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 Supreme Court of Florida

REPLY IN SUPPORT OF CERTIORARI

THIS IS A CAPITAL CASE

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PETITIONER'S REPLY

I. Respondent is Incorrect that Florida's Impractical Diligence Standard Comports with Due Process Requirements

The State opposes certiorari by mischaracterizing the question Mr. Dillbeck now brings. The Question Presented concerns whether the Florida Supreme Court's particular diligence requirement offends the Due Process Clause of the Fourteenth Amendment. *See Dist. Atty's Off. for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (state-created criminal procedure rights must comport with the Fourteenth Amendment Due Process Clause); *Medina v. California*, 505 U.S. 437, 445-46 (1992); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Contrary to the State's insinuation, Mr. Dillbeck is not seeking to wholesale invalidate "time limitations or diligence requirements on successive postconviction claims." Opp. at 7; *see id*. at 11-13, 15. Rather, his argument targets the Florida Supreme Court's constitutionally improper rule for determining whether a prisoner is diligent. *See* Pet. at 8 ("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."). Far from targeting "time limitations or diligence requirements" as such, the key premise of the certiorari petition is that Florida is an outlier among similar statutory diligence rules in other jurisdictions.

Here, the Florida Supreme Court held that a claim arising from a new mental health development becomes "discoverable" once the development is recognized by the scientific community, meaning that a diligent litigant must bring any such claim within one year. *See* App. 4 (quoting *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla.

2008)) & *id.* (holding that Mr. Dillbeck's predicate "could have been discovered by the exercise of due diligence as early as 2013, when ND-PAE became a diagnosable condition"); *see also* Pet. 9, 22 & n. 9. This is part of a pattern where the Florida Supreme Court applies such a diligence analysis in capital cases that involve newly discovered scientific evidence concerning mental health. *See* Pet. 13 (discussing three recent cases dismissed on diligence grounds).

The unfairness of the Florida Supreme Court rule is exemplified by opposing counsel's concession in the trial court that the rule imposes an "extraordinar[il]y high standard" insofar as it would require counsel to "drop everything and read the DSM-5" as soon as it comes out. R. 353; *see* Pet. 5 (citing R. 353); *see id.* ("I'm a capital litigator [for the State] and been one for 20 years, and I don't drop everything and read the DSM-5 either, not when -- I learn it as I go along.").

The State defends the rule, insisting on the need for "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." Opp. at 23. But this begs questions of what counts as a "major development" and what it takes to "act upon" such a development within a reasonable timeframe. This also ignores that the Florida Supreme Court's rule required counsel not only to learn of the new scientific development and its apparent relevance in 2013, App. 3, but also have a diagnosis completed within the same year, App. 4. The State's defense also fails to consider, in assessing due diligence, any of the actual reasons the claim was brought when it was. Pet. at 27-28. And it ignores the reality that Mr. Dillbeck, like many or perhaps most

prisoners raising newly discovered evidence claims, was in a posture with no other ongoing litigation and represented by a solo practitioner on Florida's capital case registry at the time of the scientific advance. Enforcing a legal fiction imputing knowledge of all scientific advances to defense counsel is simply not compatible with orderly operations of a fair and equitable limitations period, particularly when counsel would need to not only be constantly scouring the scientific literature, but also seeking appointment of an expert who can conduct an evaluation in sufficient time. Absent luck, a postconviction attorney in a case that has no ongoing litigation is unlikely to realize that the scientific community has made a relevant advance in time to seek authorization for expert services and plead a claim.

The State does not dispute that other states' diligence standards for new diagnoses conflict with Florida's and that in such states Mr. Dillbeck would have likely received merits review. *See*, *e.g.*, Pet. at 16-17 (discussing Arizona's treatment of a new PTSD diagnosis based on testing many years after PTSD was recognized in the scientific community). Identically worded diligence requirements in state and federal statutes have been interpreted in a variety of ways, but at bottom any of them likely would have allowed Mr. Dillbeck to bring his claim. *See* Pet. at 9-12 & n. 10 (identically worded diligence requirement in 28 U.S.C. § 2255(f)(4)),[1] 16-21 (other

[1] The State is mistaken to insist that the diligence rule this Court reviewed in *Johnson v. United States*, 544 U.S. 295 (2005) "supports the State's position." Opp. at 16-17. As the State notes in passing, this Court assessed diligence by considering the actual "explanation" for why Johnson filed when he did. *Id.* (citing *Johnson*, 544 U.S. at 311). And the State ignores the fact that in *Johnson*, this Court held that the one-year limitations period would in fact start once the factual predicate for a claim was *actually* discovered, so long the movant was diligent prior to the discovery. *Id.* at 310

states' diligence rules); *see also id*. at 25-27 & n. 10 (civil rules for a claim's discoverability with reasonable diligence). The fact that Florida's rule is unique among states in its harshness, coupled with how it operated when Mr. Dillbeck tried to press his claim, is relevant to the due process inquiry. *Cf. Osborne*, 557 U.S. at 65, 68-69 (noting that Alaska law appears to be comparable to other states' DNA access laws); *id*. at 70-71 (faulting Osborn for making a due process challenge to Alaska's procedures without seeing how the state courts would actually handle them).[2]

This Court should grant certiorari to decide whether automatic dismissal of claims not brought within one year of a scientific community's recognition of a new advance renders the Florida postconviction scheme inadequate "in operation" to vindicate "the substantive rights provided." *Osborne*, 557 U.S. at 68-69. The unfair and unique features of this rule make this an excellent case to decide on how *Osborn* governs state-created rights that are difficult to vindicate due to an idiosyncratic gatekeeping requirement.

II. This Court has Jurisdiction to Consider the Question Presented

Respondent is incorrect that this Court does not have jurisdiction to consider this case. Respondent argues that the Florida Supreme Court based its decision on a state-law procedural rule, and thus, there is no federal question. Opp. at 8. However,

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& n. 8. This Court's comment that "slumber" is not compatible with diligence does not show that Florida's imputation of scientific knowledge upon counsel is compatible with the Due Process Clause.

[2] The State's observation that due process challenges to *other* timeliness rules have been rejected, Opp. at 18-19, is beside the point as those challenges involved unrelated limitations that bear no resemblance to Florida's diligence rule.

the Question Presented asks whether the Florida Supreme Court's procedural bar undermines federal constitutional due process requirements. That is squarely within this Court's jurisdiction. This Court has previously explained: "'[T]he adequacy of state procedural bars to the assertion of federal questions,' we have recognized, is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)) (alterations in original).

Even where a procedural bar might properly apply, it only precludes this Court's review where it is adequate—*i.e.*, "firmly established and regularly followed." *See Lee*, 534 at 376. Having a diligence bar that is not "firmly established and regularly followed" would render it inadequate as a bar to federal review if the underlying claim had a substantive federal dimension, which of itself carries implications about its fundamental fairness. *See James v. Kentucky*, 466 U.S. 341, 348 (1984) (citing *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)). Here, the Florida Supreme Court only applies its heightened diligence standard to claims based on developments in psychological sciences. *See* Pet. 22-25. Where a newly discovered evidence claim is based on forensic science developments, the Florida Supreme Court has expressly rejected using the scientific advance as the diligence trigger for the one-year limitations period. *See id.* (discussing Florida Supreme Court's refusal to use this rule in cases based on developments in ballistic science, as well as in DNA testing cases).

Moreover, "[t]here are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376. Because this procedural bar applies only to capital defendants raising newly discovered mental health evidence, unlike newly discovered evidence in any other scientific field, and imposes an impossibly high standard of diligence for defense counsel, this is such a case. The Florida Supreme Court has never justified this discrepancy, and no other jurisdiction imposes such a strict standard.

Lastly, the State is incorrect that Mr. Dillbeck did not properly preserve this claim for this Court's review. The State erroneously argues that because Mr. Dillbeck did not cite to a specific case in his initial brief before the Florida Supreme Court, this issue must not have been raised. However, postconviction counsel repeatedly raised the unfairness and impossible burden of such a diligence requirement and the reasonableness of his own actions in discovering this new diagnosis during arguments before the state courts, and, after the Florida Supreme Court itself affirmed the rule that violated Mr. Dillbeck's constitutional rights, filed a motion for rehearing further noticing the Florida Supreme Court of the federal implications of such a ruling. Even if this Court believes Mr. Dillbeck's assertions below insufficient to press the federal issue before the state court, Respondent overstates the jurisdictional consequences of this rule. This Court has described it "as merely a prudential restriction" and acknowledges having "reversed a state criminal conviction on a ground not urged in state court, nor even in this Court." *Illinois v. Gates*, 462 U.S. 213, 219 (1983) (citing

Terminiello v. Chicago, 337 U.S. 1 (1949)).[3] Given the importance of the Question Presented, this Court should similarly exercise jurisdiction here.

CONCLUSION

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

Respectfully submitted,

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[3] While Respondent also requests that certiorari be denied based on what it describes as "threshold issues" of whether a newly discovered mental health claim rises to the level of innocence of the death penalty and when newly discovered evidence is new, the substance of Respondent's arguments speak directly to the merits of Petitioner's newly discovered evidence claim below, which is not before this Court.