No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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

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QUESTIONS PRESENTED - CAPITAL CASE

1. In light of the medical community's recent consensus that Fetal Alcohol Syndrome is not only functionally similar to Intellectual Developmental Disorder, but uniquely identical in both etiology and symptomatology, does it violate the Eighth or Fourteenth Amendment for a state court to foreclose all meaningful review of a defendant's claim that he is entitled to exemption from execution under *Hall v. Florida*'s requirement that state courts deciding whether to apply the protections of *Atkins v. Virginia* must be guided by the views of the medical community?

2. Because "a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death[,]" *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), does the Eighth Amendment bar the execution of a defendant who was not sentenced to death by a unanimous jury?

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Escambia County, Florida
State of Florida v. Michael Duane Zack, III, Case No. 1996-CF-2517
Judgment entered: November 24, 1997

Direct Appeal:
Florida Supreme Court (No. SC1960-92089)
Michael Duane Zack, III v. State, 753 So. 2d 9 (Fla. 2000)
Judgment entered: January 6, 2000
Rehearing denied: March 20, 2000

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 99-10062)
Michael Duane Zack, III v. Florida, 531 U.S. 858 (2000)
Judgment entered: October 2, 2000

Initial Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996-CF-2517
Judgment entered: July 15, 2003 (denying postconviction relief)

Florida Supreme Court (Nos. SC03-1374; SC04-201)
Zack v. State, 911 So. 2d 1190 (Fla. 2005)
Judgment entered: July 7, 2005 (affirming denial of postconviction relief and denying petition for habeas corpus)
Rehearing denied: September 16, 2005

Federal Habeas Proceedings:
District Court for the Northern District of Florida (No. 3:05-cv-000369-RH)
Zack v. Crosby, 607 F. Supp. 2d 1291 (N. D. Fla. 2008)
Judgment entered: November 17, 2008 (denying habeas relief)

Eleventh Circuit Court of Appeals (No. 09-12717)
Zack v. Tucker, 666 F. 3d 1265 (11th Cir. 2012)
Judgment entered: January 9, 2012
Zack v. Tucker, 678 F. 3d 1203 (11th Cir. 2012)
Vacated and rehearing en banc granted: April 30, 2012
Zack v. Tucker, 704 F. 3d 917 (11th Cir. 2013)
Judgment entered: January 9, 2013 (affirming denial of habeas relief)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 12-10693)
Michael Duane Zack, III v. Crews, 571 U.S. 863 (2013)
Judgment entered: October 7, 2013

Eleventh Circuit Court of Appeals (No. 14-14998)
Zack v. Fla. DOC, 721 Fed. Appx. 918 (11th Cir. 2018)
Judgment entered: January 12, 2018 (affirming denial of relief from final judgment)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 17-9549)
Michael Duane Zack, III v. Jones, 139 S. Ct. 322 (Mem) (2018)
Judgment entered: October 9, 2018

First Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996-CF-2517
Judgment entered: January 13, 2005 (denying postconviction relief)

Florida Supreme Court (No. SC05-963)
Zack v. State, 982 So. 2d 1179 (Table) (Fla. 2007)
Judgment entered: September 20, 2007 (affirming denial of postconviction relief)
Rehearing denied: May 1, 2008

State Habeas Petition:
Florida Supreme Court (No. SC05-378)
Zack v. Crosby, 918 So. 2d 240 (Mem) (Fla. 2005)
Judgment entered: October 6, 2005 (denying petition for habeas corpus)
Rehearing denied: December 22, 2005

Second Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996-CF-2517
Judgment entered: July 8, 2015 (denying postconviction relief)

Florida Supreme Court (Nos. SC15-1756; SC16-1090)
Zack v. State, 228 So. 3d 41 (Fla. 2017)
Judgment entered: June 15, 2017 (affirming denial of postconviction relief and denying petition for habeas corpus)
Rehearing denied: October 12, 2017

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 17-8134)
Michael Duane Zack, III v. Florida, 138 S. Ct. 2653 (Mem) (2018)
Judgment entered: June 18, 2018

Third Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996-CF-2517
Judgment entered: January 16, 2018 (denying postconviction relief)

Florida Supreme Court (No. SC18-243)
Zack v. State, --- So. 3d --- (Fla. 2018), 2018 WL 4784204
Judgment entered: October 4, 2018 (affirming denial of postconviction relief)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 18-8052)
Michael Duane Zack, III v. Florida, 139 S. Ct. 1622 (Mem) (2019)
Judgment entered: April 29, 2019

Fourth Successive Postconviction Proceedings:
Circuit Court of Escambia County, Florida
Zack v. State, 1996-CF-2517
Judgment entered: August 31, 2023 (denying postconviction relief and stay of execution)

Florida Supreme Court (No. SC23-1233)
Zack v. State, 2023 WL 6152489
Judgment entered: September 21, 2023 (affirming denial of postconviction relief and denial of stay of execution)

Federal 42 U.S.C. § 1983 Litigation:
District Court for the Northern District of Florida (No. 4:23-cv-392-RH)
Zack v. DeSantis,
Judgment entered: September 15, 2023 (denying stay of execution)

Eleventh Circuit Court of Appeals (No. 23-13021)
Zack v. DeSantis,
Judgment entered: *appeal currently pending*

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DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at ____ So. 3d ____, 2023 WL 6152489, and is reprinted in the Appendix (App.) A.[1]

JURISDICTION

The judgment of the Florida Supreme Court was entered on September 21, 2023. App. A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] Citations to non-appendix material from the record below are as follows: References to Mr. Zack's trial transcripts are designated as "T.__". References to the record of Mr. Zack's direct appeal of his trial are designated as "R.__". References to the record of Mr. Zack's initial postconviction proceedings are designated as "PCR1.__". References to the record of Mr. Zack's first successive postconviction proceedings are designated as "PCR2.__". References to the record of Mr. Zack's second successive postconviction proceedings are designated as "PCR3.__". References to the record of Mr. Zack's third successive postconviction proceedings are designated as "PCR4.__". References to the record of Mr. Zack's fourth successive postconviction proceedings are designated as "PCR5.__". All other references are self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE

I. INTRODUCTION

Michael Duane Zack was born on December 14, 1968. However, Mr. Zack's profound trauma began *in utero*. His mother drank 6–10 beers at least twice per week throughout her pregnancy, which significantly exceeded the thirteen or more alcoholic beverages per month associated with a Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) diagnosis." (T. 1701–04; PCR5. 308). Confirmation of this alcohol exposure is found in Mr. Zack's birth records, which reveal a critical marker for Fetal Alcohol Syndrome ("FAS"): microcephaly. (PCR5. 308). "We now know that microcephaly in a child prenatally exposed to alcohol is associated with a high risk of severe brain functional impairments." (PCR5. 330). Additionally, it is now understood, contrary to the scientific belief at the time of Mr. Zack's trial, "that alcohol has the single most devastating impact on the fetal brain of all substances of abuse." (PCR5. 308).

Mr. Zack's diagnosis of FAS, the most severe form of Fetal Alcohol Spectrum Disorder ("FASD"), has been thoroughly medically documented and is factually beyond dispute.[2] Although FAS is a lifelong condition and accordingly has not changed, the medical and scientific understanding related to FAS *has*. It is only now

[2] (*See e.g.*, T. 1418–42; 1588–2117; PCR5. 298–340) (detailing diagnostic findings resulting from an assessment by leading experts in the field of fetal alcohol spectrum disorders, and corroborative opinions and testimony confirming that Mr. Zack satisfies the clinical criteria for FAS).

that there is a medical and scientific consensus that FAS is a uniquely ID-equivalent condition. (PCR5. 304).

Mr. Zack has been attempting to tell the story of his impairments since 1997. Since his trial predates this Court's opinion in *Atkins*, this information was presented to the jury as mitigation rather than a constitutional exemption to his execution. Following his penalty phase, a non-unanimous jury recommended death. The court then proceeded to give Mr. Zack's diagnosis of FAS little weight, mistakenly believing that "the vast majority of these people that have fetal alcohol syndrome and post-traumatic stress disorder do not commit criminal acts." (R. 867).

However, since that time, the field of medicine has progressed, and Mr. Zack has continually attempted to litigate the impact of new scientific knowledge as it pertains to his condition. With every attempt, the state courts have imposed a procedural bar to prevent meaningful consideration of the new science and to ignore the wealth of evidence he has proffered to show the meritoriousness of his underlying claims.

Without this Court's intervention, Mr. Zack will be executed without any court having substantively addressed his claim that evolving standards of decency warrant a lesser punishment due to his profound, lifelong, and intellectual disability-equivalent impairments. That outcome, especially when viewed in conjunction with the fact that Mr. Zack's jury sentenced him to death by a now-unacceptable margin, is not constitutionally permissible.

II. PROCEDURAL HISTORY

A. Trial

Michael Zack was tried on charges of first-degree murder, robbery, and sexual assault. *Zack v. State*, 753 So. 2d 9 (Fla. 2000). Trial counsel argued that Mr. Zack did not have the level of intent required for first-degree premeditated murder. (T. 190). In support of this defense, counsel argued: Mr. Zack's high level of intoxication on the day of the murder; the chaotic and disorganized crime scene; his brain damage caused by fetal alcohol syndrome; alcohol poisoning at the age of three; and his posttraumatic stress disorder and chronic depression which originated from childhood abuse and torture at the hands of his stepfather, coupled with his mother's axe murder. (T. 1418–42). On September 15, 1997, the jury returned guilty verdicts on all charges. (T. 1521–22; R. 419–20).

During Mr. Zack's penalty phase, the defense presented additional evidence of Mr. Zack's brain damage and dysfunction, his mental health diagnoses, his history of substance abuse, and the ongoing trauma and physical, mental, and sexual abuse he suffered as a child. (T. 1588–2117).

Mr. Zack's penalty phase took place in the context of Florida's previous sentencing statute, in which the jury was tasked with rendering an advisory verdict, and a judge was responsible for making the ultimate sentencing determination. The judge was required to give the jury's recommendation great weight but could override a life recommendation. In rendering a sentence, the jury was not required to be unanimous but was required to find (1) whether at least one aggravative factor was present in the case, (2) whether sufficient

aggravating factors exist, (3) whether the aggravating factors outweigh the mitigating factors, and (4) whether the defendant should be sentenced to life or death. (T. 2107–14). Although the jury was not required to specify how individual jurors voted on each question, the jury ultimately recommended a death sentence by an 11–1 vote, meaning that one juror found that at least one of the four findings was not proven by the State. (T. 2117; R. 792).

In reaching its sentencing decision, the court rejected or gave little weight to Mr. Zack's asserted mitigating factors.[3] (R. 854–55; 866–73). Regarding the evidence of fetal alcohol syndrome, the court concluded:

> A great deal of testimony was received concerning fetal alcohol syndrome and post-traumatic stress disorder. Expert testimony suggests that four to eighteen percent of the population of this country suffer from post-traumatic stress disorder. This equates to somewhere between ten million and forty million people that have this condition in the United States. Without exception, every expert testified that *the vast majority of these people that have fetal alcohol syndrome and post-traumatic stress disorder do not commit criminal acts*.

(R. 867) (emphasis added). The court subsequently sentenced Mr. Zack to death following the jury's 11–1 recommendation. (R. 852–75; T. 2117).

B. Relevant Postconviction Proceedings

Throughout his postconviction proceedings, Mr. Zack sought to establish that he is exempt from execution pursuant to *Atkins*, which had not yet been decided at

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[3] The judge found four mitigating factors and assigned them very little weight: (1) the crime was committed while Mr. Zack was under the influence of extreme mental or emotional disturbance; (2) Mr. Zack did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (3) Mr. Zack acted under extreme duress; and (4) the nonstatutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. *Zack v. State*, 753 So. 2d at 13.

the time of his trial and has continued to develop evidence of his mental impairments and adaptive deficits. (PCR3. 109–79). However, despite his best efforts, Mr. Zack had never been provided an opportunity to litigate this claim.

While Mr. Zack's initial postconviction appeal and habeas petition were still pending before the Florida Supreme Court, Mr. Zack filed a motion to relinquish jurisdiction to pursue his intellectual disability claim in the circuit court under the newly promulgated Fla. R. Crim. P. 3.203. Simultaneously, Mr. Zack filed his first successive postconviction motion in circuit court, raising an *Atkins* claim and seeking to litigate this issue under Rule 3.203. The circuit court summarily denied this motion with prejudice on January 13, 2005. (PCR2. 58–63).

The Florida Supreme Court then denied Mr. Zack's motion to relinquish jurisdiction to the circuit court to determine intellectual disability but allowed him to re-file his motion in the circuit court when his appeal became final. However, since the circuit court had already dismissed the motion with prejudice, he was foreclosed from obtaining any relief on his intellectual disability claim.

The Florida Supreme Court thereafter denied the appeals of his initial postconviction motion as well as his first successive postconviction motion. *Zack v. State*, 911 So. 2d 1190 (Fla. 2005); *Zack v. State*, 982 So. 2d 1179 (Fla. 2007).

On May 26, 2015, Mr. Zack filed a second successive postconviction motion challenging the validity of his sentence based on *Hall v. Florida*, 134 S. Ct. 1986 (2014). (PCR3. 109–79). As evidence of his intellectual disability, Mr. Zack attached to his motion several witness declarations detailing a lifelong history of adaptive

deficits (PCR3. 169–79), as well as a report from a qualified neuropsychologist, Hyman Eisenstein, Ph.D., ABN, diagnosing him with intellectual disability. (PCR3. 158–67).

Dr. Eisenstein opined that "[s]ince there is a significant difference between the index scores, and the Full Scale IQ is a composite of the index scores, it is not the best indicator of true intellectual functioning." (PCR3. 163). Dr. Eisenstein confirmed that the profound and continuous verbal-performance index score splits are indicative of organic brain damage, as noted by experts who testified at Mr. Zack's trial. (PCR3. 120).

Witness declarations attached to Mr. Zack's *Hall* motion established that his adaptive deficits could be traced back to his early childhood. He took much longer than his siblings to reach developmental milestones, including communication, reading, writing, memorizing numbers and names of body parts, and could not color within the lines. (PCR3. 171–74). He struggled to bathe and clothe himself properly and was unable to perform simple chores such as making his bed, folding his clothes, and washing dishes. (PCR3. 171–74).

As he grew older, he continued to depend on the assistance of others. He was unable to maintain a job for very long before getting fired for not showing up when he was supposed to or not completing required tasks. He once lost his job as a janitor on a cleaning crew because he could not properly measure and mix the cleaning chemicals and use them for their intended purpose. Mr. Zack thought in very concrete terms. If a cabinet door fell off, he would nail it back onto the cabinet and consider it

fixed, though the door would no longer open. (PCR3. 171–74). Although Mr. Zack fathered two children, he was incapable of taking care of them and could not be left alone with them because of his short attention span. (PCR3. 171–74). Mr. Zack could not read or write, did not have a bank account or a driver's license, did not wash his clothes or cook, had to be reminded to bathe and brush his teeth, could not handle money responsibly or budget, was unable to plan ahead or follow through with appointments, and could not read a map or navigate to a destination that he had not previously been to. (PCR3. 171–74).

Despite this proffered evidence, the circuit court summarily denied Mr. Zack's motion based on his IQ scores, and the Florida Supreme Court affirmed the circuit court's decision on June 15, 2017. *Zack v. State*, 228 So.3d 41 (Fla. 2017).

In 2016, this Court held that the statute under which Mr. Zack was sentenced to death violated the Sixth Amendment because only the sentencing judge, rather than a jury, was required to find the existence of at least one aggravating circumstance. *Hurst v. Florida*, 577 U.S. 92 (2016). In the wake of *Hurst*, the Florida legislature adopted a new capital sentencing statute that required the sentencing jury to make the same findings as to whether aggravation exists, whether it is sufficient, whether it outweighs the mitigation, and whether the defendant should be sentenced to death, but required those decisions to be unanimous. § 921.141, Fla. Stat. (2022).

After the Florida Supreme Court extended *Hurst* and held it partially retroactive, Mr. Zack raised claims that his death sentence violated the Sixth and

Eighth Amendments under the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Zack v. State*, 228 So. 3d 41 (Fla. 2017); *Zack v. State*, --- So. 3d --- 2018 WL 4784204.[4] Mr. Zack's claims were denied on non-retroactivity grounds. *Id*.

On August 17, 2023, Governor DeSantis signed a death warrant for Mr. Zack's execution scheduled for October 3, 2023. (PCR5. 29–33). On September 28, 2023, Mr. Zack filed a fourth successive postconviction motion raising claims that his execution is barred by the Eighth Amendment because of his non-unanimous jury recommendation, as well as his ineligibility for execution because of his diagnosis of FAS, a uniquely ID-equivalent condition, under the Eighth and Fourteenth Amendments. (PCR5. 261–428). The circuit court summarily denied Mr. Zack's fourth motion for postconviction relief, and he timely appealed. App. B. On September 21, 2023, the Florida Supreme Court denied all requested relief. App. A.

Specifically, with regard to Mr. Zack's claim that his FAS warranted exemption from execution, the Florida Supreme Court found that it was untimely, procedurally barred, and meritless. App. A at 5–7. Additionally, without addressing ID-equivalence, the Florida Supreme Court found that Atkins protections don't apply to "individuals with other forms of mental illness or brain damage." App. A at 7.

Regarding Mr. Zack's claim that his nonunanimous death recommendation by the jury during his penalty phase violates the Eighth Amendment, the Florida

[4] The Florida Supreme Court has since overruled the aspects of *Hurst v. State* that went beyond this Court's opinion in *Hurst v. Florida*. *See State v. Poole*, 297 So. 3d 487 (Fla. 2020).

Supreme Court found that it was untimely, procedurally barred, and meritless based on this Court's precedent in *Spaziano v. Florida*. App. A at 7–9.

III. ADDITIONAL RELEVANT FACTS

This year marks the 50th anniversary of the first peer-reviewed publication in the United States regarding FASD. (PCR5. 298). Over the past half-century, the medical community has greatly expanded its knowledge of this condition. (PCR5. 298–304) (summarizing the history of scientific understanding related to FASD). But it is only now that scientific understanding has reached "a tipping point relative to this disorder." (PCR5. 329) (citing Kenneth Lyons Jones, one of the two U.S. physicians who first described FAS in 1973).

Unlike nearly every psychiatric or brain-based disorder raised by litigants seeking exemption from execution, the medical community now recognizes the unique cognitive, practical, and social impairments inherent to FASD as indistinguishable from those of ID. *See, e.g.*, Greenspan, S.,[5] Novick Brown, N. & Edwards, W., *Determining Disability Severity Level for Fetal Alcohol Spectrum Disorder: Assessing the Extent of Impairment*, EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS IN THE FORENSIC CONTEXT (Springer, 2021; corrected, 2022) (PCR5. 367) ("there are few disorders more related to ID (both in causing that disorder and resembling it functionally) than FASD); (PCR5. 305) ("people with FAS have adaptive deficits and support needs not only similar to but *identical* to those seen in intellectual

[5] Dr. Greenspan is a leading authority on intellectual disability and the most cited researcher in the ID section of the DSM-5. (PCR5. 330).

disability"); *see generally* Novick Brown, N. & Greenspan, S., *Diminished culpability in fetal alcohol spectrum disorders (FASD)* 2021 Behav. Sci. Law. 1 (PCR5. 374) (ND-PAE is as severe overall, and in some respects more severe than, ID). Although mean IQs for a specific FASD diagnosis may be higher than 70–75,

> [a]s defined in DSM-5, ND-PAE is identical to ID except for confirmation of prenatal exposure to alcohol. In DSM-5, both ND-PAE and ID include "deficient intellectual functions," which are defined almost exclusively as executive rather than IQ impairments…Both conditions also involve significant adaptive dysfunction which is defined in ID…In ID, diagnostic criteria require one or more adaptive deficits across multiple environments such as home, school, work, and community; in ND-PAE, two or more adaptive deficits are required. In both conditions, cognitive and adaptive impairments must manifest during the developmental period.

Jerrod M. Brown, et al., *Fetal Alcohol Spectrum Disorders (FASD) and competency to stand trial (CST)*, 52 Intl. J. L. & Psychiatry 19, 21–22 (2017) (PCR5. 302, 305–07; 386–94).

Individuals with intellectual disability (but not FAS) have IQ scores that tend to accurately reflect their level of intellectual and adaptive functioning, whereas the IQ score of someone who has FAS does not accurately reflect their intellectual and adaptive impairments. (PCR5. 305–07). The presence of FASD, like the SEM of an IQ test, the Flynn effect, and the practice effect, impacts the accuracy of an IQ score as it pertains to real-world functioning. (PCR5. 327–28) (discussing these measures as reforms meant to remedy the problem of ID underinclusion based on non-reflective IQ cutoffs). And, FAS is the most severe form of FASD due to its combined physical and mental effects. (PCR5. 304; 326). An individual who has FAS and receives an IQ test score in the 70s would not intellectually be functioning at that range. (PCR5. 305;

328–29; 333–34). This means that IQ is a grossly inaccurate and inflated measure of intellectual functioning in individuals with FAS. In addition, the adaptive functioning of individuals with FASDs is far below their IQ score. An individual with an IQ in the 70s may be expected to function adaptively as though their IQ is in the 50s or 60s. (PCR5. 305). This means adaptive deficits in FAS are *more severe* than in intellectual disability without FASD, where adaptive deficits would be roughly on par with IQ. (PCR5. 305).

These deviations are one reason that full-scale IQ scores are generally considered "an outmoded concept" in the medical and scientific community—especially for individuals with the presence of FAS. (PCR5. 304; 307; 327).[6] The professionally responsible approach in cases such as Mr. Zack's requires non-dispositive consideration of IQ test scores. One clinically acceptable approach is the "Intellectual Disability equivalence" model, which is used for individuals with conditions such as Down Syndrome, Fragile X Syndrome, and FAS, where IQ scores can be expected to be artificially elevated and reliance upon the numerical results

[6] For a more complete discussion of why use of IQ scores must not be used to preclude supports and protections to individuals who would otherwise be classified as intellectually disabled, (PCR5. 327) (explaining that IQ scores gained prominence as a tool of the eugenics movement, not to clinically evaluate the need for supports or protections); (PCR5. 327–28) (explaining that the original AAIDD standard for intellectual impairment was one standard deviation below the mean, which proved overinclusive due to a lack of emphasis on adaptive deficits and prompted an overcorrection that now is underinclusive in determining who qualifies as intellectually disabled).

would result in medically-inappropriate diagnostic and treatment restrictions. (PCR5. 303; 305; 307; 328–330).[7]

The new consensus is that IQ is "a reflection of underlying brain pathology, which is complex and cannot be captured by the myopic lens of a single test score." (PCR5. 329). Although IQ scores "function as a window into a person's cognitive functioning, they should not be used rigidly as make-or-break bases for ruling ID in or out." (PCR5. 329). This is especially critical in terms of protecting individuals with FASD from secondary disabilities, as "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; 300). Put simply:

> [I]n the medical and scientific community, denying services and protections solely based upon a full-scale IQ score slightly above a 70-75 cutoff is an outmoded concept. From a clinical and medical perspective, it is frankly absurd that an individual with an IQ of 79 and established cognitive/adaptive deficits related to FAS/FASD would be denied the supports and protections given to an individual without FASD whose IQ is a few points lower.

(PCR5. 307).

As a result of his mother's "high-risk" drinking pattern throughout the course of her pregnancy, Mr. Zack suffers from FAS—generally viewed as the most severe form of FASD. (PCR5. 304; 326; 330). The medical community now knows that alcohol is the most harmful prenatal substance exposure. (PCR5. 308; 332). Mr. Zack's *in*

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[7] *See also* Greenspan, S., Novick Brown, N., & Edwards, W., *FASD and the Concept of "Intellectual Disability Equivalence"*, LAW AND ETHICS IN FETAL ALCOHOL SPECTRUM DISORDER (2016) (PCR5. 396–421) (discussing intellectual disability equivalence model).

utero exposure has caused catastrophic impairments throughout his entire lifespan. These impairments, set in motion before he drew his first breath, illustrate the ways in which FAS mirrors intellectual disability.

Mr. Zack was born with microcephaly, a symptom of FAS correlated with severe brain functional impairments. (PCR5. 330). He had numerous developmental delays, such as walking and talking, and he wet the bed nearly nightly into his teenage years. (PCR5. 330). He had a pattern of attention deficits and academic underachievement despite strong efforts. (PCR5. 330). He could not, as a child or adult, perform basic tasks in the home, work, and social environments (such as washing dishes, properly dressing himself, cooking, personal grooming, managing money, or reading a map). (PCR5. 330-31).

As Mr. Zack grew up, he experienced many adverse outcomes that fit a "classic pattern of fetal alcohol 'secondary disabilities[,]" [which] result from having the primary disabilities (brain damage that you're born with) of FASD but none of the identified protective factors such as early diagnosis of FASD and a stable, sober, and supportive childhood home." (PCR5. 332). These secondary disabilities included disrupted education, legal problems, incarceration, substance misuse, and mental illness. (PCR5. 332).

At Mr. Zack's trial, the prosecution attempted to minimize the impact of his FAS by positing that his brain outcomes were primarily the result of trauma and neglect. But, at the time of Mr. Zack's trial, the science regarding the impact of FASD on functioning was inexact. (PCR5. 302). Now, scientific understanding of FASD

recognizes its strong correlation with other risk factors, both prenatal (e.g., exposure to other substances, poor prenatal care) and postnatal (e.g., multiple home placements, physical/sexual abuse, low socioeconomic status). The prevalence of these risk factors in individuals with prenatal alcohol exposure (PAE) "is often 3 to 7-fold higher than in the general population. PAE [is] the dominant risk factor explaining the largest proportion of variance in brain structural and functional outcomes[.]" (PCR5. 332).

At the time of Mr. Zack's 1997 trial, "prenatal alcohol exposure was known to cause significant impairment in executive functioning, with direct, severe, and far-reaching effects on adaptive behavior and developmental outcomes." (PCR5. 300; 332–33). Additionally, the secondary disabilities caused by FASD evidence wide-reaching impacts, including mental health problems, school disruption, substance abuse, trouble with the law[8], confinement, sexually inappropriate behavior, dependent living, and employment problems. (PCR5. 300; 332–33). However, not until the past decade has the medical community formally acknowledged the cognitive and adaptive dysfunction of FASD. (PCR5. 304–08).

Scientific and medical understanding of FASD has recently culminated in the consensus that FASD is functionally equivalent to intellectual disability (ID) (PCR5. 304; *see also* PCR5. 329)("FASD IS and ID-equivalent condition")). It is now accepted

[8] According to the research, "males with FASD between the ages of 12 and 51, 68% were found to have experienced trouble with the law." (PCR5. 329–300); (*see also* PCR5. 332) (when combined with additional risk factors such as disrupted school experience, the percentage jumps to 83%); *id*. ("These factors make individuals with FASD dramatically more vulnerable to legal troubles.").

that FASD occurs through no action of the individual suffering from the condition and causes lifelong brain damage. (PCR5. 330). Further, according to Dr. Novick Brown, "it is absurd that [Mr. Zack] with an IQ score of 79 and established cognitive/adaptive deficits related to FAS/FASD would be denied the supports and protections given to an individual without FASD whose IQ is a few points lower." (PCR5. 307). This absurdity is emphasized by the fact that, in 2015, Mr. Zack was indeed diagnosed with ID by a qualified practitioner but was legally precluded from relief in the Florida courts because his IQ score was over 75.

Mr. Zack's history demonstrates a textbook case of FAS accompanied by all eight of the secondary disabilities. Mr. Zack's neurobehavioral manifestations were evident in his development: he started walking and crawling late, he had communication delays, "nearly nightly enuresis (bed-wetting) into his teenage years, he rocked back and forth, and was described as "slow." (PCR5. 330). "When he was 12 years old, he was functioning at a lower level than his six-year-old sister." (PCR5. 330). And, "[a] friend of Mr. Zack's family, who was a retired prison guard and deputy sheriff and with whom Mr. Zack resided as a teenager, stated that Mr. Zack was one of the lowest functioning individuals he has ever encountered." (PCR5. 332).

As Mr. Zack aged, his limitations grew even more pronounced.[9] He "was incapable of basic adult responsibilities." (PCR5. 331). The mother of Mr. Zack's

[9] This is a hallmark of FASD. Adolescence and adulthood, in typical populations, results in the development of higher-level cognitive processes -- particularly in the realm of executive functioning. This development does not occur in individuals with FASD, which means that as adults, their impairments are even more pronounced as compared to their age-matched peers than they were in childhood.

daughter compared his functioning to that of a disabled child. (PCR5. 331). The only time Mr. Zack has coped effectively with life experiences was during his psychiatric hospitalization and his current incarceration, which is entirely predictable based on what is now known about FASD. (PCR5. 309).

REASONS FOR GRANTING THE WRIT

I. MR. ZACK MUST BE ALLOWED A MEANINGFUL OPPORTUNITY TO DEMONSTRATE THAT HE IS ENTITLED TO EXEMPTION FROM EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prohibits the execution of individuals with intellectual disability (ID) because their "lesser culpability…surely does not merit that form of retribution." 536 U.S. 304, 319 (2002). Although Mr. Zack has been diagnosed with ID by a qualified clinician and has raised the issue of his *Atkins*-based entitlement to exemption from execution at every appropriate legal opportunity, he has been repeatedly precluded from relief due to his IQ score of 79.

Now, there exists a new definitive medical consensus that Fetal Alcohol Syndrome (FAS)—the most severe form of Fetal Alcohol Spectrum Disorder (FASD)[10] and a diagnosis Mr. Zack has carried since the time of his trial in 1997—is a uniquely ID-equivalent disorder that is entitled to the same social supports and legal protections, notwithstanding IQ cutoffs. These legal protections include exemption

[10] Declaration of Natalie Novick Brown (PCR5. 304) (also noting that FAS represents a very small minority of individuals diagnosed with FASD).

from execution under the Eighth Amendment, as articulated in *Atkins* and refined by its progeny.

Executing Mr. Zack without first providing meaningful access to the courts to demonstrate that the death penalty is disproportionate to his culpability would violate the Eighth Amendment prohibition on cruel and unusual punishment.

Furthermore, excluding Mr. Zack from the group of persons constitutionally protected from execution by the Eighth Amendment without first allowing him the opportunity to prove his ID equivalence would violate the Equal Protection Clause of the Fourteenth Amendment. In terms of promoting a legitimate governmental end (here, delineating who is subject to, or exempt from, execution) there is no meaningful distinction between the reduced capacity Mr. Zack has proffered and individuals with identical symptoms who have an ID diagnosis.

A. Under The Federal Constitution, Florida State Courts May Not Ignore Evidence Of A Medical Consensus Recognizing FAS As Uniquely Equivalent And Functionally Identical To Intellectual Disability.

Although *Atkins* generally permits states to develop their own procedures for determining which capital defendants are categorically exempt from execution, 536 U.S. at 317, its progeny mandate that "in determining who qualifies[,]" states must take into account "the medical community's opinions." *Hall v. Florida*, 572 U.S. 701, 710, 723 (2014). Although the "legal determination" is "distinct from a medical diagnosis … it is informed by the medical community's diagnostic framework." *Id.* at 721. And, "the medical standards used to assess that disability constantly evolve as the scientific community's understanding grows." *Bourgeois v. Watson*, 141 S. Ct. 507,

508–09 (2020) (Sotomayor, J., dissenting from denial of certiorari) (citing *Moore v. Texas*, 581 U.S. 1, 20–21 (2017)). The medical community now recognizes that the unique cognitive, practical, social, and intellectual impairments inherent to FAS are interchangeable with intellectual disability.

When evaluating exemption from execution on the basis of the Eighth Amendment protections articulated in *Atkins*, accepted medical principles and evolved constitutional standards do not support tethering such a determination to a specific IQ score. The *Hall* Court recognized the medical community's increasing disfavor of rigid IQ cutoffs, finding that such a practice "conflicts with the logic of *Atkins* and the Eighth Amendment." 572 U.S. at 720–21. This holding is of particular relevance in Mr. Zack's case, where—although his IQ is already only in the 70s—clinicians and researchers have unambiguously found that the IQ scores of someone with FAS significantly underestimate their deficits.

Mr. Zack's FAS exemplifies the practical, legal, and moral reasoning of *Atkins*. Individuals with "disabilities in the areas of reasoning, judgment, and control of their impulses. . .do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. FAS causes widespread dysfunction that impairs executive functioning and impedes development of the requisite level of culpability to justify imposition of the death penalty.[11]

[11] This dysfunction is of a different origin, breadth, and impact than other, non-ID-equivalent forms of brain damage.

Like those with intellectual disability, individuals with FASD have impairments in learning and adaptive behavior that are directly attributable to significant deficits in executive functioning. As in ID, executive function deficits in individuals with FASD impair their ability to use foresight and judgment; to pay attention and remember lessons learned; to predict outcomes; to strategize, plan ahead, or engage in goal-directed behavior and error detection/correction, particularly in stressful, nonroutine, or technically difficult situations; to control impulses; to self-regulate; to react appropriately; to follow rules; to reason; to interpret social cues; to communicate; and to navigate the community appropriately and independently. (PCR5. 306–07; 329). Symptoms of their intellectual and adaptive deficits—including immaturity, suggestibility, and attention-seeking behaviors—may be misinterpreted for conduct or personality disorders. (PCR5. 307; 327). This convergence of factors means individuals with FASD are profoundly vulnerable in legal—and especially capital—proceedings, where, as with intellectual disability,

> the risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," … is enhanced not only by the possibility of false confessions, *but also by the lesser ability of [such defendants] to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors …. [They] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted lack of remorse for their crimes.*

Atkins, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (emphasis added). Indeed, as with other categorically-exempt conditions, the characteristics inherent to FASD are often mistakenly viewed as aggravating, rather

than mitigating.[12] This risk is reflected in Mr. Zack's case, where—although defense counsel attempted to contextualize FAS to the extent possible under limited scientific understanding of its effects in 1997, the trial court's sentencing order includes numerous instances where Mr. Zack's functional deficits and secondary disabilities were viewed as aggravating. (R. 859–75). The limited scientific understanding of FAS in 1997 also led the trial court to erroneously conclude that "the vast majority of these people that have fetal alcohol syndrome and post-traumatic stress disorder do not commit criminal acts." (R. 867). In fact, the current science shows that approximately 60% of individuals with FASD have trouble with the law. (PCR5. 327; 332). And, this statistic does not take into account the risk and protective factors that are critical to determining whether secondary disabilities such as incarceration will occur. In other words, 60% of *all* adolescents and young adults with FASD have legal trouble. But "if we look more specifically at those like Mr. Zack with additional risk factors (male gender, disrupted school experience), the rates climb to 83% having been in trouble with the law and, among these, 69% have been incarcerated[.]" (PCR5. 300; 332).

Further, excluding Mr. Zack from the set of individuals whose executions are categorically prohibited would violate the Equal Protection Clause of the Fourteenth

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[12] *See Roper v. Simmons,* 543 U.S. 551, 573 (2005) (where, in categorically exempting individuals under the age of 18 at the time of their crime, the Court found an unacceptable risk that aggravating facts of a crime would overpower mitigating arguments based on the capital defendant's juvenile status, and that "[i]n some cases a defendant's youth may even be counted against him."); *Atkins*, 536 U.S. at 320-21 ("[M]oreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.")

Amendment. The right to be free from cruel and unusual punishment is a fundamental constitutional right. *Atkins* protects individuals with ID, because their execution would categorically be cruel and unusual punishment due to the deficits inherent to ID. Excluding Mr. Zack from these protections when he suffers from a measurably ID-equivalent condition in nature and severity (FAS)—is not narrowly tailored to any compelling government interest.

Indeed, even under the more permissive rational basis test, Mr. Zack's exclusion from *Atkins* protections violates Equal Protection. The medical community, whose views must be taken into consideration in determining *Atkins* protections, have found that there is "no meaningful distinction between the cognitive, neurodevelopmental, behavioral, and adaptive functioning of an individual with FASD who does not have a precise ID diagnosis and an individual without FASD who has an ID diagnosis." (PCR5. 309). In terms of promoting a legitimate government end (*e.g.*, determining who is subject to, and exempt from, execution) there is no rational basis for failing to offer *Atkins* protections to Mr. Zack, who has the uniquely interchangeable condition of Fetal Alcohol Syndrome and who has long been found to meet the criteria for intellectual disability.[13]

[13] This lack of rational basis is especially true in Mr. Zack's case, as the specific FASD he suffers from is FAS. FAS constitutes a very small subset of FASDs and includes objectively measurable physical markers in addition to cognitive and adaptive impairments. It is quantifiable, comparatively rare, would pose no workability problems, and would cause no difficulties in making objective eligibility determinations. (PCR5. 299; 301; 307–08; 326).

In evaluating whether Mr. Zack should be exempt from execution due to the profound effects of his FAS, evolving medical principles and constitutional standards of decency do not support tethering such a determination to a specific IQ score. "[I]ntellectual disability is a condition, not a number[,]" 572 U.S. at 723. In the context of ID, the *Hall* Court recognized the medical community's increasing disfavor of rigid IQ cutoffs, finding that such a practice "conflicts with the logic of *Atkins* and the Eighth Amendment." 572 U.S. at 720–21. The state court's refusal to consider the opinions of the medical community violates this Court's Eighth Amendment jurisprudence.

B. Without This Court's Intervention, Florida's Inadequate Procedural Bars Would Foreclose Any Meaningful Opportunity For A Condemned Individual To Show That Evolving Standards Of Decency Render Them Constitutionally Exempt From Execution.

"The Eighth Amendment prohibits certain punishments as a categorical matter." *Hall*, 572 U.S. at 708. Categorical bans exist to protect both the individual as well as the interests of society. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (Eighth Amendment-based categorical exemption protects not only the death-exempt individual but "the dignity of society itself from the barbarity of exacting mindless vengeance[.]"). No state-law waiver provision can trump this constitutional prohibition, and death-sentenced individuals "must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724.

Just as it would be unconstitutional for the State to invoke the failure to timely raise an Eighth Amendment challenge as justification to execute individuals subject

to other categorical exemptions or exclusions, *see, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008), so too would it be unconstitutional to execute an individual subject to *Atkins* protection on grounds that he failed to raise his claim at the "appropriate" procedural time. *See Sawyer v. Whitley*, 505 U.S. 333 (1992) (courts may hear an otherwise-defaulted claim upon requisite showing of ineligibility for the death penalty); *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (same). Because Mr. Zack's disability warrants categorical exemption from execution, no procedural or time bar applies, and merits review is appropriate.

Further, the Florida state courts' asserted bar would, paradoxically, punish Mr. Zack for his past diligence. To the extent possible under previously available scientific and legal understanding, Mr. Zack has been diligent and has raised the issue of his entitlement to exemption from execution under *Atkins* at every reasonably available opportunity. These prior proceedings exemplify the incremental nature of scientific progress, which has only now yielded a consensus regarding FAS as an ID-equivalent condition warranting exemption from execution. The circuit court's finding of a procedural bar effectively punishes Mr. Zack for his past diligence.

At the time of Mr. Zack's trial in 1997, there was no categorical prohibition against executing individuals with intellectual disabilities, and very few capital litigators presented evidence of the mitigating impact of prenatal alcohol exposure. (PCR5. 300). Mr. Zack's counsel, however, made FAS a significant aspect of Mr. Zack's guilt phase defense and an even more central part of his penalty phase defense. (T. 1967) (testimony establishing "to a high degree of medical certainty that the

causative influence of [Mr. Zack's] cognitive problems is exposure to alcohol prenatally"). Presciently, this defense explored how entwined and similar ID was to FAS. (T. 1921) ("The most common reason [for mental retardation is] because of alcohol ingestion during direct pregnancy and the transfer of that ethanol through the placenta and ultimately through the blood-brain barrier to the child."); (T. 1193–96, 1204) (referencing FASD as a lifelong condition and discussing risk and protective factors related to secondary disabilities); (T. 1921–23, 1961–62) (referencing the large percentage of individuals with FASD who enter the criminal justice system due to a result of their deficits, including impulsivity); (T. 1923–24) (discussing risk and protective factors related to outcomes for those with FASD); (T. 1950–51) (referencing symptom patterns of FASD that are at risk of "being described as antisocial…rather than attempting to arrive at a more physiologically, medically based diagnosis to explain the symptoms"); (T. 2043) (counsel asking "if he has fetal alcohol syndrome, does he not have some mental problems that are somewhat related to mental retardation?"); (T. 2043–44) (discussing similar problems among individuals with FAS and ID).

In 2002, after the United States Supreme Court's decision in *Atkins*, counsel for Mr. Zack amended his then-pending initial state postconviction motion to include a claim that his execution would violate the Eighth Amendment. (PCR1. 226–34). That motion discussed medical and scientific knowledge that an individual with borderline intellectual disability and an IQ slightly over the 70-75 range could still meet the criteria for exemption from execution on account of intellectual disability.

(PCR1. 226–34). The trial court denied the claim without an evidentiary hearing, relying on a strict IQ cutoff: "A review of the expert trial testimony on this issue shows that not one expert found Defendant's I.Q. to be near the statutory figure, 70, which would be required to establish mental retardation." (PCR1. 577).

In October 2004, while Mr. Zack's appeal of the 3.851 denial was pending, the Florida Supreme Court promulgated a new rule, Fla. R. Crim. P. 3.203(d)(4), which laid out procedures for determining whether an already death-sentenced individual was now ineligible for execution on account of intellectual disability. *See Amendments to Fla. R. Crim. P. and Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004). Pursuant to the new rule, Mr. Zack's postconviction counsel timely moved for the Florida Supreme Court to relinquish jurisdiction and filed a successive postconviction motion in the trial court presenting the issue of his intellectual disability. (PCR2. 6–26). He was procedurally barred due to his prior efforts raising the issue. (PCR2. 58–62, 227–30). Again, the trial court again cited the "threshold" IQ cutoff of 70. (PCR2. 58–63).

The Florida Supreme Court ultimately affirmed the trial court's denial of 3.851 relief based on the strict IQ cutoff of 70. *See Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (citing *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000)). Mr. Zack's counsel appealed the denial of his successive postconviction motion related to Fla. R. Crim. P. 3.203, but the Florida Supreme Court held that "[b]ecause Zack does not meet the threshold requirement of an IQ of 70 or below, we find no useful purpose would be served" by a remand to the trial court. *See* 9/20/07 Amended Order (Case No. SC05–963).

Then, in 2014, the Supreme Court issued *Hall*, which abrogated *Cherry* and invalidated Florida's strict 70 cutoff because "intellectual disability is a condition, not a number." 572 U.S. at 723. With this sea change, Mr. Zack—through counsel—again moved for relief from his death sentence on account of intellectual disability. The motion explained that in cases such as Mr. Zack's, where an individual has FASD, severe adaptive deficits, and a profound split between verbal and performance IQ scores, "full-scale IQ may not be a reliable index of actual functioning," and a clinician's judgment may be utilized in reaching a conclusion regarding intellectual function. (PCR3. 118–20). He proffered numerous sworn lay statements establishing his lifelong history of significant adaptive deficits. (PCR3. 169–79). He provided a report from a qualified neuropsychologist, Hyman Eisenstein, Ph.D, ABN, diagnosing him with intellectual disability. (PCR3. 158–67). He requested an evidentiary hearing at which his intellectual disability could be further proven. (PCR3. 125). And, despite *Hall*'s warning about the use of strict cutoffs, he was again denied solely on the basis that his IQ score was above 75. (PCR3. 222–23).

Now, a new definitive consensus establishes that FAS is one of extremely few conditions that are uniquely ID-equivalent and subject to the same societal supports and protections, notwithstanding an IQ cutoff. Mr. Zack, who has diligently presented his *Atkins* claim as the relevant science developed, has again been diligent in presenting evidence of this consensus. At each previous turn, he has been denied an evidentiary hearing on the merits of this claim simply because his IQ of 79—scarcely above the original cutoff—was deemed too high. Considering the new scientific

consensus establishing that his IQ score cannot be the sole factor precluding *Atkins* relief, Mr. Zack is entitled to the evidentiary hearing he has long sought and ultimately to exemption from execution.

And now, when Mr. Zack has asserted that the combined effect of society's evolving standards of decency and continued advances in medical knowledge have changed the legal landscape and given rise to a newly available claim—grounded in the Eighth and Fourteenth Amendments—that Mr. Zack is exempt from execution based on his FAS, the state courts have again turned him away. The state courts claim that because this can't be considered newly discovered evidence, there is no available state-court avenue through which to bring this claim. In other words, the message of the Florida courts is that because Mr. Zack was so ahead of the curve in litigating the effect of his condition, now that science and society have caught up to what he has been saying since his trial in 1997, there is no unexpended path to relief.

Thus, through no fault of Mr. Zack's, without this Court's intervention, no court will have adequately and substantively considered the ID-equivalence of FAS, and whether it warrants exemption from execution on account of Mr. Zack's impaired functioning and reduced moral culpability.

II. THE EIGHTH AMENDMENT PROHIBITS THE EXECUTION OF THOSE NOT SENTENCED TO DEATH BY A UNANIMOUS JURY.

Although this Court has noted that the decision by a jury to sentence a defendant to death maintains the "link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing

society," *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968), this Court's jurisprudence still permits a judge or non-unanimous jury to sentence a defendant to death. This Court should grant certiorari to determine whether Mr. Zack is in the class of offenders culpable enough to face execution because, when faced with this question, one juror decided he was not.

This Court has looked to two alternative tests when determining whether a death penalty procedure passes muster under the Eighth Amendment: (1) "the evolving standards of decency that mark the progress of a maturing society," *Atkins*, 536 U.S. at 311–12 (internal quotation omitted), and (2) whether the modern procedure would have violated the public understanding at the time of the founding. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

Under both tests, Mr. Zack's execution would violate the Eighth Amendment. First, in light of the evolving standards of decency—including (1) the consensus in statutes, sentencing, and executions in favor of unanimous jury death sentences and (2) this Court's recognition that a jury vote must be unanimous to convict a defendant of a "serious offense"—Mr. Zack is not in the class of offenders culpable enough to deserve a death sentence, as found by the four jurors who recommended that his life be spared. Second, allowing a defendant to be executed despite a non-unanimous jury vote violates the common understanding at the time of the founding that death sentences must be based on a unanimous jury. Mr. Zack's case allows this Court to address the capital jury sentencing and ensure that it conforms to the evolving standards of decency and original public understanding.

A. There Is An Overwhelming National Consensus In Favor Of Unanimous Capital Jury Sentencing.

Death penalty procedures that have been found to have been repudiated by the "evolving standards of decency that mark the progress of a maturing society" violate the Eighth Amendment. *Atkins*, 536 U.S. at 312. Under this inquiry, this Court has traditionally reviewed this procedure's current understanding and administration. When the procedure used by a state is out of touch with the contemporary consensus, the procedure fails this test and has been rendered unconstitutional.

In conducting such a survey, this Court looks at three indicators of societal consensus. First, this Court reviews the current state and federal sentencing laws because Legislatures "are constituted to respond to the will and consequently the moral values of the people." *Id*. at 322–23. As such, legislation is "the clearest and most reliable objective evidence of contemporary values. *Id*. Second, this Court examines actual sentencing practices. *See, e.g., Graham v. Florida*, 560 U.S. 48, 62 (2010) ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."). Third, along with sentencing practices, "[s]tatistics about the number of executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society." *Kennedy*, 554 U.S. at 433.

1. Current sentencing laws. Of the twenty-eight states that currently authorize the death penalty and the federal government, only six jurisdictions permit a defendant to be sentenced to death without a unanimous vote from the jury. Two states—Montana and Nebraska—have limited jury involvement in capital

sentencing, resting the sentencing determination with a judge (Montana) or judges (Nebraska).[14] Indiana and Missouri consider a non-unanimous sentencing jury a hung jury.[15] Alabama and Florida allow a defendant to be sentenced to death based on the non-unanimous vote of a jury.[16] Alabama requires a minimum jury vote of 10–2, while Florida requires a minimum vote of 8–4.

2. Current sentencing practices. The contemporaneous sentencing practices of the states show that the non-unanimous jury has been widely repudiated. In Missouri, only three defendants have been sentenced to death in the last decade, only one of whom had a judge-imposed sentence that survived direct appeal.[17] In Indiana, where no one has been sentenced to death in the last nine years, only one death sentence has been handed down in the last twenty-seven years after the jury could not reach a unanimous decision.[18] Nebraska has only sentenced three defendants to death in the last thirteen years.[19] Montana has not handed down a

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[14] In both states, the jury is only asked to find whether aggravating factors exist, and the ultimate sentencing decision is left to a judge in Montana and a panel of judges in Nebraska. Mont. Code Ann. § 46-18-301; Neb. Rev. Stat. Ann. § 29-2521. In Ohio, a defendant may elect to be sentenced by a judge or panel of judges in lieu of a unanimous jury. See Ohio Rev. Code Ann. § 2929.022.

[15] Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.030.

[16] Ala. Code § 13A-5-46. Alabama allowed a judge to override a jury's life recommendation until 2017. Ala. Code § 13A-5-47.

[17] Missouri Supreme Court Grants New Sentencing Trial to Man Who Was Sentenced to Death despite 11 Jurors' Votes for Life, Death Penalty Information Center, April 11, 2019 (available at: https://deathpenaltyinfo.org/news/missouri-supreme-court-grants-new-sentencing-trial-to-man-who-was-sentenced-to-death-despite-11-jurors-vote-for-life).

[18] *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009).

[19] *The 12 Inmates of Nebraska's Death Row*, KHGI-TV, June 30, 2021 (available at: https://nebraska.tv/news/local/the-12-inmates-of-nebraska-death-row).

death sentence since 1996.[20] So, while these states may authorize death sentences based on non-unanimous juries, these states either effectively do not sentence defendants to death at all or do not do so without a unanimous jury.

3. Current execution practices. The non-unanimous capital jury has also been repudiated by the overwhelming consensus not to execute defendants sentenced to death by less-than-unanimous juries. Since 2016, when this Court decided *Hurst v. Florida,* 153 executions have occurred nationwide, but only twenty-two of those defendants were executed after being sentenced by a non-unanimous jury or mandatory judge panel. Of those, thirteen were executed in Alabama, and seven were in Florida. As a result, 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. *See* Table, App. C.

Of the six states that still allow a defendant to be sentenced to death based on a non-unanimous jury, Indiana's last execution was in 2009, Montana's last execution occurred in 2006, and Nebraska committed an execution in 2018, its only one since 1997.[21] Missouri has only committed two executions of defendants not sentenced to death based on a unanimous jury in the last two decades.[22]

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[20] Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1514 (2022).

[21] Death Penalty Information Center, Execution Database (available at: https//deathpenaltyinfo.org/executions/execution-database).

[22] *See* Table 2, App. D; Michael J. Essma, DEAD-Locked: Evaluating Judge-Imposed Death Sentences: Under Missouri's Death Penalty Statute, 85 MO. L. REV. (2020).

Only four states have executed a defendant who was sentenced to death by a non-unanimous jury during this time—Alabama, Florida, Missouri, and Nebraska—not including defendants who waived a jury. *Id*. The practice is thus "truly unusual." *Atkins*, 536 U.S. at 316 (calling the practice of executing the intellectually disabled "truly unusual" after noting that among the states that regularly execute and had no prohibition against the practice, only five states had executed a defendant with an IQ less than 70 since other states began prohibiting the practice). Because only five states carried out such executions, this Court declared in *Atkins* there was a "national consensus" against executing the intellectually disabled. *Id*. In that regard, there is a more substantial consensus here.

This survey shows that non-unanimous capital jury or judge sentencing has been widely repudiated. Few jurisdictions still allow death sentences without a unanimous jury. And of those that do, except for Alabama and Florida, exceedingly few defendants are sentenced to death or executed based on non-unanimous jury votes. Stunningly, since 2016, *only 1.3% of executions have been based on non-unanimous jury verdicts or recommendations outside of Alabama and Florida*, which remain extreme outliers. *See* Table, App. C.

B. This Court's Decision In *Ramos* Also Contributes To The Societal Consensus Against Non-Unanimous Juries.

Also relevant to the consensus is this Court's recent decision recognizing that a non-unanimous jury vote is required to convict a defendant of a "serious offense"

under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).[23] As this Court noted, a unanimous jury has been required to convict a defendant of a serious offense essentially uniformly throughout common law and contemporaneously in all but two states. *Id.* at 1394–97. In doing so, this Court recognized that the right to a jury is "fundamental to the American scheme of justice." *Id*. at 1397.

This Court's recent recognition that a unanimous jury needs to convict a defendant of a serious crime—*i.e., that* a unanimous jury vote is needed to subject a defendant to the mere possibility of facing more than six months in prison—is clearly relevant to the current standards of decency. If it is unacceptable to subject ta defendant to the possibility of facing over six months in prison based on a less-than-unanimous jury vote, clearly, as shown by the survey above, society has now recognized it is unacceptable to subject him to execution when one or more jurors—let alone four—have determined that the prosecution has not proven the defendant deserves the ultimate punishment. This Court should grant certiorari review to consider the discrepancy between the recognition of the unanimous jury right in *Ramos* and this Court's outdated precedents allowing non-unanimous jury or judge sentencing.

[23] "Serious offenses" are defined as those with a minimum potential punishment of more than six months in prison. *See Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

C. It Is Widely Understood That A Unanimous Jury Vote Was Required To Execute A Defendant At The Time Of The Founding.

Capital sentencing was understood to require a unanimous jury verdict at the time of the Founding. "[T]he Constitution's guarantees cannot mean less today than they did the day they were adopted." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). Together with the evolving standards of decency, this Court has also looked to the original understanding as another guide to the proper scope of the Eighth Amendment. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 635 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976). This is because, at the Founding, the Constitution permitted the death penalty only "so long as proper procedures [were] followed." *Bucklew*, 139 S. Ct. at 1122.

At common law, the determination of whether a defendant should be sentenced to death belonged to the jury. As Blackstone explained, it was understood that "no man should be called to answer to the king for any capital crime, unless . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterward be confirmed by the unanimous suffrage of twelve of his equals." Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 271 (2017) (quoting 4 William Blackstone, Commentaries on the Law of England 343 (4th ed., Oxford, Clarendon Press 1770)). By the time of the Bill of Rights was adopted, the jury's right to determine whether a defendant should face the death penalty "was unquestioned." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10–11 (1989).

Given the number of crimes that mandated capital punishment, the determination of whether to find the defendant guilty and whether to spare his life was frequently the same. In such cases, it was widely understood that the jury had nullification power if the jury believed a death sentence would be too harsh. *See Woodson*, 428 U.S. 289–90. This practice, known as "sanction nullification," was widely recognized. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800*, 97 (1985) (nothing the practice of "sanction nullification" as distinct from complete nullification). Thus, although "under this capital punishment scheme, there was no bifurcation between guilt and sentencing," "common law juries necessarily engaged in 'de facto sentencing' when deciding whether the defendant was guilty as well as the degree of guilt." Bijani, *supra*, at 1523–25 ("the question of 'appropriate punishment' was not only at issue in those unified proceedings but was often the principal issue faced by the jury").

Integral to the jury's determination that a defendant should be sentenced to death were the corresponding protections that the jury's verdict should be unanimous and beyond a reasonable doubt. *See* Hoeffel, *supra*, at 275–79 (noting the creation of the beyond a reasonable doubt standard was based on the "morality of punishment" in capital cases, rather than fact finding); *Ramos*, 140 S. Ct. at 1395–97 (cataloging the centuries long history of jury unanimity when defendants were charged with "serious" crimes). This contrasted with less serious crimes in which judges could determine sentences and were not bound to make findings beyond a reasonable doubt. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital*

Sentencing, 105 Colum. L. Rev. 1967 (2005) ("judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials"). This Court should grant certiorari to re-examine capital jury sentencing considering the original public understanding.

D. This Court Should Reconsider What Remains Of *Spaziano* And *Harris*.

This case presents this Court with the opportunity to revisit *Spaziano v. Florida*, 468 U.S. 447, 457–65 (1984) and, by extension, *Harris v. Alabama*, 513 U.S. 504 (1995). The Florida Supreme Court's merits denial of this claim rested entirely on this Court's opinion in *Spaziano*:

The Supreme Court "rejected the exact argument . . . that the Eighth Amendment requires a unanimous jury recommendation of death" in *Spaziano*," and that "*Spaziano* is still good law." App. 1 at 33.

Spaziano has already been overruled in part by this Court. *Hurst*, 577 U.S. at 101. Considering the evolving standards of decency and the original public understanding of unanimous capital jury sentencing, *Spaziano*'s already crumbling foundation cannot bear the weight the Florida Supreme Court has placed upon it.

Spaziano and *Harris* are not without controversy. Justices of this Court have expressed that they "harbor grave concern" over capital judge sentencing while calling for the Court to revisit these precedents allowing a judge, rather than a unanimous jury, to sentence a defendant to death. *Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari); *see also Reynolds v.*

Florida, 139 S. Ct. 27 (2018) (Breyer, J., respecting the denial of certiorari). And in *Ring*, where the question was not before the Court, Justices debated this exact issue. *Compare Ring v. Arizona*, 536 U.S. 584, 610–13 (2002) (Scalia, J., concurring) *with id.* at 613–20 (Breyer, J., concurring in judgment).

The calls to revisit these holdings are not without reason. The *Spaziano* decision is nearing its fortieth birthday, and key premises underlying the judge-vs-jury-sentencing portion of the opinion have eroded over time. Take reliability. In *Spaziano*, this Court rejected the petitioner's argument that juries would be more reliable in determining which cases truly warrant the death penalty compared to a judge. 468 U.S. at 461; *see also Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

But evidence has accumulated over time, casting doubt on this assumption. For example, a study of death-row exonerations cases across three states that permitted a judge to sentence a defendant to death over the non-unanimous vote of a jury—Alabama, Delaware, and Florida—found that "[i]n 28 of the 30 cases for which the jury vote is known . . . at least one juror voted for life." Death Penalty Information Center, *DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions* (March 13, 2020) (noting

that the 1974 jury vote could not be found for one exoneration and the other involved the waiver of a sentencing jury).[24]

This case provides the Court with the overdue opportunity to revisit the precedents that permit the execution of a condemned man despite one juror voting to spare his life.

E. This Case Is A Proper Vehicle To Decide The Question.

This case presents an excellent opportunity for this Court to decide the question because this Court's jurisdiction to hear the case is not affected by an independent or adequate state law ground. The Florida Supreme Court explicitly stated that the result below was *required* by this Court's holding in *Spaziano*. App. 1 at 33–34 ("Because the Supreme Court's Eighth Amendment precedent to which we are bound does not require a unanimous jury recommendation for death during the penalty phase, the postconviction court properly found this claim to be meritless."). As this Court has noted, "whether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction." *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) (cleaned up). Therefore, no impediment to this Court reviewing the merits of the question.

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[24] Available at: https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighen-risk-of-wrongful-convictions.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

Respectfully submitted,

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SEPTEMBER 26, 2023