No. 23A262

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DUANE ZACK, III,

Petitioner,

v.

STATE OF FLORIDA, AND SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY TO RESPONSE TO APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR TUESDAY, OCTOBER 3, 2023, AT 6:00 P.M.

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Respondent's position that this Court should deny Mr. Zack a stay of execution is premised upon mischaracterizations of Mr. Zack's presented claims, a distortion of facts supporting those claims, and misapprehension of the applicable law. Mr. Zack submits that he has shown that a stay of his execution is appropriate.

I. The first stay factor: reasonable probability of certiorari grant

Mr. Zack's exemption-from-execution claim does not require an *Atkins* extension. Instead, Mr. Zack's claim centers around the facts that (1) there exists a new medical consensus that FAS is a uniquely intellectual disability-equivalent disorder; (2) this new consensus makes plain that IQ scores alone cannot function as a basis to preclude an individual from receiving *Atkins* protection; and (3) by virtue of his FAS, he already meets the criteria for *Atkins* relief in light of *Hall*.

Further, the claim is not subject to a procedural or time bar. This is because Mr. Zack has already been diagnosed with intellectual disability and timely raised it at every available opportunity under the prior limits of law and science. The sole basis upon which the Florida courts have previously rejected this claim is that his IQ exceeded a strict cutoff. The new medical consensus regarding IQ and the effects of FAS makes clear that IQ scores fail to accurately reflect the intellectual and adaptive functioning of individuals with FAS. Reliance on IQ scores to determine disability status, services, and protections is considered outmoded. This new scientific consensus has fundamentally changed the lens through which Mr. Zack's Eighth Amendment exemption claim must be viewed. No procedural bar applies.

As to Mr. Zack's jury unanimity claim, no procedural bar is applicable to this evolving standards of decency claim. And, this Court declining to reach the question in *Dillbeck* is of no consequence. Florida's unconstitutional outlier status compared to the vast majority of the nation has only become more pronounced. In late February of this year, when Mr. Dillbeck sought this Court's review on the issue, 1.7% of

individuals executed outside of Florida and Alabama were sentenced by a non-unanimous jury, not including those who elected to waive a jury. In a matter of months, that percentage has decreased to 1.3%. This demonstrates the continuing evolution of social practice, and makes Florida's outlier status even more stark today.

There is a reasonable probability that four Justices, when evaluating Mr. Zack's claims as he properly presented them, will find the issue sufficiently meritorious to grant certiorari review.

II. The second stay factor: significant possibility of reversal

Respondents' argument that "there is not a significant possibility of reversal on either issue," is premised upon its mistaken contention that Mr. Zack is seeking an *Atkins*-extension for FAS. (BIO at 5). As stated *supra*, the crux of Mr. Zack's claim is that he by virtue of his FAS, he *already* meets the criteria for *Atkins* relief in light of *Hall*. Mr. Zack's argument has never been that he is seeking to expand *Atkins*. As a result, Respondents' contention that "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" (BIO at 6) is inapposite.

As to Mr. Zack's jury unanimity claim, Respondents' contention is that since this Court has refused to interpret the Eighth Amendment to require jury sentencing, there is no significant possibility that this Court will overrule *Spaziano*. (BIO at 7). This argument fails to acknowledge the indisputable national consensus in favor of unanimous jury sentences. Among states that will legalize the death penalty, the overwhelming majority of legislatures require unanimous sentencing. Only Alabama

and Florida maintain the practice of executing people based on non-unanimous jury votes. Florida and Alabama are extreme outliers in the United States because both states do not require unanimous jury sentencing and actively execute people with non-unanimous jury votes.

III. The third stay factor: irreparable injury

Respondents' contention that this factor is not a "natural fit" for capital cases because execution is "the inherent nature of a death sentence" (BIO at 8-9), is invalidated by the fact that the stay in *Barefoot v. Estelle* was an application for a stay of execution. 463 U.S. 880 (1983). To accept Respondents' unsubstantiated allegation that death-sentenced individuals must satisfy a more onerous specificity standard than individuals seeking a stay in other contexts would weaponize the severity of this particular injury—an individual's death—and pervert this Court's precedent.

IV. Conclusion

Mr. Zack has demonstrated that his Eighth Amendment claims related to (1) categorical exemption from execution, and (2) unanimous jury sentencing, satisfy this Court's three-factor test to grant a stay of execution. *See Barefoot*, 463 U.S. at 895.

Respectfully submitted,

Stacy R. Biggart
Fla. Bar No. 0089388
Special Assistant CCRC-North
20 SE 2nd Place, #407
Gainesville, Florida 32601
(850) 459-2226
stacybiggart@gmail.com

*Dawn B. Macready
Fla. Bar No. 0542611
Chief Assistant CCRC-North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org
*COUNSEL OF RECORD