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

APPLICATION FOR STAY OF EXECUTION

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

Baya Harrison
Fla. Bar No. 099568
Baya M. Harrison, P.A.
P.O. Box 102
Monticello, FL 32345
Tel: (850) 997-8469
Fax: (850) 997-8460
bayalaw@aol.com

Linda McDermott
Counsel of Record
Fla. Bar No. 0102857
Chief, Capital Habeas Unit
Office of the Federal Public Defender
for the Northern District of Florida
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301
Tel: (850) 942-8818
linda_mcdermott@fd.org

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

The State of Florida has scheduled the execution of Petitioner Donald David Dillbeck for **February 23, 2023, at 6:00 p.m.** The Florida Supreme Court denied state court relief as well as Mr. Dillbeck's request for stay on Thursday, February 16, 2023. Mr. Dillbeck respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for a writ of certiorari.

STANDARDS FOR A STAY OF EXECUTION

The standards for granting a stay of execution are well-established. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). There "must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Id*. (internal quotations omitted).

PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION

The questions raised in Mr. Dillbeck's petition are sufficiently meritorious for grant of certiorari. The underlying issues present significant questions of constitutional law and are not subject to any legitimate procedural impediments.

As explained in Mr. Dillbeck's underlying petition, the medical community now recognizes that the unique, cognitive, practical, and social impairments inherent to

Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) are indistinguishable from those of Intellectual Developmental Disability. This consensus has given rise to an important constitutional issue: that Mr. Dillbeck is exempt from execution under the Eighth Amendment protections articulated in *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny. *See, e.g., Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). To exclude Mr. Dillbeck from this protected class would violate the Equal Protection Clause of the Fourteenth Amendment. Mr. Dillbeck also raises the issue that, in light of a clear, contemporary, national consensus, and with consideration of the original public meaning, the Eighth Amendment prohibits the execution of those not sentenced to death by a unanimous jury.

Should this Court grant Mr. Dillbeck's request for a stay and grant review of the underlying petition, there is a significant possibility of the lower court's reversal. Per the guidance set forth by this Court in *Hall*, "it is proper for states to consult the medical community's opinions" to determine which individuals qualify for Eighth Amendment exemption from execution. 572 U.S. at 710. The medical community has now accepted ND-PAE, both in etiology and symptomatology, as functionally identical with ID. And, Mr. Dillbeck's ND-PAE is uncontested.

With regard to Mr. Dillbeck's right to a unanimous jury, there is an indisputable, national consensus in favor of unanimous jury death sentences. This consensus has manifested itself in sentencing and execution practices as well as statutes. This Court's own judgment has further buttressed the consensus

established by the nation's citizenry and legislature. In *Ramos v. Louisiana*, this Court decided that a unanimous jury vote is required to convict a defendant of a "serious offense" under the Sixth Amendment. 140 S. Ct. 1390 (2020).

Furthermore, Mr. Dillbeck's claims are not subject to any legitimate procedural impediments. The state courts have foreclosed adequate and substantive review but Eighth Amendment categorical bans cannot be nullified by any state-law waiver provision. At every opportunity since his trial, Mr. Dillbeck has presented evidence of his prenatal alcohol exposure to the full extent allowed by then-contemporaneous scientific and legal standards. Evolving standards of decency have finally progressed to the tipping point that allows Mr. Dillbeck to establish that his ND-PAE disability affords him the same protections established in *Atkins*. To deny review would penalize Mr. Dillbeck for being right too soon. In the same vein, Mr. Dillbeck's right to a unanimous jury emerges from an evolved standard of decency—an accumulation of national consensus—and bears no timeliness concerns.

The irreparable harm to Mr. Dillbeck is clear. *Wainwright v. Booker*, 473 U.S. 935, 937 n.1 (1985) (Powell, J., concurring) (finding the requirement of irreparable harm as "necessarily present in capital cases"). Additionally, the Florida Supreme Court's refusal to grant Eighth Amendment protections is not just a matter of life and death for Mr. Dillbeck. The Eighth Amendment not only protects the individual from cruel and unusual punishment, it safeguards the public's interest in living in a humane society. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (Eighth

Amendment restriction protects not only the individual, but "the dignity of society itself from the barbarity of exacting mindless vengeance[.]")

Though society's standards of decency have evolved, the Florida Supreme Court will continue to foreclose relief in other similar cases by ossifying the Eighth Amendment. This creates an unacceptable risk that individuals who are diagnosed with ND-PAE, or individuals sentenced by a non-unanimous jury, will nevertheless be denied their crucial Eighth Amendment protections.

This Court's intervention is urgently needed to prevent the imminent execution of Mr. Dillbeck, whom the evidence undisputedly shows is deserving of the protections from the death penalty provided by the Eighth and Fourteenth Amendments. Because the Florida Supreme Court refuses to apply these constitutional protections, this Court should grant a stay of execution and grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, Mr. Dillbeck respectfully requests that this Court grant his application for a stay of execution to address the important constitutional questions in this case.

Respectfully submitted,

Baya Harrison
Fla. Bar No. 099568
Baya M. Harrison, P.A.
P.O. Box 102
Monticello, FL 32345
Tel: (850) 997-8469
Fax: (850) 997-8460
bayalaw@aol.com

Linda McDermott
Counsel of Record
Fla. Bar No. 0102857
Chief, Capital Habeas Unit
Office of the Federal Public Defender
for the Northern District of Florida
227 N. Bronough St., Ste. 4200
Tallahassee, FL 32301

Tel: (850) 942-8818
linda_mcdermott@fd.org