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**IN THE SUPREME COURT OF THE UNITED STATES**

June 3, 2025

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ZANE FLOYD, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

---

*ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEVADA*

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

**CAPITAL CASE**

1. Whether an individual who suffers from fetal alcohol exposure should be categorically exempted from the death penalty because the sentence amounts to cruel and unusual punishment.

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE .....	1
ARGUMENT .....	3
A. The Nevada Supreme Court correctly held that Floyd's claim was procedurally barred.....	3
B. Floyd has not suffered prejudice because there is no "functional equivalent" standard .....	4
CONCLUSION .....	7

## TABLE OF AUTHORITIES

	<u>Page Number:</u>
<b><u>Cases</u></b>	
<u>Atkins v. Virginia</u> , 536 U.S. 304, 122 S.Ct. 2242 (2002) .....	4
<u>Graham v. Florida</u> , 560 U.S. 48, 67 (2010) .....	6
<u>Roper v. Simmons</u> , 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005) .....	4
<b><u>Statutes</u></b>	
NRS 174.098(7).....	2, 5

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**RESPONDENT'S BRIEF IN OPPOSITION**

**STATEMENT OF THE CASE**

The Nevada Supreme Court examined Floyd's claim that he is ineligible for the death penalty under the Eighth Amendment of the United States Constitution because he is intellectually disabled and because individuals who suffer from Fetal Alcohol Spectrum Disorder (FASD) are functionally equivalent to individual with intellectual disabilities. The Supreme Court rejected Floyd's arguments and affirmed the district court's decision that Floyd's petition was procedurally barred.

The Nevada Supreme Court considered Floyd's claim that new research demonstrated that FASD is equivalent to intellectual disability. However, the Nevada Supreme Court noted that Floyd did not cite "any new legal authority to suggest that any court has treated FASD as functionally equivalent to intellectual

disability or youth such that it makes a defendant categorically ineligible for the death penalty.” 559 P.3d . The Nevada Supreme Court specifically noted that his claims of FASD had been available since 2006 and that Floyd was not offering anything new.

Moreover, Floyd did not demonstrate that he was an individual who suffers from FASD to the extent that he is intellectually disabled. Based on his lack of sufficient facts to show that he is intellectually disabled, the Nevada Supreme Court saw no support to expand those diagnosed with FASD to the group of categorically excluded individuals who suffer from intellectual disabilities thereby rendering them ineligible for the death penalty.

More specifically, the Nevada Supreme Court held:

“Intellectually disabled” is defined in NRS 174.098(7) as “significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.” Thus, intellectual disability has three criteria under Nevada law—intellectual-functioning deficits, adaptive deficits, and onset of those deficits during the developmental period. *See Ybarra v. State*, 127 Nev. 47, 56-57, 247 P.3d 269, 275-76 (2011). Because we conclude that Floyd failed to allege sufficient facts to satisfy the first component of the inquiry, we need not address the other components.

Also relevant to the Nevada Supreme Court’s holding was that Floyd had offered no evidence of a national consensus that the death penalty is a disproportionate punishment for individuals with FASD.

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## **ARGUMENT**

Floyd now claims that he is categorically exempt from the death penalty because he suffers from Fetal Alcohol Spectrum Disorder (“FASD”). Floyd argued that he raised the claim for the first time in his third petition because the claim is based on new scientific evidence demonstrating the equivalence of FASD as an intellectual disability. However, as the Nevada Supreme Court pointed out, there is no scientific consensus that those who suffer from FASD are the functional equivalent of individuals with intellectual disabilities.

### **A. The Nevada Supreme Court correctly held that Floyd’s claim was procedurally barred**

Floyd has tried to raise claims regarding FASD in previous petitions that were ultimately denied. This was Floyd’s third State petition, which was untimely, successive, and the denial of his fetal alcohol syndrome disorder (FASD) claim was the law of the case.

The issue regarding Floyd’s FASD was previously litigated in his prior second petition. Floyd raised his FASD-related claims in two forms. First, he argued that his counsel was ineffective for not presenting evidence that he suffers from FASD. Second, he argued that he was “actually innocent” because his FASD, combined with other mental conditions, prevented him from forming the intent to commit premeditated and deliberate murder. Before it rejected Floyd’s second petition, the

district court conducted an evidentiary hearing regarding the FASD evidence and whether counsel's conduct fell below the reasonable standard per Strickland.

Following the evidentiary hearing that the district court conducted regarding trial counsel's failure to raise a FASD claim, the district court found that trial counsel's conduct fell within the realm of reasonableness, thus Floyd was not prejudiced and would not be entitled to relief. Furthermore, this court rejected the appeal following the denial of Floyd's second petition that his FASD claim, along with other claims, rendered him "actually innocent" of first-degree murder and ineligible for the death penalty. Thus, this is now the law of the case and he was not permitted to bring this procedurally barred petition. The Nevada Supreme Court was correct in ruling that his claim was now procedurally barred.

Moreover, to the extent that he feels there is good cause because of cases like Atkins v. Virginia (2002), Roper v. Simmons (2005), and FASD as it relates to the DSM-5 (2013), he has provided no sufficient explanation for why he waited so long to raise this claim. Other than the fact that he is not looking for a way to delay the proceedings, there is has been no good cause for his untimely filing.

**B. Floyd has not suffered prejudice because there is no "functional equivalent" standard**

Floyd argues that he is ineligible for the death penalty because his FASD amounts to a functional equivalent of being intellectually disabled pursuant to Atkins. Atkins did not mandate a particular way of identifying defendants that

would be considered intellectually disabled, but it did generally set forth three separate requirements that must be met: “[I]t must be shown that a defendant has both (1) significantly subaverage intellectual functioning and (2) deficits in adaptive behavior, and that (3) the onset of both factors occurred before the age of 18.” Atkins, 536 U.S., at 318, 122 S.Ct 2242. Atkins made a categorical rule that those determined to be intellectually disabled may not be executed, but it did not set forth a bright-line rule solely based on one’s IQ.

The Nevada Supreme Court poignantly noted that Floyd did not cite to any new legal authority to show that those suffering from FASD are functionally equivalent to those who suffer from intellectual disabilities or those that are affected by their youth. Not only had Floyd not presented any new evidence of the effects of FASD, but the Court noted that his claim had been available since 2006.

Furthermore, Floyd failed to satisfy the definition of Nevada’s statute on intellectual disability in NRS 174.098(7). NRS 174.098(7) defines “intellectually disabled” as “significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.” Floyd failed to meet this criteria which lead to the Nevada Supreme Court’s denial.

Floyd’s IQ scores did not fall within the range for intellectual-functioning deficits. Although he appears to have FASD, there was nothing sufficient to argue

that he was of any subaverage intellectual functioning. As such, the Nevada Supreme Court appropriately declined to extend this Court's categorical exemptions from the death penalty.

The relevant inquiry under the Eighth Amendment is two-fold. The first part of the inquiry looks at "objective indicia of consensus" as to whether a particular punishment is disproportionate, "as expressed in particular by the enactments of legislatures that have addressed the question." Roper, 543 U.S. at 564.

In the second part of the inquiry, the court "determine [s], in the exercise of [its] own independent judgment," whether the particular punishment is disproportionate. *Id.* That inquiry considers "the culpability of the [class of] offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." Graham v. Florida, 560 U.S. 48, 67 (2010).

Floyd meets neither of the two-part inquiry. He fails to show a national consensus that individuals who suffer from FASD are disproportionately affected by death sentences. He also fails to show that those who suffer from FASD are functionally equivalent to individuals with intellectual disabilities or juveniles with executive functioning deficits.

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## **CONCLUSION**

Petitioner fails to establish that the exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such, this Court should deny certiorari.

Dated this 3<sup>rd</sup> day of June, 2025.

Respectfully submitted,



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