No. 22-6819

IN THE

Supreme Court of the United States

DONALD DAVID DILLBECK,

Petitioner,

v.

STATE OF FLORIDA, AND SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, FEBRUARY 23, 2023, AT 6:00 P.M.

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I. Mr. Dillbeck's Categorical Exemption from Execution Under the Eighth and Fourteenth Amendments

Mr. Dillbeck's petition for writ of certiorari laid out the contours and merits of his claim, as well as why no procedural or time bar applies. Mr. Dillbeck will not rehash those explanations here, but simply clarifies a few points in light of Respondents' brief.[1]

A. Respondents misstate Mr. Dillbeck's position regarding adequacy and independence of the state court grounds for denying relief

Respondents inaccurately assert that the Florida Supreme Court's "decision below…is based primarily on state law grounds, does not implicate an important or unsettled question of federal law…[and] Petitioner does not argue otherwise[.]" (BIO at 11). However, Mr. Dillbeck's petition explained that 1) the procedural bars imposed by the Florida Supreme Court are incorrect and thus inadequate to uphold the judgment (Petition at 21-25), and 2) that court's finding of meritlessness flouts this Court's Eighth Amendment jurisprudence that the views of the medical community must be taken into consideration in determining whether Mr. Dillbeck is categorically exempt from execution. (Petition at 18-21).

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[1] As to Respondents' opposition to a stay of execution, it bears mention that Respondents' contention that the "irreparable injury" factor is not a "natural fit" for capital cases because execution is "the inherent nature of a death sentence" (BIO at 8), is invalidated by the fact that the stay contemplated in *Barefoot v. Estelle* was an application for a stay of execution. 463 U.S. 880 (1983). To accept Respondents' unsubstantiated allegation that death-sentenced individuals must satisfy a more onerous standard than individuals seeking a stay in other contexts would weaponize the severity of this particular irreparable injury—an individual's death—and pervert this Court's precedent.

The Florida Supreme Court's foreclosure of substantive review not only permits, but emphasizes the need for, this Court to grant certiorari. Mr. Dillbeck has been anything but dilatory in litigating the effect of his fetal alcohol exposure. In fact, he has been quite the opposite: prior state court findings in this case demonstrate that Mr. Dillbeck was *ahead of his time* by presenting this issue before it was properly understood in medical and sociolegal contexts. (*See, e.g.*, R. 3169 (discounting evidence of fetal alcohol effects because medical expert conclusions "were tenuous and made in the early stages of their research" and "sufficient testing has not been developed to document the degree of disability")). Thus, without this Court's intervention, Florida will be unchecked in hijacking Mr. Dillbeck's legal prescience for use as justification to carry out an unconstitutional execution.

B. Respondents' cited cases related to ND-PAE support rather than undermine the need for certiorari review

Respondents claim that because other cases exist in which individuals unsuccessfully argued that ND-PAE was akin to intellectual disability, Mr. Dillbeck was dilatory in not previously raising a categorical exemption claim. Yet, this is belied by Respondents' own assertions that "only three court opinions discuss[] whether to extend *Atkins* to ND-PAE diagnoses and all of them refuse to do so." (BIO at 18). The weakness of Respondents' position is even more apparent given that one of these three court opinions is the February 16, 2023, Florida Supreme Court judgment in Mr. Dillbeck's case—in other words, the opinion underlying this petition—and another is from a state supreme court opinion released the same day.

In other words, Respondents have only cited to one case in which this specific issue was discussed: *United States v. Fell*, 2016 WL 11550800 (D. Vt. Nov. 7, 2016). But the court in *Fell* specifically stated that "Fell ha[d] presented no evidence" of a consensus that individuals with ND-PAE should be exempt from execution. *Id.* at 4. In reaching this conclusion in 2016,[2] the *Fell* court relied heavily on a finding that "FASD is not so uniformly 'marked' and 'well understood' that capital punishment of individuals with FASD would in all cases be unacceptable." *Id.* at 6. Notably supporting Mr. Dillbeck's position that a consensus was not previously available, three years after the publication of the DSM-5 (in which ND-PAE was listed as a "Condition for Future Study") the Government in *Fell* argued that there was "no agreed-upon set of diagnostic criteria for FASD within the mental health community," *id.* at 5, and that any criteria "do not support a conclusion that FASD is the functional equivalent of ID." *Id.* Now, over six years later, there *does* exist a medical consensus as to both diagnostic criteria for ND-PAE and ND-PAE's unique equivalence to ID. *Fell* thus corroborates Mr. Dillbeck's proffered medical evidence and supports his legal arguments.

Finally, Respondents further undermine their own position (as to both timeliness and merits) by suggesting that the issue of whether ND-PAE is intellectual disability-equivalent "should be permitted to percolate further in the lower courts"

[2] Significantly, the *Fell* opinion—essentially finding that the science regarding FASDs was not yet developed enough to establish a consensus—took place two years *after* Respondents assert Mr. Dillbeck must have raised an exemption claim to be diligent. Respondents' own case citation debunks their arguments of untimeliness.

before this Court weighs in. (BIO at 18). This suggestion not only bolsters Mr. Dillbeck's assertion that he has been prescient in his litigation, it also—by suggesting this Court allow Mr. Dillbeck to be unconstitutionally executed in the meantime—illustrates the unacceptable risks denounced by Eighth Amendment categorical exemption jurisprudence. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); *Roper v. Simmons*, 543 U.S. 551, 573 (2005); *Hall v. Florida*, 572 U.S. 701, 704 (2014).

This risk is demonstrated by *Garcia v. State*, 2023 WL 2028992 (Miss. Feb. 16, 2023), cited by Respondents. *Garcia* is distinguishable from Mr. Dillbeck's case because it is framed through the lens of ineffective assistance of counsel and is necessarily retrospective (*i.e.*, whether counsel can be considered professionally unreasonable prior to Garcia's trial proceeding around January 2017 for failing to present evidence of ID-equivalence) as opposed to looking at the *current* state of medical consensus. However, the fact that two state supreme courts were—on the same day, and in different contexts—grappling with the issue of ND-PAE's ID-equivalence means that this is an issue that will continue to present itself in the lower courts. This Court's review and guidance are necessary.

C. Respondents' merits-based arguments flout this Court's Eighth Amendment jurisprudence

In arguing that the constitutional protections laid out in *Atkins* and its progeny should not apply to ND-PAE, Respondents cite the now-outdated findings in *Fell*, and ignore the wealth of medical evidence Mr. Dillbeck has proffered showing ND-PAE to be ID-equivalent. Most notably, Respondents make many wild assertions related to their position that ND-PAE is "not equivalent to intellectual disability due to

differences in objectivity and reliability of the diagnosis." (BIO at 22). Critically, all of Respondents' alleged distinctions (*i.e.*, that a diagnosis of ID is more reliable than criteria for ND-PAE because "IQ tests depend on objective, cold, hard numbers" whereas a diagnosis of ND-PAE is "wildly subjective"), *id.*, are uncited, ***wholly without medical or scientific support***, and in fact contradicted by Mr. Dillbeck's medical evidence. (*See, e.g.*, Petition at 11-12 (detailing objective clinical diagnostic criteria for ND-PAE); *see also* Petition at 13-16 (referencing medical findings that full-scale IQ is an "outmoded concept" that does not accurately reflect functioning)).

Respondents wish this Court to discount Mr. Dillbeck's medical evidence as a mere unstable "trend[.]" (BIO at 23) and appear to mock Mr. Dillbeck's extraordinarily qualified experts by inexplicably placing that word (experts) in quotations. *Id.* Further, in Respondents' opposition to Mr. Dillbeck's motion to stay, Respondents suggest that to conduct substantive review of Mr. Dillbeck's unrebutted and significant constitutional claim would be to "kowtow to the views of the medical community." (Stay Response at 4). Although Respondents say *in form* that a court should not "disregard" medical expert opinions, *id.* at 5, *in function* their medically-contradicted diatribe scorns this Court's guidance in *Hall* and *Moore v. Texas*, 581 U.S. 1 (2017) by urging this Court not to "base the scope of *Atkins* on the ever changing views of the medical community." (Stay Response at 5).

D. Respondents' brief showcases how Florida's procedures fail to adequately protect the constitutional rights of disabled capital defendants

Respondents claim that "Florida's courts are *never* closed to *diligently* pursued claims that present newly discovered evidence" (BIO at 13) (emphasis in original). However, Respondents conspicuously fail to address the quagmire identified by Mr. Dillbeck in his petition: that the Florida Supreme Court recognizes no procedural avenue for Mr. Dillbeck to show that he is exempt from execution due to the combined effect of a current medical consensus establishing ND-PAE as a uniquely ID-equivalent condition, and a sociolegal tipping point warranting recognition that evolving standards of decency prohibit such an execution. In other words, because this important constitutional claim does not fall neatly into the precise category of "newly discovered evidence" pursuant to Fla. R. Crim. P. 3.851, it is not cognizable in the Florida state courts. This underscores, rather than detracts from, the need for certiorari review.

II. The Eighth Amendment Prohibits the Execution of those not Sentenced to Death by a Unanimous Jury

This case also presents an important question about capital jury sentencing that multiple Justices have asked this Court to revisit. As Mr. Dillbeck's certiorari petition explained, non-unanimous capital jury sentencing violates the Eighth Amendment under both the evolving standards of decency and the original understanding that a unanimous jury verdict was required before a defendant could be executed. In opposition, Respondents raise three arguments: 1) only the Sixth Amendment applies to juries, while the Eighth Amendment does not even apply to

trials; 2) there is a "clear" state procedural ground barring this Court's jurisdiction; and 3) Respondents raise a new retroactivity argument that was neither argued below by Respondents nor relied upon by the Florida Supreme Court. Respondents' arguments for denying the petition should not persuade the Court.

A. Respondents argue against revisiting *Spaziano* because only the Sixth Amendment applies to juries and the Eighth Amendment does not even apply to capital trials

Respondents do not dispute Petitioner's characterizations of the overwhelming national consensus in favor of unanimous capital jury sentencing and the original public understanding that executions could only be carried out upon a unanimous jury verdict. Instead, Respondents raise a novel Sixth Amendment preemption argument and argues that the Eighth Amendment does not apply to trials as the sole reasons not to revisit *Spaziano v. Florida*, 468 U.S. 447 (1984). (BIO at 26-30) ("Dillbeck's claim has nothing to do with his punishment being cruel or unusual"). These arguments do not justify denying certiorari review, and, in any event, are incorrect.

First, Respondents' novel Sixth Amendment preemption argument has long been rejected by this Court. Respondents essentially argue that because the Sixth Amendment contains the right to a jury, no other constitutional protection can safeguard a defendant's rights with respect to juries. This has never been the case. For example, the Sixth Amendment requires that juries be unanimous to convict a defendant of a serious crime, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), while the Due Process Clause of Fifth and Fourteenth Amendments requires that the jury's

determination to convict be beyond a reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1983). As such, this Court has already applied Eighth Amendment protections to capital sentencing juries. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Second, Respondents' related argument that the Eighth Amendment does not apply to trials is frivolous. (BIO at 26). The notion that the Eighth Amendment does not apply to capital trials, let alone capital juries and sentencers, is contradicted by this Court. *See*, *e.g.*, *Smith v. Texas*, 543 U.S. 37 (2004) (capital sentencing jury was impermissibly prevented from considering mitigation by unconstitutional jury instruction); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (capital sentencing jury cannot have its role diminished); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (capital sentencing jury must be allowed to consider and give effect to mitigation); *Beck v. Alabama*, 447 U.S. 625 (1980) (capital sentencing jury must be allowed to consider lesser-included offenses before sentencing defendant to death); *cf. Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (Eighth Amendment requires that sentencer have the discretion to consider youth in sentencing juvenile for murder).

B. The Florida Supreme Court addressed the claim on the merits, rather than a "clear" state law ground

Respondents mischaracterize the Florida Supreme Court's notation that Mr. Dillbeck previously raised an Eighth Amendment claim regarding jury sentencing, (Opinion at 23), as a "clear disposal of this case on state-law procedural grounds," (BIO at 25). But the Florida Supreme Court made no such "clear" or "explicit" statement, (BIO at 25 & n.6), and addressed Mr. Dillbeck's claim on the merits,

finding that this Court's decision in Spaziano "require[d]" that the claim be denied. *See Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curium). As Mr. Dillbeck noted in his petition for certiorari, there is nothing impeding this Court's jurisdiction because the Florida Supreme Court's decision below rested on the federal question. *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016). The weakness in Respondents' flailing attempt to create a jurisdictional bar is exemplified by the almost exclusive reliance on *Durley v. Mayo*, 351 U.S. 277 (1956), a case that even Respondent admits has long been overruled, (BIO at 25 n.6), and is entirely inconsistent with this Court's modern test for jurisdiction.[3] Therefore, there is no jurisdictional bar to this Court's review.

C. Retroactivity was neither argued below nor relied upon by the Florida Supreme Court

Perhaps recognizing that the state procedural bar argument does not hold water, Respondents make a last ditch attempt at obfuscation: retroactivity. (BIO at 28-30). But retroactivity is not jurisdictional and is rendered waived when the party failed to raise the argument in lower courts. *See Schiro v. Farley*, 510 U.S. 222, 228 (1994); *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) ("We have held that States can waive a [retroactivity] defense, during the course of litigation, by expressly choosing not to rely ons it, or by failing to raise it in a timely manner[.]") (internal citations omitted).[4] That is exactly what occurred here. Respondents did not raise any

[3] Even on its own terms, this Court has jurisdiction under *Durley*'s antiquated test. In *Durley*, the Florida Supreme Court summarily denied the claim without issuing an opinion. *Id.* at 279-80. Here, the Florida Supreme Court squarely addressed Mr. Dillbeck's federal claim on the merits.

[4] Instead of acknowledging the decision not to (or failure to) raise retroactivity as a potential defense below, Respondents attempt to shift the blame onto Mr. Dillbeck

putative retroactivity argument in the response to Mr. Dillbeck's state habeas petition. (*See* Response to Habeas Petition at 6-17). Correspondingly, the Florida Supreme Court simply denied relief as "require[d]" by *Spaziano* without any regard to retroactivity. (Opinion at 23). Consistent with this Court's longstanding practice, the Court should decline to "entertain the State's eleventh-hour [retroactivity] argument." *Buck v. Davis*, 580 U.S. 100, 128 (2017).

This Court has not hesitated to take up Eighth Amendment questions in death penalty cases in a successive state collateral review posture when retroactivity was neither argued by a party below nor relied upon by the state court. *See*, *e.g.*, *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014); *cf. Haliburton v. Florida* 574 U.S. 801 (2014) (GVR'ing case in successive collateral review posture for "further consideration in light of *Hall*"). Because retroactivity would not be encompassed within the question before this Court in light of Respondents' failure to argue it below and the Florida's Supreme Court's decision to address the claim squarely on the merits, this Court can—and should—grant certiorari to address whether the Eighth Amendment requires unanimous capital jury sentencing.

CONCLUSION

This Court should grant Mr. Dillbeck's application for a stay of execution and grant a writ of certiorari to review the decision below.

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for failing to argue against an affirmative defense that was not raised in state court. (BIO at 28). Nonretroactivity is a defense to merits adjudication and the burden was on Respondents to raise it. *See Day v. McDonough*, 547 U.S. 198, 205 (2006).

Respectfully submitted,

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