In the Supreme Court of Florida

EXECUTION SCHEDULED FOR
FEBRUARY 23, 2023, at 6:00 p.m.

DONALD DAVID DILLBECK,
Appellant,

v.

CASE NOS.: SC23-190, SC23-220
ACTIVE WARRANT CAPITAL CASE

STATE OF FLORIDA,
Appellee.
_____/

STATE'S RESPONSE TO MOTION TO STAY THE EXECUTION

On February 10, 2023, Dillbeck, represented by registry counsel Baya Harrison III and the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a motion to stay the execution. There are no substantial issues being presented to this Court in either the appeal of the fourth successive postconviction motion or in the successive habeas petition. Therefore, the motion to stay should be denied.

Motions to stay executions

A stay of execution is warranted only when there are substantial grounds upon which relief might be granted. *Davis v. State*, 142 So.3d 867, 873-74 (Fla. 2014) (explaining that a stay of execution is warranted only where there are substantial grounds upon which relief might be granted quoting *Buenoano v. State*, 708 So.2d 941, 951 (Fla.1998), and denying a stay); *Chavez v. State*, 132 So.3d 826, 832 (Fla. 2014) (same citing *Bowersox v. Williams*, 517 U.S. 345 (1996), and denying a stay); *Howell v. State*, 109 So.3d 763, 778 (Fla. 2013) (same and denying a stay).[1]

As the State has explained in detail in its answer brief in the appeal of the fourth successive postconviction motion and in its

---

[1] Opposing counsel improperly relies on a single Justice's concurring opinion to state that even a mere possibility of relief can warrant a stay of execution. *King v. Moore*, 824 So.2d 127, 128 (Fla. 2002) (Harding, J., concurring) (concurring with the majority's decision to grant a temporary stay of the execution for additional briefing based on the possibility that the United States Supreme Court intended for the Florida Supreme Court to consider the issue). But a single Justice's concurring opinion is not the controlling precedent regarding the standard for a stay. Opposing counsel must establish "substantial" grounds under the Florida Supreme Court's controlling precedent to be granted a stay.

response to the successive habeas petition, none of the six claims being raised before this Court are substantial. The three issues being raised in the appeal are variously not cognizable at all under existing precedent, untimely, conclusively rebutted by the record, or meritless under this Court's precedent. And the three issues being raised in the successive habeas petition are all procedurally barred and dilatory. Because all the issues are insubstantial, the motion for a stay should be denied.

Opposing counsel asserts that ISSUE I in the appeal seeking to expand *Atkins v. Virginia*, 536 U.S. 304 (2002), to include a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE), is "an issue of first impression." It is not. This Court has repeatedly rejected attempts to expand *Atkins* to include other types of mental conditions and illness for more than a decade, including most recently in *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022).[2] While the particular diagnosis of ND-PAE, upon which

[2] *Newberry v. State*, 288 So.3d 1040, 1050 (Fla. 2019) (rejecting an argument that *Atkins* should be expanded to include other intellectual impairments); *McCoy v. State*, 132 So.3d 756, 775 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include being

opposing counsel seeks to expand *Atkins*, is a novel basis for the expansion, the attempt to expand *Atkins* itself is old hat. Stays are not warranted to attack a solid wall of this Court's precedent.

Furthermore, if more were needed to deny the stay, the *Atkins* claim, as a claim of intellectual disability, which is the only manner in which this Court may address the claim under the existing precedent, is both untimely and conclusively rebutted by the existing record. The record contains numerous IQ scores showing Dillbeck's IQ is between 98 and 100. Dillbeck's intellectual functioning is

---

"severely mentally ill"); *Muhammad v. State*, 132 So.3d 176, 207 & n.21 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include schizophrenia and paranoia); *Carroll v. State*, 114 So.3d 883, 886-87 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include severe brain damage and mental limitations); *Simmons v. State*, 105 So.3d 475, 510-11 (Fla. 2012) (rejecting an argument that *Atkins* should be expanded to include mental illness and neuropsychological deficits); *Johnston v. State*, 27 So. 3d 11, 26-27 (Fla. 2010) (rejecting an argument that *Atkins* should be expanded to include traumatic brain injury); *Connor v. State*, 979 So.2d 852, 867 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include paranoid schizophrenia, organic brain damage, and frontal lobe damage); *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include mental illness).

perfectly normal, as the postconviction court specifically found. The *Atkins* claim is totally meritless and nowhere near being "substantial." Stays are certainly not warranted to litigate untimely and totally meritless *Atkins* claims.

Nor are any of the three new claims raised in the successive habeas petition substantial. All three of the new claims in the habeas petition are procedurally barred and dilatory. Indeed, the entire successive habeas petition is an abuse of the writ. This Court should not encourage abuse of the writ by considering granting a stay based on any of the claims raised in the successive habeas petition.

Opposing counsel also relies on the short time frame of the warrant as a basis for granting a stay. But time frames, whether short or long, do not turn insubstantial claims into substantial ones.

The State of Florida and the surviving victims of Dillbeck's multiple crimes have an enormous interest in the finality and timely enforcement of valid criminal judgments and sentences. *Ledford v. Comm'r, Ga Dep't of Corr.*, 856 F.3d 1312, 1320 (11th Cir. 2017) (denying an emergency stay of execution in a capital case because the

claims were time-barred, not substantial, and noting the State and the victims' interest in the finality of the sentence). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Bucklew v.Precythe*, 139 S.Ct. 1112, 1134 (2019). Courts should "police carefully" against last minute claims being used "as tools to interpose unjustified delay" in executions. *Bucklew*, 139 S.Ct. at 1134 Last-minute stays of execution should be "the *extreme* exception, not the norm." *Id.* at 1134 (emphasis added).

Accordingly, the motion for a stay of execution should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Charmaine Millsaps
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

/s/ Jason W. Rodriguez
JASON W. RODRIGUEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 125285
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
jason.rodriguez@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S RESPONSE TO MOTION TO STAY THE EXECUTION has been furnished via the e-portal to BAYA HARRISON III, P.O. Box 102, 736 Silver Lake Rd, Monticello, FL 32345, phone: 850-997-8469; email: bayalaw@aol.com and LINDA McDERMOTT, Chief, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 33301; phone: (850) 942-8818; email: Linda_Mcdermott@fd.org this 13th day of February, 2023.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida