CAPITAL CASE
EXECUTION SCHEDULED FOR TUESDAY, OCTOBER 3,2023

No. 23-5653

In the

Supreme Court of the United States

MICHAEL DUANE ZACK, III *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that the Eighth Amendment prohibition on executing intellectually disabled defendants established in *Atkins v. Virginia*, 536 U.S. 304 (2002), should be expanded to include a diagnosis of Fetal Alcohol Syndrome.

II. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim that the Eighth Amendment requires jury sentencing in capital cases.

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OPINION BELOW

The Florida Supreme Court's opinion is reported at *Zack v. State*, 2023 WL 6152489 (Fla. Sept. 21, 2023) (SC2023-1233).[1]

JURISDICTION

On September 21, 2023, the Florida Supreme Court affirmed the state postconviction court's summary denial of a successive postconviction motion in this

[1] The pleadings filed in this case are available online on the Florida Supreme Court's website under the heading "Online Docket" which will default to the "Florida Appellate Case Information System." In the left column, under the search icon, "Case Search" will appear as the first choice. Clicking on case search yields several boxes including the "Court" box which includes the "Supreme Court of Florida" as an option. Select the Supreme Court of Florida option and then enter the case number SC2023-1233 in the next "Case Number" box will lead to the full docket of the case..

active warrant case. *Zack v. State*, 2023 WL 6152489 (Fla. Sept. 21, 2023). The Florida Supreme Court issued the mandate immediately. On September 26, 2023, Zack filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth Amendment right-to-a-jury-trial provision, the Eighth Amendment cruel and unusual punishment provision, and the Fourteenth Amendment.

The Sixth Amendment to the United States Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

The Eighth Amendment to the United States Constitution, provides:

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

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Zack murdered two women as part of a nine-day crime spree and was sentenced to death for the murder of the second victim, Ravonne Smith.

<u>Facts of the case</u>

Zack committed two murders as part of a nine-day crime spree that began on June 4, 1996. *Zack v. State*, 753 So.2d 9, 13-14 (Fla. 2000); *see also Zack v. State*, 911 So.2d 1190, 1195 (Fla. 2005). On June 12, 1996, Zack met Laura Rosillo at a bar in Okaloosa Island, Florida. Zack drove her in a red Honda he had stolen a few days earlier in Tallahassee. Zack attacked Laura while they were in the Honda. Zack then pulled her out of the car, kicked her repeatedly, and beat her head against one of the tire rims. He then strangled her to death. He dragged her body behind a sand dune, kicked dirt over her face, and left. *Zack*, 753 So.2d at 13. When her body was found, her tube top was torn and hanging off her hips and her pants were pulled down around her right ankle. (T. II 392-93); *Zack*, 753 So.2d at 13. Laura Rosillo's blood was found inside the stolen red Honda and on the outside of the Honda on the rear passenger-side tire. (T. III 410-19; IV 675-76).

Zack then drove to Pensacola in the stolen Honda. On the afternoon of June 13, 1996, at Dirty Joe's bar in Pensacola Beach, Zack met Ravonne Smith, who worked at the bar. *Zack*, 753 So.2d at 13-14. Around 8 p.m., Zack and Smith left the bar and went to her house. Immediately upon entering the house, Zack hit the victim with a beer bottle causing her blood to spray on a love seat in the living room and on the interior of the door frame. (T. II 317). She ran down the hall to the master bedroom leaving a trail of blood. (T. II 373). Zack pursued Smith to the master bedroom and sexually assaulted her. She managed to escape to the guest bedroom. But Zack pursued her and beat her head against the wooden floor of the bedroom. Zack went to

the kitchen where he got an oyster knife, returned to the guest bedroom, and stabbed her in the chest four times with the knife. Zack returned to the master bedroom, stealing a television, a VCR, and her purse. He placed the stolen items in Smith's car, a black Plymouth Conquest. Zack drove her stolen Conquest to the location where he had parked the stolen red Honda, close to Dirty Joe's bar. Zack removed the Honda's license plate and took it with him.

He then returned to Panama City in Smith's stolen car. There, he attempted to pawn the victim's TV and VCR at the "No Fuss Pawn and Loan Company." (T. IV 628). The pawn shop owners asked for identification and told Zack they had to check the merchandise. Zack fled the store. The store's two surveillance cameras captured Zack attempting to pawn the stolen property on videotape. (T. IV 629). Zack abandoned Smith's car. Zack was apprehended sometime later hiding in an empty house.

Zack confessed to the murder of Smith to Investigator Vecker of the Bay County Sheriff's Office and Investigator Henry of the Escambia County Sheriff's Office. (T. IV 745 - V 816; T. V 911-980). Zack's fingerprint was found on the stolen TV and his fingerprint and palm print were found on the stolen VCR. (T. IV 722). Zack's fingerprints were also located on numerous items found in Smith's stolen car. (T. IV 708-711). DNA evidence was presented at trial. A laboratory analyst with the Florida Department of Law Enforcement (FDLE), testified that both victims' blood were on the white boxer shorts. (T. IV 679). The DNA on the boxer shorts matched victim Smith's DNA profile at three markers and at one in 93,000 Caucasians. (T. IV 699). A vaginal swab of victim Smith matched Zack's DNA profile at six markers. (T. IV 671-73). Zack's DNA type occurs in one in 18,700 of the Caucasian population. (T. IV 673).

At the penalty phase, the defense presented several mental health experts to testify that Zack suffered from Fetal Alcohol Syndrome (FAS) and posttraumatic stress disorder (PTSD). Dr. William E. Spence, Jr., a forensic psychologist, testified in

mitigation for the defense. (T. X 1822-1841). Dr. Spence diagnosed Zack with PTSD. (T. X 1830, 1841). Zack, however, told Dr. Spence that he witnessed his stepsister murdering his mother, despite Zack's own testimony at trial that he was in a mental hospital and a stipulation that he was over 100 miles away at the time of his mother's murder. (T. VI 1101; T. X. 1830).

Dr. James D. Larson, a forensic psychologist, also testified in mitigation. (T. X 1847-1884). Dr. Larson diagnosed Zack with PTSD due to his mother's murder and the childhood abuse. (T. X 1862). Dr. Larson testified that Zack's IQ score on the Wechsler Intelligence Scale was 84, which is in the "low average range." (T. X 1854, 1868-69). Dr. Larson, however, also testified that Zack's IQ score from a Wechsler Intelligence Scale for Children, administered when he was about 12 years old, "reflected an IQ of 92." (T. X 1866-67). Zack's performance score was 104 and his verbal score was 84. (T. X 1867). Dr. Larson thought the 20-point discrepancy between the performance score and the verbal score was a sign of possible brain impairment. (T. X 1867).

Dr. Barry Crown, a forensic psychologist, testified for the defense in mitigation. (T. X 1884-1926). Dr. Crown also diagnosed Zack with PTSD and FAS. (T. X 1907, 1909).

Dr. Michael S. Maher, a psychiatrist, testified again in the penalty phase in mitigation. (T. X 1927-1967). Dr. Maher diagnosed Zack with PTSD and FAS. (T. X 1929,1932, 1937).

Dr. Eric Mings, a psychologist, testified in rebuttal for the State. (T. XI 1972-2014). Dr. Mings testified that Zack had a full scale IQ of 86 which is in the range of "low average." (T. XI 1986,1987).

Dr. Harry McClaren, a forensic psychologist, also testified in rebuttal. (T. XI 2015-2047). Dr. McClaren diagnosed Zack as having a personality disorder with prominent antisocial features. (T. XI 2022). Dr. McClaren also testified that Zack had

anger directed toward women. (T. XI 2024, 2027-2032).

Years later, in 2002, in the initial state postconviction proceedings, the defense hired another mental health expert, Brett Turner, Psy.D. Dr. Turner performed a WAIS-III IQ test in 2002 that showed a current full-scale IQ of 79. Dr. Turner's written report also referred to a prior IQ test performed in 1980 when Zack was eleven years old, showing a full-scale IQ of 92.

Procedural history of the warrant litigation

On August 17, 2023, Governor DeSantis issued a death warrant scheduling the execution for Tuesday, October 3, 2023, at 6:00 p.m. On August 28, 2023, Zack, represented by state postconviction counsel Capital Collateral Regional Counsel–North (CCRC–N), filed a successive motion for postconviction relief in the state postconviction court raising two claims: (1) the prohibition on the execution of intellectually disabled defendants, established in *Atkins v. Virginia*, 536 U.S. 304 (2002), should be expanded to include a diagnosis of Fetal Alcohol Syndrome because it is functionally identical to a diagnosis of intellectual disability; and (2) a non-unanimous jury recommendation of death violates the Eighth Amendment. On August 31, 2023, the state postconviction court summarily denied both claims, finding both claims to be untimely, procedurally barred, and meritless under the Florida Supreme Court's recent precedent of *Dillbeck v. State*, 357 So.3d 94 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023).

On September 21, 2023, the Florida Supreme Court affirmed the summary denial of the successive postconviction motion. *Zack v. State*, 2023 WL 6152489, at *12 (Fla. Sept. 21, 2023). The Florida Supreme Court concluded both claims were untimely, procedurally barred, and meritless under its existing precedent of *Dillbeck*.

On September 26, 2023, Zack, represented by CCRC–N, filed a petition for a writ of certiorari in this Court raising two questions.

<u>REASONS FOR DENYING THE WRIT</u>

ISSUE I

Whether this Court Should Grant Review of a Decision of the Florida Supreme Court Rejecting a Claim that the Eighth Amendment Prohibition on Executing Intellectually Disabled Defendants, Established in *Atkins v. Virginia*, 536 U.S. 304 (2002), Should Be Expanded to Include a Diagnosis of Fetal Alcohol Syndrome.

Petitioner Zack seeks review of the Florida Supreme Court's decision refusing to expand the prohibition on execution of defendants with a diagnosis of intellectual disability, established in *Atkins v. Virginia*, 536 U.S. 304 (2002), to include a diagnosis of Fetal Alcohol Syndrome (FAS). Pet. at 17. He argues that a diagnosis of FAS is the functional equivalent of a diagnosis of intellectual disability relying on the views of mental health experts. The Florida Supreme Court found the expansion-of-*Atkins* claim to be untimely and procedurally barred as a matter of state law. Both findings are independent and adequate state law grounds precluding review by this Court. Moreover, there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's rejection of the expansion-of-*Atkins* claim. This Court has never even hinted that *Atkins* should be expanded to include other types of diagnoses. There certainly is no conflict with *Atkins* itself. And this Court recently denied review of this same question in *Dillbeck v. Florida*, 143 S. Ct. 856 (2023) (No. 22-6819). There is also no conflict between the lower appellate courts and the Florida Supreme Court's decision in this case. Opposing counsel cites to no appellate case—federal or state—expanding *Atkins* to any other diagnosis. Review of this issue should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court affirmed the denial of the expansion-of-*Atkins* claim. *Zack v. State*, 2023 WL 6152489, at *7-*10 (Fla. Sept. 21, 2023). The Florida Supreme

Court stated that it was "appropriate for a postconviction court to summarily dismiss claims raised in a successive postconviction motion that are untimely or procedurally barred." *Id.* at *7.

The Florida Supreme Court ruled that the expansion-of-*Atkins* claim was untimely explaining that the facts the claim was based upon "have long been known to him and his attorneys." *Zack*, 2023 WL 6152489, at *7. His diagnosis of FAS was known and presented at the trial in 1997 and he was now relying on "twenty-year-old-plus information" as the basis of the current claim. *Id.* at *7. The Court pointed out that he was not relying on any newly discovered evidence regarding the issue. *Id.* at *7. Instead, he was relying on a "new scientific consensus" based on several articles published in 2017 and 2021. *Id.* at *8 & n.10. The Florida Supreme Court noted, under its precedent, new opinions or new research studies based on a compilation or analysis of previously existing data and scientific information "are not generally considered newly discovered evidence." *Id.* at *8 (citing *Dillbeck v. State*, 357 So.3d 94, 99 (Fla. 2023), and *Henry v. State*, 125 So.3d 745, 750 (Fla. 2013)). The Court also explained that, under its existing precedent, a "new scientific consensus" is an "unpersuasive reason to restart the clock for purposes of timely filing successive postconviction claims." *Id.* at *8 (citing *Barwick v. State*, 361 So.3d 785, 793 (Fla. 2023), and *Sliney v. State*, 362 So. 3d 186, 189 (Fla. 2023)). The Florida Supreme Court concluded he met "none of the exceptions" to the timeliness requirement of the applicable rule of court and therefore, the claim was untimely. *Id.* at *8 (citing Fla. R. Crim. P. 3.851(d)(2)(A)–(C)).

The Florida Supreme Court also found the expansion-of-*Atkins* claim to be procedurally barred. *Id.* at *9 (citing *Barwick v. State*, 361 So.3d 785, 793 (Fla. 2023), *Medina v. State*, 573 So.2d 293, 295 (Fla. 1990), *Branch v. State*, 236 So.3d 981, 986 (Fla. 2018), and *Simmons v. State*, 105 So.3d 475, 511 (Fla. 2012)). The Court noted

that Zack had raised this same claim "repeatedly" since 2002. *Id.* at *8 (citing *Zack v. State*, 982 So.2d 1179 (Fla. 2007) (unpublished)).

The Florida Supreme Court also concluded the expansion-of-*Atkins* claim was meritless under its existing precedent of *Dillbeck v. State*, 357 So.3d 94, 100 (Fla. 2023), and *Barwick v. State*, 361 So.3d 785, 795 (Fla. 2023). *Zack*, 2023 WL 6152489, at *9. The Court noted that it has "long held that the categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage." *Id.* at *9 (citing *Dillbeck*, 357 So.3d at 100, *Barwick*, 361 So.3d at 795, and *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022)). The Florida Supreme Court alternatively concluded that it lacked "the authority to extend *Atkins* to individuals who are not intellectually disabled" under the state constitutional conformity clause regarding Eighth Amendment claims. *Id.* at *9 (citing Art. I, § 17, Fla. Const. and *Barwick*, 361 So.3d at 795). The Florida Supreme Court explained that this Court's "interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida." *Id.* at *9 (citing *Barwick*, 361 So.3d at 795). The Florida Supreme Court affirmed the summary denial of the claim.

Independent and adequate state law

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that it lacks jurisdiction over a case if a state court's decision rests upon two grounds: a state law ground and a federal ground, provided the state law ground is independent and adequate itself. *Id.* at 1038, n.4 (quoting *Fox Film Corp. v.*

Muller, 296 U.S. 207, 210 (1935)). Provided the state law is not "interwoven" with federal law, this Court's jurisdiction "fails." *Id.* (citing *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917)); *see also Foster v. Chatman*, 578 U.S. 488, 497 (2016) (noting that this Court lacks jurisdiction to review a state court judgment if that judgment rests on state law citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

The Florida Supreme Court found the expansion-of-*Atkins* claim to be both untimely and procedurally barred. *Zack*, 2023 WL 6152489, at *7-*9. The Florida Supreme Court was interpreting a Florida rule of court to determine that the successive postconviction claim was untimely and did not meet any of the exceptions in that state rule of court. There is no federal constitutional aspect to such a determination. And the Florida Supreme Court relied exclusively on state law cases to determine the claim was procedurally barred. Neither the determination of untimeliness nor the determination of being procedurally barred was interwoven with federal constitutional law. Both of these state law determinations are independent and adequate grounds to deny review of this issue.

Opposing counsel insists that state-law rules of forfeiture cannot be applied to claims involving Eighth Amendment categorical exemptions. Pet. at 23. They argue that time bars and procedural bars cannot be applied to an *Atkins* claim; rather, such claims must be addressed on the merits. There is no case from this Court holding that categorical bars cannot be forfeited and certainly no case from this Court that categorical bars cannot be forfeited as a matter of state law. And this assertion creates a threshold issue which creates yet another reason for this Court to decline review of this question. *N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (explaining that the petition for writ of certiorari was properly denied by the Court, despite the question being a significant one that is worthy of review, because the case might require the

Court to first resolve antecedent questions of state law and trademark-protection principles); *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (denying a motion to vacate a stay, despite the serious constitutional questions involved, because the issue presented complex and novel antecedent questions of Texas law). This Court should decline review of this question due to the presence of two independent and adequate state law grounds.

No conflict with this Court's jurisprudence

There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case. There certainly is no conflict with *Atkins* itself. *Atkins* was limited to intellectual disability. As the Eleventh Circuit has explained, in a case seeking to expand *Atkins* to include a diagnosis of fetal alcohol effects, when the United States Supreme Court establishes a categorical rule, expanding the category violates that rule. *Kearse v. Sec'y, Fla. Dep't of Corr.*,2022 WL 3661526, *26 (11th Cir. Aug. 25, 2022), *cert. denied*, *Kearse v. Dixon*, 143 S.Ct. 2439 (2023) (No. 22-6868).

Nor should this Court consider expanding *Atkins* to other types of diagnoses. Intellectual disability and Fetal Alcohol Syndrome are certainly not equivalent in terms of objectivity and reliability of the diagnosis. A diagnosis of intellectual disability is mainly objective, depending as it does on IQ scores for two of the three prongs of the statutory test for intellectual disability. § 921.137(1), Fla. Stat. (2022); *cf. Atkins*, 536 U.S. at 308 n.3 (using standard definitions of intellectual disability that involve three prongs). IQ tests are objective and result in numerical scores. IQ tests are also standardized and are used for other purposes and in other fields, such as the military. This is not true of other types of diagnoses. Other types of diagnoses including FAS are highly subjective. *Cf. United States v. Fell*, 2016 WL 11550800, at

*1 (D. Vt. Nov. 7, 2016) (noting the Government's position was that there was no definite, universal criteria for a diagnosis of Fetal Alcohol Spectrum Disorder (FASD) and noting the DSM-5 listed ND-PAE under "Other Specified Neurodevelopmental Disorders"). Expanding *Atkins* to other types of mental illnesses would result in endless, highly subjective battles of the experts.

While opposing counsel insists that FAS is "uniquely" equivalent to intellectual disability among the many other diagnoses based on the views of mental health experts, the views of the psychological community often change. Pet. at 17. Tying Eighth Amendment law to those changing views "will lead to instability and continue to fuel protracted litigation." *Hall v. Florida*, 572 U.S. 701, 731-32 (2014) (Alito, J., dissenting). Justice Alito noted that the American Psychiatric Association (APA) had, in 2013, "fundamentally" altered the first prong of the "longstanding" definition of intellectual disability. *Id.* at 732 n.8 (citing the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5)). He observed that the longstanding definition, which had required "significantly subaverage intellectual functioning," was the definition this Court had relied upon in *Atkins* in 2002. A diagnosis that is "uniquely" equivalent to another diagnosis today, could be not so "uniquely" equivalent tomorrow.

This Court should not follow the latest expert trends in determining Eighth Amendment law. Any analysis under *Trop v. Dulles*, 356 U.S. 86, 101 (1958), regarding the "evolving standards of decency" should be limited to consideration of statutes enacted by elected legislatures rather than the views of unelected and unrepresentative experts. *Miller v. Alabama*, 567 U.S. 460, 510-12 (2012) (Alito, J., dissenting) (observing that the "evolving standards of decency" test of *Trop* was "problematic from the start" but, at least, when it is based on the positions taken by state legislatures, it may be characterized as a "national consensus").

The state statutes that precluded a death sentence for intellectually disabled defendants, that were enacted before *Atkins* was decided, limited the prohibition to a diagnosis of intellectual disability alone. *Atkins*, 536 U.S. at 312 (noting that legislatures of Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, North Carolina, South Dakota, Tennessee, Washington and Congress had enacted statutes prohibiting death sentences for intellectually disabled defendants). All of those legislative acts limited the prohibition to intellectual disability and several of those statutes placed the burden on the defendant to prove his disability at a clear and convincing standard of proof or even at a beyond a reasonable doubt standard. Ga. Code § 17-7-131(c)(3). None of those statutes included a diagnosis of FAS. Nor does opposing counsel point to any current legislation prohibiting a death sentence based on a diagnosis of FAS, much less to a significant number of state legislatures enacting such legislation, as required of a proper *Trop* analysis. There is no national consensus among the legislatures that capital defendants with FAS should be exempt from execution. *United States v. Fell*, 2016 WL 11550800, at *4 (D. Vt. Nov. 7, 2016) (noting there were no enactments by Congress or state legislatures prohibiting the execution of defendants with Fetal Alcohol Spectrum Disorder (FASD) and that lack of consensus weighed heavily against creating any such categorical exemption). The Eighth Amendment expansion-of-*Atkins* claim fails under a *Trop* analysis.

This Court recently denied review of this exact same question in a Florida capital case. *Dillbeck v. Florida*, 143 S. Ct. 856 (2023) (No. 22-6819). The arguments being made to this Court in support of this petition are much the same as those made in the *Dillbeck* petition.

There is no conflict with this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state court of last resort and the Florida Supreme Court's decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict with the federal appellate courts and the Florida Supreme Court's decision in this case. The Fifth Circuit has rejected a claim that *Atkins* should be expanded from intellectual disability to include Fetal Alcohol Spectrum Disorder (FASD). *Soliz v. Davis*, 750 F. App'x 282, 291 (5th Cir. 2018) (noting there was "no Supreme Court decision barring the execution of people with FASD"); *see also Shore v. Davis*, 845 F.3d 627, 634 (5th Cir. 2017) (refusing to expand *Atkins* to include brain injury). The Eleventh Circuit has also rejected a claim seeking to expand *Atkins* based on a diagnosis of fetal alcohol effects in an unpublished opinion. *Kearse v. Sec'y, Fla. Dep't of Corr.*,2022 WL 3661526 (11th Cir. Aug. 25, 2022), *cert. denied*, *Kearse v. Dixon*, 143 S.Ct. 2439 (2023) (No. 22-6868).

Nor is there any conflict with the state courts of last resort. As the Mississippi Supreme Court recently observed, "no court has ever held" that Fetal Alcohol Spectrum Disorder (FASD) is the functional equivalent of intellectual disability. *Garcia v. State*, 356 So.3d 101, 113 (Miss. 2023). Opposing counsel cites to no appellate case—federal or state—expanding *Atkins* to any other diagnosis. There is no conflict between the

Florida Supreme Court and the other state supreme courts.

There is no conflict between the Florida Supreme Court's decision and that of the federal circuit courts or the state courts of last resort. Because there is no conflict among the lower appellate courts, review of this question should be denied.[2]

Because there are two independent and adequate state law grounds, as well as there being no conflict with this Court's jurisprudence or among the lower appellate courts, review of this question should be denied.

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[2] Opposing counsel refers in passing to an equal protection argument in the petition. Pet. at 18, 20-21, 22. But the equal protection aspect of the claim was not properly raised in state court, as required by Florida's rules of court. Fla. R. Crim. P. 3.851(e)(1); Fla. R. Crim. P. 3.851(e)(2)(A); Fla. R. Crim. P. 3.851(h)(5)). And the equal protection claim was not addressed by the Florida Supreme Court in its opinion. Furthermore, the equal protections argument is not properly before this Court either under this Court's rules. Sup. Ct. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). The equal protection issue was not raised as part of the question presented in the petition filed in this Court. For both reasons, the equal protection argument should not be considered by this Court.

ISSUE II

Whether this Court Should Grant Review of a Decision of the Florida Supreme Court Rejecting a Claim that the Eighth Amendment Requires Jury Sentencing in Capital Cases.

Petitioner Zack also seeks review of the Florida Supreme Court's decision rejecting a claim that the Eighth Amendment mandates unanimous jury sentencing in capital cases. Pet. at 28. The Florida Supreme Court found the Eighth Amendment claim to be both untimely and procedurally barred. Both findings are independent and adequate state law grounds precluding review in this Court. Furthermore, it is the Sixth Amendment right-to-a-jury-trial provision that governs the jury's role in sentencing, not the Eighth Amendment. As this Court recently explained in *McKinney v. Arizona*, 140 S.Ct. 702 (2020), a jury in a capital case is required to find one aggravating circumstance but a jury is not required to weigh the aggravation against the mitigation or to make the ultimate sentencing decision. Even viewing the matter as an Eighth Amendment issue, there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case. This Court's long-standing precedent is that the Eighth Amendment does not require jury sentencing in capital cases. *Spaziano v. Florida*, 468 U.S. 447 (1984); *Harris v. Alabama*, 513 U.S. 504 (1995). And this Court recently denied review of this same question in the Florida capital case of *Dillbeck v. Florida*, 143 S.Ct. 856 (2023) (No. 22-6819). Nor is there any significant conflict between the Florida Supreme Court's decision in this case and that of the lower appellate courts. Therefore, review of this question should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court affirmed the postconviction court's summary denial of the claim that the Eighth Amendment requires unanimous jury sentencing in capital

cases. *Zack v. State*, 2023 WL 6152489, at *10-*12 (Fla. Sept. 21, 2023). The Florida Supreme Court found the Eighth Amendment claim to be untimely. *Id.* at *10-*11. The Florida Supreme Court noted that the claim did not fall within either of the exceptions in the rule of court regarding timeliness of postconviction claims because it was not a claim of newly discovered evidence or a claim of a new retroactive fundamental constitutional right. *Id.* at *10 (citing Fla. R. Crim. P.3.851(d)(2)(A)–(C)). The Florida Supreme Court determined that the claim presented "nothing constituting an exception to the one-year timeframe" of the rule. *Id.* at *10.

The Florida Supreme Court also found the Eighth Amendment claim to be procedurally barred. *Zack*, 2023 WL 6152489, at *11. The Court noted that any claim based on *Trop v. Dulles*, 356 U.S. 86 (1958), or any attack on *Spaziano* could have been raised in his direct appeal in 2000, but were not. *Id.* at *11. The Florida Supreme Court also noted that any claim that jury sentencing in capital cases was the norm at the time of the adoption of the Eighth Amendment in 1791 could have also been raised in the direct appeal in 2000 as well.

The Florida Supreme Court also concluded that the Eighth Amendment jury sentencing claim was meritless under its existing precedent of *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023). *Zack*, 2023 WL 6152489, at *11. The Court explained that in *Dillbeck*, it had noted that this Court rejected this "exact" argument in *Spaziano* and that *Spaziano* was "still good law" on that point. *Id.* at *11. The Florida Supreme Court also relied on its decision in *State v. Poole*, 297 So.3d 487, 504 (Fla. 2020), which had explained that both *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 577 U.S. 92 (2016), were Sixth Amendment cases, not Eighth Amendment cases. *Id.* The Florida Supreme Court clarified that neither *Ring* nor *Hurst* had anything "to do with jury sentencing" in capital cases. *Id.* (citing *Poole*, 297 So.3d at 504 (quoting *Ring*, 536 U.S. at 612, (Scalia, J., concurring)). The Florida Supreme Court also relied on *Harris*

v. Alabama, 513 U.S. 504, 515 (1995). *Zack*, 2023 WL 6152489, at *11. The Florida Supreme Court stated that it was bound by this Court's decision in *Spaziano* and *Harris*. *Id.* at *11. The Florida Supreme Court concluded that the Eighth Amendment did not require a unanimous jury recommendation of death. *Id.*

Independent and adequate state law grounds

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that it lacks jurisdiction over a case if a state court's decision rests upon two grounds: a state law ground and a federal ground, provided the state law ground is independent and adequate itself. *Id.* at 1038, n.4 (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210(1935)). Provided the state law is not "interwoven" with federal law, this Court's jurisdiction "fails." *Id.* (citing *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243U.S. 157, 164 (1917)); *see also Foster v. Chatman*, 578 U.S. 488, 497 (2016) (noting that this Court lacks jurisdiction to review a state court judgment if that judgment rests on state law citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

The Florida Supreme Court found the Eighth Amendment claim to be both untimely and procedurally barred. *Zack*, 2023 WL 6152489, at *10-*11. The Florida Supreme Court was interpreting a Florida rule of court to determine whether the successive postconviction claim was untimely and to determine whether the claim met any of the exceptions in that state rule of court. There is no federal constitutional aspect to such determinations. Neither the determination of untimeliness nor the determination of being procedurally barred was interwoven with federal constitutional law. Both of these state law determinations are independent and adequate grounds

to deny review.

Opposing counsel asserts that this case is a good vehicle to address the continuing viability of *Spaziano* based on the Florida Supreme Court's statement that it was bound by this Court's holding in *Spaziano*. Pet. at 39; *Zack*, 2023 WL 6152489, at *11 ("Because the Supreme Court's Eighth Amendment precedent to which we are bound does not require a unanimous jury recommendation for death during the penalty phase, the postconviction court properly found this claim to be meritless"). Opposing counsel argues that this statement means that there is no independent and adequate state law grounds involved. But the Florida Supreme Court's statement explicitly involved the merits of the claim. The Florida Supreme Court's statement did not involve the determinations of timeliness or procedural bars, both of which are questions of state law. And therefore, this case is actually a poor vehicle.[3]

The Sixth Amendment, not the Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment; it does not address a jury's proper role in capital sentencing. The Eighth Amendment does not speak to what findings a penalty phase jury must make regarding the death sentence. It is the Sixth Amendment right-to-a-to-jury-trial provision that applies to those types of issues. As the Nebraska Supreme Court observed, the Eighth Amendment is not even "pertinent" to the issue of whether a panel of judges may make the ultimate sentencing decision in a capital case. *State v. Trail*, 981 N.W.2d 269, 310 (Neb. 2022).

When a specific constitutional provision applies, this Court employs that

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[3] This case is a poor vehicle for another reason as well. Even if this Court were to overrule *Spaziano* and *Harris*, the new rule requiring jury sentencing in capital cases would not apply retroactively to Zack. Zack's sentence became final in 2000. Any such new rule would not be retroactive in federal court under *Teague v. Lane*, 489 U.S. 288 (1989). *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021) (abolishing the watershed exception); *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (stating that *Ring v. Arizona* was "properly classified as procedural" and holding *Ring* was not retroactive).

provision rather than a more general or inapplicable provision.[4] The Sixth Amendment, not the Eighth Amendment, governs this question.

No conflict with this Court's jurisprudence

There is no conflict between this Court's Sixth Amendment or Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case.

As a Sixth Amendment claim, it is meritless under this Court's recent decision in *McKinney v. Arizona*, 140 S.Ct. 702 (2020). As this Court recently explained, the Sixth Amendment right-to-a-jury trial provision only requires jury findings regarding the aggravating circumstances, not perform the weighing or make the final decision. This Court stated that capital defendants are entitled to a jury determination of at least one aggravating circumstance for the defendant to be eligible for a death sentence. *Id.* at 705, 707. But the *McKinney* Court also explained that defendants are not constitutionally entitled to a jury determination of weighing or to a jury determination of the "ultimate sentencing decision." *Id.* at 707. This Court stated that "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Id.* at 708. Neither *Ring v. Arizona*, 536 U.S. 584 (2002), nor *Hurst v. Florida*, 577 U.S. 92 (2016), require jury weighing of the aggravation against the mitigation. *McKinney*, 140 S.Ct. at 708. Constitutionally, judges, including appellate judges, may perform the weighing function and may also be ultimate sentencer.

This Court has repeatedly observed that it is aggravators that are elements of the greater offense of capital murder. *Ring*, 536 U.S. at 609 (stating that because

[4] *Graham v. Connor*, 490 U.S. 386, 395 (1989) (explaining that when a particular constitutional amendment provides an explicit textual source of constitutional protection against conduct, then that specific amendment governs); *United States v. Lanier*, 520 U.S. 259, 272, n.7 (1997) (stating that if a claim is covered by a specific constitutional provision, the claim must be analyzed under that specific provision, not under the rubric of substantive due process); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (stating that a general constitutional provision applies only if the issue is not covered by a more specific constitutional provision).

aggravating factors "operate as the functional equivalent of an element of a greater offense" of capital murder, "the Sixth Amendment requires that they be found by a jury"); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion) (explaining, that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'" which "increases the maximum permissible sentence to death" and therefore, a jury, and not a judge, must find the existence of any aggravating circumstances beyond a reasonable doubt). So, because it is the aggravator that increases the penalty to death, it is only the aggravating factor that must be found by the jury, under this Court's Sixth Amendment jurisprudence.

The petition does not cite, acknowledge, or attempt to distinguish *McKinney*. Petitions for writ of certiorari that do not account for this Court's most relevant decisions do not warrant this Court's serious consideration.

The Sixth Amendment does not require jury sentencing in capital cases according to this Court's recent decision in *McKinney*. There is no conflict between this Court's Sixth Amendment jurisprudence and the Florida Supreme Court's decision in this case.

As an Eighth Amendment claim, it is meritless under this Court's decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Harris v. Alabama*, 513 U.S. 504 (1995). In *Spaziano*, this Court rejected an Eighth Amendment challenge to a judge overriding a penalty phase jury's recommendation of a life sentence. *Id.* at 459-465. This Court was not persuaded that a judge having the ultimate responsibility to impose a death sentence in a capital case was "so fundamentally at odds with contemporary standards of fairness and decency" that Florida must be required to "give final authority to the jury to make the life-or-death decision." *Id.* at 465. This Court concluded that "there is no constitutional imperative that a jury have the responsibility of deciding whether

the death penalty should be imposed." *Id.* The dissent in *Spaziano* would have required jury sentencing in capital cases, as a matter of Eighth Amendment law, believing that a jury was more attuned to the community's moral sensibility; more accurately reflects the composition and experiences of the community as a whole; and were more likely to express the conscience of the community. *Spaziano*, 468 U.S. at 469 (Stevens, J., dissenting); *see also Hurst v. Florida*, 577 U.S. 92, 103 (2016) (Breyer, J., concurring) (expressing the view that the Eighth Amendment requires a jury, not a judge, make the decision to sentence a defendant to death citing *Ring*, 536 U.S. at 613 (Breyer, J., concurring) (quoting the dissent in *Spaziano*)).

And, in *Harris v. Alabama*, 513 U.S. 504 (1995), this Court held the Eighth Amendment does not require that a capital sentencing judge assign a capital jury's recommendation of a sentence any particular weight. This Court rejected the notion that any "specific method for balancing mitigating and aggravating factors" was "constitutionally required." *Id.* at 512. Nor did the Constitution require a State to ascribe any specific weight to any particular aggravating or mitigating factor. *Id.* This Court stated the "Constitution permits the trial judge, acting alone, to impose a capital sentence." *Id.* at 515.

While this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), overruled the Sixth Amendment aspects of *Spaziano*, it did not overrule the Eighth Amendment aspects of *Spaziano*. *Hurst*, 577 U.S. at 101. The *Hurst* Court overruled both *Spaziano* and *Hildwin v. Florida*, 490 U.S. 638 (1989), but only "to the extent" they allowed "a sentencing judge to find an aggravating circumstance." *Hurst*, 577 U.S. at 102; *see also State v. Poole*, 297 So.3d 487, 497 (Fla. 2020) (explaining that this Court retreated from the Sixth Amendment concept of aggravators being sentencing factors rather than elements of capital murder starting with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), then in *Ring v. Arizona*, 536 U.S. 584 (2002), and finally in *Hurst v. Florida*, 577 U.S.

92 (2016)); *Poole*, 297 So.3d at 500 (noting *Hurst v. Florida* "overruled *Spaziano* and *Hildwin* 'to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for the imposition of the death penalty'"and but noting that the United States Supreme Court did not address the Eighth Amendment arguments raised by the petitioner in its *Hurst* decision). Furthermore, this Court's decision in *Hurst* did not speak to the holding of *Harris v. Alabama* at all. Indeed, *Harris* was never even cited in the *Hurst* decision.

Spaziano remains good law regarding the issue of the Eighth Amendment not requiring jury sentencing in capital cases, just as the Florida Supreme Court concluded in this case. And the view that *Spaziano* remains good law was reinforced by the reasoning of this Court's recent decision in *McKinney*, albeit on Sixth Amendment grounds. *Spaziano* and *Harris* remain valid Eighth Amendment precedent which the Florida Supreme Court properly followed.

Opposing counsel relies on the fact that only six jurisdictions allow a death sentence to be imposed without requiring a unanimous jury to establish that unanimous jury sentencing in capital cases is the widespread practice in the United States. Pet. at 30-31. But jury sentencing in capital cases was the norm when *Spaziano* was decided in 1984, as well as when *Harris* was decided in 1995.

Opposing counsel insists that the decision to impose a death sentence "belonged" to the jury at the time of the founding of the nation in support of an argument that jury sentencing was part of the original understanding of the Eighth Amendment. Pet. at 35. But that statement is directly contrary to this Court's observation that at the time the "Eighth Amendment was adopted in 1791, the States *uniformly* followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses." *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (holding mandatory death sentences were unconstitutional) (emphasis added).

Mandatory death sentences were the norm from the founding until *Furman v. Georgia*, 408 U.S. 238 (1972). And it was only in the wake of *Furman* that mandatory death sentences were declared unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (holding a mandatory death sentence statute was unconstitutional even under a narrower definition of first-degree murder). Opposing counsel's argument is not historically accurate.

Furthermore, contrary to opposing counsel's basic assertion that jury sentencing was part of the original understanding of the Eighth Amendment, the original understanding of the Eighth Amendment was limited to bail, fines, and types of punishments. The drafters of the Eighth Amendment, who adopted the English phrasing, were "primarily concerned" with "proscribing tortures and other barbarous methods of punishment." *Gregg v. Georgia*, 428 U.S. 153, 170 & n.17 (1976) (plurality) (quoting *Furman v. Georgia*, 408 U.S. 238, 316-27 (1972) (Marshall, J., concurring)); *Baze v. Rees*, 553 U.S. 35, 97 (2008) (Thomas, J., concurring) (observing that evidence from the debates on the Constitution confirms that "the Eighth Amendment was intended to disable Congress from imposing torturous punishments."); *Glossip v. Gross*, 576 U.S. 863, 894-95 (2015) (Scalia, J. concurring) ("Historically, the Eighth Amendment was understood to bar only those punishments that added 'terror, pain, or disgrace' to an otherwise permissible capital sentence."). That the Eighth Amendment extends into other areas, such as to a jury's role in sentencing, is a modern invention flowing from the discussion of the dignity of man in *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). But it is openly acknowledged in the caselaw that that was not the original understanding of the Eighth Amendment. *See, e.g., Hall v. Florida*, 572 U.S. 701, 708 (2014) (stating that the Eighth Amendment is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane

justice" and the amendment's "protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.").

Opposing counsel points to the jury's power of nullification as support for the assertion that common law jury determined the sentence without even attempting to establish that it was even a common phenomena for a jury to acquit a defendant of a crime to avoid the death penalty. And regardless of the prevalence of such acquittals, a jury's power of nullification does not change the law. Mandatory death sentences imposed by the judge were the norm at the time the Eighth Amendment was adopted and for more than a century afterwards, not jury sentencing. Jury sentencing in capital cases was not the historical practice.

This Court recently denied review of this exact same Eighth Amendment question in a Florida capital case. *Dillbeck v. Florida*, 143 S.Ct. 856 (2023) (No. 22-6819). Much the same arguments made in the *Dillbeck* petition regarding this question are repeated in this petition.

There is no conflict with this Court's Sixth Amendment or Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case rejecting the claim that the Eighth Amendment requires unanimous jury sentencing in capital cases.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state court of last resort and the Florida Supreme Court's decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that

have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

Opposing counsel cites no federal circuit court case holding that jury sentencing in capital cases is constitutionally required by the Eighth Amendment. The federal circuit courts follow *McKinney*, *Harris*, and *Spaziano*. Indeed, in the wake of this Court's decision in *McKinney*, capital defendants do not even raise unanimous jury sentencing issues on appeal in the federal appellate courts. *Clark v. Comm'r, Ala. Dep't of Corr.*, 988 F.3d 1326, 1328, n.1 (11th Cir. 2021) (noting that the capital habeas petitioner abandoned his challenge to Alabama's death penalty statute and his 11-1 jury death recommendation on appeal after *McKinney* was decided), *cert. denied, Clark v. Hamm*, 142 S.Ct. 1134 (2022); *but see Davis v. Jenkins*, 79 F.4th 623 (6th Cir. 2023) (granting habeas relief in capital case regarding a Sixth Amendment jury sentencing issue) (petition for rehearing en banc pending).[5] The Eighth Amendment does not

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[5] Not only did the Sixth Circuit panel in *Davis* not account for this Court's decision in *McKinney* in any manner before concluding that the Ohio Supreme Court unreasonably applied *Ring v. Arizona*, but the panel also failed to account for the exception to *Apprendi* for prior convictions based on *Almendarez–Torres v. United States*, 523 U.S. 224 (1998). The aggravating factor that made Davis eligible for the death penalty was a prior conviction for second-degree murder to which Davis had entered a guilty plea years earlier. While capital defendants have a Sixth Amendment right to a jury finding of the aggravating factor that makes them eligible for the death penalty under *McKinney*, Davis himself had no such right due to his prior conviction under the *Almendarez–Torres* exception. A judge sitting alone may find the fact of a prior conviction. And while the *Almendarez–Torres* exception has been questioned, it is this Court's current precedent.

While the *Almendarez–Torres* exception may well be an "aberration" from common law practice when applied to contested prior convictions, it is a valid exception when applied to uncontested prior convictions involving pleas. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1253-54 (2018) (Thomas, J., dissenting). Pleas are a modern phenomena that were virtually unknown to the common law. *Brady v. United States*, 397 U.S. 742, 752 (1970) (upholding the constitutionality of plea bargaining). A plea is a waiver of jury trial rights for all time and for all purposes. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."); *Brady v. United States*, 397 U.S. 742, 748 (1970) (observing that a guilty plea is a grave and solemn act which reflects "defendant's consent that judgment of conviction may be entered without a trial" and holding that a plea is not rendered involuntary due to a subsequent change in the law). A defendants who enters a guilty plea permanently waives all jury trial rights including for future recidivist sentencing. Allowing a defendant to resurrect a right to a jury, that he had previously waived by entering a guilty plea, in the recidivist

require jury sentencing at all, much less unanimous jury sentencing. *Barksdale v. Att'y Gen. of Ala.*, 2020 WL 9256555, at *14 (11th Cir. June 29, 2020) (rejecting an Eighth Amendment challenge to Alabama's death penalty scheme because it permitted non-unanimous jury recommendations relying on *McKinney*).

Nor is there any conflict between the Florida Supreme Court's decision in this case and any decision of any other state supreme court. Various state supreme courts have followed this Court's recent decision in *McKinney* explaining that the ultimate sentencing decision in a capital case may be made by the judge. *See, e.g., State v. Trail*, 981 N.W.2d 269, 309 (Neb. 2022) (holding Nebraska's sentencing scheme, which leaves to the three-judge panel the ultimate life-or-death decision as well as the determinations of whether the aggravating circumstances justify the death penalty and weighing the aggravation against the mitigation and concluding judge sentencing in capital cases "does not violate the Sixth Amendment right to a jury trial" citing *McKinney*); *State v. Whitaker*, 196 N.E.3d 863 (Ohio 2022) (rejecting an argument that a capital defendant is entitled to a jury determination of the mitigation and weighing citing *McKinney*); *People v. McDaniel*, 493 P.3d 815, 851, 859 (Cal. 2021) (stating a penalty phase jury's sentencing decision "is not a traditional factual determination in any relevant sense" and observing that under *McKinney*, the Constitution does not require a jury to perform the weighing or they make the ultimate sentencing decision in a capital case), *cert. denied*, *McDaniel v. California*, 142 S.Ct. 2877 (2022) (No.

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setting would amount to creating a doctrine of unwaiver by subsequent criminal conduct. Defendants should not be permitted to unilaterally vacate their prior plea simply by engaging in the conduct of committing another crime. Such a doctrine would not only undermine waiver jurisprudence but would additionally strip the prosecution of some of the benefit of its original bargain because it would be required, years later, to prove a case it bargained to not to have to prove. The *Almendarez–Torres* exception is not questionable, regardless of common law practice, when the prior conviction is the result of a plea.

The panel in *Davis* failed to follow this Court's decisions in *McKinney* and *Almendarez–Torres* and worse, did so in an AEDPA case. *Davis* is incorrectly decided. One case pending hearing is not sufficient to establish a significant conflict among the federal circuit courts and certainly is not a reason to grant review of this petition when this Court has already decided the issue in *McKinney*.

21-7455). Opposing counsel does not even attempt in the petition to establish any conflict between the Florida Supreme Court's decision and that of any other state supreme court after this Court's observation that States that leave the "ultimate life-or-death decision to the judge may continue to do so." *McKinney*, 140 S.Ct. at 708. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort.

Because there are two independent and adequate state law grounds, as well as the claim being meritless under this Court's existing precedent of *McKinney*, *Spaziano* and *Harris*, review of this question regarding jury sentencing in capital cases should be denied.

In sum, the petition presents two questions that involve time and procedural bars that are matters of state law precluding review and that presents two questions that do not involve any conflict with this Court's caselaw or significant conflict among the lower courts.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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