No. _____

In the
Supreme Court of the United States

Zane Floyd,

Petitioner,

v.

Jeremy Bean, Warden, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the Nevada Supreme Court

Petition for Writ of Certiorari

CAPITAL CASE

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QUESTION PRESENTED

Capital Case)

A national medical consensus finds severe brain damage caused by fetal alcohol exposure functionally equivalent and symptomatically identical to intellectual disability.

The question presented is:

Whether, given this medical consensus, the original meaning of the Eighth Amendment, and this Court's rulings in *Atkins* and *Roper*, a state may constitutionally execute a defendant who meets the strict medical standard for severe brain damage caused by fetal alcohol exposure?

LIST OF PARTIES

Petitioner Zane Floyd is an inmate at High Desert State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent Jeremy Bean is the warden of High Desert State Prison.

LIST OF RELATED PROCEEDINGS

DIRECTLY RELATED CASES

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Judgment of Conviction (September 5, 2000)

Floyd v. State, Supreme Court of the State of Nevada, Case No. 36752, Opinion (42 P.3d 249 (March 13, 2002)) (*per curiam*)

Floyd v. State, Supreme Court of the United States, Case No. 02-7638, Opinion (537 U.S. 1196 (Feb. 24, 2003)

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Findings of Fact Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (February 4, 2005)

Floyd v. State, Supreme Court of Nevada, Case No. 44868, Order of Affirmance (178 P.3d 754 (Feb. 16, 2006))

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Findings of Fact Conclusions of Law and Order denying Petition for Writ of Habeas Corpus (April 2, 2008)

Floyd v. State, Supreme Court of the State of Nevada, Case No. 51409, Order of Affirmance (367 P.3d 769 (Nov. 17, 2010))

Floyd v. Baker, United States District Court, Case No 2:06-cv-00471-RFB-CWH, Order (47 F.Supp.3d 1148 (Sep. 22, 2014))

Floyd v. Baker, United States Court of Appeals for the Ninth Circuit, Case No. 14-99012, Opinion (940 F.3d 1082 (Oct. 11, 2019) and amended 949 F.3d 1128 (Feb. 2, 2020))

Floyd v. Gittere, Supreme Court of the United States, Case No. 19-8921, Certiorari Denied (141 S. Ct. 660 (Nov. 2, 2020))

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Decision and Order Denying Defendants Motion to Disqualify Clark County District Attorney's Office (May 18, 2021)

State v. Floyd, District Court, Clark County, Nevada, Case No. 99C159897, Order of Execution (June 9, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Zane Floyd respectfully petitions for a writ of certiorari to review the judgment of the Nevada Supreme Court affirming the district court's denial of habeas corpus relief entered on November 21, 2024.

OPINIONS BELOW

The Order of Affirmance of the Nevada Supreme Court affirming the state district court's order denying Mr. Floyd's postconviction petition for a writ of habeas corpus, which is reported at *Floyd v. Gittere*, No. 83436, 2024 WL 4865438 (Nov. 21, 2024), is set out in Appendix B.

The January 24, 2025, Order of the Nevada Supreme Court Denying Rehearing, is unpublished and set out in Appendix A.

The August 18, 2021, Notice of Entry of Findings of Fact, Conclusions of Law and Order of the Eighth Judicial District Court denying the petition for writ of habeas corpus is set out in Appendix C.

JURISDICTION

The Nevada Supreme Court denied rehearing on January 24, 2025. App. A. Justice Kagan extended the time to file a petition for a writ of certiorari until May 5, 2025. This Court has jurisdiction under 28 U.S.C. § 1254. This petition is timely per Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments."

INTRODUCTION

Zane Floyd suffers from a form of fetal alcohol spectrum disorder (FASD), and he has been diagnosed with neurobehavioral disorder associated with prenatal alcohol exposure (ND-PAE). ND-PAE is a lifelong brain-based disorder that stems from organic brain damage and affects adaptive and cognitive functioning. The characteristics, traits, and deficits of an individual with ND-PAE and an individual with intellectual disability (ID) are analogous. Those same characteristics, traits, and deficits led this Court to categorically exempt people with ID from the death penalty, as they are categorically less culpable than those "most deserving of execution." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). However, despite the clear similarities between the two, a categorical exemption from the death penalty has not yet been extended to people with ND-PAE.

Just like those with ID, people with ND-PAE are categorically less culpable and less deserving of capital punishment. This Court should grant Mr. Floyd's petition and exempt from the death penalty persons with ND-PAE.

STATEMENT OF THE CASE

Valerie Floyd, Mr. Floyd's mother, abused alcohol and drugs including LSD and cocaine throughout her pregnancy with Mr. Floyd. 12PA2833 at ¶19[1]. Her first son, Mr. Floyd's brother, died "after [Valerie Floyd] and her husband placed him in the back of their van while they watched a baseball game." *Id*. To cope with this

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[1] Citations comport with the appendix submitted with the opening brief Mr. Floyd filed with the Nevada Supreme Court. Here, the volume of the appendix appears (12), followed by an indication that the appendix belongs to the petitioner (PA), followed by the pin-cite (2833) and the paragraph (19).

tragedy, Valerie Floyd increased her abuse of alcohol. *Id.* During this period of heavy drinking, she became pregnant with Mr. Floyd. *Id.* Mr. Floyd was born six weeks premature, underweight, and with profound brain damage. 12PA2833 at ¶20; 12PA2833 at ¶22. Mr. Floyd has been diagnosed with ND-PAE. His condition is a "brain-based, congenital, lifelong, impactful disorder" causing debilitating cognitive, adaptive and executive functioning deficiencies regarded as "Intellectual Disability Equivalence." 12PA2852–53 at ¶9; 12PA2880–81 at ¶32.

At the time of Mr. Floyd's trial in 2000, the severity of the effects of ND-PAE was not sufficiently understood by the medical community, legal professionals, or the public. Kenneth R. Warren, *A Review of the History of Attitudes Toward Drinking in Pregnancy*, 39 Alcoholism, Clinical and Experimental Rsch., 1110 (2015), https://doi.org/10.1111/acer.12757. Today, however, new scientific research and a changed societal understanding have formed a consensus that FASD, such as Mr. Floyd's, is "well-deserving of being viewed under the rubric of 'ID equivalence.'" 12PA2877 at ¶31.

A. Mr. Floyd struggled during childhood because of prenatal exposure to alcohol.

Before June 3, 1999, Zane Floyd had no history of violent criminal conduct. He did, however, have a well-documented history of cognitive problems. Around age seven, Mr. Floyd was prescribed Ritalin (methylphenidate), a structural analog for amphetamine, to treat ADHD. 12PA2835 at ¶24. At thirteen years old, Mr. Floyd was also prescribed anti-depressant medication. 13PA3195. He was assessed by a psychologist due to a range of behavioral, physical, and cognitive difficulties present

since early childhood. *Id*. The psychologist found "frontal lobe dysfunction," an expression of permanent brain damage that ultimately characterized the story of his life. 12PA2837 at ¶28. Mr. Floyd dropped out of high school, was rejected for reenlistment by the Marines, and struggled to keep a job. 12PA2867, 12PA2868.

B. Mr. Floyd at age 23 committed the crimes that placed him on death row.

On the night of June 2 and early morning of June 3, 1999, following a series of personal conflicts and a period of drinking and methamphetamine abuse, Mr. Floyd became suicidal and violent. He called an escort service and asked it to send a woman to his parents' home. When she arrived, Mr. Floyd told her that he intended to kill himself and others. He then assaulted the woman but permitted her to flee. Afterwards, Mr. Floyd loaded his weapon, put on his military uniform, walked to a nearby grocery store, and shot five strangers, four of them fatally. When the police arrived, Mr. Floyd put the gun to his head and urged the police to shoot him. The police persuaded Mr. Floyd to surrender. He promptly confessed to the shootings. 14PA3256. In his post-arrest statements, Mr. Floyd's speech was slurred, and his voice presented as though he was in a psychotic state. 14PA3256. The police repeatedly asked Mr. Floyd "Why did you do it?" *Id*. Mr. Floyd stated he did not understand why he shot strangers at the grocery store. *Id.* During his interrogation he can be heard saying, "I don't know what's wrong with me." *Id*.

C. Mr. Floyd was sentenced to death after a capital trial that omitted evidence of ND-PAE.

Mr. Floyd did not dispute his guilt in the shootings. In the sentencing phase, jurors deliberated for sixteen hours over three days before reaching their decision.

On July 21, 2000, Mr. Floyd was sentenced to death for first-degree murder and sexual assault with a deadly weapon.

D. Mr. Floyd filed a state habeas petition challenging his eligibility for the death penalty based on ND-PAE.

On April 15, 2021, Mr. Floyd filed a petition for writ of habeas corpus in the Eighth Judicial District Court, in which he challenged the constitutionality of his death sentence based on ND-PAE. App. C at 27. On August 16, 2021, the district court denied the petition without conducting an evidentiary hearing. App. C. The district court denied Mr. Floyd's Eighth Amendment claim because Mr. Floyd did not meet the bright-line IQ standard for demonstrating ID. *See* App. C at 27 ("*Atkins* sets forth a bright-line test on IQ … Following the bright-line rule articulated by *Atkins*, Petitioner is not entitled to relief.").

The Nevada Supreme Court affirmed the district court's denial of habeas relief on November 21, 2024. *See* App. B. Mr. Floyd filed a Petition for Rehearing on December 19, 2024, which the court denied on January 24, 2025, over the dissent of one justice. *See* App. A.

Throughout his postconviction proceedings, Mr. Floyd sought to establish that he is constitutionally exempt from the death penalty under the rationale of *Atkins* and *Roper*, which had not yet been decided at the time of his sentencing. ND-PAE only appeared in the DSM-5 in 2013, and the scientific consensus that ND-PAE is equivalent to ID did not emerge until the years following the DSM-5's publication and its subsequent integration into clinical practice.

REASONS FOR GRANTING THE WRIT

As this Court recognized in *Atkins* and *Roper*, capital punishment is excessive when defendants demonstrate membership in an identifiable and objective group that meaningfully reduces their culpability. In *Atkins*, this Court reasoned that defendants with ID were ineligible for the death penalty because "their disabilities in areas of reasoning, judgment, and control of their impulses" means "they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. In *Roper v. Simmons*, this Court cited *Atkins* and reasoned that "[t]he same conclusions follow from the lesser culpability of the juvenile offender." 543 U.S. 551, 571 (2005).

Punishment is "excessive," and therefore prohibited by the Eighth Amendment, if it is not graduated and proportioned to the offense. *Atkins,* 536 U.S. at 304. A claim that punishment is unconstitutionally excessive is judged by currently prevailing standards of decency. *Id*. These standards evolve to "mark the progress of a maturing society." *Id*. In the 25 years following Mr. Floyd's conviction, society evolved and deepened its understanding of Fetal Alcohol Spectrum Disorders, specifically ND-PAE. With the discovery of major neurological, criminological, and behavioral findings, a consensus has formed; ND-PAE causes severe cognitive and adaptive deficits which reduce the culpability of defendants affected by the condition. "Persons with FASD typically demonstrate cognitive, academic, attentional, and behavioral deficiencies." *Trevino v. Davis*, 861 F.3d 545, 553 (5th Cir. 2017) (Dennis, J., dissenting). Even medical experts have recognized

that an individual with FASD has "daily functioning skills [that] are essentially at a level that might be expected from an individual who was diagnosed with an intellectual disability." *Id.* This equivalence reveals the diminished moral culpability of offenders with ND-PAE, and rebuts the suggestion that the execution of individuals with brain damage from ND-PAE serves the legitimate penological goals of the death penalty. The execution of a defendant with ND-PAE is therefore inconsistent with the reasoning of *Atkins* and *Roper*, and such an execution would violate the Eighth Amendment.

A. The reasoning in *Atkins* supports the recognition of a categorical exemption for ND-PAE as morally and functionally equivalent to ID.

ID and ND-PAE are alike in a myriad of ways. Like ID, brain damage caused by alcohol in utero is lifelong. Both conditions present significant cognitive deficits, adaptive failures, and an inability to conduct basic executive functioning. 12PA2877–78 at ¶31. In other measures of outcome, fetal exposure to alcohol can be more severe than ID. "Life expectancy for males in the general population is 76 years. In contrast, life expectancy is 74 years in ID … and only 34 years in FASD." 12PA2880 at ¶31. Individuals with FASD also disproportionately experience negative interactions with the criminal justice system. 61% of individuals with FASD experience trouble with the law, compared to only about 8% of individuals with mild ID. 12PA2876. Indeed, "youth with FASD are 19 times more likely to have trouble with the law compared with those without FASD." Mansfield Mela et al., *Neurocognitive Function and Fetal Alcohol Spectrum Disorder in Offenders with Mental Disorders*, 48 J. Am. Acad. Psychiatry & L. 195, 195–208 (2020). In sum, "it

is clear people with FASD are at much greater risk of a negative developmental trajectory than those with ADHD or ID." 12PA2876 at ¶30(c). Many suffering from FASD follow this negative developmental trajectory into the criminal justice system.

Mr. Floyd's undisputed diagnosis and the expression of its symptoms contextualize his life and the circumstances of the capital offenses for which he was convicted. Mr. Floyd's permanent structural brain damage led to various academic failures (school officials recommended Mr. Floyd be placed in a special education program, Mr. Floyd had to repeat the second grade, Mr. Floyd was expelled in the 5th grade and dropped out of high school), workplace failures (Mr. Floyd was not approved to re-enlist in the Marines), and personal failures (Mr. Floyd's condition predisposed him to alcoholism and drug abuse). *See* 12PA2867 at ¶22, 12PA2868 at ¶22. Further, psychological testing from 1989, 2000, and 2006 demonstrates that Mr. Floyd suffers from neurocognitive impairments including intellectual deficiencies, memory deficits, and academic learning disabilities. 12PA2863–66 ¶19–20.

Mr. Floyd was born with brain damage that impaired his cognitive, adaptive, and executive functions in much the same way as ID. This consensus about ND-PAE's ID-equivalence, evident in the recognition and development of protections by state governments, the medical community, and the legal profession, places his condition squarely within the legal reasoning of *Atkins* and *Roper*, supporting a finding that individuals with ND-PAE are categorically ineligible for the death penalty.

1. Medical Overview

a) ND-PAE

Throughout pregnancy, a fetus is vulnerable to damage from alcohol exposure. Often, pre-natal alcohol exposure causes widespread structural damage to the fetus' brain. 12PA2872 at ¶29. Pre-natal alcohol exposure is a well-established cause of birth defects, neurodevelopmental disorders, and learning disabilities. 12PA2854 at ¶14. Alcohol exposure in utero also causes potent irregularities in brain structure that compromise brain function and impact cognition and behavior. *Id*.

In 2013, the American Psychiatric Association for the first time defined ND-PAE as a diagnosis for central nervous system dysfunction due to pre-natal alcohol exposure. Am. Psychiatry Ass'n, DSM-5: Diagnostic and Statistical Manual of Mental Disorders, 798–801 (5th ed. 2013). Organic brain damage in ND-PAE degrades the cognitive faculties necessary to think adequately, understand social consequences, and self-regulate one's behavior. Am. Psychiatry Ass'n, *DSM-5: Diagnostic and Statistical Manual of Mental Disorders, Text Revision* 916–17 (5th ed. 2022). This diagnosis requires: evidence of pre-natal alcohol exposure, at least one deficit in neurocognitive functioning, at least one deficit in self-regulation, and at least two deficits in domains of adaptive functioning. *Id.* Such diagnoses are made by clinical professionals to a level of medical certainty.

The diagnosis of ND-PAE requires specialized training or experience. 12PA2877. The combination of behavioral problems, neuropsychological test results, educational history, and (sometimes) childhood appearance that would be

recognized by a specialist as demonstrating the existence of ND-PAE would not be understood by every medical professional. Organic brain damage in ND-PAE degrades the cognitive faculties necessary to think adequately, understand social consequences, and self-regulate one's behavior. *Id.* at 917.

b) Intellectual Disability

An ID diagnosis requires intellectual functioning deficits, adaptive functioning deficits, and onset of these deficits before the age of 18. *Id.* at 37. ID and ND-PAE are medically alike. "Both ID and FASD stem from permanent structural brain damage." 12PA2877 at ¶31(a). With regard to outcomes, "executive and everyday adaptive functioning in both conditions tends to be identical." 12PA2877 at ¶31(c). "Symptom manifestation in ID and FASD is lifelong." 12PA2879 at ¶31(g). The key etiological distinction between the disorders is that while ID is "defined as a broad array of mixed impairments that mostly involve executive dysfunction," ND-PAE is a narrow classification only caused by alcohol exposure before birth. 12PA2877 at ¶31(c).

2. Similarities between ND-PAE and ID justify an extension of *Atkins*.

ND-PAE and ID are both classified by the DSM-5 as neurodevelopmental disorders because both disabilities: (1) manifest early in development; (2) are characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning; and (3) involve a range of developmental deficits that vary from the specific limitations of learning or control of executive functions to global impairments of social skills or intelligence.

12PA2870–71 at ¶26. While there are differences between the conditions, such as ID's hereditary status and the relevance of IQ to diagnosis, these differences do not change the fact that both ND-PAE and ID affect capital defendants in a way that significantly diminishes their culpability. In *Atkins*, this Court held that the Eighth Amendment prohibits the execution of the intellectually disabled because "the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution." 536 U.S. at 305. Specifically, a defendant's cognitive and behavioral deficits such as "disabilities in areas of reasoning, judgment, and control of their impulses," dimmish culpability and justification for the death penalty. *Id.* at 307, 317. Thus, in light of the medical evidence, the overwhelming similarities between ID and ND-PAE justify concluding that Mr. Floyd is part of a class of offenders with lesser culpability who should be categorically exempt from the death penalty.

a) Both ND-PAE and ID require showings of significant cognitive and adaptive functioning deficits.

Cognitively, individuals with ND-PAE exhibit deficits in general intelligence, executive functioning, attention, learning, memory, motor skills, and language. Sarah N. Mattson et al., *Fetal Alcohol Spectrum Disorders: A Review of the Neurobehavioral Deficits Associated With Prenatal Alcohol Exposure*, 43 Alcohol Clin. & Experimental Res. 1046 (2019). "While IQ distinguishes between ID and FASD . . . executive and everyday adaptive functioning in both conditions tends to be identical." 12PA2877 at ¶31. "Researchers have documented that children with FASDs show diminished intellectual functioning." Piyadasa W. Kodituwakku,

Neurocognitive Profile in Children with Fetal Alcohol Spectrum Disorders. 15 Dev. Disabilities Res. Revs. 218, 218–224 (2009). In fact, for those with ND-PAE, the diminished cognitive abilities of fetal alcohol exposure can be extreme. "[I]ndividuals with ND-PAE tend to have specific difficulty with nonverbal aspects of cognition such as visual-motor skills, learning and memory for recently learned skills," along with other cognitive impairments. Joseph F. Hagan Jr. et al., *Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure*, 138 Pediatrics e20151553 (2016).

Medical experts have noted the existence of some of these deficits for Mr. Floyd. "[T]he widespread deficits seen in Mr. Floyd's cognitive profile have a profound effect on his adaptive behavior." 12PA2866 at ¶21. "Mr. Floyd's full-scale IQ varied widely." 12PA2864-65. And testing and an adaptive assessment uncovered cognitive deficiencies in the following areas: (1) IQ (with significant discrepancies among quotient/index scores); (2) attention; (3) academic achievement (math calculation); (4) memory/learning (increasingly deficient performance with increasing task complexity on visual tasks); (5) visuospatial construction; (6) motor coordination; and (7) executive functioning (initial development of problem-solving strategies). *Id.*

In *Atkins*, this Court reasoned that evidence of "cognitive and behavioral impairments," including "disabilities in areas of reasoning, judgment, and control of . . . impulses," is relevant to a categorical exemption because it reduces a defendant's "culpability" and "the penological purposes served by the death penalty." 536 U.S. at 307, 317, 320. Nonetheless, the state district court and the

Nevada Supreme Court failed to appreciate the importance of this distinction. The Nevada courts ignored the significant evidence of Mr. Floyd's diminished intellectual functioning and adaptive impairments and their similarity to individuals with ID. Instead, the state district court based its denial for relief on the fact that Mr. Floyd's IQ scores are above a traditional threshold for ID. *See* App. C at 27 ("*Atkins* sets forth a bright-line test on IQ … (f)ollowing the bright-line rule articulated by *Atkins*, Petitioner is not entitled to relief."). And although the Nevada Supreme Court noted that it was "looking at" and "considering" other evidence outside of IQ scores, the court failed to consider the similarities in cognitive and adaptive functioning in individuals with ND-PAE with culpability reasoning with individuals who are ID. *See* App. B at 11–13. This approach fails to appreciate the mountain of medical research concluding that ND-PAE is ID equivalent due to its substantial deficits in cognitive and executive functioning, the lifelong nature of the brain damage, and the dramatic and negative life outcomes associated with the disorder.

In addition to similar cognitive deficits, ND-PAE and ID manifest nearly identical adaptive deficits. "Both ID and [ND-PAE] require adaptive impairment in DSM-5 … typically making people with ID and [ND-PAE] indistinguishable from each other in terms of everyday behavior." 12PA2878 at ¶31(d). In fact, while an ID diagnosis requires a finding of only one adaptive functioning deficit, ND-PAE requires a finding of at least two adaptive functioning deficits. *See id.* at 37, 917. And this Court has held that such deficits in adaptive functioning are particularly relevant when considering culpability and eligibility for the death penalty. *Hall*, 572

U.S. at 723 (quoting 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.") This is for good reason. Adaptive dysfunction affects an individual's capacity to process stressful stimuli, understand the social consequences of actions, and advocate for themselves in legal contexts.

Mr. Floyd was administered the Vineland-3 repeatedly during childhood which demonstrated that "compared to other 12-and 16-year-olds, Mr. Floyd's adaptive functioning was severely impaired." 12PA2861–62 at ¶18(b); 14PA3347–48 at ¶18(b). The Vineland-3 results "also show Mr. Floyd's adaptive functioning decreased significantly over time, showing that as adaptive responsibilities and expectations became more complex with advancing age, his adaptive capacity diminished considerably in relation to age peers." 12PA2862 at ¶18(b). This trajectory is typical for individuals with ND-PAE. These symptoms "become more complex and debilitating, leading to greater adaptive severity in adulthood." 12PA2880 at ¶31(g). ND-PAE and ID share significant similarities in cognitive dysfunction. To the extent that there is difference in adaptive disability between the disorders, ND-PAE imposes even greater hardship than ID.

b) Differences between ND-PAE and ID support rather than detract from justifications for a categorical exemption.

Etiologically, "[b]oth ID and FASD stem from permanent structural brain damage." 12PA2877 at ¶31(d). The cause of the brain damage is indeed different. Unlike ID, which can be hereditary or caused by external influences, ND-PAE is

caused solely by pre-natal alcohol exposure. 12PA2854. The differences between the two conditions, under the reasoning of *Atkins*, further support a categorical exemption for people with ND-PAE.

Moreover, although ID and ND-PAE bear important similarities in their diagnostic process, there are differences. Both have clear clinical standards and emphasize the presence of functional deficits. A major difference is that ID can be diagnosed by a single provider whereas an ND-PAE diagnosis requires a team of professionals including neurologists, medical doctors, and an adaptive functioning specialist. 12PA2877 at ¶31(b). This means establishing an ND-PAE diagnosis requires greater resources and undergoes a wider degree of medical scrutiny than obtaining an ID diagnosis.

Notably, because of these heightened standards, ND-PAE is far less likely to be diagnosed early, making timely interventions uncommon. 12PA2876 at ¶30(c). "In the United States, 99.9% of people with FASD are undiagnosed or misdiagnosed." 12PA2879 at ¶31(f). This contributes to a great risk of a negative developmental trajectory because undiagnosed individuals with FASD, like Mr. Floyd, fail to understand their own condition. 12PA2880 at ¶31(g).

Throughout his life, Mr. Floyd has suffered from diminished cognition, executive functioning failures and maladaptive behaviors caused by his ND-PAE brain damage. As such, Mr. Floyd is a person "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 304. For the same reasons this Court relied on in *Atkins*, Mr. Floyd should be categorically exempted from the death penalty.

B. The Nevada Supreme Court misapplied this Court's precedent concerning evolving standards that justify exempting people with ND-PAE from the death penalty.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958). "Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent,'" including enacted legislation. *Atkins*, 536 U.S. at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)). Moreover, "the Constitution contemplates that in the end [this Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Enmund v. Fla.*, 458 U.S. 782, 793 (1982).

Here, Mr. Floyd was born in 1975. In America, "[t]he pervasive belief held well into the 1970s [was] that there was no risk to either mother or fetus from prenatal alcohol." Warren, *supra,* at 1110. Mr. Floyd's mother drank significantly while pregnant with him. 12PA2833 at ¶19. It wasn't until 1977 that the federal government issued its first health advisory on alcohol and pregnancy. Warren, *supra,* at 1110. In 1988, the first warning labels appeared on alcoholic beverages alerting pregnant women to the risk of fetal alcohol exposure. *Id*. at 1113. In 2000, when Mr. Floyd was sentenced to death, no public consensus yet existed pertaining to the effects of prenatal alcohol exposure and its interaction with a defendant's culpability. In fact, the term "fetal alcohol spectrum disorders" did not exist until 2002, two years after Mr. Floyd's capital trial. *Id.* at 1114.

Since 2000, however, a consensus has emerged among clinical psychiatrists, state legislatures, and the public. Today, society regards ND-PAE as functionally-equivalent to ID. The medical community has reached a consensus that FASD is functionally-equivalent with ID. Stephen Greenspan, Dr. Natalie Novick Brown, & William Edwards, *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. In 2016, medical doctors noted that:

> A growing consensus is emerging in the field of ID, and also in the FASD field, that the quality of cognitive impairment that most contributes to everyday functioning difficulties in people with brain-based disorders, involves skills captured by models and measures of "executive functioning." . . . People with FASD are by definition deficient in many areas of executive functioning, and the same is true of all individuals with ID.

Id. at 260. In the decade following, the medical community recognized "there are few disorders more related to ID (both in causing that disorder and resembling it functionally) than FASD." Stephen Greenspan, Natalie Novick Brown & William Edwards, *Determining Disability Severity Level for Fetal Alcohol Spectrum Disorder: Assessing the Extent of Impairment,* in *Fetal Alcohol Spectrum Disorders: Clinical, Scientific, and Legal Perspectives* (2021), https://doi.org/10.1007/978-3-030-73628-6_10. This consensus is also reflected in the DSM-5-TR, the most comprehensive and preeminent publication in psychiatry, as it recognizes criteria for ND-PAE similar to that for an ID diagnosis. Psychiatric Ass'n, *supra* at 916–17.

Moreover, some states, in legislation and policy, are integrating these medical advancements into their administration of criminal justice. The Alaska legislature codified FASD as a statutory mitigator in criminal sentencing. Alaska Stat. Ann. § 12.55.155 (West). It further redefined FASD to be treated the same as Down's Syndrome in social services eligibility determinations. Alaska Stat. Ann. § 47.20.290 (West). Alaska is not alone in recognizing the new consensus. "The number of states with alcohol and pregnancy policies has increased from 1 in 1974 to 43 in 2013" and "between 2003 and 2012, most types of [state] policies targeting alcohol use during pregnancy increased. For example, the number of states that defined alcohol use during pregnancy as child abuse/neglect increased by 40%." Sarah C. M. Roberts et al., *Forty Years of State Alcohol and Pregnancy Policies in the USA: Best Practices for Public Health or Efforts to Restrict Women's Reproductive Rights?*, 52 Alcohol & Alcoholism, 715, 715–16 (2017), https://doi.org/10.1093/alcalc/agx047. The promulgation of state policies treating FASD as child neglect evinces the widespread understanding that maternal consumption of alcohol during pregnancy is a serious matter from which victims need special legal protections.

Other state legislatures indicate similar sentiment in capital sentencing eligibility. In 2021, Ohio enacted a prohibition on the death penalty for the severely mentally ill, expanding categorical exemption for offenders with schizophrenia, bipolar disorder, or delusional disorder if their condition "significantly impaired the person's capacity to exercise rational judgment." Ohio Rev. Code Ann. § 2929.025. Kentucky passed legislation with near-identical language in 2022. Kentucky Rev.

Stat. § 532.140 ("[A] defendant with a serious mental illness . . . shall not be subject to execution."). Since 2017, similar legislation has been introduced in several capital punishment states: Florida, South Dakota, Tennessee, Arizona, Arkansas, Indiana, Missouri, and Texas. Death Penalty Information Center, *Kentucky and South Dakota Advance Bills to Bar Death Penalty for People with Severe Mental Illness* (last updated March 14, 2025), https://deathpenaltyinfo.org/kentucky-and-south-dakota-advance-bills-to-bar-death-penalty-for-people-with-severe-mental-illness.

In *Atkins*, this Court noted the relevance of state legislation when determining society's evolving standards. 536 U.S. at 316. Given this context, the fact that states have taken active steps towards a categorical exemption for the severely mentally ill—modeled after legislation already enacted in Ohio and Kentucky—establishes the fact that the execution of the severely mentally ill—conditions that impact culpability in a similar way as ID and ND-PAE—is rare and growing rarer still by the objective indicia of society's evolving standards.

Moreover, the legal profession has also recognized society's evolving standards concerning FASD. In 2012, the American Bar Association ("ABA") identified FASD as a basis for mitigation in criminal sentencing. Katherine Flannigan et al., *Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Systematic Literature Review*, 57 Int'l J. L. & Psychiatry 42, 43 (2018). The ABA resolution encouraged legal professionals to consider FASD as the basis for mitigation in criminal sentencing, especially when the death penalty is a possibility. FASD Report, 2012, A.B.A. Comm. on Youth at Risk et al., Sec. Rep. 1, 57–59. Additionally, the U.S. Congress has formed the Congressional Caucus on Fetal

Alcohol Spectrum Disorders. Joanna Pawlowska, *Spotlight On: National Organization on Fetal Alcohol Syndrome*, 37 Child. Legal Rts. J. 171, 172 (2020). The legal community, considering recent advancements of medical knowledge, is increasingly recognizing the moral equivalence of offenders with ND-PAE and offenders with ID.

Despite this national landscape, the Nevada Supreme Court concluded there is "no evidence of a national consensus" against executing individuals with ND-PAE. *See* App. B at 15. The court defended this assertion by citing the reasoning in *Roper* that overall "30 States prohibit the juvenile death penalty." *Id.* (citing *Roper*, 543 U.S. at 564). The Nevada Supreme Court proceeded no further in its analysis of objective indicia, declining to consider measures of consensus presented by medical, legal, and governmental entities or the "consistency of the direction of change." Atkins, 536 U.S. at 315. In doing so, the Nevada Supreme Court did not acknowledge the totality of the evidence relevant to a developing consensus. This Court's precedent does not limit the meaning of national consensus to the Nevada Supreme Court's narrow reading. Importantly, the Nevada Supreme Court ignored that "[t]here are measures of consensus other than legislation." *Graham v. Florida*, 560 U.S. 48, 62 (2010) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008)).

C. Executing individuals with ND-PAE is unconstitutionally disproportionate.

"For purposes of imposing the death penalty … punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. This determination—whether the death penalty is a disproportionate

punishment—is made by the Court in an "exercise of [its] own independent judgment" after evaluating objective indicia of consensus. *Roper*, 543 U.S. at 564 (quoting *Graham v. Florida*, 560 U.S. at 67).

Here, quoting *Graham*, the Nevada Supreme Court noted that it needed to consider that "the culpability of the [class of] offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question and whether the challenged sentencing practice serves the legitimate penological goals.'" *See* App. B at 14 (internal quotation marks omitted). The court conceded that scientific developments since Mr. Floyd's trial shows important similarities between FASD and ID. *Id.* at 15–16. (comparing the "executive functioning deficits" of offenders with FASD with deficits typical of juveniles and the intellectually disabled). However, its conclusion that FASD is not sufficiently "identifiable and quantifiable" as to merit categorical exemption failed to apprehend the nature of the disorder in several ways.

First, the Nevada Supreme Court erred when it conflated "objective criteria" with "facts . . . identifiable and quantifiable." *Id.* at 16. But identifiability is not controlling. Indeed, the DSM-5 lists unambiguous "Diagnostic Features" for ND-PAE, which regularly guide clinical diagnoses and treatment of the condition. Am. Psychiatric Ass'n, *supra* at 916–17. Put simply, ND-PAE is identified with medical certainty. Quantifiability is the only remaining distinction. The Nevada Supreme Court failed to recognize that qualitative diagnostic factors may be as *objective* as quantitative test scores. "Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent,'" *Atkins*,

536 U.S. at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)). Additionally, the Nevada Supreme Court acknowledged "FASD is a collective term for 'a group of conditions' [that] covers … a vast range of presentations" but concluded it was an insufficiently specific class to merit exemption from the death penalty. *See* App. B at 16. But this conclusion did not sufficiently appreciate Mr. Floyd's factual proffer with respect to his specific and severe form of FASD, established in the DSM-5 as ND-PAE. Mr. Floyd only seeks relief for the narrow population of offenders with "objective characteristics" of ND-PAE, as identified by the medical community.

Next, the Nevada Supreme Court considered the various ways in which ND-PAE is functionally-equivalent with the classes exempted in *Atkins* and *Roper*. Though the court acknowledged "similarities between offenders with FASD and juveniles or the intellectually disabled when it comes to executive functioning deficits" and "social incompetence," three distinctions were posited based on: (1) reform, (2) appreciating the possibility of execution as a penalty, and (3) capacity to assist counsel. *Id*. at 14–17. However, these conclusions are not supported in the record or research on FASD.

Regarding reforms, while ND-PAE is a lifelong condition, robust medical research concludes that establishing systems of support such as structured settings can mitigate the behavior that led to the capital offense. For individuals with FASD, "[b]ehaviors that were seen as moral failings … can now be seen as neurological challenges that require enhanced environmental supports. These supports include highly structured … environments, consistent routines, and most importantly,

reasonable behavioral, intellectual, emotional, and social expectations." American Academy of Pediatrics, *FASD Case Study 2: 8-Year-Old Male with FAS and Caregivers' Concerns About Behavior at Home and School* (Nov. 29, 2021), https://www.aap.org/en/patient-care/fetal-alcohol-spectrum-disorders/health-supervision/case-studies/fasd-case-study-2/. Life in prison without the possibility of parole is an environment that is "highly structured" with "consistent routines" and reasonable expectations. In *Roper*, the Court found it "would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." 543 U.S. at 570. Here too, it would be misguided to equate the failings of a young adult with severe brain damage to those of a normal adult with a fully-functioning brain, in part because with the right system of support, individuals with ND-PAE are capable of performing positively in the structured setting of a prison. 12PA2858.

Additionally, individuals with ND-PAE *are* less capable of appreciating the possibility of execution as a penalty. The Nevada Supreme Court acknowledged the relevance of this factor to the court's reasoning in *Atkins*, however, it erroneously held Mr. "Floyd has not alleged similar factors are at play when it comes to offenders with FASD." App. B at 17. Contrary to the Nevada Supreme Court's conclusions, Mr. Floyd alleged precisely those factors are present for offenders with ND-PAE in his opening brief: "[f]or individuals with intellectual disability, there is a 'diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulse,' just as there is in individuals with FASD." Opening Brief for Petitioner at 53, *Floyd v. Gittere*, (No.

83436), 2024 WL 4865438. These cognitive traits are the very foundation upon which adolescents learn (and at times fail to learn) that their actions have predictable consequences. Mr. Floyd is not asserting that he cannot tell right from wrong, but that ND-PAE renders this determination largely immaterial to those with his form of brain damage in contexts of unanticipated high-stress and perceived danger.

Finally, individuals with ND-PAE are less able to understand and advance their interests in legal proceedings. In *Atkins,* this Court considered this a second justification for a categorical rule making the intellectually disabled ineligible for the death penalty. "[Intellectually disabled] defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." 536 U.S. at 320–21. The Nevada Supreme Court cited this consideration but concluded that Mr. "Floyd has not alleged that similar factors are at play when it comes to offenders with FASD." *See* App. B at 17. Here, The Nevada Supreme Court ignored its own observation one page earlier, that "those with FASD demonstrate a social incompetence that often manifests as gullibility." *Id*. Gullible defendants make poor witnesses on cross examination. Further, the plethora of adaptive deficits herein described show how individuals with ND-PAE struggle to conform their behavior to the courtroom setting. There are few disorders less capable of navigating such circumstances than ND-PAE. Indeed, empirical data supports this assertion. "It has been estimated that 60 per cent of FASD subjects

over the age of twelve find themselves caught up in the criminal justice system." Botterell, *supra* at 341; *see also* 14PA3362 at ¶30(c).

The Nevada Supreme Court also ignores that these are examples of why individuals with ID are more at risk of wrongful execution, not requirements to prove. This Court contemplated that as a second reason for categorical exclusion for ID—[s]econd, [intellectually disabled] defendants in the aggregate face a special risk of wrongful execution because . . ." *Atkins*, 536 U.S. at 305. These examples were not a requirement for categorical exclusion, as nothing in the language of *Atkins* mandates a defendant prove these specific issues occurred during their trial.[2] This Court was clear that it is the deficiencies that are present due to an ID that diminish culpability to warrant exclusion from the death penalty: "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability." *Id.* These same deficiencies are present in individuals, such as Mr. Floyd, with ND-PAE.

As was relevant in *Roper*, here, the diminished culpability of individuals with ND-PAE demonstrates that the penological justifications for the death penalty apply with "lesser force" than to normal adults. 543 U.S. at 571. The two distinct penological justifications for the death penalty are "retribution and deterrence of capital crimes by prospective offenders." *Atkins*, 536 U. S. at 319 (quoting *Gregg v. Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Regarding deterrence, the adaptive and executive functioning deficits typical

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[2] In references to these examples that could lead to a wrongful execution, this Court used words such as "possibility" and "typically".

to ND-PAE cause reduced ability to plan ahead, assess consequences or control impulses. Prospective offenders with ND-PAE are therefore like offenders with ID – suffering from a condition that limits the deterrent value of the death penalty. Regarding retribution, the diminished culpability of the class also makes the retributive goal of the penalty inappropriate where life without the possibility of parole is an alternative.

D. The Nevada Supreme Court's decision deepens a jurisdictional split on the import of FASD evidence, leading to inconsistent outcomes in capital cases.

New findings related to FASD have led to conflicting judicial determinations about how membership in the class of defendants with FASD affects the constitutional protections relevant to capital cases. These inconsistent decisions, specifically in the context of ineffective assistance of counsel claims, are emblematic of the "systemic failure from legal professionals in recognizing … the extent and complexities of [FASD]." Jerrod Brown et al., *Fetal alcohol spectrum disorder (FASD) and the criminal justice system: A guide for legal professionals*, 97 Int'l J. L. & Psychiatry 1, 1, 40 (2024). This systematic failure is serious. "The primary consequence is that access to constitutionally mandated legal rights is functionally undermined for offenders living with FASD." *Id.* at 2, 8.

In *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), cert. denied, 140 S. Ct. 105 (2019), the defendant had brain damage resulting from FASD. At his sentencing hearing, counsel introduced evidence of a "challenging childhood, learning disabilities, and other mental health issues," but they had not investigated, and thus did not raise, FASD-related brain damage as a mitigator. *Id.*

at 315–16. In postconviction proceedings, the defendant's experts described the effect of that brain damage in terms similar to the expert reports in the instant case. *Id*. at 308, 318 (emphasis in original). The Fourth Circuit concluded that, even under AEDPA's deferential standard, the failure to investigate FASD was unreasonable, and the absence of brain-damage evidence was prejudicial:

> [T]he FAS evidence was different from the other evidence of mental illness and behavioral issues because it could have established cause and effect for the jury—specifically, a FAS diagnosis could have provided to the jury evidence of a neurological defect that caused Williams' criminal behavior. Without this information, the jury could have assumed that Williams was an individual who—despite challenges in his home life, education, and mental health—was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.

Id. at 318. Evidence that FASD "impaired [the defendant's] judgment" and "his ability to control his impulses and consider the consequences of his actions," the Fourth Circuit held, "could have been persuasive mitigating evidence for a jury" even in light of the other mitigation it heard. *Id.*

Conversely, the Fifth Circuit construed FASD in capital sentencing as "double-edged" because while "it 'might permit an inference that [the defendant] is not as morally culpable for his behavior, it also might suggest [that the defendant], as a product of his environment, is likely to continue to be dangerous in the future.'" *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012), *as amended on denial of reh'g and reh'g en banc* (Aug. 14, 2012) (quoting *Ladd v. Cockrell,* 311 F.3d 349, 360 (5th Cir. 2002)). This reasoning harkens back to *Penry I*, where this Court noted that "Penry's mental retardation and history of abuse is thus a two-edged sword." *Penry*

v. Lynaugh, 492 U.S. 302, 324 (1989). But ultimately, this Court held that this type of evidence is instrumental in mitigating moral culpability. In *Atkins*, this Court overturned *Penry I*, and its Eighth Amendment jurisprudence since has aimed to resolve the arbitrary judicial treatment of mitigating circumstances by designating certain categories of conditions as exempt from the death penalty. 536 U.S. at 321 (finding that the "two-edged sword" caused "[intellectually disabled] defendants in the aggregate [to] face a special risk of wrongful execution"). This fear was further echoed by this Court in *Hall v. Florida*. 572 U.S. 701, 720–21 (2014). "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.*

Like ID, the diminished culpability of a defendant with an FAS disorder, such as ND-PAE, has caused the courts significant consternation. Early in the development of ND-PAE research, the Ninth Circuit characterized evidence of pre-natal exposure to alcohol as "the very sort of mitigating evidence that 'might well have influenced the [judge's] appraisal of [the defendant's] moral culpability.'" *Landrigan v. Schriro*, 441 F.3d 638, 649 (9th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)). Eighteen years ago, a 5-4 majority of this Court interpreted evidence of Fetal Alcohol Syndrome as supporting "no difference in the sentencing" whereas four justices in dissent found "evidence of this kind can influence a sentencer's decision as to whether death is the proper punishment." *Compare Schriro v. Landrigan*, 550 U.S. 465, 497 (2007) (Stevens J., dissenting),

with id. at 480. In its early stages, the evolving understanding of ND-PAE evidence has produced stark, incompatible differences in judicial decisions.

In the Ninth Circuit, Mr. Floyd raised a claim of ineffective assistance of counsel because his trial counsel failed to investigate and present evidence of his brain damage caused by FASD. *Floyd v. Filson*, 949 F.3d 1128 (9th Cir. 2020). The court interpreted trial counsel's failure to investigate and present expert testimony of an FASD diagnosis as constitutionally acceptable because the jury was presented with information about Mr. Floyd's "mental health struggles" like ADHD and alcoholism and because the jury was told that Mr. Floyd's mother drank while pregnant. *Id.* at 1141. After sentencing Mr. Floyd to death, one juror commented that had she been presented with evidence of a "serious mental illness," it would have "weighed heavily" in her sentencing deliberation. 10PA2440. Despite this juror statement and the fact that Mr. Floyd's jury deliberated his sentence for over 16 hours, the court found "[t]he jury that imposed the death sentence on Floyd did not report difficulty reaching a verdict" and that the presentation of FASD evidence would not have changed the outcome. *Floyd v. Filson*, 949 F.3d 1128, 1141 (9th Cir. 2020). But this reasoning is flawed.

The Ninth Circuit sought to distinguish the Fourth Circuit decision in *Williams*, arguing that in Mr. Floyd's case the mitigating evidence that had been offered at the sentencing hearing was stronger (so additional proof of brain damage would have added less) and the aggravating evidence was stronger (so more would have been needed to overcome it). But the key rationale of the Fourth Circuit's

decision was not the relative weight of the other evidence, but the uniquely persuasive weight of proof of brain damage. *Williams*, 914 F.3d at 313–18.

In capital cases, federal appellate courts apprehend the gravity of and prejudice resulting from the presentation of FASD evidence differently. *Compare Brown*, 684 F.3d at 499 *and Floyd*, 949 F.3d at 1141 *with Williams*, 914 F.3d at 313. A categorical exemption would resolve this inconsistency by ensuring equal application of the law across all jurisdictions.

This conflict among the federal courts is well developed and ripe for resolution by this Court. Executing a defendant with an established, lifelong history of FASD would violate the bedrock constitutional principles underlying the Eighth Amendment. Denying Mr. Floyd protection from unconstitutionally excessive punishment while affording it to the functionally equivalent intellectually disabled would also run afoul of this constitutional principle.

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CONCLUSION

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

Dated this 2nd day of May, 2025.

Respectfully submitted,

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