CAPITAL CASE

No. 20-7665

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a decision of the Florida Supreme Court holding that the petitioner was not diligent, as required by a state rule of court, in raising a claim of newly discovered evidence of mental mitigation based on a diagnosis that was recognized years earlier?

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT*

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Dillbeck v. State*, 304 So.3d 286 (Fla. 2020) (SC20-178).

JURISDICTION

On September 3, 2020, the Florida Supreme Court affirmed the trial court's denial of the successive postconviction motion. On September 18, 2020, Dillbeck filed a motion for rehearing. The State filed a response to the rehearing. On October 30, 2020, the Florida Supreme Court denied the rehearing. On March 29, 2021, Dillbeck

filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d).[1] Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

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[1] This Court extended the deadline to timely file a petition for writ of certiorari from 90 days to 150 days due to COVID-19. *See* Order of March 19, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution, section one, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Facts of the murder

Dillbeck was convicted of the 1990 first-degree murder, armed robbery, and armed burglary of Faye Vann. *Dillbeck v. State*, 643 So.2d 1027, 1028 (Fla. 1994), *cert. denied*, *Dillbeck v. Florida*, 514 U.S. 1022 (1995). Dillbeck was in prison for life, after entering a plea to the murder of an on-duty deputy with the deputy's own gun, when he escaped from a work detail. He stabbed a woman to death in the Tallahassee Mall parking lot in an attempted carjacking to further his escape. *Id.*

Prior proceedings in the state and federal courts

The Florida Supreme Court affirmed Dillbeck's convictions and sentence of death on direct appeal. *Dillbeck*, 643 So.2d at 1028. One of the issues in the direct appeal was a a claim that the trial court erred in refusing to allow him to present evidence of fetal alcohol effects caused by his mother's alcoholism during pregnancy in the guilt phase. *Id.* at 1028-30. Dillbeck was permitted to present the fetal alcohol effects diagnosis to the jury as mitigation in the penalty phase and the judge at sentencing.

In the initial postconviction proceedings, the Florida Supreme Court denied Dillbeck's state habeas petition and affirmed the denial of one of his initial postconviction claims but remanded to the trial court to reconsider the remaining claims in the initial postconviction motion. *Dillbeck v. State*, 882 So.2d 969 (Fla. 2004). Following the remand, the Florida Supreme Court affirmed the denial of the remainder of the initial postconviction claims. *Dillbeck v. State*, 964 So.2d 95 (Fla. 2007).

The Florida Supreme Court also affirmed the denial of his first successive postconviction motion, *Dillbeck v. State*, 168 So.3d 224 (Fla. 2015), and his second successive postconviction motion. *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018), *cert. denied*, *Dillbeck v. Florida*, 139 S.Ct. 162 (2018).

In 2007, Dillbeck filed a federal habeas petition in federal district court raising a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002), well as numerous claims of ineffectiveness of counsel. The district court denied the numerous claims raised in the original habeas petition and dismissed as untimely the claims raised in the amended petition. *Dillbeck v. McNeil*, 4:07-cv-388, 2010 WL 419401 (N.D. Fla. Jan. 29, 2010); *Dillbeck v. McNeil*, 4:07-cv-388, 2010 WL 3958639 (N.D. Fla. Oct. 7, 2010). Following a remand, the district court denied a certificate of appealability (COA). *Dillbeck*, 2010 WL 3958639 at *4. The Eleventh Circuit denied COA as well. *Dillbeck v. McNeil*, 10-11042-P (11th Cir.). This Court denied review. *Dillbeck v. Tucker*, 565 U.S. 862 (2011) (No. 10-11017).

Current third successive state postconviction proceedings

On May 9, 2019, Dillbeck, represented by state postconviction counsel, registry counsel Baya Harrison, filed a third successive postconviction motion raising a claim of newly discovered evidence of mitigation based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). (2020 Succ. PC ROA 4-28).[2] Dillbeck asserted that he suffers from ND-PAE based on the reports of several mental health experts that he attached to the 2019 third successive postconviction motion. (2020 Succ. PC ROA 29-287). The written reports of Dr. Natalie Novick Brown of Northwest Forensic Associates in Washington State, who is a clinical and forensic psychologist with a specialty in developmental disabilities, wrote a 67-page report,

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[2] The record on appeal is available online on the Florida Supreme Court's website under the case number SC20-178 at: https://efactssc-public.flcourts.org/casedocuments/2020/178/2020-178_record_136782_record.pdf. A federal court may properly take judicial notice of state court's pleadings that are available online. *Silva-Martinez v. Fla. Dep't of Corr.*, 808 Fed.Appx. 846, 848 (11th Cir. 2020) (holding the federal district court did not abuse its discretion by taking judicial notice of electronic state court records citing *Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 651-52 (11th Cir. 2020), *cert. denied*, *Paez v. Inch*, 141 S.Ct. 309 (2020)).

dated May 1, 2019. (2020 Succ. PC ROA 29-287 at Att. A at 1-67).[3] Attached to Dr. Brown's report were the reports of Dr. Paul Connor, Dr. Wesley D. Center, and Dr. Richard Adler. (2020 Succ. PC ROA 29-287 at Att. A at 70; Att. A at 79; Att. A at 119-136). Dr. Faye E. Sultan of Northpoint Psychological Associates in Davidson, North Carolina, who is a psychologist, wrote a 22-page report, dated May 1, 2019. (2020 Succ. PC ROA 29-287 at Att. C). Dr. Richard S. Adler of Seattle, Washington, who is a forensic psychiatrist, wrote a report, dated May 1, 2019. (2020 Succ. PC ROA 29-287 at Att. E).

On May 30, 2019, the State filed an answer to the third successive postconviction motion asserting that the claim was untimely because it had not been brought within one year of the date of new diagnosis of ND-PAE being published in the Diagnostic and Statistical Manual, Fifth Edition (DSM-V), in 2013, as required by Florida law. (2020 Succ PC ROA 288-312). Alternatively, the State asserted that the claim of newly discovered evidence of mitigation was meritless arguing the new diagnosis would not result in a lesser sentence.

On June 21, 2019, Dillbeck filed a reply. (2020 Succ. PC ROA 319-330). The reply asserted that there was a difference between a diagnosis of fetal alcohol effects and a diagnosis of ND-PAE. Dillbeck also argued that the relevant date should be the date of the diagnosis, not the date of the publication of the new diagnosis in the DSM-V, as the State had asserted. (2020 Succ. PC ROA 320-322). On July 8, 2019, the defendant also filed a memorandum of law regarding the timeliness of the successive motion in the state trial court. (2020 Succ. PC ROA 360-368).

On June 28, 2019, the state postconviction court held a case management conference to hear the arguments of counsel. (2020 Succ. PC ROA 331-359). On

[3] The reference to the attachments are to the attachments as they were filed in the state trial court but the entire appendix is available on the Florida Supreme Court's website as part of the record on appeal. (2020 Succ. PC ROA 29-287).

January 28, 2020, the state postconviction court summarily denied the claim of newly discovered evidence and dismissed the successive postconviction motion as untimely. (2020 Succ. PC ROA 372-375).

Dillbeck appealed the denial of his third successive postconviction motion to the Florida Supreme Court. The Florida Supreme Court held that Dillbeck was not diligent in obtaining the diagnosis and therefore, the successive postconviction motion was untimely. *Dillbeck v. State*, 304 So.3d 286 (Fla. 2020) (SC20-178). Dillbeck filed a motion for rehearing and the State filed a response to the rehearing motion.

Dillbeck, represented by state postconviction counsel registry counsel Baya Harrison III and federal habeas counsel, the Capital Habeas Unit of the Federal Public Defender's Office of the Northern District of Florida (CHU-N), then filed a petition for a writ of certiorari from the Florida Supreme Court's opinion in this Court.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE PETITIONER WAS NOT DILIGENT, AS REQUIRED BY A STATE RULE OF COURT, IN RAISING A CLAIM OF NEWLY DISCOVERED EVIDENCE OF MENTAL MITIGATION BASED ON A DIAGNOSIS THAT WAS RECOGNIZED YEARS EARLIER?

Petitioner Dillbeck asserts that this Court should grant review of the Florida Supreme Court's denial of his claim of newly discovered evidence of mental mitigation based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). This issue is purely a matter of state law. A state supreme court is entitled to impose time limitations and diligence requirements in state postconviction litigation and is certainly entitled to do so in successive postconviction litigation. To the extent the issue can be viewed as a federal due process issue at all, there is no conflict between this Court's due process jurisprudence and the Florida Supreme Court's decision in this case. This Court has never held, or even hinted, that time limitations or diligence requirements on successive postconviction claims raised in state court violate due process. There is no conflict with this Court. Nor is there any conflict between the decisions of any other federal appellate court or any other state supreme court and the Florida Supreme Court's decision in this case. Federal habeas courts enforces time limitations in federal habeas litigation and impose diligence requirements in federal habeas litigation as well. Dillbeck cites no federal circuit court case or state supreme court case holding that time limitations or diligence requirements in successive state postconviction litigation violate the federal due process clause. Furthermore, this case is a poor vehicle because there are threshold issues. Reasonable time limits and diligence requirements do not violate due process. Because the petition presents an issue over which there is no conflict among the courts and that involves a threshold issue, this Court should deny review of this claim.

The Florida Supreme Court's decision in this case

Dillbeck appealed the state trial court's denial of his third successive postconviction motion to the Florida Supreme Court. *Dillbeck v. State*, 304 So.3d 286 (Fla. 2020) (SC20-178). The Florida Supreme Court concluded that Dillbeck was not diligent and therefore, his successive postconviction claim was untimely.

The Florida Supreme Court first noted that the successive claim was filed under Florida Rule of Criminal Procedure 3.851. *Dillbeck*, 304 So.3d at 287. The Florida Supreme Court then explained that Dillbeck's claim of newly discovered evidence was "based on reports written in 2019 by three doctors, one of whom diagnosed him with Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE), a diagnosis that was first recognized in the 2013 publication of the Diagnostic and Statistical Manual, Fifth Edition (DSM-5)." *Id.* The Florida Supreme Court noted that the postconviction trial court had "dismissed the motion as untimely." *Id.*

The Florida Supreme Court then explained that a motion for postconviction relief in a capital case must be filed within one year of the date the defendant's conviction and sentence become final to be considered timely. *Dillbeck*, 304 So.3d at 287 (citing Fla. R. Crim. P. 3.851(d)(1)). The Florida Supreme Court noted that Dillbeck's conviction and sentence became final in 1995. *Id.* (citing *Dillbeck v. Florida*, 514 U.S. 1022 (1995), and Fla. R. Crim. P. 3.851(d)(1)(B)). The Florida Supreme Court then explained that there is an exception to the one-year time limit if "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." *Id.* (citing Fla. R. Crim. P. 3.851(d)(2)(A)).

The Florida Supreme Court noted that the new diagnosis of ND-PAE was included in the DSM-V, published in 2013, and qEEG scans have been used in Florida since 2005. *Dillbeck*, 304 So.3d at 287-88. The Florida Supreme Court then stated that

Dillbeck asserted that his claim "first arose on May 10, 2018, when he was evaluated by Dr. Faye Sultan, and that May 10, 2018, is the earliest potential date the one-year clock could have started to file his claim based on this newly discovered evidence" and that therefore, he had until May of 2019 to timely file the claim. *Id.* at 288. The Florida Supreme Court disagreed explaining that any newly discovered evidence claim must be filed "within one year of the date upon which the claim became discoverable through due diligence." *Id.* (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)). The Florida Supreme Court reasoned that the facts on which the claim was predicated was the diagnosis of ND-PAE and qEEG results "could have been discovered by the exercise of due diligence as early as 2013, when ND-PAE became a diagnosable condition." *Id.* at 288. The Florida Supreme Court concluded that "Dillbeck and his counsel failed to exercise diligence by waiting until 2018 to pursue evaluation, testing, and a diagnosis of ND-PAE." *Id.* The Florida Supreme Court affirmed the postconviction court's dismissal of the third successive postconviction motion as untimely.

Florida's time limitations and diligence requirements

The Florida Rule of Criminal Procedure governing Collateral Relief After Death Sentence Has Been Imposed and Affirmed on Direct Appeal, rule 3.851(d), provides:

Time Limitation.

> (1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:
>
> > (A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or
> > (B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(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, or
(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
(C) postconviction counsel, through neglect, failed to file the motion.

The Florida Supreme Court adopted this rule of court requiring diligence in 2001. *Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993*, 802 So.2d 298, 303 (Fla. 2001). It was this rule that was cited by the Florida Supreme Court in support of its diligence requirement in this case. *Dillbeck*, 304 So.3d at 287 (citing Fla. R. Crim. P. 3.851(d)(2)(A)).

Florida actually has no time limits on claims of newly discovered evidence whatsoever. A defendant can find new evidence several decades after his conviction or penalty phase and can present that new evidence to a Florida court. *Cf. Herrera v. Collins*, 506 U.S. 390, 410-11 (1993) (noting that, at that time, Texas was one of 17 States that required a motion for a new trial based on newly discovered evidence to be made within 60 days of judgment). And Florida's concept of newly discovered evidence is much broader than the federal concept of actual innocence because it includes newly discovered evidence of impeachment as well as newly discovered evidence of mitigation, just as the claim of new evidence in this case does. *Brown v. State*, 304 So.3d 243, 274 (Fla. 2020) (addressing a claim of newly discovered evidence of impeachment); *Long v. State*, 271 So.3d 938, 942 (Fla. 2019) (addressing a claim of newly discovered evidence of mitigation and explaining that when a defendant seeks to attack his death sentence, not his conviction, then the test for newly discovered evidence becomes whether "the newly discovered evidence would probably yield a less severe sentence"), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). In Florida, provided a defendant diligently seeks the new evidence and then files a motion raising the new evidence within one

year after he discovers it, the Florida courts will entertain the claim. *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence."). The time limitation is on filing the claim, not on the discovery of the new evidence itself.

Opposing counsel argues that there is a new "trend" of requiring diligence in Florida regarding claims of newly discovered evidence and cites a few recent Florida Supreme Court cases as support for that statement. Pet. at 13 (citing *Long v. State*, 271 So.3d 938, 942 (Fla. 2019) (citing *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994)), *cert. denied, Long v. Florida*, 139 S.Ct. 2635 (2019); and *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)), *cert. denied, Rodgers v. Florida*, 141 S.Ct. 398 (2020)).[4] But the cases cited in those newer cases as support for the diligence requirement rebut any claim that this is a new trend. The Florida Supreme Court in *Long* cited the case of *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994), and the Florida Supreme Court in *Rodgers* cited the case of *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008). The supporting cases were decided in 1994 and 2008. In this case, the Florida Supreme Court again cited *Jimenez*, decided in 2008 in support of its diligence requirement, as well as a state rule of court adopted in 2001. *Dillbeck*, 304 So.3d at 288 (citing *Jimenez*). This "trend" is well over two decades old. The cases cited in the petition merely establish that the Florida Supreme Court routinely follows the state's long-standing diligence requirement. *Cf. Johnson v. Lee*, 136 S.Ct. 1802, 1804 (2016) (noting that state rules are "adequate" for federal habeas litigation if they are "firmly

[4] This Court denied the petition in *Rodgers v. Florida*, 141 S.Ct. 398 (2020) (No. 20-5117), which involved a similar attacks on Florida's time limitations and diligence requirements as those being presented in this petition.

established and regularly followed" citing *Walker v. Martin*, 562 U.S. 307, 316 (2011)). Florida's time limitations and diligence requirements are both well established and routinely followed.

Issue was not properly raised below

This Court does not grant review of questions raised for the first time in this Court. This Court is "a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001); *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005). This Court's traditional rule precludes a grant of certiorari when the question raised in the petition was either not presented to the lower court or was not ruled upon by the lower court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (discussing the concept of "not pressed or passed upon below"); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing the writ of certiorari as improvidently granted where the issue was not raised, preserved, or passed upon in the state courts below); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875). This Court refuses to entertain issues that were not properly presented to the state supreme court. *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (dismissing the writ as improvidently granted where the issue was not raised with "fair precision and in due time"); *Howell v. Mississippi*, 543 U.S. 440, 441 (2005) (dismissing the writ of certiorari as improvidently granted where the issue was not raised as a federal constitutional issue).

The issue of whether a state having a filing deadline for state postconviction motions violates the federal due process clause was not raised below in the Florida Supreme Court. Opposing counsel relied exclusively on Florida caselaw in the initial brief when arguing that the state trial court erred in finding the third successive postconviction motion to be untimely. IB at 19-34. The argument presented to the Florida Supreme Court was a case-specific argument mainly focused on diligence.

There was no argument that the Florida Supreme Court should not have any time limitations or diligence requirements on claims based on a new mental diagnosis made in the initial brief. Opposing counsel did not cite *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), to the Florida Supreme Court in the briefs which is the main case he relies upon in his petition in this Court.

The issue being raised in the petition was not raised below, as required by *Adams* and *Howell*. This Court should not grant review of an issue that is being raised for the first time in this Court.

No conflict with this Court's due process jurisprudence

There is no conflict between the Florida Supreme Court's decision in this case and this Court's due process jurisprudence. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). In *Herrera v. Collins*, 506 U.S. 390, 410-11 (1993), a plurality of this Court held that Texas' refusal to entertain a claim of newly discovered evidence of innocence, raised eight years after the conviction, did not transgress "fundamental fairness." *See also Herrera*, 506 U.S. at 427-28 (Scalia, J., concurring) (noting there is "no basis" in the text of the Constitution or tradition for finding a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction because a convicted defendant has received "all the process that our society has traditionally deemed adequate" and observing the traditional avenue to raise such claims is a pardon).

Opposing counsel points to *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), as a basis for the federal due process claim. Pet at 6-8. But *Osborne* "left slim room" for due process challenges to state postconviction proceedings. *Skinner v. Switzer*, 562 U.S. 521, 525 (2011). *Osborne* concerned a due process challenge to Alaska's postconviction procedures regarding DNA evidence that

implicated actual innocence. *Osborne*, 557 U.S. at 64. This Court in *Osborne* explained that the due process protections at trial are "not parallel" to the due process protections at the postconviction stage because a defendant at the postconviction stage "has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Id.* at 69. Under *Osborne*, federal courts "may upset a State's postconviction relief procedures only if they are fundamentally inadequate." *Id.* at 69. The *Osborne* Court endorsed Alaska's diligence requirement regarding DNA testing as well as other states' diligence requirements. *Id.* at 64, 70 (noting that under Alaska's statute, a defendant must "diligently" pursue DNA testing); *Id.* at 63 ("States also impose a range of diligence requirements."). The *Osborne* Court also relied on the federal DNA testing statute. *Id.* at 70 (citing 18 U.S.C. § 3600(a)). But that federal statute contains a rebuttable three-year time limit on seeking DNA testing. § 3600(a)(10)(A). And this Court in *Osborne* ultimately concluded that there was "nothing inadequate" about Alaska's postconviction procedures regarding DNA testing and rejected the due process challenge to them. *Id.* at 69.

A state having reasonable time limitations and reasonable diligence requirements does not render its postconviction procedures fundamentally inadequate. *Osborne*, if anything, endorses time limitations and diligence requirements in state postconviction litigation. There is no conflict with *Osborne*.

This Court has also imposed timing and diligence requirements in federal habeas litigation including when dealing with claims of actual innocence. *Ryan v. Schad*, 570 U.S. 521, 523 n.2, 526 n.3 (2013) (concluding that a motion to vacate based on *Martinez v. Ryan*, 566 U.S. 1 (2012), which had been decided approximately four months before the motion was filed, was dilatory and was not filed within a reasonable time absent an explanation for the delay); *Holland v. Florida*, 560 U.S. 631, 649 (2010) (requiring diligence on the part of the petitioner to warrant equitable tolling of the statute of

limitations); *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (holding that, while diligence was not a bar to consideration of a gateway claim of innocence, "timing" was properly considered when evaluating the strength and validity of such a claim of innocence and stating that unexplained delays bear on that determination).

This Court has upheld the prohibition on successive federal habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 663 (1996) (holding 28 U.S.C. § 2244(b) does not violate the suspension clause). The time limitation in this case was applied to a third successive postconviction claim. And, of course, this Court itself has time limitations, such as a time limitation for filing petitions for writ of certiorari. Sup. Ct. R. 13.3.

The petition also discusses, at some length, this Court's decision in *Johnson v. United States*, 544 U.S. 295 (2005), which the State had provided as supplemental authority to the Florida Supreme Court. Pet. at 9-12. In *Johnson*, this Court held that the vacating of two Georgia state convictions, that had been used to enhance a federal sentence, restarted the clock to timely file a federal habeas petition, under the habeas statute of limitations in 28 U.S.C. § 2255(f)(4), but that the petitioner could not file a habeas petition in federal court because he had not been diligent. The *Johnson* Court concluded that, under the habeas statute, a petitioner could timely file a federal habeas petition if the petition was filed within a year of the prior conviction being vacated by the state court. But the *Johnson* Court explained that this was only true if the habeas petitioner had "shown due diligence." *Id.* at 302. This Court emphasized the federal habeas statute of limitations "clear policy" mandating "promptness." *Id.* at 311. The *Johnson* Court thought that time limitations and a diligence requirement regarding new claims were necessary to prevent turning federal courts into "a forum for difficult and time-consuming reexaminations of stale state proceedings." *Id.* at 303. The *Johnson* Court noted the problem with starting a limitations period based on the defendant's own conduct of bringing the claim, regardless of "how long he may have

slumbered." *Id.* at 296. This Court then determined that Johnson had ***not*** been diligent in challenging his prior convictions in state court because he waited over three years from his federal sentencing to file the challenges to the prior convictions in the state court. *Id.* at 311. The Court found that Johnson waiting over 21 months after his federal sentence was final to go into state court was unreasonable and noted that Johnson offered no explanation for that delay. *Id.* This Court concluded: "Johnson fell far short of reasonable diligence in challenging the state conviction." *Id.* This Court found that Johnson was not diligent because he had waited nearly two years to challenge his prior state convictions.

Opposing counsel misses the entire thrust of this Court's decision in *Johnson* which was defendants must bring claims promptly. This Court required that federal § 2255 petitioners be diligent. *Johnson* supports the State's position, not Dillbeck's. This can readily been seen from opposing counsel quoting the dissent rather than the majority. Pet. at 11-12.

Waiting many years after the new diagnosis is established by publication in the DSM-V to bring a successive postconviction claim based on that new diagnosis is not being prompt. The Florida Supreme Court in this case did exactly what this Court in *Johnson* did — both courts require diligence in bringing claims. As the Florida Supreme Court properly concluded, Dillbeck was not diligent. Like Johnson, Dillbeck "slumbered" on this claim. Indeed, Dillbeck waited even longer than Johnson. Dillbeck waited six years after the publication of the DSM-V recognizing the new diagnosis to bring this claim. Dillbeck's third successive postconviction motion was filed five years late, while Johnson's motion was filed approximately two years late.

There is no conflict between the Florida Supreme Court's decision in this case and this Court's due process jurisprudence and certainly not with this Court's decision in *Johnson*. Because there is no conflict with this Court, review should be denied.

No conflict with other appellate courts

There is no conflict between the Florida Supreme Court's decision in this case and that of any federal appellate court or state court of last resort. Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

The federal appellate courts have upheld time limitations and diligence requirements in federal habeas litigation, which is the functional equivalent to state postconviction proceedings. The federal habeas statutes, 28 U.S.C. § 2255(f) and 28 U.S.C. § 2244(d)(1), contain a one-year statute of limitations for both federal and state prisoners. The federal circuit courts have upheld that time limitation against various constitutional attacks.[5]

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[5] *See, e.g., Delaney v. Matesanz*, 264 F.3d 7, 12 (1st Cir. 2001) (stating that "reasonable" time limits in federal habeas litigation are not an unconstitutional suspension of the writ); *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 113 (2d Cir. 2000) (concluding that because the one-year statute of limitations leaves habeas petitioners with a "reasonable" opportunity to have their claims heard on the merits it is not an unconstitutional suspension of the writ); *Turner v. Johnson*, 177 F.3d 390, 391-93 (5th Cir. 1999) (rejecting a due process challenge to the AEDPA statute of limitations reasoning that the limitations period did not render the habeas remedy "inadequate or ineffective"); *Hyatt v. United States*, 207 F.3d 831, 832 (6th Cir. 2000) (rejecting due process, *ex post facto*, and Suspension Clause attacks on § 2255(f)); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000) (rejecting a Suspension Clause attack on § 2244(d)(1)); *Long v. Miller*, 541 Fed.Appx. 800, 802 (10th Cir. 2013) (denying a COA regarding a due process attack on the federal statute of limitations, § 2244(d)(1), citing *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998), and also citing cases from the Second, Fifth, Ninth, and the Eleventh Circuit rejecting constitutional attacks on the federal habeas statute of limitations); *Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1217 & n.3 (11th Cir. 2000) (concluding the time limitation does not render habeas ineffective or inadequate, and therefore is not an unconstitutional suspension of the writ of habeas corpus citing other circuit cases in a footnote).

The federal courts also have time limitations and diligence requirements regarding motions to reopen habeas cases as well. Fed. R. Civ. P. 60(c)(1) (stating that any Rule 60(b)(1)-(3) motions must be filed within one year); Fed. R. Civ. P. 60(c)(1) (stating that any Rule 60(b)(4)-(6) motions "must be made within a reasonable time"). And in the case of Rule 60(b)(6) motions to reopen a federal habeas case based on a change in the law, the reasonable time is a few months.[6]

Other states also often have time limitations and diligence requirements in their state postconviction proceedings and their respective state supreme courts have rejected various attacks, including due process attacks on those limitations and requirements.[7] Dillbeck cites to no decision of any federal circuit court or state supreme court that has held that a state's time limitations or diligence requirements on postconviction claims violate the federal due process clause, much less do so in the successive postconviction context.

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[6] *Cox v. Horn*, 757 F.3d 113, 116 (3d Cir. 2014) (observing that a Rule 60(b)(6) motion to reopen a closed federal habeas case, based on the new decision of *Martinez v. Ryan*, that was filed roughly 90 days after the decision was "close enough" to that decision to be deemed filed within a reasonable time, as required by the federal rules of civil procedure); *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016) (concluding that a Rule 60(b)(6) motion that was filed more than two years after the new decision was untimely); *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (concluding a Rule 60(b)(6) motion to reopen based on a new decision was not brought within a "reasonable time" because it was filed nearly eight months after the new decision); *Pruett v. Stephens*, 608 Fed.Appx. 182, 186 (5th Cir. 2015) (concluding a Rule 60(b)(6) motion based on a new decision that was filed more than 19 months after the new decision was untimely); *Clark v. Davis*, 850 F.3d 770, 782 (5th Cir. 2017) (concluding a Rule 60(b)(6) motion based on a new decision that was filed nearly 16 months after the new decision was untimely); *see also Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987) (affirming the district court granting a 60(b)(6) motion based on an intervening change in the law, in part, because the State filed the 60(b)(6) motion only three months after the Supreme Court decision).

[7] *See, e.g., People v. Germany*, 674 P.2d 345, 350 (Colo. 1983) (upholding the state's time limitation on postconviction claims to prevent stale claims and advance finality); *Davis v. State*, 443 N.W.2d 707 (Iowa 1989) (holding the state's time limitation on postconviction claims did not violate due process); *Day v. State*, 770 S.W.2d 692, 695 (Mo. 1989) (upholding the state's time limitations on postconviction motions as reasonable and serving the legitimate end of avoiding delay and preventing stale claims).

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. Because there is no conflict among the lower appellate courts, review should be denied.

Poor vehicle due to threshold issues

This Court does not normally grant review of cases with threshold issues. *Cf. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (dismissing the writ of certiorari as improvidently granted when there was a threshold issue). There are two threshold issues in this case.

The first threshold issue in this case is whether this Court even recognizes the concept of newly discovered evidence of mitigation. It is an open question whether this Court recognizes the concept of a freestanding claim of innocence of the crime. *House v. Bell*, 547 U.S. 518, 554-55 (2006) (declining to answer the question left open about the existence of a freestanding actual innocence claim). But Dillbeck is not raising a claim of innocence regarding his conviction; he is raising a claim regarding his sentence. This claim is akin to a claim of innocent of the death penalty. *Bowles v. Sec'y, Fla. Dep't of Corr.*, 935 F.3d 1176, 1182 (11th Cir. 2019) (stating that the "actually innocent of the death penalty" exception based on *Sawyer v. Whitley*, 505 U.S. 333 (1992), did not survive the AEDPA quoting *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015)), *cert. denied*, *Bowles v. Inch*, 140 S.Ct. 26 (2019); *but see Pizzuto v. Blades*, 673 F.3d 1003, 1010 (9th Cir. 2012) (recognizing a claim of actual innocence of the death penalty and stating that § 2244(b)(2) applies not only to the underlying conviction but also to the death penalty citing *Thompson v. Calderon*, 151 F.3d 918, 923 (9th Cir. 1998)). Dillbeck's new evidence of mitigation relates to his sentence, not his conviction.

And this claim does not even actually rise to the level of a claim of innocent of the death penalty because it does not attempt to negate all of the aggravating factors (or even involve a *per se* mitigator, such as intellectual disability). *McKinney v. Arizona*, 140 S.Ct. 702, 707 (2020) (explaining that, under *Ring v. Arizona*, capital defendants are entitled to a jury determination of any fact that increases their maximum punishment to death which in a capital case is "the finding of an aggravating circumstance"); *Johnson v. Singletary*, 938 F.2d 1166 (11th Cir. 1991) (en banc) (explaining, in a pre-AEDPA case, that a claim of actual innocence of the death penalty requires the petitioner present new evidence that negates *all* of the aggravating factors). Rather, this is a claim of newly discovered evidence of mitigation that could impact his sentence. This Court has never even hinted that there is such a concept as newly discovered evidence of mitigation, much less that state courts are required to recognize such a concept as a matter of federal due process law. It cannot be a federal due process violation to put limits on a type of claim that this Court would not recognize at all. This Court would have to first address whether the concept of new discovered evidence of mitigation even exists.[8]

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[8] As the State argued in the Florida Supreme Court, which does recognize the concept of newly discovered evidence of mitigation as a matter of state law, the diagnosis of ND-PAE would not result in a life sentence at any new penalty phase. The first jury heard the old similar diagnosis of fetal alcohol effects yet recommended a death sentence nonetheless. And the original sentencing judge found the old diagnosis of fetal alcohol effects as mitigation yet sentenced Dillbeck to death nonetheless too. The original sentencing judge discounted the old diagnosis based on Dillbeck's mental abilities, such as playing chess and taking college courses. But Dillbeck's real-world abilities undermine his new diagnosis, just as readily as they undermined his old diagnosis. And, even if the diagnosis of ND-PAE somehow increased the mitigation value of the old diagnosis of fetal alcohol effects in the eyes of either the jury or the judge, it would still not outweigh the compelling facts of this case or the powerful aggravation present in this case. Dillbeck nearly killed a man in Indiana while attempting to steal his truck. Then, after fleeing from that crime to Florida, about two weeks later, Dillbeck murdered an on-duty deputy by shooting the deputy twice with the deputy's own gun. And, then many years later, Dillbeck escaped from a work detail while serving a life sentence and murdered yet again, this time stabbing a woman to death in an attempted carjacking designed to further his escape. That factual scenario speaks for itself in terms of aggravation. As the state postconviction court concluded, the new diagnosis of ND-PAE was "not of such a nature" that it "would probably yield a less severe sentence in a new penalty phase." This is a weak claim of newly discovered mitigation.

The second threshold issue is whether the current diagnosis of ND-PAE can even be properly classified as "new." Dillbeck presented a diagnosis of fetal alcohol effects as mitigation at the penalty phase in 1991 and the trial court found fetal alcohol effects as mitigation in its sentencing order. *Dillbeck v. State*, 964 So.2d 95, 100 (Fla. 2007) (noting that trial counsel had argued in closing in the penalty phase that Dillbeck suffered from fetal alcohol syndrome which resulted in brain damage); *Dillbeck v. State*, 882 So.2d 969, 970 n.5 (Fla. 2004) (noting that the sentencing court found as non-statutory mitigation that "Dillbeck suffers from fetal alcohol effect as a result of his mother's alcohol consumption"). The prior diagnosis of fetal alcohol effects is a forerunner to the current diagnosis of ND-PAE. A slight twist on an old diagnosis is not properly characterized as a "new" diagnosis for purposes of time limitations. The State made this argument in its answer brief filed in the Florida Supreme Court and it would assert that same argument again in any merits brief filed in this Court. This Court would have to decide whether the current diagnosis of ND-PAE can even be considered new before reaching the question of whether time limitations and diligence requirements in state successive postconviction litigation violate due process.

Dillbeck totally ignores these threshold issues in his petition to this Court but this Court would have to address these threshold issues. Because this case involves two threshold issues, this case is a poor vehicle.

Diligence requirements regarding a new mental diagnosis

The Florida Supreme Court's time limitations and diligence requirements regarding a new mental diagnosis are reasonable. Contrary to opposing counsel argument, it is not an "impossibly high" standard to mandate that the capital defense bar keep abreast of developments in the most recognized source for mental diagnoses, the DSM, and then have their client examined for any new diagnosis within a year of

the date of the formal recognition of that new diagnosis. It is not unreasonable to require the capital defense bar to be aware of major developments in the area of psychology and act upon those major developments within a reasonable time frame.

While petitioner asserts that Florida's diligence standard is "impossibly high" and "forecloses" claims of new diagnosis of mental illness, this is hyperbole. Pet. at 8. A one-year time limitation on filing does not foreclose any claim brought within 365 days. Such a limitation only forecloses late claims. And a diligence requirement only forecloses claims brought by those who are not diligent. Timely and diligently pursued claims are not foreclosed by Florida law.

The alternative to the Florida Supreme Court's view of dating any claim regarding a new diagnosis from the date of the publication of the new diagnosis in the DSM is that the defense bar would unilaterally control both the time frame and the diligence requirement. Dillbeck asserted in the Florida Supreme Court that the time calculations and diligence requirement should only begin after he received a formal written diagnosis from his own defense mental health expert. Reply Brief at 9 ("the date of the diagnosis is the triggering date for a new claim," not "the date of publication of the DSM-5 or the date that qEEG testing became available"); Motion for Rehearing at 8 (insisting that the "inducement to act was Dr. Sultan's evaluation," not the publication of diagnosis in the DSM-V). So, his position was that he should have an unlimited number of years to learn of the new diagnosis, regardless of the publication date of new diagnosis in the DSM and then also have an unlimited number of years to be examined by a defense expert after learning of the new diagnosis, in addition to having an unlimited number of years for his own defense mental health expert to examine him and write a report diagnosing him with the new diagnosis. Such a view of diligence would place complete control of the time limitation in the hands of the

defense alone. A time limitation totally in the control of the opposing party and dependent on the unilateral actions of opposing counsel is not a time limitation at all.

Due process does not require unlimited time frames or diligence requirements under the unilateral control of the defense bar, especially not in the context of state successive postconviction proceedings, where finality concerns are at their apex. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1912, 1913 (2017) (observing that "finality concerns are far more pronounced" in postconviction proceedings and remarking on the "profound importance of finality in criminal proceedings"). The *Weaver* Court noted the "costs and uncertainties" are greater in the postconviction context. *Id.* at 1912. Having time limitations and diligence requirements in state postconviction proceedings are designed to further finality and to reduce the uncertainties of litigation due to the lapse of significant time since the trial. Diligence requirements reduce the uncertainties of granting new trials based on postconviction claims that are stale, due to the defendant's own delay in bringing the claim. Reasonable time limitations and diligence requirements in state postconviction litigation do not violate due process.

In sum, the petition presents an issue which does not involve any conflict among the courts but which does involve two threshold issues. There is no basis for granting certiorari review of this case.

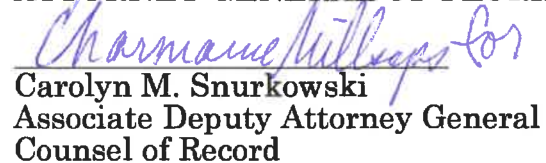
Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



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