patient as having a seizure disorder plus pseudo-seizure disorder. Additionally, I reviewed records from 1990 in which Mr. Pizzuto had gone to the Emergency Room at Saint Alphonsus Regional Medical Center, taken by correctional officers, for possible seizure activity. In those incidents, he had also been described as having seizure disorder. The Idaho Corrections medical records are also consistent with Mr. Pizzuto's indication that he has been on anti-convulsive medications during the course of his incarceration at that facility.

17. In my interview with Jerry Pizzuto, he indicates that he has had seizures since possibly adolescence if not early adulthood. He was somewhat uncertain as to the exact date of onset of his seizures. However, he suspects he was sometime after a bicycle accident around age 15 in which he reports receiving a significant head injury. Jerry Pizzuto indicates he has been told he had a head injury at age 2 ½ after falling down a flight of stairs and that he also suffered a second

head injury in adolescence secondary to a bicycle accident. Mr. Pizzuto further indicates that he has been on anti-seizure medications now for many years. He reports that if he does not take the medication, he has difficulty with seizure control.

18. Mr. Pizzuto further indicates that when he experiences seizures, he loses control and does not recall exactly what occurs. He understands that when he does have seizures, he can become very aggressive and violent towards others but, again, indicates that he has little recall of those events when he has the actual seizures.

19. Mr. Pizzuto indicates that he has a long history of multiple substance abuse beginning in adolescence. He indicates that his polysubstance abuse has been a lifelong problem for him

20. Jerry Pizzuto describes having a very chaotic, dysfunctional and violent family upbringing. He reports he had limited and unstable contact with his biological father. He describes being severely mentally, sexually and physically abused by his stepfather, Veryl A. Bartholomew. This involved multiple physical beatings, ongoing mental abuse and sexual abuse. The level of abuse far exceeds normal life experience and, again, was severe.

21. Neuropsychometric testing of Mr. Pizzuto did find evidence of significant neurocognitive deficits that would be consistent with a prior history of brain injury and/or seizure disorder. In particular, his neuropsychometric testing indicates that Jerry Pizzuto has difficulty with impulse control and sustained attention in activities. Additionally, neuropsychometric testing finds evidence that Jerry Pizzuto has difficulty with decision-making in more demanding or unfamiliar circumstances.

22. In my clinical experience, patients who have neurological limitations (i.e., cognitive impairment secondary to brain injury) and/or neurological disorders such as epilepsy, are more vulnerable to their environment. Specifically, these individuals, from my clinical experience, are more adversely affected by negative family and environmental conditions than other patients given their more limited resources. Therefore, the fact that Jerry Pizzuto had a very dysfunctional abusive upbringing would likely have a much larger impact upon his own behavior and development than an individual without such a neurological history. Thus affecting his ability to conform his behavior and conduct to community standards. Also, significantly disabling Mr. Pizzuto's ability to develop appropriate relationships with others.

23. The combination of Jerry Pizzuto having a seizure disorder, neurocognitive limitations that affect his impulse control and decision-making, combined with the neurotoxic affects of polysubstance abuse would have significantly impacted his abilities to make appropriate decisions and to control his behavior in an appropriate and community acceptable manner.

Finally, Mr. Pizzuto's problems with impulse control and high level problem-solving in stressful circumstances, combined with his emotional issues, make it difficult for him, in my opinion, to adequately anticipate the consequences of his activities.

24. On or about July 26, 1985, when the murders of Delbert and Bertha Herndon occurred, Mr. Pizzuto indicated that he was not taking his anti-seizure medication and had been heavily involved in polysubstance abuse. This certainly would have affected his ability to make appropriate decisions and to effectively control his behavior in a highly charged and emotional circumstance.

25. Additional information and records could be beneficial in further evaluating these issues as they relate to Gerald Pizzuto. Specifically, obtaining the following information would be of benefit:

A. Medical records relating to the two prior head injuries that Mr. Pizzuto suffered in his youth.

B. Obtaining head MRI Scan of Gerald Pizzuto would assist in determining whether or not a structural lesion could be identified that would account for his seizure disorder and his neurocognitive deficits.

C. Obtaining sleep deprived EEG would be of benefit in further evaluating Mr. Pizzuto's seizure disorder.

D. Obtain and review records from Idaho Maximum Security Correctional Institute regarding Mr. Pizzuto's discipline record and behavior, during the course of his incarceration.

26. In my interactions with Mr. Pizzuto and in my review of records of prior evaluations, I note that he can present as very verbose with considerable "bravado." He demonstrates a strong tendency to overstate his accomplishments. This also includes his accomplishments that relate to how "tough or mean" Mr. Pizzuto is. In my interviewing of Pam Pizzuto and in reviewing Jerry Pizzuto's history, it is clear that this tendency towards exaggeration of accomplishments is of a longstanding nature. There does appear to be a specific psychological dynamic involved with this behavior. Specifically, beginning at a young age, Mr. Pizzuto was severely physically, mentally and sexually abused by his stepfather. Pam Pizzuto, his mother, reports that Jerry Pizzuto would frequently attempt to embellish and overstate his accomplishments in hopes that his stepfather would be accepting of him and not abuse him so severely. Despite multiple occasions of abuse, Jerry Pizzuto persisted in attempting to gain acceptance from his stepfather via his exaggerations and overstatements of his accomplishments. This appeared to become an ingrained characteristic for Mr. Pizzuto. Additionally, his mother reports that Jerry Pizzuto engaged in more and more fantasy play and activities, also presenting circumstances in which he was either of a stature that he could not

be harmed by his stepfather or was protected by some type of animal that would help protect him. This further goes to the ingrained pattern that we now see with Mr. Pizzuto of him often being unreliable as a historian secondary to the amount of "bravado" in his presentation. Again, this appears to have been an attempt by Mr. Pizzuto to adapt to a highly abusive and stressful upbringing as a young child.

27. Mr. Pizzuto is influenced by the peer group he is interacting with. This influence can be quite significant, based upon review of Mr. Pizzuto's history and my psychological testing of him. Specifically, Mr. Pizzuto is very concerned about what impression he gives to others. As mentioned above, this can often lead him to greatly overstate his abilities, accomplishments, etc. It is very important for Mr. Pizzuto to appear tough and unafraid in situations, to those that are around him. Therefore, in a highly emotionally charged situation, Mr. Pizzuto would be easily influenced by others in the sense that he would not want to show any "weakness." He also then is very likely to be influenced by others in terms of going along with or engaging in acts with the group so that he is accepted by others and not viewed as "weak" or "afraid."

28. Additionally, in a peer group, Mr. Pizzuto has a strong need for attention and acceptance. His personality testing suggests he can be rather passive dependent. Consequently, all of these issues result in Mr. Pizzuto being easily influenced by his peers. Further, these issues, with his cognitive and emotional limitations, make it very unlikely Jerry Pizzuto would be a leader with a group of peers.

29. Mr. Pizzuto was described as an Antisocial Personality by Dr. Emery, based upon his January and April 1986 evaluations. However, as best I can determine, Dr. Emery had limited records, little, if any, awareness of Mr. Pizzuto's organic mental status, and had only conducted a brief examination. My more extensive evaluation of Jerry Pizzuto reveals a much more complex person with many other significant factors. While Mr. Pizzuto does have some antisocial traits, he also struggles with an organic mental syndrome, related to his epilepsy. He also shows evidence of both Histrionic and Passive Dependent features to his personality which were also heavily influenced by the savage abuse Jerry suffered at the hands of his stepfather.

30. There has been concern, in his original sentencing, that Mr. Pizzuto presented as a significant threat to others. I will agree in reviewing his history and records that he does, in fact, present a significant threat to others if he were again placed in an unstructured environment outside of the correctional system. However, in considering Mr. Pizzuto's age and in reviewing what I know at this point about his conduct while in the correctional facility, either in Michigan or Idaho, I do not believe he poses a high risk to others. Specifically, in reviewing the Michigan Correctional Institute's records, we note that in the beginning, when Mr. Pizzuto was quite young (i.e., 19) he had a few incidents in which he was written up for fights and/or being threatening with other inmates. However, in continued review of the Michigan records, we see that behavior drop off substantially during the

course of his incarceration. In fact, he was ultimately released after 9 years of incarceration on a sentence of 20-40 years. He was described as having complied with their requests and having made good adjustment to the correctional system. Additionally, I am not aware at this time of any incidents in which Mr. Pizzuto has posed a significant threat to other inmates or correctional officers during the course of his stay at the Idaho Maximum Security Facility. Therefore, I believe if Mr. Pizzuto were to continue within the structure of a correctional facility, I do not believe he would pose a high risk to others. I do not feel Jerry Pizzuto poses a significant risk to others within the prison population. If Mr. Pizzuto continues on medication, has the structure of the correctional system and remains abstinent from drugs or alcohol, I believe he can function safely and adjust appropriately to long-term incarceration.

Craig W. Beaver, Ph.D.

Craig W. Beaver, Ph.D.
Diplomate in Clinical Neuropsychology, ABPP

CWB:mb

JOAN M. FISHER
Idaho State Bar No. 2854
Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
201 North Main
Moscow ID 83843
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR. Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV-03-34748 AFFIDAVIT OF RON DIAS

STATE OF CALIFORNIA)
: ss
County of Humboldt)

I, Ron Dias, a person over eighteen years of age and competent to testify, mindful of the penalty of perjury and being duly sworn under oath, declare and affirm as follows:

1. I am currently a resident of Eureka, California and am employed as the Counselor/Scholarship & Financial Aid Coordinator for Eureka High School in Eureka, California.

2. I have a B.A. in psychology (1969) and an M.A. in psychology (1971) from Humboldt State University in Arcata, California.

3. On Friday, May 7, 2004, I met with Amy Hurd, an investigator with the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho at ~~Zoe Barnum~~ High School at 2:00 p.m. 7/28/04 R.D.

4. In 1971-1972, I was a counselor at Zoe Barnum, during which time I came into contact with students at Zoe Barnum. When Mr. Pizzuto was at Zoe Barnum, I was there two days out of the work week. I spent the other three work days at Eureka High.

5. Ms. Hurd showed me an aged photograph of a person approximately fourteen or fifteen years of age who she identified as Gerald Pizzuto. I have reviewed this photograph, a copy of which is attached hereto, initialed and dated by me this date. Having had my memory refreshed with the photograph, I recalled having contact with Jerry Pizzuto while assigned to Zoe Barnum.

6. I have a specific memory of the boy identified to me as Jerry Pizzuto. I recall that the boy was emotionally very immature; developmentally behind other people; outgunned by his class peers; annoying; did not appear to have any friends; probably cognitively immature; talked out of turn; and was unorganized, unruly, and inconsistent.

7. The boy identified to me as Jerry Pizzuto would occasionally talk to other students in a threatening manner. It was clear that Jerry did not have the physical package or ability to carry out these threats.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 28TH day of July, 2004.

Ron Dias

SUBSCRIBED AND SWORN TO before me this 28TH day of July, 2004.

NOTARY PUBLIC FOR CALIFORNIA
Residing at
JAN 23, 2008
Commission expires :

PATRICIA L. HARRIS
Commission # 1458684
Notary Public - California
Humboldt County
My Comm. Expires Jan 23, 2008

JOAN M. FISHER
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Capital Habeas Unit
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201 North Main
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR. Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV-03-34748 AFFIDAVIT OF MARGARET HERZOG

State of Washington)
: ss
County of Spokane)

I, Margaret Herzog, a person over eighteen years of age and competent to testify, mindful of the penalty of perjury and being duly sworn under oath, declare and affirm as follows:

1. I was the school principal at St. Ann's School in Spokane, Washington, a Catholic grammar school where Gerald Ross Pizzuto Jr. (hereinafter "Jerry") attended sixth grade during the academic year of 1968-69. I was a teacher for eight years before I became principal at St. Ann's in 1967. I was known as "Sister Margaret."

2. St. Ann's was a Catholic grammar school wholly funded by student tuition and monies from the Spokane Catholic Diocese, receiving no monetary assistance from the state of Washington. The school was located in the poorest of the poor neighborhoods in Spokane and had a standard tuition amount of $50 per student per school year. I recall many families paying $1 per month for each of their children to attend St. Ann's.

3. On July 15, 2003, I met with Rosanne Dapsauski, an investigator with the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho at my home in Spokane. At that meeting, Ms. Dapsauski provided Jerry's school photos and report cards during his time at St. Ann's.

4. I have reviewed Jerry's report card for the academic year during which he attended St. Ann's, and I have reviewed the photograph of Jerry from that same time period, copies of which are attached hereto, initialed and dated by me this date. I have no specific recollection of Jerry.

5. Mae Drury, who is now deceased, was Jerry's sixth grade teacher. I worked with Mrs. Drury during my tenure at St. Ann's. I fully respected Mrs. Drury as a teacher and I would never doubt any decision made by her. She was committed to helping students succeed, and it was her practice to help students in every way possible, including giving extra help to students during school hours and after school into the late afternoon.

6. St. Ann's School rarely failed a student; however, if a student was held back, the teacher felt that the student had not progressed sufficiently in their academic learning and needed to repeat the year. I can see that Jerry was retained by Mae Drury to repeat the sixth grade.

7. St. Ann's School had no special education programs. The school was severely underfunded, so there was no money or personnel to enable such programs to exist.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 25TH day of September, 2004.

Margaret Herzog

Margaret Herzog

SUBSCRIBED AND SWORN TO before me this 25TH day of September, 2004.

OFFICIAL SEAL
JOHANNES HERZOG
NOTARY PUBLIC
STATE OF WASHINGTON
MY COMMISSION EXPIRES
DECEMBER 31, 2004

NOTARY PUBLIC FOR WASHINGTON
Residing at 345 E 12TH Moscow
Commission expires : Dec 31 2004

JOAN M. FISHER
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR. Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV-03-34748 AFFIDAVIT OF PAUL L. IRCINK

State of Washington)
: ss
County of Spokane)

I, Paul L. Ircink, mindful of the penalty of perjury and being duly sworn under oath, declare and affirm as follows:

1. I am over the age of 18 and competent to testify.

2. I live at 3310 North Highway 395, Deer Park, Washington, 99006 .

3. I have a B.A. in education from Gonzaga University.

4. I taught for 18 years, was a principal for 14 years, and served one full year as a staff

P.L.I.

developer.

5. I was Jerry Pizzuto's 6th grade teacher (1969 - 1970 academic year) at Hamblen Elementary in Spokane, Washington.

6. The average 6th grade student was 11 and then 12 years of age during the academic year.

7. Having taught and known hundreds of children in my career in education, I specifically remember Jerry *Bartholomew* [idenitified to me as "Jerry Pizzuto"] because his physical maturity caused him to stand out from his peers. Jerry had a thin growth of hair on his upper lip, the beginnings of a mustache

8. There was an apparent age difference between Jerry and his classmates. Because Jerry appeared to be older I recall believing he must have been held back in school.

9. Hamblen Elementary did not departmentalize, meaning the sciences and so forth did not have their own departments and respective teachers. Sixth grade teachers were responsible for teaching their students the entire curriculum and thus, I taught all of the subjects to Jerry for which he received letter grades. I gave Jerry all of the letter grades for all of his classes.

10. Around the time Jerry was in attendance at Hamblen, the teacher to student ration was roughly 1:30.

11. Children with learning disabilities are undoubtedly at greater risk of going unnoticed with larger classes.

12. The Hamblen community was largely affluent. Jerry, however, lived in the section of the Hamblen school district limits that was of low socio-economic status.

13. Jerry arrived after the school year commenced, though still in the first out of four

P.L.I.

academic quarters. Jerry was a loner. He did not seem to have friends among his classmates. Concerned for Jerry, I suggested to him that he get involved in after-school sports. Jerry replied that he could not participate because he had to get home.

14. Though parents were invited to meet with the teacher when report cards were administered at the end of each quarter, I never met Jerry's parents.

15. Paul divided his class into two groups: one for average to higher learning students and one for lower learning students. Jerry was placed in the lower learning group.

16. I have reviewed Jerry's report card for the academic year during which I taught Jerry, a copy of which is attached hereto, initialed and dated by me this date. The report card reflects the likelihood that Jerry was probably at the lower part of the low group.

17. When Jerry attended Hamblen, no programs for special education or for special needs students existed. The only separation of the students in regard to special needs was the result of my division of the into the two groups. Unlike the other school district in which I taught, the school district in which Hamblen School was located did not receive moneys to fund a special education. Based on Jerry's academic performance, I would have referred Jerry to such a program had one been available at Hamblen during Jerry's attendance. It is my opinion based upon Jerry's academic performance that Jerry would have qualified for special education. This opinion is further supported by Jerry's age of 13 and 14 in the sixth grade. Despite the fact that he was a couple of years older than the average 6th grade student, Jerry performed at the bottom of his class.

18. Labels such as mentally retarded were not utilized at this time within the Hamblen school, nor were they used at any teaching institution at which I was employed. You were special

P.L.I.

performance would have yielded an F, a failing grade, but for the fact that the group in which he was being compared was other low learning students.

24. The report card reveals that at 13 and 14 years of age, Jerry was performing *average* and *below average* in a group of 11 and 12 years olds who were considered to be of lower intellectual ability.

25. During the 2nd quarter, Jerry received a minus sign in arithmetic. There was a minus in the subcategory *computation*. There was no minus sign in the subcategory *reasoning* because the bulk of 6th grade math was computation and I would have been unlikely to measure *reasoning*. The absence of a mark beside *reasoning* does not mean that Jerry had even average reasoning abilities. If Paul did mark the *reasoning* box on another child's report card, it would have been a plus sign to indicate that a child had gone beyond that which was assigned to the class.

Dated this 28th day of May, 2004.

Paul L. Ircink

SUBSCRIBED AND SWORN TO before me this 28th day of May, 2004.

JAY C. LINDH NOTARY PUBLIC STATE OF WASHINGTON Commission Expires MAY 16, 2007

NOTARY PUBLIC FOR WASHINGTON
Residing at Deer Park
Commission expires : May 16, 2007

P.L.I.

JOAN M. FISHER
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Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR. Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV-03-34748 AFFIDAVIT OF WILLIAM C. MATSON

State of California)
: ss
County of Humboldt)

I, William C. Matson, a person over eighteen years of age and competent to testify, mindful of the penalty of perjury and being duly sworn under oath, declare and affirm as follows:

1. I currently reside in Trinidad, California.

2. I received a B.S. in Fisheries (1960) and an M.A. in Educational Psychology (1973) from Humboldt State University in Arcata, California.

3. I was the school counselor at Zoe Barnum High School in Eureka, California, a school where Gerald Ross Pizzuto Jr. (hereinafter "Jerry") attended the ninth grade during the academic year of 1971-72.

4. On June 10, 2004, I met with Amy Hurd, an investigator with the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho, in Eureka, California. At that time, Ms. Hurd provided me with a copy of Jerry's Zoe Barnum High School permanent record. Ms. Hurd also provided an aged photograph of a person approximately fourteen or fifteen years of age whom she identified as Jerry Pizzuto. I have reviewed Jerry's report card and the photograph, copies of which are attached hereto, initialed and dated by me this date.

5. Based on the photograph provided, I have no specific memory of the boy identified to me as Jerry Pizzuto. I was, however, able to glean information about Jerry's academic progress by examining his permanent record.

6. The Math box under the Record of Test Data heading was marked on Jerry's report card, while the Reading box was not. Zoe Barnum High School would not have given one test (Math) and not the other (Reading). The omission of a check in the Reading box indicates that Jerry did not pass the Reading Equivalency Test given by the school.

7. Jerry's record indicates that he received a grade of D in English. This is a significant mark because it was my experience while at Zoe Barnum that the school rarely gave a D grade to any student.

8. Students at Zoe Barnum were not held back or given failing grades (F's). Instead, students were given an "incomplete" if their work was not sufficient to warrant anything

other than an F. This type of grading was based on the idea that if students continually received F's, they would give up. Even when students received a D or an "incomplete," they would still progress to the next grade, though they would be responsible for earning enough credits to graduate, a task completed by accumulating "production days."

9. The term "production days" on the report cards used at Zoe Barnum were days counted by the teachers where they felt a student was actively working. A student sitting at his/her desk or study carrel and deemed to be behaving would generally receive credit for a production day so long as s/he was attempting to complete the given assignment. At Zoe Barnum, teachers were more interested in the students attempting to work, than they were in the quality of the work product.

10. After Ms. Hurd asked me if Jerry could have been placed in the ninth grade at Zoe Barnum without completing the eighth grade at another school, I responded that, assuming he had not completed the eighth grade, he was likely placed in the ninth grade anyway at Zoe Barnum High School to prevent him from being further removed from fellow students in age. At the age of 15, Jerry was more closely matched to ninth grade students than eighth grade students.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 29 day of ~~September~~ November, 2004.

William C. Matson

SUBSCRIBED AND SWORN TO before me this 29th day of ~~September~~ November, 2004.

J. PAUL TREPANIER
Commission # 1205934
Notary Public - California
Humboldt County
My Comm. Expires Dec 1, 2004

NOTARY PUBLIC FOR CALIFORNIA
Residing at McKINLEYVILLE
Commission expires : 12-1-04

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR.

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. CV-03-34748

AFFIDAVIT OF GAYE W. MOMERAK

State of Nevada)
: ss
County of Washoe)

I, Gaye W. Momerak, a person over eighteen years of age and competent to testify, mindful of the penalty of perjury and being duly sworn under oath, declare and affirm as follows:

1. I currently reside in Reno, Nevada.

2. I received a B.A. in education from San Jose State College in 1958.

3. I was Gerald Ross Pizzuto Jr's (hereinafter "Jerry") fifth grade teacher at Stead Elementary in Reno, NV during the academic year of 1967-68. This was my first year at

Stead Elementary, I had been teaching since 1958. Stead Elementary was a school on a military base, until the base was closed and the housing was converted to low income housing that year. As a result, Stead Elementary had a huge influx of low-income students.

4. The academic year of 1967-68 was particularly challenging for me as a teacher. My class originally had 45-50 students. After an increase in staff, my class size was eventually reduced to 35-40 students. There were more behavior problems within the group of children at Stead than in groups I had formerly taught. The philosophy of the school principal, Ted Furchner, who had been at Stead Elementary while it was a military school, was to evaluate the overall performance of the school based solely on classroom decorum, not by the children's academic progress.

5. On April 9, 2004, I met with Amy Hurd, an investigator with the Capital Habeas Unit of the Federal Defenders of Eastern Washington and Idaho. Ms. Hurd showed me an aged photograph of a person approximately fourteen or fifteen years of age whom she identified as Jerry Pizzuto. I have reviewed the photograph of Jerry, a copy of which is attached hereto, initialed and dated by me this date. Ms. Hurd also provided a copy of Jerry's grades from the 1967-68 academic year. I have reviewed Jerry's report card, a copy of which is attached hereto, initialed and dated by me this date.

6. After reviewing the photograph, a fifth grade school portrait, I recalled specific memories of Jerry. I also remember that Jerry had a sister who was also in my class [Renee] but my memory of her is limited to her interaction with Jerry.

7. Jerry was admitted at Stead Elementary ten days after the academic year officially began

in the Fall of 1967. At Stead, the student population changed frequently; it was common for children to come and go at different times during the academic year.

9. Jerry had no overt behavior problems which caused me concern or to contact the counselor or school psychologist. I remember Jerry as being an immature student. I remember Jerry lacked the ability to interact with his peers. My recollection is that Jerry did not have any friends. I recall his relationship with his sister, Renee. Jerry and Renee always seemed to be very protective of each other when they were in my class. Other than the relationship with his sister, Jerry did not associate with other classmates.

10. It became obvious to me that Jerry had been held back in school at least once. Jerry was older than the average fifth grade student, since Jerry was ages eleven and twelve during the school year, whereas most other fifth graders would have been ages ten and eleven.

11. In October of 1967, Jerry took the Standard Achievement Test. Jerry's score was a 4.2, indicating performance of someone at a fourth grade and two-month level. The national norm for this test was 5.1, indicating performance of someone at a fifth grade and one-month level. The class median for my fifth grade class at Stead was 4.7, indicating performance of someone at a fourth grade and seven-month level. At the time, I translated Jerry's score to mean that Jerry was performing a year behind where he should have been as a fifth grader. Given that Jerry was sixth grade age, he was even farther behind.

12. I have promoted students with low academic performance to the next grade level during my teaching career. For example, if a student was older and had already experienced being withheld from promotion to the next grade level, I would promote that student to

the next grade in an attempt to prevent the child from being further isolated from his/her peers. Most of Jerry's grades ranged from C- to D-. The report card reflects the likelihood that Jerry had received failing grades (F's), but I promoted him to the next grade level because he was already a year older than his classmates.

13. School counseling was rare at Stead Elementary. Only children with overt behavior problems were given specific counseling attention; that is to say, Jerry would not have received assistance for a learning disability if he did not act out in class.

14. Stead Elementary provided very few services for special needs children. I do not recall any of my students being removed from the class to receive special education assistance.

15. I had no formal education or instruction about identifying special needs children or learning disabilities. As a teacher, I felt if a child was trying his/her hardest, I would pass him/her on to the next grade level. Most concerns I had toward specific students during my teaching days were triggered by the student's overt behavioral problems; therefore, a student with disabilities could have gone through my class at Stead without having their specific disabilities recognized.

16. During the academic year of 1967-68, my large class, coupled with the strict military-style approach of teaching classes required by our school principal, did not allow me to pay particularly close attention to students on an individual basis. As such, I would not have perceived Jerry as worthy of extra attention, regardless of his apparent performance deficit.

17. The main focus at Stead was to educate and to get the children into the next grade no matter what. The emphasis was not to look at the students and their home environment.

There was a "no nonsense"attitude about education – teachers just taught the class and did not become involved with the children's personal lives. In those days, teachers did not look at children in the same way teachers do now, in terms of looking for indications of abuse. Jerry could have been in an abusive home, but I would not have known. I sensed that something wasn't right with Jerry, there just wasn't anything I could do about it to help him.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated this 3rd day of ~~September~~ December, 2004.

Gaye W. Momerak

Gaye W. Momerak

SUBSCRIBED AND SWORN TO before me this 3rd day of ~~September.~~ December, 2004.

VICKI L. CRAWFORD
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 00-65605-2 - Expires October 13, 2008

Vicki L. Crawford
NOTARY PUBLIC FOR NEVADA
Residing at Reno NV
Commission expires : 10-13-08

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR. **Petitioner,** **v.** **STATE OF IDAHO,** **Respondent.**	**CASE NO. CV 34748** **AFFIDAVIT OF CRAIG W. BEAVER, PhD**

STATE OF IDAHO)
: ss.
County of Ada)

I, Craig W. Beaver, being first duly sworn, deposes and states as follows:

1. Currently, I am licensed as a psychologist in the State of Idaho and previously had completed a neuropsychological examination of Gerald R. Pizzuto, Jr.

I am qualified under state law to conduct neuropsychological testing.

2. Currently, I hold a PhD in clinical psychology from Miami University of Ohio, an AP Approved Clinical Training Program. I also completed an internship at the Fort Miley VA

Medical Center in Coordination with the UC San Francisco Medical School, which is also an AP Approved Clinical Training Program, with an emphasis in clinical neuropsychology. I then completed four years of additional supervised practice under Dr. Lloyd Cripe. In short, I have extensive formal training in the area of brain behavior relationships.

3. Presently, I hold a Diplomate in Clinical Neuropsychology by the American Board of Professional Psychological and the American Board for Clinical Neuropsychology. This reflects my additional training and expertise in the area of clinical neuropsychology. There are only a little over 300 boarded neuropsychologists practicing and recognized in the United States.

4. Please see attached curriculum vitae outlining my training and clinical and professional experiences working with patients who have neurological disorders that affect their function and behavior. Presently, in addition to private practice, I am the Director of Neuropsychological Services at Idaho Elks Rehabilitation Hospital in Boise, Idaho in which I oversee a Brain Injury Rehabilitation Program.

5. Previously, I had conducted an examination of Gerald Pizzuto, Jr. in 1996. At that time, I completed neuropsychometric testing of him. Additionally, I reviewed other neuro-psychological testing completed on Mr. Pizzuto in the past. Neuropsychometric testing was used to evaluate Mr. Pizzuto's cognitive abilities, particularly as it refers to his ability to understand and process information, communicate, abstract information and learn from experience, as well as assessing ones logical reasoning and impulse control.

6. In addition to formal assessment of Gerald Pizzuto, Jr., I have also completed an extensive review of medical records related to his care and treatment. This included a number of neurological evaluations and workups relating to Gerald Pizzuto, Jr.

7. Neuropsychological examination of Mr. Pizzuto, Jr. demonstrates significant neurocognitive deficits. More specifically, Mr. Pizzuto on formal neuropsychometric testing, evidences difficulties with language skills, memory, and higher-level reasoning and problem solving skills. Thus, he does show impairment on formal neuropsychometric testing of difficulties with mental abilities. These deficits are consistent with an individual who has an organic brain disorder.

8. Review of medical records finds evidence that Gerald Pizzuto has a long history of seizure disorder, with evidence of abnormal EEG and a history of requiring anticonvulsive medications. This also is both evidenced and consistent with Gerald Pizzuto having an organic brain disorder that affects his mental capacities.

9. Mr. Pizzuto has continued to require pharmacological management of his seizure disorder since he was last examined by myself in 1996. He has continued to have neurological difficulties. Therefore, given that it has now been over eight years since his last comprehensive neuropsychological examination, I would strongly recommend that he undergo repeat neuropsychometric studies. Repeat neuropsychometric studies are needed to better determine Gerald Pizzuto's cognitive abilities. Often, patients that have persistent seizure disorders, for example, will decline over time in their overall mental abilities. Therefore, repeat neuropsychological testing to evaluate issues relating to his ability to understand and process information and abstract information, communicate, and learn from experience, engage in logical reasoning, and his abilities to control his impulses would be evaluated by repeat testing.

10. Given his history of seizure disorder and positive findings on EEG examination, it is my opinion that Gerald Pizzuto would also benefit from further neurological study. This should include not only a comprehensive neurological examination, but also further neuroradiological studies (i.e. PET scan, Spec scan, and/or MRI) to further evaluate his neurological functioning and how it affects his behavior. Those technologies are readily available in the medical community adjacent to where Mr. Pizzuto currently is incarcerated.

11. The combination of having more current neuropsychometric testing on Mr. Pizzuto, combined with additional neurological studies would further elucidate his mental abilities, and the etiology of his limitations. These factors are particularly relevant with regard to issues of his culpability given the legal circumstance in which he finds himself.

12. Mr. Pizzuto does have a history of intellectual limitations and poor adaptability. Within the context of the recent U.S. Supreme Court case, *Atkins v. Virginia*, current evaluation of Gerald Pizzuto is indicated to determine if he meets the criteria of mental adaptability.

FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 15th day of September, 2004.

Craig W. Beaver, PhD

Craig W. Beaver, PhD, ABPP-CN
Clinical Neuropsychologist

SUBSCRIBED AND SWORN to before me this 15th day of September, 2004.

ANNE KNITTLE NOTARY PUBLIC STATE OF IDAHO

Anne Knittle
NOTARY PUBLIC FOR IDAHO
Residing in Boise, Idaho
Commision Expires: 10-02-2006