

No. SC23-1233

EXECUTION SCHEDULED FOR OCTOBER 3, 2023, at 6:00 P.M.

**IN THE
Supreme Court of Florida**

MICHAEL DUANE ZACK, III,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

*On Appeal from the Circuit Court, First
Judicial Circuit, in and for Escambia County, Florida
Lower Tribunal No. 1996-CF-2517A*

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CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record:

- “T” refers to the transcript of trial proceedings;
- “R” refers to the record on direct appeal to this Court (SC60-92089);
- “PCR1” refers to the record on appeal from the denial of Mr. Zack’s initial rule 3.850 motion (SC03-1374);
- “PCR2” refers to the record on appeal from the denial of Mr. Zack’s first successive rule 3.850 motion (SC05-963);
- “PCR3” refers to the record on appeal from the denial of Mr. Zack’s second successive rule 3.850 motion (SC15-1756)(*Hall* claim);
- “PCR”4 refers to the record on appeal from the denial of Mr. Zack’s third successive rule 3.851 motion (SC18-243)(*Hurst* claim);
- “PCR5” refers to the record on appeal from the denial of Mr. Zack’s fourth successive rule 3.851 motion (SC23-1233) (this case);
- All other references will be self-explanatory.

STATEMENT OF THE CASE AND FACTS

I. Procedural History

On September 15, 1997, Mr. Zack was convicted of first-degree murder, robbery, and sexual assault. (T. 1521–22; R. 419–20). The jury recommended death by a vote of 11-1, and the trial court sentenced Mr. Zack to death on November 24, 1997. (T. 2117; R. 792; 852-75). On direct appeal, this Court affirmed Mr. Zack’s convictions and sentence. *Zack v. State*, 753 So. 2d 9 (Fla. 2000). Certiorari was denied on October 2, 2000. *Zack v. Florida*, 531 U.S. 858 (2000).

On May 10, 2002, Mr. Zack filed his initial motion for postconviction relief. (PCR1. 131). He filed an amended motion for postconviction relief on October 21, 2002. (PCR1. 219-56). The circuit court denied relief on July 15, 2003. Mr. Zack appealed to this Court, and he also filed a petition for writ of habeas corpus.

On November 30, 2004, while his appeal and habeas petition were still pending before this Court, Mr. Zack filed a motion to relinquish jurisdiction to pursue his intellectual disability claim in the circuit court under the newly promulgated Rule 3.203. Simultaneously, Mr. Zack filed his first successive Rule 3.850 motion

in circuit court. The circuit court dismissed Mr. Zack's first successive Rule 3.850 motion with prejudice on January 13, 2005. (PCR2. 58–63).

On March 9, 2005, this Court 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. On July 7, 2005, this Court denied Mr. Zack's initial appeals. *Zack v. State*, 911 So. 2d 1190 (Fla. 2005).

On October 27, 2006, Mr. Zack filed an appeal of his first successive Rule 3.850 motion, claiming the circuit court failed to follow the law and hold Mr. Zack's case in abeyance until the proceedings before this Court were final, and the court erred in dismissing Mr. Zack's claim under Fla. R. Crim. P. 3.203. (PCR2. 231-32). This Court denied his appeal on September 20, 2007. *Zack v. State*, 982 So. 2d 1179 (Fla. 2007), *rehearing denied* (May 1, 2008).

Mr. Zack filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida on September 28, 2005. (Case No. 3:05-cv-000369-RH). The proceedings were stayed by the court pending resolution of Mr. Zack's state court appeal. He filed an amended petition for writ of habeas corpus on March 20, 2008. All claims not based on *Atkins v. Virginia*, were dismissed with prejudice as untimely on November 17, 2008. *Zack v. Crosby*, 607 F.Supp.2d 1291 (N.D. Fla. 2008). Mr. Zack's *Atkins* claim was denied with prejudice on the merits on March 26, 2009. On appeal, the Eleventh Circuit affirmed the dismissal of Mr. Zack's non-*Atkins* claims as untimely. *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013). The United States Supreme Court denied certiorari review on October 7, 2013. *Zack v. Crews*, 134 S. Ct. 156 (2013).

On May 26, 2015, Mr. Zack filed a second successive Rule 3.851 motion challenging the validity of his sentence based on *Hall v. Florida*, 134 S. Ct. 1986 (2014). (PCR3. 109-79). The circuit court summarily denied the successive motion, and this Court affirmed on June 15, 2017. *Zack v. State*, 228 So.3d 41 (Fla. 2017).

On January 11, 2017, Mr. Zack filed a third successive Rule 3.851 motion seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). (PCR4. 23-83). The circuit court denied Mr. Zack's motion, and this Court affirmed the circuit court's order. The United States Supreme Court denied certiorari review. *Zack v. Florida*, 139 S. Ct. 1622 (2019).

Mr. Zack filed a Rule 60(b)(6) motion in the United States District Court for the Northern District of Florida. The district court denied relief, and the Eleventh Circuit affirmed. *Zack v. Secretary, DOC*, 721 Fed. Appx. 918 (11th Cir. 2018). The United States Supreme Court denied certiorari review. *Zack v. Jones*, 139 S. Ct. 322 (2018).

On August 17, 2023, Governor DeSantis signed a death warrant for Mr. Zack's execution scheduled for October 3, 2023. (PCR5. 29-33). This Court entered a scheduling order for warrant litigation in state court. On September 28, 2023, Mr. Zack filed a fourth successive Rule 3.851 motion raising claims that his execution was barred by the Eighth Amendment because of his non-unanimous jury recommendation, as well as his ineligibility for execution because of his diagnosis of fetal alcohol syndrome under the Eighth and

Fourteenth Amendments. (PCR5. 261-428). After a *Huff* hearing on August 31, 2023, the circuit court denied relief. (PCR5. 478-84). This appeal follows.

II. Relevant Facts from Trial

At trial, defense counsel argued that Mr. Zack did not have the level of intent required for first-degree premeditated murder due to: his high level of intoxication on the day of the murder; the chaotic and disorganized crime scene; Mr. Zack's 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).

During Mr. Zack's penalty phase, trial counsel 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).

III. Relevant Facts from Prior Postconviction Proceedings

Throughout his postconviction proceedings, Mr. Zack has sought to establish that he is exempt from execution pursuant to *Atkins* and has continued to develop evidence of his mental impairments and adaptive deficits. (PCR3. 109-79). Although Mr. Zack's IQ scores have prevented him from obtaining *Atkins* relief, Dr. Eisenstein opined that these scores were unreliable as an indicator of intellectual disability. He further opined that the verbal and performance based splits on his IQ tests could be attributed to organic brain damage. (PCR3. 160-61).

Further development of Mr. Zack's adaptive deficits established that 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).

IV. Relevant Facts from Current Postconviction Proceedings

A. A new scientific consensus establishes FASD as a uniquely ID-equivalent disorder.

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.,¹ 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

¹ Dr. Greenspan is a leading authority on intellectual disability and the most cited researcher in the ID section of the DSM-5. (PCR5. 330).

adaptive deficits and support needs not only similar to but *identical* to those seen in intellectual 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 which 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).² 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 would result in medically-inappropriate diagnostic and treatment restrictions. (PCR5. 303; 305; 307; 328-330).³

² 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).

³ 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).

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).

B. Mr. Zack’s life history exemplifies this new consensus

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 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).

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Mr. Zack's motion and in this appeal as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

SUMMARY OF ARGUMENT

ARGUMENT I: Mr. Zack's uncontested diagnosis of FAS renders him categorically exempt from execution under the Eighth and Fourteenth Amendments. Mr. Zack presented unrebutted evidence of a new medical consensus recognizing FAS as a uniquely intellectual disability-equivalent, warranting the same legal protections established in *Atkins* and its progeny. The circuit erred by summarily denying Mr. Zack's exemption claim without addressing the important constitutional arguments, and without holding an evidentiary hearing related to the timeliness or underlying merits.

ARGUMENT II: This Court should reconsider its decision in *Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023), that the Eighth Amendment does not require unanimous jury recommendations. Since Mr. Dillbeck's execution in February 2023, Florida has joined Alabama as an extreme outlier among the states that still apply the death penalty for executing people with non-unanimous jury recommendations. Mr. Zack urges this Court to re-examine the compelling data of the evolving standards of decency across the

United States and hold that his execution is prohibited by the Eighth Amendment because one juror voted to spare his life.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RULING THAT MR. ZACK IS NOT 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)⁴ 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

⁴ Declaration of Natalie Novick Brown (PCR5. 304) (also noting that FAS represents a very small minority of individuals diagnosed with FASD).

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

In denying Mr. Zack's claim, the circuit court relies on this Court's recent holding in *Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023). While Mr. Zack recognizes this precedent, he respectfully requests that this Court reconsider its ruling as argued below.

A. No Procedural Bar Applies

The circuit court ruled that Mr. Zack's claim is procedurally barred because he is seeking to relitigate his previously denied *Atkins* claim. (PCR5. 480). Additionally, the circuit court ruled that his newly discovered evidence claim was untimely and that scientific consensus opinions do not constitute newly discovered evidence. (PCR5. 481). These rulings are erroneous, as neither accurately reflects the constitutional issue currently before this Court. *Rather, the present claim is that scientific understanding and evolving standards of decency have now reached a sociolegal tipping point which renders Mr. Zack exempt from execution because he suffers from FAS, a uniquely ID-equivalent disorder.*

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 disability, 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. In light of 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.⁵

B. Notwithstanding His IQ Score, Mr. Zack Falls Within the Class of Persons Protected by *Atkins* and Its Progeny.

The circuit court ruled that Mr. Zack’s claim is without merit, that intellectual disability is clearly defined under Florida law, and that Mr. Zack does not now claim he qualifies as intellectually disabled as so defined. (PCR5. 482). Elsewhere in its order, the circuit court noted previous findings that Mr. Zack’s IQ scores were “well outside the margin of error, precluding him from relief.” (PCR5. 481).

⁵ If the State disputes that Mr. Zack fits into the category of individuals exempt from execution under *Atkins*, that dispute is factual in nature and necessitates an evidentiary hearing. Likewise, if the State disputes Mr. Zack’s diligence in presenting this claim, that too is a factual dispute and requires resolution at an evidentiary hearing.

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). In other words, 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*, 582 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.⁶

Like those with intellectual disability, individuals with FASD have impairments in learning and adaptive behavior that are directly

⁶ This dysfunction is of a different origin, breadth, and impact than other, non-ID-equivalent forms of brain damage.

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.⁷ 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

⁷ 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.”)

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 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.⁸

⁸ 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

C. Conclusion

The Eighth Amendment “must draw its meaning from the evolving standards of decency to mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Those evolving standards have previously recognized that execution of individuals with intellectual disability violates the Eighth Amendment, due to those individuals’ reduced culpability. Now, with the evolution of medical and scientific knowledge, a consensus exists that, notwithstanding IQ score, FASD is equivalent to intellectual disability in nature, severity, manifestation, and lessened culpability. Due to Mr. Zack’s FAS, the most severe form of FASD, he has functioned as intellectually disabled for the entirety of his life. He is possessed of a lesser culpability and his execution would violate equal protection and constitute cruel and unusual punishment with no legitimate retributive or deterrent effect. Thus, he is categorically exempt from execution and his death sentence must be permanently set aside.

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).

II. MR. ZACK'S EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT BECAUSE ONE JUROR VOTED TO SPARE HIS LIFE.

At Mr. Zack's trial, the jury voted to recommend a sentence of death by a vote of 11–1 before he was sentenced to death by the trial judge. (R. 792; T. 2117). 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) the Supreme Court's recognition that a jury vote must be unanimous to convict a defendant of a "serious offense"—he is no longer in the class of offenders who were found by a unanimous jury to be among those culpable enough to deserve a sentence of death. *Cf. Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) (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.") (internal quotation omitted). Additionally, 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 upon a unanimous jury. Therefore, Mr. Zack's execution would violate the Eighth Amendment.

The circuit court based its denial of this claim on this Court's decision in *Dillbeck v. State*, 357 So. 3d 94, 104 (Fla. 2023), that the Eighth Amendment does not require unanimous jury recommendations. However, since Mr. Dillbeck was executed in February 2023, Florida has joined Alabama as an extreme outlier among the states that still apply the death penalty for executing people with non-unanimous jury recommendations. Mr. Zack urges this Court to re-examine the compelling data of the evolving standards of decency across the United States and hold that his execution is prohibited by the Eighth Amendment.

A. Florida's capital sentencing statute at the time of Mr. Zack's non-unanimous death recommendation

After Mr. Zack was convicted in this case, his penalty phase was conducted under Florida's previous sentencing statute that was in effect until 2016. Under the statute, the jury rendered an advisory verdict, and the judge made the ultimate sentencing determination. The sentencing judge was required to give the jury's recommendation

great weight and could not override a majority vote for life. In making the recommendation, the jury was required to find (1) whether at least one aggravating 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. 2107-2114). 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. The significance of this one vote for life cannot be overstated. To put this in context, if one juror had voted to find Mr. Zack not guilty of murder, he would have been acquitted. If the vote of one juror could have been enough to spare him from a murder conviction, one vote should be enough to spare his life.

B. The evolving standards of decency

Sentencing procedures that have been repudiated due to the “evolving standards of decency that mark the progress of a maturing society” violated the Eighth Amendment. *Atkins v. Virginia*, 536 U.S.

304, 312 (2002). Under this inquiry, when a capital sentencing procedure is called into question, a court must review the current understanding and administration of that procedure. When the capital sentencing procedure used by a state is out of touch with the contemporary consensus, the procedure fails this test and has been rendered unconstitutional.

For example, in *Beck v. Alabama*, 447 U.S. 625, 635 (1980), the Supreme Court held that Alabama’s requirement that disallowed jury instructions for lesser-included offenses in death penalty cases was unconstitutional. In doing so, the Supreme Court surveyed the land and noted that Alabama’s procedure was “unique in American criminal law,” given that no state or federal jurisdiction had a similar procedure. *Id.* The Supreme Court also noted that the procedure was otherwise out of step with Alabama law, given that “for all noncapital crimes, Alabama itself gives the defendant a right to such instructions under appropriate circumstances.” *Id.* at 636–37.⁹

⁹ Although not a capital case, also instructive is the Supreme Court’s recent opinion in *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021) declining to hold that a written finding of “permanent incorrigibility” in juvenile sentencing cases is required by the Eighth Amendment

In conducting such a survey, the Supreme Court has traditionally looked to three indicators of societal consensus. First, courts look at the current state and federal sentencing laws because legislatures “are constituted to respond to the will and consequently the moral values of the people.” *Atkins*, 536 U.S. at 322–23. As such, legislation is “the clearest and most reliable objective evidence of contemporary values.” *Id.* at 322–23. Second, courts are also to examine 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, in addition to sentencing practices, “[s]tatistics about the number of executions may inform the consideration whether capital punishment. . . is regarded as unacceptable in our society.” *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008).

Therefore, this Court must look to the contemporary consensus regarding jury unanimity in capital sentencing. Two states—Montana

after looking to the “historical or contemporary sentencing practice in the states.”

and Nebraska—have limited jury involvement in capital sentencing, resting the sentencing determination with a judge (Montana) or judges (Nebraska).¹⁰ Indiana and Missouri consider a non-unanimous sentencing jury to be a hung jury and allow a judge to sentence a defendant in the event of a hung jury.¹¹ Alabama allows a defendant to be sentenced to death based on the non-unanimous vote of a jury.¹²

Since this Court previously considered a similar Eighth Amendment claim in Donald Dillbeck’s warrant litigation in February 2023¹³, the Florida legislature has abolished the requirement for a unanimous jury recommendation, which had been the law since 2016, to allow a death sentence based on an 8-4 vote. In sum, of the 28 states that currently authorize the death penalty and the federal

¹⁰ 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.

¹¹ Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.030.

¹² Ala. Code § 13A-5-46. Alabama allowed a judge to override a jury’s life recommendation until 2017. Ala. Code § 13A-5-47.

¹³ *Dillbeck v. State*, 357 So. 3d 94, 104 (Fla. 2023).

government, only six jurisdictions currently authorize a defendant to be sentenced to death without a nonunanimous vote from the jury.¹⁴

The contemporaneous sentencing practices of the states show that the non-unanimous jury has been widely repudiated. In Missouri, two of the three defendants who have been sentenced to death in the last decade received non-unanimous jury votes, one of whom had their sentence vacated on direct appeal and was sentenced to life.¹⁵ 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.¹⁶ Nebraska has only sentenced three defendants to death in the last thirteen years.¹⁷ Montana has not

¹⁴ 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 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-votes-for-life>).

¹⁶ *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009).

¹⁷ *The 12 Inmates of Nebraska's Death Row*, KHGI-TV, June 20, 2021 (available at: <https://nebraska.tv/news/local/the-12-inmates-of-nebraskas-death-row>).

handed down a death sentence since 1996.¹⁸ So, while these states may authorize death sentences based on non-unanimous juries, in practice, these states either effectively do not sentence defendants to death at all, or at least do not do so without a unanimous jury.

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, 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. (PCR5. 423-28). Of those, thirteen were executed in Alabama, and seven were executed in Florida. (PCR5. 423-28). 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. (PCR5. 423-28).

Notably, of the six states that still allow a defendant to be sentenced to death based on a non-unanimous jury, Indiana's last

¹⁸ Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1514 (2022).

execution was in 2009, Montana’s last execution occurred in 2006, and Nebraska committed an execution in 2018, its only one since 1997.¹⁹ Missouri has only committed two executions of defendants who were not sentenced to death based on a unanimous jury in the last two decades.²⁰

Also relevant to the consensus is the Supreme Court’s recent decision requiring a unanimous jury vote to convict a defendant of a “serious offense” under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).²¹ As the Supreme 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. As such, the Supreme Court recognized that the right to a jury is “fundamental to the American scheme of justice.” *Id.* at 1397.

¹⁹ Death Penalty Information Center, Executive Database (available at: <https://deathpenaltyinfo.org/executions/execution-database>).

²⁰ See App. 2; Michael J. Essma, *DEAD-Locked: Evaluating Judge-Imposed Death Sentences: Under Missouri’s Death Penalty Statute*, 85 Mo. L. Rev. (2020).

²¹ “Serious offenses” are those defined as those with a minimum potential punishment of more than six months in prison. See *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

The Supreme Court’s recent recognition that a unanimous jury is required to convict a defendant of a serious crime—*i.e.*, that a unanimous jury vote is required 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 a 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 not recognized it is unacceptable to sentence him to death.

C. At the founding, capital sentences required unanimous juries

Mr. Zack’s execution violates the Eighth Amendment because 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). In addition to the evolving standards of decency, the Supreme Court has also looked to the original understanding as an additional guide to the proper scope of the Eighth Amendment. *See, e.g., Beck*, 447 U.S. at 633–35; *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 v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

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 afterwards 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 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. at 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) (noting 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.” Biljani, *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”).

Part and parcel of 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”).

Therefore, as originally understood at the time of the Founding, the public understanding was that the determination of whether to sentence a defendant to death belonged to a jury, which was required to make the determination unanimously and beyond a reasonable doubt.

D. Conclusion

Based on the evolving standards of decency and the common understanding of capital sentencing at the Founding, this Court should hold that Mr. Zack's death sentence violates the Eighth Amendment because he was sentenced to death despite one juror recommending that he be sentenced to life. If just one juror had voted to find him not guilty, Mr. Zack would not have been convicted of murder. As such, the vote of one juror should also spare his life.

CONCLUSION AND RELIEF SOUGHT

Mr. Zack respectfully requests that this Honorable Court remand his case for an evidentiary hearing, vacate his sentence of death, and/or grant a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to all counsel of record, on this 10th day of September, 2023.

/s/ Dawn B. Macready

Dawn B. Macready

CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Bookman Old Style 14-point font and is not proportionately spaced.

/s/ Dawn B. Macready

Dawn B. Macready