IN THE

SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the
Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Did *Atkins v. Virginia*, 536 U.S. 304 (2002), require the use of clinical standards for the determination of sub-average intellectual functioning?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are all listed in the caption.

RELATED PROCEEDINGS

Idaho County District Court
Case No. 22075
State v. Pizzuto
Judgment and Sentence entered, May 27, 1986

Idaho County District Court
Case No. 23001
Pizzuto v. State
Post-conviction relief denied, Apr. 15, 1988

Idaho Supreme Court
Case Nos. 16489 and 17534
State v. Pizzuto, 810 P.2d 680 (Idaho 1991)
Conviction, sentence and denial of post-conviction relief affirmed, Jan. 15, 1991

Supreme Court of the United States
Case No. 91-5965
Pizzuto v. Idaho, 503 U.S. 908 (1992)
Cert. denied, Mar. 2, 1992

Idaho County District Court
Case No. 23001
Pizzuto v. State
Post-conviction relief dismissed, Sept. 29, 1994

Idaho Supreme Court
Case No. 21637
Pizzuto v. State, 903 P.2d 58 (Idaho 1995)
Appeal dismissed, Aug. 3, 1995

Idaho County District Court
Case No. CV-1994-961
Pizzuto v. State
Post-conviction relief denied, Mar. 19, 1997

United States District Court, District of Idaho
Case No. CV-92-00241-S-AAM
Pizzuto v. Arave
Habeas corpus denied, Apr. 7, 1997

Idaho County District Court
Case No. CV-1997-1837
Pizzuto v. State
Post-conviction relief denied, May 26, 1998

Idaho Supreme Court
Case No. 24802
Pizzuto v. State, 10 P.3d 742 (Idaho 2000)
Denial of post-conviction relief affirmed, Sept. 6, 2000

United States Court of Appeals, Ninth Circuit
Case No. 97-99017
Pizzuto v. Arave, 280 F.3d 949 (9th Cir. 2002)
Denial of habeas corpus affirmed, Feb. 6, 2002

United States Court of Appeals, Ninth Circuit
Case No. 01-71257
Pizzuto v. Fisher
Permission to file second habeas petition denied, Feb. 14, 2002

Supreme Court of the United States
Case No. 04-10640
Pizzuto v. Fisher, 546 U.S. 976 (2005)
Cert. denied, Oct. 31, 2005

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Pizzuto v. State
Post-conviction relief denied, Dec. 16, 2005

Idaho County District Court
Case No. CV-2003-34748
Pizzuto v. State
Post-conviction relief dismissed, Dec. 16, 2005

United States Court of Appeals, Ninth Circuit
Case No. 05-77184
Pizzuto v. Hardison
Permission to file successive habeas petition granted, May 16, 2006

Idaho Supreme Court
Case Nos. 32677 and 32678
Idaho v. Pizzuto
Appeal dismissed, Dec. 28, 2006

Ada County District Court
Case No. CV-2006-5139
Pizzuto v. State
Post-conviction relief denied, Oct. 31, 2007

Idaho Supreme Court
Case No. 32679
Pizzuto v. State, 202 P.3d 642 (Idaho 2008)
Denial of post-conviction relief affirmed, Feb. 22, 2008

Supreme Court of the United States
Case No. 06-11010
Pizzuto v. Idaho, 552 U.S. 1227 (2008)
Cert. granted, judgment vacated, and remanded, Feb. 25, 2008

Idaho Supreme Court
Case No. 35187
Rhoades et al. v. State, 233 P.3d 61 (Idaho 2010)
Denial of post-conviction relief affirmed, Mar. 17, 2010

Idaho Supreme Court
Case No. 34845
Pizzuto v. State, 233 P.3d 86 (Idaho 2010)
Denial of post-conviction relief affirmed, Mar. 19, 2010

Supreme Court of the United States
Case No. 10-6377
Pizzuto v. Idaho, 562 U.S. 1182 (2011)
Cert. denied, Jan.18, 2011

Supreme Court of the United States
Case No. 10-7831
Rhoades et al. v. Idaho, 562 U.S. 1258 (2011)
Cert. denied, Feb. 28, 2011

United States District Court, District of Idaho
Case No. 1:05-cv-00516-BLW
Pizzuto v. Blades
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United States Court of Appeals, Ninth Circuit
Case No. 11-70623
Pizzuto v. Blades, 673 F.3d 1003 (9th Cir. 2012)
Permission to file successive habeas petition denied, Mar. 8, 2012

United States District Court, District of Idaho
Case No. 1:92-cv-00241-BLW
Pizzuto v. Ramirez
Rule 60(b) denied, Mar. 22, 2013

United States Court of Appeals, Ninth Circuit
Case No. 12-99002
Pizzuto v. Blades, 729 F.3d 1211 (9th Cir. 2013)
Denial of habeas corpus affirmed, Sept. 9, 2013

United States Court of Appeals, Ninth Circuit
Case No. 12-99002
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Withdrawing opinion, vacating district court opinion and remanding, July 15, 2014

United States Court of Appeals, Ninth Circuit
Case No. 13-35443
Pizzuto v. Ramirez, 783 F.3d 1171 (9th Cir. 2015)
Denial of Rule 60(b) affirmed, Apr. 22, 2015

United States District Court, District of Idaho
Case No. 1:05-cv-00516-BLW
Pizzuto v. Blades
Habeas corpus denied on remand, Nov. 28, 2016

United States Court of Appeals, Ninth Circuit
Case No. 16-36082
Pizzuto v. Yordy, 947 F.3d 510 (9th Cir. 2019)
Denial of habeas corpus affirmed, Dec. 31, 2019

Idaho County District Court
Case No. CV-2003-34748
Pizzuto v. State
Rule 60(b) denied, Jan. 6, 2020

Idaho Supreme Court
Case No. 32679
Pizzuto v. State
Motion to Recall Remittitur denied, May 14, 2020

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Petitioner Gerald Ross Pizzuto respectfully submits this petition for a writ of certiorari to review the judgment of the Idaho Supreme Court.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, at App. 1–22, and is available at *Pizzuto v. State of Idaho*, 484 P.3d 823 (Idaho 2021).[1]

JURISIDICTIONAL STATEMENT

On February 3, 2021, the Idaho Supreme Court issued a decision. The court denied Mr. Pizzuto's petition for rehearing on April 29, 2021. App. 23. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which reads in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

STATE STATUTES INVOLVED

This petition involves Idaho Code § 19-2515A, which is entitled "Imposition of death penalty upon mentally retarded person prohibited," and 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

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

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.

* * *

(3) If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed.

* * *

(6) 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.

STATEMENT OF THE CASE

Mr. Pizzuto was convicted of two counts of first-degree murder and sentenced to death in 1986. *State v. Pizzuto*, 810 P.2d 680, 687 (Idaho 1991). Since then, his case has been engaged in continual litigation, covering numerous proceedings and issues. Here, he will only set forth the events relevant to the question presented.

The question presented here concerns intellectual disability. To understand the certiorari petition, including the statement of the case, some background on intellectual disability is necessary. Intellectual disability is comprised of three features: 1) "subaverage intellectual functioning"; 2) "significant limitations in adaptive skills"; and 3) manifestation "before age 18." *See Atkins*, 536 U.S. at 318; Idaho Code § 19-2515A(1)(a). IQ scores go to the first prong of this three-prong test. *See Atkins*, 536 U.S. at 309 n.5 ("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"); Idaho Code § 19-2515A(1)(b) (defining subaverage intellectual functioning for purposes of Idaho law as an IQ "of seventy (70) or below").

In 2003, Mr. Pizzuto sought post-conviction relief based on this Court's decision in *Atkins*. App. 24. To establish his intellectual disability, Mr. Pizzuto expressly noted his verbal IQ score of seventy-two, "which is within the plus or minus 5 point range, characterizing him as having significantly subaverage intellectual functioning." App. 28. In 2005, without granting an evidentiary hearing or additional testing, the state district court summarily dismissed the petition.

In 2008, the Idaho Supreme Court affirmed the post-conviction court's dismissal of the petition. *Pizzuto v. State*, 202 P.3d 642, 657 (Idaho 2008). The court reasoned that that the standard error of measurement ("SEM") for IQ scores of "plus or minus five points" did not apply to Mr. Pizzuto's seventy-two verbal IQ score, because "the legislature did not require the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.* at 651.

After a series of proceedings whose vicissitudes are not germane here, the Ninth Circuit ultimately denied Mr. Pizzuto's *Atkins* claim. *See Pizzuto v. Yordy*, 947 F.3d 510 (9th Cir. 2019) (per curiam), *cert. denied*, 141 S. Ct. 661 (2020). The Ninth Circuit recognized that the Idaho Supreme Court's adjudication of the claim "was inconsistent with the clinical definitions in place at the time of the state

court's decision," in large part because of its confusion about the SEM. *See id.* at 525. Nevertheless, the Ninth Circuit determined that relief was barred under 28 U.S.C. § 2254(d) because the state court's error was only prohibited by *Hall v. Florida*, 572 U.S. 701 (2014), which was unborn at the time of the 2008 opinion, and not by *Atkins* itself. *Id.* at 526–27. Although it was powerless to grant relief, the Ninth Circuit emphasized that its decision did "not preclude the Idaho judiciary from reconsidering" Mr. Pizzuto's *Atkins* claim given the tension between the state supreme court's analysis and the science that existed at the time, as well as the law as it later developed. *Id.* at 534–35.

Consistent with the Ninth Circuit's suggestion, and based on its statements, Mr. Pizzuto filed a motion to reopen his *Atkins* post-conviction claim in the state district court under Idaho Rule of Civil Procedure 60(b). App. 2. The district judge denied the motion and the Idaho Supreme Court affirmed. App. 2. In pertinent part, the Idaho Supreme Court reasoned that its 2008 opinion was correctly decided under the law in place at the time. App. 7–10. As the court explained, it was true in 2008—as its earlier opinion stated—that "the legislature did not require that the IQ score be within five points of 70 or below because of the standard error of measurement." App. 9. "Rather, the legislature required an IQ score of 70 or below." *Id*. There was nothing wrong with that reasoning in 2008, the court continued, because "*Atkins* did not adopt specific clinical standards." *Id.*.

The court later denied a timely petition for rehearing, App. 23, and Mr. Pizzuto now seeks certiorari review here.

REASONS FOR GRANTING THE WRIT

I. There is a conflict between lower courts on whether *Atkins* adopted the clinical standards regarding the SEM.

There is a clear and entrenched split between lower courts on whether *Atkins* approved of the clinical standards concerning sub-average intellectual functioning, including the SEM.

On one side of that line there are several decisions, from both state and federal courts around the country, holding that *Atkins* did indeed make the clinical IQ standards part of Eighth Amendment precedent, and that *Hall* therefore did not change the law but merely confirmed what it had already been. *See Fulks v. Watson*, 4 F.4th 586, 592 (7th Cir. 2021) (describing the continuity in the law between *Atkins* and subsequent cases, including *Hall*; observing that *Atkins* "did rely on clinical definitions;" and categorizing later decisions such as *Hall* as primarily "course corrections to state-court applications of *Atkins*"); *Smith v. Sharp*, 935 F.3d 1064, 1077, 1080 (10th Cir. 2019) (evaluating several IQ scores, including a seventy-three, with an eye to "*Atkins*' statement that a score of 75 or lower will generally satisfy the intellectual functioning prong" because "[t]he Supreme Court in *Atkins* accepted clinical definitions for the meaning of the term mentally retarded"); *Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014) (noting that *Hall* "clarified the minimum *Atkins* standard"); *Fuston v. State*, 470 P.3d 306, 316 (Okla. Crim. App. 2020), *cert. denied,* 141 S. Ct. 1400 (2021) (summarizing *Hall* as having clarified that "failing to take into account the SEM and setting a strict cutoff at 70 . . . misconstrues *Atkins*"); *Reeves v. State*, 226 So. 3d 711, 727 n.7 (Ala. Crim. App.

2016) ("We view *Hall*, not as a new rule of constitutional law, but simply as an application of existing law, i.e., *Atkins*, to a specific set of facts."); *see also In re Henry*, 757 F.3d 1151, 1164–65 (11th Cir. 2014) (Martin, J., dissenting) ("It occurs to me, therefore, that the decision in *Hall* did not announce a new rule insofar as the result was dictated by *Atkins*.").

By contrast, another set of courts views *Hall* and its championing of the SEM as an expansion of the law beyond what was accomplished by *Atkins*. *See Pizzuto*, 947 F.3d at 526–27 (observing that "[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" the SEM, because that was only confirmed by *Hall*); *In re Henry*, 757 F.3d at 1159 ("Nothing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff."); *Phillips v. State*, 299 So. 3d 1013, 1019 (Fla. 2020), *cert. denied*, --- S. Ct. ----, 2021 WL 2044590 (2021) (remarking that "*Hall* establishes a new rule of law"); *White v. Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018) (deeming *Hall* a "sea change" in the law that qualified as a new rule).

The decisions listed above disagree with one another on a question only this Court can answer: did *Atkins* incorporate the SEM into Eighth Amendment intellectual-disability law or not? Lower courts have issued detailed opinions on either side of the equation. Seven years after *Hall*, the division is not going

anywhere. There is no reason to wait for further percolation, and the Court should intervene now to settle the dispute.

II. The conflict implicates an important issue of national concern.

The difference of opinion within the lower courts on the import of *Atkins* is not a minor, technical squabble, but a serious matter affecting the outcome of large numbers of life-and-death cases. More than 350 death-row inmates raised intellectual-disability claims in the period between the issuance of *Atkins* and *Hall*. *See* Alexander H. Updegrove et al., *Intellectual Disability in Capital Cases: Adjusting State Statutes After* Moore v. Texas, 32 Notre Dame J.L. Ethics & Pub. Pol'y 527, 545 n.110 (2018).

For this substantial number of prisoners, the distinction between what *Atkins* held and what *Hall* held, or the absence of a distinction, is critical. It could impact a number of different issues. Perhaps most significantly, the interplay between the cases sheds light on whether *Hall* applies retroactively, because retroactivity analysis turns in large part on whether a "new rule" is involved. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342, 347–54 (2013) (providing an example of how an inquiry into retroactivity implicates the question of whether the Supreme Court rule at issue is new or not); *Lambrix v. Singletary*, 520 U.S. 518, 527–29 (1997) (same); *Truesdale v. Aiken*, 480 U.S. 527, 528 (1987) (Powell, J., dissenting) (same). Four of the cases listed above in the description of the split consider the relationship between *Atkins* and *Hall* as part of an inquiry into retroactivity: *Reeves*, *Henry*, *Phillips*, and *White*. Indeed, there is a division of authority on the

retroactivity question itself, with *Reeves* and *White* applying *Hall* to older cases and *Henry* and *Phillips* refusing to. *See also In re Henry*, 757 F.3d at 1167 (Martin, J., dissenting) (contending that the fact this Court issued *Hall* in a post-conviction case indicates that it is to be applied retroactively). That is a ground for granting certiorari standing alone.[2]

In addition, the question can influence cases in other important ways. For instance, the nature of what *Atkins* held, versus *Hall*, is germane in habeas proceedings, which raise the question of what was "clearly established" by this Court's cases at the time the state judiciary ruled on the claim, as in Mr. Pizzuto's own federal action and in *Smith*. *See supra* at 4, 5. The question also has ramifications for savings clause cases brought under 28 U.S.C. § 2241, where courts must consider whether a federal inmate had a remedy for an intellectual-disability claim under an earlier legal regime. *See Fulks*, 4 F.4th at 592. Or the issue could arise in a more unusual posture. In this case itself, for instance, the question is at issue mainly because the timeliness of Mr. Pizzuto's motion to amend judgment

[2] Cases dealing with the retroactivity vel non of rules on federal habeas review often carry their own procedural wrinkles which render them imperfect vehicles for developing more general principles through certiorari. *See* 28 U.S.C. § 2244(b)(2)(A) (limiting consideration of successive petitions raising new issues to new rules of law "made retroactive to cases on collateral review *by the Supreme Court*"). Such cases are relevant here, because they can turn—like *Henry*, *supra*—on whether the rule at issue is new or not. Plus, the existence of such cases regarding *Hall* indicates that the question of its novelty has fully percolated in the circuit courts, either in the § 2244(b)(2)(A) setting or otherwise, and there is consequently no need for the Court to wait longer before taking the matter up. Aside from the cases cited already, *see In re Payne*, 722 F. App'x 534, 538–39 (6th Cir. 2018); *Williams v. Kelley*, 858 F.3d 464, 473–74 (8th Cir. 2017).

hinges on whether he should have filed it in the wake of *Hall*—i.e., whether *Hall* reshaped the legal landscape or not.

No doubt, there are still other ways in which the precise meaning of *Atkins*' allusions to the clinical standards and the SEM will surface, given the large pool of death-row inmates with intellectual-disability claims whose sentences were final before *Hall*, and given the volume of litigation generated by every capital case. Fewer than twenty years have elapsed since *Atkins*, and the Court has already dived back into intellectual disability and the death penalty a number of times, demonstrating how significant and complex an area of law it is. *See Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam); *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brumfield v. Cain*, 576 U.S. 305 (2015); *Hall*, 572 U.S. 701. Clearly, the intellectual-disability exemption from the death penalty is a subject that has necessitated—and will continue to necessitate—the Court's attention.

As intellectual-disability issues continue to come up and land on both sides of the conflict, the confusion in the lower courts over where *Atkins* ends and where *Hall* starts will continue to generate uncertainty and inefficiency, consuming the resources of litigants and courts, as well as leading to inconsistent results. Such inconsistency is especially problematic when it comes to who lives and who dies. By way of example, Freddie Lee Hall had a seventy-two IQ, and a death sentence that became final prior to *Atkins*, and he obtained penalty-phase relief and a life term. *See Hall v. State*, 201 So.3d 628, 631, 633, 638 (Fla. 2016). Jerry Pizzuto had a

seventy-two IQ, and a death sentence that became final prior to *Atkins*, and the State of Idaho is moving rapidly towards his execution without any judicial intervention to stop it. To avoid inequality in the selection of who is executed and who is not, both in this case and in many others, the conflict should be settled now.

III. This case is an ideal vehicle for resolving the conflict.

Mr. Pizzuto's case provides the Court with a clean chance to straighten out this area of law. Below, the Idaho Supreme Court flatly stated that it had been "correct" to say, in 2008, that it was fine to "require[] an IQ score of 70 or below" at that time, because "*Atkins* did not adopt specific clinical standards." App. 9. That is as direct and unequivocal a holding as the Court is likely to see on the central question that is the focus of the split. Moreover, it is a statement of federal constitutional law inextricably intertwined with the Idaho Supreme Court's result. This is so because the Idaho Supreme Court found Mr. Pizzuto's motion to amend judgment untimely on the basis that it should have been submitted shortly after *Hall*. App. 12–14. But if *Hall* added nothing substantive to *Atkins*' pre-existing endorsement of the SEM, that reasoning would be incoherent. Consequently, the Idaho Supreme Court's analysis in this regard "appears to rest primarily on federal law" and "to be interwoven with the federal law," *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), so there are no potential jurisdictional concerns.

Furthermore, the complications that render other cases imperfect vehicles are not present here. Nearly all of the federal cases listed earlier in the section on the conflict were habeas actions. Habeas petitions carry with them an exceedingly

deferential standard of review, which makes it difficult for the Court to reach the underlying questions in a straightforward way that advances the law. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("As a condition for obtaining habeas corpus from a federal court, 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."); *see also Peede v. Jones*, 138 S. Ct. 2360, 2361 (2018) (Sotomayor, J., respecting the denial of certiorari) ("Considering the posture of this case, under which our review is constrained by the [federal habeas standard of review], I cannot conclude the particular circumstances here warrant this Court's intervention," even though the lower court's approach was "deeply concerning."); *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring) (remarking that the issue presented deserved a "full airing" but that given the habeas restrictions it was not a good vehicle for such an airing in its current posture).

In other cases, there are multiple IQ scores in the record, some above seventy and some below, muddying the picture about how the SEM would apply. *See, e.g.*, *Smith*, 935 F.3d at 1079. By contrast, when the Idaho Supreme Court declared in 2008 that Mr. Pizzuto's IQ disqualified him from intellectual disability (i.e., the declaration reaffirmed below), "[t]he record reflect[ed] only one IQ score," a verbal seventy-two. *Pizzuto*, 202 P.3d at 651. And that is the conclusion the Idaho

Supreme Court below championed. App. 9. The SEM issue is, accordingly, unobstructed by any statistical ambiguities.

In summary, the question behind the split is at the front and center of the case, allowing the Court to answer it once and for all.

IV. The Idaho Supreme Court got it wrong.

Finally, the Idaho Supreme Court's reading of *Atkins*—and the likeminded interpretation articulated by the other decisions listed earlier—is mistaken, and certiorari review is warranted to correct it.

The belief on the part of those courts that *Atkins* has nothing to do with the SEM conflicts with the plain language of the opinion. In particular, *Atkins* expressly addressed the upper limit of an intellectually disabled person's IQ score. The Court noted explicitly that "the cutoff IQ score for the intellectual function prong" of intellectual disability is "between 70 and 75 or lower." *Atkins*, 536 U.S. at 309 n.5.

Nor can the Idaho Supreme Court's approach be squared with *Hall*. In that case, the Court emphasized 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*." *Hall*, 572 U.S. at 720. *Hall* further elaborated that it "read[] *Atkins* to provide substantial guidance on the definition of intellectual disability." *Id.* at 721. Were it otherwise and "the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity." *Id.* at 720. It is impossible to take these passages,

which the Idaho Supreme Court entirely ignored, as anything other than an acknowledgment that it was *Atkins* that enshrined the SEM in the Eighth Amendment, and *Hall* only confirmed it after the fact.

Tellingly, the Idaho Supreme Court did not cite a single binding authority that directly supports its construction of *Atkins*. And the two cases from this Court that were relied upon are plainly distinguishable. *Shoop*, 139 S. Ct. at 506, deals with adaptive deficits, the second prong of intellectual disability, not questions about IQ scores and the SEM, which concerns the first prong and is the germane one here. While *Atkins* did expressly discuss clinical standards in connection with IQ scores, it did not do so in relation to adaptive deficits, which makes *Shoop* irrelevant. *Bobby v. Bies*, 556 U.S. 825 (2009), is even farther afield. It is a double-jeopardy case containing no substantive analysis of intellectual disability whatsoever, for either prong—the language cited in the opinion below is from the procedural history section of the decision, which hardly signals its significance as a statement of law. 556 U.S. at 831.

In short, the Idaho Supreme Court's analysis is at odds with the text of both *Atkins* and *Hall*, and there is no precedent from this tribunal to support it. That is yet another reason for this Court to resolve the conflict and correct the jurisdictions that have, like Idaho, gone astray. In the alternative, it is a justification for a decision by the Court to summarily vacate and remand, as the decision below conflicts with the plain language of these controlling opinions. Since Mr. Pizzuto's life hangs in the balance, summary vacatur is an appropriate vehicle to prevent the

extreme inequity that would result if he were executed on the basis of a decision that badly misunderstood this Court's precedent. The Court has increasingly issued summary decisions to reverse rulings in capital state post-conviction proceedings in order to protect against "potentially severe and irreversible miscarriage[s] of justice." Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 200 (2021). Such a mechanism is especially appropriate when federal habeas proceedings are incapable of remedying the error, *see id.* at 201, which has already proven to be the case here, *see supra* at 3–4. In the absence of plenary review, a summary reversal would be proper.

CONCLUSION

The petition for certiorari should be granted and the case set for merits briefing and oral argument. Alternatively, Mr. Pizzuto respectfully asks the Court to summarily vacate and remand for further proceedings.

Respectfully submitted this 23rd day of September 2021.

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