No. 22A757
CAPITAL CASE

EXECUTION SCHEDULED FOR
THURSDAY, FEBRUARY 23, 2023, AT 6:00 P.M.

In the
Supreme Court of the United States

DONALD DAVID DILLBECK,
Petitioner,

v.

STATE OF FLORIDA, ET. AL.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

On February 20, 2023, Dillbeck, represented by state postconviction counsel Baya Harrison III and the Capital Habeas Unit of the Federal Public Defender Office of the Northern District of Florida (CHU-N), filed, in this Court, a petition for writ of certiorari seeking review of a decision from the Florida Supreme Court in this active warrant case. *Dillbeck v. Florida*, 22-6819. The petition raised two issues: (1) a claim that a state may not bar a claim that the prohibition on executing intellectually disabled defendants, established in *Atkins v. Virginia*, 536 U.S. 304 (2002), be expanded to include neurodevelopmental disorder associated with prenatal alcohol

exposure (ND-PAE), and (2) a claim that the Eighth Amendment requires jury sentencing in capital case. He also filed an application for a stay of the execution based on that petition. In his motion for stay of execution, Dillbeck is seeking a stay of execution for this Court to decide his pending petition for writ of certiorari. This Court, however, should simply deny the petition and then deny the stay.

Stays of execution

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Equity must also consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)).

This Court recently highlighted the State's and the victims' "important interest" in the timely enforcement of the death sentence. *Bucklew v.Precythe*, 139 S.Ct. 1112, 1133-34 (2019). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Bucklew*,

139 S.Ct. at 1134. The Court stated that courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Id.* at at 1134. Last-minute stays of execution should be "the *extreme* exception, not the norm." *Id.* (emphasis added).

To be granted a stay of execution, Dillbeck must establish (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal; ***and*** (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (emphasis added). Dillbeck must establish all three factors.

As to the first factor, there is little chance that four justices of this Court would vote to grant certiorari review on either of the two issues.

In state court, Dillbeck raised a claim that *Atkins* should be expanded to include a diagnosis of a fetal alcohol spectrum disorder, specifically neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE). The *Atkins* claim is untimely on two grounds. *Dillbeck v. State*, 2023 WL 2027567, at *3 (Fla. Feb. 16, 2023). Even generously using the date of the 2021 article as the date of the alleged new medical consensus regarding ND-PAE, the Florida Supreme Court found that claim seeking to expand *Atkins* to include ND-PAE was not timely. *Dillbeck*, 2023 WL 2027567, at *3. This Court does not grant review of untimely claims.

The claim that the Eighth Amendment requires unanimous jury sentencing is procedurally barred. The Florida Supreme Court found the jury sentencing claim to be procedurally barred because Dillbeck had previously raised this Eighth Amendment

jury sentencing claim in his second successive postconviction motion filed in the state court in 2016. *Dillbeck v. State*, 2023 WL 2027567, at *7 (Fla. Feb. 16, 2023) (citing *Dillbeck v. State*, 234 So.3d 558, 559 (Fla. 2018)). This Court does not grant review of procedurally barred claims. Moreover, there is no conflict between the State Supreme Courts regarding the constitutionality of jury sentencing in capital cases. The Florida Supreme Court's recent decision in this case comports with the Nebraska Supreme Court's recent decision. *State v. Trail*, 981 N.W.2d 269, 309 (Neb. 2022) (rejecting a claim that sentencing by a three-judge panel in capital cases violates the Eighth Amendment relying the reasoning of *McKinney v. Arizona*, 140 S.Ct. 702 (2020)). The State's brief in opposition, which is being filed simultaneously with the State's response to the motion to stay, contains a more detailed explanation of why this Court should deny the petition for writ of certiorari.

Dillbeck fails the first factor, which is alone sufficient to deny the motion for a stay.

As to the second factor, there is no significant possibility of reversal on either issue. There is no significant possibility of reversal on the issue of expanding *Atkins* to include ND-PAE and presumably every other form of fetal alcohol spectrum disorder as well. Dillbeck will not succeed in having this Court kowtow to the views of the medical community. While Dillbeck asserts that the medical community now views ND-PAE as the functional equivalent of intellectual disability, courts determine Eighth Amendment law, not the medical community. This Court's Eighth Amendment jurisprudence, while informed by the medical community's standards, does not adhere

"to everything stated in the latest medical guide." *Moore v. Texas*, 581 U.S. 1 (2017); *see also Hall v. Florida*, 572 U.S. 701, 721 (2014) (stating that while the Court does not disregard the views of medical experts, experts do not "dictate" the Court's decision citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002)). Following medical trends causes instability in the law and undermines the finality of the criminal law with each change in the professional manuals. *see also Fulks v. Watson*, 4 F.4th 586, 589-91 (7th Cir. 2021) (noting that the medical diagnostic standards for intellectual disability have not stood still since *Atkins* and discussing the various changes to the standards in the AAIDD guide in 2012 and in the DSM-5 manual in 2013). As Justice Alito noted, joined by Chief Justice Roberts, Justice Scalia and Justice Thomas, there are serious practical problems with relying on the views of professional associations in Eighth Amendment cases including that the views of the associations often change which leads to "instability" in the law and "protracted litigation," including about the degree of agreement among the relevant community. *Hall v. Florida*, 572 U.S. 701, 731-32 (2014) (Alito, J., dissenting). If this Court were to base the scope of *Atkins* on the ever-changing views of the medical community, the law regarding what diagnosis will preclude an execution would change every decade with each new manual or guide.

Moreover, the views of experts do reflect the views of the people or the views of the various legislatures. *Miller v. Alabama*, 567 U.S. 460, 510-11 (2012) (Alito, J., dissenting) (noting the philosophical basis for the evolving-standards-of-decency test, first established in *Trop v. Dulles*, 356 U.S. 86 (1958), was "problematic from the start" but, at least, it is an objective test when based on the views of state legislatures and

Congress). *Atkins* itself said the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312. The *Atkins* Court relied on the views of state legislatures, not the views of the medical community.

While the medical community may view intellectual disability and ND-PAE as functionally equivalent conditions, intellectual disability and ND-PAE are not equivalent conditions in terms of objectivity and reliability of the diagnosis. Two of the three prongs of the test for intellectual disability are objective. Both the first prong of significantly subaverage intellectual functioning and the third prong of onset as a minor are based on IQ tests. IQ tests depend on cold, hard numbers. Indeed, childhood IQ scores are viewed as particularly reliable because the scores are obtained at a time before the defendant has any incentive to malinger on the IQ tests. A diagnosis of intellectual disability is largely objective, but diagnoses of FASD including NE-PDA are not. Both FASD and NE-PDA can be wildly subjective. One of the reasons that courts and legislatures were comfortable with creating a prohibition on death sentences for intellectually disabled defendants was the objective nature of such determinations. For example, both the Florida legislature and the Georgia legislature had enacted statutes prohibiting intellectually disabled defendants from being sentenced to death before *Atkins*. *Hill v. Humphrey*, 662 F.3d 1335, 1337 (11th Cir. 2011) (en banc) (noting in 1988, Georgia led the nation by abolishing the death penalty for intellectually disabled defendants citing Ga. Code § 17-7-131). And the *Atkins* court relied on these state legislatures in their decision as part of the

evolving-standards-of-decency analysis because the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (discussing legislation enacted by Georgia in 1986, Congress in 1988, Maryland in 1989, Kentucky and Tennessee in 1990, New Mexico in 1991, Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994, Nebraska in 1998, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina in 2000 and 2001 prohibiting a death sentence for intellectually disabled defendants). The objectivity and reliability of that diagnosis mattered to these legislatures which is why the Georgia legislature required defendants prove the diagnosis of intellectual disability "beyond reasonable doubt" and the Florida Legislature required that defendants do so by "clearly and convincing evidence." *Hill*, 662 F.3d at 1360-61 (discussing Georgia's beyond reasonable doubt statutory standard for *Atkins* claims); *Haliburton v. State*, 331 So.3d 640, 652 (Fla. 2021) (refusing to address Florida's clear and convincing statutory standard for *Atkins* claims), *cert. denied*, *Haliburton v. Florida*, 143 S.Ct. 231 (2022). The conditions certainly are not equivalent in terms of objectivity and reliability of the different diagnoses.

There is no significant possibility of reversal on the issue of the Eighth Amendment requiring jury sentencing. In *Spaziano v. Florida*, 468 U.S. 447, 459-61 (1984), the Court refused to interpret the Eighth Amendment to require jury sentencing, reasoning that individualized sentencing did not require the jury's participation. *Hurst v. Florida*, 577 U.S. 92 (2016), did not address the Eighth Amendment claim and therefore, *Hurst* did not overrule that part of *Spaziano*. The

Hurst Court overruled *Spaziano* only "to the extent" it allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding." *Hurst*, 577 U.S. at 102. *Spaziano* remains good law in the wake of *Hurst*.

Moreover, this Court recently reaffirmed the view that "States that leave the ultimate life-or-death decision to the judge may continue to do so." *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020) (quoting Justice Scalia's concurring opinion in *Ring v. Arizona*, 536 U.S. 584, 612 (2002)). While *McKinney* was decided as a matter of the Sixth Amendment right-to-a-jury-trial provision, that is because that is the constitutional provision that actually applies to such a claim. If the Eighth Amendment does not require jury sentencing, which it does not under this Court's current precedent, then it cannot require unanimous jury sentencing. *Barksdale v. Att'y Gen. of Ala.*, 2020 WL 9256555, at *14 (11th Cir. June 29, 2020) (rejecting an Eighth Amendment challenge to Alabama's death penalty scheme because it permitted non-unanimous jury recommendations, relying on *McKinney v. Arizona*, and making this same comment).

Dillbeck fails the second factor as well.

As to the third factor of irreparable injury, it is a given in capital cases. While the execution will cause irreparable injury, that is the inherent nature of a death sentence. The factors for granting a stay are taken from the standard for granting a stay as applied to normal civil litigation. This factor is not a natural fit in capital cases. There must be more to establish this factor and Dillbeck does not provide any unique or special argument in support of this factor. But Dillbeck's argument is

boilerplate as to this factor. For that reason, this truism by itself is not a critical factor in consideration of a stay of execution. While the execution means his pending litigation will be rendered moot, that consideration must be balanced by the fact that Dillbeck has had decades to raise these claims and did not do so until the eve of the execution. As the Eleventh Circuit has noted regarding stays of execution, they amount to a commutation of a death sentence to a life sentence for the duration of the stay. *Bowles v. Desantis*, 934 F.3d 1230, 1248 (11th Cir. 2019) (citing *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019)). Without finality, "the criminal law is deprived of much of its deterrent effect." *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). And real finality is the execution.

Because Dillbeck points to no specific argument in support of this factor, he fails this factor as well.

Dillbeck does not meet any of the three factors or does not meet, at least, two of the three factors for being granted a stay of execution. Therefore, the motion for a stay of the execution should be denied.

Accordingly, the application for stay of execution should be denied.

Respectfully submitted,

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