No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GERALD ROSS PIZZUTO,

Petitioner,

v.

TYRELL DAVIS, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Intellectual disability is comprised of three features: 1) subaverage intellectual functioning; 2) significant limitations in adaptive skills; and 3) manifestation before age 18. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Below, the Ninth Circuit denied relief on Petitioner's *Atkins* claim because it believed that even though the Idaho Supreme Court's rejection of the claim was inconsistent with the science that existed at the time, its decision on the first and third prongs was not so unreasonable as to satisfy the federal habeas standard. The questions presented are:

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

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

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

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

PARTIES TO THE PROCEEDINGS BELOW

In addition to those listed in the caption, the parties to the proceedings below included former Wardens at the Idaho Maximum Security Institution, Keith Yordy, Randy Blades, Al Ramirez, John Hardison, Gregory Fisher and Arvon Arave.

RELATED PROCEEDINGS

Idaho County District Court
Case No. 22075
State v. Pizzuto
Judgment and Sentence entered, May 27, 1986

Idaho County District Court
Case No. 23001
Pizzuto v. State
Post-conviction relief denied, Apr. 15, 1988

Idaho Supreme Court
Case Nos. 16489 and 17534
State v. Pizzuto, 119 Idaho 742 (1991)
Conviction, sentence and denial of post-conviction relief affirmed, Jan. 15, 1991

Supreme Court of the United States
Case No. 91-5965
Pizzuto v. Idaho, 503 U.S. 908 (1992)
Cert. denied, Mar. 2, 1992

Idaho County District Court
Case No. 23001
Pizzuto v. State
Post-conviction relief dismissed, Sept.29, 1994

Idaho Supreme Court
Case No. 21637
State v. Pizzuto, 127 Idaho 469 (1995)
Appeal dismissed, Aug. 3, 1995

Idaho County District Court
Case No. CV-1994-961

Pizzuto v. State
Post-conviction relief denied, Mar. 19, 1997

United States District Court, District of Idaho
Case No. CV-92-00241-S-AAM
Pizzuto v. Arave
Habeas corpus denied, Apr. 7, 1997

Idaho County District Court
Case No. CV-1997-1837
Pizzuto v. State
Post-conviction relief denied, May 26, 1998

Idaho Supreme Court
Case No. 24802
Pizzuto v. State, 134 Idaho 793 (2000)
Denial of post-conviction relief affirmed, Sept. 6, 2000

United States Court of Appeals, Ninth Circuit
Case No. 97-99017
Pizzuto v. Arave, 280 F.3d 949 (9th Cir. 2002)
Denial of habeas corpus affirmed, Feb. 6, 2002

United States Court of Appeals, Ninth Circuit
Case No. 01-71257
Pizzuto v. Fisher
Permission to file second habeas petition denied, Feb. 14, 2002

United States Court of Appeals, Ninth Circuit
Case No. 97-99017
Pizzuto v. Arave, 385 F.3d 1247 (9th Cir. 2004)
Dissenting opinion amended, Oct. 20, 2004

United States Court of Appeals, Ninth Circuit
Case No. 97-99017
Pizzuto v. Arave, 386 F.3d 938 (9th Cir. 2004)
Stay lifted in light of *Schriro v. Summerlin*,542 U.S. 348 (2004), Oct. 20, 2004

Supreme Court of the United States
Case No. 04-10640
Pizzuto v. Fisher, 546 U.S. 976 (2005)
Cert. denied, Oct. 31, 2005

Idaho County District Court

Case No. CV-2002-33907
Pizzuto v. State
Post-conviction relief denied, Dec. 16, 2005

Idaho County District Court
Case No. CV-2003-34748
Pizzuto v. State
Post-conviction relief dismissed, Dec. 16, 2005

United States Court of Appeals, Ninth Circuit
Case No. 05-77184
Pizzuto v. Hardison
Permission to file successive habeas petition granted, May 16, 2006

Idaho Supreme Court
Case No. 32677/32678
Idaho v. Pizzuto
Appeal dismissed, Dec. 28, 2006

Ada County District Court
Case No. CV-2006-5139
Pizzuto v. State
Post-conviction relief denied, Oct. 31, 2007

Idaho Supreme Court
Case No. 32679
Pizzuto v. State, 146 Idaho 720 (2008)
Denial of post-conviction relief affirmed, Feb. 22, 2008

Supreme Court of the United States
Case No. 06-11010
Pizzuto v. Idaho, 552 U.S. 1227 (2008)
Cert. granted, judgment vacated, and remanded in light of *Danforth v. Minnesota*, 552 U.S. 264 (2008), Feb. 25, 2008

Idaho Supreme Court
Case No. 35187
Rhoades et al. v. State, 149 Idaho 130 (2010)
Denial of post-conviction relief affirmed, Mar. 17, 2010

Idaho Supreme Court
Case No. 34845
Pizzuto v. State, 149 Idaho 155 (2010)
Denial of post-conviction relief affirmed, Mar. 19, 2010

Supreme Court of the United States
Case No. 10-6377
Pizzuto v. Idaho, 562 U.S. 1182 (2011)
Cert. denied, Jan.18, 2011

Supreme Court of the United States
Case No. 10-7831
Rhoades et al. v. Idaho, 562 U.S. 1258 (2011)
Cert. denied, Feb. 28, 2011

United States District Court, District of Idaho
Case No. 1:05-cv-00516-BLW
Pizzuto v. Blades
Habeas corpus denied, Jan. 10, 2012

United States Court of Appeals, Ninth Circuit
Case No. 11-70623
Pizzuto v. Blades, 673 F.3d 1003 (9th Cir. 2012)
Permission to file successive habeas petition denied, Mar. 8, 2012

United States District Court, District of Idaho
Case No. 1:92-cv-00241-BLW
Pizzuto v. Ramirez
Rule 60(b) denied, Mar. 22, 2013

United States Court of Appeals, Ninth Circuit
Case No. 12-99002
Pizzuto v. Blades, 729 F.3d 1211 (9th Cir. 2013)
Denial of habeas corpus affirmed, Sept. 9, 2013

United States Court of Appeals, Ninth Circuit
Case No. 12-99002
Pizzuto v. Blades, 758 F.3d 1178 (9th Cir. 2014)
Withdrawing opinion, vacating district court opinion and remanding, Sept. 9, 2013

United States Court of Appeals, Ninth Circuit
Case No. 13-35443
Pizzuto v. Ramirez, 783 F.3d 1171 (9th Cir. 2015)
Denial of Rule 60(b) affirmed, Apr. 22, 2015

United States District Court, District of Idaho
Case No. 1:05-cv-00516-BLW
Pizzuto v. Blades

Habeas corpus denied on remand, Nov. 28, 2016

United States Court of Appeals, Ninth Circuit
Case No. 16-36082
Pizzuto v. Yordy, 947 F.3d 510 (9th Cir. 2019)
Denial of habeas corpus affirmed, Dec. 31, 2019

Idaho County District Court
Case No. CV-2003-34748
Pizzuto v. State
Rule 60(b) denied, Jan. 6, 2020

Idaho Supreme Court
Case No. 32679-2006
Pizzuto v. State
Motion to Recall Remittitur denied, May 14, 2020

Idaho Supreme Court
Case No. 47709-2020
Pizzuto v. State
Review of Rule 60(b) denial pending

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Petitioner Gerald Ross Pizzuto respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

A copy of the opinion below is attached as Appendix A, at App. 1–21, and is available at *Pizzuto v. Yordy*, No. 16-36082, 947 F.3d 510 (9th Cir. 2019) (per curiam) ("*Pizzuto VI*").

JURISIDICTIONAL STATEMENT

On August 14, 2019, the United States Court of Appeals for the Ninth Circuit issued a decision. *Pizzuto v. Blades*, 933 F.3d 1166 (9th Cir. 2019) (per curiam). After Mr. Pizzuto timely moved for rehearing and rehearing en banc, the Ninth Circuit issued an amended opinion on December 31, 2019, while denying the petitions for panel rehearing and rehearing en banc. *Pizzuto VI*, 947 F.3d at 514, App. at 5. On March 12, 2020, Justice Kagan extended the deadline for filing this petition for a writ of certiorari until May 29, 2020. Appendix B, App. at 22. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which reads in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

FEDERAL STATUTES INVOLVED

The instant case implicates 28 U.S.C. § 2254(d), a clause stating:

> an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) 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.

STATE STATUTES INVOLVED

This petition involves Idaho Code § 19-2515A, which is entitled "Imposition of death penalty upon mentally retarded person prohibited," and provides:

> (1) As used in this section:
>
> (a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.
>
> (b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.
>
> * * *
>
> (3) If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed.

* * *

(6) Any remedy available by post-conviction procedure or habeas corpus shall be pursued according to the procedures and time limits set forth in section 19-2719, Idaho Code.

STATEMENT OF THE CASE

This case involves a death-sentenced inmate seeking relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). Long before *Atkins* was announced, Mr. Pizzuto was convicted of two counts of first-degree murder and sentenced to death by a judge[1] in 1986. *State v. Pizzuto*, 810 P.2d 680, 687 (Idaho 1991) ("*Pizzuto I*"). As part of Idaho's consolidated post-conviction and appeal procedures, Mr. Pizzuto filed a post-conviction relief petition following sentencing, which was dismissed after a hearing and affirmed in the consolidated appeal along with the convictions and death sentences. *Id*. at 688, 716.

In 2003, after Mr. Pizzuto had made three additional challenges in state post-conviction that are not relevant to the intellectual disability issue in this case,[2] he sought post-conviction relief based on this Court's decision in *Atkins*. App. at 111–145 (petition with pertinent attached exhibits and supporting affidavits). To

[1] Mr. Pizzuto was sentenced by a judge because his case was tried before this Court declared the practice unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002).

[2] Mr. Pizzuto sought post-conviction relief without success in three separate actions that did not address the issue of intellectual ability that is at issue in this petition. *See Pizzuto v. State*, 903 P.2d 58 (Idaho 1995) ("*Pizzuto II*") (raising ineffective assistance of counsel, which had not been raised in the first post-conviction petition); *Pizzuto v. State*, 10 P.3d 742 (Idaho 2000) ("*Pizzuto III*") (raising the State's suppression of exculpatory and impeaching material); *Rhoades v. State*, 233 P.3d 61 (Idaho 2010) ("*Pizzuto IV*") (a consolidated appeal on behalf of Mr. Pizzuto and other Idaho death row inmates raising the retroactivity of *Ring*).

establish his intellectual disability, Mr. Pizzuto expressly noted his verbal IQ score of 72, "which is within the plus or minus 5 point range, characterizing him as having significantly subaverage intellectual functioning." App. at 115 (citing this Court's approval of the clinical standards in *Atkins*, 536 U.S. at 308 n.3, 309 n.5). *See* App. at 129 (report of 72 verbal IQ). Petitioner sought additional testing. Petitioner's Excerpts of Record ("PER"), *Pizzuto v. Yordy*, 9th Cir., No. 16-36082, Vol. 4 at 831–33 [Dkt. 11-4 at 150–52].[3] The State moved for summary dismissal of the petition. Respondent's Excerpts of Record ("RER"), Vol. 2 at 227–28 [Dkt. 38-2 at 155–56]. Petitioner moved for summary judgment. PER, Vol. 4 at 839 [Dkt. 11-4 at 158]. Petitioner filed additional affidavits documenting his intellectual failings and sustained history of academic failure, including being retained twice to repeat a grade. App. at 146–164. In 2005, without granting an evidentiary hearing or additional testing, the district court summarily dismissed the petition, finding the petition was untimely and failed to raise a genuine issue of material fact. App. at 109. Mr. Pizzuto timely appealed. PER, Vol. 4 at 841 [Dkt. 11-4 at 160].

In 2008, the Idaho Supreme Court affirmed the post-conviction court's dismissal of the petition. *Pizzuto v. State*, 202 P.3d 642, 657 (Idaho 2008) ("*Pizzuto V*"), App. at 107. The state supreme court first found the district court erred in its finding of untimeliness, and ruled that the petition was "filed timely." *Id*. at 649, App. at 99. Nevertheless, the court affirmed on the merits.

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[3] All of the record citations in this petition, both Petitioner's and Respondent's, are from the Excerpts of Record in the U.S. Court of Appeals for the Ninth Circuit, in the case below.

In his brief, Mr. Pizzuto expressly averred that he was intellectually disabled based on his submission of evidence of his "verbal IQ of 72, pre-18 etiology of brain damage … and significant evidence of pre-18 adaptive skills deficits in numerous areas of functioning." RER, Vol. 2 at 122 [Dkt. 38-2 at 50]. He challenged the Idaho statute's requirement, Idaho Code § 19-2515A(1)(b), that an IQ be 70 or below, arguing: "This fixed cutoff is inconsistent with clinical definitions and the limitations of IQ testing, and creates an intolerable risk that a mentally retarded person will be executed in violation of the Eighth Amendment."[4] RER, Vol. 2 at 125 [Dkt. 38-2 at 53]. Mr. Pizzuto argued that in *Atkins* this Court recognized that the upper range for IQ for an intellectually disabled individual was "between 70 and 75." *Id*. at 126 [Dkt. 38-2 at 54]. However, the Idaho Supreme Court affirmed the dismissal on the merits, based in part[5] on its finding that the SEM for IQ scores of "plus or minus five points" did not apply to Mr. Pizzuto's 72 verbal IQ score, because "the legislature did not require the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id*. at 651, App. at 101 (noting Mr. Pizzuto's argument that the error rate would lower his IQ into the statutory range of 70 or below).

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[4] The authorities at one time referred to "mental retardation" rather than "intellectual disability." However, the latter phrase is now the accepted one. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2274 n.1 (2015). Mr. Pizzuto will accordingly use the phrase "intellectual disability" except when quoting older material.

[5] In state court at both the post-conviction court and on appeal, Mr. Pizzuto sought additional testing to supplement the partial score, but he was denied. *See Pizzuto V*, 202 P.3d at 655–56 & n.9, App. at 105–06.

Though the lower court had held no hearing and made no finding regarding a change in Mr. Pizzuto's IQ, the supreme court noted that in order for him to prevail the lower court had "to infer that Pizzuto's IQ had not decreased during the eleven-year period from his eighteenth birthday to the date of his IQ test." *Id.* The supreme court concluded that the district court "was not required to make that inference … in light of the opinions of Pizzuto's experts that his long history of drug abuse and his epilepsy would have negatively impacted his mental functioning." *Id.* Neither of Mr. Pizzuto's experts, Dr. Craig Beaver and Dr. James Merikangas, suggested that his IQ declined. *See* App. at 132–145. Despite addressing an affidavit indicating in 1996 that Pizzuto had "possible mild mental retardation" and met the standard of the Idaho statute, the supreme court concluded that "is not an opinion that [Mr. Pizzuto] had an IQ of 70 or below twenty-two years earlier." *Pizzuto V*, 202 P.3d at 652, App. at 102. The supreme court based this conclusion on its determination that Dr. Beaver "was talking about Pizzuto's present condition, not his condition at age 18." *Id.* at 653, App. at 103.

Mr. Pizzuto sought federal habeas corpus relief to pursue his *Atkins* claim.[6] PER, Vol. 1 at 101 [Dkt. 11-1 at 106]. The federal district court agreed that the state court applied a "strict interpretation" of the Idaho statute defining intellectual

[6] Because he had already litigated a federal habeas petition commenced after *Pizzuto I*, *see Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002), *dissenting opinion amended*, 385 F.3d 1247 (9th Cir. 2004), *cert. denied, Pizzuto v. Fisher*, 546 U.S. 976 (2005), he sought and obtained permission from the Ninth Circuit to file a new habeas petition. *See Pizzuto VI*, 947 F.3d at 519, App. at 9 ("We granted Pizzuto permission to file a successive federal habeas petition on his *Atkins* claim.").

disability, "holding that any full scale score above 70 fails as a matter of law." App. at 66. Based on the state court record,[7] the district court determined that the Idaho Supreme Court's refusal to adjust Mr. Pizzuto's IQ score of 72 through consideration of the five point SEM did "not amount to an objectively unreasonable application of clearly established federal law." App. at 67. This was so, the district court determined, because in *Atkins* this Court "did not constitutionalize any specific definition." App. at 67–68.

Mr. Pizzuto appealed, and initially, the Ninth Circuit affirmed. The court of appeals held that "*Atkins* does not mandate any particular form of calculating IQs, including the use of [the] SEM." *Pizzuto v. Blades*, 729 F.3d 1211, 1218 (9th Cir. 2013).[8] However, before that opinion became final, it was withdrawn in an order that also vacated the district court's order and remanded the case to the district court for further proceedings consistent with *Hall v. Florida*, 572 U.S. 701 (2014). *Pizzuto v. Blades*, 758 F.3d 1178, 1179 (9th Cir. 2014).

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[7] The federal district court held an evidentiary hearing. App. at 55. Additional testing was allowed, and new IQ scores of 60 and 92 were admitted, in addition to the verbal IQ score of 72 that was before the state court. *See* App. at 75. Alternatively, under de novo review, the district court determined that Mr. Pizzuto did not meet the intellectual functioning prong of the test for intellectual disability. On appeal, the Ninth Circuit concluded that it could not consider the district court's conclusions regarding new evidence that was not before the state court. *Pizzuto v. Blades*, 729 F.3d 1211, 1224 (9th Cir. 2013) (citing *Cullen v. Pinholster*, 563 U.S. 170, 180-85 (2011)), *opinion withdrawn*, *Pizzuto v. Blades*, 758 F.3d 1178, 1179 (9th Cir. 2014).

[8] In this petition, unless otherwise noted, all internal quotation marks and citations are omitted, all alterations are in original, and all emphasis is added.

On remand, the district court again denied the petition. App. at 48. The court acknowledged that "rejecting an *Atkins* claim based solely on a hard IQ score cutoff without consideration of the SEM is unconstitutional," but attributed that principle to *Hall*. App. at 33. The district court acknowledged that "the Idaho Supreme Court appears to have interpreted the statute as prohibiting consideration of the SEM—that is, the Idaho statute established a hard IQ score cutoff of 70." App. at 38 (citing *Pizzuto V*, 202 P.3d at 651). But the district court held that "*Atkins* did not hold that a hard IQ score cutoff was unconstitutional, nor did it plainly require consideration of an IQ test's SEM with respect to the first prong." App. at 41. Despite the district court's acknowledgement that *Hall*'s "repudiation of a hard IQ score cutoff of 70 flowed directly from *Atkins*," it concluded that "the Idaho Supreme Court's refusal to consider the SEM was not contrary to, or an unreasonable application of, the *Atkins* decision," and denied relief under 28 U.S.C. § 2254(d)(1). App. at 42–43. The district court also found that the Idaho Supreme Court's determination that Mr. Pizzuto had not shown a pre-18 IQ of 70 or below was not unreasonable because the supreme court "relied on credible evidence that Pizzuto's medical problems and drug abuse could very well have caused his intellectual functioning to decline in the eleven years between his eighteenth birthday and the date of the IQ test resulting in a verbal score of 72." App. at 46. The district court also denied relief under de novo review. App. at 46–47.

While recognizing that the Idaho Supreme Court's adjudication of Mr. Pizzuto's *Atkins* claim "was inconsistent with the clinical definitions in place at the

time of the state court's decision," in large part because of its confusion about the SEM, the court of appeals nevertheless affirmed the district court decision to deny habeas relief on appeal. *Pizzuto VI*, 947 F.3d at 525, App. at 14. The panel determined that relief was barred under § 2254(d), because the Idaho Supreme Court's decision was not contrary to law, did not involve an unreasonable application of clearly established federal law, as determined by this Court, and did not involve an unreasonable determination of the facts in light of the evidence presented in state court. *Id*. at 514–15, App. at 5. The panel did not address whether Mr. Pizzuto was intellectually disabled, nor whether his execution would violate the Eighth Amendment. *Id*. at 515, App. at 5.

In determining that the Idaho Supreme Court's bright line IQ cutoff at 70 was not contrary to *Atkins*, the panel noted *Atkins*' extensive quotation of the clinical standards, including this Court's statement that "an IQ between 70 and 75 or lower … is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id*. at 515–16, App. at 5–7. However, the panel stated that *Atkins* "did not expressly adopt these clinical definitions of intellectual disability," because *Atkins* left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id*. at 516, App. at 7 (quoting *Atkins*, 536 U.S. at 317).

The panel acknowledged that *Hall* made clear that a strict IQ cutoff of 70 was unconstitutional. *Id*. at 520, App. at 10. The strict IQ cutoff ignored the clinical standards' definition of the intellectual functioning prong with respect to the IQ

"test's acknowledged and inherent margin of error," which arose from the fact that an IQ score is only accurate for a range within an SEM of plus or minus five points. *Id*. at 519–20, App. at 9–10. Though the panel deemed *Atkins* not to have "expressly adopt[ed]" the clinical definitions, *id*. at 516, App. at 7, it quoted *Hall*'s statement that "[t]he clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*," and that *Atkins* "provide[d] substantial guidance on the definition of intellectual disability." *Id*. at 520, App. at 10. However, having deemed these points not within *Atkins*' holding, the panel declined to apply them to the Idaho Supreme Court's 2008 decision, because *Hall* was decided in 2014 and was not clearly established federal law under §2254(d) for purposes of Mr. Pizzuto's case. *Id*. at 525, App. at 13–14 (finding *Pizzuto V* not contrary to *Atkins*). For the same reason, the panel held that *Pizzuto V* was not an unreasonable application of *Atkins*. *See id*. at 526–27, App. at 14–16.

In sum, the panel agreed that the Idaho Supreme Court's' decision violated *Hall*, *id*. at 528, App. at 16; and "was contrary to the clinical definitions in place at the time" of the state court decision. *Id*. at 526, App. at 15. But "because it was not apparent in 2008 that states were required to adhere closely to the clinical definitions of intellectual disability," the panel determined that "the Idaho Supreme Court's application of a 'hard IQ-70 cutoff' was not an 'unreasonable application' of *Atkins*." *Id*. at 527, App. at 16.

With respect to the state court determination that no pre-18 IQ had been shown, the panel agreed with the state court's reasoning. *Id*. at 531–32, App. at 18–19. The panel recognized the state court's reliance on the statements in Mr. Pizzuto's experts' affidavits, i.e., that Pizzuto's drug abuse "has caused him further neurological dysfunction" and that "[o]ften patients that have persistent seizure disorders … will decline over time in their overall mental abilities." *Id*. at 532, App. at 19. The panel acknowledged Pizzuto's argument that the affidavits did not state his IQ ever declined and that the inference drawn by the supreme court was unreasonable. *Id*. (citing Pizzuto's opening brief). But the panel concluded that "it was not unreasonable for the Idaho Supreme Court to determine that the state trial court reasonably could have inferred that Pizzuto's IQ may have declined as a result of drug abuse or epilepsy." *Id*.

After an extension of time from Justice Kagan, App. at 22, Mr. Pizzuto then filed this timely certiorari petition.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With This Court And Another Circuit On Whether *Atkins* Adopted The SEM.

Atkins launched a sea change in categorically outlawing the execution of those murderers who are intellectually disabled. With substantially more than three thousand people on death row at the time of that decision,[9] most of whose

[9] *See* Thomas P. Bonczar and Tracy L. Snell, "Capital Punishment, 2002," U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin, at 3 (indicating 3,557 persons under sentence of death in 2002, and in excess of 3,000 since the early to mid-1990s), available at https://www.bjs.gov/content/pub/pdf/cp02.pdf.

appeals were already final, it is especially important to define the constitutional floor of those who qualify for the exclusion based on the *Atkins* decision itself. Uniformity on a national scale is paramount to prevent the selective execution of intellectually disabled inmates who happened to be convicted in states like Idaho that defined the term parsimoniously and below the constitutional floor this Court set in *Atkins*. It is especially important to clarify the constitutional floor because, as this case demonstrates, there is confusion in the lower courts over the scope of *Atkins*. In particular, the panel decision is in conflict with language from *Atkins* itself. *See* Sup. Ct. R. 10(c). Moreover, there is a conflict in the circuit courts of appeal on this issue, as the panel decision is in conflict with *Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019), *petition for cert pending*, No. 19-1106, and this Court should grant this petition for that reason, too. Sup. Ct. R. 10(a). The likelihood is great that differing standards as set forth in the panel decision and *Smith* will lead to the execution of intellectually disabled persons contrary to *Atkins*' mandate and arbitrary executions of some inmates in certain states where they would be exempted in other jurisdictions. This Court should accordingly take up the question of whether the use of a bright line 70-IQ cutoff that did not take into consideration the SEM was contrary to or an unreasonable application of *Atkins*. This petition presents the question clearly and is an excellent vehicle to address the question.

A. The Panel Decision Conflicts With *Atkins*.

Although the panel recognized that the Idaho Supreme Court opinion at issue was "inconsistent with the clinical definitions in place at the time" regarding IQ

scores and the need to take into account the SEM, it upheld Mr. Pizzuto's death sentence on the theory that *Atkins* did not embrace that aspect of the clinical definitions. *Pizzuto*, 947 F.3d at 525–29, App. at 13–17. However, as set forth below, *Atkins* explicitly adopted the minimum IQ score required by the clinical definitions. Accordingly, the panel misapplied this Court's precedent.

By way of background, intellectual disability is comprised of three features: 1) subaverage intellectual functioning; 2) significant limitations in adaptive skills; and 3) manifestation before age 18. *See Atkins*, 536 U.S. at 318; Idaho Code § 19-2515A(1)(a). IQ scores go to the first prong of this three-prong test. *See Atkins*, 536 U.S. at 309 n.5 ("an IQ between 70 and 75 or lower … is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition"); Idaho Code § 19-2515A(1)(b) (Idaho law defines subaverage intellectual functioning as an IQ "of seventy (70) or below.").

In Mr. Pizzuto's state appeal, "the record included only one IQ test score," a 72 on the verbal sub-test. *Pizzuto VI*, 947 F.3d at 524, App. at 13. Mr. Pizzuto explained to the Idaho Supreme Court that as a scientific matter an IQ score is only a range, going up and down five points from the number chosen, and as a result a score of 72 ought not to preclude relief even with a 70 cutoff. *See Pizzuto V*, 202 P.3d at 651, App. at 101. The Idaho Supreme Court was unpersuaded, declaring: "the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below." *Id.* On habeas review, the panel agreed with Mr. Pizzuto's reading of the clinical standard, finding that it "requires an IQ of

approximately 70 or below" and that "individuals with IQs between 70 and 75" can be intellectually disabled. *Pizzuto VI*, 947 F.3d at 526, App. at 14. Nevertheless, the panel declined to grant relief because, in its view, the Idaho Supreme Court did not unreasonably apply *Atkins* under 28 U.S.C. § 2254(d)(1), as at the time of its decision "it was not yet apparent that states were required to define intellectual disability in accordance with these prevailing clinical definitions." *Pizzuto VI*, 947 F.3d at 526, App. at 15.

That conclusion conflicts with *Atkins* itself, which endorsed the very definition in question. In particular, *Atkins* expressly addressed the upper limit of an intellectually disabled person's IQ score. The Court noted explicitly that "the cutoff IQ score for the intellectual function prong" of intellectual disability is "between 70 and 75 or lower." *Atkins*, 536 U.S. at 309 n.5.

Brushing over that language, the panel wrongly concluded that *Atkins* did not adopt any aspect of the clinical definition of intellectual disability and therefore held that *Atkins* did not clearly establish that the upper limit for IQ scores extended to 75. *Pizzuto VI*, 947 F.3d at 525–28, App. at 13–16. The panel relied on a mistaken view of *Atkins* as informed by an overly broad reading of *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam). *Pizzuto VI*, 947 F.3d at 527, App. at 15. The panel misread *Shoop*'s statement that "*Atkins* gave no *comprehensive* definition of 'mental retardation' for Eighth Amendment purposes," *Shoop*, 139 S. Ct. at 507. *See Pizzuto VI*, 947 F.3d at 527, App. at 15. That *Atkins* lacked a "comprehensive" definition of intellectual disability does not mean that it failed to prescribe *any*

aspect of the clinical definition. However, the panel broadly interpreted *Shoop* to have held that *Atkins* required application of no aspect of the clinical definition, and as a consequence the panel erroneously held that "the Idaho Supreme Court's application of a 'hard IQ-70 cutoff' was not an 'unreasonable application' of *Atkins*." *Id.*, App. at 15–16.

What the panel also overlooked is that *Shoop* turned on adaptive deficits, which are the second prong of intellectual disability, not on IQ score, which is the first prong. *Shoop*, 139 S. Ct. at 506 (explaining the Sixth Circuit's opinion below questioned the Ohio courts' overemphasis on "adaptive strengths" and applied *Moore v. Texas*, 137 S. Ct. 1039 (2017)). The petitioner in *Shoop* defended the Sixth Circuit's opinion that "*Moore* merely spelled out what was clearly established by *Atkins* regarding the assessment of adaptive skills." *Shoop*, 139 S. Ct. at 506. The Supreme Court rejected that argument and reversed because the Sixth Circuit "did not explain how the rule it applied can be teased out of" *Atkins*. *Id.* at 508. The Court acknowledged that *Atkins* addressed the "meaning" of intellectual disability and "included as a necessary element 'significant limitations in adaptive skills … that became manifest before age 18.'" *Id.* The *Shoop* Court concluded, however, that "*Atkins* did not definitively resolve how *that element* was to be evaluated," i.e., the adaptive-skills element, and instead left its application to the States. *Id.*

The passage of *Atkins*, discussed above in *Shoop* as identifying the "meaning" of intellectual disability, explicitly referenced the "clinical definitions" as the source of that meaning. *Atkins*, 536 U.S. at 318. *Atkins* prefaced that shorthand

statement of the elements of intellectual disability by noting that the clinical definitions were discussed earlier in the opinion. *Id.* It is those definitions, which were explicitly included in *Atkins*, that were clearly established by the opinion.

What makes *Shoop* distinguishable from this case is that it addressed an interpretative question about the adaptive deficits prong in a way that was not elaborated upon in *Atkins*, unlike the prong at issue in this case, the minimum IQ score, which *Atkins* expressly addressed. The clinical definitions expressly set forth in the *Atkins* opinion did not address the "adaptive strengths" that were at issue in both *Shoop* and *Moore*. *See Atkins*, 536 U.S. at 308 n.3. In contrast, *Atkins* expressly addressed the upper limit of an intellectually disabled person's IQ score. This Court noted explicitly that "the cutoff IQ score for the intellectual function prong" of intellectual disability is "between 70 and 75 or lower." *Id.* at 309 n.5. It is this specific language in the *Atkins* opinion that proscribes Idaho's rigid 70 IQ cutoff. The lack of discussion in *Atkins* of adaptive strengths and their impact on adaptive deficits is why *Atkins* did not constitute "clearly established" law regarding the issue in *Moore* and *Shoop*. But unlike with adaptive deficits, *Atkins* did go out of its way to discuss subaverage functioning and define it in such a way as to make it completely incompatible with the Idaho Supreme Court's approach here.

Atkins' embrace of the clinical standards was confirmed beyond any doubt by *Hall*, which described "[t]he clinical definitions of intellectual disability" and in particular the SEM as "a fundamental premise of *Atkins*." 572 U.S. at 720. The panel paid lip service to such passages but disregarded the import of them. *Pizzuto*

VI, 947 F.3d at 527, App. at 15–16. Specifically, the panel acknowledged the Court's admonition in *Hall* that *Atkins* provided "substantial guidance on the definition of intellectual disability," *Hall*, 572 U.S. at 721, and that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection," *id*. at 719, but found those passages wanting. *See Pizzuto VI*, 947 F.3d at 527, App. at 15–16. Those passages alone are compelling and strongly support Pizzuto's argument that the panel misconstrued this Court's precedent. However, they are dispositive when added to the third *Hall* quote, when it is displayed in full.

Unfortunately, the panel truncated its third selection from *Hall* in a way that diminished this Court's own acknowledgement of *Atkins*' controlling effect on the measurement of a qualifying IQ score. Through the panel's use of an ellipsis in the pertinent quote from *Hall*, the panel omitted critical language regarding this Court's own characterization of *Atkins*' definition of IQ scores. *See Pizzuto VI*, 947 F.3d at 527, App. at 15 ("'[t]he clinical definitions of intellectual disability … were a fundamental premise of *Atkins*'" (quoting *Hall*, 572 U.S. at 720)). The actual passage from *Hall* expressly acknowledges that in *Atkins* the Court had addressed IQ scores particularly: "*The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of Atkins*." *Hall*, 572 U.S. at 720. Thus, the panel missed *Atkins*' clear establishment of the clinical definitions and the softness of a 70 IQ limit, as previously noted by *Atkins*' express acknowledgment that someone with an IQ of 75 could be intellectually disabled. *See Atkins*, 536 U.S. at 309 n.5.

Atkins is the seminal case from this Court on intellectual disability and the death penalty, and was so for a dozen years before *Hall*. The extent to which *Atkins* embraced and mandated aspects of the clinical definitions is critically important to the many intellectually disabled petitioners who were already on death row in 2002 when *Atkins* was announced. *Atkins* set a constitutional floor on improperly limited state definitions. The question of whether and to what extent *Atkins* embraced the clinical definitions, defined intellectual disability and, as pertinent here, identified the cutoff IQ score at 75, not 70, is a surpassingly important question for the many death row inmates who had to establish their disability immediately and without the benefit of *Hall*. Accordingly, this Court should grant Pizzuto's petition for a writ of certiorari to resolve the conflict between the panel opinion and *Atkins*.

B. The Panel Decision Conflicts With Another Court of Appeals Decision And This Court Should Resolve the Circuit Split.

The panel decision likewise conflicts with the Tenth Circuit's opinion in *Smith*, which held—in direct opposition to the panel here—that this Court's decision in *Atkins* indeed made the clinical definitions for subaverage functioning a constitutionally indispensable part of the test, and with them the rule that an IQ between 70 and 75 cannot preclude relief standing alone.

In *Smith*, the Tenth Circuit granted relief on an intellectual disability claim that Smith's execution would violate *Atkins*, *Smith*, 935 F.3d at 1073, overturning a state court decision from 2007 that affirmed the denial of Smith's *Atkins* claim. *Id.* at 1070.

In the course of granting the claim, the Tenth Circuit concluded that the state court "unreasonably applied *Atkins*." *Id*. at 1076. The court acknowledged that *Atkins* provided the substantive law, and, crucially, that "[t]he Supreme Court in *Atkins* accepted clinical definitions for the meaning of the term [intellectually disabled]." *Id*. at 1077. The Tenth Circuit further acknowledged that "*Atkins* left the primary task of defining intellectual disability to the states," but nevertheless concluded that "*Atkins* clearly establishes that intellectual disability must be assessed, at least in part, under the existing clinical definitions." *Id*. In setting the parameters for evaluating the sub-average intellectual functioning prong, the Tenth Circuit recognized the binding nature of "the clinical definitions of the intellectual functioning prong at the time of Smith's *Atkins* trial," which was—like petitioner's—before *Hall*. *Id*. at 1078.

Smith had several IQ scores below 70, but also a score above 70 and within the margin of error, namely, a 73.[10] *Id*. at 1079. The Tenth Circuit evaluated these scores in light of "*Atkins*' statement that a score of 75 or lower will generally satisfy the intellectual functioning prong of an intellectual disability diagnosis." *Id*. at 1080. *See also id*. at 1079 ("not even one of Smith's IQ scores falls outside the

[10] One of Smith's scores was given as a range of 69–78. *See Smith*, 935 F.3d at 1079–1080 (addressing a score under the Raven's Standard Progress Matrices, which did not allow for "a fixed score," unlike the Wechsler Adult Intelligence Scale). The *Smith* court appears to have disregarded the Raven's score as an outlier, perhaps because it was given as a range, perhaps because "the WAIS 'is the premier instrument used throughout the world for IQ measurement,'" *id*. at 1080, or perhaps because the median point of the range would be a 74 and within the margin of error.

intellectually disabled range 'between 70 and 75 or lower,' *Atkins*, 536 U.S. at 309 n.5"). Accordingly, the Tenth Circuit found that "a reasonable jury would have been compelled to find" that Smith met the intellectual functioning prong, *Smith*, 935 F.3d at 1082 n.11, and therefore that the state court opinion finding otherwise was both an unreasonable determination of the facts, *id*., and "an unreasonable application of *Atkins*." *Id*. at 1082. In sum, the 2007 state court decision, issued years before *Hall* and *Moore*, was "an unreasonable application of *Atkins* because such determination requires the [state court] to have disregarded the clinical definitions *Atkins* mandated states adopt." *Id*. at 1083.

Smith thus holds, contrary to the panel opinion, that *Atkins* itself mandated application of the clinical definitions of intellectual disability and required state courts to find that IQ scores of 75 or lower satisfied the intellectual functioning prong.

Significantly, the Tenth Circuit in *Smith* acknowledged *Shoop* and § 2254's requirement that "Supreme Court precedent must have been 'clearly established at the time of the [state] adjudication.'" *Id*. at 1071 (quoting *Shoop*, 139 S. Ct. at 506). Unlike the panel here though, *see supra* at 13–17, that principle did not prevent the Tenth Circuit from understanding *Atkins* as having raised the clinical standards, and their margin of error in IQ scores, to a constitutional status. The panel's differing interpretation of *Shoop* and § 2254 creates yet another irreconcilable disagreement between the two opinions and yet another reason for certiorari review.

If the panel opinion here remains in effect, there will be two published opinions from two different circuits that read *Atkins* in radically distinct ways. An inmate sentenced to death in the Tenth Circuit will be entitled to habeas relief, while an identically situated prisoner in the Ninth Circuit will be executed. That is an unacceptable state of affairs, particularly in such heavy capital jurisdictions[11] with lives hanging in the balance, and the conflict should be resolved. *See* Sup.Ct. R. 10(a). This Court should grant Mr. Pizzuto's petition for a writ of certiorari to resolve the conflict between the panel opinion and the Tenth Circuit.

C. This Case Is A Good Vehicle For Resolving the Circuit Split.

This case is the ideal vehicle to resolve the circuit split with *Smith*. The question is clearly presented without factual complications, as the state court plainly disregarded the clinical standards and the SEM's applicability in determining that Idaho's statutory definition required a score of "70 or below" and "did not require that the IQ score be within five points of 70 or below." *Pizzuto V*, 202 P.3d at 651, App. at 101. As set forth above in the statement of the case, the question has no preservation issues, as it was consistently raised in the state and

[11] Oklahoma, which is in the Tenth Circuit, has carried out the third-most executions of any state in the modern era of the death penalty—only one fewer than the second state on the list. *See* Death Penalty Information Center, *Executions by State and Region Since 1976*, https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976. The Ninth Circuit includes California, Arizona, and Nevada, all of which are in the top-ten states for the population of their death rows, with California in the first spot by a significant margin. Collectively, those three states contain 35% of the inmates on death row in the country. *See* Death Penalty Information Center, *The Death Penalty in 2019: Year End Report* at 2, https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf.

federal proceedings. *See supra* at 3–11. Most significantly, the Ninth Circuit addressed the issue head-on, noting that the five-point margin of error was required by both the clinical standards and *Hall*, but was not compelled by the holding in *Atkins*. *Pizzuto VI*, 947 F.3d at 526–27, App. 14–16. What *Atkins* held, regarding the intellectual function prong of the clinical standards, is the precise question here, and the panel opinion is in direct conflict with *Smith* on that point. *Cf. Smith*, 935 F.3d at 1080 (relying upon "*Atkins*' statement that a score of 75 or lower will generally satisfy the intellectual functioning prong of an intellectual disability diagnosis").[12] Accordingly, this case is the perfect opportunity to take up the question. In addition, because the second question presented reaches the only other element of the lower court's reasoning—as outlined below—a plenary opinion could change the result and lead to the vacatur of Mr. Pizzuto's death sentence, so there are no harmless-error type problems to prevent review.

II. The State Court Made An Unreasonable Determination of Fact in Concluding that Petitioner Failed to Make a Prima Facie Showing That Onset of His Disability Occurred Before Age 18.

Another basis to grant certiorari is to review the Ninth Circuit's finding that the Idaho Supreme Court did not make an unreasonable determination of fact in concluding that petitioner failed to show that his disability manifested before age 18. *See Brumfield*, 135 S. Ct. at 2276 (deciding case under § 2254(d)(2) despite also

[12] In the event that the Court re-lists or grants certiorari in *Smith*, No. 19-1106, this Court should hold the instant petition while that case is pending, assuming it does not immediately grant the petition here. As appropriate, it should then grant certiorari, vacate and remand for reconsideration in light of that opinion.

granting certiorari under both § 2254(d)(1) and (d)(2)). Here, the parallels with *Brumfield* are numerous, including the failure of the state court in this case to make reasonable determinations of fact.

As in *Brumfield*, Mr. Pizzuto had a single IQ score within the margin of error. *See supra* at 4–5; *Brumfield*, 135 S. Ct. at 2277–79 (a single score of 75).[13] Similarly, both had been assessed as having a borderline intelligence. *See* App. at 129 (report of Dr. Michael Emery that Mr. Pizzuto fell "in the borderline range of intellectual deficiency"); *Brumfield*, 135 S. Ct. at 2280 (expert found "Brumfield had a borderline general level of intelligence"). Both suffered from seizures. *Id*. at 2279; App. at 132–134 (Mr. Pizzuto had epileptic seizures resulting from brain damage arising out of either a fall causing a fractured skull at age two and a half and/or an accident at age fourteen).

Both Mr. Pizzuto and Mr. Brumfield had significant academic difficulties in school, though Mr. Pizzuto would appear to have had more. In fifth grade, Mr. Pizzuto had already been held back once, and his Standard Achievement Test score placed him a full year behind his class and two years behind his sixth grade age. App. at 162. In sixth grade, Mr. Pizzuto failed again and was forced to repeat sixth grade. App. at 150. The next year, again in sixth grade in a different elementary school, Mr. Pizzuto was placed in the "lower learning" group, and despite being two years older than his peers, his grades reflected that he was at the bottom of that

[13] In *Brumfield*, this Court found the trial court's conclusion, that a reported IQ of 75 precluded a finding of subaverage intelligence, to be an unreasonable determination of fact under § 2254(d)(2). *Brumfield*, 135 S. Ct. at 2278.

group and performed at the bottom of his class. App. at 154. He would have been qualified for and been placed in special education had such a program been available. App. at 154. He could not pass a Reading Equivalency Test. App. at 157. Similarly, Mr. Brumfield was placed in special education classes in school, had a learning disability and read at a fourth grade level. *Brumfield*, 135 S. Ct. at 2279–80.

This Court had no difficulty in concluding that Mr. Brumfield's disability manifested before adulthood.[14] *Id.* at 2283. This Court relied on the 75 IQ found by his expert at sentencing, *id.* at 2274–75, and his intellectual shortcomings as a child to conclude "there is little question that he also established good reason to think that he had been [intellectually disabled] since he was a child." *Id.* at 2283.

The Idaho Supreme Court sought to avoid a finding of pre-18 onset of Mr. Pizzuto's intellectual disability by inventing an inference that his IQ *decreased* due to his epilepsy and drug use. *Pizzuto V*, 202 P.3d at 651–52, App. at 101–02. The state court inferred that Mr. Pizzuto's IQ could have decreased before he obtained the 72 IQ score at age 29 because his "long history of drug abuse and his epilepsy would have negatively impacted his mental functioning." *Id.* at 651, App. at 101.

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[14] In *Brumfield*, the question was whether the evidence presented had met the showing of adaptive deficits, sufficiently to make unreasonable under § 2254(d)(2) the state court's determination of fact that it did not. *Brumfield*, 135 S. Ct. at 2279–82. This Court found the state court determination an unreasonable determination of the facts. *Id.* at 2282. The State also suggested that Mr. Brumfield had likewise not shown a pre-18 onset of the adaptive deficits, but that prong of *Atkins* had not been addressed by the state court, and so § 2254(d)(2) did not apply and review on that point was *de novo*. *Id.*

The court relied on Dr. Merikangas's statement that "Mr. Pizzuto has a lifelong history of almost continuous drug abuse," which has "caused him further neurological dysfunction and has caused him to have substantial defects of mind and reason." *Id.* Similarly, the state court relied on two statements from Dr. Beaver, first, that Mr. Pizzuto's "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." *Id.* at 651–52, App. at 101–02. In an affidavit drafted eight years later, Dr. Beaver recommended that the neuropsychometric studies be repeated, as "[o]ften, patients that have persistent seizure disorders will decline over time in their overall mental abilities." *Id.* at 652, App. at 102. From this, the state court concluded that "Dr. Beaver felt that Pizzuto's mental functioning could have declined … due to his seizure disorder." *Id.* The supreme court further concluded that the state district court "could have inferred that [Mr. Pizzuto's mental functioning] would also have declined during the eleven-year period from Pizzuto's eighteenth birthday to the date of his IQ testing, where Pizzuto was not only suffering from epileptic seizures but was also abusing various drugs." *Id.*

The problem with the state supreme court's reasoning is that neither of Mr. Pizzuto's experts suggested that his IQ would have decreased. The state court engaged in rank speculation without any reasonable support in connecting Dr. Merikangas's finding of "neurological dysfunction" that "caused substantial defects

of mind and reason" to IQ. *Pizzuto V*, 202 P.3d at 651, App. at 101. There is no basis in the record for that inference. Dr. Merikangas made this finding in 1988, long before *Atkins*, and his primary finding was "brain damage," not intellectual disability. App. at 134–35. Furthermore, the sources of the brain damage were the accidents when Mr. Pizzuto was two and fourteen, clearly in the developmental period before age 18. App. at 134. Indeed, while Dr. Merikangas noted the 72 IQ as a consequence of the damaged brain, his focus was on Mr. Pizzuto's inability to control his impulses. App. at 134–135. In a lengthy quote on the effects of drugs, he noted explicitly a series of eight neurological dysfunctions, all of which constitute impaired mental functioning but none of which relate to IQ in any way. *See* App. at 135 (diminished ego control over comportment; impaired judgment; restlessness, irritability and combativeness; paranoid thought disorders; drug cravings that may lead to crime and assault; a state of intoxication or delirium that may lead to combativeness and hyperactivity; feelings of bravado or omnipotence that may obliterate one's sense of caution; an amnesic or fugue state during which assaults may take place).

Likewise, Dr. Beaver conducted neuropsychometric testing in 1996 to evaluate neurocognitive functioning and find "neurological impairment secondary to brain injury seizure disorder or drug/alcohol problems." App. at 140. He addressed at length Mr. Pizzuto's brain damage and seizures, as a consequence of head injuries that led to impaired mental functioning, impulsive behavior, particularly uncontrolled when combined with the neurotoxic effects of drugs. App. at 142. In

2003, Dr. Beaver stated that Mr. Pizzuto likely satisfied the Idaho statute, which included a requirement that the IQ and adaptive deficits manifest pre-18. *Pizzuto V*, 202 P.3d at 653, App. at 103. When Dr. Beaver later suggested more psychometric testing because the mental abilities of people with seizure disorders may decline over time, he again focused on brain damage ("organic brain disorder") and did not mention IQ. App. at 165–68. He again recommended the brain scans that he had previously recommended in 1996, App. at 143, in combination with current psychometric testing to "further elucidate his mental abilities, and the etiology of his limitations." App. at 168. Dr. Beaver's request for further testing, including imaging, could have helped to explain the cause of Mr. Pizzuto's brain problems, likely his serious accidents in the developmental period, pre-18.

None of the affidavits relied upon by the Idaho Supreme Court mentioned IQ, much less a decreased IQ. To infer a decreased IQ under these entirely speculative circumstances, as the court did, *Pizzuto V*, 202 P.3d at 651–52, App. at 101–02, was an unreasonable determination of fact. *Brumfield*, 135 S. Ct. at 2279–83. Mr. Pizzuto's burden was merely to make a prima facie case with evidence showing that his intellectual disability manifested before age 18. *Pizzuto V*, 202 P.3d at 651, App. at 101. He did. And the Idaho Supreme Court made an unreasonable determination of fact when it concluded that he did not.

In finding otherwise, the court of appeals below ran afoul of this Court's precedent. Mr. Pizzuto argued that his "abysmal school record" was "evidence of subaverage intellectual functioning," *Pizzuto VI*, 947 F.3d at 530–31, App. at 18,

but the panel characterized that evidence as "sparse and incomplete," in dismissing the significance of the evidence of pre-18 onset of Mr. Pizzuto's intellectual function evidence based on his extreme academic difficulties. *Id.* at 531, App. at 18. The panel necessarily acknowledged that his school records were "some evidence of pre-18 significantly subaverage intellectual functioning," but asserted that did not make unreasonable the Idaho Supreme Court's decision that Mr. Pizzuto fell short of showing pre-18 onset. *Id.*

While the panel asserted that Mr. Pizzuto had "failed to bring the evidence to the [state] court's attention," and cited the state court's assertion that he "relied solely upon Dr. Emery's IQ determination," *id.*, neither statement is true. Admittedly, Mr. Pizzuto argued the IQ score itself, but he also supported the onset of his disability pre-18 based on "pre-18 etiology of brain damage which may have resulted in his retardation, and significant evidence of pre-18 adaptive skills deficits in numerous areas of functioning." *See* RER, Vol. 2 at 122 [Dkt. 38-2 at 50.] The numerous areas of adaptive skills deficits included the evidence of Mr. Pizzuto's longstanding and early intellectual challenges, including having been held back twice in elementary school. *See supra* at 23–24. As the Idaho Supreme Court was apprised of this evidence, it indeed chose to ignore it, contrary to the panel's conclusion.

And as this Court found in *Brumfield*, such a state court record contains "ample evidence" that the "disability manifested before adulthood" and provides "good reason to think that he had been [disabled] since he was a child." *Brumfield*,

135 S. Ct. at 2283. Given Mr. Pizzuto's showing in state court, the Idaho Supreme Court made an unreasonable determination of fact in concluding otherwise. This Court should grant the petition on this question as well, which would allow it to resolve the circuit split set forth above with respect to the first question presented.

CONCLUSION

As "the death penalty is the most severe punishment" known to the law, *Roper v. Simmons*, 543 U.S. 551, 568 (2005), and society's evolving standards of decency and the Eighth Amendment mandate that society protect the intellectually disabled from execution, *Atkins*, 536 U.S. at 321, this Court should grant the petition for writ of certiorari to ensure that Mr. Pizzuto is not executed on the basis of a decision that conflicts with *Atkins* and with the precedent of another circuit. Alternatively, this Court should grant a per curiam reversal.

Respectfully submitted this 28th day of May 2020.

Respectfully submitted,

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