No. 19-8598

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

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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For nearly two decades, the Eighth Amendment has restricted states from executing intellectually disabled offenders. *See Atkins v. Virginia*, 536 U.S. 304 (2002). In that time, this Court has never directly explained the extent of *Atkins*' substantive definition of subaverage intellectual functioning. This case presents that opportunity. In holding that there is a "'substantive restriction'" on the power of the states to execute intellectually disabled offenders, *Atkins* certainly established some substantive limit on how that power can be exercised. *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The decision's language and logic made plain that those limits were drawn at intellectual disability's "'essential feature,'" subaverage intellectual functioning, which includes the standard error of measurement ("SEM"). *Id.* at 308 n.3 (quoting *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000)).

The decision below directly conflicts with that holding, as well as the decision of another court of appeals on the same point. *See Pizzuto v. Yordy*, 947 F.3d 510, 526 (9th Cir. 2019) (per curiam) ("*Pizzuto VI*"), *Smith v. Sharp*, 935 F.3d 1064, 1077 (10th Cir. 2019), *cert. denied*, 2020 WL 3578740. These conflicts, which threaten the consistent execution of sentences in capital jurisdictions, demand resolution, and granting certiorari in this case would provide an ideal vehicle for resolving them. *See* Petition for Writ of Certiorari ("Pet.") at 21–22. As set forth below, Respondent sidesteps these conflicts without resolving them. *See* Brief in Opposition ("BIO") at 9–24.

I. Respondent does not resolve the Ninth Circuit's conflict with *Atkins*.

Respondent asserts that there is no conflict between *Atkins* and the opinion below. BIO at 13–20. But his assertion misreads (A) *Atkins*, (B) *Atkins*' progeny, and (C) the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

A. Respondent misreads *Atkins*.

Respondent submits that *Atkins* left to the states the task of implementing its restriction, which proves that the decision did not adopt a constitutional floor based on specific definitions of intellectual disability, let alone the clinical definitions for subaverage intellectual functioning. BIO at 14–15.

Respondent's arguments fail. Respondent agrees that *Atkins* held that the Eighth Amendment places "'substantive'" limits on the power of the states to execute intellectually disabled offenders. BIO at 12–13 (quoting *Atkins*, 536 U.S. at 321). In adding that those limits were "'substantive,'" the Court offered more than a warning. *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). The Court's holding staked out meaningful boundaries that could not be crossed without violating the Eighth Amendment. *See* "Substantive Law," *Black's Law Dictionary* (11th ed. 2019) ("The part of the law that creates, defines, and regulates the rights, duties, and powers of parties."); *cf. Ford*, 477 U.S. at 405 (holding that there is a "substantive restriction" on executing insane offenders), *id.* at 417–18 (elaborating that particular state procedures for determining insanity provided "inadequate assurances of accuracy").

But *Atkins* also described where those boundaries fell. States had to define intellectual disability in accordance with the clinical definitions for subaverage intellectual functioning, which includes the SEM. *Atkins*, 536 U.S. at 309 n.5 (IQ scores "between 70 and 75"). *Atkins* directs readers to these definitions, noting that these definitions constitute the "'essential feature'" of intellectual disability. *Supra* at 1. It defies logic that the holding would substantively limit the power of the states to execute intellectually disabled offenders, but ignore the "essential feature" relied upon by the Court.

The same logic is reflected in the rationale behind the decision. The Eighth Amendment restricts states from executing intellectually disabled offenders, because of an emerging national consensus about the "impairments" that characterize intellectual disability. *Atkins*, 536 U.S. at 306–07. That rationale would be incomprehensible if states could disregard the clinical definitions for subaverage intellectual functioning, as it is the impairment's "essential feature."

In any event, *Atkins* expressly cabined the discretion that it left the states. In so doing, *Atkins* further directed that the states had to define intellectual disability in accordance with the clinical definitions for subaverage intellectual functioning. In the central passage on this point, *Atkins* admonished that the states had been left the task of devising "'appropriate'" means to enforce its restriction. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416–17). *Ford*, the model for that task, had announced that the states had been left the limited task of devising "procedural safeguards," and that the states could run afoul of its "substantive

restriction" if the means chosen failed to provide relief for "substantial claims," or if the means chosen failed to provide "accuracy in the factfinding determination." *Ford*, 477 U.S. at 417. It further provided that the means chosen had to be "conducive" to "professional judgments." *Id.*

Atkins instructed the states that it followed the "approach in *Ford*." *Atkins*, 536 U.S. at 317. Implementing its restriction, but ignoring the clinical definitions for subaverage intellectual functioning, could not be conducive to relief for substantive claims, accuracy in the factfinding determination, or professional judgments. This Court held, and medical professionals agree, that intellectual disability has an "essential feature," which includes the SEM. *Atkins*, 536 U.S. at 308 n.3.

Respondent, alternatively, argues that *Atkins* could not have clearly established that the states must define intellectual disability in accordance with the clinical definitions for subaverage intellectual functioning, because, on this point, there is "confusion in the lower courts." BIO at 20.

First of all, the existence of confusion in the lower courts is exactly why certiorari review is in order. Furthermore, the question of whether a rule is clearly established is, like any legal matter, one that courts can get wrong. *See, e.g.*, *McWilliams v. Dunn*, 137 S. Ct. 1790, 1799–1801 (2017) (reversing a circuit panel for wrongly concluding that the state courts did not violate clearly established precedent). If the mere existence of differing answers in the lower courts foreclosed

certiorari review, then discrepancies on important issues—like the one presented here—would never be resolved.

B. Respondent misreads *Atkins*' progeny.

Respondent argues that *Atkins'* progeny confirm that the Ninth Circuit is not in conflict with the opinion because *Shoop v. Hill*, 139 S. Ct. 504 (2019), and *Bobby v. Bies*, 556 U.S. 825 (2009), confirmed that *Atkins* provided no "'comprehensive'" or "'definitive'" guides to intellectual disability. BIO at 15, 18. However, the Ninth Circuit went well beyond Respondent's position, concluding that *Atkins* provided *no* guidance at all. *Pizzuto VI*, 947 F.3d at 526.

Respondent does not seriously dispute this distinction, but instead contends that it makes no difference. BIO at 18. The distinction, in fact, makes all the difference. The central point of the petition is that *Atkins* clearly established that the states must define intellectual disability in accordance with the clinical definitions for subaverage intellectual functioning and not that the states do so in accordance with a "comprehensive" or "definitive" definition, while the Ninth Circuit concluded that *Atkins* said nothing about this and therefore the states need not define intellectual disability in accordance with the clinical definitions at all. Pet. at 12–18; *Atkins*, 536 U.S. at 308 n.3, 309 n.5, 318, 321; *Pizzuto VI*, 947 F.3d at 526. That is a major part of the very conflict that demands certiorari intervention.

In arguing that *Hall v. Florida*, 572 U.S. 701 (2014), established the applicability of the SEM, BIO at 15-16, Respondent ignores *Hall*'s teaching and

conjures a strawman. Respondent argues that under AEDPA Mr. Pizzuto cannot benefit from *Hall*, which postdated the state court decision. BIO at 20.

But Mr. Pizzuto relies on *Hall* only for the proposition that, in stating that the clinical definitions "were a fundamental premise of *Atkins*," Pet. at 17, it resolved what *Atkins* had *already* clearly established: that the states must define intellectual disability in accordance with the clinical definitions for subaverage intellectual functioning, including the SEM.

C. Respondent misreads AEDPA.

Respondent contends, lastly, that *Atkins* could not have clearly established that the states must define intellectual disability in accordance with the clinical definitions for subaverage intellectual functioning because this would "'extend'" the decision "beyond its holding." BIO at 12, 19 (quoting *White v. Woodall*, 572 U.S. 415, 425–26 (2014)). As an initial matter, the disagreement about *Atkins*' significance demands resolution regardless of AEDPA. At least three state courts—which are not bound by AEDPA—share the Tenth Circuit's basic reading of the case. *See Reeves v. State*, 226 So. 3d 711, 727 n.7 (Ala. Crim. App. 2016) ("We view *Hall*, not as a new rule of constitutional law, but simply as an application of existing law, i.e., *Atkins*, to a specific set of facts."); *accord Fuston v. State*, 470 P.3d 306, 316–17 (Okla. Crim. App. 2020); *State v. Grell*, 66 P.3d 1234, 1238 (Ariz. 2003) ("*Atkins* provided some direction" for determining mental retardation, citing the clinical definitions and "recogniz[ing] that an IQ below 70 to 75 indicates subaverage intellectual functioning"). Indeed, there is conflict among the state

courts on that question. *See Smith v. State*, 213 So. 3d 239, 247 (Ala. 2007) (*Atkins* "set forth some clinical definitions…as examples" but "left the ultimate determination" of mental retardation to the individual states); *Commonwealth v. DeJesus*, 58 A.3d 62, 85 (Pa. 2012) ("[T]he High Court did not command that the definitions and model it cited were required to satisfy the Eighth Amendment."). Simply put, *Atkins* is a seminal case, and its meaning should be uniform across the country, no matter what constraints apply in federal habeas. *See McWilliams*, 137 S. Ct. at 1804–07 (Alito, J., dissenting) (emphasizing that certiorari was granted on a question about the scope of this Court's clearly established law under AEDPA when state and federal judges had competing interpretations).

In any event, on AEDPA, Respondent misreads *Woodall*, which precludes relief "if a habeas court must extend a *rationale* before it can apply to the facts at hand." *Woodall*, 572 U.S. at 426. Mr. Pizzuto is not seeking to extend the rationale of *Atkins*; he seeks to apply its unambiguous holding regarding the substance of the clinical definition it clearly established, the SEM's effect on a given IQ score, to the facts in his case. Section 2254(d)(1) does not require an "identical factual pattern before a legal rule must be applied." *Id*. at 427 (internal quotation omitted).

Here, the relevant rationale was more than clear at the time that the state court rendered its decision. The Eighth Amendment restricts states from executing intellectually disabled offenders because, *Atkins* reasoned, intellectually disabled offenders have impairments that undermine the penological purposes of capital punishment and the reliability and fairness of capital proceedings. *Atkins*, 536 U.S.

at 306–07; *accord Roper v. Simmons*, 543 U.S. 551, 563–64 (2005); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

One need not extend that rationale to conclude that *Atkins* adopted substantive limits based on the clinical definitions for subaverage intellectual functioning. Subaverage intellectual functioning, per the clinical definitions, is the "'essential feature'" of intellectual disability. *Supra* at 3-4.

Respondent, perhaps sensing that *Atkins*' rationale is not amenable to another reasonable interpretation, serially mis-inserts into those definitions the "Flynn Effect," and contends that *Atkins* did not clearly establish that the states must adopt the "Flynn Effect." *See* BIO at 9, 14, 15, 16, 17, 18, 20. This, again, is a strawman. Mr. Pizzuto does not contend that *Atkins* clearly established that the states must adopt the "Flynn Effect." *See generally* Pet. Unlike with the "Flynn Effect," *Atkins* expressly addressed the SEM and therefore clearly established that subaverage intelligence can involve an IQ as high as 75.

II. Respondent sidesteps, but does not resolve, the Ninth and Tenth Circuit's split over *Atkins*.

Mr. Pizzuto seeks a writ of certiorari for the additional reason that the Ninth Circuit is in direct conflict with the Tenth Circuit over the meaning of *Atkins*. Pet. at 18–21.

Respondent argues that there is no conflict between the Ninth and Tenth Circuits' decisions, because the Tenth Circuit "did not mandate adoption" of the "entire diagnostic framework." BIO at 20. Rather, the Tenth Circuit only concluded, in Respondent's view, "'that intellectual disability must be assessed, at

least *in part*, under the existing clinical definitions.'" *Id.* (quoting *Smith*, 935 F.3d at 1077) (Respondent's emphasis).

Nevertheless, the Ninth and Tenth Circuits' decisions still conflict, because the Ninth Circuit concluded that intellectual disability need not be assessed *at all* under the existing clinical definitions. *Pizzuto VI*, 947 F.3d at 526. And *Smith*'s caveat hardly undermines the existence of the conflict when the Tenth Circuit there understood *Atkins* as embracing the precise element of the clinical standards that the Ninth Circuit below refused to apply: the SEM.

This conflict is larger than the Ninth and Tenth Circuits. Several other circuits have taken the Ninth's side. *See, e.g.*, *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1312 (11th Cir. 2015); *Clark v. Quarterman*, 457 F.3d 441, 444–45 (5th Cir. 2006); *Green v. Johnson,* 515 F.3d 290, 300 n.2 (4th Cir. 2008). This conflict has sufficiently percolated and it must be resolved. *See* Sup. Ct. R. 10(a). It is fundamental that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). The geography of an intellectually disabled inmate plainly is a wanton and freakish basis for the imposition of our legal system's "most severe punishment." *Roper*, 543 U.S. at 568.

III. Respondent sidesteps, but does not resolve, the state court's unreasonable determination of fact.

A final reason to grant certiorari is to review the Ninth Circuit's finding that the state court made no unreasonable determination of fact. Pet. at 22–29.

Respondent maintains that the state court's factual determinations were not unreasonable. BIO at 25–28. Respondent's arguments are insubstantial.

A. Respondent overlooks that IQ decline, without more, does not affect pre-18 onset.

Respondent insists that the state court made no unreasonable determination of fact, because it was "objectively reasonable" for the court to infer that Mr. Pizzuto's IQ score might have "declined after his eighteenth birthday." BIO at 26–27. Even if that were true, the state court still made an unreasonable determination of fact when it relied on the inference to conclude that his intellectual disability could not have manifested pre-18. Pet. at 27.

Respondent contends that the state court could have inferred that Mr. Pizzuto's IQ score was not 75 or lower before the age of 18, because it might have declined from somewhere above an IQ of 75 to the 72 that was in the record, based upon the fact that Mr. Pizzuto had suffered from traumatic brain injuries, drug use, and epilepsy. BIO at 26–27. That inference has no basis in the record, and it is logically fallacious. No expert ever suggested that Mr. Pizzuto's IQ score could or would have declined from trauma, drugs, or epilepsy, and to infer that it could have declined so far that his pre-18 IQ must have exceeded the range for subaverage intellectual functioning is to speculate wildly. Pet. at 25–27.

Respondent attempts to salvage the state court's reasoning, suggesting that there was an alternative reasonable basis for its finding that Mr. Pizzuto had not made even a prima facie showing that his intellectual disability manifested before he turned age 18. BIO at 27. Mr. Pizzuto's attorneys, he alleges, conceded that no

expert had ever opined that he met the statutory standard for intellectual disability. BIO at 27. Contrary to Respondent's belief, Mr. Pizzuto's expert, in fact, did state that he "likely meets the standard" for "defendants who are mentally retarded." *Pizzuto v. State*, 202 P.3d 642, 653 (Idaho 2008) ("*Pizzuto V*"). *See* App. at 122. The state court itself acknowledged this statement, but then dismissed it, on the grounds that the statement had not referred to Mr. Pizzuto's intellectual disability before he turned 18, but instead referred to his "present condition." *Pizzuto V*, 202 P.3d at 653. This, too, was objectively unreasonable. The state statutory definition, I.C. § 19-2515A(1)(a), enumerated the requirement that onset of the disability occur pre-18, as required for the protection of intellectually disabled individuals under the Eighth Amendment, *Atkins*, 536 U.S. at 308 n.3. In stating that Mr. Pizzuto likely met "the standard recently enacted in Idaho Code § 19-2515A," his expert declared that Mr. Pizzuto met the standard before turning 18. App. at 122.

B. Respondent overlooks the Ninth Circuit's failure to follow *Brumfield*.

In opposition to the certiorari petition, Respondent argues that *Brumfield* is inapposite, because the habeas petitioner there "was in a far different procedural posture." BIO at 24.

To withstand summary dismissal, Mr. Pizzuto needed to "present evidence establishing a *prima facie* case." *Pizzuto V*, 202 P.3d at 650 (internal quotation marks omitted). *Brumfield* made clear that a petitioner's IQ score, coupled with "intellectual shortcomings as a child," comprises "ample evidence" that the

petitioner's intellectual disability "manifested before adulthood." *Brumfield v. Cain*, 576 U.S. 305, 323 (2015).

As in *Brumfield*, Mr. Pizzuto presented an IQ score consistent with subaverage intellectual functioning, as well as evidence that he suffered from substantial intellectual shortcomings as a child, including the fact that he failed multiple grades and was assessed to be many years behind his peer group developmentally. *See* Pet. at 23–24. The relevant facts are directly on point.

IV. Conclusion.

The Court should grant the petition for a writ of certiorari and afford plenary review or, in the alternative, grant a per curiam reversal.

Respectfully submitted this 6th day of October 2020.

Respectfully submitted,

/s/Deborah A. Czuba

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