No. _____

IN THE

Supreme Court of the United States

DONALD DAVID DILLBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE
QUESTIONS PRESENTED

This Court established long ago that the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Given the realities of the modern death penalty, however, many prisoners remain on death row for decades before their execution. This has led to a complicated question for lower courts dealing with post-conviction claims based on ever-evolving medical and mental health science: whether to consider legitimate post-trial evidence speaking directly to a prisoner's appropriateness for a death sentence. The result is that jurisdictions are imposing markedly different diligence standards on death-sentenced individuals and defense counsel advancing claims relying on new medical diagnoses.

The questions presented are:

1) What constitutes diligence in raising newly discovered medical and/or mental health evidence and diagnoses?
2) Are capital defendants confined to the medical and mental health science available at the time of their trial, or must the lower courts provide a meaningful opportunity for advancements in scientific evidence to be heard?

PARTIES TO THE PROCEEDINGS

Petitioner, Donald David Dillbeck, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:

Circuit Court of Leon County, Florida
State of Florida v. Donald David Dillbeck, Case No. 1990 CF 2795
Judgment Entered: March 15, 1991

Direct Appeal:

Florida Supreme Court (No. SC77752)
Donald David Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994)
Judgment Entered: April 21, 1994
Rehearings Denied: August 18, 1994; October 17, 1994

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 94-7723)
Donald David Dillbeck v. Florida, 514 U.S. 1022 (1995)
Judgment Entered: March 20, 1995

Post-conviction Proceedings:

Circuit Court of Leon County, Florida
Dillbeck v. State, 1990 CF 2795
Judgment Entered: September 3, 2002 (denying motion for post-conviction relief)

Florida Supreme Court (Nos. SC02-2044; SC03-1123)
Dillbeck v. State, 882 So. 2d 969 (Aug. 2004)
Judgment Entered: Aug. 26, 2004 (remanding for further proceedings)

Circuit Court of Leon County, Florida
State v. Dillbeck, 1990 CF 2795
Judgment Entered: July 21, 2005 (denying post-conviction relief on remand)

Florida Supreme Court (No. SC05-1561)
Dillbeck v. State, 964 So. 2d 95 (2007)
Judgment Entered: May 10, 2007 (affirming)
Rehearing Denied: August 27, 2007

Federal Habeas Proceedings
District Court for the Northern District of Florida (No. 4:07-cv-388-SPM)
Dillbeck v. McNeil, 2008 WL 11516887
Judgment Entered: March 27, 2008

District Court for the Northern District of Florida (No. 4:07-cv-388-SPM)
Dillbeck v. McNeil, 2010 WL 419401
Judgment entered: January 29, 2010
Reconsideration denied: Feb. 19, 2010
Certificate of Appealability denied: October 7, 2010

Eleventh Circuit Court of Appeals
Dillbeck v. McNeil, No. 10-11042
Judgment entered: January 18, 2011 (denying certificate of appealability)

First Successive Post-conviction Proceedings:

Circuit Court of Leon County, Florida
Dillbeck v. State, 2010-CF-688
Judgment Entered: June 5, 2014 (denying post-conviction relief)

Florida Supreme Court (No. SC14-1306)
Dillbeck v. State, 168 So. 3d 224 (Fla. 2015)
Judgment Entered: April 16, 2015 (affirming)

Second Successive Post-conviction Proceedings:

Circuit Court of Leon County, Florida
Dillbeck v. State, 2010-CF-688
Judgment Entered: April 11, 2017 (denying post-conviction relief)

Florida Supreme Court (No. SC17-847)
Dillbeck v. State, 234 So. 3d 558 (Fla. 2018)
Judgment Entered: January 24, 2018 (affirming)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 17-9375)
Donald David Dillbeck v. Florida, 139 S. Ct. 162 (2016)
Judgment Entered: October 1, 2018

Third Successive Post-conviction Proceedings:
Circuit Court of Leon County, Florida
Dillbeck v. State, 2010-CF-688
Judgment Entered: January 30, 2020 (denying post-conviction relief)

Florida Supreme Court (No. SC20-178)
Dillbeck v. State, 304 So. 3d 286 (Fla. 2020)
Judgment Entered: September 3, 2020 (affirming)
Rehearing Denied: October 30, 2020

Juvenile Proceedings:
Trial:
Circuit Court of Lee County, Florida
State v. Dillbeck, 79-CF-335
Judgment Entered: June 6, 1979

Post-conviction:
Circuit Court of Lee County, Florida
Dillbeck v. State, 2D19-765
Judgment Enterered: May 27, 2020

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DECISION BELOW

The decision of the Florida Supreme Court is available at *Dillbeck v. State*, 304 So. 3d 286 (Fla. 2020), reh'g denied, No. SC20-178, 2020 WL 6375463 (Fla. Oct. 30, 2020), and is reprinted in the appendix at App. 1.

JURISDICTION

The final judgment of the Florida Supreme Court was entered on October 30, 2020. App. 1.[1] This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

In 1979, fifteen-year-old Donald Dillbeck was arrested and charged with first-degree murder. Two months later, in order to avoid the death penalty, Mr. Dillbeck pleaded guilty in exchange for a life sentence. *State v. Dillbeck*, No. 79-335-CF (Fla. Circ. Court, Twentieth Jud. Circuit, June 9, 1979). In 1990, Mr. Dillbeck "walked

[1] By order of the Supreme Court dated March 19, 2020, the deadline to file any petition for a writ of certiorari due on or after the date of that order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Petitioner's timely petition for rehearing was denied by order of the Florida Supreme Court on October 30, 2020. As such, Petitioner's petition for a writ of certiorari is due March 29, 2021.

away from a public function he and other inmates were catering in Quincy, Florida," purchased a paring knife, and killed the driver of a vehicle that he tried to hijack at a Tallahassee parking lot. *Dillbeck v. State,* 643 So. 2d 1027, 1028 (Fla. 1994). The jury found Mr. Dillbeck guilty of first-degree murder, robbery, and burglary,

During the penalty phase, Mr. Dillbeck presented evidence of fetal alcohol effects (FAE) R. 32.[2] Dr. Berland, a defense expert, did not diagnose Mr. Dillbeck with a mental condition (R. 86). Dr. Wood, a second defense expert, testified that Mr. Dillbeck had something wrong with his brain, and had a disorder that resembled, but was not as severe as, schizophrenia. These diagnoses did not explain Mr. Dillbeck's developmental disabilities or his criminal behavior. R. 86. Following this testimony, a divided jury recommended a death sentence by an 8-4 vote.

Among the "numerous" mitigators, the trial court acknowledged that Mr. Dillbeck had a "condition known as fetal alcohol effect." Partially due to the medical lack of understanding at the time regarding prenatal exposure to alcohol and its effects on cognitive development and behavior, the trial court gave this condition no mitigating weight, reasoning that:

> [T]he impression given to the court by those who testified about it was that the conclusions reached by them were tenuous and made in the early stages of their research so that while the physical effects of fetal alcohol syndrome are well documented, the extent of the mental effects of the fetal alcohol effect can vary widely and sufficient testing has not been developed to document the degree of disability. The stated conclusion was that there was a lack of impulse control, but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree.

[2] Citations to "R. [page number]" refer to the record on appeal from the successive postconviction proceedings below.

R. 385.

The trial court found the evidence insufficient to establish the statutory mental health mitigator based on extreme mental disturbance, and also declined to give it weight as a non-statutory mitigating factor. *See* R. 385 ("All mental health professionals who testified agreed that there was a mental disorder of some type although they differed as to what it was and the degree to which it controlled the Defendant's actions. The Court is reasonably convinced that the Defendant suffers from some mental disorder as all must who commit acts of this violent nature, but the Court finds that it is not of such significance as to weigh heavily as a non-statutory mitigating circumstance.").

The trial court also found that Mr. Dillbeck's good prison record negated the diminished capacity mitigator because it showed that the fetal alcohol effects had no impact on his capacity to control his behavior. *See* R. 388. Thus, the fetal alcohol effects evidence resulted in no mitigating weight, either as a statutory mental health mitigator or as a non-statutory mitigator. Ultimately, the trial court followed the jury's recommendation, having "found five aggravating and numerous mitigating circumstances," and sentenced Mr. Dillbeck to death. *Dillbeck,* 643 So. 2d at 1028.[3]

The Florida Supreme Court affirmed, *Dillbeck*, 643 So. 2d 1027, and this Court denied certiorari, *Dillbeck v. Florida*, 115 S. Ct. 1371 (1995). Mr. Dillbeck's state

[3] Although Mr. Dillbeck was denied the constitutional right to jury sentencing under *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Florida Supreme Court refused to remedy the violation on nonretroactivity grounds. *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018).

collateral attacks were unsuccessful, *see Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007), and federal habeas relief was likewise denied. *Dillbeck v. Secretary, Fla. Dep't of Corrs.*, No. 4:07-CV-388-SPM, 2010 WL 3958639 (N.D. Fla. Oct. 7, 2010), certificate of appealability denied, No. 10-11042 (11th Cir. Jan. 18, 2011), *cert. denied*, 565 U.S. 862 (Oct. 3. 2011).

On April 27, 2018, following the Florida Supreme Court's decision in *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016) (holding that Florida juveniles with mandatory life sentences are entitled to new sentencing hearings), Mr. Dillbeck moved to vacate his illegal juvenile life sentence, which was used to aggravate his capital case. To prepare for the juvenile litigation, Mr. Dillbeck was evaluated by Dr. Faye Sultan in May 2018, who noted the possibility of Fetal Alcohol Spectrum Disorder (FASD). Later, upon further multidisciplinary evaluation by three additional experts, Mr. Dillbeck was diagnosed with Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure (ND-PAE). On May 1, 2019, these experts issued their final written reports, which were then provided to the undersigned Registry-appointed counsel.[4] Dr. Brown found that Mr. Dillbeck met the diagnostic criteria for Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE).

[4] ND-PAE was first recognized as a mental health diagnosis in the DSM-5 in 2013 R. 33. Prior to the publication of the DSM-5, there was no specific mental health diagnosis for the central nervous system dysfunction associated with fetal alcohol spectrum disorders (R. 84). In order for a person to be diagnosed with ND-PAE, seven factors must be present: (1) prenatal exposure to alcohol, (2) at least one neurocognitive impairment, (3) at least self-regulation impairment, (4) at least two adaptive impairments, (5) childhood onset, (6) clinically significant distress or impairment in social, occupational, or other important areas of functioning, and (7) the disorder is not better explained by other causes (R. 84-85).

On May 9, 2019, one week after obtaining the final reports diagnosing him with ND-PAE in his juvenile case, Mr. Dillbeck filed a successive motion for postconviction relief in this case asserting a single claim of newly discovered evidence based on his new diagnosis and the results of brain scans and neurological testing that were not available at the time of trial. R.4. The State argued that the motion was untimely because ND-PAE has been a recognized condition since 2013. R. 344. The prosecutor conceded, however, that even though she has been a capital litigator for twenty years, she does not read the DSM-5, and it would be an "extraordinary [sic] high standard" to require defense counsel to be aware of every possible diagnosis as soon as it was published in a scientific source. R. 353.

The trial court dismissed Mr. Dillbeck's motion as untimely, R. 374, and the Florida Supreme Court affirmed, *Dillbeck v. State*, 304 So. 3d 286 (Fla. 2020). Although Mr. Dillbeck filed in the trial court immediately after his diagnosis, the Florida Supreme Court reasoned that since ND-PAE was recognized as a disorder by the American Psychological Association in 2013, "Dillbeck and his counsel failed to exercise diligence by waiting until 2018 to pursue evaluation, testing, and a diagnosis of ND-PAE." *Id*. at 288. The Florida Supreme Court did not assess whether Mr. Dillbeck's actual reasons for obtaining his diagnosis when he did were inconsistent with due diligence. Mr. Dillbeck sought rehearing based on these and other concerns about fundamental unfairness, and argued that the state court's diligence interpretation was in conflict with this Court's holding in *Johnson v. United States*,

544 U.S. 295 (2005). The Florida Supreme Court summarily denied rehearing. *Dillbeck v. State,* No. SC20-178, (Fla. Oct. 30, 2020).

REASONS FOR GRANTING THE PETITION

I. Where States Afford Postconviction Review, That Review Must Comport with Fifth and Fourteenth Amendment Due Process Guarantees

States generally have the discretion to develop their own procedures for postconviction relief. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Medina v. California*, 505 U.S. 437, 445-46 (1992). This does not mean that states have no constitutional mandates in crafting their postconviction systems, however. A "'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Id.* (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)). In the creation of appellate rights for criminal defendants, this Court has provided that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (state criminal procedures must comport with the Fourteenth Amendment Due Process Clause). This is because state-mandated review of criminal convictions creates a liberty interest that cannot be deprived without due process. *See Osborne*, 557 U.S.

at 68. Relatedly, this Court leaves it to the states to enact those procedures, but States have a "duty" to provide "an adequate opportunity to present . . . claims fairly in the context of the State's appellate process," *Ross v. Moffitt*, 417 U.S. 600, 616 (1974), and "'meaningful access' to the courts is the touchstone." *Bounds v. Smith*, 430 U.S. 817, 823 (1977) (citing *Ross*, 417 U.S. at 611).

When a state's procedure for evaluating this state-created liberty interest in post-conviction review faces constitutional scrutiny, "the question is whether consideration of [the] claim within the framework of the State's procedures for post-conviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Osborne*, 557 U.S. at 69 (citing *Medina v. California*, 505 U.S. 437, 445 (1992)). "Federal courts may upset a State's post-conviction relief procedures . . . if they are fundamentally inadequate to vindicate the substantive rights provided." *Id.*; *see also Hale v. Fox*, 829 F.3d 1162, 1175 (10th Cir. 2016) ("To make out a procedural due process violation in this context, a prisoner must show (1) a substantive 'parent right' that derives from a source such as [a] statutory post-conviction scheme, and (2) lack of procedures adequate to assert and protect that right.").

In *Osborne*, for example, the defendant-respondent challenged Alaska's procedure for reviewing newly discovered DNA evidence. *Id.* at 60. This Court found no due process violation where Alaska provided an avenue of relief, exempted petitioners from the time limitations imposed in other contexts, and allowed for

adequate discovery. *Id.* at 69-70. For these reasons, Alaska's "procedures [were] not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Id.* at 70. Moreover, Osborne had filed suit against the state in a 42 U.S.C. § 1983 action without first attempting to use the state-provided process. *Id.* at 70-71. Accordingly, this Court found that Alaska's "procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice." *Id.* at 71.

Here, the Florida Supreme Court imposed an impossibly high diligence standard on defendants presenting newly discovered mental health evidence. This standard has, in effect, foreclosed such claims from ever being considered on the merits, despite the state-created statutory right to present such claims. *See generally* Fla. R. Cr. P. 3.851(d)(2)(A).

Despite this avenue to present newly discovered evidence, the Florida Supreme Court has effectively barred petitioners, like Mr. Dillbeck, from presenting their claims based on newly discovered mental health evidence through the statutorily-provided process based on an impossibly strict standard of diligence by capital defendants. To be clear, Mr. Dillbeck does not take issue with the statute itself, but with how the Florida Supreme Court has applied it to curtail certain types of claims. The Florida Supreme Court's definition of diligence appears to apply only in cases raising newly discovered evidence of a mental health condition that may undermine the imposition of a death sentence. This outcome belies this Court's notions of fundamental fairness.

II. Florida's Diligence Standard Prevents Death-Sentenced Prisoners from Seeking the Post-Conviction Review Afforded by Florida Statute in Violation of Their Due Process Rights

By statute, Florida provides an avenue for capital defendants to seek post-conviction relief. *See* Fla. R. Crim. P. 3.851. Generally, post-conviction claims must be filed within one year of the conviction becoming final. Fla. R. Crim. P. 3.851(d)(1). However, the statute also grants a right to present successive post-conviction claims where "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). In this case, the Florida Supreme Court denied Mr. Dillbeck's claim because it found him not diligent for failing to raise his new diagnosis of ND-PAE a few years earlier, when the DSM-V first recognized this disorder, despite the fact that Mr. Dillbeck's case was not in a posture that made retaining an expert appropriate or expected. The court did not use the reasoned approach this Court has used in making similar diligence determinations.

As Mr. Dillbeck argued below, this Court's decision in *Johnson v. United States*, 544 U.S. 295 (2005), illustrates this Court's approach to diligence in raising newly discovered evidence claims. In *Johnson*, the petitioner sought to file a §2255 motion after one of the state convictions supporting his federal sentence enhancement had been vacated. 544 U.S. at 301. This Court assessed whether the petitioner had

acted with diligence in getting his state conviction vacated so that he satisfied the standard for the discovery of new facts in under § 2255. *Id.*[5]

This Court's main concern was that if the one-year clock started at the time of the state court's vacatur order, a petitioner could delay seeking relief in state court for some tactical advantage. *See id.* at 307 ("A more serious problem is Johnson's position that his § 2255 is timely . . . as long as he brings it within a year of learning he succeeded in attacking the prior conviction, no matter how long he may have slumbered before starting the successful proceeding"). Thus, this Court decided that the state court's order becoming final could serve as a trigger, so long as the petitioner was diligent in seeking that state court order. *Id.* at 308. Diligence existed after "prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence." *Id.* This Court explained that where the petitioner "'discovers' a fact that one has helped to generate . . . whether it be the result of a court proceeding or of some other process begun at the petitioner's behalf, it does not strain logic to treat required diligence in the 'discovery' of that fact as entailing

[5] In terms of statutory text, Florida's diligence standard is identical to the federal correlate at issue in *Johnson*. *Compare* Fla. R. Crim. P. 3.851(d)(2)(A) ("the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence"), *with* 28 U.S.C. §2255(f)(4) ("the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"). *See generally State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988) (explaining that Florida's post-conviction statute "was taken nearly word-for-word from the federal habeas corpus statute, 28 U.S.C. § 2255 (1961). . . and we plainly have given the rule the same broad scope as its federal counterpart.").

diligence in the steps necessary for the existence of that fact." *Id.* at 310. By way of example, the *Johnson* Court explained that if a defendant raised a claim supported by new DNA evidence, "the due diligence requirement would say that the test result only triggers a new 1-year period if the petitioner began the testing process with reasonable promptness once the DNA sample and testing technology were available." *Id.* at 310.

Notably, *Johnson* rejected the government's request to start the timeline before the federal conviction, even if the reason for vacating the underlying state conviction may be known, because "it is highly doubtful that in § 2255 challenges to enhanced sentences Congress would have meant to start the period running under paragraph four on the discoverability date of facts that may have no significance under federal law for years to come and that cannot by themselves be the basis of a § 2255 claim." *Id.* at 305. Thus, *Johnson* accepts the discovery of a new fact as the triggering event, so long as the pursuit of that discovery was diligent. The diligence assessment is a case-by-case analysis, rather than a bright line rule drawn at any specific event that occurs in most cases.

Although the diligence standard in *Johnson* is significantly more lenient than the Florida test at issue here, the *Johnson* dissent lamented the extraordinary burden this Court placed on defense counsel. *See, e.g.*, *Johnson*, 544 U.S. at 318 (Kennedy, J., dissenting). ("It is most troubling for a Court that insists on high standards of performance for defense counsel now to instruct that collateral proceedings must be commenced in one or more States during the critical time immediately after judgment

and before appeal."). Instead, Justice Kennedy opined: "If the Court is to insist upon its own second tier of diligence, the dynamics of the criminal system and ordinary rules for determining when collateral proceedings become necessary should instruct us that, for federal purposes, this tier begins when the federal conviction becomes final." *Id.* Accordingly, the dissent would have defined the triggering event as, at the earliest, the date the order vacating a prior state conviction was entered. *Id.* at 319.

The Florida Supreme Court's ruling in this case went far beyond any diligence standard set by this Court. Mr. Dillbeck exhausted his first round of appeals in 2011. *Dillbeck v. Tucker,* 565 U.S. 862 (2011) (denying certiorari). After that, he had no basis to request funds for an expert in his capital case.[6] In *Atwell v. State*, however, when the Florida Supreme Court announced that defendants sentenced to life as juveniles had an opportunity for resentencing, *see* 197 So. 3d 1040 (Fla. 2016), Mr. Dillbeck logically retained an expert to assist with his mitigation in the non-capital juvenile case that was used to aggravate his capital conviction. When those experts diagnosed him with ND-PAE, Mr. Dillbeck timely filed his newly discovered evidence claim in the capital case. The reasonableness of Mr. Dillbeck's timing in reaction to developments in his non-capital case was never considered by the lower courts. Instead, the Florida Supreme Court focused only on whether an expert could have examined Mr. Dillbeck earlier, without considering whether it would have been

[6] In the Eleventh Circuit, successive federal habeas petitions are limited to those raising claims of actual innocence in the guilt phase, not the penalty phase. *See, e.g.*, *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015) (finding AEDPA eliminated the innocence-of-the-death-penalty exception for successive petitions).

reasonable for counsel to seek state-court funding to conduct a fishing expedition during a time of inaction on the case.

The ruling below is part of a trend by the Florida Supreme Court to deny the opportunity to present newly discovered mental health diagnoses for similar reasons. The Florida Supreme Court routinely cites to the earliest study available to support petitioners' new diagnoses. This practice ignores the distinction between sporadic studies making initial observations and the point where the research consolidates into a consensus by the mental health and medical professional community, resulting in a nearly absolute bar to raising these types of claims. *See, e.g.*, *Long v. State*, 271 So. 3d 938 (Fla. 2019) (finding petitioner was not diligent in raising newly discovered evidence based on improved neuroimaging technology that now demonstrated the full scope of the effects from a head injury); *Rodgers v. State*, 288 So. 3d 1038 (Fla. 2019) (finding petitioner was not diligent in bringing a claim based on her gender dysphoria diagnosis); *Branch v. State*, 236 So. 3d 981 (Fla. 2018) (finding petitioner was not diligent in raising newly discovered evidence of effects of extended adolescent brain development).

The result of this pattern is to deny Florida death row prisoners with mental illnesses fundamental fairness by leaving them with a system "inadequate to vindicate the substantive rights provided." *See Osborne*, 557 U.S. at 69. This unduly strict diligence standard leads to an inevitable denial of relief for Florida petitioners who promptly present newly-diagnosed mental health conditions that may make their death sentences less appropriate. The Florida Supreme Court's failure to allow

the consideration of such diagnoses deprives defendants the opportunity to show that they are not among "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *See Roper v. Simmons*, 543 U.S. 551, 568 (2005). While these post-conviction petitioners may have had the opportunity to present mitigating evidence during their original penalty phase proceedings, those presentations occurred years, often decades, earlier and pre-dated the mental health developments that more accurately explain their poor judgment and behavior. Holding a death row prisoner's culpability assessment to outdated medical standards contravenes this Court's precedent. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (holding that in assessing claims based on intellectual disability, reviewing courts must consider the expertise of the medical community). It also disregards the evolving standards of decency, which increasingly trend against imposing death sentences on those with severe mental illnesses. Recently, Ohio passed a bill allowing defendants to show their ineligibility for a death sentence based on severe mental illness.[7] It also allows those already on death row a year to file a claim that they should be ineligible under

[7] Annika Russell, *Ohio Passes Law Barring the Death Penalty for Defendants with Serious Mental Illness*, American Bar Association Death Penalty Representation Project Blog, *available at* americanbar.org/groups/committees/death_penalty_representation/project_blog/ohio-bars-death-penalty-for-mental-illness (Feb. 25, 2021).

this new law. *Id.* Kentucky legislators have now filed a similar bill, and legislators in Florida recently reviewed a proposal for the same.[8]

III. Florida's Heightened Diligence Standard is Inconsistent with Other Jurisdictions and With Itself in Other Contexts

The unfairness of the Florida rule is apparent in light of how other courts treat similar types of evidence. Although no other jurisdictions appear to impose this kind of herculean diligence standard, there is a general inconsistency among the states in how to review similar claims brought under state-created statutory rights. This evidences confusion among the lower courts as to what process is due. As the *Johnson* dissent warned, "the majority's approach creates new uncertainty, giving rise to future litigation. It leaves unsaid what standard will be used for measuring whether a petitioner acted promptly, forcing litigants and lawyers to scramble to . . . court in the hopes they satisfy the Court's . . . diligence requirement." 544 U.S. at 318-19 (Kennedy, J., dissenting).

Justice Kennedy's prediction has proven correct. In 2010, the Superior Court of Pennsylvania recognized "that the existence of a mental illness for the purposes of post-conviction relief is a question with which other jurisdictions have struggled." *Commonwealth v. Monaco*, 996 A.2d 1076, 1083 (2010). This Court should step in here not only to declare Florida's standard unreasonably high and in violation of the

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[8] Bruce Schreiner, *Kentucky bill would ban execution for severely mentally ill*, ABC News, *available at* abcnews.go.com/Health/wireStory/kentucky-bill-ban-execution-severely-mentally-ill-76256174 (March 4, 2021); Mitch Perry, *Assistant Public Defender Wants Florida to Ban Executions of Mentally Ill People*, Spectrum News 9, *available at* baynews9.com/fl//tampa/news/2021/01/26/assistant-public-defender-wants-florida-to-ban-executions-of-mentally-ill-people (Jan. 26, 2021).

Constitution, but also to give clear guidance to the nation's courts who are struggling to answer this question. The Florida Supreme Court also struggles with this question internally, as it affords far more lenience to litigants in other contexts—including post-conviction petitioners raising newly discovered science in the *guilt* phase—than it does to death-sentenced prisoners seeking penalty phase relief

A. The Florida Supreme Court's Diligence Standard is Unparalleled in Other Jurisdictions

While lower courts' treatment of these issues vary, no other jurisdiction imposes a diligence standard as strict as Florida's. In Florida, prisoners (and their counsel) with no active appeals must stay abreast of every medical development, ranging anywhere from a newly-recognized disorder to a minor study merely implicating a change in the current consensus, and then promptly seek leave for funding for an expert, identify an expert, and complete all consultations, evaluations, and testing before drafting a newly-discovered evidence claim, all within one year of that new development being published somewhere in the medical community. This Court should grant review to decide whether such a restrictive and Kafkaesque interpretation of "diligence" is in operation "inadequate to vindicate the substantive rights" granted to prisoners through Florida's post-conviction scheme. *Osborne*, 557 U.S. at 68-69.

For example, the Arizona Supreme Court has interpreted Arizona's analogous newly discovered evidence provision, Ariz. R. Crim. P. 32.1(e), to be timely satisfied when a petitioner brings "his condition to the court's attention shortly after its diagnosis." *See State v. Bilke*, 781 P.2d 28, 30 (Ariz. 1989). In *Bilke*, the petitioner—

who was convicted in 1974—brought a newly discovered evidence claim based on a post-traumatic stress disorder (PTSD) diagnosis in 1987. *Id*. at 28. The Arizona court found that the petitioner "easily met[] the first requirement that the evidence be newly-discovered" and that he was "diligent in pursuing his remedy," *id*. at 30, even though PTSD was acknowledged to have been available, and to have been used for forensic diagnosis in Arizona since at least 1983. *See id.* (citing *State v. Jensen*, 735 P.2d 781, 784 (1987) (discussing another defendant's PTSD diagnosis from 1983)).

By contrast, the same court distinguished a defendant raising a claim based on juvenile psychology and neurology because, unlike the PTSD diagnosis in *Bilke*, this research "merely supplement[ed] then-existing knowledge of juvenile behavior that was considered at the time of sentencing" and "simply confirmed what was already known." *State v. Amaral*, 368 P.3d 925, 929 (Ariz. 2016) (quoting *Roper v. Simmons* 543 U.S. 551, 569 (2005)). The court elaborated on the difference in these holdings, explaining:

> Unlike Amaral, Bilke suffered from a condition that existed at the time of the trial but was not yet recognized by mental health professionals and, consequently, could not have been diagnosed until years after the trial. Thus, at the time of sentencing, it would have been impossible for the trial judge in *Bilke* to have assessed the petitioner's actions in light of his disorder.

Id. at 221.

Similarly, the Pennsylvania Supreme Court has applied its newly discovered evidence provision for late post-conviction applications, 42 Pa. C.S.A. §9545(b)(1)(ii), by calculating diligence in pursuit of a claim from the defendant's actual discovery that he has (or probably has) a particular condition, without regard for when such a

condition was initially recognized by the scientific community. S*ee Commonwealth v. Monaco*, 996 A.2d 1076 (Pa. Super. Ct. 2010). In *Monaco*, the defendant was convicted and sentenced for murder in 1982, *id.* at 1077, and moved in 2007 for relief based on a 2006 PTSD diagnosis. *Id.* at 1078-79. The court deemed the motion untimely because the defendant also had a 2005 PTSD diagnosis and an attorney had advised him about his likely PTSD and filed for VA benefits based on that condition in 2003, but the petitioner failed to bring the claims earlier. *Id.* 1081-82. However, the court did not require the defendant to have engaged in a PTSD evaluation at any earlier time after his 1982 conviction.

On the other hand, the Sixth Circuit has embraced a restrictive pleading requirement for the diligence prong governing belated habeas petitions, 28 U.S.C. § 2244(d)(1)(D), but one that still provides more process than Florida. In *McSwain v. Davis,* 287 F. App'x 450 (6th Cir. 2008), the court held that a petitioner raising her newly discovered diagnosis could not satisfy her burden of showing that the petition was timely from when the factual predicate "could have been discovered through the exercise of reasonable diligence." *Id.* at 455. Immediately after noting 1987 as the date of recognition of the condition by the American Psychiatric Association (APA), the court stated: "Because McSwain has failed to establish 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence,' 28 U.S.C. § 2244(d)(1)(D), she did not meet her burden of establishing that her mental illness was newly-discovered evidence." *Id.* at 454-55. Instead, the court's reasoning turned on one fact: although she pled to have only

discovered her mental illness in 1998, she never pleaded any explanation for why she "did not discover her mental illness earlier, or what prompted her, in 1997, to obtain the mental health evaluations", *id.*, and therefore she "failed to establish the date on which [her diagnosis] could have been discovered[.]" *Id.* at 455. This indicates the court considered some date other than 1987—when the condition was recognized by the APA—for McSwain to realize that *she* had the condition and still be diligent in raising the claim. Indeed, the court itself assumed that "the earliest date on which McSwain could have reasonably discovered the mental illness that forms the factual predicate of her habeas claim was February 5, 1998, when [the expert's] report confirmed [another doctor's] August 15, 1997 diagnosis." *Id.* at 455. Thus, the court implicitly acknowledged that a diagnosis eleven years after the APA recognized PTSD could have been considered reasonably discovered and based that factual predicate on the defendant's own diagnosis.

Another common focus among other jurisdictions is the length of time the medical community has recognized a condition. Accordingly, defendants struggle to establish diligence when their diagnosis has been recognized for decades, not just a matter of a few years. *See, e.g.*, *State v. King*, 1 CA-CR 17-0543 PRPC, No. 2021 WL 404281, *6 (declining successive newly discovered evidence claim based on a post-trial diagnosis of postpartum psychosis because it "was recognized and diagnosed by medical science for hundreds if not thousands of years prior to King's trial, and the disorder had been raised as a defense by defendants accused of similar crimes for decades") (Ariz. Ct. App. Feb. 4, 2021); *Commonwealth v. Shuman*, 836 N.E.2d 1085,

1089-90, 1090 n.2 (Mass. 2005) (in denying a motion for new trial, Massachusetts Supreme Judicial Court found connection between antidepressants and psychosis was not newly discovered when the effects had been "widely reported" since more than a decade before the defendant's trial).

It is likely that under any of these standards, then, Mr. Dillbeck would have been able to establish diligence in a way that he cannot do in Florida courts. As in *Bilke*, his condition—unrecognized by the medical community until 2013—was *not* "then-existing knowledge" and was more than just a mere "supplement" to the trial evidence that his mother drank alcohol during her pregnancy. Indeed, it was a distinct test with seven prongs that must be established before a doctor can make the ND-PAE diagnosis, and those prongs in themselves demonstrate a more nuanced understanding of the effects of prenatal exposure to alcohol on a person's cognitive development, decision-making abilities, and behavior. The evidence at trial was insufficient to inform the jury and trial judge of the import of such a diagnosis. And, had Mr. Dillbeck raised his claim in the Sixth Circuit, that court would have conducted a more thorough analysis into the timing and reasonableness of Mr. Dillbeck's use of mental health experts. Finally, unlike in Florida, Massachusetts allows more time for a diagnosis to become established and make its way into the broader consciousness. All of these approaches differ from one another; yet, none of them impose the draconian burden so often endorsed by the Florida Supreme Court.

In a display of concern similar to Justice Kennedy's in *Johnson*, other courts have explicitly warned of the dangers in imposing such a high burden on defendants

and their counsel. In *Commonwealth v. Rosario*, for example, the Massachusetts Supreme Judicial Court recognized the unfairness of holding defense counsel to the high standard of bearing the knowledge of a medical professional. 74 N.E.2d 599 (Mass. 2017). In *Rosario*, the court considered the defendant's motion for new trial based on his post-trial contention that his alcohol-withdrawal-induced delirium tremens (DTs) was newly discovered evidence. *Id.* at 606. The court ultimately decided it was not because DTs were "widely recognized" at the time of his trial. *Id.* However, the court seemingly echoed Justice Kennedy's *Johnson* dissent in its discussion of why defense counsel was not ineffective for failing to identify the DTs diagnosis before trial:

> Although the DTs diagnosis was 'discoverable,' and therefore not 'newly discovered' evidence, we cannot say that defense counsel was ineffective for failing to discover it. He relied upon the expertise of others—three psychiatrists . . . in a field in which the attorney was not himself trained. *It would be a high hurdle indeed to expect counsel to continue to search for an alternative diagnosis where he reasonably could not be expected to know that one existed*.

Id. at 79.

Similarly, the Supreme Court of Virginia has also opined on the impropriety of holding defense counsel to the standard of a medical professional. *Orndorff v. Commonwealth*, 628 S.E.2d 344 (2006). In *Orndorff*, the defendant filed a motion for new trial when she was diagnosed with Dissociative Identity Disorder ("DID") after her guilt phase, which is when her symptoms began to manifest. *Id.* at 346. The lower court found that counsel "did not meet the reasonable diligence [standard] because her experts could have discovered earlier the several symptoms of DID that they later

identified." *Id.* at 353. However, the Virginia Supreme Court disagreed: "[the lower court] improperly shifted the focus of the reasonable diligence inquiry by effectively assigning to Orndorff's counsel the responsibility for reaching a different medical diagnosis." *Id.*

This rationale both contradicts the Florida Supreme Court's expectation that defense counsel stay abreast of any and all newly recognized medical conditions while also highlighting the reliance counsel often has on medical and mental health experts. Where Mr. Dillbeck's case was virtually in a legal limbo where no counsel could have been expected to fund an expert at that time, this standard is impossibly high.[9] As a result, the Florida Supreme Court's impossibly high diligence standard is denying Florida defendants due process to have meaningful consideration of their claims regarding newly discovered mental health diagnoses, a problem not seen in other jurisdictions. While every state may develop its own post-conviction procedures and deadlines, this Court should provide more uniform guidance that incorporates constitutional standards of fairness and due process into the diligence analysis.

B. The Florida Supreme Court does not impose this Heightened Diligence Standard in the Context of Other Types of Newly-Discovered Evidence

Even the Florida Supreme Court does not generally subscribe to such unreasonable strictness. In cases relying on other types of science, the focus is on a

[9] The State acknowledged as much during the motion hearing below. The prosecutor conceded that even though she has been a capital litigator for 20 years, she does not read the DSM-5 either, and it would be an "extraordinary [sic] high standard" to require counsel to be aware of every possible diagnosis as soon as it was published (R. 353).

petitioner's diligence once the science has been applied in their individual case, not what is generally happening in the broader scientific community.

In *Wyatt v. State*, the defendant raised a newly discovered evidence claim based on a letter from the FBI denouncing an FBI agent's trial testimony regarding comparative bullet lead analysis ("CBLA"). 71 So. 3d 86, 98 (2011). In 2004, after the defendant's trial, the National Research Council had issued a report questioning the reliability of CBLA. *Id.* The next year, the FBI announced it would no longer use CBLA. *Id.* Three years later, in 2008, the FBI sent the prosecutor a letter that the CBLA testimony in Wyatt's case specifically was not backed by science. *Id.* Wyatt then relied on this letter in raising his newly discovered evidence claim. *Id.* The State argued that his claim was procedurally barred because the unreliability of the science was available after the 2004 National Research Council Report. *Id.* at 98-99. The Florida Supreme Court rejected this argument, finding that the letter talked about the prior testimony in Wyatt's case specifically, while the report and 2005 FBI statement were general and did not admit to past misconduct. *Id.* at 99. The court "[held] that a newly discovered evidence claim predicated upon a case-specific letter from the FBI discrediting the CBLA testimony offered at trial is not procedurally barred if timely raised." *Id.* The triggering event was the case-specific letter.

The Florida Supreme Court also discussed its review of newly discovered science evidence more generally. It explained that the holding in *Wyatt* was "in accord with [its] prior decisions, which have recognized newly discovered evidence claims predicated upon new testing methods or techniques that did not exist at the time of

trial, but are used to test evidence introduced at the original trial." *Id.* at 100; *see also id.* (citing *Preston v. State*, 970 So. 2d 789, 798 (Fla. 2007) (treating DNA evidence as newly discovered)), and *Hildwin v. State*, 951 So. 2d 784, 788-89 (Fla. 2006) (same)). It also acknowledged similar holdings in the context of witness recantations where the recantation did not exist at the time of trial but the truthful information behind it did. *See id.* (citing *Hurst v. State*, 18 So. 3d 975, 992-93 (Fla. 2009)). Thus, the Florida Supreme Court found it appropriate to deem the 2008 FBI letter newly discovered because the "case-specific letter" contained facts Wyatt and his counsel could not have known at trial. *See also Smith v. State*, 75 So. 3d 205, 206 (Fla. 2011) (FBI letter regarding faulty testimony may constitute newly discovered evidence).

The Florida Supreme Court's view toward case-specific scientific findings have not extended to the social sciences. It attempted to explain this distinction in *Henry v. State*, 125 So. 3d 745 (Fla. 2013). In *Henry*, the court explained that "new opinions or new research studies," especially those comprising of "a compilation or analysis of previously existing data and scientific information," do not constitute newly discovered evidence. 125 So. 3d at 750. It distinguished these studies from evidence that "involve[s] faulty testimony actually given at [] trial." *Id.* at 751.

Of course, this ignores the nuance in claims like Mr. Dillbeck's, where the newly discovered diagnosis speaks directly to the evidence presented at Mr. Dillbeck's penalty phase, which, while not faulty per se, provided only a rudimentary explanation of the effects of maternal drinking during pregnancy and did not adequately educate the jurors on how this affected his cognitive and behavioral

functioning. The Florida Supreme Court's arbitrary distinction that ignores its own justifications in other types of cases is inadequate to afford Florida defendants their due process rights.

C. The Heightened Diligence Standard is also Uncommon in the Court's Civil Jurisprudence

Outside the criminal context, courts also take a more measured approach to newly discovered medical diagnoses. In tort law, plaintiffs in virtually all jurisdictions are protected by what is known as the "discovery rule": a provision that allows bringing a claim outside of the default limitations period if, like in the post-conviction context here, the factual predicate was not reasonably discoverable through due diligence. Because the text of such rules typically mirrors Fla. R. Crim. P. 3.851(d)(2)(A),[10] an analysis of their purpose and interpretation is instructive.

The civil discovery rule protects plaintiffs from unfairness resulting from late discovery of facts, despite reasonable diligence. "Under the rule, accrual of the cause of action occurs when the plaintiff *should* have discovered the claim, not when the plaintiff *could* have discovered it." Am. L. Prod. Liab. 3d § 47:32 (Feb. 2021 update) (emphasis added). These ubiquitous rules inform the Questions Presented by this petition because (aside from being textually analogous to the provision at issue) their

[10] *Compare* Fla. R. Crim. P. 3.851(d)(2)(A), *with*, *e.g.*, *McCarrell v. Hoffmann-La Roche, Inc.*, 153 A.3d 207, 212 (N.J. 2017) ("Under the 'discovery rule,' the statute of limitations does not begin to run 'until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.'"); Colo. Rev. Stat. § 13-80-108(1) (statute runs from when facts "are known or should have been known by the exercise of reasonable diligence"); Ky. Rev. Stat. Ann. § 413.140 (statute runs from "the time the injury is first discovered or in the exercise of reasonable care should have been discovered").

core function—to ensure "justice, reasonableness, *and fundamental fairness*," *id.* (emphasis added)—is the same as the function performed by the Due Process Clause when it acts as a backstop against unfair post-conviction rules. *See, e.g., Osborne*, 557 U.S. at 69 (due process prohibits rules that "transgress . . . fundamental fairness in operation"); *Ross,* 417 U.S. at 615 (due process requires "an adequate opportunity to present . . . claims fairly in the context of the State's appellate process").

For its part, Florida has a civil discovery rule that, like those in most jurisdictions, is textually indistinguishable from its post-conviction newly discovered evidence statute. *See R.J. Reynolds Tobacco Co. v. Ciccone*, 190 So. 3d 1028, 1038 (Fla. 2016) (noting that Fla. Stat. §§ 95.031(2)(b) & 95.11(3) provide for a limitations period running "from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence."). Like the civil rule generally, Florida's application is based on "concerns about fairness to the plaintiff," because "it is clear that a plaintiff should not, and cannot, be required to file a cause of action before even realizing that the cause of action exists." *Id.* (applying the rule in a suit arising from tobacco-related diagnoses). As an authoritative treatise notes, the purpose of this rule "is that to require the plaintiffs to have the gift of prophecy [about the existence of a diagnosed condition] would *offend fundamental fairness*." 35 Fla. Jur. 2d Limitations and Laches § 62 (emphasis added) (citing *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985) (collecting cases involving medical diagnoses)). For this reason, "the exercise of 'due diligence' does not require that courts 'impute sophisticated medical analysis to a lay

person struggling with the fact of a crippling or horrifying illness.'" *Cohen v. Cooper*, 20 So. 3d 453, 456 (Fla. Dist. Ct. App. 2009). And under Florida law, this timeliness assessment—whether "the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence," *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 936 (Fla. 2000) (cleaned up)—is a "question of fact for the jury to resolve," *id.* at 938, that is answered after a meticulous and "fact-specific" analysis, *Cohen,* 20 So. 3d at 456 (collecting cases of timeliness inquiries concerning the diligence in medical diagnoses), instead of a per se rule.

Yet despite being textually indistinguishable, the Florida Supreme Court applied its post-conviction diligence rule in a manner that looks nothing like the measured and fact-specific assessment of diagnosis diligence in civil cases. *See*, *e.g., Cohen,* 20 So. 3d at 456. Instead, the opinion below tersely held that Mr. Dillbeck's claim accrued the moment the DSM-5 was published, because that is when "ND-PAE became a diagnosable condition." *Dillbeck*, 304 So.3d at 288. But the court never explained why a diligent prisoner with no ongoing litigation must be constructively on notice of any published development in the sciences, the moment it occurs. Nor did the court assess the adequacy of the actual reasons why Mr. Dillbeck explored the ND-PAE issue in the wake of the *Atwell* decision that required juvenile resentencing. Accordingly, by its operation, this constructive-knowledge requirement ensures that compliance with a limitations period be a product of pure chance, rewarding those fortuitous prisoners who obtain *actual knowledge* of a scientific development (and

with enough time left in the one-year period to investigate and secure funds and an evaluation in light of that development).

This Court should grant certiorari to determine whether Florida transgressed the outer limits of due process by imposing a per se rule that runs a limitations period based on imputed, not actual, notice of scientific developments.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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