NO. 21-5800

IN THE SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE IDAHO SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

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

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

(Petition, p.i.)

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STATEMENT OF THE CASE

Pizzuto is seeking certiorari from the Idaho Supreme Court's decision that reasoned the post-conviction court did not abuse its discretion by finding that Pizzuto's Motion to Alter or Amend, based upon I.R.C.P. 60(b)(6), was untimely under state law and, alternatively, that he failed to demonstrate "unique and compelling circumstances" as required by Idaho law to grant 60(b)(6) relief.

In 1985, Pizzuto brutally murdered two innocent strangers, Berta Herndon and her nephew Del Herndon, who were staying in their mountain cabin, by tying their wrists behind their backs with shoe laces and wire, and bludgeoning their heads with a hammer that sounded like "'bashing hollow sounds' like that of 'thumping a watermelon.'" State v. Pizzuto (Pizzuto I), 810 P.2d 680, 687 (Idaho 1991).

Prior to trial, Pizzuto was examined by Dr. Michael Emery, and given the WAIS-R Verbal Scale IQ test. While Pizzuto scored 72, which "falls in the borderline range of intellectual deficiency," Dr. Emery opined, "[b]oth [Pizzuto's] Rorschach and Bender-Gestalt suggested somewhat higher intellectual potential." (BIO App., p.1.) Pizzuto was convicted of both murders, sentenced to death, and denied post-conviction relief, which the Idaho Supreme Court affirmed in a consolidated appeal. Pizzuto I, 810 P.2d at 687-88.

In 1992, Pizzuto filed his first federal habeas petition, which was denied in 1997, and affirmed by the Ninth Circuit. *See* Pizzuto v. Arave, 280 F.3d 949, 954 (9th Cir. 2002), *dissent amended and superseded in part by* 385 F.3d 1247 (9th Cir. 2004).

While Pizzuto's Ninth Circuit appeal was pending, this Court decided Atkins v. Virginia, 536 U.S. 304 (2002), concluding the execution of intellectually disabled ("ID") murderers violates the Eighth Amendment. Responding to Atkins, the Idaho Legislature

enacted I.C. § 19-2515A, prohibiting the execution of ID murderers and establishing requirements that must be met to prove an ID claim in Idaho. 2003 Idaho Sess. Laws, Ch. 136 §§ 4 & 6, p.398. In concert with Atkins, the Legislature defined ID as requiring three elements: (1) "significantly subaverage general intelligence functioning" defined as "an intelligent quotient score of seventy (70) or below"; (2) "significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, work, leisure, health and safety"; and (3) "onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years." I.C. § 19-2515A(1).

Responding to Atkins, Pizzuto filed his fifth post-conviction petition in 2003.[1] (App., pp.24-33.) The state filed a motion for summary dismissal asserting the petition did not comply with the dictates of I.C. § 19-2719. Pizzuto v. State (Pizzuto V), 202 P.3d 642, 646, 650 (Idaho 2008). Pizzuto sought additional testing, none of which included more IQ testing. Id. at 655. Rather than notice his request for a hearing, Pizzuto filed a Motion for Summary Judgment asserting that, because of the evidence he had submitted, "there are no genuine issues of material fact, and he was "entitled to the requested judgment as a matter of law." (BIO App., p.3.) The post-conviction court denied Pizzuto's Motion for Summary Judgment, granted the state's motion for summary dismissal, and concluded

[1] In addition to his first and fifth post-conviction petitions, Pizzuto filed four more post-conviction petitions that were all rejected. *See* Pizzuto v. State (Pizzuto VI), 233 P.3d 86 (Idaho 2010); Rhoades, et al. v. State (Pizzuto IV), 233 P.3d 61 (Idaho 2010); Pizzuto v. State (Pizzuto III), 10 P.3d 742 (Idaho 2000); Pizzuto v. State (Pizzuto II), 903 P.2d 58 (Idaho 1995).

his Atkins petition was untimely and, alternatively, he "failed to raise a genuine issue of material fact supporting his claim of mental retardation." (Id., p.6.)

Addressing the merits of Pizzuto's ID claim, the Idaho Supreme Court concluded he failed to present sufficient evidence establishing two elements under I.C. § 19-2515A: an IQ score of 70 or below **and** onset before age 18; the court did not address whether Pizzuto established the second prong of I.C. § 19-2515A – significant limitations in adaptive functioning. Pizzuto V, 202 P.3d at 651-55.

Pizzuto received permission from the Ninth Circuit to file a successive habeas petition based upon the contention he is ID. Pizzuto v. Blades, 2012 WL 73236, *3 (D. Idaho 2012). At a four-day evidentiary hearing, three IQ scores were presented: "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. [Craig] 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." Id. at *13. After the evidentiary hearing, the district court initially denied relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), concluding the Idaho Supreme Court's decision was not contrary to, or an unreasonable application of, Atkins, or based upon an unreasonable determination of facts from the evidence presented to the state courts. Id. at *7-13. Based upon the first and third prongs of I.C. § 19-2515A, the court also denied habeas relief under *de novo* review, concluding Pizzuto failed to establish his IQ was significantly subaverage (meaning an IQ score of 70 or below) prior to age 18; the court concluded he met his burden on the second prong – significant limitations in adaptive functioning. Id. at *13-21.

Explaining its rationale regarding Pizzuto's different IQ scores, the court gave the 2009 score of 60 "the least weight" because of Dr. Weinstein's concession that "one can assume, everything being the same, that the accuracy of an IQ score would be better the closer to age 18," "cognitive abilities certainly diminish with age," and "Pizzuto's advanced cardiovascular disease could have contributed to an overall decline in his mental ability." Id. at *14 (brackets omitted). While not entirely discounting the 1985 score of 72, the court found "the score to be a low estimation of Pizzuto's full intellectual functioning before he turned 18" since "Dr. Emery did not record a full scale score and has since disposed of his raw data," and "Pizzuto's drug use and other neurological problems may have affected his cognitive functioning at the time." Id. at *14-15. Addressing the 1996 scores, the court gave Pizzuto the benefit of an "adjustment" based upon the "standard error of measurement" ("SEM") and "Flynn Effect," which dropped the numerical range between 82 and 92. Id. at *15. However, the court recognized that "still [did] not get him close to the threshold for significantly subaverage general intellectual functioning," with the court ultimately concluding, "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." Id. at *15-16. While recognizing this placed the score "most likely somewhere in the 80s," the court declined to "determine a precise numerical score," concluding Pizzuto had not proven "that his general intellectual functioning at the relevant time was significantly subaverage; that is, that he had an IQ of 70 or below." Id. at 16.

The Ninth Circuit initially affirmed based upon AEDPA deference, and did not address the district court's analysis under *de novo* review. Pizzuto v. Blades, 729 F.3d 1211 (9th Cir. 2013). However, because Hall v. Florida, 572 U.S. 701 (2014) was issued

after the Ninth Circuit's decision was filed, but before the mandate issued, the court withdrew its opinion, vacated the district court's order, and remanded for further proceedings. Pizzuto v. Blades, 758 F.3d 1178 (9th Cir. 2014).

On remand, the district court recognized that Hall involved a Florida statute that had been interpreted by the Florida Supreme Court to establish a "hard IQ score cutoff" of 70 without consideration of the SEM of plus or minus five points, and that further inquiry into a petitioner's intellectual functioning was not permitted even if the IQ score was within the SEM. Pizzuto v. Blades, 2016 WL 6963030, *4 (D. Idaho 2016). The court also gleaned three main points from Hall: (1) "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"; (2) "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*"; and (3) "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." Id. at *5.

However, recognizing the limitations of AEDPA, the court explained that, because the holding from Hall was not clearly established at the time of the Idaho Supreme Court's 2008 decision, the state court was only bound by the holding from Atkins, and, therefore, the state court's decision was neither contrary to, nor an unreasonable application of, Atkins. Id. at *7-9. Alternatively, the district court assumed that, even if Atkins barred using a hard IQ score of 70 or below, the Idaho Supreme Court's decision – that Pizzuto

failed to establish "any subaverage intellectual functioning developed *before* he turned eighteen" – "was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent." Id. at *9-10. (emphasis in original). The court also reaffirmed its prior *de novo* review decision, concluding, "nothing in *Hall* renders suspect any of the [c]ourt's previous findings and conclusions on de novo review." Id. at *10-11.

Applying AEDPA's deferential standards to the Idaho Supreme Court's 2008 decision, the Ninth Circuit affirmed, concluding the state court's decision was neither contrary to, nor an unreasonable application of, Supreme Court precedent because the only precedent available to the state court at the time of its decision was Atkins; Hall and its progeny were decided after the Idaho Supreme Court filed its decision and the new requirements from Hall – that the legal determination of intellectual disability be informed by the medical community's diagnostic framework – were not mandated by Atkins. Pizzuto v. Yordy, 947 F.3d 510, 523-29 (9th Cir. 2019).[2] However, relying upon the Diagnostic and Statistical Manual of Mental Disorders adopted in 2000 ("DSM-IV") and the American Assoc. of Mental Retardation ("AAMR") 2002 manual, the court also opined "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." Id. at 525. Nevertheless, the court recognized that, "[a]lthough 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," and while "the state court's requirement of an IQ of 70 or below is contrary to *Hall* [and its progeny], these decisions all postdated the state

[2] The Ninth Circuit issued its initial post-remand decision on August 14, 2019. *See* Pizzuto v. Blades, 933 F.3d 1166 (9th Cir. 2019). That decision was amended without any substantive changes on December 31, 2019. (App., pp.1-21.)

court's decisions, and it was not obvious under *Atkins* alone that … an individual with an IQ score between 70 and 75 or lower may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." Id. at 529.[3] However, in dicta, the court stated, "Our decision, however, does not preclude the Idaho courts from reconsidering those questions in light of intervening events." Id. at 534.

Pizzuto filed a Petition for Certiorari expressly challenging the Ninth Circuit's conclusion that the clinical standards adopted by this Court in Hall were not mandated in Atkins. (BIO App., pp.8-9.) Pizzuto's Petition was denied on November 2, 2020. Pizzuto v. Yordy, 141 S.Ct. 661 (2020).

Undaunted and relying upon the Ninth Circuit's dicta, on September 25, 2019, nearly fourteen years after his Atkins post-conviction petition was denied, Pizzuto returned to state court and, pursuant to I.R.C.P 60(b)(6), filed a Motion to Alter or Amend Judgment. (BIO App., pp.10-11.) The post-conviction court denied Pizzuto's motion, reasoning it was untimely and that he failed to meet the requirements of Rule 60(b)(6) by showing "unique and compelling circumstances." (BIO App., pp.17-25.)

The Idaho Supreme Court affirmed, concluding the post-conviction court did not abuse its discretion by finding Pizzuto's Motion to Alter or Amend was untimely under Rule 60(b)(6) and, alternatively, the post-conviction court did not abuse its discretion by finding that neither the Ninth Circuit's dicta nor Pizzuto's post-conviction counsel's

[3] The court also addressed each of Pizzuto's arguments under 28 U.S.C. § 2254(d)(2), and concluded that he failed to establish the Idaho Supreme Court's decision was based upon an unreasonable determination of facts. Pizzuto, 947 F.3d at 529-34. Based upon his failure to overcome the limitations associated with AEDPA, the court declined to address the district court's *de novo* review of Pizzuto's ID claim based on the evidentiary hearing evidence. Id. at 534.

alleged negligence established "unique and compelling circumstances" as required by Rule 60(b)(6). (App., pp.12-22.) On April 29, 2021, the Idaho Supreme Court denied Pizzuto's Petition for Rehearing. (App., p.23.)

REASONS FOR DENYING THE WRIT

Pizzuto contends that certiorari should be granted because there is allegedly "a clear and entrenched split between lower courts on whether *Atkins* approved of the clinical standards concerning sub-average intellectual functioning, including the SEM." (Id., p.5.) He further contends that Atkins made "the clinical IQ standards part of Eighth Amendment precedent, and that *Hall* did not change the law but merely confirmed what it had already been." (Id.) Irrespective of the question Pizzuto raises or whether there is an alleged "split" regarding that question, the Idaho Supreme Court's decision was based upon state, not federal law. Specifically, it was based upon whether Pizzuto's Motion to Alter or Amend under I.R.C.P. 60(b)(6) was untimely and, alternatively, whether he failed to establish "unique and compelling circumstances" as required by Rule 60(b)(6). Moreover, Pizzuto did not raise a constitutional claim before the state court. Finally, Pizzuto has failed to establish his case is the proper vehicle for resolving any alleged split, or that the Idaho Supreme Court "got it wrong."

A. The Idaho Supreme Court's Decision Was Based Upon State, Not Federal Law

This Court's jurisdiction to review state court decisions is premised upon 28 U.S.C. § 1257(a). "Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed or properly presented to the state court that rendered the

decision we have been asked to review.'" Howell v. Mississippi, 543 U.S. 440, 442 (2005) (quoting Adams v. Robertson, 520 U.S. 83, 86 (1997) (per curiam)). Review of state-court decisions must "rest upon federal law." Oregon v. Guzek, 546 U.S. 517, 521 (2005). "When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion,' … we … conclude that the State decided as it did because federal law required it to do so." Pennsylvania v. Labron, 518 U.S. 938, 947 (1996) (Stevens, J., dissenting) (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)). As explained in Long, "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." 463 U.S. at 1040. Consequently, this Court will not grant certiorari "if the same judgment would be rendered by the state court after we corrected its views of federal laws." Id. at 1042. This basic principle "serves an important interest of comity," and "avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record." Adams, 520 U.S. at 90-91.

Because the Idaho Supreme Court's decision was based upon I.R.C.P 60(b)(6), and whether the post-conviction court abused its discretion by denying Pizzuto's Motion to Alter or Amend, this Court should decline to grant certiorari.[4] The Idaho Supreme Court

[4] In Idaho, when reviewing a trial court's decision for abuse of discretion, the appellate courts assess "whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." (App., p.6) (quotes, brackets, citations omitted).

initially addressed the issue of whether the 60(b)(6) motion was timely. Pizzuto contended the "triggering event" for the filing of his motion was the Ninth Circuit's December 31, 2019 opinion that stated, in dicta, that its decision "does not preclude the Idaho courts from reconsidering those questions in light of intervening events." (App., p.12); *see* Pizzuto v. Yordy, 947 F.3d at 534. Under Idaho law, motions under I.R.C.P. 60(b)(6) "must be made within a reasonable time, which "depends upon the facts in each individual case," and is "a question of fact to be resolved by the trial court." (App. 13.) Consequently, the Idaho Supreme Court reviewed the post-conviction court's findings of fact regarding timeliness that included the following:

> Pizzuto was aware of the developments from *Hall* … well before the Ninth Circuit issued *Pizzuto 2019A*…. Pizzuto's decision to proceed through the federal courts and delay on seeking redress through the Idaho state courts is not a reasonable basis for waiting five years to reopen the fifth petition for post-conviction relief…. Clearly, Pizzuto was aware of the developments resulting from *Atkins*, and strategically he decided to pursue remedy through the federal system.

(App., pp.13-14) (brackets omitted).

The supreme court then recognized that the post-conviction court's decision was reviewed for an abuse of discretion, and that Pizzuto failed to assert the post-conviction court did not perceive the issue as one of discretion or that the post-conviction court acted outside the boundaries of discretion. (App. 14.) The supreme court also reasoned that the post-conviction court correctly identified the applicable legal standards and acted in a manner consistent with those standards. Finally, the supreme court concluded the post-conviction court reached its decision by an exercise of reason, determining that Hall was the predicate for Pizzuto's motion, that he was aware of Hall years before the Ninth Circuit issued its decision, and that it was unreasonable for Pizzuto to wait several years after Hall

to file his motion. (Id.) Consequently, the supreme court concluded the post-conviction court did not abuse its discretion.

This is a state law question that is not interwoven with federal law. Indeed, the question Pizzuto has presented to this Court has absolutely no application regarding whether his Motion to Alter or Amend was timely under I.R.C.P. 60(b)(6). While Pizzuto contends the Idaho Supreme Court stated that its 2008 decision was correctly decided, which, according to Pizzuto "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" (Petition, p.10), he ignores the fact that whether Pizzuto V, was correctly decided is irrelevant to the state court question of whether his 60(b)(6) motion was timely. This is particularly true because Pizzuto contended the "triggering event" was the Ninth Circuit's dicta, while the Idaho Supreme Court concluded the post-conviction court did not abuse its discretion by reasoning the "triggering event" was Hall. (App., pp.12-14.) In other words, regardless of whether Atkins requires the use of clinical standards, the question the Idaho Supreme Court addressed was the triggering event that required the filing of Pizzuto's 60(b)(6) motion, which is a state law question unrelated to the question he presents before this Court.

Pizzuto's request for certiorari should also be rejected because, as an alternative holding, the Idaho Supreme Court affirmed the post-conviction court's factual finding that he failed to establish "unique and compelling circumstances," which is also a question of state law under Rule 60(b)(6). In Idaho, 60(b)(6) relief can only be granted upon a showing of "unique and compelling circumstances justifying relief." (App., p.13) (quoting Eby v. State, 228 P.3d 998, 1003 (Idaho 2010)). While Idaho's appellate courts have not defined what constitutes "unique and compelling circumstances, they have "infrequently granted

relief under Rule 60(b)(6)." Berg v. Kendall, 212 P.3d 1001, 1008 (Idaho 2009); *see also* Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc., 283 P.3d 757, 767 (Idaho 2012) (citing cases) ("We have generally, but sparingly, applied [the unique and compelling circumstances standard] in cases where a party seeks relief under Rule 60(b)(6)."). Nevertheless, "relief under Rule 60(b)(6) may be appropriate where the district court granted relief that is inconsistent with the pleadings and evidence in the case or is beyond what was sought in the complaint." Profits Plus Capital Management, LLC v. Podesta, 332 P.3d 785, 798 (Idaho 2014). Relief has also been affirmed "where defense counsel's representation to an unrepresented plaintiff constituted overreaching." Id. Additionally, "the complete absence of meaningful representation in a post-conviction proceeding may be 'unique and compelling circumstances' warranting relief under I.R.C.P. 60(b)(6)," id., or "where a person lacking the capacity to sue or be sued is represented in an action, whether by a natural guardian, guardian ad litem, or next friend, and the representative completely fails to prosecute a meritorious claim that results in the claim being dismissed with prejudice," Berg, 212 P.3d at 1009.

Pizzuto initially contended the Ninth Circuit's dicta constituted unique and compelling circumstances that justified Rule 60(b)(6) relief. (App. 15.) While the Idaho Supreme Court examined the Ninth Circuit's decision and its analysis regarding Atkins and Hall, the court's decision was based upon Pizzuto's failure to establish the post-conviction court abused its discretion by concluding the Ninth Circuit's decision did not constitute unique and compelling circumstances under Idaho law. Indeed, the supreme court reasoned that "[t]he findings and conclusion of the federal district court in *Pizzuto 2016*, in particular, call into question the relevance of the dicta in *Pizzuto 2019B*, since the

federal district court determined that Pizzuto had failed to establish that he was intellectually disabled at the time of the murders and prior to his eighteenth birthday." (App., p.17.) Consequently, the supreme court concluded Pizzuto failed to establish the post-conviction court abused its discretion "when it determined that the dicta in *Pizzuto 2019* was insufficient to establish unique and compelling circumstances necessary to justify relief under Idaho Rule of Civil Procedure 60(b)(6)." (App., pp.17-18.)

Pizzuto also contended his Atkins post-conviction attorney's failure to notice the motion for additional testing constituted unique and compelling circumstances. (App., p.18.) The Idaho Supreme Court recognized that, under Idaho law, there may be unique and compelling circumstances when there is a "complete absence of meaningful representation" during post-conviction proceedings. (App., pp.19-20) (quoting Eby, 228 P.3d at 1004) (emphasis omitted). However, reviewing the post-conviction court's findings of fact, its determination that those facts are "'substantially different' from the facts in *Eby*," and the post-conviction court's application of those facts to other Idaho cases, the Idaho Supreme Court reasoned there was no abuse of discretion. (App., pp.19-22.)

The determination of whether Pizzuto demonstrated unique and compelling circumstances to warrant Rule 60(b)(6) relief, is another state law question. The question Pizzuto has presented to this Court has no application regarding whether he established unique and compelling circumstances mandated by Idaho law as required for relief under I.R.C.P. 60(b)(6). The state recognizes the Idaho Supreme Court reexamined Pizzuto V, and concluded it was "correctly decided based on the plain language of Idaho Code section 19-2515A and the Supreme Court of the United States' holding in *Atkins*." (App., p.7.) Examining Atkins, the court recognized this Court "referenced clinical definitions

promulgated by the American Association of Mental Retardation and the American Psychiatric Association when discussing intellectual disability." (App., p.108) (citing Atkins, 536 U.S. at 308 n.3). The court also recognized Atkins "did not, however, adopt these clinical definitions. Rather, it left it to each state to develop appropriate mechanism to enforce the rule announced in *Atkins*." (Id.) Consequently, the Idaho Supreme Court concluded, "The requirement concerning an IQ score of 70 or below was not inconsistent with *Atkins* at the time this [c]ourt issued its decision in *Pizzuto* [*V*]." (App., p.9.)

Undoubtedly, it is this review by the Idaho Supreme Court that spawned Pizzuto's Petition. However, the state court's review of its prior decision, or for that matter its review of Atkins, has nothing to do with the court's analysis regarding whether the post-conviction court abused its discretion by denying Pizzuto's Rule 60(b)(6) motion because it was untimely and he failed to establish unique and compelling circumstances. The timeliness decision was based upon when Pizzuto had sufficient information to file his 60(b)(6) motion, which the state courts found was at the time Hall was issued – a state law question. Whether Pizzuto demonstrated unique and compelling circumstances based upon the Ninth Circuit's dicta or his attorney's performance during the Atkins post-conviction litigation is also a state law question. In addressing both the timeliness and unique and compelling circumstances issues, the Idaho Supreme Court never discussed whether Atkins adopted the clinical standards adopted in Hall. In other words, regardless of whether this Court addresses the question Pizzuto presents, it will be no more than an advisory opinion because "the same judgment would be rendered by the state court" since the Idaho Supreme Court's view of Atkins was irrelevant regarding the state courts' factual findings, especially whether he established unique and compelling circumstances. *See* Long, 463 U.S. at 1042.

B. Pizzuto Failed To Properly Raise Before The Idaho Supreme Court The Question Presented Before This Court

This Court has repeatedly held that federal constitutional issues must first be raised in state court before being raised before this Court. Illinois v. Gates, 462 U.S. 213, 217-24 (1983). Several purposes have been identified by the Court in support of this policy. First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." Id. at 221 (quotes, bracket, citations omitted). Second, "due regard for the appropriate relationship of this Court to state courts, demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and equally important, proposed changes in existing remedies for unconstitutional actions." Id. at 221-22 (quotes and citation omitted). Finally, "we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." Id. at 222. As explained in the context federal habeas cases and fair presentation to the state's highest court, "it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." Gray v. Netherland, 518 U.S. 152, 163 (1996).

In federal habeas, the context of "fair presentation" requires more than a "mere similarity of claims" between the issues raised before the state's highest court and those in the federal petition. Duncan v. Henry, 513 U.S. 364, 366 (1995). In Solis v. Garcia, 219 F.3d 922, 930 (9th Cir. 2000), the Ninth Circuit examined the "issues" section of the petitioner's state court brief and the argument supporting the claim, and concluded the claim was not fairly presented. This is particularly true in Idaho where I.A.R. 35 details the content of briefs submitted to Idaho's appellate courts. Rule 35(a)(4) requires:

> A list of the issues on appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the issues should be short and concise, and should not be repetitious. The issues shall fairly state the issues presented for review. The issues presented will be deemed to include every subsidiary issue fairly comprised therein.

Consequently, it is the statement of issues that alerts Idaho's appellate courts to the issues being presented on appeal. In State v. Nez, 950 P.2d 1289, 1291, n.1 (Idaho Ct. App. 1997), the court explained, "Generally, the failure of the appellant to include an issue in the statement of issues will eliminate consideration of that issue on appeal." *See also* State v. Hosey, 11 P.3d 1101, 1107-08 (Idaho 2000) ("We have previously held a failure to designate an issue on appeal will eliminate that issue from consideration."). Admittedly, the rule can be relaxed, but only "where the issue was addressed by authorities cited or arguments contained in the briefs." State v. Prestwich, 783 P.2d 298, 300 (Idaho 1989), *rev'd on other grounds,* 842 P.2d 660 (Idaho 1992); *see also* State v. Watkins, 224 P.3d 485, 489 (Idaho 2009).

In his Opening Brief before the Idaho Supreme Court, Pizzuto failed to raise the question he now presents to this Court. (BIO App., pp.27-61.) Indeed, the two issues Pizzuto raised to the Idaho Supreme Court were "[w]hether [his] I.R.C.P. 60(b) motion was timely," and "[w]hether [his] I.R.C.P. 60(b) motion was meritorious." (Id., p.34.) Admittedly, Pizzuto discussed the post-conviction court's "interpretation of the legal developments around *Atkins*," but that was only in the context of whether his 60(b)(6) motion was timely and not the constitutional question he now presents to this Court. (Id., pp.36-38.) The same is true regarding Pizzuto's discussion about whether his motion was meritorious – Atkins was discussed only in terms of whether the Ninth Circuit's dicta provided "unique and compelling circumstances" as required under I.R.C.P 60(b)(6); it

was not raised as the constitutional question he presents to this Court (App., pp.9-16), nor was it even discussed in terms of whether his prior attorney's performance provided unique and compelling circumstances during the Atkins post-conviction proceedings.

Additionally, certiorari should not be granted when a petitioner "fail[s] to comply with applicable state procedures." In re Lamkin, 355 U.S. 59 (1957); *see also* Parker v. North Carolina, 397 U.S. 790, 798 (1970) (declining to address a question regarding the composition of a grand jury because there was no contemporaneous objection). Pizzuto's failure to comply with I.A.R. 35(a)(4) dictates against granting his Petition.

The issues Pizzuto raised before the Idaho Supreme Court involved the timeliness of his 60(b)(6) motion and whether he established unique and compelling circumstances warranting relief nearly fourteen years after the post-conviction court denied his Atkins post-conviction petition. Because the question he raises before this Court was not raised before the Idaho Supreme Court, and because he failed to abide by I.A.R. 35(a)(4), Pizzuto should not be rewarded by having this Court grant certiorari and decide an issue that was not directly raised before the Idaho Supreme Court, particularly where he failed to abide by state appellate procedures.

C. Pizzuto Has Failed To Establish There Is A Conflict Between The Lower Courts

Pizzuto contends 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." (Id., p.5) (emphasis added). While the state does not necessarily disagree with Pizzuto's contention that clinical standards were "approved" in Atkins, that is not the question he presents to this Court. Rather, Pizzuto contends that Atkins "**require[s]** the use of clinical standards for the determination of sub-average

intellectual functioning" (Petition, p.i) (emphasis added), a question that is far different from whether Atkins "approved" the standards. This explains why the cases he cites fail to support his contention that there is a split between the lower courts regarding the question he actually raises.

Relying only upon a parenthetical, Pizzuto initially contends that Fulks v. Watson, 4 F.4th 586, 592 (7th Cir. 2021), supports the notion that Hall "merely affirmed" that Atkins required the use of clinical standards to determine ID. (Petition, p.5.) Fulks involved the question of whether a petitioner could use the "savings clause" in 28 U.S.C. § 2255(e)[5] to raise an ID claim under 28 U.S.C. § 2241 after failing to raise the claim in the first 28 U.S.C. § 2255 petition. Fulks, 4 F.4th at 588-89. Fulks contended he could "channel his *Atkins* claim through the savings clause because the recent **adjustments** to today's legal and clinical diagnostic standards came after his sentencing and § 2255 petition." Id. at 590 (emphasis added). The Seventh Circuit recognized the "Supreme Court **refined** the *Atkins* analysis 12 years later in *Hall*," which "reaffirmed *Atkins's* teaching that courts are to be '**informed** by the work of medical experts in determining intellectual disability.'" Id. (quoting Hall, 572 U.S. at 710) (emphasis added). "**Building** on *Atkins*, the *Hall* Court reiterated that 'the medical community defines intellectual disability according to three criteria.'" Id. (quoting Hall, 572 U.S. at 710) (emphasis added). The court recognized that, "[b]ecause IQ tests entail certain imprecision," the Court in Hall "**further instructed** that 'when a defendant's IQ score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability,

[5] The savings clause allows a federal petitioner to circumvent the prohibitions of 28 U.S.C. § 2255(e) if "it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

including testimony regarding adaptive deficits.'" Id. (quoting Hall, 572 U.S. at 723) (emphasis added). Even though **"[u]pdates** to the legal and diagnostic standards" [ ] may now provide Fulks a stronger basis to prove an intellectual disability," the court rejected the argument that they exposed a structural defect in § 2255. Id. at 592. Rather, Hall and its progeny "represent **course corrections** to state-court applications of *Atkins* that **further elaborated** on the measurements of intellectual function and the evaluation of adaptive deficits." Id. (quotes and citation omitted) (emphasis added). Finally, the court recognized that neither Hall nor its progeny "suggest[ ] that the legal and diagnostic standards recognized in *Atkins* were **etched in stone**." Id. at 593 (emphasis added).

The use of the words recent "adjustments," " refined," "informed," "building," "further instructed," "updates," "course corrections," "further elaborated," "[not] etched in stone," and "adopting the legal framework," demonstrate the Seventh Circuit did not believe Atkins "required the use of clinical standards." (Petition, p.i.) Rather, they support the state's assertion that Hall built upon Atkins with further instruction, updates, and course corrections because clinical standards were not etched in stone in Atkins.

Smith v. Sharp, 935 F.3d 1064, 1077 (10th Cir. 2019), also failed to mandate adoption of the medical community's entire diagnostic framework, actually noting, "*Atkins* clearly establishes that intellectual disability must be assessed, at least **in part**, under the existing clinical definitions applied through expert testimony." (Emphasis added.) Additionally, even if this Court allegedly "accepted clinical definitions," in Atkins, that does not mean the States were **required** to adopt those standards. This is particularly true in light of the Court's conclusion that "[t]he statutory definitions of mental retardation are not identical," Atkins, 536 U.S. at 317 n.22, and that the States were left with "the task of

developing appropriate ways to enforce the constitutional restrictions upon their execution of sentences, id. at 317. Moreover, Smith is a sufficiency of the evidence case in which the court applied the standards from Jackson v. Virginia, 443 U.S. 307 (1979). Smith, 935 F.3d at 1071, 1074-77. Irrespective, as demonstrated by the other cases Pizzuto cites, at best, Smith is an outlier that does not warrant certiorari. *See* In Re Williams, 898 F.3d 1098, 1110 (11th Cir. 2018) (recognizing this Court does not generally review outlier cases); Strayhorn v. Wyeth Pharmaceuticals, Inc., 737 F.3d 378, 405-06 (6th Cir. 2013) (declining to follow an outlier case).

Pizzuto's reliance upon Van Tran v. Colson, 764 F.3d 594, 612 (6th Cir. 2014), is even further afield. In Van Tran, the Court addressed Tennessee's definition of ID regarding adaptive functioning – the second prong of ID, and the Tennessee Supreme Court's discussion of the second prong in Coleman v. State, 341 S.W.3d 221 (Tenn. 2011). Van Tran, 764 F.3d at 605-612. Indeed, the parties agreed that Van Tran met the first prong of ID – subaverage intellectual functioning. Id. at 605. The Sixth Circuit concluded the Tennessee Supreme Court's analysis in Coleman was "buttressed by the United States Supreme Court's recent opinion in *Hall*, [ ], which **clarified** the minimum *Atkins* standard under the U.S. Constitution." Id. at 612 (emphasis added). Not only did the Sixth Circuit fail to conclude the States were required to use clinical standards to determine subaverage intellectual functioning under Atkins, since the court never addressed subaverage intellectual function because the parties stipulated to the first prong, but the court recognized that Hall was merely a "clarification" of Atkins.

The two state court decisions cited by Pizzuto – Fuston v. State, 470 P.3d 306 (Okla. Crim. App. 2020), and Reeves v. State, 226 So.3d 711 (Ala. Crim. App. 2016) – are

not even decisions from a state court of last resort, but are from the States' two intermediate courts. As explained in Beaulieu v. U.S., 497 U.S. 1038, 1039 (1990) (White, J., dissenting from the denial of certiorari) (quotes omitted), "Rule 10 of the Rules of this Court indicate the character of reasons that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals, between a court of appeals and the highest court of a State, or between two state courts of last resort." *See also* McCoy v. Louisiana, 138 S.Ct. 1500, 1507 (2018) (explaining that certiorari was being granted because "of a division of opinion among state courts of last resort"). Irrespective, neither case supports Pizzuto's position.

In Fuston, 470 P.3d at 315-16, the issue was the constitutionality of Oklahoma's ID statute that barred a finding of ID if the defendant received a score of 76 or above on an IQ test, and whether he was entitled to an evidentiary hearing. Because Fuston scored an 81 on an IQ test when he was 12-years-old, the Oklahoma Court of Appeals recognized that Hall and its progeny did not support Fuston's challenges, particularly since he did not challenge the 81 score. Id. at 316-18. Admittedly, when discussing Hall, the court stated, "The Supreme Court noted that, '[b]y failing to take into account the SEM and setting a strict cutoff at 70, Florida 'goes against the unanimous professional consensus'' and misconstrues *Atkins*." Id. at 316 (quoting Atkins, 536 U.S. at 722, 724) (brackets in original). However, Pizzuto concedes that Fuston merely "summarize[ed] *Hall* as having **clarified**" Atkins. (Petition, p.5) (emphasis added). And the court of appeals never stated that Atkins required state courts to take into account the SEM. Moreover, because the court ultimately found Hall had no application based upon Fuston's 81 IQ score, the statement is merely dicta.

In Reeves, 226 So.3d at 727 n.7 (quoting In re Henry, 757 F.3d 1151, 1158 (11th Cir. 2014)) (brackets in original), the Court of Criminal Appeals of Alabama recognized the Eleventh Circuit had reasoned that Hall "'announce[d] a new rule of constitutional law,' but held that the new rule does not apply retroactively on collateral review for purposes of 28 U.S.C. § 2244(b)." The Alabama court disagreed with the Eleventh Circuit's "characterization of *Hall* as a new rule of constitutional law," and opined that Hall was not "a new rule of constitutional law, but simply [ ] an application of existing law, i.e., *Atkins*, to a specific set of facts." Id. Irrespective of whether any court concluded Hall did not announce a new rule of constitutional law, that does not mean the clinical standards for the determination of subaverage intellectual functioning referenced in a footnote in Atkins, were mandated or required by Atkins; and the court in Reeves made no such statement.

Finally, Pizzuto relies upon the dissenting opinion in In Re Henry, 757 F.3d at 1164-65 (Martin, J., dissenting). (Petition, p.6.) While there may be a "split" among various judges, a dissenting opinion even in a circuit case does not establish the requisite split upon which this Court generally grants certiorari. Irrespective, the question Judge Martin was addressing was not whether Atkins required the States to use clinical standards for determining subaverage intellectual functioning, but whether Hall constituted a new rule under Teague v. Lane, 489 U.S. 288 (1989) that had to be applied retroactively, a far different question than what Pizzuto raises.

Not only has Pizzuto failed to establish the "[l]ower courts have issued **detailed** opinions on either side of the question" (Petition, p.6) (emphasis added), but he has failed to establish any kind of split among the federal circuits or States' highest courts. The cases Pizzuto has cited establish there is no split, because he has failed to cite any case holding

that the States were required or mandated, based exclusively upon clinical standards this Court discussed in a footnote Atkins, to comply in every aspect with those standards. Indeed, the cases Pizzuto has cited establish the standards discussed in Atkins, merely informed the States, and that it was not until Hall that the Court required the States to adopt the SEM discussed in those clinical standards.

D. Pizzuto's Question Does Not Implicate Important Issues Of National Concern And Is A Poor Vehicle For Resolving The Alleged Conflict

Pizzuto contends that more than 350 murderers raised ID claims between the issuance of Atkins and Hall, and, therefore, "the distinction between what *Atkins* held and what *Hall* held … is critical." (Petition, p.7.) However, Pizzuto fails to explain how the "distinction" is "critical." Admittedly, Pizzuto has cited cases that involve retroactivity. However, retroactivity is not the question he raises before this Court. And if it is "critical" to issues involving retroactivity, the question would be more appropriately raised when retroactivity is squarely before the Court. The same is true for the saving clause under 28 U.S.C. § 2255(e). Indeed, Pizzuto has failed to explain how addressing the question he presents to this Court would have any impact on retroactivity or the savings clause.

Pizzuto correctly notes that the circuit decisions he cited for his alleged conflict are habeas cases (Petition, p.10), and that the question he presents "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" (id., p.8.) However, as conceded by Pizzuto (Petition, p.8), the question he now raises was squarely at issue after the Ninth Circuit's decision. Applying AEDPA's deferential standards to the Idaho Supreme Court's 2008 decision, the Ninth Circuit concluded the state court's decision was neither contrary

to, nor an unreasonable application of, Supreme Court precedent because the only precedent available to the state court at the time of its decision was Atkins; Hall and its progeny were decided after the state court filed its decision and the new requirements from Hall – that the legal determination of intellectual disability be informed by the medical community's diagnostic framework – were not mandated by Atkins. Pizzuto, 947 F.3d at 523-29. Pizzuto sought certiorari on the question of whether the clinical standards adopted in Hall were required by the Court's reference to those standards in a footnote in Atkins (BIO App., pp.8-9), which this Court denied even though the question was presented "in a straightforward way that advances the law" (Petition, p.11).

Moreover, contrary to Pizzuto's contention, this case does not present the Court "with a clean chance to straighten out this area of law" (Petition, p.10), because it involves a state question of law. And the state has already explained why the Idaho Supreme Court's discussion of whether its prior decision in Pizzuto V was correct is irrelevant to the court's ultimate conclusion that the post-conviction court did not abuse its discretion by finding the Motion to Alter or Amend was untimely and, alternatively, why Pizzuto failed to establish unique and compelling circumstances as required by I.R.C.P. 60(b)(6).

Further, granting certiorari on this question will not resolve Pizzuto's case because the Idaho Supreme Court found the post-conviction court's finding, that Pizzuto failed to establish unique and compelling circumstances, did not constitute an abuse of discretion. Indeed, Pizzuto virtually concedes that the question he presents involves only the timeliness of his Motion to Alter or Amend when he states, "the question is at issue mainly because the timeliness of [his] motion to amend judgment hinges on whether he should have filed it in the wake of *Hall*." (Petition, pp.8-9.) He makes no mention of how Hall

has any impact on the question of whether he demonstrated unique and compelling circumstances as required by Rule 60(b)(6).

Pizzuto also ignores the fact that the Idaho Supreme Court's 2008 decision was also based upon the third prong of I.C. § 19-2515A(1)(a) – "onset of significant subaverage general intelligence functioning . . . before age eighteen (18) years." Pizzuto V, 202 P.3d at 655. Consequently, Pizzuto's ID claim will not be resolved because the question he presents has no bearing whatsoever on whether onset occurred before his eighteenth birthday. Finally, the question Pizzuto presents does not address the federal district court's *de novo* finding that the 1996 full scale IQ score of 92 on the WAIS-R "[did] not get him close to the threshold for significantly subaverage general intellectual functioning" even after giving him the benefit of the SEM and Flynn Effect. Pizzuto v. Blades, 2016 WL 6963030 at *5 n.4. In other words, giving Pizzuto every conceivable benefit of the doubt, the resolution of the question he presents will not resolve the ID issue in his favor.

As Justice Sotomayor recognized in Kansas v. Carr, 577 U.S. 108, 128 (2016) (Sotomayor, J., dissenting) (quotation and citation omitted), "Even where a state court has wrongly decided an important question of federal law, we often decline to grant certiorari, instead reserving such grants for instances where the benefits of hearing a case outweigh the costs of so doing." *See also* Hittson v. Chatman, 576 U.S. 1028 (2015) (Ginsburg, J., concurring in the denial of certiorari) (concurring in the denial of certiorari because "the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst* [*v. Nunnemaker*, 501 U.S. 797 (1991]."). Because the Idaho Supreme Court's 2008 decision was also based upon the third prong of I.C. § 19-2515A(1)(a), the federal district court conducted a *de novo* review finding that Pizzuto's IQ score was nowhere near the 70

threshold prior to his eighteenth birthday, and the Idaho Supreme Court affirmed the post-conviction court's finding that Pizzuto failed to establish unique and compelling circumstances, there is no reason to expend this Court's valuable time and resources on a case where the ultimate outcome will not change.

E. *Atkins* Did Not Mandate The Use Of Clinical Definitions

Relying upon a snippet from footnote 5 in the background section of Atkins, Pizzuto contends that "[t]he belief on the part of those courts that *Atkins* has nothing to do with the SEM conflicts with the plain language of the opinion" because "*Atkins* expressly addressed the upper limit of an intellectually disabled person's IQ score," and "[t]he Court noted explicitly that 'the cutoff IQ score for the intellectual function prong' of intellectual disability is 'between 70 and 75 or lower.'" (Pet., p.12) (quoting Atkins, 536 U.S. at 309 n.5). However, not only has Pizzuto omitted portions of the sentence upon which he relies, but this Court never "expressly addressed the upper limit of an ID person's IQ score." While discussing the testimony of one of Atkins' experts, Dr. Evan Nelson, the Court noted that he administered the WAIS-III, "the standard instrument in the United States for assessing intellectual functioning." Atkins, 536 U.S. at 309 n.5. The Court initially explained how the WAIS-III is scored, and then noted, "It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is **typically considered** the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. (emphasis added).

Not only has Pizzuto omitted the words "typically considered," but nowhere in the footnote, or anywhere else in Atkins, did this Court "explicitly" hold "the cutoff IQ scores for the intellectual function prong of intellectual disability is between 70 and 75 or lower."

(Petition, p.12) (quotes and citation omitted). Even if the clinical definitions were "addressed" as asserted by Pizzuto, they do not constitute the "holding" in Atkins. Rather, after explaining it was "leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," id. at 317, this Court merely noted, "[t]he statutory definitions of mental retardation are not identical, but **generally conform** to the clinical definitions set forth in n.3," id. at 317 n.22 (emphasis added). Footnote 3 quoted the criteria for ID from the AAMR and APA because Dr. Nelson opined Atkins was "mildly mentally retarded."[6] Id. at 308 n.3. The mere reference to "statutory definitions" from some States that "generally conform" to two clinical definitions does not mean the Court adopted those definitions as its "holding." Pizzuto's contention is contrary to the Court's admonition that it would "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restrictions." Id. at 318. If the Court had desired to "hold" that the States are required to follow the AAMR and APA clinical definitions, including the SEM, the Court would have so stated instead of relegating discussion of the standards to footnotes and using the words "typically" and "generally."

Several of this Court's subsequent opinions confirm the "holding" from Atkins was narrow and did not include the SEM. In Bobby v. Bies, 556 U.S. 825, 831 (2009) (emphasis added), the Court explained the holding in Atkins:

> [T]his Court **held**, in *Atkins v. Virginia*, 536 U.S. at 321, 122 S.Ct. 2242, that the Eighth Amendment prohibits execution of mentally retarded offenders. **Our opinion 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*'*s* compass]." We "le[ft] to the States the task of developing appropriate ways to enforce the

[6] The courts and authorities now use the term "intellectual disability" when referring to mental retardation. Hall, 572 U.S. at 704. Consequently, that is the phrase the state has used except when quoting from material expressly using the phrase, "mental retardation."

> constitutional restriction." *Id.* at 317, 122 S.Ct. 2242 (internal quotation marks omitted).

See also Wood v. Allen, 558 U.S. 290, 294 (2010) ("[Atkins] held that the Eighth Amendment prohibits the execution of the mentally retarded."); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("[W]e held in . . . *Atkins* that the execution of . . . mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime."); Baze v. Rees, 553 U.S. 35, 83 (2008) (Alito, J., concurring) (the "holding" from Atkins is that "death is an excessive sanction for a mentally retarded defendant"); Schriro v. Smith, 546 U.S. 6, 7 (2005) (quotes, citations, brackets omitted) ("*Atkins* stated in clear terms that we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.").

Even in Hall, 572 U.S. at 704, after citing Atkins, the Court stated, "This Court has held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability." Discussing the exact question in Hall, the Court stated, "The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." Id. at 709. After addressing Florida's law defining ID, the Court stated, "This rigid rule, **the Court now holds**, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Id. at 704 (emphasis added).

In Brumfield v. Cain, 576 U.S. 305, 315 (2015) (quotes, citations, ellipsis omitted) (emphasis added), the Court stated, "this Court **observed** in *Atkins* that an IQ between 70 and 75 or lower is **typically** considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition," and that "in adopting these definitions, the

Louisiana Supreme Court **anticipated** our holding 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." Merely observing something that is typically considered does not make it a holding. And the Louisiana Supreme Court could not have "anticipated" the Court's holding in Hall if it was already the holding in Atkins.

Because Atkins "provided the States with virtually no meaningful guidance on how to define" ID, the States "adopted widely varying definitions." DeMatteo, et al., *A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice After Atkins*, 25 Behav. Sci. Law 781, 789 (2007). Indeed, as of 2007, approximately seven years prior to Hall, only 11 of the 37 States that had a legislative definition of ID "define[ed] mental retardation using accepted clinical standards." Id. This is exemplified by the number of federal and state courts that struggled with the "holding" from Atkins, and more specifically whether the SEM was mandated by Atkins.

In Clark v. Quarterman, 457 F.3d 441, 444 (5th Cir. 2006), the petitioner argued the state court erred by "considering the numerical IQ scores of [his] tests instead of the 'confidence band,' or range of potential 'true' scores someone with [his] score falls within" as required by the AAMR. Rejecting the argument, the court recognized that, while Atkins referred to the clinical definitions from the AAMR and APA, "it did not dictate that the approach and the analysis of the State inquiry *must* track the approach of the AAMR or the APA exactly." Id. at 445 (emphasis in original); *see also* Green v. Johnson, 515 F.3d 290, 300 n.2 (4th Cir. 2008) ("Neither *Atkins* nor Virginia law appears to require expressly that [the SEM] be accounted for in determining mental retardation status."); Bowling v. Kentucky, 163 S.W.3d 361, 375 (Ky. 2005) (quoting Atkins 536 U.S. at 317 n.22) ("*Atkins*

did not discuss margins of error or the 'Flynn Effect' and held that the definition in KRS 532.130(2) 'generally conform[ed]' to the approved clinical definitions.").[7]

Pizzuto's primary complaint stems from the Idaho Supreme Court's reliance upon Shoop v. Hill, 139 S.Ct. 504 (2019) (per curium) and Bies, 556 U.S. at 831. (Pet., p.13.) Pizzuto contends that Shoop is inapposite because it was based upon the adaptive deficits element, not the intelligence prong. (Id.) Even if true, which the state does not concede, this is a distinction without a difference. In ascertaining "what was clearly established regarding the execution of the intellectually disabled in 2008, when the Ohio Court of Appeals rejected Hill's *Atkins* claim," the Court noted that "*Atkins* itself was on the books, but *Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." Shoop, 139 S.Ct. at 506-07. Indeed, the Court explained that Atkins merely "noted that the definitions of mental retardation adopted by the [AAMR] and the [APA] required both subaverage intellectual functioning and significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." Id. at 507 (quotes and citation omitted). More importantly, the Court "also noted that state statutory definitions of mental retardation at the time were not identical, but generally conformed to these clinical definitions," and the Court would leave "to the States the task of developing appropriate ways to enforce the constitutional restriction that the Court adopted." Id. (quotes, citations, brackets omitted). The Court then explained, "More than a decade later, we **expounded** on the definition of intellectual disability in two cases" – Hall and Moore v. Texas, 137 S.Ct. 1039 (2017). Id. (emphasis added). Admittedly, the

[7] In Hall, this Court noted that Kentucky was one of only two other States that had adopted a fixed score cutoff identical to Florida's. 572 U.S. at 714. Consequently **after** the Court issued Hall, Bowling was abrogated by Woodall v. Commonwealth, 563 S.W.3d 1 (2018).

Court ultimately concluded that "*Atkins* did not definitely resolve how [significant limitations in adaptive skills were] to be evaluated, but instead left its application in the first instance to the States." Id. at 508. However, neither did Atkins "resolve how [the intelligence prong] was to be evaluated, but instead left its application in the first instance to the States." Id. As explained in Shoop it was not until Hall that the Court provided any additional guidance regarding any definition of ID. Id. at 507.

As discussed above, in Bies, 556 U.S. at 831, the Court explained 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*'*s* compass. We left to the States the task of developing appropriate ways to enforce the constitutional restriction." While Pizzuto attempts to distinguish Bies by contending, "It is a double-jeopardy case containing no substantive analysis of intellectual disability" (Petition, p.13), he ignores what this Court said about its holding in Atkins or otherwise explain why the Idaho Supreme Court erred by relying upon the Court's statement. Moreover, it is ironic that Pizzuto would contend "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" (Petition, p.13), when the statement he relies upon from Atkins is not only from the background section, but in a footnote. (Pet., p.12) (quoting Atkins, 536 U.S. at 309 n.5).

Atkins did not adopt definitions or guides from any organization or otherwise establish a constitutional floor involving the implementation of Atkins' Eighth Amendment prohibition. Nor did Atkins squarely address what standards should be applied, and the Idaho Supreme Court was not required to "extend" Atkins beyond its holding. The only "bright-line" rule that emerged from Atkins was the exclusion of ID murderers from the

death penalty. *See* U.S. v. Caro, 597 F.3d 608, 644 (4th Cir. 2010) (noting Atkins created a "bright-line rule barring execution of [the] mentally retarded"). In short, the Idaho Supreme Court's decision was in perfect harmony with the holding from Atkins.

CONCLUSION

The state respectfully requests that Pizzuto's Petition for Writ of Certiorari be denied.

DATED this 27th day of October, 2021.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 27th day of October, 2021, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Jonah J. Horwitz	_____ U.S. Mail
Capital Habeas Unit	_____ Hand Delivery
Federal Defender Services of Idaho	_____ Overnight Mail
702 West Idaho Street, Suite 900	_____ Facsimile
Boise, ID 83702	X Electronic Court Filing

/s/ *L. LaMont Anderson*
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