

No. 17-8134

IN THE

Supreme Court of the United States

MICHAEL DUANE ZACK, III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. There is a conflict with this Court's cases, insofar as the Florida Supreme Court continues to adhere to a strict cutoff score to foreclose *Atkins* relief without an evidentiary hearing where there is significant evidence of adaptive deficits

A. Conflict with this Court's cases

Respondent claims that “[t]here is no conflict between this Court’s intellectual disability cases and the Florida Supreme Court’s decision. And there is no conflict between the Florida Supreme Court’s decision and that of any other federal appellate court or state court of last resort.” Opp. 11. However, the Florida Supreme Court’s continued reliance upon IQ scores as dispositive for determinations of intellectual disability, and more specifically, its adherence to strict cutoff scores to deny any claims of intellectual disability, thereby foreclosing any relief based upon *Atkins*, is in direct contravention to this Court’s decisions. *See Hall v. Florida*, 134 S.Ct. 1986 (2014); *Wright v. Florida*, 138 S.Ct. 360 (2017); *Moore v. Texas*, 137 S.Ct. 1039 (2017).

This Court granted certiorari in *Hall* and held that the manner in which Florida defined an intellectual disability for capital litigation violated the Eighth Amendment because it “disregards established medical practice” and “creates an unacceptable risk that persons with intellectual disability will be executed.” *Hall*, 134 S.Ct. at 1990, 1995. This Court further stated:

Florida's bright-line rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

Id. at 1995. In addition, this Court stressed that **a single factor should not be considered dispositive because the three factors must be considered together in an interrelated assessment.** *Id.* at 2001 (relying on the DSM–5, at 37 (“[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.”)). (emphasis added).

Notably, the DSM-5 no longer requires proof of “significantly subaverage intellectual functioning.” Instead, it simply requires “deficits” in intellectual functioning, which may be shown in a variety of ways and confirmed by clinical assessment and standardized tests. Thus, **the consensus of the psychological community, as reflected in the DSM-5, now recognizes that intellectual functioning should be interpreted in conjunction with adaptive functioning in diagnosing intellectual disability.** DSM-5 at 37 (“The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functioning.”). (emphasis added).

Despite this Court’s rulings and the consensus in the psychological community, the Florida Supreme Court continues to impose a strict cutoff IQ score as dispositive for claims of intellectual disability, although it has now shifted this cutoff score from 70 to 75. *See Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017) (“Because Zack's current score is well above 75, and there are no scores in his history below 75, it is unlikely that he would ever be able to satisfy the significantly subaverage intellectual functioning prong.”).

B. First Prong

Respondent maintains that because Zack's intellectual functioning is not significantly subaverage, he cannot meet the first prong of the intellectual disability analysis. Opp. 14. Critically, neither the Florida Supreme Court nor the Respondent has addressed Zack's argument that his full-scale IQ scores are simply not a reliable indicator of his true intellectual functioning due to brain damage, and evidenced by severe splits in his testing scores.

Zack has consistently argued that because of his organic brain damage, his full-scale IQ scores are unreliable and that the courts should look to other evidence of adaptive deficits as evidence of his intellectual disability. Zack's IQ test scores have repeatedly shown severe splits in verbal and performance IQ test scores, ranging from 10 to 31 points.

According to the Diagnostic and Statistical Manual of Mental Disorders ("DSM") "when there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading." DSM-IV-TR, at 42. The DSM-5 expanded upon this idea, noting that "highly discrepant individual subtest scores may make an overall IQ score invalid." DSM-5, at 37.

As instructed in *Hall*, adjudications of intellectual disability should be "informed by the views of medical experts". *Hall*, 134 S.Ct. at 2000. "That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017). *Hall* rendered Florida's mandatory cutoff score unconstitutional because it foreclosed further

exploration of a capital defendant's intellectual disability. This is especially significant in situations like Zack's where full-scale IQ scores are invalid. In such cases, the courts should not rely on these aforementioned invalid scores to foreclose *Atkins* relief, but rather should look to evidence of adaptive deficits to support a finding of intellectual disability, as suggested by the medical community. *See Hall*, 134 S.Ct. at 1994-95.

C. Third Prong

Respondent also argues that Zack cannot meet the third prong for establishing intellectual disability, which requires onset prior to age eighteen, and cites to *Glover v. State*, 226 So.3d 795 (Fla. 2017), in support of this argument. Opp. 14. A notable difference is that the defendant in *Glover*, unlike Zack, was permitted to present evidence regarding deficits in his adaptive functioning in support of his argument that his intellectual disability manifested before the age of eighteen. *See Glover*, 226 at 811. "As required by *Hall*, Glover was permitted to present evidence of all three prongs of the test for an intellectual disability. The trial court considered each prong in tandem in determining that Glover was not intellectually disabled; no single factor was considered dispositive." *Id.* (internal quotations omitted).

Zack has been repeatedly denied an evidentiary hearing in which to present evidence of all three prongs of the intellectual disability analysis. And this denial has been based every time on the Florida Supreme Court's adherence to a strict IQ score cutoff. In Zack's case, the Florida Supreme Court has failed to consider each prong in tandem, but rather has considered one single factor, his full-scale IQ score, as

dispositive, and in violation of *Hall* as cited above.

Zack's severe splits in IQ test scores have continuously appeared in his testing since he was eleven years old. These splits are indicative of organic brain damage, which is likely related to numerous head injuries, childhood abuse, ingestion of hard liquor as a child, ingestion of LSD as a child, and his premature birth after his mother was involved in a serious car accident. In addition to this evidence of deficits in intellectual functioning prior to age eighteen, Zack has submitted multiple affidavits from close friends and family members detailing his history of significant adaptive deficits, beginning in childhood and continuing through adulthood, and chronicling Zack's profound difficulty in maintaining a daily routine, grasping simple tasks, and his poor academic performance. Such ample evidence that Zack's disability manifested before adulthood requires an evidentiary hearing so that the trial court can determine whether Zack is indeed intellectually disabled. *See Oats v. State*, 181 So.3d 457, 467 (Fla. 2015), *citing Brumfield v. Cain*, 135 S.Ct. 2269, 2283 (2015) ("[E]vidence pertaining to [defendant's] low birth weight and his intellectual shortcomings as a child provided 'ample evidence' that the defendant's disability manifested before adulthood and thus required an evidentiary hearing so that the trial court could hear all relevant evidence and determine whether the defendant is intellectually disabled.").

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted,



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