

Florida executes man after US Supreme Court denies his intellectual disability claim

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Michael Duane Zack III, 54, was put to death by the state of Florida on Tuesday evening at the Florida State Prison in Raiford. His execution went forward after the US Supreme Court denied, without comment, Zack's appeal for a stay of execution based on his intellectual disability from fetal alcohol syndrome (FAS). He was the sixth person put to death in Florida so far this year, after Republican Governor Ron DeSantis—a leading contender for the Republican presidential nomination next year—resumed signing death warrants after a brief hiatus due to the COVID-19 pandemic.

Zack was sentenced to death in 1997 for the June 1996 sexual assault, robbery and murder of Ravonne Smith, a woman he met at a bar in the Florida Panhandle. He was also convicted and sentenced to life in prison for the murder of another woman, Laura Rosillo, whom he had befriended at another bar.

Zack's defense team sought to block his execution on the grounds that he suffered from fetal alcohol syndrome (FAS) and post-traumatic stress disorder and was therefore ineligible for execution due to intellectual disability. The Supreme Court ruled in 2002 in *Atkins v. Virginia* that execution of people with intellectual disabilities violated Eighth Amendment protections against cruel and unusual punishment.

Zack died by a lethal injection cocktail administered by the execution team at 6:02 p.m. He was pronounced dead at 6:14 p.m., although the *Pensacola News Journal* said that he showed no visible signs of breathing after the first minute.

A written statement by Zack was shared by Floridians for Alternatives to the Death Penalty after his execution.

"Twenty-seven years ago, I was an alcoholic and a drug addict. I did things that have hurt a lot of people—not only the victims and their families and friends, but my own family and friends as well," Zack wrote. "I have woken up every single day since then filled with remorse and a wish to make my time here on earth mean something more than the worst thing I ever did."

"I am so grateful to the guys on the row who took the time to teach me how to read and write. They changed my life

forever because their love and support allowed me to have pen pals and friends all over the world," he said.

"I make no excuses. I lay no blame. But how I wish that I could have a second chance, to live out my days in prison and continue to do all I can to make a difference in this world. To all my brothers on death row, please continue to help each other. Give each other hope and peace."

Zack suffered a litany of horrors in his childhood. His lawyers wrote in a court filing that his mother drank heavily throughout her pregnancy. He was hospitalized at the age of three for drinking about 10 ounces of vodka. He endured extensive physical and sexual abuse from his stepfather, including forcing him to drink alcohol, injecting him with drugs, running over him with a car and creating devices to electrically shock him if he wet the bed. Zack's older sister killed their mother with an ax.

Zack's attorneys appealed to the US Supreme Court after the Florida Supreme Court and the 11th US Circuit Court of Appeals refused to issue stays of execution in his case based largely on his intellectual disability. In their appeal to high court, Zack's attorneys said, "the medical community now recognizes that the unique, cognitive, practical and social impairments inherent to Fetal Alcohol Syndrome (FAS) [are] indistinguishable from those of Intellectual Developmental Disability."

"At every opportunity since his trial, Mr. Zack has presented evidence of his prenatal alcohol exposure to the full extent allowed by then-contemporaneous scientific and legal standards," Zack's appeal to the Court said. "Evolving standards of decency have finally progressed to the tipping point that allows Mr. Zack to establish that his FAS disability affords him the same protections established in *Atkins*. To deny review would penalize Mr. Zack for being right too soon."

In a filing Thursday at the US Supreme Court, however, Florida Attorney General Ashley Moody's office challenged Zack's FAS intellectual disability argument, saying, "There is no real possibility of this Court expanding *Atkins* to include a diagnosis of FAS." The state lawyers said, "Zack

would not succeed in having this court wholesale defer to the views of the psychiatric community on the matter of whether *Atkins* should be expanded to include other types of diagnoses. While he asserts that the psychiatric community now views FAS as functionally identical to intellectual disability, courts determine Eighth Amendment law, not unelected and unrepresentative experts.”

Earlier denying a stay of execution for Zack, Escambia County Circuit Judge Linda Nobles wrote that the “alleged consensus [about FAS meeting the criteria for intellectual disability] does not constitute newly discovered evidence and, even if it were, it has not been timely raised.”

“Defendant’s claim is without merit,” Nobles continued. “Intellectual disability is clearly defined under Florida law, and defendant does not now claim he qualifies as intellectually disabled as so defined.” She said that Zack was attempting to “expand the protection” of the ruling in *Atkins* that bars execution of people with intellectual disabilities.

The Death Penalty Information Center (DPIC) notes, “Unlike almost all other states, Florida rigidly required an IQ of 70 or below to demonstrate intellectual disability, with no allowance for the test’s margin of error.” Zack at one point scored 79 on an IQ (intelligence quotient) test. IQ tests have been demonstrated to be inaccurate in measuring intelligence.

Nobles also wrote that Zack’s argument was “procedurally barred,” in part because courts in the past have rejected Zack’s intellectual disability claims. In other words, she said that he was barred from appealing on these grounds because a lower court had already denied his claims of intellectual disability.

Fetal alcohol spectrum disorders (FASDs) are a group of conditions that occur when a fetus is exposed to alcohol before birth. Alcohol in the mother’s blood passes to the baby through the umbilical cord. Fetal alcohol syndrome, the most severe of these conditions, is the number one cause of intellectual disability in the United States.

The American Academy of Pediatrics suspects that 800 to 8,000 babies in the US are born with FAS every year, while other estimates place the number as high as 12,000. According to the Institutes of Health, three times as many children are born each year with FASDs, including FAS, affecting more newborns than Down syndrome, cystic fibrosis, spina bifida and sudden infant death syndrome combined.

FAS is a condition that can be prevented entirely through the mother’s abstention from alcohol during pregnancy. That the syndrome is so widespread in the United States is testament to the raft of social pressures plaguing women and their families. At the top of this list is a lack of prenatal care

and public health education, fueled by poverty and burgeoning social inequality. Substance abuse, including abuse of alcohol, has contributed to an explosion of overdose deaths and suicides in recent years.

The string of courts, with the US Supreme Court as final authority, that denied Michael Zack’s appeals for a stay of execution have sent a signal that individuals with intellectual disability as defined by medical science can be sent to their deaths despite the Supreme Court’s own ruling that such executions are unconstitutional.

Zack was also sentenced to death by a nonunanimous jury vote, a statute that has since been found unconstitutional, but which has not been applied retroactively to death row inmates sentenced in this manner. Florida has now changed the law yet again, reducing the number of jurors required to impose a death sentence from 12 to 8, the lowest jury threshold of any state.

This year Florida lawmakers also passed a bill making it possible for individuals 18 years of age or older who commit sexual battery on victims 12 years of age or under to be sentenced to death. The legislation reinstating nonunanimous jury sentencing in capital cases and allowing death sentences in cases of child rape, both signed into law by DeSantis, are expected to face constitutional challenges.

Florida has executed 105 people since the US Supreme Court reinstated the death penalty in 1976, according to DPIC. The US states that practice capital punishment have sent 1,577 people to their deaths, including 23 people convicted and executed for crimes committed as juveniles, a practice that has now been ruled unconstitutional by the Supreme Court.



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