No. 24-5904

In the
Supreme Court of the United States

ALLEN WARD COX,

Petitioner,

v.

STATE OF FLORIDA
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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Capital Case

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court rejecting an unpreserved claim that the Eighth Amendment prohibition on executing juveniles and intellectually disabled defendants should be expanded to include defendants diagnosed with brain damage?

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The opinion of the Florida Supreme Court is reported at Cox v. State, 390 So. 3d 1189 (Fla. 2024).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257. Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction. See Sup. Ct. R. 10(b), (c).

CONSTITUTIONAL PROVISIONS INVOLVED

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.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Facts of the murder

In 1998, Allen Cox, Petitioner, while incarcerated and serving life sentence terms for sexual battery and kidnapping at Lake Correctional Institute ("LCI"), decided to kill whoever was responsible for breaking into his prison footlocker and stealing the money he had saved from his lucrative drug-dealing operation.[1] After discovering the theft of his money, Cox went to the balcony of his prison dorm and loudly announced to the crowd of inmates that he was offering a fifty dollar reward to anyone willing to identify the thief and that he planned to stab and kill the person responsible. Cox, 390 So. 3d at 1192. Unsurprisingly, inmates gave Cox information about who they suspected of stealing his money, and one inmate provided Cox with a homemade shank. (T.636-40).

The next day during the prison's lunch break, Cox went to the handball court and called Thomas Baker over to him. In front of numerous inmates, Cox proceeded to pummel Baker until he turtled on the ground in the fetal position.[2] Cox then stated that the beating was not good enough and proceeded to kill the victim by stabbing him three times with the shank. Cox, 390 So. 3d at 1192. A jury convicted Cox of the first-degree murder of Baker and sentenced him to death. See Cox v. State, 819 So. 2d 705 (Fla. 2002), cert. denied, 537 U.S. 1120 (2003).

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[1] While incarcerated, Cox smuggled marijuana into the prison and sold it, making approximately $4000 every two weeks. (T.1495-96, 1614-21).

[2] Cox was substantially larger than Thomas Baker. Witnesses described Baker as a "featherweight," whereas Cox, known as "Big Al," was six foot three or four inches and weighed 230-240 pounds. (T.364, 373). The medical examiner testified that Baker was five foot, ten inches and weighed only 140 pounds. (T.521-22).

Cox's resentencing proceeding

After exhausting his initial state and federal postconviction proceedings, Cox filed a successive motion for postconviction relief based on Hurst v. Florida, 577 U.S. 92 (2016), and obtained a new penalty phase proceeding.[3] At the resentencing, Cox presented potential mitigating evidence from family members and nine mental health experts, and the State presented rebuttal evidence from a forensic psychiatrist and two prison mental health employees.

Cox's family members testified regarding his upbringing in a very rural and poor area of Kentucky. Cox's parents had an abusive relationship and divorced when Cox was young. When Cox was about ten years old, his mother drove him to his father's home and dropped him off and threatened him to never come back. Cox lived with his father and also spent considerable time with his grandmother who provided him with a loving environment and spoiled and coddled him.

Cox presented testimony from multiple mental health experts that focused on his alleged brain damage as a child, as well as his drug use and suicide attempts. Cox self-reported three head injuries and his retained neurologist, Dr. Rubino, reviewed MRI and PET scan results on Cox's brain. Cox's experts opined that Cox suffered from atrophy in his temporal and frontal lobes which can lead to altered judgment and impulsiveness. The experts agreed that Cox's brain atrophy could be caused by factors

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[3] See generally Cox v. State, 966 So. 2d 337 (Fla. 2007) (affirming denial of postconviction relief); Cox v. State, 5 So. 3d 659 (Fla. 2009) (affirming denial of successive motion for postconviction relief); Cox v. McNeil, Sec'y Dep't of Corr., 638 F.3d 1356 (11th Cir.) (affirming denial of petition for writ of habeas corpus), cert. denied, 565 U.S. 906 (2011).

such as his age, high blood pressure, drug and alcohol use, and lack of oxygen from when he attempted suicide in 2010. Dr. Rubino ultimately diagnosed Cox with neurocognitive disorder, depression, anxiety, a history of head injuries, and possibly progressive dementia. (T.768). Dr. Rubino noted that Cox had a static form of dementia, or a brain injury that causes a loss of function, but he did not diagnose Cox with Alzheimer's disease or "progressive" dementia. (T.768-69).

The State presented rebuttal mental health testimony from Dr. Emily Lazarou, a forensic psychiatrist, and two Lake Correctional Institution employees. The LCI psychological specialist testified that Cox was diagnosed with low level depression and, shortly before the murder, she met with Cox and testified that his demeanor was normal and cooperative. Dr. Lazarou testified regarding Cox's lucrative drug-dealing business and malingering of mental health issues. She opined that neither of Florida's statutory mental mitigators applied in this case as Cox was not under extreme mental or emotional disturbance at the time of the murder, nor was his capacity to conform his conduct to the requirements of the law substantially impaired. (T.1646-52).

After the presentation of the evidence, the jury unanimously found that the State had proven beyond a reasonable doubt that two aggravating circumstances had been established: (1) that the murder was committed by a felon while under a sentence of imprisonment, and (2) that Cox was previously convicted of a felony involving the use or threat of violence. The jury also unanimously found that the aggravating circumstances outweighed the mitigation and unanimously

recommended that Cox receive a death sentence.

The trial court followed the jury's recommendation and sentenced Cox to death for the murder of Thomas Baker. The trial court considered the 80 mitigating circumstances proposed by defense counsel and found most of these factors had been established and assigned them various levels of weight. The court rejected the defense experts' opinions that the two statutory mental mitigators applied in this case, but considered numerous mitigators related to Cox's brain injuries, drug usage, depression, and other circumstances that his experts opined were factors in explaining Cox's impaired cognitive abilities or "static" dementia. However, because the weight of the mitigating factors did not outweigh the two significant aggravating circumstances, the trial court sentenced Cox to death.

On appeal to the Florida Supreme Court, Cox argued, *inter alia*, that the trial court erred in rejecting the nonstatutory mitigating circumstance that Cox suffers from the early signs of dementia and that executing an offender with brain damage violates the Eighth Amendment based on evolving standards of decency. Cox, 390 So. 3d at 1194. The Florida Supreme Court found that the trial court did not err by rejecting the nonstatutory mitigator that Cox suffers from the early signs of progressive dementia as that mitigator was not definitively established. Id. at 1195-96 & n.5 (noting that the trial court did consider the defense expert's testimony that Cox has "static" dementia caused by head trauma which is consistent with a decline in neurocognitive abilities). In addressing Cox's request to extend this Court's precedent from Atkins v. Virigina, 536 U.S. 304 (2002) (Eighth Amendment bars the

execution of defendants with intellectual disability), and Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment prohibits the execution of juveniles), to individuals with brain damage, the Florida Supreme Court found that the claim was unpreserved for appellate review and further held that Cox failed to offer any reason for the court to reconsider its well-established precedent rejecting such a claim. Id. at 1199.

Cox now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court properly rejected Cox's unpreserved claim that the Eighth Amendment prohibits the execution of defendants with mental conditions such as slight brain damage.

Cox seeks review of the Florida Supreme Court's decision refusing to expand the prohibition on the execution of juveniles and intellectual disabled defendants[4] to include defendants diagnosed with brain damage. He argues that evolving standards of decency establish that executing defendants with brain damage is the functional equivalent of executing a defendant with intellectual disability. The Florida Supreme Court found that Cox's claim was unpreserved for appellate review and further, following its well-established precedent, refused to expand this Court's rulings in Atkins and Roper. Cox, 390 So. 3d at 1199-1200. The Florida Supreme Court's finding that the claim was unpreserved as a matter of state law is an independent and adequate state law ground 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/Roper claim. This Court has

[4] See Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virigina, 536 U.S. 304 (2002).

never even hinted that Atkins or Roper should be expanded to include other types of mental diagnoses. Finally, there is no conflict between the lower appellate courts and the Florida Supreme Court's decision in this case. Cox cites to no appellate case, federal or state, expanding Atkins or Roper to any other diagnoses such as brain damage or static dementia. Accordingly, review of this issue should be denied.

The Florida Supreme Court's decision on this claim

The Florida Supreme Court found that Cox's constitutional claim seeking an expansion of Atkins and Roper was unpreserved for appellate review as a matter of state law. Cox, 390 So. 3d at 1199 ("Cox's final four points on appeal constitute unpreserved and purely legal arguments"); see also Perez v. State, 919 So. 2d 347, 377 (Fla. 2005) (holding that a defendant's Eighth Amendment constitutional challenge to Florida's death sentencing scheme was not preserved for review when he failed to present the claim to the trial court below).

Although unpreserved, the Florida Supreme Court nevertheless addressed Cox's claim and concluded that the expansion of Atkins and Roper was meritless under its existing precedent. Cox, 390 So. 3d at 1199-1200 (citing Carroll v. State, 114 So. 3d 883, 886-87 (Fla.), cert. denied, 569 U.S. 1014 (2013); Simmons v. State, 105 So. 3d 475, 510-11 (Fla. 2012); Barwick v. State, 88 So. 3d 85, 106 (Fla. 2011); Johnston v. State, 27 So. 3d 11, 26 (Fla.), cert. denied, 562 U.S. 964 (2010); Lawrence v. State, 969 So. 2d 294, 300 n.9 (Fla. 2007); Connor v. State, 979 So. 2d 852, 867 (Fla. 2007)). Notably, as the Florida Supreme Court has held, it does not have the authority to expand this Court's Eighth Amendment protections under Florida's conformity

clause. See Barwick v. State, 361 So. 3d 785, 791-95 (Fla.) (holding that Florida's constitutional conformity clause requires it to construe the Eighth Amendment in conformity with the United States Supreme Court's interpretations), cert. denied, 143 S. Ct. 2452 (2023). Thus, because Cox failed to offer any reason for the court to reconsider its prior precedent, the Florida Supreme Court rejected his claim. Cox, 390 So. 3d at 1199-1200.[5]

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, 1038 n.4 (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. Provided the state law is not "interwoven" with federal law, this Court's jurisdiction "fails." Id. (citing Enterprise 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).

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[5] This Court has recently denied certiorari review in similar Florida cases seeking to expand Atkins or Roper. See, e.g., Barwick, id.; Zack v. State, 371 So. 3d 335 (Fla.), cert. denied, 144 S. Ct. 274 (2023); Dillbeck v. State, 357 So. 3d 94 (Fla.), cert. denied, 143 S. Ct. 856 (2023).

The Florida Supreme Court found Cox's claim seeking to extend Atkins and Roper unpreserved for appellate review based on his failure to raise the claim in the trial court below. Cox, 390 So. 3d at 1199. The Florida Supreme Court has long held that a defendant must raise a constitutional challenge before the trial court to preserve the claim for appellate review. See Perez v. State, 919 So. 2d 347, 377 (Fla. 2005) (holding that a defendant's Eighth Amendment constitutional challenge to Florida's death penalty scheme was not preserved for review when he failed to present the claim to the trial court below); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). There is no federal constitutional aspect to such a determination, and the Florida Supreme Court relied exclusively on state law to determine that Cox's claim was unpreserved and procedurally barred. The state law determination of a procedural bar is an independent and adequate ground to deny review of the instant issue.

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 either Atkins or Roper. Atkins was specifically limited to defendants diagnosed with intellectual disability and Roper was limited to juveniles who were under the age of eighteen at the time of their capital crime. See Atkins v. Virigina, 536 U.S. 304 (2002) (holding that the execution of intellectually disabled criminals would constitute cruel

and unusual punishment prohibited by the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (finding that the Eighth Amendment prohibits the execution of individuals who were under the age of eighteen at the time of their capital crime). Both Atkins and Roper noted that evolving standards of decency established that the execution of intellectually disabled and juveniles were so disproportionate as to constitute cruel and unusual punishment. Atkins, 536 U.S. at 311-17; Roper, 543 U.S. at 560-64. However, neither decision contemplated an expansion of their respective categories to include criminals who have been diagnosed with various levels of mental illnesses or diseases. In both cases, this Court drew "bright line" rules seeking to specifically limit the categories to only those individuals diagnosed with intellectual disability or under the age of eighteen. Atkins, 536 U.S. at 317 (drawing the line at "intellectual disability," but leaving it to the States to develop the task of developing appropriate ways to enforce the constitutional restriction"); Roper, 543 U.S. at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

Nor should this Court accept Cox's invitation to expand Atkins or Roper to individuals with other types of diagnoses such as brain damage and dementia.[6]

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[6] The sentencing court in this case noted that the defense experts testified that Cox had "some level of brain damage" given his "slight brain atrophy," but gave this mitigating circumstance "very little weight" because it was unclear whether it was the result of traumatic brain injury, natural aging, or due to Cox's history of substance abuse. Additionally, the court correctly noted that Cox's brain atrophy was consistent with the expected range of atrophy for men of a similar age. (R.2028-31). The court further rejected the proposed mitigator that Cox suffers from "progressive

Intellectual disability and brain damage 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. See § 921.137(1), Fla. Stat. (2024); 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. This is not true of other types of diagnoses such as the highly subjective "brain damage." See generally State v. Hancock, 840 N.E.2d 1032, 1059-60 (Ohio 2006) (noting that "mental illnesses come in many forms and different illnesses may affect a defendant in different ways and to different degrees, thus creating an ill-defined category of exemption from the death penalty without regard to the individualized balance between aggravation and mitigation in a specific case"). Expanding Atkins or Roper to other types of mental illnesses or conditions would result in endless, highly subjective battles of the experts.

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.,

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dementia," but credited the defense expert's testimony that he had "static dementia" from brain injuries. (R.2057-58).

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).[7] 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. See Ga. Code § 17-7-131(c)(3). None of those statutes included a diagnosis of brain damage or dementia. Nor does Cox point to any current legislation prohibiting a death sentence based on a diagnosis of these conditions, much less to a significant number of state legislatures enacting such legislation. There simply is no "national consensus" among state legislatures that capital defendants with brain damage should be exempt from execution. Because there is no conflict with this Court's Eighth

[7] Similarly, in Roper, this Court noted that over thirty states prohibited the executions of juveniles. Roper, 543 U.S. at 564.

Amendment jurisprudence and the Florida Supreme Court's decision in this case, certiorari should be denied.

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 Court of Appeals has rejected a claim that Atkins should be expanded from intellectual disability to include brain damage. See Shore v. Davis, 845 F.3d 627, 634 (5th Cir. 2017) (refusing to expand Atkins to include brain injury); Mays v. Stephens, 757 F.3d 211 (5th Cir. 2014), cert. denied, 574 U.S. 1082 (2015). The Eleventh Circuit has also rejected a claim seeking to expand Atkins based on a diagnosis of mental illness. Carroll v. Sec'y, DOC, 574 F.3d 1354, 1370 (11th Cir. 2009) (holding that court could not expand Atkins as such an extension would constitute the creation of a new rule of constitutional law in violation

of AEDPA); see also Kearse v. Sec'y, Fla. Dep't of Corr., 2022 WL 3661526, *25-26 (11th Cir. Aug. 25, 2022), cert. denied, 43 S. Ct. 2439 (2023).

Nor is there any conflict with the state courts of last resort. Pennsylvania has declined any invitations to expand Atkins to those diagnosed with mental illness or brain damage. See Commonwealth v. Baumhammers, 960 A.2d 59, 61-62 (Penn. 2008); Commonwealth v. Robinson, 82 A.3d 998, 1020-21 (Penn. 2013). Texas has likewise refused to expand Atkins to defendants suffering from brain damage. See Soliz v. State, 432 S.W.3d 895, 903-04 (Ct. Crim. App. 2014) (holding that there is no "emerging national consensus in favor of barring the execution of adult offenders convicted of capital murder who are not mentally retarded but who have permanent brain damage resulting from partial fetal alcohol syndrome"), cert. denied, 574 U.S. 1123 (2015); Rivers v. State, 2017 WL 6505792, *6 (Ct. Crim. App. Dec. 20, 2017) (declining to extend Atkins's categorical exemption to non-intellectually-disabled but brain-damaged adults). Finally, 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 diagnoses. There is no conflict between the Florida Supreme Court's decision and the federal circuit courts of appeal. Furthermore, there is no conflict between the Florida Supreme Court's decision and any state court of last resort. Accordingly, because there is an adequate state law ground to support the Florida

Supreme Court's decision denying Cox's claim, as well as no conflict among the lower appellate courts on the question, certiorari review should be denied.

CONCLUSION

Therefore, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

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