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

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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

January 23, 1986

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

Re: Gerald Pizzuto
Case NO. 22075

Dear Judge Reinhardt:

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

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

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

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

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

Diagnosis

Axis I - Borderline intellectual deficiency V-62.89

Axis II - Anti-social personality disorder 301.70

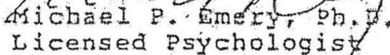
In response to the more specific questions addressed in your order it is my opinion that:

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

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

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

Respectfully submitted,



Michael P. Emery, Ph.D.
Licensed Psychologist

COUNTY DISTRICT COURT
FILED
AT 2:11 O'CLOCK P .M.
SEP 2 2005
DEPUTY

JOAN M. FISHER
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Capital Habeas Unit
Federal Defenders of Eastern Washington & Idaho
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Moscow ID 83843
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DOCKETED

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

GERALD ROSS PIZZUTO, JR. Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. CV 34748 PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, Gerald Ross Pizzuto, by and through his attorney, Joan M. Fisher, hereby moves this court for its order granting Petitioner's Motion for Summary Judgment pursuant to Rule 56 of the Idaho Rules of Civil Procedure and Idaho Code Section 19-4906. Petitioner specifically requests that this Court grant the petition before this Court as there are no genuine issues of material fact in this case. Petitioner is entitled to the requested judgment as a matter of law.

This Motion is based upon the Supplemental Reply Brief in Opposition to Respondent's Motion for Summary Dismissal and Petitioner's Statement of Material Facts in Support of Motion for Summary Judgment with supporting Affidavit and Appendices which have been contemporaneously filed with this Court, as well as, the files and pleadings herein and those files

and pleading of which the Court has taken judicial notice including: *Gerald Ross Pizzuto vs. State of Idaho*, CV 23001;*Gerald Ross Pizzuto vs. State of Idaho*, SP 1837; *Gerald Ross Pizzuto vs. State of Idaho*, SP 00961; *Gerald Ross Pizzuto vs. State of Idaho*, CV 02-33907; and, *State of Idaho v. Gerald Ross Pizzuto Jr.*, Idaho County Case No. CR 85-22075.

DATED this 23d day of September, 2005.

RESPECTFULLY SUBMITTED,

Joan M. Fisher
Attorney for Petitioner

IDAHO COUNTY DISTRICT COURT
FILED
AT 12:44 O'CLOCK P M.
16 2005
ROSE E. GEHRING
CLERK OF DISTRICT COURT
DEPUTY

DOCKETED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO JR.,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV 03-34748

OPINION AND ORDER

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

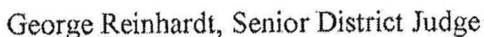
Pizzuto argues that *Atkins* should be applied retroactively to his case. Assuming that Pizzuto is correct in this regard, the Atkins Petition was not timely filed and must therefore be dismissed. I.C.§ 19-2719.

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

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

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

Dated this 16th day of December, 2005



George Reinhardt, Senior District Judge

No. ______

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO,

Petitioner,

v.

TYRELL DAVIS, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Deborah A. Czuba*
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CAPITAL CASE

QUESTIONS PRESENTED

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 v. Virginia*, 536 U.S. 304, 318 (2002). Below, the Ninth Circuit denied relief on Petitioner's *Atkins* claim because it believed that even though the Idaho Supreme Court's rejection of the claim was inconsistent with the science that existed at the time, its decision on the first and third prongs was not so unreasonable as to satisfy the federal habeas standard. The questions presented are:

1. In determining intellectual disability, at the time of the pertinent state court decision in 2008, whether *Atkins* and the Eighth Amendment mandated the use of clinical standards for the determination of sub-average intelligence as measured by intelligence quotient ("IQ") scores, including the standard error of measurement ("SEM")?

2. *Atkins* acknowledged that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills ... that became manifest before age 18." 536 U.S. at 318. Affidavits in the state court record averred that before petitioner reached age 18 he had significant academic difficulties and failing grades, and was forced to repeat two grades in school. No pre-18

IQ tests exist, but an IQ test at age 29 was 72. Expert affidavits speculated that Petitioner's mental functioning could have declined over the years since he turned 18 due to epilepsy and drug abuse, but no testing occurred and no expert averred that Petitioner's IQ had declined.

In denying a hearing based in part on its view that Petitioner failed to establish the pre-18 onset of adaptive limitations because of such speculation, did the Idaho Supreme Court make an unreasonable determination of fact?

Electronically Filed
9/25/2019 1:08 PM
Second Judicial District, Idaho County
Kathy Ackerman, Clerk of the Court
By: Sherie Clark, Deputy Clerk

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Attorney for Gerald Ross Pizzuto, Jr.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

GERALD ROSS PIZZUTO, JR., Petitioner, v. STATE OF IDAHO, Respondent.	)	**Case No. CV 03-34748** **MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO IDAHO RULE OF CIVIL PROCEDURE 60(b)(6)** **ORAL ARGUMENT REQUESTED** **(CAPITAL CASE)**

Because the Ninth Circuit has held that the Idaho judiciary's resolution of the claim at bar is inconsistent with binding precedent from the United States Supreme Court, and because of prior counsel's negligence, Petitioner Gerald Ross Pizzuto, Jr., respectfully moves to alter or amend the judgment entered against him. Specifically, Mr. Pizzuto requests that the Court reopen the case, vacate the order denying relief on December 16, 2005, allow him an opportunity to request leave to amend his petition, and set an evidentiary hearing to take testimony on whether he is constitutionally immune from execution under the Eighth Amendment by virtue of his intellectual disability. The motion is supported by a contemporaneously filed memorandum.

DATED this 25th day of September 2019.

/s/ Jonah J. Horwitz
Jonah J. Horwitz
Attorney for Gerald Ross Pizzuto, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September 2019, I served the foregoing document on all interested parties, who are set forth below, via iCourt file and serve:

L. LaMont Anderson
Deputy Attorney General
Chief, Capital Litigation Unit
Statehouse Mail, Room 10
PO Box 83720
Boise, ID 83720-0010

/s/ L. Hollis Ruggieri
L. Hollis Ruggieri

IDAHO COUNTY DISTRICT COURT
AT 3:23 FILED O'CLOCK P .M.

JAN 06 2020

KATHY M. ACKERMAN
CLERK OF DISTRICT COURT
DEPUTY

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

GERALD ROSS PIZZUTO, JR., Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO.** CV 03-34748 **MEMORANDUM OPINION AND ORDER ON MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO I.R.C.P. 60(b)(6)**

This matter came on before the Court on the Petitioner's Motion to Alter or Amend Judgment Pursuant to I.R.C.P. 60(b)(6).[1] The Petitioner was represented by Jonah Horwitz, of the Federal Defender Services of Idaho. The State was represented by LaMont Anderson, of the Idaho Attorney General's Office. The matter was before the Court on December 10, 2019. The Court, being fully advised in the matter, hereby renders its decision.

PROCEDURAL BACKGROUND

Pizzuto was convicted of two counts of first-degree murder and one count of robbery and grand theft and sentenced to death in 1986. *See State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991). The judgment of conviction was affirmed by the Idaho

[1] The State also presented a Motion to Take Judicial Notice, which was not opposed by the Petitioner. The motion was granted on the record.

Supreme Court. *Id.* There has been extensive litigation over Pizzuto's convictions and sentence. Pizzuto has filed a total of five petitions for post-conviction relief, all of which were dismissed.[2]

The Idaho Supreme Court affirmed the district court's summary dismissal of the fifth petition for post-conviction relief in *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642 (2005).[3] Pizzuto's fifth petition raised the issue of whether Pizzuto's death sentence was unconstitutional in light of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). wherein the United States Supreme Court held that the execution of a murderer who was mentally retarded[4] at the time of the killing constituted cruel and unusual punishment in violation of the Eighth Amendment. The Idaho Supreme Court affirmed the District Court's summary dismissal of Pizzuto's fifth petition in *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642 (2005).

There is also significant federal litigation resulting from Pizzuto's conviction and sentence.[5] Most recently, the Ninth Circuit Court of Appeals affirmed the District of Idaho Court's order denying habeas relief. *See Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir.

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[2] Pizzuto's first post-conviction claim was reviewed in conjunction with the appeal of his judgment of conviction in *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991). Pizzuto's second petition for post-conviction relief was dismissed by the District Court; the Idaho Supreme Court affirmed this decision in *Pizzuto v. State*, 127 Idaho 469, 903 P.2d 58 (1995). Pizzuto's third petition for post-conviction relief was summarily dismissed by the District Court; the Idaho Supreme Court also affirmed this decision. *See Pizzuto v. State*, 134 Idaho 793, 10 P.3d 742 (2000). Pizzuto's fourth petition for post-conviction relief addressed issues arising from the United States Supreme Court case *Ring v. Arizona*, 536 U.S. 584 (2002). This post-conviction appeal was consolidated with several others. In *Rhoades et al. v. State*, 149 Idaho 130, 233 P.3d 61 (2010), the Idaho Supreme Court affirmed the post-conviction court, concluding that *Ring* is not retroactive under Idaho law.

[3] The procedural history and summary of details from each of Pizzuto's post-conviction cases are set forth at 146 Idaho at723-34, 202 P.3d at 645-646.

[4] At the time *Atkins* was decided, "mental retardation" was the common phrase used to describe intellectual disability. This Court will use the phrase "intellectual disability" for purposes of this order, unless specifically quoting older material.

[5] Pizzuto's first habeas petition is located at *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002), *dissent amended and superceded in part by* 385 F.3d 1247 (9th Cir. 2004).

2019).[6] The Ninth Circuit review of Pizzuto's case was governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Habeas relief[7] can be granted only if the state court proceeding adjudicating the merits "'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,

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[6] Pizzuto's federal cases are intertwined with the United States Supreme Court's rulings in *Atkins* and its progeny, including *Hall v. Florida*, 572 U.S. 701 (2014). In *Pizzuto v. Blades*, 2012 WL 73236 (D. Idaho 2012), Judge Winmill determined that Pizzuto was not entitled to habeas relief. This decision was reviewed and affirmed in *Pizzuto v. Blades*, 729 F.3d 1211 (9th Cir. 2013); however, as a result of *Hall v. Florida*, the case was vacated and remanded. *See Pizzuto v. Blades*, 758 F.3d 1178 (9th Cir. 2014). Judge Winmill again considered the matter and determined that *Hall v. Florida* did not alter the previous decision denying the successive petition. This decision was affirmed at *Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir. 2019).

[7] The standard of review of the habeas action is set forth as follows:

> "[A] decision by a state court is 'contrary to' [the Supreme Court's] clearly established law if it 'applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent.' " *Price v. Vincent*, 538 U.S. 634, 640, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "[A] state-court decision involves an unreasonable application of th[e Supreme] Court's precedent if the state court identifies the correct governing legal rule from th[e Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407, 120 S.Ct. 1495. To satisfy this requirement, the record "must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). The question "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (citing *Williams*, 529 U.S. at 410, 120 S.Ct. 1495). Turning to § 2254(d)(2), "we may only hold that a state court's decision was based on an unreasonable determination of the facts if 'we [are] convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.' " *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014) (alteration in original) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other grounds as stated in Murray*, 745 F.3d at 1000).
>
> We apply our review under § 2254(d) to the last reasoned state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). Here, we review the Idaho Supreme Court's 2008 decision. *See Pizzuto I*, 202 P.3d 642. Because that court denied Pizzuto's *Atkins* claim on the merits, our review under § 2254(d) is limited to the record that was before the state court. *See Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). We may grant habeas relief only if we conclude both that § 2254(d) is satisfied and, on de novo review, that the petitioner is in custody in violation of the Constitution of the United States. *See Frantz v. Hazey*, 533 F.3d 724, 735–37 (9th Cir. 2008) (en banc).

Pizzuto v. Blades, 933 F.3d 1166, 1178–79 (9th Cir. 2019)

as determined by the Supreme Court of the United States,' 28 U.S.C. § 2254(d)(1), or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' *id.* § 2254(d)(2)." *Pizzuto v. Blades*, 933 F.3d at 1178. The Ninth Circuit Court of Appeals concluded the following:

> Because § 2254(d) is not satisfied, we hold that the district court properly denied habeas relief. We need not address Pizzuto's remaining appellate arguments or review his *Atkins* claim de novo. Accordingly, we do not address whether Pizzuto is intellectually disabled or whether his execution would violate the Eighth Amendment.
> Our decision, however, does not preclude the Idaho courts from reconsidering those questions in light of intervening events. Although the Idaho courts rejected Pizzuto's *Atkins* claim in 2008, they did so without the benefit of an evidentiary hearing, without the benefit of the Supreme Court's decisions in *Hall*, *Brumfield* and *Moore I*, and without the benefit of the most recent iterations of the AAIDD and American Psychiatric Association clinical standards. Since 2008, the United States Supreme Court has made clear that "it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an IQ above 70." *Brumfield*, 135 S. Ct. at 2278 (quoting *Hall*, 572 U.S. at 704, 134 S.Ct. 1986), and the professional clinical standards now advise that "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11 at 37. The Idaho courts have not yet addressed whether, under these standards, Pizzuto's execution would violate the Eighth Amendment.

Pizzuto v. Blades, 933 F.3d at 1190.

Pizzuto is currently before this Court seeking to reopen the fifth petition for post-conviction relief pursuant to I.R.C.P. 60(b)(6). The motion to reopen the fifth petition is based upon Pizzuto's argument that the state court should consider his intellectual disability claim under the correct, contemporary clinical standards and law.

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a). A petition for post conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a).

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App.1995). "An application for post-conviction relief initiates a proceeding which is civil in nature." *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App.1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Id.*

The petitioner bears the burden of pleading and proof that is imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief." *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941, 943 (Ct. App.1994).

I.R.C.P. 60(b) STARDARD OF REVIEW

The standard of review for the trial court's decision to grant relief pursuant to I.R.C.P. 60(b) is set forth in *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010).

> The interpretation of the Idaho Rules of Civil Procedure is a matter of law over which this Court has free review. *Canyon County Bd. of Equalization v. Amalgamated Sugar Co.*, 143 Idaho 58, 60, 137 P.3d 445, 447 (2006). The decision to grant or deny a motion under I.R.C.P. 60(b) is committed to the discretion of the trial court. *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979).
>
> > A trial court's decision whether to grant relief pursuant to I.R.C.P. 60(b) is reviewed for abuse of discretion. The decision will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason. A determination under Rule 60(b) turns largely on questions of fact to be determined by the trial court. Those factual findings will be upheld unless they are clearly erroneous. If the trial court applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion.
>
> *Waller v. State, Dep't of Health and Welfare*, 146 Idaho 234, 237–38, 192 P.3d 1058, 1061–62 (2008) (internal citations omitted).

Eby v. State, 148 Idaho at 734, 228 P.3d at 1001.

ANALYSIS

The Petitioner is seeking relief from judgment pursuant to I.R.C.P. 60(b)(6). which states, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons. . . any other reason that justifies relief." *Id.* "I.R.C.P. 60(b)(6), which is the catchall for the

rule, was not intended to allow a court to reconsider the legal basis for its original decision." *First Bank & Tr. of Idaho v. Parker Bros.*, 112 Idaho 30, 32, 730 P.2d 950, 952 (1986).

> "[A]lthough the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) [(6)] motion, its discretion is limited and may be granted only on a showing of 'unique and compelling circumstances' justifying relief." *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996) (quoting *In re Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct.App.1990)). "The appellate courts of this state have infrequently granted relief under Rule 60(b)(6)." *Berg*, 147 Idaho at 578, 212 P.3d at 1008.

Dixon v. State, 157 Idaho 582, 587, 338 P.3d 561, 566 (Ct. App. 2014). "A motion under Rule 60(b) must be made within a reasonable time . . .." I.R.C.P. 60(c)(1).

1. The motion to reopen the fifth petition is untimely.

The threshold question is whether the motion to reopen the fifth petitioner made within a reasonable time.[8] Pizzuto contends that the motion was filed within a reasonable time based upon the Ninth Circuit's dicta in *Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir. 2019) stating that Idaho courts have not yet addressed whether Pizzuto's execution would violate the Eighth Amendment under *Hall, Brumfield* and *Moore I*, and the most recent iterations of the AAIDD and American Psychiatric Association clinical standard. The

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[8] If Pizzuto had filed a sixth successive post-conviction petition, then I.C. § 19-2719(5) would have limited Pizzuto to bringing the successive petition within forty-two days after the claim was known or reasonably should have been known. *Id., see also Pizzuto v. State*, 146 Idaho 720, 727, 202 P.3d 642, 649 (2008).

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

Pizzuto v. State, 146 Idaho at 727, 202 P.3d at 649. Had this case been filed as a sixth successive petition at this time, the petition would have been untimely filed. Pizzuto's claims should have been reasonably known following the issuance of *Hall v. Florida*. There are no extraordinary circumstances that prevented Pizzuto from filing a successive claim within 42 days of the issuance of *Hall*.

State argues that with the issuance of *Hall v. Florida*, 572 U.S. 701 (2014) Pizzuto knew or reasonably should have known of his claims with respect to his assertion that he is intellectually disabled.

While this is not a successive petition, based upon the record of this case, the Petitioner's motion to reopen the fifth petition was not made within a reasonable time. The parties do not dispute that the Idaho Supreme Court considered *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d (2002) as well as the I.C. § 19-2515A(1) when addressing Pizzuto's fifth petition for post-conviction relief in 2008. Since that time, the parties agree that the analysis applied in *Atkins* has evolved. The progeny of *Atkins* includes *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d (2014)(decided on May 27, 2014); *Brumfield v. Cain*, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015)(decided June 18, 2015), and *Moore v. Texas (Moore I)*, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017)(decided March 28, 2017).

Having reviewed the federal as well as state record with respect to Pizzuto's intellectual disability claims, it is clear that Pizzuto was aware of the developments from *Hall*, *Brumfield*, and *Moore I*, as well as the updates to the AAIDD and the American Psychiatric Association clinical standards well before the Ninth Circuit issued *Pizzuto v. Blades*, 933 F.3d 1166 (2019). Issues arising from *Hall* and the AAIDD and APA clinical standards were addressed and developed by Pizzuto's counsel when Judge Winmill considered *Pizzuto v. Blades*, 2016 WL 6963030 (2016). 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 move to reopen the fifth petition for post-conviction relief. While the Ninth Circuit noted that the Idaho Supreme last

considered this issue in 2008, this does not mean that Pizzuto was unaware of his claims until the Ninth Circuit laid them out. Clearly, Pizzuto was aware of the developments resulting from *Atkins*, and strategically he decided to pursue remedy through the federal system. This Court is not persuaded that this decision of strategy equates to reasonableness which would allow Pizzuto to delay in filing either a successive petition for post-conviction relief or a motion to reopen the fifth petition pursuant to I.R.C.P. 60(b)(6). Therefore, Pizzuto's motion to reopen the fifth petition, filed five years after the issuance of *Hall v. Florida*, is untimely.

2. There has not been a showing of unique and compelling circumstances justifying relief in this case.

In the alternative, Pizzuto has not established unique and compelling circumstances justifying relief pursuant to I.R.C.P. 60(b)(6). There is limited case law discussing when unique and compelling circumstances are present with respect to post-conviction cases. Cases dealing with this issue have focused on whether there was an absence of meaningful representation during the post-conviction proceeding. This issue was first considered in *State v. Eby*, 148 Idaho 731, 228 P.3d 998 (2010).

The Supreme Court of Idaho remanded *Eby* to the district court for a determination of whether Eby had established unique and compelling circumstances for purposes of I.R.C.P. 60(b)(6) where he had received little to no representation in pursuing his post-conviction petition.

> Eby argues that being prevented a meaningful opportunity to present his claim through the inaction of his state-provided attorney would be a denial of his due process rights and would constitute grounds for relief from judgment based on I.R.C.P. 60(b)(6). We have recognized that "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Lee v. State*, 122 Idaho 196,

> 199, 832 P.2d 1131, 1134 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640, 671 (1991)). We recognize and reiterate today that there is no right to effective assistance of counsel in post-conviction cases. We likewise recognize that "this Court has infrequently found reason to grant relief under I.R.C.P. 60(b)(6)." *Berg v. Kendall*, 147 Idaho 571, 576 n. 7, 212 P.3d 1001, 1006 n. 7 (2009). However, we are also cognizant that the Uniform Post-Conviction Procedure Act is "the exclusive means for challenging the validity of a conviction or sentence" other than by direct appeal. *Rhoades v. State*, 148 Idaho 215, 217, 220 P.3d 571, 573 (2009) (quoting *Hays v. State*, 132 Idaho 516, 519, 975 P.2d 1181, 1184 (Ct.App.1999)). Given the unique status of a post-conviction proceeding, and given the complete absence of meaningful representation in the only available proceeding for Eby to advance constitutional challenges to his conviction and sentence, we conclude that this case may present the "unique and compelling circumstances" in which I.R.C.P. 60(b)(6) relief may well be warranted.

Eby, 148 Idaho at 737, 228 P.3d at 1004.

With respect to the issue of whether Pizzuto has been prevented a meaningful opportunity to present his claim, the facts of the case before this Court are substantially different from those of *Eby*. In *Eby*, the Supreme Court found a complete absence of meaningful representation available to Eby. Since *Eby*, the Idaho Court of Appeals has considered at least three other cases where petitioners have been denied relief pursuant to I.R.C.P. 60(b)(6). In *Dixon v. State*, 157 Idaho 582, 338 P.3d 561 (Ct. App. 2014), the Court found *Eby* distinguishable.

> Dixon relies on *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010). In that case, the Idaho Supreme Court concluded that "[g]iven the unique status of a post-conviction proceeding, and given the complete absence of meaningful representation in the only available proceeding for Eby to advance constitutional challenges to his conviction and sentence, we conclude that this case may present the 'unique and compelling circumstances' in which I.R.C.P. 60(b)(6) relief may well be warranted." *Id.* at 737, 228 P.3d at 1004. However, as the State points out, in that case the petitioner was denied the ability to present his post-conviction claim due to the lack of any representation from multiple attorneys over several years. Unlike that case, Dixon's post-conviction attorney presented his claim, and represented him at an evidentiary hearing. While there may have been a fatal evidentiary gap at the post-conviction trial, Rule 60(b)(6)

> does not provide an avenue to retry the case or supplement the evidence. The circumstances of Dixon's case do not rise to the level of unique and compelling circumstances, and the district court did not abuse its discretion in denying the Rule 60(b)(6) motion. This is true even if we consider that Dixon's post-conviction counsel failed to present evidence at the post-conviction hearing as to one of the claims.

Id. at 587–88, 338 P.3d at 566–67.

In *Bias v. State*, 159 Idaho 696, 365 P.3d 1050 (Ct. App. 2015), the Court found that the petitioner's dissatisfaction with post-conviction counsel's performance did not constitute "unique and compelling circumstances."

> Bias argues that the Idaho Supreme Court's holding in *Eby v. State*, 148 Idaho 731, 228 P.3d 998 (2010), establishes that ineffective assistance by post-conviction counsel constitutes a sufficient basis for granting relief under Rule 60(b). Bias's reliance on *Eby* is misplaced. In *Eby*, the petitioner's post-conviction counsel failed to file *any response* to the court's issuance of no less than five notices of its intention to dismiss his case for inactivity pursuant to I.R.C.P. 40(c). *Eby*, 148 Idaho at 733, 228 P.3d at 1000. After the court dismissed the case under Rule 40(c), petitioner's fourth post-conviction attorney sought relief under Rule 60(b), which the court denied. *Id.* at 734, 228 P.3d at 1001. On appeal, the Idaho Supreme Court reiterated that petitioners do not have a right to effective assistance of post-conviction counsel. *Id.* at 737, 228 P.3d at 1004. However, because post-conviction proceedings constitute "the only available proceeding for [a petitioner] to advance constitutional challenges to his conviction and sentence," relief may be warranted under Rule 60(b) in the "unique and compelling circumstances" where a petitioner experiences "the *complete absence* of meaningful representation." *Id.* (emphasis added).
>
> Here, Bias's motion does not allege a complete absence of post-conviction representation, nor does the record support such a finding. Bias's post-conviction counsel filed a responsive brief and supporting affidavits after the State filed a motion for summary dismissal. Unlike the petitioner in *Eby*, Bias did not experience a "complete absence of meaningful representation." Bias's dissatisfaction with his post-conviction counsel's performance does not constitute the "unique and compelling circumstances" required before a court may grant relief under Rule 60(b).

Id. at 706–07, 365 P.3d at 1060–61. In *Devan v. State*, 162 Idaho 520, 399 P.3d 847 (Ct. App. 2017), the Idaho Court of Appeals again reiterated that dissatisfaction with post-

conviction counsel's performance does not constitute unique and compelling circumstances.

> A post-conviction petitioner is not entitled to the effective assistance of post-conviction counsel, and thus, "petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Murphy v. State*, 156 Idaho 389, 394, 327 P.3d 365, 370 (2014) (quoting *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640, 670-71 (1991)). We do not read *Eby* to open the door to challenge the effectiveness of post-conviction counsel by virtue of a Rule 60(b) motion. In *Eby*, the case was dismissed for inactivity, pursuant to I.R.C.P. 41(e), after over four years and several attorneys who did nothing but attempt to forestall such dismissal. *Eby*, 148 Idaho at 733, 228 P.3d at 1000. Only after the petition was dismissed did yet another lawyer make any attempt to advance a claim. *Id.* at 733-34, 228 P.3d at 1000-01. Our Supreme Court's reference to "the complete absence of meaningful representation" reflected these "unique and compelling circumstances." *Id.* at 737, 228 P.3d at 1004.[3]
> Unlike the petitioner in *Eby*, Devan did not experience a "complete absence of meaningful representation." *Eby*, 148 Idaho at 737, 228 P.3d at 1004. Devan's dissatisfaction with his post-conviction counsel's performance does not constitute the unique and compelling circumstances required before a court may grant relief under I.R.C.P. 60(b).

Id. at 523–24, 399 P.3d at 850–51.

Pizzuto's case is also distinguishable from *Eby*. Pizzuto has called into question counsel's strategy on how the fifth petition for post-conviction relief was handled. Pizzuto claims that counsel was negligent for failing to adequately develop the factual record with respect to his intellectual disability. The record is clear, however, that Pizzuto was not prevented a meaningful opportunity to present his claim due to the lack of representation. When the fifth petition was considered, counsel and the court did not have the guidance of *Hall*, *Brumfield*, and *Moore I*, as well as the updates to the AAIDD and the American Psychiatric Association clinical standards. This Court can also look in hindsight and question why counsel did not develop the record regarding the issue of intellectual disability, but the record establishes Pizzuto was represented; he did not

experience a complete absence of meaningful representation regarding post-conviction relief in any of the five petitions that have been considered on his behalf.

One can review *Pizzuto v. State,* 146 Idaho 720, 202 P.3d 642 (2005) and see that the issues surrounding Pizzuto's fifth petition for post-conviction relief are well distinguishable from the lack of representation that occurred in *Eby.* Pizzuto's case is akin to *Dixon, Bias,* and *Devan.* For these reasons, Pizzuto's argument that his case constitutes unique and compelling circumstances based upon his representation fails.

While it is clear that the level of representation in Pizzuto's case does not constitute unique and compelling circumstances requiring relief under I.R.C.P. 60(b)(6), this leaves the question of whether there are other unique and compelling circumstances which may create a basis to reopen the fifth petition for post-conviction relief. The Ninth Circuit opinion in *Pizzuto v. Blades*, 933 F.3d 1166 (2019) does give this Court pause. This is a capital case, an evidentiary hearing has not been held before a state court to determine whether Pizzuto's execution would violate the Eighth Amendment. The Ninth Circuit was critical of the Idaho Supreme Court's review of Pizzuto's fifth petition for post-conviction relief based upon the recent developments of *Atkins* and its progeny.

This Court is mindful that the Uniform Post–Conviction Procedure Act is "the exclusive means for challenging the validity of a conviction or sentence" other than by direct appeal.[9] *Rhoades v. State,* 148 Idaho 215, 217, 220 P.3d 571, 573 (2009).

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[9] Pizzuto has reserved the right to ask the Idaho Supreme Court to recall its remittitur in case number 32679. *See State v. Beam*, 115 Idaho 208, 221, 766 P.2d 678, 691 (1988)("If there is to be any proportionality in death penalty sentencing, however, it is only just that the Court now pause to reconsider Beam's death sentence. And it can do so. In *State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921), the Court recalled its remittitur to further consider its earlier judgment which had affirmed a conviction of first degree murder and punishment *fixed by the jury* at death." *Id., citing State v. Ramirez*, 33 Idaho 803, 199 P. 376 (1921)). Here, where the Ninth Circuit reviewed and called into question the Supreme Court of Idaho's opinion in *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642 (2005), a recall of the remittitur may be the appropriate avenue of review in this case.

However. "appellate courts of this state have infrequently granted relief under Rule 60(b)(6)." *Dixon v. State*, 157 Idaho 582, 587, 338 P.3d 561, 566 (Ct. App. 2014). This Court does not believe the record in this case rises to the level of unique and compelling circumstances as contemplated by I.R.C.P. 60(b)(6). From reviewing the record, it appears this issue was brought under this rule because a sixth successive petition would not have been timely in this matter. It is not appropriate to allow a catchall provision to circumvent the parameters of the UPCPA. While the Court does not decide this issue lightly, considering the seriousness of the matter and also the statements of the Ninth Circuit Court of Appeals, the record as a whole does not support reopening the fifth petition for post-conviction relief pursuant to the catchall provision of I.R.C.P. 60(b). Therefore the Petitioner's motion is denied.[10]

---

[10] While Pizzuto has not had an evidentiary hearing before a state court, the record in this matter also includes the federal habeas review. Judge Winmill found that Pizzuto failed to prove his IQ was 70 or below, and also that his IQ was 75 or below before he turned 18. Judge Winmill's opinion states:

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

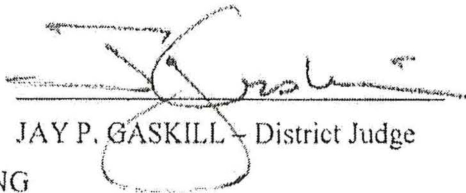
Pizzuto v. Blades, No. 1:05-CV-00516-BLW, 2016 WL 6963030, at *11 (D. Idaho Nov. 28, 2016), aff'd, 933 F.3d 1166 (9th Cir. 2019). If the appellate court remands this issue for purposes of an evidentiary hearing, this Court would consider the issue on the evidence presented, but for purposes of the motion before this Court, the issue of whether Pizzuto is intellectually disabled, as defined by I.C. § 19-2515A, is questionable. Therefore, this Court finds that it is reasonable and appropriate for purposes of judicial economy to deny the motion and allow the appellate courts to consider the issue and determine whether the matter should be remanded for an evidentiary hearing.

ORDER

The Petitioner's Motion to Alter or Amend Judgment Pursuant to I.R.C.P.

60(b)(6) is DENIED.

DATED this 6th day of January 2020.



JAY P. GASKILL – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO I.R.C.P. 60(b)(6) was delivered via electronic court filing by the undersigned at Lewiston, Idaho, this 6th day of January, 2020, on:

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALD ROSS PIZZUTO, JR.,	)	
	)	
Petitioner-Appellant,	)	
	)	**DOCKET NO. 47709-2020**
v.	)	
	)	**(Idaho County District Court No.**
STATE OF IDAHO,	)	**CV-2003-34748)**
	)	
Respondent.	)	**CAPITAL CASE**
	)	

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the
Second Judicial District for Idaho County
Honorable Jay Gaskill, District Judge presiding

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I. STATEMENT OF THE CASE

This is a successive, capital post-conviction case raising the question of whether Appellant Gerald Ross Pizzuto, Jr. is constitutionally protected from execution by the Eighth Amendment because he is intellectually disabled[1] under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Mr. Pizzuto is a capital inmate confined by the State of Idaho. He was convicted of first-degree murder and sentenced to death in Idaho County in 1986. Since then, there has been extensive litigation over his convictions and sentence. Here, Mr. Pizzuto will only present the background relevant to the issues currently before the Court.

That background began on June 19, 2003, when Mr. Pizzuto filed a successive petition for post-conviction relief in Idaho County District Court. 32679 R. 1–10.[2] In that petition, Mr. Pizzuto alleged an *Atkins* claim. 32679 R. 1–10. The district court summarily denied the petition without an evidentiary hearing on December 16, 2005. 32679 R. 309–11. In a two-page order, the court found that the petition was untimely and, without written elaboration, that it "failed to raise a genuine issue of material fact." 32679 R. 309–11. On appeal, this Court determined that the district judge's timeliness ruling was in error. *See Pizzuto v. State*, 146 Idaho

[1] The authorities at one time referred to "mental retardation" rather than "intellectual disability." However, the latter phrase is now the accepted one. *See Hall v. Florida*, 572 U.S. 701, 704 (2014). Mr. Pizzuto will accordingly use the expression "intellectual disability" except when quoting older material.

[2] Citations to the record in case number 32679, the earlier *Atkins* appeal, are in the form above. Mr. Pizzuto refers to the record in the instant case, number 47709, in the form "R. Vol.__, p.__." Below, at the State's request, R. Vol. III, p. 700, the district court took judicial notice of the record in case number 32679, R. Vol. V, p. 1370 n.1.

720, 727 (2008). For purposes of the appeal, it regarded Mr. "Pizzuto's petition as being filed timely." *Id.*

Nevertheless, the Court affirmed the denial of post-conviction relief on the substance of Mr. Pizzuto's *Atkins* claim. *See id.* at 728–35. It did so because it thought Mr. Pizzuto's petition failed under Idaho Code § 19-2515A, which sets forth the state's standards for intellectual-disability claims in capital cases. Section 19-2515A(1)(b) defines the subaverage functioning prong of intellectual disability as comprising an IQ "of seventy (70) or below." Applying that provision, the Court observed that there was "only one IQ score" in the record, "a Verbal IQ of 72." *Pizzuto*, 146 Idaho at 729. The Court recognized Mr. Pizzuto's contention "that an IQ score is only accurate within five points" given the standard error of measurement ("SEM") and that the 72 was therefore within the range of intellectual disability under the statute. *Id.* But it rebuffed that proposition on the ground that "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.*

Mr. Pizzuto then pursued the same claim in federal habeas and a panel of the Ninth Circuit ruled on it, with its final opinion issued on December 31, 2019. In that ruling, the Ninth Circuit concluded that this Court's adjudication of Mr. Pizzuto's *Atkins* 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, and that as a result its opinion "violated" constitutional principles embraced by the United States Supreme Court. *Pizzuto v. Yordy*, 947 F.3d 510, 525, 528 (9th Cir. 2019) (per curiam). Still, the Ninth Circuit was unable to grant the writ, as it was hamstrung by the federal habeas standard of review. Specifically, the habeas statute demands a

showing that the state court unreasonably applied the caselaw that existed at the time of its decision. *See id.* at 522–23. In the Ninth Circuit's view, even though this Court's 2008 opinion was erroneous under current law, its errors were not so obviously forbidden by U.S. Supreme Court precedent *in 2008* as to satisfy that unforgiving test. *See id.* at 526–27. Consequently, the Ninth Circuit denied relief, while emphasizing that its disposition did "not preclude the Idaho courts from reconsidering" the issue "in light of intervening events." *Id.* at 534.

Consistent with the Ninth Circuit's invitation, Mr. Pizzuto moved to reopen his post-conviction *Atkins* case on September 25, 2019[3] so that the state courts could consider his intellectual-disability claim under the correct, contemporary clinical standards and law. R. Vol. I, pp. 13–14. On January 6, 2020, the district court denied the motion as both late and meritless. R. Vol. V, pp. 1370–84. Mr. Pizzuto filed a timely notice of appeal on January 10, 2020. R. Vol. V, pp. 1385–96.

On March 24, 2020, Mr. Pizzuto filed a motion to recall the remittitur in case number 32679, based on the same essential theory as the one urged here. He also submitted a motion to consolidate case number 32679 with the instant appeal. Mr. Pizzuto takes the position that relief must be granted either through this appeal or a recall of the remittitur.

More facts and procedural history are presented below where necessary.

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[3] Mr. Pizzuto filed his Rule 60 motion based on an earlier version of the Ninth Circuit's opinion, *see Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir. 2019) (per curiam), which was identical in all material respects to the final, December 2019 version mentioned above. Because it superseded the previous one, Mr. Pizzuto relies upon the latter opinion except when he is discussing the timeliness of his Rule 60 motion, which was triggered by the earlier Ninth Circuit decision.

II. ISSUES PRESENTED ON APPEAL

The issues presented on appeal are:

A. Whether Mr. Pizzuto's I.R.C.P. 60(b) motion was timely.

B. Whether Mr. Pizzuto's I.R.C.P. 60(b) motion was meritorious.

III. STANDARD OF REVIEW

"The decision to grant or deny a motion under I.R.C.P. 60(b) is committed to the discretion of the trial court." *Eby v. State*, 148 Idaho 731, 734 (2010).[4] However, "[t]he interpretation of the Idaho Rules of Civil Procedure is a matter of law over which this Court has free review." *Id.* Furthermore, a district court abuses its discretion when it acts inconsistently "with the applicable legal standards." *Id.* In this case, the district court denied Mr. Pizzuto's 60(b) motion without a hearing because it felt he had the legal basis to bring it earlier and because it determined that prior counsel's mistakes were categorically not the type of errors that could trigger the reopening of the action. R. Vol. V, pp. 1375–83. Mr. Pizzuto submits that these are essentially legal conclusions and do not depend on any factual findings deserving of appellate deference. In that regard, it is also relevant that the district judge who denied the motion was not the one who observed prior counsel's conduct when she made the mistakes at issue here. Therefore, Mr. Pizzuto believes that de novo review is appropriate. In the alternative, if a stricter standard applies, he contends that it is satisfied.

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

IV. ARGUMENT

Two issues are presented on appeal: (1) whether the Rule 60(b) motion was timely; and (2) whether it was meritorious. Mr. Pizzuto addresses each in turn.[5] Because the different aspects of the case are so interrelated, he incorporates every section of this brief into every other section.

A. The Rule 60(b) Motion Was Timely

Motions made pursuant to Rule 60(b)(6) must be filed "within a reasonable time," I.R.C.P. 60(c)(1), and, as set forth below, Mr. Pizzuto's was.

"What constitutes a reasonable time" under Rule 60(b) "is based upon the facts of each case." *Fisher Sys. Leasing v. J & J Gunsmithing & Weaponry Design*, 135 Idaho 624, 628 (Ct. App. 2001). In *Davis v. Parrish*, 131 Idaho 595, 597 (1998), this Court categorized a Rule 60(b) motion as timely where it was filed roughly three months after the litigant had notice of the basis for seeking to alter or amend the judgment. As elaborated on below, the predicate for Mr. Pizzuto's motion was the new Ninth Circuit opinion, which was originally handed down on August 14, 2019. The Rule 60(b) motion was filed on September 25, 2019. R. Vol. I, p. 13. Having filed within forty-two days of the triggering event, Mr. Pizzuto acted diligently in assembling a detailed motion in this complex capital case involving an extensive procedural history and difficult scientific subject matter. Per *Davis*, his motion is not time-barred.

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[5] Mr. Pizzuto reserves the right to respond in his reply brief to any arguments raised by the State for affirmance that were not relied upon by the district court. Because Mr. Pizzuto does not currently know what arguments the State will make in that regard, he does not address them here.

Rejecting that straightforward logic, the district court held that the Rule 60(b) motion was untimely because, in the judge's view, it had to be filed within a reasonable time after *Hall*, not after the Ninth Circuit's decision in Mr. Pizzuto's own habeas appeal. R. Vol. V, pp. 1376–78. The district court's theory is a non-sequitur. Regardless of whether *Hall* might have served as a valid triggering point for a *different* Rule 60(b) motion, the question at hand is whether the Ninth Circuit's opinion was a valid triggering point for the motion that was actually filed. In Idaho, a Rule 60(b) motion is appropriate when there are "unique and compelling circumstances justifying relief." *Miller v. Haller*, 129 Idaho 345, 349 (1996). Thus, the sole question for timeliness purposes is whether such unique circumstances are presented by the fact that the Ninth Circuit declared this Court's resolution of Mr. Pizzuto's *Atkins* claim to be unscientific and, under today's law, unconstitutional. The district court did not even attempt to address that question, but the answer is yes. A federal court with jurisdiction over the issue and no obligation to say so nevertheless felt obligated to point out how problematic the 2008 *Pizzuto* opinion is, and to invite further proceedings here. That surely qualifies as a unique and compelling circumstance.

Furthermore, the district court's reasoning does not hold up even on its own terms. The fundamental premise of the district court's analysis is that *Hall* and the developments in the science of intellectual disability gave Mr. Pizzuto everything he needed in order to make the arguments that he advanced in his Rule 60(b) motion. R. Vol. V, pp. 1376–78. That is incorrect.

Starting with the science, the most significant scientific flaw in this Court's 2008 opinion was to ignore the SEM. But as the Ninth Circuit explained at length, that approach was just as

unscientific when the Court undertook it in 2008 as it is today. *See Pizzuto*, 947 F.3d at 525 ("Pizzuto is correct that the Idaho Supreme Court's application of a hard IQ-70 cutoff was inconsistent with the clinical definitions in place *at the time of the state court's decision.*"). Indeed, Mr. Pizzuto called this Court's attention to the margin of error in the prior appeal. *See Pizzuto*, 146 Idaho at 729 ("Pizzuto argues that an IQ score is only accurate within five points."). The Court simply disagreed with him. *See id.* ("[T]he legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below."). There was no scientific change on this issue. It follows that Mr. Pizzuto had no valid event in the scientific community that could have legitimately triggered a Rule 60(b) motion, and the district court was in error to hold to the contrary.

The district court's interpretation of the legal developments around *Atkins* is equally unsupported. There, the district court's principal rationale was that *Hall* provided Mr. Pizzuto a basis to assert his argument. R. Vol. V, pp. 1376–78. The text of both *Atkins* and *Hall* proves otherwise. In *Atkins*, the Supreme Court noted explicitly that "the cutoff IQ score for the intellectual function prong" of intellectual disability is "*between* 70 and 75 or lower." 536 U.S. at 309 n.5. And in *Hall*, 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. Stated differently, the SEM was embraced by *Atkins* itself. *See Smith v. Sharp*, 935 F.3d 1064, 1077 (10th Cir. 2019) (acknowledging that "[t]he Supreme Court in *Atkins* accepted clinical definitions for the meaning of the term mentally retarded," and that "*Atkins* clearly establishes that intellectual disability

must be assessed, at least in part, under the existing clinical definitions," including the SEM), *cert. pet. filed* (19-1106) (Mar. 2, 2020).

In short, the scientific and legal landscape surrounding Mr. Pizzuto's claim did not meaningfully change with medical advancements or new precedents from the U.S. Supreme Court. The relevant science and law already existed in 2008, and the Court simply misunderstood them in its opinion. It would not be reasonable to expect Mr. Pizzuto to articulate an argument the Court had already rejected. The real change took place when the Ninth Circuit issued a published opinion stating that this Court's 2008 opinion was inconsistent with the science and the law. That was the only valid triggering event for the Rule 60(b) motion. Because the motion was filed within a reasonable time of that event—only forty-two days later—it was timely.

Finally, to the extent the district court believed the Rule 60(b) motion was untimely because a *post-conviction petition* asserting the same theory would have been barred by the limitations period, *see infra* at 14–15, that too is incorrect. When a prisoner files a Rule 60(b) motion in a collateral challenge, its tardiness vel non is judged under the "reasonable time" provision in I.R.C.P. 60(c)(1), *see Stuart v. State*, 128 Idaho 436, 437 (1996), not the limitations period in the post-conviction statutes.

By misconstruing the precedents and scientific authorities to avoid the foregoing conclusions, the district court ran afoul of "the applicable legal standards," and thereby abused its discretion. *Eby*, 148 Idaho at 734. The district court's timeliness ruling should be reversed, and the merits of the Rule 60(b) motion should be considered on appeal.

B. The Rule 60(b) Motion Was Meritorious

On the merits, there are two bases for retracting the previously entered judgment in light of the Ninth Circuit opinion: (1) the opinion erodes the legal and scientific bases for this Court's 2008 decision denying Mr. Pizzuto's *Atkins* claim; and (2) the opinion exposes prior counsel's negligence and its consequences. Mr. Pizzuto takes each in turn.

1. The Legal And Scientific Bases For This Court's 2008 Decision

To begin, the state courts' treatment of Mr. Pizzuto's *Atkins* claim was revealed as erroneous by the Ninth Circuit under the latest scientific and legal standards. Additional proceedings are thus justified in order for the state courts to utilize the correct standards and ensure that an intellectually disabled man is not executed, an event that would be plainly forbidden under the Constitution.

As mentioned, the U.S. Supreme Court announced in *Atkins* that the Eighth Amendment bars the execution of intellectually disabled offenders. *Atkins* indicated that medical literature defined intellectual disability as comprising three features: (1) subaverage intellectual functioning; (2) significant limitations in adaptive skills; and (3) manifestation before age eighteen. 536 U.S. at 318. In a footnote, the *Atkins* Court observed that "an IQ between 70 and 75 or lower" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309 n.5. Idaho's legislative codification of *Atkins* tracks the same three categories. *See* Idaho Code § 19-2515A(1). Importantly, though, the statute defines the first prong as an IQ of 70 or below. *See* § 19-2515A(1)(b).

In Mr. Pizzuto's case, this Court had before it "only one IQ score," "a Verbal IQ of 72" from 1985. *Pizzuto*, 146 Idaho at 729. According to this Court, the 72 was not low enough. As the court explained, "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.*

The Ninth Circuit deemed that approach "inconsistent with the clinical definitions in place at the time of the state court's decision." *Pizzuto*, 947 F.3d at 525. It noted that pursuant to those definitions, intellectual disability "does not require an IQ of 70 or below; it requires 'an IQ of *approximately* 70 or below.'" *Id.* at 526 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 49 (4th ed. 2000) ("DSM-IV") (emphasis in original)). The Ninth Circuit in *Pizzuto* drew from *Hall* the lesson that "an IQ test score represents a range rather than a fixed number" since "[e]ach IQ test has a[n SEM] of plus or minus five points." *Id.* at 519. By way of example, "[a] score of 71 . . . is generally considered to reflect a range between 66 and 76." *Id.* (quoting *Hall*, 572 U.S. at 713). "A court, therefore, may not cut off the inquiry when a defendant scores between 70 and 75 on an IQ test," as a "strict IQ test score cutoff of 70" is constitutionally unacceptable. *Id.* "In effect," the Ninth Circuit continued, *Hall* "expands the operational definition of mental retardation to 75" in light of the SEM. *Id.* at 526.

As the Ninth Circuit saw it, this Court was not faithful to those well-established scientific principles. Instead, substituting its own perceptions for the "clinical standards, [this] Court required an offender to establish an IQ of 70 or below under all circumstances, regardless of the offender's deficits in adaptive functioning." *Id.* "In doing so," the Ninth Circuit went on, this

Court "failed to recognize that 'it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.'" *Id.* (quoting DSM-IV at 41–42). As a consequence, this Court's opinion was, in the words of the Ninth Circuit, "contrary to the clinical definitions in place at the time." *Id.*

Despite acknowledging this Court's mistakes, the Ninth Circuit was constrained to uphold its mandate. This was only because, to the Ninth Circuit's mind, "[a]t the time of the state court's decision in 2008, it was not yet apparent that states were required to define intellectual disability in accordance with these prevailing clinical definitions." *Id.* Nonetheless, the Ninth Circuit observed that "[i]t is *now* clear" that this Court's method is constitutionally prohibited by more recent proclamations from the U.S. Supreme Court in the form of *Hall*, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Moore v. Texas* (*Moore I*), 137 S. Ct. 1039 (2017). *Id.* at 528. As mentioned earlier, the Ninth Circuit went out of its way to stress that its opinion did "not preclude the Idaho courts from reconsidering" their rulings "in light of intervening events," such as the three U.S. Supreme Court opinions just listed. *Id.* at 534.

The time for such reconsideration is now.

To see why, it is important to understand the legal effect of the Ninth Circuit's opinion. Mr. Pizzuto has a federal constitutional and statutory right to seek habeas relief from his sentence in the United States court system. *See Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (noting that the Suspension Clause protects a prisoner's right to seek the writ of habeas corpus); *see also* 28 U.S.C. § 2254 (codifying the right to pursue habeas review of state judgments in the federal courts). The Ninth Circuit has jurisdiction over any federal habeas issues that come to the fore in

the State of Idaho. *See* 28 U.S.C. §§ 41, 1291, 1294. Given those basic principles, the Ninth Circuit's comments about Mr. Pizzuto's case are a correct statement of the law for purposes of the post-conviction proceeding here. It follows that under the law, as it now stands, this Court's resolution of Mr. Pizzuto's *Atkins* claim is unconstitutional. While the Ninth Circuit could not remedy the unconstitutionality because of the limitations of habeas review, this Court can and should. It is difficult to imagine more "unique and compelling circumstances justifying relief," *Miller*, 129 Idaho at 349, than when an opinion from a competent court uncovers the unlawfulness of a previous judicial decision, and Rule 60(b) is therefore satisfied.

What's more, the Ninth Circuit opinion underscores how constitutionally problematic it would be for this Court to deny relief now. The Ninth Circuit was incapable of remedying the errors it identified in this Court's opinion because of the rigid restrictions of the federal habeas statute. If this Court now declines to do the same, it will mean there is no forum for Mr. Pizzuto to bring a valid Eighth Amendment claim that renders his execution unconstitutional. That, in turn, would violate Mr. Pizzuto's Fourteenth Amendment due process right to have a vehicle in which he can challenge his death sentence and to a fundamentally fair post-conviction proceeding. *See generally Felker v. Turpin*, 518 U.S. 651 (1996); *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Apart from highlighting the conflict between this Court and the clinical standards in place at the time of its ruling, the Ninth Circuit also underscored the fact that the clinical standards have evolved since then. *See Pizzuto*, 947 F.3d at 534–35 ("Although the Idaho courts rejected Pizzuto's *Atkins* claim in 2008, they did so without the benefit of . . . the most recent iterations of

the . . . clinical standards."). Most notable in that regard is the Ninth Circuit's commentary on the Flynn effect. "The Flynn effect refers to the observation that IQ scores have been increasing over time" as test norms become outdated. *Id.* at 528 n.11. As one court to cover the matter with particular thoroughness put it, "the Flynn Effect is well established scientifically" and it means that an older IQ score should be "correct[ed]" by a downward adjustment that reflects how long ago the test was given and when it was normed. *United States v. Hardy*, 762 F. Supp. 2d 849, 866 (E.D. La. 2010).

The Ninth Circuit recognized in Mr. Pizzuto's case that the Flynn effect has been endorsed by recent clinical standards, including the eleventh edition of the manual put out by the American Association on Intellectual and Developmental Disabilities ("AAIDD-11") and the DSM-V. *See Pizzuto*, 947 F.3d at 526 n.10. The AAIDD-11 was published in 2010 and the DSM-V was published in 2013. *See Hall*, 572 U.S. at 705, 727 n.1. When this Court released its decision on Mr. Pizzuto's *Atkins* claim in 2008, these sources had not yet come into being. In closing its opinion, the Ninth Circuit reiterated that because of that timing this Court had been unable to effectuate the current consensus of the medical community, which "now advise[s] that 'best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." *Pizzuto*, 947 F.3d at 535 (quoting AAIDD-11 at 37).

Before this Court, the only IQ score under review was a 72, which was obtained on the Wechsler Adult Intelligence Scales, Revised ("WAIS-R") in 1985. *See Pizzuto*, 146 Idaho at 729. "The WAIS-R was originally normed in 1978." *Hardy*, 762 F. Supp. 2d at 863. Due to the

Flynn effect, there is "an inflation rate of about 0.3 points per year after the test is normed." *Id.* at 860. Compensating for the Flynn effect, then, the 72 drops to 69.9. Remember that Idaho's statute demands a showing of an IQ of 70 or below. *See* Idaho Code § 19-2515A(1)(b). Even under this Court's rigid approach, that would bring Mr. Pizzuto within the protection of the statute, providing yet another reason to reopen the case.

In a perfunctory few sentences, the district court found that the Ninth Circuit opinion was an insufficiently compelling reason to reopen the case because "[i]t is not appropriate to allow a catchall provision to circumvent the parameters of" Idaho's post-conviction regime. R. Vol. V, p. 1383. The district court held that view based on its speculation that a separate post-conviction petition asserting the theory at issue here would have been untimely. R. Vol. V, p. 1383. That logic does not withstand scrutiny, for there is no incompatibility between Rule 60(b) and the statutory scheme for post-conviction actions.

To the contrary, as the Court has reiterated in a number of capital post-conviction cases, the rules of civil procedure generally govern such proceedings. *See, e.g.*, *Stuart v. State*, 149 Idaho 35, 40 (2010); *Pizzuto v. State*, 149 Idaho 155, 159 (2010); *Rhoades v. State*, 148 Idaho 247, 249 (2009). Needless to say, I.R.C.P. 60(b) is a part of the rules of civil procedure. In fact, the Court has applied Rule 60(b) in particular to post-conviction proceedings. *See, e.g.*, *Eby*, 148 Idaho at 734–38. Like any civil litigant, Mr. Pizzuto was entitled to seek 60(b) relief for the judgment entered against him in the original *Atkins* proceeding. The district court was obligated to consider that 60(b) motion on its own terms, and decide whether the rule's standard was

satisfied. There was no cause to consider in the calculus what might have happened to a successive post-conviction petition that was never filed.

It is likewise helpful to remember that in post-conviction matters "the court shall take account of substance regardless of defects of form." Idaho Code § 19-4906(a).[6] Rule 60(b)(6) is similarly flexible: as one court has put it, the provision "is a grand reservoir of equitable power to do justice in a particular case." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) (quoting Moore's Federal Practice ¶ 60.27[2], at 60–295).[7] Given the tenor of both § 19-4906(a) and Rule 60(b)(6), the chief factor below should have been the demands of justice. It was error for the district court to instead apply a hyper-technical framework based on pleading rules that do not even apply to Rule 60(b) motions. By doing so, the district court did not comport "with the applicable legal standards," *Eby*, 148 Idaho at 734, and consequently abused its discretion. Once this Court views the case through the appropriate, equitable lens, the proper result is plain. Justice is not accomplished when an intellectually disabled man is executed on the basis of an opinion that was unscientific at the time and is unconstitutional now. *See White v. Commonwealth*, --- S.W.3d ----, 2020 WL 1847086, at *2–3 (Ky. 2020) (refusing to

[6] Idaho Code § 19-4906(a) is a part of the Uniform Post-Conviction Procedure Act ("UPCPA"). In capital cases, the UPCPA controls unless there is a conflicting provision in Idaho Code § 19-2719, which was written specifically for death penalty matters. *See Fields v. State*, 155 Idaho 532, 534–35 (2013). Mr. Pizzuto submits that, with respect to the question at issue here, there is no language in § 19-2719 that would supersede the equitable approach laid out in § 19-4906(a).

[7] I.R.C.P. 60(b)(6) is identical to Fed. R. Civ. P. 60(b)(6). Federal cases are therefore persuasive authority on the scope of the latter. *See Stewart v. Arrington Constr. Co.*, 92 Idaho 526, 529 (1968) ("Since our rules of civil procedure are substantially similar to the Federal Rules of Civil Procedure, cases construing the federal rules are persuasive.").

allow a defendant to waive the same type of claim and remanding for an evidentiary hearing because *Atkins* erected "an absolute bar against imposing the death penalty on the intellectually disabled").

In these various ways, this Court's opinion has been uprooted both legally and factually by the Ninth Circuit decision, and the case ought to be remanded to allow for a full, fair consideration of Mr. Pizzuto's intellectual disability under the current medical standards and caselaw.

2. Prior Counsel's Negligence

Mr. Pizzuto's second ground for reactivating the case flows from the serious missteps made by his prior attorney in the initial *Atkins* post-conviction proceedings, a type of Rule 60(b) theory that has been expressly approved of by this Court. *See Eby*, 148 Idaho at 734–38. As detailed below, those missteps induced the Ninth Circuit to later deny him habeas relief, the most dire repercussion imaginable.

In a nutshell, prior counsel fell short of her duties by needlessly undercutting her own request for evidentiary development. Although counsel "moved for additional psychological testing," she "did not notice the motion for a hearing," *Pizzuto*, 947 F.3d at 516, which she ought to have done had she wished to have it adjudicated, *see, e.g., State v. Ayala*, 129 Idaho 911, 915 (Ct. App. 1996). The Ninth Circuit remarked that counsel's omission likely flowed from the rationale that because the district judge "had erroneously denied the motion to disqualify, any order entered by the court on the question of testing would be void." *Pizzuto*, 947 F.3d at 517 n.3. That interpretation of counsel's motivation is reinforced by a subsequent pleading from

counsel, where she suggested that any order entered by the judge was "void and of no effect." 32679 R. 225. Such logic was deeply flawed.

As an initial matter, counsel's supposed tactics cannot adequately explain her conduct. Assuming arguendo that a judge acts ultra vires when he rules on a motion while a disqualification request is pending, the request here was not pending forever. This Court denied counsel's request to prosecute an interlocutory appeal on the disqualification issue on June 22, 2005. R. Vol. I, p. 45. The issue was then dead. After that point, there certainly was no conceivable basis for holding off on the pursuit of testing. Yet six months elapsed after the failure of the interlocutory appeal and before the district court denied the post-conviction petition, and still no notice of hearing was filed. 32679 R. 309–11. Even if the legal foundation of counsel's plan was sound, her execution of it was anything but.

And at any rate the foundation was far from sound. The authorities relied upon by counsel pertain to *automatic* disqualifications. 32679 R. 122–28. Counsel's motion invoked both the automatic disqualification provision and, in the alternative, the provision governing disqualifications for cause. 32679 R. 122–28. But the rules leave no doubt that one cannot use an automatic disqualification "in a post-conviction proceeding, when that proceeding has been assigned to the judge who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding." *Pizzuto*, 146 Idaho at 724 (quoting I.R.C.P. 40(d)(1)(I)(ii)).[8] Although counsel had arguments against the provision's application in Mr. Pizzuto's case, it was

[8] *Pizzuto* referred to an earlier version of the rule. The quoted language now appears in I.R.C.P. 40(a)(8)(B).

surely foreseeable that this Court might reject them in favor of the plain language of the rule, since the same judge who imposed the sentence was presiding over the post-conviction action. *See id.* at 724–25. The bottom line is that counsel could not realistically assume that she would be able to claim the benefit of the automatic-disqualification rule.

That left only the pursuit of a for-cause disqualification. And prior counsel had no authority for the proposition that a judge lacks jurisdiction to manage a case after *that* type of disqualification motion. 32679 R. 122–28. The distinction stands to reason. It makes sense that a judge would have no authority to supervise a case after the submission of a timely motion to automatically disqualify. For then, the judge is removed instantly by operation of law. Unlike a motion without cause, one with cause has to advance an argument. The courts may well be unpersuaded by the argument, in which case it would be senseless to deprive the judge of any power to move the matter forward in the interim. Significantly, that is precisely what happened in Mr. Pizzuto's own proceeding. Both the district judge and this Court were unconvinced by the for-cause disqualification motion. *See Pizzuto,* 146 Idaho at 725–26. Simply put, counsel had no cause to expect any court to agree with her notion that the trial judge was powerless to render rulings while the disqualification motion remained pending.

In essence, prior counsel placed a critical motion in jeopardy in the hopes that this Court would later accept her tenuous and novel legal theory. Such a gamble was ill-advised, and its consequences were, unsurprisingly, dire.

When the Ninth Circuit issued its opinion, the futility of prior counsel's poorly conceived strategy was confirmed. For the Ninth Circuit relied upon counsel's mishandling of the testing

issue to find that Mr. Pizzuto had insufficiently pushed for factual development, and thereby to deny habeas relief. *See Pizzuto*, 947 F.3d at 533–34. In that sense, the Ninth Circuit opinion crystalized the ramifications of counsel's unforced error. As a result, it is proper for the error to be the subject of the Rule 60(b) motion under review, which was triggered by that opinion.

To absolve prior counsel of her omissions, the district judge below incorrectly focused on the fact that Mr. Pizzuto "did not experience a complete absence of meaningful representation *regarding post-conviction relief.*" R. Vol. V, pp. 1381–82. That paints with too broad a brush. Since the issue here is what counsel did *to secure testing*, the proper inquiry is into what tasks she accomplished to further *that* goal. With the question framed thusly, the answer becomes plain: effectively nothing. Counsel filed a motion for testing and then did not notice it for hearing or apparently pursue it in any other fashion. The watchword of *Eby* is "inactivity," a term the opinion uses no fewer than six times. 148 Idaho at 732–34. In regards to the issue of testing—the only issue that matters—counsel's performance was the epitome of inactivity.

The district court's citations do not dictate a different result. Although it proffered a trio of decisions, R. Vol. V, pp. 1379–82, all are distinguishable, both collectively and individually.

On the collective front, the first salient fact about the cases is that they are from the Court of Appeals and thus not binding here. *See, e.g.*, *State v. Skurlock*, 150 Idaho 404, 406 (2011). The second salient fact about the cases is that none of them involved death sentences. *See Devan v. State*, 162 Idaho 520 (Ct. App. 2017); *Dixon v. State*, 157 Idaho 582 (Ct. App. 2014); *Bias v. State*, 159 Idaho 696 (Ct. App. 2015). The U.S. Supreme Court announced many years ago that because "execution is the most irremediable and unfathomable of penalties," "death is different."

Ford v. Wainwright, 477 U.S. 399, 411 (1986). Death being different, capital cases demand "a correspondingly greater degree of scrutiny." *California v. Ramos*, 463 U.S. 992, 998–99 (1983). That higher level of scrutiny extends to capital defense lawyers' work, as their clients' lives depend upon how they discharge their duties. *See Frierson v. Woodford*, 463 F.3d 982, 993 (9th Cir. 2006). And it extends beyond the trial itself, for even on appeal (and by the same token, in post-conviction), the consequences of defense counsel's omissions remain potentially fatal. *See Jamison v. Collins*, 100 F. Supp. 2d 647, 740 (S.D. Ohio 2000), *aff'd*, 291 F.3d 380 (6th Cir. 2002) (stating that in a capital appeal, unlike a non-capital one, "any winnowing or narrowing of issues must be done very cautiously when a person's life is at stake"). The Court of Appeals' decisions relied upon by the district judge did not grapple with those heavy stakes. They are therefore of limited value in assessing the errors of Mr. Pizzuto's prior post-conviction counsel.

In the event the Court looks beyond that fundamental difference, the cases remain inapposite. In *Devan*, post-conviction counsel determined after due study and reflection that there was "no meritorious claim" to advocate for. 162 Idaho at 523. By contrast, Mr. Pizzuto's prior attorney obviously felt her claim was a winning one, and simply exercised poor judgment in how she developed it by abandoning her motion for testing. In that sense, the *Devan* lawyer acted in the reasonable, deliberative fashion that is the most any defendant can expect, while Mr. Pizzuto's did not. As for *Dixon* and *Bias*, there is no indication in those opinions as to *why* the attorney's omissions occurred. Here, prior counsel's reasoning is undisputed, and it was patently illogical. That is, counsel never noticed her motion for hearing because she regarded "any order

entered by the court on the question of testing" as "void," *Pizzuto*, 947 F.3d at 517 n.3, a line of reasoning that simply made no sense.

By staking a key request for evidentiary development entirely on the success of a far-fetched legal gambit, prior counsel did not discharge her duties, and her performance does not survive the searching judicial scrutiny called for in this capital case. In holding otherwise, the district court applied an overbroad test, utilized inapposite precedent, and failed to account for the unique standards that govern counsel's conduct in death penalty matters. It thereby abused its discretion, and reversal is warranted.

C. The Consequences Of Reopening The Case

In the preceding sections of this brief, Mr. Pizzuto justifies the restarting of this post-conviction action. Once it comes back to life, the question is what the Court should do next. The answer is that it ought to take into consideration the substantial evidence that Mr. Pizzuto is intellectually disabled and order a hearing so the district court can fully assess such evidence. That evidence encompasses both the submissions made earlier in the post-conviction matter, as well as significant material that has not yet been reviewed in state court. Keeping in mind the fact that the blunders by prior counsel described in the previous section relate to evidentiary development, it is especially fitting that the remedy under Rule 60(b) would be a hearing with the elicitation of expert testimony, as laid out in this section.

As for the evidence offered earlier in these proceedings, Mr. Pizzuto continues to rely on the previous pleadings and simply refers the Court to them. In particular, Mr. Pizzuto points to the factual presentation on pages 16 to 33 of his supplemental reply brief in opposition to

summary judgment, filed on September 23, 2005, and the attachments cited therein. 32679 R. 279, Ex. 7, at 16–33. Those documents include extensive evidence of all three prongs of intellectual disability.

Turning to the new material, Mr. Pizzuto primarily directs the Court to three expert reports that have not yet been analyzed here: one by Ricardo Weinstein, Ph.D., one by James R. Patton, Ed.D., and one by James Merikangas, M.D. R. Vol. I, pp. 46–117.

Dr. Weinstein is a neuropsychologist. R. Vol. I, p. 47. He was awarded a Ph.D. in clinical psychology in 1981. R. Vol. I, p. 66. In 1998, he completed a post-doctoral certificate program in neuropsychology. R. Vol. I, p. 66. Since then, he has had a far-ranging career in the field, both practicing and serving as an adjunct professor at San Diego State University. R. Vol. I, pp. 66–67. Dr. Weinstein has published and presented on brain science, neurological development, and neuropsychological testing, especially as those themes relate to childhood experiences and family dynamics. R. Vol. I, pp. 67–69.

As part of his work on this case, Dr. Weinstein reviewed an extensive amount of documentary materials regarding Mr. Pizzuto, interviewed him personally, and tested his IQ. R. Vol. I, pp. 47–49. Having conducted that inquiry, Dr. Weinstein took up the question of whether Mr. Pizzuto was intellectually disabled within the meaning of three sources: (1) Idaho Code § 19-2515A; (2) the DSM-IV; and (3) the American Association on Mental Retardation ("AAMR"), which later became the AAIDD. The DSM, the AAMR, and the AAIDD have all been accepted as authorities in this area of law by the U.S. Supreme Court. *See Hall*, 572 U.S. at 707–23.

Dr. Weinstein gave Mr. Pizzuto the WAIS-IV. R. Vol. I, p. 58. In *Atkins* itself, the U.S. Supreme Court pronounced the WAIS "the standard instrument in the United States for assessing intellectual functioning." 536 U.S. at 309 n.5. Mr. Pizzuto's full-scale score on the test was 60, R. Vol. I, p. 58, which satisfies the first prong of intellectual disability within the meaning of any of the authorities discussed here.

Dr. Weinstein next ventured into the second prong, that of adaptive functioning. R. Vol. I, pp. 59–63. To gauge Mr. Pizzuto's adaptive functioning, Dr. Weinstein read his social history and declarations from individuals who knew him, and interviewed two sisters of Mr. Pizzuto's. R. Vol. I, p. 61. Surveying the information he gleaned from those sources, Dr. Weinstein delved into the extent of Mr. Pizzuto's limitations in three general categories: conceptual adaptive behavior skills, social adaptive behavior skills, and instrumental activities of daily living. R. Vol. I, pp. 62–63. The U.S. Supreme Court has likewise characterized these three areas as comprising adaptive functioning. *See Moore v. Texas* (*Moore II*), 139 S. Ct. 666, 668 (2019) (per curiam); *Moore I*, 137 S. Ct. at 1050.

Within these three broad classes, Dr. Weinstein went through a series of more specific items. Many of those items tracked the language of § 19-2515A. Both include self-direction, academic abilities, interpersonal skills, and safety. *Compare* R. Vol. I, pp. 62–63, *with* § 19-2515A(1)(a). Other areas appear substantively in both, even if slightly different nomenclature is used. For instance, the report looks at Mr. Pizzuto's ability to use "expressive language," R. Vol. I, p. 62, whereas the statute enumerates "communication" as a skill area, § 19-2515A(1)(a).

Similarly, the report refers to "occupational skills," R. Vol. I, p. 63, while the statute prefers the term "work," § 19-2515A(1)(a).

To better understand how Dr. Weinstein's reports—and the opinions of the other experts—track with the statutory definition of adaptive functioning, it is helpful to have some context. The terminology of adaptive behavior functioning in the clinical definitions has evolved over time. In *Atkins*, the Court quoted the clinical definitions adopted by the AAMR and the American Psychiatric Association ("APA"), which were substantively the same. *See Atkins*, 536 U.S. at 308 n.3. The quoted publications from the APA and AAMR had the most minor of differences in wording, such as "functional academics," "social skills," "community use" and "health and safety" from the AAMR, compared to "functional academic skills," "social/interpersonal skills," "use of community resources," and "health, and safety" from the APA. *See id.*

Idaho's intellectual-disability statute imported virtually verbatim the adaptive functioning factors from the APA and the AAMR that were set out in *Atkins*. *Compare* Idaho Code § 19-2515A(1)(a), *with Atkins*, 536 U.S. at 308 n.3. In a manual published after the one that *Atkins* quoted, the AAMR adopted a less complicated formulation of adaptive behavior. Specifically, the AAMR incorporated a one-in-three-domain model of adaptive behavior limitations that replaced the two-out-of-ten-or-eleven model referenced in *Atkins*. *See* R. Vol. I, pp. 53, 75. Both the Weinstein and Patton reports addressed the ten or eleven skills enumerated in the adaptive behavior prong of the Idaho statute, while also analyzing them under the newer, one-in-three-domain rubric of the later AAMR manual. *See* R. Vol. I, pp. 51–53, 61–64, 76–83.

In all events, it is apparent that Dr. Weinstein's report and the statute are in accord on the essential questions that define adaptive functioning. And in answering those questions, Dr. Weinstein found numerous instances of serious limitations in Mr. Pizzuto's skills from an early age.

To name just a few, Dr. Weinstein determined that Mr. Pizzuto "was unable to understand and follow instructions," that he "could not express himself," that he "was not able to learn in school," that he "is quite gullible," that he "has limited logic," that he "is easily taken advantage of," and that he "has shown complete disregard for his safety and the safety of others." R. Vol. I, pp. 62–63. On the third prong, Dr. Weinstein indicated that Mr. Pizzuto's "limitations in intellectual functioning and adaptive behaviors" surfaced "prior to the age of eighteen." R. Vol. I, p. 63.

His review of the three prongs completed, Dr. Weinstein articulated his opinion "within a reasonable degree of psychological certainty that Mr. Pizzuto suffers from mental retardation" as defined by Idaho Code § 19-2515A, the DSM-IV, and the AAIDD. R. Vol. I, p. 64. Dr. Weinstein identified a number of "risk factors" that might have contributed to the intellectual disability, including a premature birth, "tremendous amounts of stress, poverty and malnutrition all through his developmental years," "extreme physical, sexual and psychological abuse," epilepsy, head injuries, and brain damage. R. Vol. I, p. 64. It was Dr. Weinstein's view that "Mr. Pizzuto's mental retardation is the result of genetic, developmental and environmental causes." R. Vol. I, p. 64.

Moving to the next expert, Dr. Patton has a doctoral degree in the area of special education from the University of Virginia. R. Vol. I, p. 71. Since 1977, he has worked in higher education and has occupied faculty positions at the University of Virginia and the University of Texas, where he has taught courses about the characteristics of the intellectual disabled. R. Vol. I, p. 71. Dr. Patton has been in the intellectual-disability field for more than forty-four years. R. Vol. I, p. 71. During that time, he has co-authored and co-edited books on the topic and written a variety of chapters and articles as well. R. Vol. I, p. 71. Dr. Patton served as the president of the Division on Mental Retardation and Developmental Disabilities of the Council for Exceptional Children, an international organization devoted to intellectual-disability issues. R. Vol. I, p. 72. Complementing his scholarly experience, Dr. Patton has worked directly with the intellectually disabled as a special-education teacher and diagnostician in the public school system of Charlottesville, Virginia, as the coordinator of a continuing-education program, and as a participant in vocational training settings. R. Vol. I, pp. 72–73.

Dr. Patton was supplied with a number of social-history records, and he interviewed Mr. Pizzuto and various people who knew him as a child. R. Vol. I, p. 74. In evaluating Mr. Pizzuto's adaptive functioning, Dr. Patton referred primarily to the AAIDD and the AAMR. R. Vol. I, pp. 74–75. He broke his observations down into a series of categories, many of which correspond to the areas addressed by Dr. Weinstein and listed in § 19-2515A, such as self-direction, academic performance, social skills, safety, communication, and work. *Compare* R. Vol. I, pp. 76–83, *with supra* at 23–24.

Within those areas, Dr. Patton discerned numerous significant deficits. R. Vol. I, pp. 76–83. Separating out just a few for representative purposes, Dr. Patton remarked that the young Mr. Pizzuto was seen as "mentally very slow," that "he could not talk very well," that he "demonstrated a consistent pattern of academic difficulty," that he got held back in school and received unusually low grades, that "[r]eading was a major problem" for him, that he "could easily be taken advantage of," that he wore clothes backwards without realizing it, and that he "had problems with everyday hygiene." R. Vol. I, pp. 76–82. Opining on these qualities, and the detailed first-hand accounts underlying them, Dr. Patton maintained that Mr. Pizzuto "meets the adaptive deficit prong of mental retardation." R. Vol. I, p. 83.

Lastly, Dr. Merikangas is "a medical doctor trained and board certified in both Psychiatry and Neurology." R. Vol. I, p. 86. In 1969, he received his medical degree from Johns Hopkins University. R. Vol. I, p. 90. He has been on the faculty of the George Washington University School of Medicine and has had various roles at Yale University School of Medicine, including Chief Resident in Neurology and Assistant Clinical Professor. R. Vol. I, pp. 86, 91. Numerous professional societies have recognized Dr. Merikangas's accomplishments, including the American College of Physicians, which made him an Elected Fellow, the American Neuropsychiatric Association, which made him Director, and the American Academy of Clinical Psychiatrists, which made him President. R. Vol. I, pp. 91, 92. He is a Diplomate of the American Board of Psychiatry and Neurology, certified in both subjects. R. Vol. I, p. 92. A number of hospitals have employed Dr. Merikangas in staff appointments, including Yale-New Haven Hospital, Yale Psychiatric Institute, Georgetown University Hospital, the George

Washington University Hospital, and the Veteran's Administration Hospital. R. Vol. I, pp. 92–93. Other health facilities have placed him in leadership positions, such as Director of the Neuropsychiatry Program at Georgetown University Hospital and Director of the Behavioral Neurology Program at Western Psychiatric Institute and Clinic. R. Vol. I, pp. 93–94. Dr. Merikangas has published and lectured widely in his fields of expertise, including on intellectual disability. R. Vol. I, pp. 101–17.

In 2003, Dr. Merikangas administered to Mr. Pizzuto a neuropsychiatric examination. R. Vol. I, p. 86. Several years later, at Dr. Merikangas's request, several types of brain testing were performed, such as an Electroencephalogram, a Whole Brain Perfusion PET Scan, a CT scan, and an MRI. R. Vol. I, p. 86. From those tests, Dr. Merikangas ascertained that Mr. Pizzuto has frontal lobe dysfunction, an atypically small brain, and more atrophy than the ordinary person. R. Vol. I, p. 86. In addition, Dr. Merikangas reviewed a collection of medical and social-history documents concerning Mr. Pizzuto. R. Vol. I, pp. 87–88. The brain testing and the document review led Dr. Merikangas to the conclusion "to a reasonable degree of medical certainty" that Mr. Pizzuto "suffers from mental retardation" under Idaho Code § 19-2515A and the DSM-IV. R. Vol. I, p. 88. Explaining that view, Dr. Merikangas stated that Mr. Pizzuto possessed an IQ "below 70, and he exhibited significant deficiencies in many areas [in] relation to his adaptive behaviors and these conditions were present before the age of 18." R. Vol. I, pp. 88–89.

In post-conviction cases, "[w]hen a genuine issue of material fact is shown to exist, an evidentiary hearing must be conducted." *State v. Dunlap*, 155 Idaho 345, 361 (2013). In resolving whether such an issue exists, the Court must "liberally construe the facts and

reasonable inferences in favor" of the petitioner. *Hauschulz v. State*, 144 Idaho 834, 838 (2007). So construed, the alleged facts clearly entitle Mr. Pizzuto to a hearing. He has proffered three qualified, experienced experts, all of whom have expounded at length and in detail on why he is intellectually disabled under the prevailing medical standards. At a bare minimum, Mr. Pizzuto has certainly established that there is a genuine issue of material fact as to his intellectual disability.

Aside from qualifying for an evidentiary hearing under Idaho law, Mr. Pizzuto has a right to one pursuant to the U.S. Constitution. As referenced earlier, the Ninth Circuit held that this Court's ruling on Mr. Pizzuto's *Atkins* claim could not be reconciled with several more recent decisions from the U.S. Supreme Court on intellectual disability. The Ninth Circuit further intimated that it would be appropriate to give this Court a chance to apply those authorities. *See supra* at 3. One of the authorities at issue is *Brumfield*. *See Pizzuto*, 947 F.3d at 529 ("[T]he state court's requirement of an IQ of 70 or below is contrary to . . . *Brumfield* . . . ."); *id.* at 534–35 ("Although the Idaho courts rejected Pizzuto's *Atkins* claim in 2008, they did so . . . without the benefit of the Supreme Court's decision[] in . . . *Brumfield* . . . .").

In *Brumfield*, a death row inmate asserted an *Atkins* claim in a state post-conviction case. *See* 135 S. Ct. at 2274. Relying upon documentary evidence of intellectual disability, Mr. Brumfield pursued an evidentiary hearing on the matter. *See id.* The state courts rejected the claim without a hearing and without authorizing funds for more investigation, fixating on one 75 IQ score in the record. *See id.* at 2275. That was unreasonable, the U.S. Supreme Court said,

because "it is unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70." *Id.* at 2278.

For all intents and purposes, Mr. Pizzuto is identically situated to Mr. Brumfield. Like Mr. Brumfield, Mr. Pizzuto has brought forward substantial documentary evidence of intellectual disability. Like Mr. Brumfield, Idaho's threshold for evidentiary hearings is relatively low: a "reasonable doubt" in Louisiana, *see id.* at 2281, and the presence of a genuine issue of material fact here, *see supra* at 28. Like Mr. Brumfield, then, there is a constitutional obligation to afford Mr. Pizzuto an evidentiary hearing on his claim.

V. CONCLUSION

The Court faces a stark choice: either let a man be executed even though its previous opinion upholding his death sentence was unscientific then and is unconstitutional now, or allow the parties to present evidence at a hearing so that the Idaho judiciary can finally render a fully informed and correct ruling on his claim. In this capital case, such a modest measure of additional process is more than justified to ensure that Mr. Pizzuto is not executed in violation of the Eighth Amendment.

Based on the foregoing, Mr. Pizzuto respectfully asks for the district court's decision denying his Rule 60(b) motion to be reversed and for the case to be remanded so an evidentiary hearing can be held on whether he is constitutionally insulated from execution under the Eighth Amendment by virtue of his intellectual disability. In the alternative, he requests that the remittitur be recalled in case number 32679 and the same relief afforded.

Respectfully submitted this 23rd day of April 2020.

/s/ Jonah J. Horwitz

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