

NO. #19-8598

IN THE SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO,

Petitioner,

v.

KEITH YORDY,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Gerald Ross Pizzuto, Jr. (“Pizzuto”) has raised the following questions before this Court:

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 subaverage intelligence as measured by the intelligence quotient (“IQ”) scores, including the standard error of measurement (SEM)?
2. 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 a reasonable determination of fact?

(Pet., pp.i-ii.)

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STATEMENT OF THE CASE

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

Prior to trial, Pizzuto was examined by Dr. Michael Emery, and given the WAIS-R Verbal Scale IQ test. While Pizzuto scored 72, which “falls in the borderline range of intellectual deficiency,” Dr. Emery opined, “[b]oth [Pizzuto’s] Rorschach and Bender-Gestalt suggested somewhat higher intellectual potential.” (App., pp.129-30.) At Pizzuto’s sentencing, Dr. Emery discussed his diagnosis of borderline intellectual deficiency, explaining it was “because [Pizzuto] did score in the seventies in the Wexler Verbal.” (RER, Vol.III, p.329.)¹ However, Dr. Emery qualified his diagnosis, stating that Pizzuto “showed more intelligence in his conversation, his choice of words, and very frequently individuals who come out of a background similar to that of Mr. Pizzuto’s, with the interrupted education, a family in which there is very little intellectual interchange, the testing would be spuriously low especially on the verbal scale.” (Id., p.361.) Pizzuto was convicted of both murders, sentenced to death, and denied post-conviction relief, all of which was affirmed by the Idaho Supreme Court in a consolidated appeal. Pizzuto I, 810 P.2d at 687-88.

¹ The record citations are to the Excerpts of Record before the Ninth Circuit Court of Appeals. “PER” refers to Petitioner’s Ninth Circuit Excerpts of Record and “RER” refers to Respondent’s Ninth Circuit Excerpts of Record.

In 1992, Pizzuto filed his first federal habeas petition, which was denied in 1997, and affirmed by the Ninth Circuit. See Pizzuto v. Arave, 280 F.3d 949, 954 (9th Cir. 2002), *dissent amended and superseded in part by* 385 F.3d 1247 (9th Cir. 2004).²

While Pizzuto’s Ninth Circuit appeal was pending, this Court decided Atkins v. Virginia, 536 U.S. 304 (2002), concluding the execution of intellectually disabled (“ID”) murderers violates the Eighth Amendment.³ Responding to Atkins, the Idaho Legislature enacted I.C. § 19-2515A, prohibiting the execution of ID murderers and establishing requirements that must be met to prove an ID claim in Idaho. 2003 Idaho Sess. Laws, Ch. 136 §§ 4 & 6, p.398. In concert with Atkins, the Legislature defined ID as requiring three elements: (1) “significantly subaverage general intelligence functioning” defined as “an intelligent quotient score of seventy (70) or below”; (2) “significant limitation in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, work, leisure, health and safety”; and (3) “onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.” I.C. § 19-2515A(1)(a).

Responding to Atkins, Pizzuto filed his fifth post-conviction petition in 2003 (App., pp.718-27), with a number of attachments that included: (1) a letter from Dr. Emery

² While litigating his first federal habeas petition, Pizzuto filed his second and third post-conviction petitions, which were both rejected pursuant to I.C. § 19-2719. See Pizzuto v. State (Pizzuto III), 10 P.3d 742 (Idaho 2000); Pizzuto v. State (Pizzuto II), 903 P.2d 58 (Idaho 1995). Pizzuto also filed a fourth post-conviction petition contending he should be resentenced by a jury under Ring v. Arizona, 536 U.S. 584 (2002), which was also rejected. See Rhoades, et al. v. State (Pizzuto IV), 233 P.3d 61 (Idaho 2010).

³ At that time, “intellectual disability” was known as “mental retardation.” Because the courts and authorities now use the term “intellectual disability,” Hall v. Florida, 572 U.S. 701, 704 (2014), that is the phrase Respondent (“state”) will use except when quoting from material expressly using the phrase, “mental retardation.”

discussing his pre-trial examination of Pizzuto (App. pp.129-30); (2) an April 1, 1988 letter from Dr. James R. Merikangas who “suggested” that Pizzuto is “brain damaged” as a result of a “traumatic brain injury,” and that Pizzuto’s “long history of polydrug abuse caused him further neurological dysfunction and has caused him to have substantial defects of mind and reason” (App., p.134); (3) a June 18, 2003 affidavit by Dr. Craig W. Beaver who explained that in 1996 he “conducted a comprehensive neuropsychological examination” of Pizzuto that “demonstrated limited intellectual skills indicative of **possible** of [sic] mild mental retardation” and that Pizzuto “likely meets the standard recently enacted in Idaho Code Section 19-2515A regarding defendants who are mentally retarded” (App., p.122) (emphasis added); and (4) an undated affidavit from Dr. Beaver referencing the 1996 neuropsychometric examination, and opining, “[t]he combination of Jerry Pizzuto having a seizure disorder, neurocognitive limitations that affect his impulse control and decision making, combined with the neurotoxic affects [sic] of polysubstance abuse would have significantly impacted his abilities to make appropriate decisions and to control his behavior in an appropriate and community acceptable manner” (App., pp.140, 142).

The state filed a motion for summary dismissal asserting the petition did not comply with the dictates of I.C. § 19-2719. (RER, Vol.II, pp.227-28.) Pizzuto sought additional testing (PER, Vol.IV, pp.831-34) that included another affidavit from Dr. Beaver (“2004 affidavit”) referencing the prior evaluations that “demonstrate[d] significant neurocognitive deficits” that were “consistent with an individual who has an organic brain disorder.” (App., p.167.) Dr. Beaver recommended repeat neuropsychometric studies because “patients that have persistent seizure disorders, for example, will decline over time in their overall mental abilities.” (Id.) Dr. Beaver noted Akins, and opined, “Within the

context of [*Atkins*], current evaluation of Gerald Pizzuto is indicated to determine if he meets the criteria of mental adaptability.” (Id., p.168.)

Without noticing his motion for additional testing, Pizzuto filed a number of additional affidavits (App., pp.146-64) and a Motion for Summary Judgment asserting that, because of the evidence he had submitted, “there are no genuine issues of material fact” and he “is entitled to the requested judgment as a matter of law.” (RER, Vol.IV, p.839.) After argument on the two competing motions (RER, Vol.III, pp.160-94), the post-conviction court denied Pizzuto’s Motion for Summary Judgment, concluding his fifth post-conviction petition was untimely and, alternatively, “failed to raise a genuine issue of material fact supporting his claim of mental retardation.” (App., p.109.)

Addressing the merits of Pizzuto’s ID claim, the Idaho Supreme Court concluded he failed to present sufficient evidence establishing two elements under I.C. § 19-2515(A): an IQ score of 70 or below and onset before age 18; the court did not address whether Pizzuto established the second prong of I.C. § 19-2515A – significant limitations in adaptive functioning. (App., pp.100-05.) Addressing Pizzuto’s request for additional testing, the supreme court explained that he did not ask the trial court to rule on the motion or even notice it for hearing, and that, under Idaho law, “[i]f a trial court denies a party’s motion for summary judgment (Pizzuto’s), it has discretion to grant summary judgment to the opposing party.” (App., p.105.) The court also noted counsel’s concession during oral argument that “neither Dr. Beaver nor any other expert expressed any opinion as to whether Mr. Pizzuto meets the standard set forth in Idaho Code 19-2515A.” (App., p.101.)

While his Atkins post-conviction case was pending, Pizzuto received permission from the Ninth Circuit to file a successive habeas petition based upon the contention he is

ID. (RER, Vol.I, p.16.) At Pizzuto's request, Dr. Ricardo Weinstein completed additional psychological testing in January 2009, including the WAIS-IV IQ test where Pizzuto scored 61 on verbal comprehension, 67 on perceptual reasoning, 80 on working memory, 56 on full processing speed, and a full-scale score of 60. (RER, Vol.III, p.496.) In preparation for an evidentiary hearing, the state obtained Dr. Beaver's records from the 1996 neuropsychological examination that he completed with Pizzuto, and included IQ testing revealing that Pizzuto had a verbal IQ score of 91, a performance IQ score of 94, and a full scale IQ score of 92. (Id., p.587.)

After the evidentiary hearing, the district court initially denied relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), concluding the Idaho Supreme Court's decision was not contrary to, or an unreasonable application of, Atkins, or based upon an unreasonable determination of facts from the evidence presented to the state courts. (App., pp.61-74.) The court also denied habeas relief under *de novo* review, concluding Pizzuto failed to establish his IQ was significantly subaverage (meaning an IQ score of 70 or below) prior to age 18 (App., pp.74-80); the court concluded Pizzuto met his burden of establishing significant limitations in adaptive functioning (App., pp.80-89).

Explaining its rationale regarding Pizzuto's IQ score, the court addressed the three IQ scores presented during the hearing: (1) the 1985 verbal score of 72 on the WAIS-R given by Dr. Emery; (2) the 1996 full scale IQ score of 92 on the WAIS-R given by Dr. Beaver; and (3) the 2009 full scale IQ score of 60 on the WAIS-IV given by Dr. Weinstein. (App., pp.75-79.) Of the three scores, the court gave the 2009 score of 60 "the least weight" because of Dr. Weinstein's concession that "one can assume, everything being the same, that the accuracy of an IQ score would be better the closer to age 18," "cognitive abilities

certainly diminish with age,” and “Pizzuto’s advanced cardiovascular disease could have contributed to an overall decline in his mental ability.” (Id., p.75) (brackets omitted).

While not entirely discounting the 1985 score of 72, the court found “the score to be a low estimation of Pizzuto’s full intellectual functioning before he turned 18” since “Dr. Emery did not record a full scale score and has since disposed of his raw data,” and “Pizzuto’s drug use and other neurological problems may have affected his cognitive functioning at the time.” (Id., pp.76-77.)

Addressing the 1996 scores from Dr. Beaver’s testing, the court gave Pizzuto the benefit of the doubt by granting him an “adjustment” based upon the “standard error measurement” (“SEM”) and “Flynn Effect,” which dropped the numerical range between 82 and 92, but that “still [did] not get him close to the threshold for significantly subaverage general intellectual functioning.” (Id., p.78.) The court ultimately concluded, “Pizzuto’s intellectual functioning was likely higher than the Emery verbal score of 72 indicates but lower than the Beaver full scale score of 92.” (Id., pp.79-80.) While recognizing this placed the score “most likely somewhere in the 80s,” the court declined to “determine a precise numerical score,” concluding Pizzuto had not proven “that his general intellectual functioning at the relevant time was significantly subaverage; that is, that he had an IQ of 70 or below.” (Id., p.80.)

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

withdrew its opinion, vacated the district court's order, and remanded for further proceedings consistent with Hall. Pizzuto v. Blades, 758 F.3d 1178 (9th Cir. 2014).

On remand, the district court recognized that Hall involved a Florida statute that had been interpreted by its supreme court to establish a “hard IQ score cutoff” of 70 without consideration of the SEM of plus or minus five points, and that further inquiry into a petitioner's intellectual functioning was not permitted even if the IQ score was within the SEM. (App., pp.32-33.) The court also gleaned three main points from Hall: (1) “subaverage intellectual functioning—the first prong of the intellectual disability analysis—can be established by evidence of an IQ score, and an IQ score of 70 or below will satisfy that prong”; (2) “an IQ score of 76 or higher means that the individual does not suffer from significantly subaverage intellectual functioning and, therefore, is not entitled to relief under *Atkins*”; and (3) “petitioners with IQ scores of 71 to 75 must be allowed to present additional evidence of intellectual disability, including additional evidence of subaverage intellectual functioning and evidence of the second and third prongs of the analysis—deficits in adaptive functioning and onset before the age of eighteen.” (App., pp.33-35.)

However, recognizing the limitations of AEDPA, the court explained that, because the holding from Hall was not clearly established at the time of the Idaho Supreme Court's decision in 2008, the state court was only bound by the holding from Atkins, and, therefore, that court's decision was neither contrary to, nor an unreasonable application of, Atkins. (App., pp.40-43.) Alternatively, the district court assumed that, even if Atkins barred using a hard IQ score of 70 or below, the Idaho Supreme Court's decision – that Pizzuto failed to establish “any subaverage intellectual functioning developed *before* he turned eighteen—the third prong of the intellectual disability analysis” – “was not contrary to, or an

unreasonable application of, clearly established Supreme Court precedent.” (Id., pp.43) (emphasis in original). The court also concluded that the Idaho Supreme Court’s factual findings that Pizzuto’s medical problems and drug abuse could have caused his intellectual functioning to decline since his eighteenth birthday were not objectively unreasonable under 28 U.S.C. § 2254(d)(2). (App., pp.45-46.) Finally, the court reaffirmed its prior *de novo* review decision, concluding, “nothing in *Hall* renders suspect any of the [c]ourt’s previous findings and conclusions on *de novo* review.” (Id., p.47.)

Applying AEDPA’s deferential standard to the Idaho Supreme Court’s 2008 decision, the Ninth Circuit affirmed,⁴ concluding the state court’s decision was neither contrary to, nor an unreasonable application of, Supreme Court precedent because the only precedent available to the state court at the time of its decision was Atkins; Hall and its progeny were decided after the Idaho Supreme Court filed its decision and the new requirements from Hall – that the legal determination of intellectual disability be informed by the medical community’s diagnostic framework – was not mandated by Atkins. (App., pp.12-17.) The court also addressed each of Pizzuto’s arguments under 28 U.S.C. § 2254(d)(2), and concluded that he failed to establish the Idaho Supreme Court’s decision was based upon an unreasonable determination of facts. (Id., pp.17-21.) Based upon Pizzuto’s failure to overcome the limitations associated with AEDPA, the court declined to address the district court’s *de novo* review of Pizzuto’s ID claim based on the evidentiary hearing evidence or “address whether [he] is intellectually disabled or whether his execution would violate the Eighth Amendment.” (Id., p.21.)

⁴ The Ninth Circuit issued its initial post-remand decision on August 14, 2019. See Pizzuto v. Blades, 933 F.3d 1166 (9th Cir. 2019). That decision was amended without any substantive changes on December 31, 2019. (App., pp.1-21.)

REASONS FOR DENYING THE WRIT

Pizzuto initially contends that the Ninth Circuit's decision conflicts with Atkins because, according to Pizzuto, "Atkins explicitly adopted the minimum IQ score required by the clinical definitions," including the SEM and Flynn Effect, which were "confirmed beyond any doubt by Hall," making Atkins "completely incompatible with the Idaho Supreme Court's approach." (Pet., pp.12-18.) However, Pizzuto virtually ignores the fact that his petition is governed by AEDPA standards, which mandate that habeas relief cannot be granted without a showing that the state court's decision is contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). And "clearly established law signifies the holdings, as opposed to the dicta of this Court's decisions." Howes v. Fields, 565 U.S. 499, 505 (2012) (quotes and citation omitted). Because Atkins did not hold that states must adopt the SEM and Flynn Effect in ascertaining the first prong of an ID claim, Pizzuto's argument fails and certiorari should be denied. Moreover, this Court's decision in Shoop v. Hill, 139 S.Ct. 504 (2019) (per curiam), establishes Atkins did not adopt the SEM and Flynn Effect as advocated by Pizzuto.

Pizzuto attempts to bolster his argument by contending, based upon a single case – Smith v. Sharp, 935 F.3d 1064 (10th Cir. 1064) – that there is a split in the circuits regarding whether this Court mandated consideration of the SEM and Flynn Effect in Atkins. (Pet., pp.18-22.) Because Smith is far afield from what Pizzuto advocates, he has failed to establish a circuit split. Irrespective, this is not the proper vehicle for resolving the alleged split because the Ninth Circuit's decision was also based upon the third prong of I.C. § 19-2515A(1)(a), and the district court found, under *de novo* review, that Pizzuto is not ID.

Finally, relying exclusively upon Brumfield v. Cain, 576 U.S. 305 (2015), Pizzuto contends the Idaho Supreme Court’s finding that he did not establish the third prong of I.C. § 19-2515A(1)(a) – onset of significant subaverage general intelligence before age eighteen – was an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2). (Pet., pp.22-29.) Once again Pizzuto virtually ignores the limitations associated with AEDPA. Moreover like Smith, Brumfield is readily distinguished from Pizzuto’s case. Irrespective, this is a factually intense question that merely involves alleged error correction that does not warrant utilizing this Court’s resources, particularly since the district court also found, under *de novo* review, that Pizzuto failed to meet his burden.

I.

The Ninth Circuit’s Decision Does Not Conflict With *Atkins*

A. General AEDPA Standards And Clearly Established Federal Law

Recognizing Pizzuto’s habeas petition was filed after April 24, 1996, the Ninth Circuit applied the deferential standards of 28 U.S.C. § 2254(d)(1), which require that Pizzuto establish the Idaho Supreme Court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” (App., p.12) (quoting 28 U.S.C. 2254(d)(1)).

In its first decision expressly addressing the parameters of 28 U.S.C. § 2254(d)(1), this Court explained that § 2254(d)(1) “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” Williams v. Taylor, 529 U.S. 362, 412 (2000). While “[i]n most situations, the task of determining what” the Court has “clearly established will be straightforward,” when the Court’s precedent is not “a model of clarity” confusion abounds. Lockyer v. Andrade, 538 U.S.

63, 72 (2003). For example, in Lockyer, the Court recognized its precedent regarding disproportionate sentences under the Eighth Amendment “exhibit[ed] a lack of clarity regarding what factors may indicate gross disproportionality,” and ultimately concluded “the only relevant clearly established law amenable to the ‘contrary to’ or ‘unreasonable application of’ framework is the gross proportionality principle, the precise contours of which are unclear, applicable only in the ‘exceedingly rare’ and ‘extreme’ case.” Id. at 73.

In Knowles v. Mirzayance, 556 U.S. 111, 121-22 (2009), the Court reaffirmed the narrow meaning of “holdings,” rejecting the Ninth Circuit’s attempt to graft a “nothing to lose” rule onto the deficient performance prong for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The Court reaffirmed, “it is not ‘an unreasonable application of’ ‘clearly established Federal law’ for a state court to decline to apply a specific legal rule that has not been **squarely established** by this Court.” Knowles, 556 U.S. at 122 (emphasis added). *See also* Carey v. Musladin, 549 U.S. 70, 72-76 (2006) (rejecting the Ninth Circuit’s expansion of Estelle v. Williams, 425 U.S. 501, 503-06 (1976), and Holbrook v. Flynn, 475 U.S. 560, 568 (1986), to private-actor courtroom conduct involving the victim’s family sitting in the front row of the spectators’ gallery wearing buttons with a photo of the victim during the trial).

Similarly, in Yarborough v. Alvarado, 541 U.S. 652, 659-60 (2004), the Ninth Circuit expanded this Court’s precedent regarding “custodial interrogation” by concluding the state court erred by “failing to account for Alvarado’s youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave.” While recognizing “the difference between applying a rule and extending it is not always clear,” this Court rejected the expansion because the Court’s prior opinions “applying the

Miranda custody test have not mentioned the suspect's age, much less mandated its consideration." *Id.* at 666. In *Howes*, 565 U.S. at 505, the Court repudiated the Sixth Circuit's attempt to expand the holding from *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny by erecting a *per se* rule that questioning about conduct occurring outside the prison constitutes custodial interrogation. In *White v. Woodall*, 572 U.S. 415, 425-226 (2014), the Court rejected the Sixth Circuit's "unreasonable-refusal-to-extend" rationale that required state courts "to extend the governing legal principle to a context in which the principle should have controlled." The Court reasoned that § 2254(d)(1) "does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Id.* at 426 (emphasis in original). "Thus, if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *Id.* (quotes and citations omitted).

B. The Supreme Court's "Holding" In *Atkins*

Thirteen years after *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989), this Court revisited the issue of ID, concluding, "[m]uch has changed since [*Penry*]," and the "consistency" of change in which state legislatures had enacted statutes prohibiting the execution of ID murderers and the "uncommon" practice of executing ID murderers even in states where it was permitted established a "national consensus has developed against it." *Atkins*, 536 U.S. at 314-16. After determining a national consensus had developed against executing ID murderers and examining "the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty," *id.* at 317, the Court held "that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to

take the life of a mentally retarded offender,” id. at 321 (internal quotes and citation omitted). Addressing the existence of the “national consensus,” the Court explained:

To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restrictions upon [their] execution of sentences.” *Id.*, at 405, 416-417, 106 S.Ct. 2595.

Id. at 317 (brackets in original) (footnote omitted).

The Court noted, “The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth” by The American Association on Mental Retardation (“AAMR”) and The American Psychiatric Association’s Diagnostic (“APA”) and Statistical Manual of Mental Disorders (4th ed. 2000) (“DSM-IV”). Id. at 317 n.22 (citing footnote 3). The Court recognized, “clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that become manifest before age 18.” Id. at 318. However, the Court never held the States must adopt any specific definition of ID, but “held” only that “such punishment is excessive and that the Constitution places a substantive restriction on the State’s power to take the life of a mentally retarded offender.” Id. at 321 (internal quotes and citation omitted).

C. Atkins Did Not Mandate The Use Of Clinical Definitions

Relying upon a snippet from footnote 5 in the background section of Atkins, Pizzuto contends, “*Atkins* explicitly adopted the minimum IQ score required by the clinical

definitions,” including the SEM and Flynn Effect. (Pet., pp.13-14, 16.) Not only has Pizzuto taken the footnote out of context, but it hardly constitutes the holding in Atkins.

While discussing the testimony of one of Atkins’ experts, Dr. Evan Nelson, the Court noted that he administered the WAIS-III, “the standard instrument in the United States for assessing intellectual functioning.” Id. 536 U.S. at 309 n.5. The Court initially explained how the WAIS-III is scored, and then noted, “It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is **typically considered** the cutoff IQ score for the intellectual function prong of the mental retardation definition.” Id. (emphasis added).

Not only has Pizzuto omitted the words “typically considered,” but nowhere in the footnote, or anywhere else in the opinion, did this Court “explicitly adopt the minimum IQ score required by the clinical definitions,” let alone the SEM or Flynn Effect. Even if the clinical definitions were “addressed” or “noted,” as asserted by Pizzuto, they do not constitute the “holding” in Atkins. Rather, after explaining it was “leav[ing] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,” id. at 317, the Court merely noted, “[t]he statutory definitions of mental retardation are not identical, but **generally conform** to the clinical definitions set forth in n.3,” id. at 317 n.22 (emphasis added). Footnote 3 quoted the criteria for ID from the AAMR and APA because Dr. Nelson had opined Atkins was “mildly mentally retarded.” Id. at 308 n.3. The mere reference to “statutory definitions” from the various states that “generally conform” to two clinical definitions does not mean the Court “embraced” those two definitions as its “holding.” Pizzuto’s contention is contrary to the Court’s admonition that it would “leave to the State[s] the task of developing appropriate

ways to enforce constitutional restrictions.” *Id.* at 321. If the Court had desired to “hold” that the states are required to follow the AAMR and APA clinical definitions, particularly the SEM and Flynn Effect, the Court would have so stated instead of relegating discussion of the standards to footnotes and utilizing the words “typically” and “generally.”

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

[T]his Court **held**, in *Atkins v. Virginia*, 536 U.S. at 321, 122 S.Ct. 2242, that the Eighth Amendment prohibits execution of mentally retarded offenders. **Our opinion did not provide definitive procedural or substantive guides** for determining when a person who claims mental retardation “will be so impaired as to fall [within *Atkins*’ compass].” We “le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.” *Id.* at 317, 122 S.Ct. 2242 (internal quotation marks omitted).

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

Even in *Hall*, 572 U.S. at 704, citing *Atkins*, the Court stated, “This Court had held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of

persons with intellectual disability.” Discussing the exact question in Hall, the Court stated, “The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*.” Id. at 709. After addressing Florida’s law defining ID, the Court stated, “This rigid rule, **the Court now holds**, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.” Id. (emphasis added).

In Brumfield, 576 U.S. at 315 (quotes, citations, and ellipsis omitted) (emphasis added), this Court stated, “this Court **observed** in *Atkins* that an IQ between 70 and 75 or lower is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition,” and that “in adopting these definitions, the Louisiana Supreme Court **anticipated** our holding in *Hall*[], that it is unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70.” Merely observing something does not make it a holding. And the Louisiana Supreme Court could not have “anticipated” the Court’s holding in Hall if it was already the holding in Atkins.

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

express “the difficult position that the states are placed in due to the Supreme Court’s lack of clear guidance on this analysis.” Wright v. State, 256 So.3d 766, 776 n.9 (Fla. 2018).

In Clark v. Quarterman, 457 F.3d 441, 444 (5th Cir. 2006), the petitioner argued the state court erred by “considering the numerical IQ scores of [his] tests instead of the ‘confidence band,’ or range of potential ‘true’ scores someone with [his] score falls within” as required by the AAMR. Rejecting the argument, the court recognized that, while Atkins referred to the clinical definitions from the AAMR and APA, “it did not dictate that the approach and the analysis of the State inquiry *must* track the approach of the AAMR or the APA exactly.” Id. at 445 (emphasis in original); *see also* Green v. Johnson, 515 F.3d 290, 300 n.2 (4th Cir. 2008) (“Neither *Atkins* nor Virginia law appears to require expressly that [the SEM or Flynn Effect] be accounted for in determining mental retardation status.”); Bowling v. Kentucky, 163 S.W.3d 361, 375 (Ky. 2005) (quoting Atkins 536 U.S. at 317 n.22) (“*Atkins* did not discuss margins of error or the ‘Flynn Effect’ and held that the definition in KRS 532.130(2) ‘generally conform[ed]’ to the approved clinical definitions.”).⁵

Even after Hall was issued, the lower courts have recognized that Atkins did not mandate use of the Flynn effect. *See* Jenkins v. Comm., Alabama Dep’t of Corr., 963 F.3d 1248, 1276 (11th Cir. 2020) (emphasis in original) (“[N]either we nor the Alabama Supreme Court nor the U.S. Supreme Court have said a court *must* consider [the Flynn Effect] in order to reasonably apply *Atkins*.”); Ledford v. Warden, 818 F.3d 600, 635-37 (11th Cir. 2016) (explaining the divergent approaches to the Flynn Effect taken by other

⁵ In Hall, this Court noted that Kentucky was one of only two other states that had adopted a fixed score cutoff identical to Florida’s. 572 U.S. at 714. Consequently **after** the Court issued Hall, Bowling was abrogated by Woodall v. Commonwealth, 563 S.W.3d 1 (2018).

circuits); Fuston v. State, 2020 WL 1074845, *4 n.3 (Okla. Crim. App. 2020) (quoting Smith v. State, 245 P.3d 1233, 1237 n.6 (Okla. Crim. App. 2010)) (“The Flynn Effect has not achieved universal acceptance in courts where it has been raised.”); State v. Ford, 140 N.E.3d 616, 653 (Ohio 2019) (“There is also no legal or scientific consensus that requires an across-the-board downward adjustment to offset the Flynn Effect.”).

Pizzuto’s primary complaint stems from the Ninth Circuit’s reliance upon Shoop v. Hill, 139 S.Ct. 504 (2019) (per curium). (Pet., pp.14-16.) Pizzuto contends that Shoop is inapposite because it was based upon the adaptive deficits element, not the intelligence prong. (Id.) Even if true, which the state does not concede, this is a distinction without a difference. In ascertaining “what was clearly established regarding the execution of the intellectually disabled in 2008, when the Ohio Court of Appeals rejected Hill’s *Atkins* claim,” the Court noted, of course, that “*Atkins* itself was on the books, but *Atkins* gave no comprehensive definition of ‘mental retardation’ for Eighth Amendment purposes.” Shoop, 139 S.Ct. at 506-07. Indeed, the Court explained that Atkins merely “noted definitions of mental retardation adopted by the [AAMR] and the [APA] required **both** subaverage intellectual functioning **and** significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.” Id. at 507 (quotes and citation omitted) (emphasis added). More importantly, the Court “also noted that state statutory definitions of mental retardation at the time were not identical, but generally conformed to these clinical definitions,” and the Court would leave “to the States the task of developing appropriate ways to enforce the constitutional restriction that the Court adopted.” Id. (quotes, citations, brackets omitted). The Court then explained, “More than a decade later, we expounded on the definition of intellectual disability in two

cases” – Hall and Moore v. Texas, 137 S.Ct. 1039 (2017). Id. Admittedly, the Court ultimately concluded that “*Atkins* did not definitely resolve how [significant limitations in adaptive skills were] to be evaluated, but instead left its application in the first instance to the States.” Id. at 508. However, neither did Atkins “resolve how [the intelligence prong] was to be evaluated, but instead left its application in the first instance to the States.” As explained in Shoop it was not until Hall that the Court provided any additional guidance regarding any definition of ID. Id. at 507.

More importantly, the Ninth Circuit’s conclusion was not based exclusively upon Shoop, but also several circuit cases and Bies, 556 U.S. at 831, which explained that Atkins “did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within *Atkins*’ compass.” (App., p.15.) And after discussing the parameters of Atkins’ holding, the Ninth Circuit ultimately reasoned, “This is not a case in which the [Idaho Supreme Court] utterly disregarded the clinical definitions,” (id.), a conclusion Pizzuto has not challenged. Indeed, in Hall this Court explained that Idaho was distinguishable from Florida’s “bright line rule” because it was one of at least five states that has “passed legislation allowing a defendant to present additional evidence of intellectual disability even when an IQ score is above 70.” 572 U.S. at 717 (citing (App., p.101)); see also Moore, 137 S.Ct. at 1050 n.7.

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

death penalty. See United States. v. Caro, 597 F.3d 608, 644 (4th Cir. 2010) (noting Atkins created a “bright-line rule barring execution of [the] mentally retarded”). Indeed, if the holding from Atkins was as contended by Pizzuto, there would be no need for this Court to “define the constitutional floor of those who qualify for the exclusion based on the *Atkins* decision itself,” and there would not be “confusion in the lower courts over the scope of *Atkins*.” (Pet., p.12.) Any confusion that has arisen is because Atkins did not hold that states were mandated to use clinical definitions, let alone the SEM or Flynn Effect. Rather, the first “definition” for ID did not occur until Hall, which was issued years after the Idaho Supreme Court’s decision in Pizzuto’s case.

D. Smith Did Not Create A “Circuit Split”

Pizzuto next contends that as a result of Smith, *supra*, there is a “circuit split.” (Pet., pp.18-21.) However, Smith did not mandate adoption of the medical communities’ entire diagnostic framework, actually noting, “*Atkins* clearly establishes that intellectual disability must be assessed, at least **in part**, under the existing clinical definitions applied **through expert testimony**.” 935 F.3d at 1077 (emphasis added). Moreover, Smith is a sufficiency of the evidence case in which the court applied the standard from Jackson v. Virginia, 443 U.S. 307 (1979). Smith, 935 F.3d at 1071, 1074-77.

Additionally, the court’s analysis was focused upon expert testimony regarding the intellectual functioning prong of Atkins, particularly since “[e]very IQ test Smith took placed him firmly within the intellectual disability range,” *id.* at 1078, which “strongly compel[s] a finding of significant deficits in intellectual functioning,” *id.* at 1079.⁶

⁶ Pizzuto concedes “Smith had several IQ scores below 70,” but then contends Smith “also had a score of 70 and within the margin of error, namely, a 73.” (Pet., p.19.) However,

Therefore, according to the Tenth Circuit, for the state court’s decision to withstand review “there must be evidence that either: (1) all of the IQ assessments administered to Smith significantly underestimated his intellectual functioning; or (2) contrary to the clinical definitions of the intellectual functioning prong at the time of Smith’s *Atkins* trial, expert assessments relying upon standardized metrics are not dispositive.” Id. at 1078. Attempting to meet this standard, the state sought to demonstrate Smith was malingering and presented lay testimony to overcome the experts’ opinions, which the court rejected. Id. at 1080-82. In Pizzuto’s case, counsel conceded before the Idaho Supreme Court that “neither Dr. Beaver nor any other expert expressed any opinion as to whether Mr. Pizzuto meets the standard set forth in Idaho Code 19-2515A.” (App., p.101.)

Further, while Smith referenced Shoop, it was only in the context of the standard boilerplate that, under a 28 U.S.C. § 2254(d)(1) analysis, Federal law must be based upon this Court’s precedent that is clearly established at the time of the state adjudication. 935 F.3d at 1071. Indeed, the Tenth Circuit not only disregarded Shoop, it also ignored Bies, and the other cases cited above that clearly articulate the holding from Atkins, and relied instead upon circuit precedent, particularly Hooks v. Workman, 689 F.3d 1148, 1166 (10th Cir. 2012). Smith, 935 F.3d at 1077-83. Simply stated, Shoop does not create the circuit split advanced by Pizzuto.

However, even if Smith conflicts with the case here, certiorari is unwarranted. As explained above, there is authority from this Court, the federal circuits, and States’ highest

the court refused to consider the 73 score because it was from “an unknown test and only introduced into the *Atkins* trial record indirectly.” Smith, 935 F.3d at 1080. And while it is true that on a WAIS-R test Smith had a Performance IQ score of 70, Pizzuto fails to mention that on the same test the Verbal IQ score was 64 and the full scale IQ score was 65. Id.

courts detailing the holding from Atkins, which is contrary to Pizzuto’s interpretation of Smith. And Pizzuto argues that Smith is the only case that allegedly contradicts the Ninth Circuit’s decision in his case. As such, at best, it is an outlier that does not warrant certiorari. See In Re Williams, 898 F.3d 1098, 1110 (11th Cir. 2018) (recognizing this Court does not generally review outlier cases); Strayhorn v. Wyeth Pharmaceuticals, Inc., 737 F.3d 378, 405-06 (6th Cir. 2013) (declining to follow an outlier case).

Further, granting certiorari on this question will not resolve Pizzuto’s case because the Idaho Supreme Court’s decision was also based upon the third prong of I.C. § 19-2515A(1)(a) – “onset of significant subaverage general intelligence functioning . . . before age eighteen (18) years.” And Pizzuto’s first question regarding the holding from Atkins does not address that third prong. Moreover, even if Pizzuto could circumvent AEDPA’s limitations, he would still have to prevail on his challenge to the federal district court’s *de novo* review that included the finding, after an evidentiary hearing, that the 1996 full scale IQ score of 92 on the WAIS-R “[did] not get him close to the threshold for significantly subaverage general intellectual functioning” even after giving him the benefit of the SEM and Flynn Effect. (App., p.78.)

As Justice Sotomayor recognized in Kansas v. Carr, 136 S.Ct. 633, 647 (2016) (Sotomayor, J., dissenting) (quotation and citation omitted), “Even where a state court has wrongly decided an important question of federal law, we often decline to grant certiorari, instead reserving such grants for instances where the benefits of hearing a case outweigh the costs of so doing.” See also Hittson v. Chatman, 576 U.S. 1028 (2015) (Ginsburg, J., concurring in the denial of certiorari) (concurring in the denial of certiorari because “the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst* [v.

Nunnemaker, 501 U.S. 797 (1991].”). Because the Idaho Supreme Court’s decision was also based upon the third prong of I.C. § 19-2515A(1)(a) and the federal district court conducted a *de novo* review finding that Pizzuto’s IQ score was nowhere near the 70 threshold prior to his eighteenth birthday, there is no reason to expend this Court’s valuable time and resources on a case where the ultimate outcome will not change.

II.

The Ninth Circuit Properly Determined The Idaho Supreme Court’s Decision Was Not Based Upon An Objectively Unreasonable Application Of Fact

A. General AEDPA Standards Involving State Court Factual Findings

Collateral review of state court decisions “must be consistent with the respect due state courts in our federal system,” which is embodied under 28 U.S.C. § 2254. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). “[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” Id. (citing 28 U.S.C. § 2254(d)(2)⁷). “Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.” Id. (citing 28 U.S.C. § 2254(e)(1)⁸). While this Court has recognized apparent tension between § 2254(d)(2) and 2254(e)(1), it has declined to define “the precise relations between § 2254(d)(2) and §

⁷ Section 2254(d)(2) bars habeas relief unless the state courts’ adjudication of a claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

⁸ Section 2254(e)(1) states, “In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”

2254(e)(1).” Burt v. Titlow, 571 U.S. 12, 18 (2013); *see also* Wood v. Allen, 558 U.S. 290, 299 n.1 (2010) (discussing the various approaches adopted by the circuit courts).

Irrespective, under § 2254(d)(2), this Court has determined “that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” Burt, 571 U.S. at 18 (quoting Wood, 558 U.S. at 293). Rather, § 2254(d)(2) requires that state courts be accorded “substantial deference. If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court’s determination.” Wood, 559 U.S. at 301 (quotes, citations, brackets, ellipsis omitted). A petitioner must show “that the trial court had no permissible alternative but to” reach the opposite conclusion. Rice v. Collins, 546 U.S. 333, 341-42 (2006).

The Court has recognized this standard “erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court,” which “was meant to be” because “AEDPA requires a state prisoner to show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error beyond any possibility for fairminded disagreement.” Burt, 571 U.S. at 19-20 (quotes, citations, ellipsis, brackets omitted).

B. *Brumfield* Does Not Support Pizzuto’s Contention That The Idaho Supreme Court Unreasonably Found That He Failed To Establish Age Of Onset Prior To 18

Focusing upon a handful of insignificant similarities between his case and Brumfield, Pizzuto ignores rigorous AEDPA standards and the significant dissimilarities between the two cases. Initially, Pizzuto’s post-conviction case was in a far different procedural posture. Brumfield only relied upon mitigation evidence from his sentencing

to request an evidentiary hearing. Brumfield, 576 U.S. at 309. Pizzuto’s post-conviction petition included evidence beyond his sentencing hearing to support his ID claim (App., pp.122, 129-68), including the affidavits from Drs. Merikangas and Beaver upon which the Idaho Supreme Court relied in making its factual determination (App, pp.101-02). Pizzuto believed his evidence was so compelling that he filed a Motion for Summary Judgment contending that “there are no genuine issues of material fact” and he was “entitled to the requested judgment as a matter of law.” (RER, Vol.IV, p.839.)

Additionally, in Brumfield, this Court discussed the evidence regarding the only IQ score that was provided to the state court, which was 75, and initially noted the state court concluded Dr. Brian Jordan rated Brumfield’s intelligence higher. 576 U.S. at 316. However, Dr. Jordan never testified, gave only a “screening test,” and his report did not actually provide the 75 IQ score. Id. Rather, another expert, Dr. John Bolter, explained during cross-examination that “Dr. Jordan rated [Brumfield’s] intelligence just a little higher than I did. But Dr. Jordan also only did a screening test and I gave a standardized measure of intellectual functioning.” Id. Consequently, this Court opined, “The state court therefore could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence.” Id. In Pizzuto’s case, Dr. Emery submitted a report explaining that “[b]oth [Pizzuto’s] Rorschach and Bender-Gestalt suggested somewhat higher intellectual potential” than on WAIS-R Verbal IQ score of 72 (which did not include a full-scale IQ score). (App., p.129.) Additionally Dr. Emery testified that Pizzuto “showed much more intelligence in his conversation, his choice of words, and very frequently individuals who come out of a background similar to [his], with the interrupted

education, a family in which there is very little intellectual interchange, the testing would be spuriously low especially on the verbal scale.” (RER, Vol.III, p.361.)

The Idaho Supreme Court also addressed the information from Drs. Merikangas and Beaver and recognized the trial court “could have inferred that [Pizzuto’s intellectual functioning] would also have declined during the eleven-year period from [his] eighteenth birthday to the date of his IQ testing.” (App., pp.101-02.) Admittedly, neither expert expressly opined that Pizzuto’s IQ decreased during that period. However, contrary to Pizzuto’s contention that the Idaho Supreme Court engaged in “rank speculation” (Pet., p.25), there was significant information for the court to draw such an inference. Dr. Merikangas suggested that Pizzuto is “brain damaged” as a result of a “traumatic brain injury,” and that Pizzuto’s “long history of polydrug abuse has caused him further neurological dysfunction and caused him to have substantial defects of mind and reason.” (App., p.134.) That “long history” involved “a life long history of almost continuous drug abuse including intravenous Heroin [sic] as well as cocaine, speed and marijuana.” (App., p.133.) Based upon the “life long history” that caused “**further** neurological dysfunction” and “substantial defects of mind and reason,” it was objectively reasonable for the state court to infer Pizzuto’s IQ score declined after his eighteenth birthday.

Additionally, in his undated affidavit, Dr. Beaver explained that in 1996 Pizzuto “underwent a comprehensive neuropsychometric examination.” (App., p.140.) As a result, Dr. Beaver opined that “having a seizure disorder, neurocognitive limitations that affect his impulse control and decision-making, combined with the neurotoxic affects of poly substance abuse would have significantly impacted [Pizzuto’s] abilities to make appropriate decisions and to control his behavior in an appropriate and acceptable manner.”

(Id., p.142.) In his 2004 affidavit, Dr. Beaver recommended the neuropsychometric studies be conducted again because “patients that have persistent seizure disorders, for example, will decline over time in their overall mental abilities.” (App., p.167.) Based upon Dr. Beaver’s conclusion that mental abilities will decline in people with persistent seizure disorders, like Pizzuto, it was objectively unreasonable for the Idaho Supreme Court to conclude that Pizzuto’s mental functioning could have declined between the time of his eighteenth birthday and Dr. Emery’s 1985 testing, irrespective of whether that decline was the result of Pizzuto’s brain damage in combination with ongoing seizures and drug abuse. What is important is that Dr. Beaver’s explanation that mental abilities “will decline over time” in individuals with Pizzuto’s medical history. (App., p.167.)

Further, distinct from Brumfield, Pizzuto’s counsel conceded during oral argument before the Idaho Supreme Court that “neither Dr. Beaver nor any other expert expressed any opinion as to whether Mr. Pizzuto meets the standard set forth in Idaho Code 19-2515A.” (App., p.103.) This concession, especially with Dr. Emery’s explanation at Pizzuto’s sentencing and Drs. Merikangas’ and Beaver’s opinions, are sufficient to establish there was another permissible factual alternative beyond what Pizzuto advocates that could be found by the Idaho Supreme Court. See Rice, 546 U.S. at 341-42. As recognized by the Ninth Circuit, “even if, as Pizzuto contends,” there were “more reasonable inference[s],” that “does not render the state court’s contrary determination objectively unreasonable under § 2254(d)(2).” (App., p.19.)

This is not a case like Brumfield, where the record “contained sufficient evidence to raise a question” regarding whether there was sufficient evidence under Louisiana law to mandate an evidentiary hearing. 576 U.S. at 317-18. As this Court explained, “It is

critical to remember, however, that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a ‘reasonable doubt’ as to his intellectual disability to be entitled to an evidentiary hearing.” Id. at 320. That is in stark contrast to Pizzuto’s case where he filed a Motion for Summary Judgment proclaiming “there are no genuine issues of material fact” and he was “entitled to the requested judgment as a matter of law” (RER, Vol.IV, p.839), and his attorney conceded before the Idaho Supreme Court no expert offered an opinion that Pizzuto meets the ID standard.

Finally, not only will resolution of this question not complete Pizzuto’s case because the district court conducted *de novo* review, but this is a factually complex claim that makes it a poor vehicle for resolution of any argument that it raises an important constitutional question. Long ago this Court explained, “We do not grant a certiorari to review evidence and discuss specific facts.” United States v. Johnston, 268 U.S. 220, 227 (1925); *see also* Salazar-Limon v. City of Houston, Tex., 137 S.Ct. 1277, 1277-78 (2017) (Alito, J., concurring in denial of certiorari) (noting the “hundreds of cases” in which the circuit courts decide summary judgment motions, and that “it is clear that the lower courts acted responsibly and attempted to apply the correct legal rule to what is at best a marginal set of facts”). Moreover, Pizzuto’s question is nothing more than a request to second guess the Ninth Circuit’s decision, which does not warrant granting certiorari. *See* Salazar-Limon, 137 S.Ct. at 1278 (Alito, J., concurring in denial of certiorari) (“[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.”). And while Pizzuto notes this is a capital case (Pet., p.29), that alone does not justify granting certiorari. *See* Kyles v. Whitley, 514 U.S.

419, 454 (1995) (Stevens, J., concurring) (quoting Coleman v. Balkcom, 451 U.S. 949 (1981) (Stevens, J., concurring in denial of certiorari) (“Proper management of our certiorari docket . . . precludes us from hearing argument on the merits of even a ‘substantial percentage’ of capital cases that confront us.”); Id. at 457 (Scalia, J., dissenting) (quoting Burger v. Kemp, 483 U.S. 775, 786 (1987)) (brackets and ellipses omitted) (“Nevertheless, when the lower courts have found that no constitutional error occurred, deference to the shared conclusion of two reviewing courts prevents us from substituting speculation for their considered opinions.”); Gray v. Lucas, 463 U.S. 1237, 1240 (1983) (Burger, C.J., concurring in denial of certiorari) (“This case illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality.”).

CONCLUSION

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

DATED this 25th day of August, 2020.

Respectfully submitted,
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