No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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

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QUESTIONS PRESENTED -- CAPITAL CASE

1. In light of the medical community's recent consensus that Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure is not only functionally similar to Intellectual Developmental Disability, but uniquely identical in both etiology and symptomatology, does it violate the Eighth or Fourteenth Amendment for a state court to foreclose all meaningful review of a defendant's claim that he is entitled to exemption from execution under *Hall v. Florida*'s requirement that state courts deciding whether to apply the protections of *Atkins v. Virginia* must be guided by the views of the medical community?

2. Because "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death[,]" *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), does the Eighth Amendment bar the execution of a defendant who was not sentenced to death by a unanimous jury?

NOTICE OF RELATED CASES

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

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

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

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

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

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

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

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

Federal Habeas Proceedings

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

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

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

First Successive Postconviction Proceedings:
Circuit Court of Leon County, Florida
Dillbeck v. State, 1990 CF 2795
Judgment Entered: June 5, 2014 (denying postconviction relief)

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

Second Successive Postconviction Proceedings:
Circuit Court of Leon County, Florida
Dillbeck v. State, 1990 CF 2795
Judgment Entered: April 11, 2017 (denying postconviction relief)

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

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

Third Successive Postconviction Proceedings:
Circuit Court of Leon County, Florida
Dillbeck v. State, 1990 CF 2795
Judgment Entered: January 30, 2020 (denying postconviction relief)

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

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 20-7665)
Donald David Dillbeck v. Florida, 141 S. Ct. 2733 (2021)
Judgment Entered: June 7, 2021

Fourth Successive Postconviction Proceedings:
Circuit Court of Leon County, Florida
Dillbeck v. State, 1990 CF 2795
Judgment Entered: February 2, 2023 (denying postconviction relief and stay of execution)

Florida Supreme Court (No. SC23-190) (related to appeal of postconviction denial)
(No. SC23-220) (related to state habeas petition)
Dillbeck v. State, 2023 WL 2027567 (Fla. Feb. 16, 2023)
Judgment Entered: February 16, 2023 (affirming denial of postconviction relief and denying petition for habeas corpus)

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

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

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DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at __ So. 3d __, 2023 WL 2027567, and is reprinted in the Appendix (App.) at A.[1]

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 16, 2023. App. A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . 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.

[1] Citations to non-appendix material from the record below are as follows: References to the direct appeal record of Mr. Dillbeck's trial are designated as "R. __". References to the record of Mr. Dillbeck's postconviction proceedings are designated as "PCR __". References to the record of Mr. Dillbeck's first successive postconviction proceedings are designated as "PCR2 __". References to the record of Mr. Dillbeck's second successive postconviction proceedings are designated as "PCR3 __". References to the record of Mr. Dillbeck's third successive postconviction proceedings are designated as "PCR4 __". References to the record of Mr. Dillbeck's fourth successive postconviction proceedings are designated as "PCR5 __" (from the initial submission of February 1, 2023). References to the supplemental record of Mr. Dillbeck's fourth successive postconviction proceedings are designated as "S-PCR5 __". All other references are self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE

I. INTRODUCTION

Donald Dillbeck was born amidst "hell" (R. 2262). His birth mother, Audrey Hosey, drank 18-24 beers per day, every day, for the duration of her pregnancy (PCR5 448). Far exceeding the diagnostic threshold of "more than minimal" consumption, *id.*, Ms. Hosey's gestational alcohol use had a catastrophic effect on Mr. Dillbeck's intellectual and adaptive functioning, causing congenital, clinically significant impairment which manifested in childhood and spans the neurocognitive/intellectual, self-regulative, and adaptive realms (PCR5 467-68, 470).

That Mr. Dillbeck suffers from Neurobehavioral Disorder associated with Prenatal Alcohol Exposure (ND-PAE) is thoroughly medically documented, unrebutted, and factually beyond dispute.[2] Although ND-PAE is a lifelong condition and accordingly has not changed, the medical and scientific understanding related to ND-PAE *has*. At the time of trial in 1991, "medical and scientific understanding of the cognitive and behavioral effects of fetal alcohol exposure was not nearly as advanced" and "there were no clinically accepted studies equating this condition to intellectual disability." (PCR5 757). Now, however, the medical community recognizes that ND-PAE "is well-deserving of being considered a developmental disability under the rubric 'ID-equivalence.'" (PCR5 621).

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[2] (*See, e.g.*, R. 2261; PCR5 415-593) (detailing diagnostic findings resulting from a three-pronged assessment by leading experts in the field of fetal alcohol spectrum disorders, and corroborative opinions and testimony confirming that Mr. Dillbeck satisfies the clinical criteria for ND-PAE).

Mr. Dillbeck has been attempting to tell the story of his impairments since 1991. When he did so at his trial, he suffered for presenting a claim that was "ahead of its time." After a non-unanimous jury recommended death, the court relied on its belief that the science related to fetal alcohol exposure was underdeveloped to refuse to give it any significant weight in determining whether to impose the jury's recommendation (R. 3169). Since that time, as the field of medicine has progressed, Mr. Dillbeck has continually attempted to litigate the impact of new scientific knowledge as it pertains to his condition, now known as ND-PAE. With every attempt, the state courts have weaponized the fact that Mr. Dillbeck was "right too soon" to procedurally bar him from meaningful consideration of that new science, and to ignore the wealth of evidence he has proffered to show the meritoriousness of his underlying claims.

This tragic irony means that, without this Court's intervention, Mr. Dillbeck will be executed without any court having substantively addressed his claim that evolving standards of decency warrant a lesser punishment due to his profound, lifelong, and intellectual disability-equivalent impairments. That outcome, especially when viewed in conjunction with the fact that Mr. Dillbeck's jury sentenced him to death by a now-unacceptable margin, is not constitutionally permissible.

II. PROCEDURAL HISTORY

A. Trial

In 1991, Mr. Dillbeck was tried on charges of first-degree murder, armed robbery, and burglary. *Dillbeck v. State*, 643 So. 2d 1027, 1028 (Fla. 1994). He

attempted to show that the effects of his prenatal alcohol exposure (then understood as Fetal Alcohol Effects) rendered him unable to form the requisite *mens rea* to commit premeditated murder; however, the trial court erroneously barred presentation of this evidence (R. 1696-98, 1713, 1947-56, 1968, 2431, 2439, 2452, 2840, 3058).

After Mr. Dillbeck was found guilty, a penalty phase was conducted. Mr. Dillbeck's biological mother (Audrey Hosey) was deceased,[3] but Mr. Dillbeck's biological father (Donald Hosey) testified about Ms. Hosey's alcohol consumption while pregnant with Mr. Dillbeck. Although Ms. Hosey had not drunk much during her pregnancy with Mr. Dillbeck's older sister, Cindy, she drank between three and four six-packs of beer per day, every day, throughout her pregnancy with Mr. Dillbeck (R. 2261).[4]

Mr. Dillbeck's biological sister, Cindy, testified that Mr. Dillbeck was "very slow" and unable to learn basic skills such as tying his shoes (R. 2252). He was frequently mocked for his slowness, including by the children's foster family once they were removed from Ms. Hosey's care (R. 2252-53). Mr. Dillbeck's deficits ultimately led to the siblings' separation, as the family that adopted Cindy would not take Mr. Dillbeck due to his slow learning and disability (R. 2249-50; 2285; 2551-52).

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[3] Audrey Hosey is reported to have committed suicide by stepping directly into oncoming traffic on a busy highway after walking out of a mental health facility.

[4] After Mr. Dillbeck's birth, Ms. Hosey's drinking further increased, leading to conflict between Mr. and Ms. Hosey because "all the money" was going to alcohol instead of rent and food (R. 2261-62). Ms. Hosey's violent reaction to Mr. Hosey's attempts to reallocate the family finances led to Mr. Hosey leaving the family due to fear for his life (R. 2262-64).

Additionally, the defense presented expert testimony related to Mr. Dillbeck's prenatal alcohol exposure. Dr. Ione Thomas,[5] a physician and geneticist with expertise on fetal alcohol syndrome, explained that fetal alcohol effects is diagnosed when a syndrome cannot be proven but there is evidence of *in-utero* exposure, leading to "significant" abnormalities in neurobehavioral testing (R. 1690-92). Dr. Thomas testified that persons with fetal alcohol effects may have either normal or diminished intelligence, impulsivity, difficulty controlling reactions to circumstances, poor decision making, and difficulty in school (R. 1696-98). Neuropsychologist Dr. Frank Wood testified that Mr. Dillbeck had a pattern of congenital cognitive deficiencies consistent with fetal alcohol effects, including certain neuropsychological test results placing him in the first percentile and indicating permanent brain damage (R. 2434, 2439-40, 2445-46, 2453). He explained that Mr. Dillbeck's brain does not effectively process or understand what occurs in interpersonal or social situations, particularly intense or fast-moving scenarios (R. 2452). Dr. Robert Berland confirmed that Mr. Dillbeck was brain damaged and had a significant discrepancy ("split") in his IQ score (R. 2366-69). Because of his impairments, Mr. Dillbeck is likely to misperceive, think things are happening that are not, and struggle with an inability to control his reactions or reason through situations (R. 2390-91).

Mr. Dillbeck's penalty phase took place in the context of Florida's previous sentencing statute, in which the jury was tasked with rendering an advisory verdict

[5] Dr. Thomas' testimony was presented through use of a videotaped deposition (R. 2492-93).

and a judge was responsible for making the ultimate sentencing determination. The judge was required to give the jury's recommendation great weight but could override a life recommendation. In rendering a sentencing verdict, the jury was not required to be unanimous but was required to find (1) whether at least one aggravating factor was present in the case, (2) whether sufficient aggravating factors exist, (3) whether the aggravating factors outweigh the mitigating factors, and (4) whether the defendant should be sentenced to life or death (R. 2442-47). Although the jury was not required to specify how individual jurors voted on each question, the jury's 8-4 vote death vote meant that four jurors concluded at least one of the four requisite findings was not proven by the State. *Dillbeck*, 643 So. 2d at 1028.

Following the jury's non-unanimous recommendation, the trial court sentenced Mr. Dillbeck to death. *Id*. In so doing, the court found five aggravating circumstances. *Id.* at n.1. The court also found as statutory mitigation that Mr. Dillbeck had committed the murder while substantially impaired. *Id.* at n.2.

In reaching its sentencing decision, the court rejected or gave low weight to Mr. Dillbeck's asserted nonstatutory mitigating factors (R. 3168-71). Regarding the evidence of fetal alcohol effects, the court found:

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

(R. 3169) (emphasis added). The court found the evidence insufficient to establish the statutory mental health mitigator based on extreme mental disturbance, and also declined to attach much weight as a non-statutory mitigating factor. *Id.*

B. Relevant Post-trial Proceedings

On direct appeal, Mr. Dillbeck challenged the trial court's failure to allow guilt-phase presentation of his fetal alcohol exposure. The Florida Supreme Court found this to be error, noting that the trial court had admitted the same evidence in the penalty phase and found in its sentencing order that the testimony established Fetal Alcohol Effects. Likening the issue to the then-available voluntary intoxication defense, the Florida Supreme Court explained: "Just as the harmful effect of alcohol on the mature brain of the adult imbiber is a matter within the common understanding, so too is the detrimental effect of this intoxicant on the delicate, evolving brain of a fetus held *in utero*." *Dillbeck*, 643 So. 2d at 1029. Although that court could "envision few things more certainly beyond one's control than the drinking habits of a parent prior to one's birth[,]" *id.*, it held the error harmless. *Id.* at 1029-30. Mr. Dillbeck's conviction and sentence were affirmed, and subsequently upheld during initial postconviction proceedings.

In 2016, this Court held that the statute under which Mr. Dillbeck was sentenced to death violated the Sixth Amendment because only the sentencing judge, rather than a jury, was required to find the existence of at least one aggravating circumstance. *Hurst v. Florida*, 577 U.S. 92 (2016). In the wake of *Hurst*, the Florida legislature adopted a new capital sentencing statute that is still in effect today. Under

the current statute, the sentencing jury is required to make the same findings as to whether aggravation exists, whether it is sufficient, whether it outweighs the mitigation, and whether the defendant should be sentenced to death, but these decisions must now be unanimous and the failure to return a unanimous death verdict is binding on the sentencing judge. § 921.141, Fla. Stat. (2022). After the Florida Supreme Court extended *Hurst* and held it partially retroactive, Mr. Dillbeck raised claims that his death sentence violated the Sixth and Eighth Amendments under the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018).[6] Mr. Dillbeck's claims were denied on non-retroactivity grounds. *Id*. at 559.

In 2018, during the course of separate litigation, Mr. Dillbeck was found to meet the clinical criteria for ND-PAE, a diagnosis not in existence at the time of Mr. Dillbeck's trial. Mr. Dillbeck moved for postconviction relief based on newly discovered evidence (PCR4 20-27). Despite the State's concession that it would be an "extraordinar[ily] high standard" to expect a capital litigator to be aware of every possible diagnosis as soon as it is published, *id*. at 353, the trial court summarily denied Mr. Dillbeck's motion on the State's asserted untimeliness grounds. *Id*. at 353-54. Alternatively, the court assumed without conducting any further fact-finding that because certain information related to prenatal alcohol exposure had been presented at the penalty phase and referenced in the sentencing order, evidence related to ND-

[6] The Florida Supreme Court has since overruled the aspects of *Hurst v. State* that went beyond this Court's opinion in *Hurst v. Florida*. *See State v. Poole*, 297 So. 3d 487 (Fla. 2020).

PAE would not have made a difference. *Id*. at 374. The Florida Supreme Court affirmed the time-bar. *Dillbeck*, 304 So. 3d 286, 287-88 (Fla. 2020).

On January 23, 2023, Mr. Dillbeck's execution was scheduled for February 23, 2023. On January 30, 2023, Mr. Dillbeck filed a motion for postconviction relief, arguing in relevant part that his execution would violate the Eighth and Fourteenth Amendments due to a new medical consensus that ND-PAE is an intellectual disability-equivalent condition (PCR5 326-336). Following a case management conference held on February 1, 2023, the trial court denied relief on February 2, 2023—again without holding an evidentiary hearing or allowing further factual development (PCR5 1031-51).

On February 10, 2023, Mr. Dillbeck presented concurrent filings in the Florida Supreme Court: 1) appealing the denial of postconviction relief; 2) petitioning for state habeas corpus relief; 3) seeking oral argument; and 4) moving to stay his execution. In the state habeas petition, Mr. Dillbeck raised a claim that his death sentence violates the Eighth Amendment because four jurors voted to spare his life. On February 16, 2023, the Florida Supreme Court denied all requested relief. App. A.

Specifically with regard to Mr. Dillbeck's claim that his ND-PAE warranted exemption from execution, the Florida Supreme Court found it either untimely and procedurally barred as newly discovered evidence, or not cognizable in a successive postconviction motion. App. A at 7, 9-11. Alternatively, without addressing ID-

equivalence, the Florida Supreme Court found that *Atkins* protections don't apply to "individuals with other forms of mental illness or brain damage." App. A at 11.

III. ADDITIONAL RELEVANT FACTS

ND-PAE was first categorized in the 2013 DSM-5, "in a section of the manual called 'Conditions for Further Study,' which laid out proposed criteria for conditions where future research was encouraged to potentially establish diagnoses." (PCR5 566). Over the next several years, "despite the 'proposed' status of ND-PAE and its diagnostic criteria, researchers in the United States and beyond slowly began using the condition and its guidelines[.]" (PCR5 567). It was not until 2018/2019 that ND-PAE criteria "had become widely accepted by FASD professionals in the forensic [and] the research and clinical fields." (PCR5 567).

Prior to this general acceptance in 2018/2019, "all that attorneys or forensic experts in non-FASD fields could have been expected to know about ND-PAE was DSM-5's view that the condition was not yet available as an accepted mental health diagnosis." (PCR5 567). Indeed, any attorney keeping up with the newest DSM publications would have been advised by "the text itself" that "ND-PAE was not officially recognized and could not be used for clinical purposes." (PCR5 567).

By 2021, however, "[d]espite DSM-5's odd bifurcation…diagnosing ND-PAE for the [central nervous system] dysfunction in FASD ha[d] become the standard of practice in the mental health field." (PCR5 612).

On May 10, 2018, incidental to an evaluation for Mr. Dillbeck's juvenile case, Dr. Faye Sultan noted indications of a fetal alcohol spectrum disorder ("FASD"), an

umbrella term for a variety of conditions—some, like fetal alcohol syndrome, previously known; others, like ND-PAE, only recently recognized—that result from prenatal alcohol exposure. Consistent with standard diagnostic practices, Mr. Dillbeck underwent a multidisciplinary evaluation conducted by pre-eminent FASD experts.[7] Final reports from the experts were issued on May 1, 2019, concluding that Mr. Dillbeck meets the diagnostic criteria for ND-PAE and finding that "there is no explanation other than ND-PAE that adequately explains [Mr. Dillbeck's] lifelong functioning." (PCR5 470).

ND-PAE is a specific form of central nervous system dysfunction resulting from *in utero* alcohol exposure. Diagnosis requires the presence of several clinically significant factors, including: "more than minimal"[8] exposure to alcohol during gestation; impaired neurocognitive functioning (which includes intellectual impairment); at least two adaptive impairments; and childhood onset.[9]

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[7] These experts include Dr. Natalie Novick Brown, a clinical psychologist; Dr. Paul Connor, a neuropsychologist; and Dr. Richard Adler, a medical doctor. Additionally, Dr. Wes Center prepared a report based on the results of quantitative electroencephalogram (qEEG) brain mapping, and Dr. Sultan provided additional life history information based upon her evaluation.

[8] Over 13 drinks per month, or over 2 drinks on a single occasion (PCR5 448).

[9] Additional required diagnostic criteria include at least one self-regulation impairment (in Mr. Dillbeck's case, impaired executive functioning); clinically significant distress or impairment in social, occupational, or other important areas of functioning (in Mr. Dillbeck's case, causing five secondary disabilities including school disruption, mental health problems, substance abuse, trouble with the law, and confinement); and the disorder not being better explained by other causes (in Mr. Dillbeck's case, all other causes were ruled out by brain mapping and life history examination) (PCR4 84-85).

Mr. Dillbeck not only met, but "exceed[ed,] diagnostic requirements for ND-PAE" (PCR4 84). Most relevant to intellectual disability-equivalence, his mother's alcohol consumption was over 40 times the monthly threshold for "more than minimal" gestational exposure; he suffered from neurocognitive impairments including intellectual/IQ discrepancies, academic achievement, verbal learning/memory, and visuospatial construction; he presented with adaptive impairments in socialization, daily living skills, and communication; and, the impairments were of childhood onset, as evidenced by early childhood speech, language, and learning deficits. *Id*.

Results of qEEG testing indicated widespread and profound neurological damage throughout Mr. Dillbeck's brain, with particular abnormality in the portions of the brain most responsible for regulating planning, mood, judgment, behavior, impulse control, and intentionality. *Id*. at 83, 150, 156-57, 165. These results showed Mr. Dillbeck to be developmentally disabled and biologically predisposed to overreact to stress. *Id*. at 34. Neuropsychological testing also revealed more pronounced deficiencies in abstract and unstructured situations, indicating that Mr. Dillbeck functions better in controlled settings, such as prison, than in the broader community where less structure exists. *Id*. at 77-78.

Mr. Dillbeck's scores on various measures were "consistent with intellectual disability." *Id*. at 70, 77, 84, 90. Dr. Novick Brown noted that the DSM-5 "recognizes the predictive relationship between executive functioning and adaptive behavior in its criteria for intellectual disability[,]" *id*. at 63, and that individuals with ND-PAE

who have average to borderline IQs "are no different functionally than those with intellectual disability (ID) because their adaptive functioning typically falls approximately 2 standard deviations below full-scale IQ." *Id*. at 89.

FASDs and ID are now considered "tied for severity" by preeminent experts in the field, although FASDs may "even exceed[] complexity scores for ID[.]" (PCR5 613). Whereas individuals with ID (but not ND-PAE) have IQ scores which tend to accurately reflect their level of intellectual and adaptive functioning, clinicians and researchers have unambiguously found that the IQ scores of someone with ND-PAE *do not* accurately reflect that individual's full range of deficits.

> Put more bluntly, a defendant with FASD whose full-scale IQ is 100 may function adaptively like someone with an IQ of 70. The significant discrepancy between IQ and adaptive functioning is a hallmark characteristic in FASD. Moreover, studies have found that adaptive deficits in children with FASD become more pronounced over the developmental years due to slow brain development in childhood, particularly in the frontal lobes. Thus, adult defendants with FASD are neurologically as well as adaptively equivalent to children. For example, research has found that adults with FASD function adaptively like seven year olds regardless of IQ.

Jerrod M. Brown, et al., *Fetal Alcohol Spectrum Disorders (FASD) and competency to stand trial (CST)*, 52 Intl. J. L. & Psychiatry 19, 23 (2017) (citations omitted); (*see also* PCR5 568). This means that adaptive deficits are *more severe* in ND-PAE than in ID. *Id*.

Further, there has been a dramatic shift in how the medical and scientific community view IQ as a measure of intellectual functioning. Reliance on full-scale IQ scores is now viewed as "an outmoded concept" that "does not begin to capture the extent of someone's intellectual abilities or impairments." (PCR5 569); Greenspan, S.

& Novick Brown, N., *Diagnosing Intellectual Disability in People with FASD*, 40 Behav. Sci. Law 31, 37 (2021). The DSM-5 itself recognizes that in terms of evaluating intellectual disability, "when an individual has very deficient adaptive functioning, then one should be able to use executive functioning deficits to satisfy prong one [of ID diagnostic criteria], even when full-scale IQ is above the usual ceiling." *Id*. at 38.

As a result of this new understanding, leading experts in the field have shifted away from numbers-based determinations and toward a clinical presentation-based "ID-equivalency" model (PCR5 569-70). Under this model, services, supports, and protections are implemented for individuals who, due to specific conditions involving cognitive impairment and adaptive deficits, clearly operate within the functional equivalence of ID despite IQ scores outside the previously demarcated range. *Id*. at 567-68, 629-54. Examples of ID-equivalent conditions—notwithstanding IQ score—include Down Syndrome, Fragile X Syndrome, and ND-PAE (PCR5 570).

Regarding ND-PAE, the medical community recognizes that "there are few disorders more related to ID (both in causing that disorder and resembling it functionally) than FASD". *Id*. at 624; *see also id*. at 762 (characterizing ND-PAE as "more severe than ID"). Although "mean IQs for specific FASD diagnoses fall[] in the borderline to average ranges," Brown et. al at 22, ND-PAE is not simply analogous to ID, but uniquely indistinguishable:

> *As defined in DSM-5, ND-PAE is identical to ID except for confirmation of prenatal exposure to alcohol. In DSM-5, both ND-PAE and ID include "deficient intellectual functions,"* which are defined almost exclusively as executive rather than IQ impairments: "deficits in general mental abilities, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from

> experience"….Both conditions also involve significant adaptive dysfunction, which is defined in ID….In ID, diagnostic criteria require one or more adaptive deficits across multiple environments such as home, school, work, and community; in ND-PAE, two or more adaptive deficits are required. In both conditions, cognitive and adaptive impairments must manifest during the developmental period.

Id. at 21 (citing DSM-5) (emphasis added).

The medical community recognizes that ND-PAE "is brain-based, manifests congenitally or in early childhood, is of lifelong duration, and in terms of its definitional elements, has an incompetence pattern and risk-based support needs that are essentially identical" to ID (PCR5 621). As opposed to other disabling cognitive and mental health conditions that are devastating but not ID-equivalent, ND-PAE is "a logical candidate for Intellectual Disability Equivalence" for three primary reasons:

> (a) it stems directly from brain impairment at birth; (b) people with ND-PAE have adaptive deficits and support needs not only similar but identical with those seen in intellectual disability, and (c) despite significantly deficient adaptive functioning, most individuals with ND-PAE have full-scale IQ scores that are too high to qualify for an intellectual disability diagnosis. As such, people with ND-PAE are among the most victimized by the current practice of rigid adherence to full-scale IQ cutoffs.

(PCR5 568).

Whereas IQ cutoffs used to be *de rigueur* in determining which individuals were deserving of categorical protections, the medical community now urges against "falling into a conventional trap of relying on a full-scale IQ or some other arbitrary indicator of a single dimension of impairment, one that does not translate adequately" in capturing the extent of disability (PCR5 621). Importantly, as "IQ scores of those with ND-PAE reflect performance in highly structured test settings with considerable

examiner guidance, such scores do not reflect how brain damage in affected persons manifests in everyday behavior in the unstructured real world." (PCR5 568).

The extent of disability is profound. Individuals with ND-PAE "often are unable to improve adaptive functioning over time and frequently cannot live independently in society as adults" due to "increasingly delayed [adaptive development] as age related societal expectations increase, resulting in adaptive behavior that diminishes over time[.]" (PCR5 618).

Ultimately, "a growing consensus has emerged in the fields of both intellectual disability and ND-PAE that it is executive function capacity and not IQ that directly affects everyday adaptive functioning in persons with [ND-PAE]." (PCR5 569). Now,

> the medical and scientific communities have shifted from a numbers-based approach to a clinical presentation-based conceptualization in the definition and diagnosis of intellectual disability. The brain pathology that makes intellectual disability just that—a disability—manifests in complex and variegated manners that cannot be captured by a test score with limited content validity. This pathology occurs in equal manner and force in individuals with ND-PAE, whose functioning in the world cannot be meaningfully distinguished from intellectual disability.

(PCR5 570).

REASONS FOR GRANTING THE WRIT

I. MR. DILLBECK MUST BE ALLOWED A MEANINGFUL OPPORTUNITY TO DEMONSTRATE THAT HE IS ENTITLED TO EXEMPTION FROM EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In *Atkins v. Virginia*, this Court held that the Eighth Amendment prohibits the execution of individuals with intellectual disability, instructing that "the lesser

culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U.S. at 304, 319 (2002).

As a result of the cognitive and adaptive impairments caused by Mr. Dillbeck's ND-PAE, a condition recognized by the medical community as intellectual disability ("ID")-equivalent, Mr. Dillbeck embodies the lessened culpability described in *Atkins*:

> *[T]he mental defect in FASD makes ND-PAE equivalent to ID* in terms of the very same factors that compelled the Court in *Atkins* to categorically exempt defendants with ID from the death penalty…*[T]here is no empirical difference between FASD and ID* in terms of impaired capacity to reason and control impulses or in terms of impaired capacity to successfully navigate the adjudication process. In other words, *ID and FASD are equivalent with respect to every metric established by the Supreme Court for diminished responsibility*.

(PCR5 769) (emphasis added). Executing Mr. Dillbeck without first providing meaningful access to the courts to demonstrate that the death penalty is disproportionate to his culpability would violate the Eighth Amendment prohibition on cruel and unusual punishment.

Furthermore, excluding Mr. Dillbeck from the group of persons constitutionally protected from execution by the Eighth Amendment without first allowing him the opportunity to prove his ID-equivalence would violate the Equal Protection Clause of the Fourteenth Amendment. In terms of promoting a legitimate governmental end (here, delineating who is subject to, or exempt from, execution) there is no meaningful distinction between the reduced capacity Mr. Dillbeck has proffered and individuals with identical symptoms who have an ID diagnosis.[10]

[10]*See* RONALD D. ROTUNDA AND JOHN E. NOWACK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.2(a), 300 (4th ed. 2007) (describing Equal

A. Under the Federal Constitution, Florida State Courts May Not Ignore Evidence of a Medical Consensus Recognizing ND-PAE as Uniquely Equivalent and Functionally Identical to Intellectual Disability

Although *Atkins* generally permits states to develop their own procedures for determining which capital defendants are categorically exempt from execution, 536 U.S. at 317, its progeny mandate that "in determining who qualifies[,]" states must take into account "the medical community's opinions." *Hall v. Florida*, 572 U.S. 701, 710, 723 (2014). Although the "legal determination" is "distinct from a medical diagnosis…it is informed by the medical community's diagnostic framework." *Id*. at 721. Importantly, "the medical standards used to assess that disability constantly evolve as the scientific community's understanding grows." *Bourgeois v. Watson*, 141 S. Ct. 507, 508-09 (2020) (Sotomayor, J., dissenting from denial of certiorari) (citing *Moore v. Texas*, 581 U.S. 1, 20-21 (2017)).

Mr. Dillbeck's ND-PAE exemplifies the legal and moral reasoning of *Atkins*. Individuals with identical, congenital "disabilities in the areas of reasoning, judgment, and control of their impulses…do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. As a uniquely ID-equivalent condition, ND-PAE causes widespread brain dysfunction which originates *in utero*, immutably impairs functioning, and impedes development of the requisite level of culpability to justify imposition of the death penalty. This

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Protection Clause classification analysis); (*see also* PCR5 355) (automatically withholding *Atkins* protections from individuals with ID-equivalent deficits violates equal protection).

dysfunction is of a different origin, breadth, and impact than other, non-ID-equivalent forms of brain damage or serious mental illness.

As with ID, individuals with ND-PAE "bear no responsibility for their disorder," and the condition "explains both *cause and effect* regarding thinking and behavior in criminal acts." (PCR5 768). The hallmark cognitive and behavioral impairments cause poor memory, misunderstanding cause-and-effect, and trouble interpreting concepts; this leads to making the same mistake multiple times, which frequently leads to trouble with the law and vulnerability within the legal setting (such as panicking during encounters with police or falsely claiming to understand legal rights) (PCR5 656-57).

In capital cases with a defendant suffering from ND-PAE, as with ID and other conditions requiring categorical exemption from execution,

> the risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," … is enhanced…by the lesser ability of [these defendants] to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors….[They] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted lack of remorse for their crimes.

Atkins, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605) (1978)). Indeed, as with other categorically-exempt conditions, the characteristics inherent to ND-PAE are often mistakenly viewed as aggravating rather than mitigating.[11] This

[11] *See Roper v. Simmons*, 543 U.S. 551, 573 (2005) (finding an unacceptable risk that aggravating facts of a crime would overpower age-based mitigation and "[in] some cases a defendant's youth may even be counted against him."); *Atkins*, 536 U.S. at 320-21 ("reliance on mental retardation as a mitigating factor can be a two-edged sword"). *See also* (PCR5 458, 460, 472).

unacceptable risk materialized in Mr. Dillbeck's case, where—although trial counsel attempted to contextualize his condition to the extent possible under then-limited scientific understanding of fetal alcohol exposure—the trial court's imposition of death relied on misconceptions regarding the condition:

> The most compelling evidence of mitigating circumstances is with regard to the fetal alcohol effect which resulted in Defendant's borderline normal intelligence level and Defendant's lack of impulse control. When Defendant's borderline normal intelligence level is considered with other evidence it simply becomes insignificant in the overall picture. The Defendant's ability to play chess, to accumulate 12 hours of college credits, to perform work so that a supervisor will describe him as "one of the best inmates I'd ever worked" and to formulate a plan for escape which took years to implement far outweigh any mitigating effect of his low intelligence level.
>
> The claim of a lack of impulse control does not stand when considering Defendant's exemplary record of only two disciplinary reports in eleven years of incarceration, a large portion of which was spent in the most violent institution in the state corrections system. Surely, if Defendant had any difficulty in controlling his impulses his prison record would be substantially different.

(R. 3172). *But c.f. Moore*, 581 U.S. at 16 ("Clinicians, however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is.") (quoting DSM-5 at 38).[12] As the *Atkins* Court recognized, categorical exemption is necessary to protect against—or, in Mr. Dillbeck's case, to remedy—these unacceptable risks.

[12] Contrary to the trial court's finding, ND-PAE, like ID, is consistent with a minimal prison disciplinary history. *See Atkins*, 536 U.S. at 318 ("in group settings [individuals with ID] are followers rather than leaders."); (PCR5 456) (Mr. Dillbeck's "behavior tended to improve significantly in direct proportion to the amount of structure and guidance in his environment – a tendency that is commonly observed in FASD.")

In evaluating whether Mr. Dillbeck should be exempt from execution due to the profound effects of his ND-PAE, evolving medical principles and constitutional standards of decency do not support tethering such a determination to a specific IQ score. "[I]ntellectual disability is a condition, not a number[,]" 572 U.S. at 723. In the context of ID, the *Hall* Court recognized the medical community's increasing disfavor of rigid IQ cutoffs, finding that such a practice "conflicts with the logic of *Atkins* and the Eighth Amendment." 572 U.S. at 720-21. The state courts' refusal to consider opinions of the medical community violates this Court's Eighth Amendment jurisprudence.

B. Without This Court's Intervention, Florida's Inadequate Procedural Bars Would Foreclose Any Meaningful Opportunity for a Condemned Individual to Show That Evolving Standards of Decency Render Them Constitutionally Exempt from Execution

"The Eighth Amendment prohibits certain punishments as a categorical matter." *Hall*, 572 U.S. at 708. Categorical bans exist to protect both the individual as well as the interests of society. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (Eighth Amendment-based categorical exemption protects not only the death-exempt individual but "the dignity of society itself from the barbarity of exacting mindless vengeance[.]") No state-law waiver provision can trump this constitutional prohibition, and death-sentenced individuals "must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724.

Just as it would be unconstitutional for the State to invoke the failure to timely raise an Eighth Amendment challenge as justification to execute individuals subject to other categorical exemptions or exclusions, *see, e.g., Roper v. Simmons*, 543 U.S.

551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008), so too would it be unconstitutional to execute an individual subject to *Atkins* protection on the grounds that he failed to raise his claim at the "appropriate" procedural time. *See Sawyer v. Whitley*, 505 U.S. 333 (1992) (courts may hear an otherwise-defaulted claim upon requisite showing of ineligibility for the death penalty); *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (same). Because Mr. Dillbeck's disability warrants categorical exemption from execution, no procedural or time bar applies, and merits review is appropriate.

Even if categorical exemption claims may be subject to a procedural bar, no bar exists in this case. Mr. Dillbeck has consistently litigated the issue of his prenatal alcohol exposure (and resulting condition) to the fullest extent allowed by the previously-limited scientific understanding regarding ND-PAE and its ID-equivalence.

When, in 2018-2019, the precise diagnosis of Mr. Dillbeck's condition (ND-PAE) was established via general acceptance by the medical community, Mr. Dillbeck promptly litigated its impact under the only legal mechanism then available to him: newly discovered evidence pursuant to Fla. R. Crim. P. 3.851 (*See generally* PCR5 673-98); (*see also* PCR5 707) ("Mr. Dillbeck was so seriously affected in the womb [by prenatal alcohol exposure] that he has always functioned as a person with an intellectual disability"); *id*. at 709 ("the experts say…that this is a new illness that could not have been known about at the time of trial").

Despite uncontested evidence that Mr. Dillbeck suffers from ND-PAE, the Florida courts assert that because Mr. Dillbeck's trial counsel knew he had been

exposed to alcohol *in utero*, diligence required Mr. Dillbeck to raise any claim related to ND-PAE within one year of the condition's publication in the 2013 DSM-5 (in other words, by 2014 at the latest) (*see* PCR5 730-31, 751). However, the Florida courts ignored medical expert opinions—including a sworn statement from Dr. Novick Brown—that ND-PAE was only included as a proposed, unofficial set of criteria in the "Conditions for Further Study" section of the DSM-5, and was considered a "work in progress" rather than a clinically accepted diagnosis (PCR5 567). As medical experts explained in 2017:

> [D]iagnostic criteria for the condition are found in a section of the Manual designated "Conditions for Further Study." *Despite empirical support for DSM-5's diagnostic criteria (Kable et al., 2016), this rather confusing bifurcation of the diagnosis and diagnostic criteria leaves ND-PAE largely unidentified in the general population[.]*

Brown, et al. at 20 (emphasis added). Although preeminent experts in the field began advocating for diagnostic use of ND-PAE in the years following publication of the DSM-5, the process of clinical acceptance of the condition occurred over a substantial period of time, culminating in its general recognition among medical professionals in 2018/2019 (PCR5 566-67); *see also* Brown et al. at 21-22 (advocating in 2017 for diagnostic acceptance of ND-PAE due to emerging use in clinical settings). Prior to 2018/2019, the criteria for ND-PAE were not "widely accepted by FASD professionals in the forensic as well as the research and clinical fields." (PCR5 567).

In other words, at the time Florida suggests Mr. Dillbeck must have raised this claim to avoid a procedural bar, there was no medical or scientific basis for recognizing ND-PAE as an ID-equivalent condition subject to categorical exemption

from execution. As soon as scientific and constitutional principles reached a consensual tipping point establishing such a basis, Mr. Dillbeck raised the claim. The State's procedural bar is incorrect, and is thus insufficient to impede this Court's review of Mr. Dillbeck's constitutional claim.

Further, the Florida state courts' asserted bar would, paradoxically, punish Mr. Dillbeck for his past diligence. Mr. Dillbeck has made good faith attempts to litigate the impact of his lifelong condition as it pertained to the appropriateness (or lack thereof) of a death sentence. When he first raised it at trial, the state courts found it was too soon to grant relief, because the science was not established. Then, in 2019, when the diagnosis of ND-PAE passed the threshold of general medical acceptance, Mr. Dillbeck promptly raised a claim based on his condition. Once more, he was denied, with the state courts saying he was too late. And now, when Mr. Dillbeck has asserted that the combined effect of society's evolving standards of decency and continued advances in medical knowledge have changed the legal landscape and given rise to a newly available claim—grounded in the Eighth and Fourteenth Amendments—that Mr. Dillbeck is exempt from execution based on his ND-PAE, the state courts have again turned him away. The state courts claim that because this can't be considered newly discovered evidence, there is no available state-court avenue through which to bring this claim. In other words, the message of the Florida courts is that *because* Mr. Dillbeck was so ahead of the curve in litigating the effect of his condition, now that science and society have caught up to what he has been saying since 1991, there is no unexpended path to relief.

Thus, through no fault of Mr. Dillbeck's, without this Court's intervention, no court will have adequately and substantively considered the ID-equivalence of ND-PAE, and whether it warrants exemption from execution on account of Mr. Dillbeck's impaired functioning and reduced moral culpability.

II. THE EIGHTH AMENDMENT PROHIBITS THE EXECUTION OF THOSE NOT SENTENCED TO DEATH BY A UNANIMOUS JURY.

Although this Court has noted that the decision by a jury to sentence a defendant to death maintains the "link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society," *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968), this Court's jurisprudence still permits a judge or non-unanimous jury to sentence a defendant to death. This Court should grant certiorari to determine whether Mr. Dillbeck is in the class of offenders culpable enough to face execution in light of the fact that, when faced with this question, four jurors determined he was not.

This Court has looked to two alternative tests when determining whether a death-penalty procedure passes muster under the Eighth Amendment: (1) "the evolving standards of decency of that mark the progress of a maturing society," *Atkins*, 536 U.S. at 311-12 (internal quotation omitted), and (2) whether the modern procedure would have violated the general public understanding at the time of the founding, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

Under both tests, Mr. Dillbeck's execution would violate the Eighth Amendment. First, in light of the evolving standards of decency—including (1) the

consensus in statutes, sentencing, and executions in favor of unanimous jury death sentences and (2) this Court's recognition that a jury vote must be unanimous to convict a defendant of a "serious offense"—Mr. Dillbeck is not in the class of offenders culpable enough to deserve a sentence of death, as found by the four jurors who recommended that his life be spared. Second, allowing a defendant to be executed despite a non-unanimous jury vote violates the common understanding at the time of the founding that sentences of death must be based upon a unanimous jury. Mr. Dillbeck's case offers this Court the opportunity to address capital jury sentencing and ensure that it conforms with both the evolving standards of decency and original public understanding.

A. There is an Overwhelming National Consensus in Favor of Unanimous Capital Jury Sentencing

Death penalty procedures that have been found to have been repudiated by the "evolving standards of decency that mark the progress of a maturing society" violate the Eighth Amendment. *Atkins*, 536 U.S. at 312. Under this inquiry, this Court has traditionally reviewed the current understanding and administration of the procedure in question. When the procedure used by a state is out of touch with the contemporary consensus, the procedure fails this test and has been rendered unconstitutional.

In conducting such a survey, this Court looks to three indicators of societal consensus. **First**, this Court reviews the current state and federal sentencing laws because Legislatures "are constituted to respond to the will and consequently the moral values of the people." *Id.* at 322-23. As such, legislation is "the clearest and

most reliable objective evidence of contemporary values." *Id*. **Second**, this Court examines actual sentencing practices. *See*, *e.g.*, *Graham v. Florida*, 560 U.S. 48, 62 (2010) ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."). **Third**, in addition to sentencing practices, "[s]tatistics about the number of executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society." *Kennedy*, 554 U.S. at 433.

1. Current sentencing laws. Of the 28 states that currently authorize the death penalty and the federal government, only five jurisdictions authorize a defendant to be sentenced to death without a unanimous vote from the jury. Two states—Montana and Nebraska—have limited jury involvement in capital sentencing, resting the sentencing determination with a judge (Montana) or judges (Nebraska).[13] Indiana and Missouri consider a non-unanimous sentencing jury to be a hung jury and allow a judge to sentence a defendant to death in the event of such a hung jury.[14] Alabama allows a defendant to be sentenced to death based on the non-unanimous vote of a jury.[15] Alabama does, however, require a minimum jury vote of

[13] In both states, the jury is only asked to find whether aggravating factors exist, and the ultimate sentencing decision is left to a judge in Montana and a panel of judges in Nebraska. Mont. Code Ann. § 46-18-301; Neb. Rev. Stat. Ann. § 29-2521. In Ohio, a defendant may elect to be sentenced by a judge or panel of judges in lieu of a unanimous jury. See Ohio Rev. Code Ann. § 2929.022.

[14] Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.030.

[15] Ala. Code § 13A-5-46. Alabama allowed a judge to override a jury's life recommendation until 2017. Ala. Code § 13A-5-47.

10-2,[16] meaning someone in Mr. Dillbeck's shoes could not be sentenced to death. And, most concerningly, Mr. Dillbeck could not be sentenced to death in Florida today.[17]

2. Current sentencing practices. The contemporaneous sentencing practices of the states show that the non-unanimous jury has been widely repudiated. In Missouri, only three defendants have been sentenced to death in the last decade, only one of whom had a judge-imposed sentence that survived direct appeal.[18] In Indiana, where no one has been sentenced to death in the last nine years, only one death sentence has been handed down in the last 27 years after the jury could not reach a unanimous decision.[19] Nebraska has only sentenced three defendants to death in the last thirteen years.[20] Montana has not handed down a death sentence since 1996.[21] So, while these states may authorize death sentences based on non-unanimous juries, in practice, these states either effectively do not sentence defendants to death at all, or at least do not do so without a unanimous jury.

3. Current execution practices. The non-unanimous capital jury has also been repudiated by the overwhelming consensus not to execute defendants

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[16] § 13A-5-46.
[17] § 921.141, Fla. Stat.
[18] Missouri Supreme Court Grants New Sentencing Trial to Man Who Was Sentenced to Death Despite 11 Jurors' Votes for Life, Death Penalty Information Center, April 11, 2019 (available at: https://deathpenaltyinfo.org/news/missouri-supreme-court-grants-new-sentencing-trial-to-man-who-was-sentenced-to-death-despite-11-jurors-votes-for-life).
[19] *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009).
[20] *The 12 Inmates of Nebraska's Death Row*, KHGI-TV, June 30, 2021 (available at: https://nebraska.tv/news/local/the-12-inmates-of-nebraskas-death-row).
[21] Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1514 (2022).

sentenced to death by less-than-unanimous juries. Since Florida changed its sentencing statute in 2016, 141 executions have taken place nationwide, but only 17 of those defendants were executed after being sentenced by a non-unanimous jury or mandatory judge panel. *See* Table 1, App. C. Of those, 12 defendants were executed in Alabama. *Id.*[22] As a result, only 3.9% of those executed outside of Alabama since 2016 were not sentenced by a unanimous jury, not including those who elected to waive a jury. *Id.* In Florida, since the unanimous jury requirement became law, only three defendants who were sentenced by non-unanimous juries have been executed, and none within five years of Mr. Dillbeck's execution date. *See* Table 2, App. D.

Notably, of the five states that still allow a defendant to be sentenced to death based on a non-unanimous jury, Indiana's last execution was in 2009, Montana's last execution occurred in 2006, and Nebraska committed an execution in 2018, its only

[22] Alabama is a clear outlier in sentencing and executions. Of Alabama's 14 executions since 2016, only two were based on a unanimous jury recommendation. *See* Table 2, App. D; *see also Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari) (noting that, of the 27 life-to-death jury overrides since 2000, "26 of [them] were by Alabama judges."). Alabama has also called off three executions during this time because they were botched. The inmates in these cases were all sentenced to death despite non-unanimous juries. *See Smith v. State*, 160 So. 3d 40, 41–42 (Ala. Crim. App. 2010) ("By a vote of 11 to 1, the jury recommended that Smith be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Smith to death."); *Hamm v. Allen*, No. 5:06-CV-00945-KOB, 2013 WL 1282129, at *3 (N.D. Ala. Mar. 27, 2013) (11-1 jury recommendation); *Miller v. State*, 913 So. 2d 1148, 1151 (Ala. Crim. App. 2004) (10-2 jury recommendation).

one since 1997.[23] Missouri has only committed two executions of defendants who were not sentenced to death based on a unanimous jury in the last two decades.[24]

Statistics among those states, besides Alabama, who have executed a defendant during this time based on a non-unanimous jury show that even these states have mostly repudiated this practice. These states have executed a combined 12 defendants who were not sentenced based on a non-unanimous jury determination, more than double the five defendants executed during this time based on a non-unanimous jury or judge panel determination, three of which were by Florida in 2017 and early 2018. *See* Table 2, App. D. Thus, outside of Alabama and Florida, who account for 15 executions based on non-unanimous juries, two states have executed two defendants based on a non-unanimous jury and a judge panel, respectively, since *Hurst*. *See* Table 2, App. D.

In total, only four states have executed a defendant who was sentenced after the jury was not unanimous during this time—Alabama, Florida, Missouri, and Nebraska—not including defendants who waived a jury. *Id*. The practice is thus "truly unusual." *Atkins*, 536 U.S. at 316 (calling the practice of executing the intellectually disabled "truly unusual" after noting that among the states that regularly execute and had no prohibition against the practice, only five states had actually executed a defendant with an IQ less than 70 since other states began

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[23] Death Penalty Information Center, Execution Database (available at: https://deathpenaltyinfo.org/executions/execution-database).

[24] *See* Table 2, App. D; Michael J. Essma, *DEAD-Locked: Evaluating Judge-Imposed Death Sentences: Under Missouri's Death Penalty Statute*, 85 MO. L. REV. (2020).

prohibiting the practice). In fact, because only five states carried out such executions, this Court declared in *Atkins* there was a "national consensus" against executing the intellectually disabled. *Id.* In that regard there is a stronger consensus here.

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This survey shows that non-unanimous capital jury or judge sentencing has been widely repudiated. Few jurisdictions still allow death sentences without a unanimous jury. And of those that do, with the exception of Alabama, exceedingly few defendants are sentenced to death or executed based on non-unanimous jury votes. Stunningly, since Florida changed its sentencing statute in 2016, less than 4% of executions have been based on non-unanimous jury verdicts or recommendations outside of Alabama, which remains an extreme outlier. *See* Table 1, App. C.

B. This Court's Decision in *Ramos* Also Contributes to the Societal Consensus Against Non-unanimous Juries

Also relevant to the consensus is this Court's recent decision recognizing that a unanimous jury vote is required to convict a defendant of a "serious offense" under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).[25] As this Court noted, a unanimous jury has been required to convict a defendant of a serious offense essentially uniformly throughout common law and contemporaneously in all but two states. *Id.* at 1394-97. In doing so, this Court recognized that the right to a jury is "fundamental to the American scheme of justice." *Id.* at 1397.

[25] "Serious offenses" are defined as those with a minimum potential punishment of more than six months in prison. *See Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

This Court's recent recognition that a unanimous jury is required to convict a defendant of a serious crime—*i.e.* that a unanimous jury vote is required to subject a defendant to the mere possibility of facing more than six months in prison—is clearly relevant to the current standards of decency. If it is unacceptable to subject a defendant to the possibility of facing over six months in prison based on a less-than-unanimous jury vote, clearly, as shown by the survey above, society has now recognized it is unacceptable to subject him to execution when one or more jurors—let alone four—have determined that the prosecution has not proven the defendant is worthy of the ultimate punishment. This Court should grant certiorari review to consider the discrepancy between the recognition of the unanimous jury right in *Ramos* and this Court's outdated precedents allowing capital non-unanimous jury or judge sentencing.

C. It was Widely Understood that a Unanimous Jury Vote was Required to Execute a Defendant at the Time of the Founding

Capital sentencing was understood to require a unanimous jury verdict at the time of the Founding. "[T]he Constitution's guarantees cannot mean less today than they did the day they were adopted." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). In addition to the evolving standards of decency, this Court has also looked to the original understanding as an additional guide to the proper scope of the Eighth Amendment. *See, e.g.*, *Beck v. Alabama*, 447 U.S. 625, 635 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976). This is because, at the Founding, the Constitution permitted the death penalty only "so long as proper procedures [were] followed." *Bucklew*, 139 S. Ct. at 1122.

At common law, the determination of whether a defendant should be sentenced to death belonged to the jury. As Blackstone explained, it was understood that "no man should be called to answer to the king for any capital crime, unless . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals." Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 271 (2017) (quoting 4 William Blackstone, Commentaries on the Law of England 343 (4th ed., Oxford, Clarendon Press 1770)). By the time the Bill of Rights was adopted, the jury's right to determine whether a defendant should face the death penalty "was unquestioned." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989).

Given the number of crimes that mandated capital punishment, the determination of whether to find the defendant guilty and whether to spare his life was frequently the same. In such cases, it was widely understood that the jury had nullification power if the jury believed a death sentence would be too harsh. *See Woodson*, 428 U.S. at 289–290. This practice, known as "sanction nullification," was widely recognized. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*, 97 (1985) (noting the practice of "sanction nullification" as distinct from complete nullification). Thus, although "under this capital punishment scheme, there was no bifurcation between guilt and sentencing," "common law juries necessarily engaged in 'de facto sentencing' when deciding whether the defendant was guilty as well as the degree of guilt."

Bijlani, *supra*, at 1523-25 ("the question of 'appropriate punishment' was not only at issue in those unified proceedings but was often the principal issue faced by the jury").

Part and parcel of the jury's determination that a defendant should be sentenced to death were the corresponding protections that the jury's verdict should be unanimous and beyond a reasonable doubt. *See* Hoeffel, *supra*, at 275-79 (noting the creation of the beyond a reasonable doubt standard was based on the "morality of punishment" in capital cases, rather than fact finding); *Ramos*, 140 S. Ct. at 1395-97 (cataloging the centuries long history of jury unanimity when defendants were charged with "serious" crimes). This was in contrast to less serious crimes in which judges could determine sentences and were not bound to making findings beyond a reasonable doubt. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) ("judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials"). This Court should grant certiorari to re-examine capital jury sentencing in light of the original public understanding.

D. This Court should Reconsider What Remains of *Spaziano* and *Harris*

This case presents this Court with the opportunity to revisit *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984) and, by extension, *Harris v. Alabama*, 513 U.S. 504 (1995). The Florida Supreme Court's merits denial of this claim rested entirely on this Court's opinion in *Spaziano*:

> The Supreme Court "rejected th[e] exact argument . . . that the Eighth Amendment requires a unanimous jury recommendation of death" in *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). *Poole*, 297 So. 3d at 504. To the extent that our prior decision rejecting Dillbeck's Eighth Amendment challenges to his death sentence does not foreclose relief, *Spaziano* is still good law and requires denying Dillbeck's claim.

App. A. *Spaziano* has already been overruled in part by this Court. *Hurst*, 577 U.S. at 101. In light of the evolving standards of decency and the original public understanding regarding unanimous capital jury sentencing, *Spaziano's* already crumbling foundation cannot bear the weight the Florida Supreme Court has placed upon it.

Spaziano and *Harris* are not without controversy. Justices of this Court have expressed that they "harbor grave concern" over capital judge sentencing while calling for the Court to revisit these precedents allowing a judge, rather than a unanimous jury, to sentence a defendant to death. *Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari); *see also Reynolds v. Florida*, 139 S. Ct. 27 (2018) (Breyer, J., respecting the denial of certiorari). And in *Ring*, where the question was not before the Court, Justices debated this exact issue. *Compare Ring v. Arizona*, 536 U.S. 584, 610-13 (2002) (Scalia, J., concurring) *with id.* at 613-20 (Breyer, J., concurring in judgment).

The calls to revisit these holdings are not without reason. The *Spaziano* decision is nearing its fortieth birthday and key premises underlying the judge-vs-jury-sentencing portion of the opinion have eroded over time. Take reliability. In *Spaziano*, this Court rejected the petitioner's argument that juries would be more reliable in determining which cases truly warrant the death penalty compared to a

judge. 468 U.S. at 461; *see also Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.").

But evidence has accumulated over time casting doubt on this assumption. For example, a study of death-row exonerations across three states that permitted a judge to sentence a defendant to death over the non-unanimous vote of a jury—Alabama, Delaware, and Florida—found that "[i]n 28 of the 30 cases for which the jury vote is known . . . at least one juror had voted for life." Death Penalty Information Center, *DPIC Analysis: Exoneration Data Suggests Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions* (March 13, 2020) (noting that the 1974 jury vote could not be found for one exoneration and the other involved the waiver of a sentencing jury).[26]

This case provides the Court with the overdue opportunity to revisit the precedents that permit the execution of a condemned man despite four jurors voting to spare his life.

E. This Case is a Proper Vehicle to Decide the Question

This case presents an excellent opportunity for this Court to decide the question because this Court's jurisdiction to hear the case is not affected by an

[26] Available at: https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-death-sentencing-statutes-heighten-risk-of-wrongful-convictions.

independent or adequate state law ground. Although the Florida Supreme Court noted that it had "already rejected Dillbeck's Eighth Amendment challenge to his death sentence, including for lack of juror unanimity as to the recommended sentence," App. A at 23 (citing *Dillbeck*, 234 So. 3d at 559), the Florida Supreme Court did not rest the decision below—in whole or in the alternative—on that fact. Instead, the court recognized that *Spaziano* "require[d]" the rejection of Mr. Dillbeck's claim. *Id*.

The court had reason to divide up the decision below by acknowledging Mr. Dillbeck's prior challenge while denying his current challenge on the merits under *Spaziano*: Mr. Dillbeck has raised two distinct claims challenging capital jury sentencing under the Eighth Amendment. In the wake of *Hurst*, which the Florida Supreme Court extended and held partially retroactive, Mr. Dillbeck raised an Eighth Amendment challenge to his sentence based on the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See Dillbeck*, 234 So. 3d at 558. In the 2023 proceedings below, Mr. Dillbeck raised a distinct Eighth Amendment challenge based on (1) the national consensus in favor of unanimous capital jury sentencing since *Hurst* was decided; (2) this Court's opinion in *Ramos*; and (3) the original public understanding that unanimous capital jury sentencing was required, which was not a ground for the Florida Supreme Court's decision in *Hurst v. State*.

By merely noting the fact that Mr. Dillbeck had raised a prior Eighth Amendment challenge, the Florida Supreme Court did not make a clear statement that the decision below denying relief actually rested on that ground. That notation

does not establish a state law ground. *Harris v. Reed*, 489 U.S. 255, 261–62 (1989) ("The state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.") (internal quotation omitted). And even if the decision below could be considered ambiguous, this Court still has jurisdiction to decide the federal question. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) ("[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

But the Florida Supreme Court did not stop at simply noting the prior decision. The court went one step further in confirming that the decision below rested on a federal ground. Taking its cue from this Court's opinion in *Long*, the Florida Supreme Court explicitly stated that the result below was *required* by this Court's holding in *Spaziano*. App. A at 23 ("*Spaziano* is still good law and requires denying Dillbeck's claim."). As this Court has noted, "whether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction." *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) (cleaned up). Therefore, there is no impediment to this Court reviewing the merits of the question.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

Respectfully submitted,

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