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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

The State has filed its answer to Mr. Zack's initial brief, and this reply follows. The reply will address only the most salient points argued by the State. Mr. Zack relies on his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

ARGUMENT IN REPLY

I. THE CIRCUIT COURT ERRED IN RULING THAT MR. ZACK IS NOT ENTITLED TO EXEMPTION FROM EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State relies on the following arguments to justify the summary denial of Mr. Zack's Eighth and Fourteenth Amendment claim that he is exempt from execution: 1) that Mr. Zack's claim is procedurally barred by the law-of-the-case doctrine; 2) that Mr. Zack's claim of categorical exemption is untimely; 3) that Mr. Zack's exemption claim is meritless because of this Court's precedent refusing to expand *Atkins*, and because Mr. Zack is not intellectually disabled; and 4) that Art. 1, § 17 of the Florida Constitution ("the conformity clause") prohibits the state courts from applying *Atkins*'[1] Eighth Amendment protections to Mr. Zack.

A. Procedural Bar

The State argues that Mr. Zack's claim that he is exempt from execution is procedurally barred by the law-of-the-case doctrine. (AB. 46). In making this argument, the State misconstrues Mr. Zack's constitutional claim before this Court. This is not the relitigation of

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

the denial of Mr. Zack's Rule 3.203 motion filed years earlier, but an issue of the scientific understanding of FAS and the evolving standards of decency as they relate to the protections established by *Atkins*. At the time of Mr. Zack's trial there was not yet a prohibition against executing those who were intellectually disabled, let alone a scientific consensus establishing that FAS is a uniquely ID-equivalent condition. It is only now that there has been a tipping point in the scientific community regarding this consensus, and it is only now that Mr. Zack can bring this claim that he is exempt from execution under *Atkins* and the Eighth and Fourteenth Amendments. Furthermore, Mr. Zack has been diligent in pursuing such a claim to the extent that it has been possible under previously available scientific and legal understanding. He should therefore, not be punished by way of a procedural bar for this diligence.

B. Timeliness

The State asserts that Mr. Zack's claim is untimely because it should have been filed in November 2004, following the Supreme Court's decision in *Atkins*. (AB. 49). The State's contention that Mr. Zack should have raised this issue in 2004 misunderstands the

contours of Mr. Zack's claim and disregards the scientific and sociolegal processes that gave rise to it. As Mr. Zack explained in his initial brief, this claim requires one additional step that differentiates it from an *Atkins* claim that could have been brought in 2004. The claim is not that Mr. Zack "has intellectual disability" *per se*, but that his FAS is an ID-equivalent condition which entitles him to the same protections due to its unique indistinguishability from intellectual disability. (IB. 18).

Although FAS existed in 2004, there was not yet a medical consensus that "there are few disorders more related to ID (both in causing the disorder and resembling it functionally) than FASD."[2] (IB. 8; 18). Furthermore, according to the "DSM-5, FAS is identical to ID except for confirmation of prenatal exposure to alcohol." (IB. 8-9). In his initial brief and in the circuit court, Mr. Zack detailed the evolution of the medical consensus related to FAS. His claim -- that scientific understanding and evolving standards of decency have now, in 2023, reached a tipping point rendering him exempt from

[2] FASD is the umbrella term for disorders arising from prenatal alcohol exposure. FAS is the most severe form of FASD.

execution because he suffers from an ID-equivalent condition -- is timely raised.

C. Merits

The State argues that Mr. Zack's claim is meritless for two reasons: 1) because of this Court's precedent refusing to expand *Atkins*; and 2) because Mr. Zack is not intellectually disabled. (AB. 58). Both arguments misconstrue Mr. Zack's claim.

First, Mr. Zack is not arguing that this Court must expand *Atkins* to realms outside of intellectual disability (such as serious mental illness, brain damage, or other intellectual impairments). Rather, Mr. Zack is arguing that because the medical community recognizes FAS as uniquely indistinguishable from intellectual disability, he should be exempted from execution under the protections of *Atkins* without requiring meaningful expansion of those protections. (IB. 19). Thus, no precedent precludes this Court from finding that Mr. Zack is entitled to the constitutional protections already articulated in *Atkins*.

The State further argues to this point that "another reason to limit the prohibition established in *Atkins* to intellectual disability" is

because "the diagnosis of intellectual disability is mainly objective, depending … on IQ scores." (AB. 57). Such a strict construction of intellectual disability was refuted in favor of a more holistic approach espoused in *Hall v. Florida*, 572 U.S. 701, 710, 723 (2014) (when "determining who qualifies" for *Atkins* protections, states must take into account "the medical community's opinions.").

Furthermore, the State's cited cases related to this Court's "repeated[] reject[ion]" of "attempts to expand *Atkins*" to other mental conditions are distinguishable from Mr. Zack's case. (AB. 55-58). Aside from *Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023), none of these cited cases involved a condition recognized by the medical community to be not only analogous to intellectual disability, but functionally identical to all three prongs according to the DSM-5 diagnostic criteria. While Mr. Zack recognizes this Court's holding in *Dillbeck*, he urges this Court to reconsider its ruling in that case.

Second, the State claims that "[t]he existing record totally rebuts any *Atkins* claim." (AB. 58). This is demonstrably false.

In *Atkins*, the Supreme Court referred to the DSM when defining intellectual disability. *Atkins*, 536 U.S. 304, 308 n.3 (2002). Prong

one of an intellectual disability diagnosis, as laid out in *Atkins*, requires a showing of significantly subaverage general intellectual functioning.

The State erroneously claims that Mr. Zack "fails the first prong of significantly subaverage intellectual functioning because the *average* of his four adult IQ scores is over 82." (AB. 60). There is no support in either the scientific or the legal community for taking an average of these scores. This is simply not done. Additionally, the State fails to acknowledge that general intellectual functioning is not exclusively measured by full-scale IQ scores. The medical community considers full-scale IQ scores to be an outmoded concept and the DSM-5 itself does not support tethering prong one to a specific IQ score. *See* Greenspan, S. & Novick Brown, N., *Diagnosing Intellectual Disability in People with FASD*, 40 Behav. Sci. Law 31, 37-38 (2021). According to the unrebutted expert reports Mr. Zack has proffered related to his FAS, Mr. Zack *does* suffer from clinically significant intellectual impairment, and his impairments are consistent with intellectual disability. (IB. 5-17; PCR5. 298-421).

The State also claims that Mr. Zack cannot satisfy prong three (childhood onset) due to his IQ score of 92 when he was 11 or 12 years old. (AB. 59). However, there is uncontested evidence dating back to Mr. Zack's trial in 1997 that establishes Mr. Zack was exposed to vast quantities of alcohol *in utero* when his mother drank heavily during her pregnancy. (T. 1418-42). Mr. Zack's impairments are not only of childhood onset; they were set in motion even before his birth. Indeed, the lifelong nature of Mr. Zack's condition is apparent even from its name --- *Fetal Alcohol Syndrome*.

D. Conformity Clause

The State argues that Art. 1, § 17 of the Florida Constitution ("the conformity clause") prohibits the state courts from applying *Atkins*' Eighth Amendment protections to Mr. Zack. (AB. 53). However, in the context of Eighth Amendment claims, states are expected to actively participate in bringing a society closer to "the Nation we aspire to be[,]" *Hall*, 572 U.S. at 708, by reflecting and advancing "the evolving standards of decency to mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

Affirming the circuit court's reading of Florida's conformity clause, as the State urges (AB. 53), would be an abdication of Florida's role in evolving standards of decency. Such an interpretation would signal that Florida will not consider constitutional challenges to an execution -- no matter how meritorious those challenge and how reflective of current societal mores -- unless explicitly instructed by the United States Supreme Court.

This violates *Trop* and the litany of cases bearing its legacy. *See*, *e.g. Hall*, 572 U.S. at 708 ("The Eighth Amendment's protection of dignity …[affirms] that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force"); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule"); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) ("the [Eighth] Amendment has been interpreted in a flexible and dynamic manner"); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("Central to the application

of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment"); *see also Weems v. United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore [a constitutional principle], to be vital, must be capable of wider application than the mischief which gave it birth.").

Additionally, even within this unconstitutionally restrictive reading of the conformity clause, this Court may recognize that *Atkins* bars Mr. Zack's execution. As Mr. Zack has explained, his current claim does not require expansion of the principles and protections articulated in *Atkins*; it only requires recognition that FAS, identified by the medical community as a uniquely ID-equivalent condition, fits within the protections that *Atkins* has already established.

E. Summary Denial was Error

As argued above and in Mr. Zack's initial brief, Mr. Zack's claim that he is constitutionally entitled to categorical exemption from execution is timely, not subject to a procedural bar, and states a meritorious claim for relief that cannot be conclusively rebutted by

the state-court record. Because of this, none of the State's cited cases related to summary denial apply, and the circuit court's summary denial of Mr. Zack's successive postconviction motion was error. This Court should either find that Mr. Zack is entitled to categorical exemption from execution under the constitutional protections articulated in *Atkins*; or, alternatively, should stay Mr. Zack's execution and remand the case to the circuit court to conduct an evidentiary hearing.

II. THE CIRCUIT COURT ERRED IN RULING THAT MR. ZACK'S EXECUTION WOULD NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE ONE JUROR VOTED TO SPARE HIS LIFE.

In response to Mr. Zack's second claim in his appeal, the State argues that this claim is not timely raised, misconstrues this claim as a Sixth Amendment issue under *Hurst v. Florida*, 577 U.S. 92 (2016), and meritless as a matter of law under *Spaziano v. Florida*, 468 U.S. 447, 465 (1984).

As an initial matter, this claim is timely raised. The State argues that Mr. Zack could have raised this claim "years ago" based on how long other states have had unanimous capital sentencing. (AB. at 66). However, Mr. Zack's claim is based on the evolving

standards of decency and relates to the accumulation of a national consensus that people with non-unanimous jury recommendations should not be executed. This consensus only began in the wake of *Hurst,* and the data has become increasingly more compelling since February 2023 when Florida once again changed its capital sentencing statute to all allow executions based on an 8-4 jury recommendation for death. In fact, since Donald Dillbeck's execution in February 2023, Governor DeSantis has signed five death warrants, and four of those people had non-unanimous death recommendations.[3]

On the merits, the State claims that Mr. Zack should have brought his claim under the Sixth Amendment. (AB. at 68-72). The State then argues that because the Sixth Amendment only requires a capital jury to unanimously find one specific aggravating factor, Mr. Zack's claim fails. (AB. at 72). This Court should disregard the argument that because *one* constitutional provision applies (*i.e.* the Sixth Amendment jury right) to capital sentencing, that preempts

[3] Louis Gaskin (8-4); Darryl Barwick (9-3); Duane Owen (10-2); Michael Zack (11-1). James Barnes waived a penalty phase jury.

the application of any other constitutional right to capital sentencing. In doing so, the State appears to argue that the Eighth Amendment does not apply to capital trials (AB. at 69-70), but the United States Supreme Court has long held that sentencing procedures must comport with the Eighth Amendment. *See, e.g., Jones v. Mississippi*, 141 S. Ct. 1307 (2021); *Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977).

Regarding the merits of the evolving standards of decency, the State does not address the crux of Mr. Zack's argument at all. Rather, the State refers this Court to its rejection of a similar claim in *Dillbeck v. State*, 357 So. 3d 94, 104 (Fla. 2023). (AB. at 73). Mr. Zack recognizes this Court's previous ruling but urges this Court to exercise its right to disregard the doctrine of stare decisis considering the compelling data compiled since February 2023 that reveals that Florida has now joined Alabama as an extreme outlier in capital sentencing in the United States. Only 1.3% of total executions since 2016, excluding Florida and Alabama, were based on non-unanimous jury votes. Moreover, 90.9% of executions in

Alabama and Florida since 2016 were based on non-unanimous jury recommendations.

Regarding Mr. Zack's originalist argument about the historical practice of jury sentencing, the State claims that because sentences were often mandatory, juries only determined guilt. (AB. at 74-75). Although it is true that many serious crimes mandated capital punishment, it was widely understood that the jury had nullification power if they jury believed a death sentence would be too harsh. *See Woodson v. North Carolina*, 428 U.S. 280, 280-290 (1976). "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." Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1523-25 (2022) ("the question of 'appropriate punishment' was not only at issue in those unified proceedings but was often the principal issue faced by the jury"). Therefore, the State is incorrect to argue that there was no historic capital sentencing practice.

The State cites *Woodson v. North Carolina*, 428 U.S. 280 (1976) for the proposition that because sentences were mandatory upon a finding of guilt, juries had no historic role in sentencing. (AB. at 74). However, *Woodson* supports Mr. Zack's argument. As *Woodson* states, capital juries played a significant role in developing criminal law based on "sanction nullification." As *Woodson* notes, because juries frequently engaged in sanction nullification, criminal statutes were tailored to add what is now seen as fundamental pillars that allow a jury to convict a defendant while sparing him from the death penalty. *See id.* at 289–90 (noting that, in response to jurors' unfavorable reaction to "the harshness of mandatory death sentences," jurisdictions created defenses such as justifiable homicide and limited the class of crimes that were punishable by death). Thus, the capital jury has historically played a vital role in limiting the application of the death penalty to those who are genuinely the most culpable and deserving in the eyes of society.

Mr. Zack's death sentence violates the Eighth Amendment under both the evolving standards of decency and the original understanding because one juror voted to spare his life.

CONCLUSION

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 15th day of September, 2023.

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CERTIFICATE OF COMPLIANCE

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

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