No. 21-5800

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO, JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ of Certiorari to the Idaho Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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To oppose certiorari, the State's brief in opposition ("BIO") conjures up legal and factual complications that are either non-existent, unproblematic, or affirmative reasons for granting review. Its efforts all miss the mark.

I. The Court Has Jurisdiction.

The State questions whether there is jurisdiction here, *see* BIO at 8–14, by misconstruing the Court's well-established rules and practices. In particular, the State submits that the Idaho Supreme Court below resolved a pure matter of state law, leaving no federal question for purposes of satisfying the test set out in 28 U.S.C. § 1257(a). *See* BIO at 8–14. The State is mistaken.

Preliminarily, the State's recitation of the standard sweeps far too broadly. "*Because* the Idaho Supreme Court's decision was based upon [Idaho Rule of Civil Procedure] 60(b)(6), and whether the post-conviction court abused its discretion by denying Pizzuto's Motion to Alter or Amend," the State insists, "this Court should decline to grant certiorari." BIO at 9.[1] Contrary to the implication of the brief in opposition, though, the mere fact that a state court is applying its own law does not eliminate any possibility of certiorari review. Rather, if "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law," this Court is authorized to "review[] the federal question on which the state-law determination appears to have been premised." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 152 (1984); *see*

[1] In this reply, all internal quotation marks and citations are omitted, and all emphasis is added.

Foster v. Chatman, 578 U.S. 488, 497–98 (2016) (applying this rule to a state post-conviction case); *id.* at 522 (Alito, J., concurring) (explaining the application in more detail). While conducting that inquiry, this Court asks whether the state judiciary "has proceeded on an incorrect perception of federal law." *Three Affiliated Tribes*, 467 U.S. at 152. If the answer is yes, "it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Id.*

The case at bar is a textbook example of the foregoing dynamic. As outlined in Mr. Pizzuto's certiorari petition ("Pet."), the critical conclusion reached by the Idaho Supreme Court that underlies the question presented is that "*Atkins*[2] did not adopt specific clinical standards," including the standard error of measurement ("SEM"). *See* Pet. at 10. That pronouncement of the Idaho Supreme Court appears in the first section of its substantive discussion. *See* App. 9.[3] In prefatory language, the court described the section as dealing with a "preliminary matter[]" that "impact[ed] [its] subsequent analysis," that is, everything else in the opinion. App. 7. Through this unequivocal language, which tracks almost exactly the controlling test, the Idaho Supreme Court confirmed that its "interpretation of state law [was] influenced by an accompanying interpretation of federal law," i.e., the constitutional significance of *Atkins* and the Eighth Amendment status of the clinical standards.

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[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[3] Citations in the format above are to the appendix submitted in connection with the certiorari petition.

Three Affiliated Tribes, 467 U.S. at 152. As a result, this Court is empowered to consider the question itself. *See id.*

Aside from contradicting the principles above, the brief in opposition contradicts the Court's general approach to state cases. In any such case, the major pleadings are almost always filed pursuant to state statutes or rules. Consider the typical civil case, where the decision below might well be the adjudication of a motion to dismiss or for summary judgment. Both would be products of civil rules just as much as the motion to alter or amend below. Opposing counsel's framework would remove a huge array of state cases from the Court's docket even when federal questions were undeniably presented and disposed of below. *See, e.g.*, *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 617–19 (2003) (applying Illinois law regarding motions to dismiss for failure to state a claim in a First Amendment case). And it would be inconsistent with the Court's post-conviction practice in particular. Every state post-conviction petition is brought pursuant to a local statue or rule of some kind. Yet "[i]f a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires"—a duty enforceable in certiorari proceedings. *Montgomery v. Louisiana*, 577 U.S. 190, 204–05 (2016). By way of one instructive example, *Madison v. Alabama*, 139 S. Ct. 718, 730 (2019) reversed a state court's interpretation of its own insanity statute because its reasoning failed to demonstrate that the judges "properly understood the Eighth Amendment bar" at issue. The same is true here of intellectual disability.

To the unclear extent that the State is pointing to the abuse-of-discretion standard below as a freestanding jurisdictional impediment, *see, e.g.*, BIO at 9, it is wrong there too. "A [trial] court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *see Bratton v. Scott*, 248 P.3d 1265, 1275 (Idaho 2011) ("This is an error of law that amounts to an abuse of discretion, necessitating a new trial on this issue."). The conclusion that *Atkins* did not bring the clinical standards into the Eighth Amendment is a purely legal one. If the conclusion is erroneous, the post-conviction judge here automatically abused his discretion, and there is nothing preventing this Court from saying so. *See, e.g.*, *Blueford v. Arkansas*, 566 U.S. 599, 610 (2012) (assessing whether a state trial court abused its discretion in how it handled a federal constitutional issue).

Finally, if the State is correct that there is some question here as to the reviewability of the Idaho Supreme Court's decision, it would be yet another reason to grant certiorari. In recent years, the Court has increasingly taken up state post-conviction appeals. *See, e.g.*, *Garza v. Idaho*, 139 S. Ct. 738 (2019); *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Rippo v. Baker*, 137 S. Ct. 905 (2017) (per curiam). Furthermore, the *Montgomery* decision arguably expands the scope of certiorari jurisdiction by appearing to establish a federal constitutional right to certain types of state post-conviction remedies. *See generally* Carlos M. Vasquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 Va. L. Rev. 905 (2017). This confluence of factors potentially creates uncertainty as to when the presence of state law in post-

conviction cases forecloses certiorari review and when it does not. The State's jurisdictional objection brings such uncertainty to the fore and would be a fruitful subsidiary question for certiorari review in its own right. *See* Sup. Ct. R. 14(1)(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

II. The Question Presented Is Preserved.

The State challenges the question presented on preservation grounds. *See* BIO at 15–17. It misunderstands both the briefing below and the Court's rules. In the instant certiorari proceedings, the question presented is whether *Atkins* required the use of clinical standards for the determination of sub-average intellectual functioning. *See* Pet. at i. It is true, as the State observes, that the "issues presented" section of Mr. Pizzuto's opening brief below did not explicitly assert the same question. *See* BIO App. 34.[4] But this Court's approach to preservation does not demand such rigid formalism. The test is instead whether the "federal question ha[s] been both raised and decided in the state court below." *Illinois v. Gates*, 462 U.S. 213, 218 (1983).

That occurred here. In the motion to alter or amend judgment that began the litigation now before the Court, the underlying question was clearly articulated as whether Mr. Pizzuto "is constitutionally immune from execution under the Eighth Amendment by virtue of his intellectual disability." BIO App. 10. The state trial

[4] Citations in the format above are to the appendix submitted in connection with the brief in opposition.

court found the motion untimely because it was not raised within a reasonable amount of time after *Hall v. Florida*, 572 U.S. 701 (2014). *See* BIO App. 19. On appeal at the Idaho Supreme Court, Mr. Pizzuto explained at length why the trial judge's reasoning conflicted with federal constitutional law established by this Court, since it was *Atkins* that embraced the clinical standards and the SEM, and not *Hall*. *See* BIO App. 37–38. As a result, Mr. Pizzuto reasoned, the appropriate trigger for the motion was the Ninth Circuit's 2019 opinion in the habeas appeal. *See id.* at 38. The Idaho Supreme Court disagreed, expressly holding that "*Atkins* did not adopt specific clinical standards." App. 9. Clearly, the "federal question" was "both raised and decided in the state court below." *Gates*, 462 U.S. at 218. The State's focus on a single page of the opening brief below to the exclusion of everything else—including the substance of issues presented and resolved by the Idaho Supreme Court—is inconsistent with the applicable standard, and preservation is no bar to Mr. Pizzuto's certiorari petition.

Lastly, the State's reliance upon Idaho Appellate Rule 35, *see* BIO at 15–16, is even farther afield. The Idaho Supreme Court itself never breathed a word about Rule 35. If there was an issue as to compliance with the briefing requirements below, the Idaho Supreme Court would have noted as much. The Rule has no bearing here, especially when—as stated—the Idaho Supreme Court directly spoke to the federal constitutional issue presented today.

III. There Is A Conflict Between The Lower Courts.

Engaging in a hyper-technical parsing of the cases, the State disputes the existence of a conflict between the lower courts on the question presented. *See* BIO at 17–23. The State's chief strategy is to delve deeply into the particular facts of the cases Mr. Pizzuto relies upon, and to distinguish them from the proceedings below. *See id.* Regardless of the circumstances of the cases, though, it remains true that lower courts have described *Atkins*, *Hall*, and their relationship, in starkly different terms. Some cases have read *Atkins* to enshrine the clinical standards in the Eighth Amendment—others have read *Hall* instead to have done so for the first time. *See* Pet. at 5–6. That disagreement is creating real tension in the law, including in the areas addressed in the next section of this reply. And it is the solving of the disagreement that makes the case at bar a salutary one for the Court, no matter what factual nuances might have been presented in other cases.[5]

IV. The Case Is A Good Vehicle For Deciding An Important Issue.

In his certiorari petition, Mr. Pizzuto outlined how his appeal represents an ideal vehicle for the question presented because it directly implicates the question of whether *Atkins* endorsed the clinical standards, an issue that will affect a number of legal issues elsewhere, including the retroactivity of *Hall*, the matter of what was "clearly established" for habeas purposes by *Atkins* itself, and the savings clause

[5] The State also maintains in its section denying the split that cases concerning the retroactivity of *Hall* do not go to the question presented. *See* BIO at 22. Mr. Pizzuto refutes that theory below, when discussing the virtues of the case as a vehicle. *See infra* at Part IV.

under 28 U.S.C. § 2241. *See* Pet. at 7–14. The State's first complaint with Mr. Pizzuto's theory seems to be that his case does not implicate all of these issues. *See* BIO at 23 ("Admittedly, Pizzuto has cited cases that involve retroactivity. However, retroactivity is not the question he raises before this Court. . . . The same is true for the savings clause . . . ."). Of course, no case can be in multiple procedural postures at the same time. That is why the Court grants certiorari on a question it can answer with a single vehicle allowing it to resolve the issue, permitting the rest of the judiciary to apply the holding in whatever other settings are relevant. Mr. Pizzuto has such a vehicle. If the Court grants the certiorari petition, it can determine whether *Atkins* imported the clinical standards into Eighth Amendment law. Lower courts would then use the answer in retroactivity cases, savings-clause cases, "clearly established" cases, and so forth. That is how the process is supposed to work.

Even less persuasively, the State faults Mr. Pizzuto for supposedly failing "to explain how addressing the question he presents to this Court would have any impact on retroactivity or the savings clause." BIO at 23. As to the first subject, Mr. Pizzuto noted in the certiorari petition that retroactivity hinges on whether a case sets forth a "new rule" or not. *See* Pet. at 7. This is so because "[o]nly when [the Court] appl[ies] a settled rule may a person avail herself of the decision on collateral review." *Chaidez v. United States*, 568 U.S. 342, 347 (2013). If *Hall* created a new rule when it approved of the clinical standards—as the Idaho Supreme Court below concluded—it would presumably not be retroactive. By

contrast, if *Atkins* constitutes the approval, and *Hall* was merely following in its footsteps, the rule would be retroactive. That is precisely how the matter of *Hall*'s retroactivity vel non was analyzed by the courts cited in Mr. Pizzuto's certiorari petition. *See Reeves v. State*, 226 So. 3d 711, 727 n.7 (Ala. Crim. App. 2016); *In re Henry*, 757 F.3d 1151, 1159 (11th Cir. 2014); *Phillips v. State*, 299 So. 3d 1013, 1019 (Fla. 2020), *cert. denied*, 141 S. Ct. 2676 (2021); *White v. Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018). Thus, a decision by this Court in Mr. Pizzuto's case regarding the status of the clinical standards under *Atkins* would resolve the retroactivity debate.

It would also answer the savings-clause question. The savings clause allows a federal inmate to seek collateral relief under 28 U.S.C. § 2241, even when he has already exhausted his first-round post-conviction remedies pursuant to 28 U.S.C. § 2255, if the latter proceeding was "inadequate or ineffective to test the legality of his detention." § 2255(e). Section 2255 is inadequate within the meaning of the statute where "a legal argument is foreclosed by precedent." 39 C.J.S. Habeas Corpus § 31. Imagine, then, a federal prisoner who, prior to *Hall*, pursues a claim for relief under § 2255 based on intellectual disability and premised upon the SEM (or some other aspect of the clinical standards). His § 2255 motion is rejected by every level of the federal judiciary. After *Hall* is decided, he again attacks his death sentence, this time through § 2241. The question therefore arises: was the inmate's *Hall* claim "foreclosed by precedent" because *Atkins* itself did not adopt the clinical

standards, which would mean the savings clause was applicable? Or did *Atkins* indeed codify the clinical standards, in which case the inmate did have an adequate remedy under § 2255, and the savings clause would not be available to him? The Seventh Circuit found itself considering that difficult question in *Fulks v. Watson*, 4 F.4th 586 (7th Cir. 2021). As before, the question presented in the case at bar gets to the same quandary, and review would assist courts engaging in the savings-clause inquiry, just as it would assist those courts dealing with the retroactivity problem. For both sets of cases, and others in more sui generis categories (like Mr. Pizzuto's), it will benefit the legal system for the Court to finally announce whether *Atkins* championed the clinical standards or not. Because Mr. Pizzuto's certiorari petition enables the Court to make such an announcement, it should be granted.

The State further objects to Mr. Pizzuto's case as a vehicle on the ground that the Idaho Supreme Court's 2008 decision—which was reaffirmed below in connection with the motion to amend judgment—rejected the *Atkins* claim on the third prong of the test as well, i.e., whether there was onset before age eighteen. *See* BIO at 25. As a consequence, the State posits, Mr. Pizzuto's claim here "will not be resolved because the question he presents has no bearing whatsoever on whether onset occurred before his eighteen birthday." *Id.*

The third prong is no impediment to certiorari. In the original *Atkins* proceedings, Dr. Craig Beaver explicitly swore in an affidavit that Mr. Pizzuto likely met the standard for intellectual disability under the Idaho statute, *see Pizzuto v. State*, 202 P.3d 642, 652 (Idaho 2008), and the relevant statute itself defines

intellectual disability with reference to onset before one's eighteenth birthday, *see id.* at 650. Nevertheless, the Idaho Supreme Court sidestepped Dr. Beaver's affidavit based on its impression that he "was talking about Pizzuto's present condition, not his condition at age eighteen." *Id.* at 653. That finding was just as unscientific as the SEM discussion. As noted, the statute defines intellectual disability as requiring pre-eighteen onset. To opine, as Dr. Beaver did, that the statute was likely satisfied is to implicitly opine that the condition appeared before Mr. Pizzuto's eighteenth birthday. That is true not just as a matter of federal constitutional law, but as an elemental principle of psychology. In every reputable medical source, intellectual disability was historically a status that *by definition* only existed if the patient had it by the time he turned eighteen. *See, e.g.*, *Atkins*, 536 U.S. at 308 n.3 & 318; *United States v. Coonce*, 932 F.3d 623, 633 (8th Cir. 2019). No medical professional would even conceive of something like "adult-onset" intellectual disability, for it is a contradiction in terms. *See Pizzuto v. Blades*, No. 1:05-cv-516, 2012 WL 73236, at *11 (D. Idaho Jan. 10, 2012) (agreeing "with Pizzuto that the state court's focus on distinguishing between childhood and adult-onset" intellectual disability "makes little sense" because intellectual disability is, "by definition, a condition that is manifested before the age of 18"), *vacated on other grounds*, 758 F.3d 1178 (9th Cir. 2014) (per curiam). The Idaho Supreme Court assumed that Dr. Beaver was speaking in terms that were, from a medical perspective, oxymoronic, which is yet another unscientific and unconstitutional

aspect of the opinion and therefore an additional reason to grant review and reverse.

Finally, opposing counsel overstates the extent to which potential alternative holdings prevent this Court from granting certiorari when erroneous conclusions of federal constitutional law were made below. In *Arave v. Creech*, 507 U.S. 463, 469–70, 478 (1993), for example, the Ninth Circuit granted sentencing relief in a capital habeas case from Idaho on three separate grounds. This Court granted certiorari, "limited to the narrow question" of whether one such ground was correctly decided by the Ninth Circuit. *Id.* at 470. After reversing the Ninth Circuit on that ground, the Court reiterated that one of the other bases for relief entitled Mr. Creech to a resentencing. *See id.* at 478–79. If the State's perspective on this Court's practices were correct, it never would have granted certiorari in *Creech*, because the same outcome was going to inevitably occur after its review as before: a resentencing. Nonetheless, the Court did accept the case, presumably because the Ninth Circuit directly and incorrectly addressed an important federal constitutional question. The Idaho Supreme Court did the same in finding that *Atkins* did not constitutionalize the clinical standards, and certiorari is called for here too.

V. *Atkins* Did Mandate The Use Of Clinical Standards.

The State spends six pages on the merits of the question presented, *see* BIO at 26–32, an undertaking that serves mainly to highlight why it ought to be answered on certiorari review. For the State's authorities—in conjunction with Mr.

Pizzuto's own—only underscore how challenging and divisive a question it is. That is why the Court should take the question up and answer it.

At a minimum, the State falls well short of proving the question to be an easy one yielding only one potential answer. Indeed, in six pages of discussion the State neglects to even mention—let alone grapple with—the single strongest point in support of Mr. Pizzuto's reading of *Atkins*. The point is *Hall*'s own characterization of *Atkins*. *Hall* itself described the SEM as "a fundamental premise of *Atkins*," confirmed that *Atkins* offered "substantial guidance on the definition of intellectual disability," and stressed that a contrary conclusion regarding the SEM would reduce *Atkins* to "a nullity." 572 U.S. at 720–21. These passages undeniably suggest that *Atkins* did in fact require the use of the clinical standards. Again, there is certainly an argument to the contrary, which the State ably articulates, but it is the tension in the law which demands this Court's intervention. The State cannot paper over the tension by ignoring the most important language in the most important opinion on the subject.

Oddly, the State appears to believe that if the "holding" of *Atkins* is understood as not encompassing the SEM, then certiorari must be unwarranted. *See* BIO at 27–32. The State goes so far as to use the word "holding" fourteen times in its six-page section on the merits. *See id.* As an initial matter, since *Hall* characterized the SEM as "a fundamental premise of *Atkins*," 572 U.S. at 720, the question of whether this was actually a holding is contestable enough that it should not stand in the way of certiorari. *See Employment Div., Dep't of Human Res. v.*

Smith, 485 U.S. 660, 673–74 (1988) (referring to a holding as potentially resting on an "unstated premise"). In addition, the lower courts recognize that they are not just bound by this tribunal's formal holdings. *See, e.g.*, *ACLU of Ky. v. McCreary Cty., Ky.*, 607 F.3d 439, 447 (6th Cir. 2010) ("Lower courts are obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale."); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.").

It follows that even if *Atkins*' nod to the clinical standards was not a traditional "holding," it might still bind the lower courts under their own jurisprudence. That is especially significant in the present case, where the Idaho Supreme Court did not ground its decision in any line-drawing between holdings and dicta. The Idaho Supreme Court grounded its decision on the determination that "*Atkins* did not adopt specific clinical standards." App. 9. In other words, the Idaho Supreme Court simply felt that *Atkins* did not favor the clinical standards at all, whether in a holding or otherwise. Certiorari review is merited so this Court can either confirm or deny that reasoning.

If anything, the State's emphasis on the "holding" of *Atkins* only underscores the attractiveness of the present petition as a vehicle. It is federal habeas proceedings that turn on "the holdings, as opposed to the dicta, of this Court's decisions," *Williams v. Taylor*, 529 U.S. 362, 412 (2000), and this case arises instead from state post-conviction proceedings. That is another reason why federal habeas appeals are not the best cases for answering the question presented here. *See* Pet. at 10–11 (providing more such reasons). And by the same token it is another reason why the instant case, which comes uncluttered by the habeas standards, is a better vehicle.

VI. Conclusion

The petition for certiorari should be granted.

Respectfully submitted this 10th day of November 2021.

Respectfully submitted,

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