No. 24-7151

In the
Supreme Court of the United States

Zane Floyd,

Petitioner,

v.

Jeremy Bean, Warden *et al.*,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Nevada

Reply to Brief in Opposition to Petition for Writ of Certiorari

CAPITAL CASE

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INTRODUCTION

Mr. Floyd filed his Petition for Writ of Certiorari on May 2, 2025. He raised a sole claim of categorical exemption from capital punishment for individuals suffering from Fetal Alcohol Spectrum Disorder (FASD) due to their shared analogous characteristics, traits, and deficits with the intellectually disabled. On June 3, 2025, the State of Nevada filed its Brief in Opposition. Rather than addressing the specific merits of Mr. Floyd's arguments, the State's brief largely focuses on procedural default serving as a bar to his claim. However, the State is incorrect. Procedural default cannot impede this Court's review of Mr. Floyd's claim because the Nevada Supreme Court's decision does not rest on an independent state ground and Mr. Floyd demonstrated good cause and prejudice, which is a decision on the merits of the claim.

I. The Nevada Supreme Court's decision is not independent of federal law, so this Court has jurisdiction to decide the question presented.

The State asserts that law of the case and Mr. Floyd's delay in bringing this claim means it is procedural defaulted, and that procedural default, according to the State, is an adequate and independent state law ground depriving this Court of jurisdiction. BIO at 3–4. However, the State's assertion is meritless as procedural default is inapplicable here.

Procedural default is not an impediment to this Court's review of Mr. Floyd's petition as the Nevada Supreme Court's application of state procedural bars was not independent of federal law. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). "For a state procedural rule to be 'independent,' the state law ground for a decision

must not be 'interwoven with the federal law.'" *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). A state court decision is interwoven with federal law when it "fairly appears to rest primarily on federal law . . . and independence of any possible state law ground is not clear from the face of the opinion." *Coleman v. Thompson*, 501 U.S. 722, 733 (1991). Under these circumstances, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*

Here, although the Nevada Supreme Court briefly stated Mr. Floyd's claim was procedurally defaulted under Nev. Rev. Stats. §§ 34.726(1) and 34.810(1)(b)(4) as untimely, successive, and barred by laches, it primarily rested its decision on Mr. Floyd's claim of categorical exclusion due to FASD on an analysis of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). App. B at 9–10. Specifically, in determining whether cause and prejudice existed, the Nevada Supreme Court undertook a robust merits analysis of Mr. Floyd's claim. Spanning nearly six pages, the Nevada Supreme Court cited, quoted, and relied on this Court's decisions in *Atkins* and *Roper* to determine Mr. Floyd did not meet the threshold showing for intellectual disability.

The Nevada Supreme Court also engaged in a merits determination when analyzing whether there should be a categorical exclusion for offenders with FASD. App. B at 7–13. And its reliance on federal law wasn't inadvertent or paltry. Particularly concerning categorical exclusion, the Nevada Supreme Court recognized this Court's decisions as providing clear benchmarks to granting Mr.

Floyd relief, such as evidence of a national consensus, new scientific evidence, and similarities between other excluded groups. The Nevada Supreme Court then addressed the federal law considerations recognized by this Court before determining Mr. Floyd's claim was not meritorious to support a showing of cause and prejudice. Thus, it's clear from the Nevada Supreme Court's decision that its default ruling did not rest on an independent state ground, but rather was interwoven with an analysis of this Court's decisions in *Atkins* and *Roper*.

Accordingly, Mr. Floyd's claim is not subject to procedural default.

II. The state court's determination of good cause and prejudice is also a decision on the merits of the claim.

Even if the Nevada Supreme Court's decision was independent of federal law, procedural default is still not an impediment to this Court's review as the state court's determination of cause and prejudice was a decision on the merits of the claim. The State contends Mr. Floyd's claim of categorial exemption based upon his FASD is procedurally barred because in Mr. Floyd's second postconviction petition he raised and litigated the following claims: "his counsel was ineffective for not presenting evidence that he suffers from FASD" and "he was 'actually innocent' because his FASD, combined with other mental conditions, prevented him from forming the intent to commit premeditated and deliberate murder." BIO at 3. The State further contends good cause does not exist because Mr. Floyd waited years after *Atkins*, *Roper*, and issuance of the DSM-5 to raise his claim. *Id.* at 4. But each of the State's arguments is inaccurate.

Contrary to the State's assertions, law of the case is inapplicable here. The State cites Mr. Floyd's second amended state habeas petition where he raised two claims concerning his FASD—ineffective assistance of counsel based on counsel's failure to present evidence of his FASD diagnosis and Mr. Floyd's actual innocence as the combination of his FASD and mental conditions that he suffers from made him incapable of forming the requisite intent for first degree murder. BIO at 3–4. But neither claim concerned categorical exclusion for individuals diagnosed with FASD based on its functional equivalency to intellectual disability and the logic behind *Atkins* and *Roper*. In support of its argument, the State points to the evidentiary hearing conducted by the district court in 2006. However, the evidentiary hearing did not include Mr. Floyd's actual FASD or its equivalence to ID under *Atkins*, it was regarding ineffective assistance of initial state postconviction counsel. Moreover, while Mr. Floyd previously raised an actual innocence claim upon which FASD was a component, he did not argue that he was categorically exempt from the death penalty under the Eighth Amendment. Instead, he "asserted that due to Fetal Alcohol Spectrum Disorder, Attention Deficit Hyperactivity Disorder, long term drug use, and the use of alcohol and methamphetamine, he was incapable of premediating and deliberating and that his own admissions of premeditation were undermined because he was 'in the throes of a dissociative state' when the statements were made." *Floyd v. State*, No. 51409, 2010 WL 4675234, at *2 (Nev. 2010).

Moreover, even if Mr. Floyd's claim was barred by law of the case doctrine in state court, that ruling is inadequate to support a procedural default finding. *See*

Cone v. Bell, 556 U.S. 449, 466–67 (2009). As this Court has recognized, if "a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts." *Id.* at 467. Thus, the Nevada Supreme Court's prior determination of the merits of Mr. Floyd's claim would render it ripe for this Court's review not procedurally defaulted.

Further, Mr. Floyd could not raise his claim sooner, because the new scientific research regarding FASD's equivalence to ID changed after the denial of Mr. Floyd's second postconviction petition. *See* Stephen Greenspan et al., *FASD and the Concept of "Intellectual Disability Equivalence," in Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives*, International Library of Ethics, Law, and the New Medicine 241 9M. Nelson & M. Trusslers eds., 2016; *see also* Pet. for Writ of Certiorari at 16–23. For example, previously it was believed that "IQ represented a precise snapshot of the brain that was concrete, immutable….and incorporative of all that we view as 'intelligence'" Greenspan, *supra* at 242–43. Medical and mental health experts now know this to be false. *Id; see Hall v. Florida*, 572 U.S. 701 (2014); *see also Moore v. Texas*, 586 U.S. 133 (2019). Additionally, in 2022, Drs. Stephen Greenspan and Natalie Novick-Brown explained that defendants with FASD "are no different than those with ID in terms of executive and adaptive functioning and thus merit similar consideration with regard to criminal culpability. That is, debilitating brain damage in FASD can substantially compromise capacity to make rational choices and control impulses just as it does in

ID . . . ." Natalie Novick Brown & Stephen Greenspan, *Diminished Culpability in Fetal Alcohol Spectrum Disorders (FASD)*, Behavioral Sciences & the Law 40(1) (Feb. 2022), https://www.researchgate.net/publication/355178338_Diminished_culpability_in_fetal_alcohol_spectrum_disorders_FASD, at 2. The fact that this new scientific evidence was not previously available to Mr. Floyd to raise a claim of categorical exclusion from the death penalty demonstrates that his claim is not barred as previously raised and litigated, and also provides good cause to overcome any procedural default. *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007).

Finally, the State asserts Mr. Floyd has not suffered prejudice because this Court has yet to determine that FASD is functionally equivalent to ID, he does not meet the criteria for intellectual disability discussed in *Atkins*, and he has not demonstrated national consensus or disproportionality. BIO at 4–6. However, each of the State's prejudice arguments were addressed and rebutted in Mr. Floyd's Petition, and the State fails to address Mr. Floyd's specific arguments concerning the reasoning in *Atkins* and *Roper*, the similarities between FASD and ID, national medical and legal consensus, and disproportionality. *See* Pet. for Writ of Certiorari at 7–31.

Accordingly, even if Mr. Floyd's claim was subject to procedural default, his showing that his claims have merit can overcome that default based on a showing of good cause and prejudice. That is so because a determination that a petitioner cannot demonstrate cause and prejudice in Nevada is not a decision that is independent of federal law. *Rippo v. Baker*, 580 U.S. 285, 286 n.* (2017).

CONCLUSION

For the foregoing reasons and those included in his petition, Mr. Floyd respectfully requests that this Court grant his petition for writ of certiorari and reverse the judgment of the Nevada Supreme Court.

Dated this 13th day of June, 2025.

Respectfully submitted,

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