

URGENT ACTION

FLORIDA SETS ITS SIXTH EXECUTION OF THE YEAR

The State of Florida is due to execute Michael Zack on 3 October 2023 for a murder committed in 1996. Twenty-seven years old at the time of the crime, he is now 54. At trial, four medical experts for the defence testified that in their opinion he had Post-Traumatic Stress Disorder (PTSD), Fetal Alcohol Syndrome (FAS), and severe depression. Michael Zack's FAS diagnosis and his history of "severe cognitive and adaptive impairments" has led an expert to conclude that he "always has functioned as an individual with intellectual disability". The US Constitution bans the execution of people with intellectual disability.

TAKE ACTION: WRITE AN APPEAL IN YOUR OWN WORDS OR USE THIS MODEL LETTER

Office of Governor Ron DeSantis
State of Florida
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399-0001
USA

Email: <https://www.flgov.com/email-the-governor/>

Dear Governor DeSantis

Michael Zack is due to be executed on 3 October. I am appealing for your intervention.

International law bans the execution of people with psychosocial or intellectual disabilities. Four medical experts testified that Michael Zack had Post-Traumatic Stress Disorder, Fetal Alcohol Syndrome, chronic depression, and possible brain damage. His PTSD and depression had its origins in the appalling abuse by his stepfather, and his mother's murder when he was 11.

I urge you also to consider what his lawyers point to as "a new definitive medical consensus that Fetal Alcohol Syndrome... is a uniquely [intellectual disability] ID-equivalent disorder". A FAS expert has concluded: "In light of Mr Zack's FAS diagnosis and... severe cognitive and adaptive impairments at all stages of his life, I have no doubt that he always has functioned as an intellectually disabled individual".

Please grant Michael Zack a stay of execution and ensure his death sentence is commuted.

Yours sincerely,

ADDITIONAL INFORMATION

Michael Zack was charged with sexual assault, robbery, and the first-degree murder of a woman in her house in Pensacola, Florida on 13 June 1996. His trial began in September 1997. "Death qualifying" jurors in US capital cases occurs at jury selection when the defence and prosecution can exclude prospective jurors for a stated reason (for cause) or without giving a reason (a peremptory challenge). In 2015, explaining why he considered the death penalty was likely now unconstitutional, a US Supreme Court (USSC) Justice noted that "no one can serve on a capital jury who is not willing to impose the death penalty," and that research over decades had showed that this "skews juries toward guilt and death". In the Zack case, two Black women were peremptorily dismissed by the prosecutor. Challenged by the defence, the prosecutor gave supposedly "race-neutral" reasons for dismissing them. Both women were employed at an institution in Pensacola which, noted the prosecutor, "administers psychological support, therapy, counselling, over a wide array... of psychological needs within the community". One of the women, the prosecutor said, had "some knowledge concerning post-traumatic stress syndrome". Because there was "going to be a great deal of psychological evidence coming in during the penalty phase and perhaps on guilt-innocence, I'm not comfortable with [these women as jurors]". The judge allowed the dismissals.

At the guilt/innocence phase, the defence introduced expert evidence that Michael Zack's mental disabilities left him impulsive, constantly operating under emotional distress, and unable to form the intent necessary for a first-degree murder conviction. The jury nevertheless convicted him on all counts. During the sentencing phase of the trial, four experts testified that he had PTSD, chronic depression, FAS, and possible brain damage, and that he had the mental and emotional age of a 10 or 11-year-old child. An expert for the prosecution agreed with a defence expert that Michael Zack exhibited a profile similar to a person with intellectual disability.

The jury was told that Michael Zack's mother had routinely consumed large amounts of alcohol while pregnant with him. His stepfather abused the boy. When he wet the bed, nightly from the age of eight to 12, the stepfather variously punched him, used an electric blanket to electrocute him, or heated a spoon and held it against the boy's tongue or penis. He also "threw him against the wall, and kicked him with boots that had spurs", tried to "drown him", to "run over him with a car", and to "poison him". When the boy was three, he was hospitalized after he drank 10 ounces (about 300ml) of vodka; he "overdosed on drugs [his stepfather] had given him"; and the stepfather "threatened to shoot and stab him". The stepfather also allegedly sexually abused him. When he was 11, his mother was killed with an axe. By then, the boy was in psychiatric hospital. Later in foster care, he was allegedly sexually abused again. The jury voted 11 to one for the death penalty, and on 14 November 1997, the judge accepted its recommendation.

In 2016, in *Hurst v. Florida*, the USSC ruled Florida's statute unconstitutional because it gave juries only an advisory role in death sentencing, incompatible with its 2002 *Ring v. Arizona* decision that the Constitution requires juries rather than judges to make the factual findings necessary to sentence a defendant to death. In October 2016, implementing the USSC's *Hurst* decision, the Florida Supreme Court (FSC) ruled that death sentences could only be passed by unanimous juries, and that "Florida has been a clear outlier" by failing to require this. In December 2016, however, the FSC ruled that *Hurst* applied retroactively only to about half of the more than 300 people then on death row – those individuals whose death sentences had not yet been 'finalized' (meaning affirmed on initial automatic direct appeal) by the time of the *Ring* ruling. One dissenting Justice argued that to avoid arbitrariness *Hurst* should be applied across the board. Another accused the majority of leaving "constitutional protection [to] depend on little more than a roll of the dice." Michael Zack's death sentence became final in October 2000, and in 2017 the FSC affirmed that he could not benefit from *Hurst*. Around 150 people have obtained relief under *Hurst*.

The UN Human Rights Committee, the expert body established under the International Covenant on Civil and Political Rights to monitor compliance with this treaty, has said of the absolute prohibition of the arbitrary deprivation of life that the notion of arbitrariness must be interpreted "to include elements of inappropriateness, injustice, lack of predictability and due process of law." The FSC's application of *Hurst* falls short of these elements.

All but one of Michael Zack's claims brought in federal court were ruled as procedurally defaulted because his then lawyer was unaware of and missed the one-year deadline for filing federal petitions. The claim that he has intellectual disability – the one claim that was deemed timely – was rejected on the merits. An appeal filed in state court in late August 2023 points to "a new scientific consensus that individuals with [FAS] meet the functional criteria for intellectual disability" and claims that, as such, Michael Zack's execution would be unconstitutional. The appeal also argues that his execution would be unconstitutional because one juror voted to spare his life.

Amnesty International opposes the death penalty unconditionally. There have been 1,575 executions in the USA since the USSC upheld new capital laws in 1976. There have been 17 executions in 2023; five of them in Florida, where there have been 104 executions since 1976. In April 2023, Governor Ron DeSantis signed legislation once again allowing death sentences to be passed by less than unanimous juries (as divided as 8-4). Governor DeSantis, a keen death penalty supporter, said that the new law would allow "proper justice to be served in the State of Florida".

PREFERRED LANGUAGE TO ADDRESS TARGET: English. You may also write in your own language.

PLEASE TAKE ACTION AS SOON AS POSSIBLE UNTIL: 3 October 2023

NAME AND PRONOUN: Michael Duane Zack (he/him)

ADDITIONAL TARGET

Ms Jane D Hartley

U.S. Embassy

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