

Determination of Mental Retardation in the Application of *Atkins* to State Decisions

Anna Glezer, MD

Assistant Clinical Professor of Psychiatry

Department of Psychiatry

University of California, San Francisco

San Francisco, CA

States Are Allowed to Set Their Own Determinations, Within Reason, for What Qualifies as Mental Retardation in the Determination of Whether an Individual Can be Sentenced to Execution

In the case of *Pizzuto v. Blades*, 729 F.3d 1211 (9th Cir. 2013), the United States Court of Appeals for the Ninth Circuit affirmed the decision of the Idaho Supreme Court, where it held that the state's denial of Mr. Pizzuto's writ of *habeas corpus* (based on the *Atkins* prohibition of the execution of offenders with mental retardation) was not unreasonable.

Facts of the Case

In 1986 Gerald Ross Pizzuto, Jr., was convicted on multiple counts of first-degree murder, felony murder, robbery, and grand theft. He approached a mountain cabin where he first tied up the victims, bludgeoned and shot them, and then joked and bragged about the killings to friends. On appeal, all the convictions were upheld except for robbery. In a postconviction review, the convictions and death sentence were again upheld.

In his fifth state petition for postconviction review, Mr. Pizzuto stated that his death sentence was prohibited by the Supreme Court case of *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Supreme Court stated that it is a violation of the Eighth Amendment against cruel and unusual punishment to execute a man who has intellectual disability, but it purposefully left the definition of mental retardation broad and up to the states.

In his petition, Mr. Pizzuto moved for summary judgment on this question. However, the state court granted the summary judgment instead to the state, noting that Mr. Pizzuto did not raise a genuine issue of material fact to support his claim of mental retardation and that the petition was untimely. The Idaho Supreme Court affirmed the grant of summary judgment. It held that Mr. Pizzuto "had the burden of showing that at the time of his murders he was men-

tally retarded" *Pizzuto*, p 1215), as defined in Iowa by an IQ of 70 or below, with the occurrence of mental retardation before the age of 18. After that decision was put forth, Mr. Pizzuto appealed to the Ninth Circuit. He noted that his testing showed a verbal IQ score of 72.

Ruling and Reasoning

The Appellate Court's review of Mr. Pizzuto's petition fell under the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, 110 Stat. 1214), which was an act of Congress signed into law in April 1996. The Act had a significant impact on the law of *habeas corpus*. The AEDPA essentially limited the power of federal judges to grant relief, unless it was determined that the state court's adjudication of the claim led to a decision that was either contrary to or involved an unreasonable application of federal law established by the U.S. Supreme Court or if the decision was based on an "unreasonable determination of the facts in light of evidence presented in the state court proceeding" (*Pizzuto*, p 1215). Those who supported the Act's creation stated that the purpose was to prevent frivolous filing and endless postponement of justice. The Ninth Circuit in this case emphasized that the question under the AEDPA is not whether a federal court might deem the state court's determination incorrect, but whether that court's determination was unreasonable. The court pointed out that this is a significantly higher threshold to attain. It also noted that this bar must first be reached (that is, the state court's decision must be determined to be unreasonable) before any evidentiary hearing is granted.

The court's reasoning began by looking at the first prong of the AEDPA threshold, whether there was an unreasonable application of federal law and, more specifically, whether Idaho's application of *Atkins* was reasonable. Idaho prohibits the execution of those with intellectual disability and defines this condition in Idaho Code Ann. § 19-2515A as "significantly sub-average general intellectual functioning that is accompanied by significant limitations in at least 2 skill areas. . . . The onset . . . must occur before age eighteen years." Furthermore, the definition of subaverage general intellectual function is an IQ of 70 or below. The Ninth Circuit noted that this is the definition cited by the Supreme Court in *Atkins* from

the American Psychiatric Association's definition of mental retardation. Many other states use a similar definition.

Part of Mr. Pizzuto's contention was that the Idaho Supreme Court unreasonably interpreted Idaho Code Ann. § 19-2515A because it did not take into account the Flynn effect and the standard error of measurement (SEM). The Flynn effect is the theory that IQ scores increase over time, so the score is artificially higher the farther away in time it is obtained compared with when the IQ test was normed. The SEM is the possible error around an individual's score. Mr. Pizzuto argued that these together mean that his IQ could be lower than 70. The court of appeals first noted that the Flynn effect is not universally accepted. Furthermore, it noted that it was not unreasonable for the Idaho Supreme Court not to give weight to either of these elements.

Mr. Pizzuto's next argument was that the state court did not hold an evidentiary hearing before denying the petition, and therefore the state court's determination of facts was unreasonable (the second prong of the AEDPA). The state court had granted summary judgment for the state without an evidentiary hearing, and the Idaho Supreme Court affirmed this. The court of appeals answered whether this denial violated the second prong. This point is particularly interesting in this case. The court noted that Mr. Pizzuto, in fact, obviated the need for an evidentiary hearing by asking for summary judgment because, under Idaho law, when one party moves for summary judgment, the trial court has the option of granting summary judgment to the other party. Therefore, when he motioned for summary judgment under the contention that he had intellectual disability, he stated that the evidence demonstrated his condition as a matter of law. A summary judgment is granted when there is no dispute as to the material facts of a case, and the judgment is a matter of law. Mr. Pizzuto's motion, in essence, stipulated that the facts in the record were sufficient to decide the case. The Ninth Circuit therefore concluded that it was not unreasonable for the Idaho trial court to view his summary judgment motion as "a concession that the record was complete" (*Pizzuto*, p 1220), and therefore the state court could decide the *habeas corpus* petition without an evidentiary hearing.

Finally, Mr. Pizzuto argued that his equal protection and due process rights were violated because Idaho treats postconviction *Atkins* claims differently

than those raised before trial. Here, the court of appeals concluded that the different processes for *Atkins* claims are "rationally related to Idaho's legitimate interests in finality and preventing abuses of the writ" (*Pizzuto*, p 1222); that is, it should not be used merely as a delaying tactic. This decision was based on a similar case in Virginia (*Walker v. True*, 399 F.3d 315 (4th Cir. 2005)), wherein it was held that the use of a separate *Atkins* process for those in the postconviction phase is not a violation of the Equal Protection Clause.

Overall, the Ninth Circuit concluded that the Idaho Supreme Court's findings were not unreasonable, given the facts before it, and that it was appropriate for the court to use these facts in rendering the decision, rather than granting an evidentiary hearing.

Discussion

An interesting point in *Atkins* and its progeny is that the Supreme Court chose to rely on a clinical diagnosis (in this case, mental retardation), rather than a legal concept, such as diminished capacity, mitigation, or criminal responsibility. In essence, that decision opened the door for cases such as *Pizzuto*.

Pizzuto speaks to the question of how courts define mental retardation. The definition is essential because it influences whether an individual can pose an *Atkins* claim. In *Atkins v. Virginia*, the Supreme Court held that imposing the death penalty on those with mental retardation is cruel and unusual, citing evolving standards of decency and national consensus. However, the justices chose not to define mental retardation and to allow the states to do so. They did include a reference to the American Psychiatric Association's definition of mental retardation. That they did not explicitly define mental retardation suggests that, as we learn more, from a scientific standpoint, about the brain and mental retardation, these definitions may change. Even most recently with the development of DSM-5, the term "mental retardation" has been replaced by the term "intellectual disability." This new definition focuses more on adaptive functioning than the older term did and less on IQ scores. Courts are likely to have questions regarding how to make and interpret diagnoses of intellectual disability and the implications of these diagnoses on an individual's cog-

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nitive and reasoning abilities. It will fall under the purview of the forensic clinician to provide this education.

Among the more interesting elements in Mr. Pizuto's claim of mental retardation is that he was never tested before age 18; his test occurred at age 29. Furthermore, this test occurred after many years of substance use, seizures, and other potential nervous sys-

tem insults. There was no evidentiary hearing in this case and therefore no experts to speak to these factors, but had that occurred, the debate would probably have touched on the controversies in neuroscience today. In future cases, this role too may well fall to the forensic expert.

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