

No. 22-6819

IN THE
Supreme Court of the United States

DONALD DAVID DILLBECK,
Petitioner,

v.

STATE OF FLORIDA, ET AL.
Respondents.

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

**BRIEF OF AMICUS CURIAE FASD UNITED
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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BRIEF OF AMICUS CURIAE¹

INTEREST OF AMICUS

Amicus, FASD United, is a national, non-profit public health advocacy group committed to raising awareness of the risks associated with alcohol consumption during pregnancy and supporting families living with neurodevelopmental disorder associated with prenatal alcohol exposure (“ND-PAE”). FASD United represents children and adults seeking medical, mental health, education, rehabilitative, and other therapeutic services for the spectrum of effects associated with prenatal alcohol exposure. ND-PAE is the leading cause of intellectual disabilities and neurobehavioral disorders in the developed world and affects as many as 40,000 newborns each year in the United States alone.

In light of the evidence before the Florida courts, Petitioner Donald David Dillbeck exhibits the hallmark features of ND-PAE. Although his case is an extreme example, persons with ND-PAE do exhibit maladaptive behavior and face criminal charges much more often than the general population: 61% of adolescents with FASD and 58% of adults with the disorder come into contact with the criminal justice system. Twenty-three percent are ultimately confined in a

¹ Pursuant to Rules 37.2(a) and 37.6, Amici certify that no party or party’s counsel authored this brief in whole or in part and that no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of Amici’s intent to file this brief more than ten days prior to its due date.

mental hospital and 35% are incarcerated for a crime. Accordingly, FASD United advocates for the education about ND-PAE for law enforcement officials, corrections officers, and the courts as well as urges the courts, law enforcement officials, and corrections officers to become educated about ND-PAE. *Amicus* also urges sentencing authorities to appropriately consider ND-PAE and its effects in making punishment and confinement decisions.

In the context of capital punishment, FASD United maintains that, with respect to blameworthiness, ND-PAE is a disorder without a medical distinction from intellectual disability. FASD United thus further maintains that persons suffering from it should not be executed. This case has important implications for persons with ND-PAE and for the courts as they ensure that the punishments they mete out and administer are consistent with current standards of medical and scientific communities and society's evolving standards of decency.

SUMMARY OF ARGUMENT

This Court has repeatedly held that to effectuate the exemption from execution of the intellectually disabled ("ID"), courts must account for the current medical standard relevant to that inquiry. That standard has recently undergone a shift both related to the relative importance of IQ scores and in the recognition of neurodevelopment prenatal alcohol exposure ("ND-PAE") disorder as being ID-equivalent.

The Florida Supreme Court did not account for this change in the current medical standards as it addressed Petitioner's claim of categorical exemption from punishment. It addressed neither the consensus that ID is best understood without undue emphasis on

a test score nor that ND-PAE is an ID-equivalent disorder.

Properly accounted for, Donald Dillbeck's undisputed ND-PAE diagnosis should exempt him from execution. His pre-natal alcohol exposure was extraordinary, exceeding by more than 40 times the threshold for excess exposure, with his mother drinking dozens of drinks daily during her pregnancy. And his life was marked by the disorder.

This Court should grant review to enforce the Eighth Amendment's requirement of the courts to account for current standards of the medical and scientific communities in assessing developmental disabilities and blameworthiness.

ARGUMENT

I. CURRENT MEDICAL CONSENSUS COLLAPSES ANY RATIONALE FOR DIFFERENTIATING BETWEEN THOSE WITH ND-PAE AND THOSE WITH INTELLECTUAL DISABILITY

A. States Must Account for the Current Medical Consensus to Determine Who They Exempt from Execution

The constitution prohibits executing persons with intellectual disability. *See generally Atkins v. Virginia*, 536 U.S. 304 (2002). At the time the Court announced that protection, intellectual disability generally required a showing that a person had substantially impaired intellectual functioning and deficits in adaptive functioning, with onset during the development period. *Id.* at 308 n.3 (citing AAMR, Mental

Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992) and APA, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)).

In announcing that protection, the Court initially gave states leeway to develop standards for implementing this limitation on punishment, resulting in a leading example of “constitutional experimentation.” Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1314 (2019) (discussing Jeffrey S. Sutton, 51 *Imperfect Solutions: States and the Making of Constitutional Law* 18–20 (2018) and noting that the federal courts benefit from state courts engaging in constitutional questions before the federal courts definitively “decid[e] a federal constitutional issue.”). This was consistent with its approach taken with other categorical exemption from the ultimate punishment. *See Atkins*, 536 U.S. at 317 (“As was our approach in *Ford v. Wainwright*, with regard to insanity, ‘we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.’” quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

Eventually, a consensus emerged that applying the current medical definitions to assess intellectual disability was necessary to avoid an unconstitutional risk of executing someone who was, in fact, categorically excluded from the death penalty. *See Hall v. Florida*, 572 U.S. 701, 704 (2014). Implementing that protection, the Court has required states to implement the current medical consensus on both assessments of intellectual functioning, *see id.* at 724, and deficits in adaptive functioning. *See Moore v. Texas*, 581 U.S. 1, 5–6 (2017).

To determine whether a person has intellectual

disability, courts must account for the current medical understanding of the disorder.

B. States Must Account for the Current Medical Consensus, Which Now Recognizes ND-PAE Encompasses Commensurate Deficits to Intellectual Disability, to Determine Who They Exempt from Execution

Recent advancements in understanding intelligence and fetal alcohol spectrum disorders in general and ND-PAE in particular have led experts in the field away from a use of IQ testing and towards a clinically based model that focuses on adaptive deficits. See James C. Harris & Stephen Greenspan, *Definition and Nature of Intellectual Disability* in Nirbary N. Singh, *Handbook of Evidence Based Practices in Intellectual and Developmental Disabilities* (2016); Christopher Fanning, *Defining Intellectual Disability: Fetal Alcohol Spectrum Disorders and Capital Punishment*, 38 Rutgers L. Rec. 1 (2010); George W. Woods & Stephen Greenspan, *Intellectual Disability as a Disorder of Reasoning and Judgment: The Move Away from Intelligence Quotient Ceilings*, 27 Current Op. in Psy. 110 (2014); Timothy E. Moore & M. Green, *Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System*, 19 Crim. Reports 99 (2004). These advancements have rendered irrelevant, under the current medical definition, the use of IQ testing as a means to exclude from treatment persons with substantial impairments in adaptive functioning with onset during the development period.

They have also newly recognized that ND-PAE and ID are, like Down Syndrome and Fragile X disorder, ID-equivalent conditions, notwithstanding IQ score. Natalie Novick Brown & Stephen Greenspan,

Diagnosing Intellectual Disability in People with FASD: A Function of Which Diagnostic Manual Is Used?, 40 *Behav. Sci. & L.* 31 (2021); Stephen Greenspan, et al., *FASD and the Concept of “Intellectual Disability Equivalence”*, in Monty Nelson & Marguerite Trussler, *Law and Ethics in Fetal Alcohol Spectrum Disorder* (2016). Accounting for these advancements, an IQ score of around 70 is no longer required for persons with ND-PAE for exclusion from execution. *Which Manual?*, *supra*, at 31; Stephen Greenspan, James C.O. Harris, & George W. Woods, *Intellectual Disability Is “A Condition, Not a Number”: Ethics of IQ Cut-offs in Psychiatry, Human Service, and Law*, 1 *Ethics, Med. & Pub. Health* 312 (2015).

ND-PAE is a fetal alcohol spectrum disorder. For diagnosis, a patient must undergo a multidisciplinary assessment conducted by a neuropsychologist, medical doctor, and psychologist. Natalie Novick Brown, et al., *Prenatal Alcohol Exposure: An Assessment Strategy for the Legal Context*, 42 *Int’l J. L. & Mental Health* 144 (2015); Natalie Novick Brown, et al., *A proposed Model Standard for Forensic Assessment of FASD*, 38 *J. Psy. & L.* 383 (2010). A person may be diagnosed with ND-PAE only if there is verified prenatal alcohol exposure and deficits manifesting in childhood that span the neurocognitive, self-regulatory, and adaptive areas. APA, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., text rev.) (2022).

In 2013, in the Fifth Edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual*, ND-PAE was listed as among “Conditions for Further Study,” which encouraged medical professionals to study the disorder and to develop diagnostic

criteria. *Id.* In the intervening decade, researchers heeded this call.

In the intervening years, medical standards have developed to recognize a consensus that ND-PAE as a lifelong disorder that is congenital, manifesting early in childhood and presenting with impairments and support needs that are the same as those with intellectual disability. Stephen Greenspan, et al., *Determining Disability Severity for Fetal Alcohol Spectrum Disorder: Assessing the Extent of Impairment* in Natalie Novick Brown, *Evaluating Fetal Alcohol Spectrum Disorders (FASD) in the Forensic Context: A Manual for Mental Health Practice* (2021). Those similarities hold, even when a person with ND-PAE has an IQ above 75. Natalie Novick Brown, *Fetal Alcohol Spectrum Disorders (FASD): Intellectual Disability Equivalence* in Stephen Greenspan, et al., *Fetal Alcohol Spectrum Disorder in Adults: Ethical and Legal Perspectives* (2019).

Over the last decade, in the context of intellectual disability assessments, there has been a growing consensus against placing undue weight on IQ testing and, instead, focusing on adaptive behavior and executive functioning. Executive functioning and adaptive behavior provide a more realistic paradigm for assessing the impacts of a disorder because they are oriented around real world challenges. This paradigm holds true for normally developing individuals, Emily Gardiner & Grace Iarocci, *Everyday Executive Function Predicts Adaptive and Internalizing Behavior in Children with and Without Autism Spectrum Disorder* 11 *Autism Res.* 284 (2017), as well as autism spectrum disorder, Lorcan Cribb, et al., *Childhood Executive Function Predicts Later Autistic Feature and Adaptive Behavior in Young Autistic People: A 12-Year*

Prospective Study, 47 *J. Abnormal Child Psy.* 1089 (2018), Down syndrome, Camila Sabat, et al., *Different Abilities Needed at Home and School: The Relation Between Executive Function and Adaptive Behavior in Adolescents with Down Syndrome*, 10 *Sci. Rep.* 1683 (2020), and FASD. See Ashley L. Ware, et al., *Executive Function Predicts Adaptive Behavior in Children with Histories of Heavy Prenatal Alcohol Exposure and Attention Deficit/Hyperactivity Disorder*, 36 *Alcoholism: Clinical & Experimental Res.* 1431 (2012); Amy M. Schonfeld, et al., *Executive Functioning Predicts Social Skills Following Prenatal Alcohol Exposure*, 12 *Child Neuropsych.* 439 (2006). In fact, when IQ and executive functioning were recently compared in a study involving children with mild intellectual disability, executive functioning directly predicted adaptive behavior while IQ did not. See Sissel Gravrakmo, et al., *Associations Between Executive Functions, Intelligence and Adaptive Behaviour in Children and Adolescents with Mild Intellectual Disability*, *J. of Intellectual Disabilities* (2022).

The similarities between intellectual disability and ND-PAE are extensive. See Natalie Novick Brown & C.R. Reynolds, *Connecting the Dots: Functional Behavior Evaluation in Fetal Alcohol Spectrum Disorder in Evaluating Fetal Alcohol Spectrum Disorders (FASD) in the Forensic Context*. Beyond the similarities in symptoms and course, treatments also are similar; although neither can be cured, the effects of each are amenable to interventions that mitigate their effects. Stephen Greenspan, et al., *Determining Disability Severity Level for Fetal Alcohol Spectrum Disorder: Assessing the Extent of Impairment in Evaluating Fetal Alcohol Spectrum Disorders (FASD) in the Forensic Context*. Both disorders also have come to be

defined by disordered thinking and an inability to adapt to changing environments. See Anastasia Hronis, et al., *A Review of Cognitive Impairments in Children with Intellectual Disability: Implications for Cognitive Behavioural Therapy*, 56 *British J. Clin. Psy.* 189 (2017); H. Carmichael Olson, et al., *Neuropsychological Deficits in Adolescents with Fetal Alcohol Syndrome; Clinical Findings*, 22 *Alcoholism: Clinical and Experimental Research* 8 (1998-2012). Behaviors associated with these conditions are typified by taking particular courses of action without recognizing or avoiding risk. K. Wyper & J. Pei, *Neurocognitive Difficulties Underlying High Risk and Criminal Behaviour in FASD: Clinical Implications* in Nelson & Trussler, *supra*; Natalie Novick Brown & Stephen Greenspan, *Diminished Culpability in Fetal Alcohol Spectrum Disorders*, 39 *Behav. Sci. & L.* 1 (2021); Lisa Christensen & Bruce L. Baker, *Risk-taking and Delinquent Behaviors Among Youth with and Without Intellectual Disabilities*, 13 *J. Mental Health & Res. in Intellectual Disabilities* 1 (2020). Because these behavioral impairments define both disorders, the emerging medical consensus is that an IQ score should not be the point of emphasis for either diagnosis and that ND-PAE and ID are equivalent disorders. See Greenspan, *The Gradual Move Away*, *supra*, at 10.

II. THE FLORIDA SUPREME COURT FAILED TO ACCOUNT FOR THE CURRENT MEDICAL CONSENSUS THAT ND-PAE IS FUNCTIONALLY EQUIVALENT TO INTELLECTUAL DISABILITY

The Court below did not account for how development in the medical consensus undermines its refusal to extend *Atkins* protections to those with conditions

other than intellectual disability per se, but with developmental disability of indistinguishable blameworthiness. The court below refused to entertain the new medical consensus that ND-PAE is an ID-equivalent disorder and that IQ testing no longer has the weight it once possessed. Instead, it flatly observed that it had long declined to extend *Atkins* to those with conditions other than intellectual disability. Pet. App. 5.

But in light of the current medical understanding, no extension is required. Rather, mere recognition of the equivalence of these two developmental disabilities is needed. ND-PAE is an ID-equivalent disorder, and applying this current medical consensus requires shielding Mr. Dillbeck from execution. The Florida Supreme Court failed to consider, let alone account for, this emergent consensus and, thus, failed to meet the Eighth Amendment's mandate to avoid an intolerable risk of wrongful execution.

III. EXECUTING MR. DILLBECK WOULD DEFY CAPITAL PUNISHMENT'S PENALOGICAL JUSTIFICATION

It is firmly established that “[n]o legitimate penological purpose is served by executing a person with intellectual disability.” *Hall v. Florida*, 572 U.S. 701, 708 (2014) (citing *Atkins*, 536 U.S. at 317, 320). The Eighth Amendment prohibits executing the intellectually disabled because doing so can serve neither deterrence nor retribution. *Id.* at 709. As set forth above, the medical and scientific rationale for this prohibition under the Eighth Amendment applies as much to the intellectually disabled as it does to those, like Mr. Dillbeck, who are developmentally disabled with the mental defect of ND-PAE.

Expert reports on Mr. Dillbeck issued May 1, 2019, establish that he plainly satisfies—indeed, exceeds—all criteria for ND-PAE. (PCR4 84). Mr. Dillbeck’s forensic psychological evaluation specifically established: (1) his gestational alcohol exposure *exceeded by more than 40 times* the monthly threshold for “more than minimal” exposure, given that his mother consumed 18-to-24 beers *daily* for the duration of her pregnancy; (2) he possessed four neurocognitive impairments in the categories of intellectual/IQ discrepancies, academic achievement, verbal learning/memory, and visuospatial construction; (3) he was impaired in executive functioning; (4) he suffered three adaptive impairments regarding socialization, daily living skills, and communication; (5) he had early childhood speech, language, and learning deficits establishing childhood onset of clinically significant impairments; (6) his impairments caused secondary disabilities, namely (a) school disruption, (b) mental health problems, (c) substance abuse, (d) negative contact with the law, and (e) confinement; and (7) other possible causes of his dysfunction were ruled out. (PCR 84-85).

Experts also conducted quantitative electroencephalogram (qEEG) brain mapping of Mr. Dillbeck, which applies “digitalization/computerized methods to the analysis of the well-established practice of studying the brain’s electrical activity.” (PCR4 151). This form of mapping permits the quantification of brain wave testing. (*Id.*). Broadly, the point of a qEEG in relation to Mr. Dillbeck’s legal position is to present medical findings speaking to the question of his blameworthiness for his actions. (PCR4 153). To that end, this brain mapping provided that Mr. Dillbeck’s “qEEG as a whole is clearly and markedly abnormal,” and

“showed ‘dysregulation’ (a general term conveying abnormalities of various types . . .) on both the right and left sides of the brain and affecting all of its major sections: the frontal, temporal, parietal and occipital lobes.” (PCR4 156).

Further, the analytic technique applied to the qEEG “showed a particular abnormality located at the left inferior frontal lobe. This area of the brain is vital in the following: Executive, Functioning, Abstract Thinking, Language Expression, Sequential (i.e., strategic) Planning, mood *control* and social skills.” (PCR4 156-57 (emphasis in original)). Furthermore, every single qEEG-based indicia of brain connectivity were “abnormal” and “impaired in every one of the brain’s four regions.” (PCR4 157).

In sum, Mr. Dillbeck’s brain mapping data and analysis leave nothing to the imagination, resoundingly confirming the forensic psychological evaluation’s ND-PAE diagnosis. (*Id.*).

CONCLUSION

For all of the foregoing reasons, *amicus* respectfully submits that the Court should grant the petition.

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February 2023