No. 23-5653

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

REPLY TO BRIEF IN OPPOSITION

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

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I. Mr. Zack's Categorical Exemption from Execution Under the Eighth and Fourteenth Amendments.

Mr. Zack's petition for writ of certiorari set forth the merits of his claim, as well as the reasons why no procedural or time bar applies.

In opposition, Respondents raise the following arguments: (1) the findings by the Florida Supreme Court -- that Mr. Zack's "expansion-of-*Atkins* claim" is both untimely and procedurally barred -- is based on independent and adequate state law grounds; (2) there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case; and (3) there is no conflict between the lower appellate courts or any state court of last resort and the Florida Supreme Court's decision in this case. These arguments misconstrue several key points.

This reply addresses Respondents' most salient misapprehensions and clarifies that the issue presented in Mr. Zack's petition is appropriately within this Court's purview.

A. Mr. Zack is not asking this Court to extend *Atkins*.

Mr. Zack's argument has always been that (1) there exists a new medical consensus that FAS is a uniquely ID-equivalent disorder; (2) this new consensus changes the lens through which his Eighth Amendment claim must be viewed; and (3) by virtue of his FAS, he already meets the criteria for *Atkins* relief in light of *Hall*. This argument does not require *Atkins* to be extended. In order to grant Mr. Zack the relief he seeks, this Court need not even go so far as to recognize that all individuals with FASD, or even all individuals with the much rarer condition of FAS, meet the

Atkins criteria -- because Mr. Zack actually has a precise diagnosis of intellectual disability. (PCR3. 158-67).

Respondents cite a number of cases denying the extension of *Atkins* protection to other mental health conditions. But because Mr. Zack has a diagnosis of intellectual disability, these cases are inapposite. Most notably, Respondents claim Mr. Zack's case involves the "exact same question" as was recently denied review in *Dillbeck v. Florida*, 143 S. Ct. 856 (2023). However, Mr. Dillbeck did not have an intellectual disability diagnosis and had never attempted to litigate intellectual disability. Similarly, Respondents' discussion of pre-*Atkins* state statutes (BIO at 13) is irrelevant.

Mr. Zack has always been intellectually disabled; that is not new. What is new is the scientific understanding and medical consensus that Mr. Zack's IQ score, particularly when viewed in conjunction with his FAS, cannot be used to preclude him from the legal protections that diagnosis warrants.

B. The Florida Supreme Court's findings were not based on independent and adequate state grounds.

Respondents assert that "the Florida Supreme Court relied exclusively on state law cases to determine the claim was procedurally barred," and that "[n]either the determination of untimeliness nor the determination of being procedurally barred was interwoven with federal constitutional law." (BIO. 10). These jurisdictional arguments fail for two overarching reasons: (1) the procedural bars imposed by the Florida Supreme Court are incorrect and thus inadequate to uphold the judgment (Pet. 23-28), and (2) those procedural rulings resulted from the Florida Supreme

Court's failure to follow this Court's mandate in *Hall* and *Moore v. Texas*, 581 U.S. 1 (2017), that the views of the medical community must be considered in taken into consideration in determining whether Mr. Zack is categorically exempt from execution. (Pet. 18-23). Thus, those rulings are inextricably bound with federal law.

Mr. Zack has a diagnosis of ID from a qualified neuropsychologist. To the extent possible under the limits of prior legal and scientific standards, he has timely raised the issue of his entitlement to exemption from execution under *Atkins* at every available opportunity. However, he has been barred at each turn for a single reason: his IQ exceeded Florida's strict numerical cutoff.

Now, a new consensus establishes that these cutoffs are scientifically outmoded and unreliable—particularly as they pertain to an individual with FAS. This consensus "reflects a paradigm shift from a 'disability' approach, which emphasizes arbitrary psychometric (i.e., IQ) cutoffs, to a more clinical and qualitative 'disorder' approach" to FASD. (PCR5. 329). "[T]he arbitrary 70–75 cutoff often used by the legal system does not protect individuals with FASD" because "individuals with FASD who have IQs above 70 are actually *more* likely to have trouble with the law than those with an IQ below 70." (PCR5. 329).

The Florida Supreme Court's application of procedural bars not only permits, but emphasizes the need for, this Court's intervention. Without it, Mr. Zack and other diligent individuals will be foreclosed from bringing meritorious claims that evolving standards of decency warrant their exemption from execution. Florida will go

unchecked in its failure to comport with this Court's Eighth Amendment jurisprudence. This cannot be.

C. The Florida Supreme Court's decision presents a conflict worthy of this Court's review

Respondents incorrectly argue that "there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case," and that "[t]here is certainly no conflict with *Atkins* itself." (BIO. 11). But this Court has made clear that "intellectual disability is a condition, not a number[,]" *Hall v. Florida*, 572 U.S. 701, 721 (2014), and a state court's refusal to consider the opinions of the medical community "conflicts with the logic of *Atkins* and the Eighth Amendment." *Id.* at 720-21. The Florida Supreme Court's decision directly contravenes that precedent. Mr. Zack's previous attempts to show that he is exempt from execution have all been denied based on a strict IQ score cutoff. Now, based on a new medical consensus, Mr. Zack has provided further evidence to show that his intellectual disability is not confined to a number. And, again, the Florida courts have ignored it.

1. Respondents misstate the science regarding FAS

In addition to overlooking the critical fact that Mr. Zack has an intellectual disability diagnosis, Respondents claim, without any supporting citations, that "[i]ntellectual disability and Fetal Alcohol Syndrome are certainly not equivalent in terms of objectivity and reliability of the diagnosis," and that "IQ tests are objective and result in numerical scores," while "FAS [is] highly subjective." (BIO. 11). These statements are false.

FAS is a reliable diagnosis with objective diagnostic criteria and—unlike intellectual disability—visible physical features:

> In 1996, the Institute of Medicine (IOM) published a set of medical diagnostic criteria that specified five conditions under the FASD umbrella…Of the five IOM diagnoses, only FAS had the entirety of visible physical features (facial abnormalities and growth deficiency) as well as brain damage…Following Mr. Zack's trial in 1997, several diagnostic systems were published in the United States that clarified, specified, and refined the IOM diagnostic criteria[.]

(PCR5. 301). Moreover, by the time the cognitive effects of FAS (ND-PAE) were included in the DSM-5 as a condition for further study, the underlying research "had a 40-year history of convergent findings – a distinction far exceeding the diagnostic criteria for nearly all other conditions in the DSM-5, including ID."[1] (PCR5. 303).

In addition to verifiable physical markers, the deficits and support needs in FAS are "not only similar to but *identical* to those seen in ID" and "the deficits are quantifiable and, like IQ, can be measured in terms of standard deviations from the mean[.]" (PCR5. 305).

By contrast, the scientific and medical communities are clear that strict reliance on numerical IQ scores is "outmoded" (PCR5. 327); less diagnostically useful related to intellectual disability than other objective measurements; (PCR5. 327–28, 305) and unreliable in evaluating the intellectual and adaptive capacities of individuals with FAS (PCR5. 305). *See also id*. at 307) ("the presence of FASD alone negatively impacts the validity of an IQ test score, because individuals with FASD

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[1] This lengthy and studied history regarding FAS should assuage any of Respondent's concerns that this Court "should not follow the latest expert trends" in determining Mr. Zack's Eighth Amendment claim. (BIO at 12).

function—both intellectually and adaptively—at a significantly lower level than their IQ-matched peers.").

Reliable, objective clinical testing supports Mr. Zack's precise intellectual disability diagnosis. Similarly reliable scientific measures support the medical community's consensus that his comorbid condition of FAS is an intellectual disability-equivalent condition.

2. The Florida Supreme Court's entire framework for evaluating Mr. Zack's exemption claim conflicts with this Court's Eighth Amendment jurisprudence

In rejecting Mr. Zack's claim that he is categorically exempt from execution pursuant to the Eighth Amendment as articulated in *Atkins* and its progeny, the Florida Supreme Court stated that pursuant to Florida's conformity clause:[2]

> This Court must interpret Florida's prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court…This means that the Supreme Court's interpretation of the Eighth Amendment *is both the floor and the ceiling for protection from cruel and unusual punishment in Florida*….[T]his Court cannot interpret Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment….Because Florida Courts *lack the authority* to extend *Atkins* to Zack, who is not intellectually disabled as provided in *Atkins*, [ ] the postconviction court properly denied this claim as meritless.

FSC Order at 27-28 (citations and quotations omitted) (emphases added).

The Florida Supreme Court's reliance on the conformity clause expressly abdicated any independent consideration of Mr. Zack's *Atkins* claim. This repudiates

[2] The conformity clause is found in article I, section 17 of the Florida Constitution. It is anomalous—the only one of its kind in a state constitution.

a critical aspect of Eighth Amendment determinations: consideration of ever-evolving societal, legal, and scientific standards. Put simply, Florida refuses to even contemplate anything more than the minimum protections articulated by this Court's verbatim holdings.

This scheme for adjudicating categorical exemption claims violates this Court's seminal Eighth Amendment caselaw. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 719 (2014) (expecting states to play a "critical role in advancing protections and providing [this] Court with information that contributes to an understanding" of how Eighth Amendment protections should be applied); *Moore v. Texas*, 581 U.S. 1, 5 (2017) (expecting courts to consider views of the scientific community when determining *Atkins*-based exemptions from execution); *see also Trop v. Dulles*, 356 U.S. 86, 100, 101 (1958) (recognizing that the Eighth Amendment is "not static" and presupposing that states will actively participate in reflecting and advancing "the evolving standards of decency that mark the progress of a maturing society."); *Alden v. Maine*, 527 U.S. 706, 748 (1999) (referring back to "the founding generation" in declaring that "our federalism" necessitates that states be "joint participants in the governance of the Nation.").

Paradoxically, although in word Florida purports to "conform" with the Eighth Amendment, in deed its refusal to consider anything other than whether this Court has verbatim required protections in a factually identical case effectively forecloses evolving standards of decency in Florida. This Court's intervention is warranted.

3. Respondents' remaining "no conflict" arguments are of no consequence

Finally, Respondents assert that "there is 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." (BIO. 14-15). While a lower court split is one potential justification for a grant of certiorari, such a split is certainly not required. The Court may grant a petition for writ of certiorari for *any* "compelling reason.[]" *See* Rule 10, Rules of the Supreme Court of the United States. Mr. Zack has already demonstrated that the Florida Supreme Court's decision conflicts with this Court's seminal Eighth Amendment jurisprudence. No further conflict is necessary to compel this Court's intervention.

II. The Eighth Amendment Prohibits the Execution of those not Sentenced to Death by a Unanimous Jury.

This case also affords this Court a procedurally unencumbered opportunity to consider the question of whether non-unanimous capital jury sentencing violates the Eighth Amendment under both the evolving standards of decency and the original understanding that a unanimous jury verdict was required before a defendant could be executed.

In opposition, Respondents raise three arguments: (1) the Sixth Amendment, not the Eighth Amendment, applies to juries; (2) this Court's jurisdiction is barred because the Florida Supreme Court's holding was based on a state procedural bar; and (3) there is no conflict between the federal circuits or any state court of last resort and the Florida Supreme Court's decision in this case. These arguments are unavailing.

A. Respondents conflate the jury's fact-finding role in capital trials with the concept of unanimous jury sentencing

Respondents do not dispute Mr. Zack's characterizations of the overwhelming national consensus in favor of unanimous capital jury sentencing and the original public understanding that executions could only be carried out after a unanimous jury verdict. Instead, Respondents rely on their argument in the Florida Supreme Court that the Eighth Amendment does not apply to trials. *Spaziano v. Florida*, 468 U.S. 447 (1984). (BIO at 19). This argument is incorrect and does not justify denying certiorari review.

Respondents' Sixth Amendment preemption argument has long been rejected by this Court. Respondents essentially argue that because the Sixth Amendment contains the right to a jury, no other constitutional protection can apply to a defendant's rights with respect to juries. (BIO at 19–20). This has never been the case. For example, the Sixth Amendment requires that juries be unanimous to convict a defendant of a serious crime, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), while the Due Process Clause of the Fifth and Fourteenth Amendments requires that the jury's determination to convict be beyond a reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1983). This Court has previously applied Eighth Amendment protections to issues regarding capital sentencing juries. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Respondents and the Florida Supreme Court misapprehend this Court's Sixth and Eighth Amendment jurisprudence. In arguing that "[t]he Eighth Amendment prohibits cruel and unusual punishment" and "does not speak to what findings a

penalty phase jury must make regarding the death sentence[,]" (BIO at 19), Respondents confuse caselaw regarding the factfinding role of capital juries with the concept of unanimous jury sentencing. As a result, Respondents misunderstand Mr. Zack's claim. Mr. Zack's Eighth Amendment claim is that the "evolving standards of decency that mark the progress of [our] maturing society" require unanimity in jury sentencing. *Trop v. Dulles*, 356 U.S. at 101. It is not about what specific findings a penalty phase jury must make along the way.

B. The Florida Supreme Court addressed the claim on the merits rather than a "clear" state law ground

Respondents argue that the Florida Supreme Court's state-law procedural rulings were not interwoven with federal constitutional law and, therefore, this Court has no jurisdiction. (BIO at 18). However, the Florida Supreme Court's procedural rulings appear to be secondary to the court's merits decision that this Court's precedent *required* the denial of Mr. Zack's claim. Respondents' argument falls short by relying on "[t]he mere existence of a . . . state procedural bar," which "does not deprive this Court of jurisdiction." *Caldwell v. Mississippi*, 472 U.S. at 327.

Furthermore, no procedural bar is applicable to this evolving standards of decency claim. This point is underscored by Respondent's own cited case. *See* BIO at 16 ("this Court recently denied review of this same question in the Florida capital case of *Dillbeck v. Florida*"). 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.

C. Respondents do not meaningfully respond on the merits

Respondents assert that "there is 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." (BIO at 25). While certiorari may be granted when there is a lower court split, such a split is not required. The Court may grant a petition for writ of certiorari for *any* "compelling reason.[]" *See* Rule 10, Rules of the Supreme Court of the United States.

Further, the lack of a lower court split is, in large part, due to Florida's extreme outlier status in its use of non-unanimous jury sentencing. Indeed, that outlier status is the crux of Mr. Zack's claim that evolving standards of decency (as reflected by national state practice) preclude execution in cases where the underlying death sentence was obtained via a non-unanimous jury. It would be Kafkaesque for Florida to evade review by virtue of the same outlier status which gives rise to his claim in the first place.

Respondents argue that "*Spaziano* remains good law regarding the issue of the Eighth Amendment not requiring jury sentencing in capital cases" and that this Court's recent decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020) reinforces that view. (BIO at 23). However, as Respondent conceded, *McKinney* was decided on Sixth Amendment grounds. In fact, Respondent's only argument on the merits in response to Mr. Zack's claim that unanimous jury sentencing is the norm in the United States

is to acknowledge that "jury sentencing in capital cases was the norm when *Spaziano* was decided in 1984, as well as when *Harris* was decided in 1995." (BIO at 23). Respondents acknowledge the existence of jury sentencing but completely avoid discussing the evolving standards of decency requiring unanimous jury sentencing in capital cases.

This Court looks to the legislation enacted by the country's legislature to gauge the evolving standards of decency. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (this Court noting that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.") (quoting source omitted). And among states that still legalize the death penalty, the overwhelming majority of legislatures require unanimous sentencing. Only Alabama and Florida maintain a practice of executing individuals based on non-unanimous jury votes.[3] As Mr. Zack explained, only *1.3% of those executed outside of Alabama and Florida* between 2016 and 2023 were not sentenced by a unanimous jury, not including those who elected to waive a jury. (Petition at 32). 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. The evolving standards of decency of the Eighth Amendment allow this Court to grant Mr. Zack's petition for writ of certiorari to revisit its decisions in *Spaziano* and *Harris*.

[3] As Mr. Zack explained in his petition, only six states even *contemplate* a non-unanimous jury death sentence. Four of those states have effectively repudiated the practice, either by abstaining from recent executions generally, or from executing individuals sentenced by non-unanimous juries.

CONCLUSION

This Court should grant Mr. Zack's application for a stay of execution and grant a writ of certiorari to review the decision below.

Respectfully submitted,

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SEPTEMBER 30, 2023