No. 23A262
CAPITAL CASE

EXECUTION SCHEDULED FOR
TUESDAY, OCTOBER 3, 2023, AT 6:00 P.M.

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

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

On September 26, 2023, Zack, represented by Capital Collateral Regional Counsel–North (CCRC–N), filed, in this Court, a petition for writ of certiorari seeking review of a decision from the Florida Supreme Court in this active warrant case. *Zack v. State*, 2023 WL 6152489 (Fla. Sept. 21, 2023) (SC2023-1233). The petition raised two issues: (1) a claim that the prohibition on executing intellectually disabled capital defendants, established in *Atkins v. Virginia*, 536 U.S. 304 (2002), should be expanded to include Fetal Alcohol Syndrome (FAS), because many experts consider a diagnosis

of FAS to be functionally identical to a diagnosis of intellectual disability; and (2) a claim that the Eighth Amendment requires unanimous jury sentencing in capital cases. CCRC–N also filed an application for a stay of the execution. Zack is seeking a stay of execution for this Court to decide his pending petition for writ of certiorari. This Court, however, should simply deny the petition and then deny the stay.

Stays of execution

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Equity must also consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). This Court has highlighted the State's and the victims' interest in the timely enforcement of the death sentence. *Bucklew v.Precythe*, 139 S.Ct. 1112, 1133-34 (2019). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Bucklew*, 139 S.Ct. at 1134. The Court stated that courts should "police carefully" against last minute claims being

used "as tools to interpose unjustified delay" in executions. *Id.* at 1134. This Court has also stated that last-minute stays of execution should be the "extreme exception, not the norm." *Id.*

To be granted a stay of execution, Zack must establish three factors: (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal if review was granted; *and* (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (emphasis added). Zack must establish all three factors.

Probability of this Court granting certiorari

As to the first factor, there is little chance that four justices of this Court would vote to grant certiorari review of either of the two questions presented in the petition. In state court, Zack raised a claim that *Atkins* should be expanded to include a diagnosis of Fetal Alcohol Syndrome (FAS). But the Florida Supreme Court found the claim to be both untimely and procedurally barred as a matter of state law. *Zack*, 2023 WL 6152489, at *7-*9. Zack also raised a claim that the Eighth Amendment mandates unanimous jury sentencing in all capital cases. But the Florida Supreme Court also found that claim to be both untimely and procedurally barred. *Zack*, 2023 WL 6152489, at *10-*11. This Court does not grant review of issues that are matters of state law that are not interwoven with federal law. *Michigan v. Long*, 463 U.S. 1032 (1983);

Foster v. Chatman, 578 U.S. 488, 497 (2016).[1]

Opposing counsel insists that because the expansion-of-*Atkins* claim is a categorical bar, it is "not subject to any procedural impediments." Motion to stay at PDF pg 4. But the expansion-of-*Atkins* claim, even though involving a categorical bar, is subject to both time and procedural bars, just as the Florida Supreme Court concluded. There is no case from this Court holding that categorical bars cannot be forfeited and certainly no case from this Court holding that categorical bars cannot be forfeited as a matter of state law. Nor is there any case from this Court holding, or even hinting, that Eighth Amendment claims based on *Trop v. Dulles*, 356 U.S. 86 (1958), cannot be forfeited.

Even claims involving the most basic and fundamental of constitutional rights can be forfeited. *Peretz v. United States*, 501 U.S. 923, 936 (1991) (stating the "most basic rights of criminal defendants are similarly subject to waiver" citing cases). And, at the very least, this issue regarding forfeiture of the issues would create a threshold issue, making it even less likely that this Court would grant review of either question

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[1] Opposing counsel also refers to an equal protection aspect to the expansion-of-*Atkins* claim in the motion to stay. Motion to stay at PDF pg 3. But the equal protection aspect of the claim was not properly raised in state court as required by Florida's rules of court, as the State pointed out to the Florida Supreme Court in its answer brief. Fla. R. Crim. P. 3.851(e)(1); Fla. R. Crim. P. 3.851(e)(2)(A); and Fla. R. Crim. P. 3.851(h)(5); *see also Zack v. State*, State's answer brief at 61-63, n.16. The equal protection claim was not explicitly addressed by the Florida Supreme Court in its opinion. Alternatively, under this Court's rules, the equal protections aspect of the expansion-of-*Atkins* claim is not properly before this Court either. The equal protection issue was not raised as part of the question presented in the petition. Sup. Ct. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). For these reasons, the equal protection arguments made in the motion to stay should not be considered by this Court.

presented.

Moreover, there is no conflict between this Court's jurisprudence and the Florida Supreme Court's opinion regarding either question presented which is a major consideration in this Court granting review. The State's brief in opposition, which is being filed simultaneously with the State's response to the motion to stay, contains a more detailed explanation of why this Court should deny review of both questions raised in the petition.

And this Court recently denied review of a petition raising these same two questions in the active warrant capital case of *Dillbeck v. Florida*, 143 S. Ct. 856 (2023) (No. 22-6819). The arguments being made to this Court in support of the petition in this case differ little from those made to this Court in support of the petition in *Dillbeck*.

There is little probability that the Court would vote to grant certiorari review of either of the two questions presented in the petition. Zack fails the first factor, which is alone sufficient to deny the motion for a stay.

Significant possibility of reversal

As to the second factor, there is not a significant possibility of reversal on either issue. There is no real possibility of this Court expanding *Atkins* to include a diagnosis of FAS. Zack would not succeed in having this Court wholesale defer to the views of the psychiatric community on the matter of whether *Atkins* should be expanded to include other types of diagnoses. While he asserts that the psychiatric community now

views FAS as functionally identical to intellectual disability, courts determine Eighth Amendment law, not unelected and unrepresentative experts. As Justice Alito noted, joined by Chief Justice Roberts, Justice Scalia and Justice Thomas, there are serious practical problems with relying on the views of professional associations in Eighth Amendment cases including that the views of such associations often change which leads to "instability" in the law and "protracted litigation," including about the degree of agreement that exists among the relevant community about the diagnosis. *Hall v. Florida*, 572 U.S. 701, 731-32 (2014) (Alito, J., dissenting). If this Court were to permit the reach of *Atkins* to be based on the ever-changing views of the psychiatric community, the law regarding which diagnoses will preclude a death sentence would change with each revision of the Diagnostic and Statistical Manual of Mental Disorders (DSM).

Moreover, the views of experts do *not* reflect the views of the people or the views of the nation's elected legislators for purposes of determining the current standards of decency. *Miller v. Alabama*, 567 U.S. 460, 510-11 (2012) (Alito, J., dissenting) (noting the philosophical basis for the evolving-standards-of-decency test, first established in *Trop v. Dulles*, 356 U.S. 86 (1958), was "problematic from the start" but, at least, it is an objective test when based on the views of state legislatures and Congress). *Atkins* itself said the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *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 enacted statutes prohibiting a death sentence for intellectually disabled defendants). But all of those statutes limited the prohibition to a diagnosis of intellectual disability. 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 significant possibility of this Court expanding *Atkins* to include a diagnosis of FAS.

There is also no significant possibility of this Court agreeing that the Eighth Amendment requires jury sentencing in capital cases. In *Spaziano v. Florida*, 468 U.S. 447 (1984), this Court refused to interpret the Eighth Amendment to require jury sentencing, reasoning that individualized sentencing did not require the jury's participation. *See also Harris v. Alabama*, 513 U.S. 504 (1995) (holding the Eighth Amendment does not require a judge to give a jury's recommendation in a capital case any particular weight).

This Court, in *Hurst v. Florida*, 577 U.S. 92 (2016), did not address the Eighth Amendment claims raised by the petitioner and therefore, *Hurst* did <u>*not*</u> overrule the Eighth Amendment part of *Spaziano*. The *Hurst* Court overruled *Spaziano* only "to the extent" it allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding." *Hurst*, 577 U.S. at 102. *Hurst* was a Sixth Amendment case, not an Eighth Amendment case. The Eighth Amendment holding of *Spaziano* remains good law in the wake of *Hurst*, as the Florida Supreme Court

properly concluded.

Furthermore, this Court recently explained that the only finding a capital jury must make in a capital case is the finding of the aggravating factor that makes the defendant eligible for a death sentence. *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The *McKinney* court noted that "States that leave the ultimate life-or-death decision to the judge may continue to do so." *Id.* at 708. *McKinney* was decided as a matter of the Sixth Amendment's right-to-a-jury-trial provision because it is the Sixth Amendment that actually applies to jury claims. This Court would have to recede from both *Spaziano* and *Harris*, as well as retreat from much of the reasoning of its recent decision in *McKinney,* to hold the Eighth Amendment requires unanimous jury sentencing in capital cases.

There is not a significant possibility of reversal on the merits regarding either of the two questions presented in the petition. So, Zack fails the second factor as well.

Irreparable injury

As to the third factor of irreparable injury, it is often viewed as a given in a capital case that an execution will cause irreparable harm but the harm is the inherent nature of a death sentence. For that reason, this truism by itself is not a critical factor in consideration of a stay of execution. The factors for granting a stay due to a petition pending in this Court are taken from the standard for granting a stay for normal civil litigation. *Barefoot*, 463 U.S. at 895-96 (citing *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell. J., in chambers). But

Times-Picayune Publishing was a First Amendment prior restraint case seeking a stay for this Court to review a lower court's order restricting media coverage of a racially-charged, highly-publicized rape and murder trial. This factor is not a natural fit in a capital case. Because actual finality of the sentence in a capital case is the execution, there must be more than the execution itself to establish this factor in an active warrant capital case.

But Zack does not provide any special argument in support of this factor. Instead, Zack's argument consists largely of boilerplate language applicable to all capital cases with an active warrant. Motion to stay at PDF pg 4 (quoting *Wainwright v. Booker*, 473 U.S. 935, 937 n.1 (1985) (Powell, J., concurring)). Because Zack points to no particular arguments in support of this factor, he fails the third factor too.

But even assuming the third factor as a given, Zack does not meet the other two factors for being granted a stay of execution. Zack fails at least two of the three factors when he must establish all three factors and, therefore, the motion for a stay of the execution should be denied.

Accordingly, the application for stay of execution should be denied.

Respectfully submitted,

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