AMNESTY INTERNATIONAL

URGENT ACTION

Urgent Action Office 3-1992 Yonge Street Toronto ON M4S 1Z7 Phone: (416) 363-9933 Fax: (416) 363-3103 urgentaction@amnesty.ca
First UA: 16/2023 Index: AMR 51/6429/2023 USA of February 07, 2023

USA
EXECUTION SET AFTER 32 YEARS ON DEATH ROW

The State of Florida is scheduled to execute Donald Dillbeck on February 23, 2023. Now aged 60, he was sentenced to death in 1991 after only eight jurors voted for the death penalty under a law that has since been found unconstitutional. His lawyers are seeking recognition that his neurobehavioral disorder is akin to intellectual disability and should exempt him from execution under constitutional law. They also maintain that the prosecution's use of his prior conviction for murder to support the death penalty is undermined by new evidence that reveals more mitigating than aggravating factors than the original jury heard in this regard.

Since the trial, Donald Dillbeck has been diagnosed with Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE). His adaptive and cognitive deficits have been described by medical experts as "functionally identical" to the criteria that the US Supreme Court recognized in 2002 as requiring exemption from execution of people with intellectual disability.

Write to the Governor of the State of Florida urging him to:

- Grant Donald Dillbeck a reprieve and
- Work to ensure his death sentence is commuted.

Write to:
Office of Governor Ron DeSantis
State of Florida
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399-0001, USA
Email: https://www.flgov.com/email-the-governor/
Salutation: *Dear Governor DeSantis,*

And copy:
His Excellency David Louis COHEN
Ambassador
Embassy of the United States of America
490 Sussex Drive
Ottawa, ON K1N 1G8
Tel: (613) 238-5335 / 688-5335 (24h)

ADDITIONAL INFORMATION

On February 26, 1991, a jury in Florida convicted Donald Dillbeck of the murder of a woman who was fatally stabbed outside a shopping mall in Tallahassee on June 24, 1990. Donald Dillbeck had been arrested soon after the murder. At the time, he was serving a life sentence for a 1979 murder but had absconded during a day-release event.

At that time, Florida law allowed bare majority juries (7-5) to recommend the death penalty. In Donald Dillbeck's case, the jury voted eight to four for the death penalty, and on March 15, 1991, the judge sentenced him to death. In 2016, in Hurst v. Florida, the US Supreme Court (USSC) ruled Florida's statute unconstitutional because it gave juries only an advisory role in death sentencing, incompatible with its 2002 Ring v. Arizona decision that the US Constitution requires juries rather than judges to make the factual findings necessary to sentence a defendant to death. Florida law now requires juror unanimity for death sentencing.

In late 2016 the Florida Supreme Court (FSC) ruled that Hurst applied retroactively only to about half of the more than 300 people then on death row – those individuals whose death sentences had not yet been 'finalized' (meaning affirmed on initial automatic direct appeal) by the time of the Ring ruling. One dissenting Justice argued that to avoid arbitrariness Hurst should be applied across the board. Another accused the majority of "arbitrarily draw[ing] a line between June 23 and June 24, 2002 – the day before and the day after Ring was decided", but without providing "a convincing rationale" for this differential treatment and leaving "constitutional protection [to] depend on little more than a roll of the dice." Donald Dillbeck's death sentence became final in 1995, and in 2018 the FSC affirmed that he could not benefit from Hurst. Some 150 others, meanwhile, have obtained relief under Hurst.

The USA ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992. The UN Human Rights Committee, the expert body established under the ICCPR to monitor its implementation, have said of the absolute prohibition of the arbitrary deprivation of life that the notion of arbitrariness must be interpreted "to include elements of inappropriateness, injustice, lack of predictability and due process of law." Amnesty International considers that the FSC's application of Hurst falls short of these elements.

In Atkins v. Virginia in 2002, the USSC banned the execution of individuals with intellectual disability, due to their diminished culpability. In 2014, it emphasized that "in determining who qualifies as intellectually disabled" states must consult "the medical community's opinions." In 2020, two USSC Justices added that "the medical standards used to assess that disability constantly evolve as the scientific community's understanding grows". While Donald Dillbeck's IQ score means he has not received a formal diagnosis of intellectual disability, his lawyers are arguing in their efforts in court, citing expert opinion, that "the specific cognitive and adaptive impairments caused by his extensive prenatal alcohol exposure are functionally identical to (and in some cases exceed) the criteria Atkins recognized as necessitating exemption from execution. As a result of his Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure ("ND–PAE") …, Mr. Dillbeck embodies the lessened culpability described in Atkins".

A three-pronged assessment conducted by a neuropsychologist, a medical doctor, and a psychologist in 2018 and 2019, including brain scan imaging and neurological testing not available in 1991, concluded that Donald Dillbeck "satisfies the clinical criteria for ND–PAE, which requires: verified prenatal alcohol

exposure; and deficits manifesting in childhood that span neurocognitive, self-regulatory, and adaptive realms." His in utero alcohol exposure "which far exceeds the threshold for a ND–PAE diagnosis, caused significant, quantifiable impairments in cognitive and adaptive functioning." The experts who assessed him concluded that these deficits would have directly impacted his conduct and functioning in relation to the 1990 murder, as well as in the 1979 case.

Donald Dillbeck's lawyers point to a growing recognition within the medical community that "the unique cognitive, practical, and social impairments inherent to ND–PAE are indistinguishable from those of intellectual disability." Also, that "IQ is a particularly inaccurate measure of intellectual functioning in individuals with ND–PAE. For example, someone with ND–PAE who has an IQ in the 80s may function adaptively as though their IQ is in the 60s or 70s."

At his 1991 trial, the prosecution presented the aggravating factor of Donald Dillbeck's capital murder conviction for the 1979 murder. The jury heard that the then 15-year-old fled Indiana in a stolen car and drove to Florida. Sleeping in the car there, he was woken up by a police officer. The boy tried to run away but was tackled by the officer. In the ensuing struggle, the teenager got hold of the officer's gun, and two shots were fired, killing the officer. Donald Dillbeck pleaded guilty to first-degree premeditated murder. However, new witness evidence that was not presented at the 1991 trial paints a different picture, that of a boy who at the time of the shooting had had virtually no sleep for three days, had consumed drugs and was displaying symptoms of serious mental disability. Two experts have concluded from a review of the new evidence that at the time of the shooting the teenager was likely unable to distinguish right from wrong and both experts have voiced doubts that he was competent when he pleaded guilty.

Amnesty International opposes the death penalty unconditionally. There have been 1,562 executions in the USA since the US Supreme Court upheld new capital laws in 1976. There have been four executions in 2023; this would be the first in Florida since 2019 and its 100th since 1976. See Darkness visible in the Sunshine State, 2018).

Please take action at your earliest convenience!