No. ______

IN THE

Supreme Court of the United States

DONALD DAVID DILLBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

PETITIONER'S APPENDIX

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Supreme Court of Florida

No. SC20-178

DONALD DAVID DILLBECK,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

September 3, 2020

PER CURIAM.

Donald David Dillbeck, a prisoner under sentence of death, appeals the circuit court's order summarily dismissing his third successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

I. BACKGROUND

Dillbeck was convicted of the 1990 first-degree murder, armed robbery, and armed burglary of Faye Vann. *Dillbeck v. State*, 643 So. 2d 1027 (Fla. 1994), *cert. denied*, 514 U.S. 1022 (1995). This Court affirmed Dillbeck's convictions and sentence of death on direct appeal. *Id.* at 1028. We thereafter denied Dillbeck's

petition for a writ of habeas corpus and affirmed the denial of one of his initial postconviction claims but remanded for the trial court to support its denial of the remaining claims in Dillbeck's initial postconviction motion. *Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004). After remand, this Court affirmed the denial of the remainder of Dillbeck's initial postconviction claims. *Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007). We affirmed the denial of Dillbeck's first successive motion for postconviction relief, *Dillbeck v. State*, 168 So. 3d 224 (Fla. 2015), and his second successive motion, *Dillbeck v. State*, 234 So. 3d 558 (Fla.), *cert. denied*, 139 S. Ct. 162 (2018).

In May 2019, Dillbeck filed his third successive motion for postconviction relief, in which he raised a single claim of newly discovered evidence based on reports written in 2019 by three doctors, one of whom diagnosed him with Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE), a diagnosis that was first recognized in the 2013 publication of the Diagnostic and Statistical Manual, Fifth Edition (DSM-5). Dillbeck alleged that the results of quantitative electroencephalogram (qEEG) brain scans and neurocognitive test results, which were not available at the time of trial, revealed quantifiable brain damage in certain areas of the brain that could explain his criminal conduct in a manner that the defense experts at trial were unable to provide. Dillbeck asserted that there is a reasonable probability that the mitigating

effects of the ND-PAE diagnosis are of such a nature that they would probably produce a life sentence at a retrial. The trial court dismissed the motion as untimely. Dillbeck now appeals the dismissal of that motion.

II. ANALYSIS

A motion for postconviction relief must be filed within one year of the date the defendant's conviction and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Dillbeck's conviction and sentence became final when the United States Supreme Court denied certiorari review of the direct appeal proceedings on March 20, 1995. *Dillbeck v. Florida*, 514 U.S. 1022 (1995); *see* Fla. R. Crim. P. 3.851(d)(1)(B) ("For the purposes of this rule, a judgment is final . . . on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). The one-year time limit therefore expired in 1996. But there is an exception to the one-year time limit for motions alleging "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). According to Dillbeck, the facts on which his claim is based are "the new diagnosis of ND-PAE and the qEEG and other neurocognitive test results supporting it."

Although the new diagnosis of ND-PAE was included in the DSM-5, published in 2013, and qEEG scans have been recognized by this Court as being

used since 2005, *see Lebron v. State*, 232 So. 3d 942, 954 (Fla. 2017), Dillbeck claims that the possibility that he might suffer from and meet the diagnostic criteria for ND-PAE first arose on May 10, 2018, when he was evaluated by Dr. Faye Sultan, and that May 10, 2018, is the earliest potential date the one-year clock could have started to file his claim based on this newly discovered evidence. Thus, he believes this claim was timely filed on May 1, 2019. We disagree.

"To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence." *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). Dillbeck and his counsel knew that Dillbeck had brain damage related to fetal alcohol exposure even before he was sentenced in 1991. Thus, the facts on which the claim is predicated—a diagnosis of ND-PAE and qEEG results—could have been discovered by the exercise of due diligence as early as 2013, when ND-PAE became a diagnosable condition. Dillbeck and his counsel failed to exercise diligence by waiting until 2018 to pursue evaluation, testing, and a diagnosis of ND-PAE. Thus, the trial court did not err in dismissing Dillbeck's motion as untimely.

III. CONCLUSION

For these reasons, we affirm the circuit court's order dismissing Dillbeck's third successive motion for postconviction relief.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Leon County,
J. Lee Marsh, Judge - Case No. 371990CF002795AXXXXX

Baya Harrison III, Monticello, Florida,

for Appellant

Ashley Moody, Attorney General, and Charmaine Millsaps, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 1990 CF 2795

v.

DONALD DILLBECK,

Defendant.
_______________________________/

ORDER DISMISSING DEFENDANT'S POSTCONVICTION MOTION

THIS CAUSE comes before the Court on Defendant's Third Successive Motion for Postconviction Relief Based on Newly Discovered Evidence filed on May 9, 2019. The Court, after reviewing the State's response and Mr. Dillbeck's reply, held a hearing on the timeliness of the motion on June 28, 2019. Mr. Dillbeck provided a post-hearing memorandum on July 8, 2019. The Court has reviewed and considered all the filings and reviewed a transcript of the hearing,[1] and now finds that Mr. Dillbeck's claim is untimely. The Court therefore cannot consider it and dismisses the motion.

Case History: In 1991, Mr. Dillbeck was convicted of first-degree murder. The jury recommended death by a vote of 8-4 and this Court imposed the death penalty. The Florida Supreme Court affirmed his conviction and sentence on appeal. *Dillbeck v. State*, 643 So. 2d 1027 (Fla. 1994), *cert. denied*, *Dillbeck v. Florida*, 115 S. Ct. 1371 (1995). Mr. Dillbeck has filed three postconviction motions in this Court, all of which have been unsuccessful. *See Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004); *Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007); *Dillbeck v. State*, 168 So. 3d 224 (Fla. 2015); *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018), *cert. denied*, *Dillbeck v. Florida*, 139 S. Ct. 162 (2018). This is his fourth.

[1] A new circuit judge was assigned this case after the hearing.

Claim: Mr. Dillbeck makes a claim of newly discovered evidence based on three reports written in 2019 by three doctors who assessed and diagnosed him with Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure. This diagnosis was first recognized in the 2013 publication of the Diagnostic and Statistical Manual, Fifth Edition, commonly referred to as the DSM-5, and the reports reference studies older than one year prior to the motion's date.

Mr. Dillbeck acknowledges that he presented evidence of the effects fetal alcohol exposure had on him at his original sentencing but asserts that these new reports constitute "new scientific advancements" that can serve the basis for a newly discovered evidence motion. He argues, had these reports been available at his sentencing, he would have received a life sentence rather than death.

Legal Standard: To establish that he is entitled to a new penalty phase based on newly discovered evidence, Mr. Dillbeck must meet the two-prong test recited in *Jones v. State*, 709 So.2d 512 (Fla. 1998):

> First, in order to be considered newly discovered, the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Id. at 521 (internal quotation marks omitted).

Analysis: The Florida Supreme Court recently rejected a claim remarkably similar to this one in *Long v. State*, 271 So. 3d 938 (Fla. 2019), *cert. denied sub nom. Long v. Florida*, 139 S. Ct. 2635 (2019). Under the unanimous reasoning in that case, the fact that Mr. Dillbeck and his counsel knew he had brain damage related to fetal alcohol exposure from before the date of sentencing obliged him to pursue new testing within a year of the new research they cite. *See id.* at 942 ("[T]he attachments to his motion reference research and studies much older than one year

prior to the date that Long filed his motion."); *see also* Fla. R. Crim. P. 3.851(d)(1). They did not. Therefore, Mr. Dillbeck has failed the due diligence prong by not pursuing testing earlier.

Further, as is conceded by him, evidence of Mr. Dillbeck's fetal alcohol exposure was presented at his penalty phase hearing—the same as in *Long*. *See id.* ("Long already presented testimony and evidence regarding [his brain damage] at his 1989 penalty phase, and Long's jury still unanimously recommended that the death penalty be imposed.") (internal quotation marks omitted). Although Mr. Dillbeck's case is distinguished because his jury was not unanimous, the Court gave significant weight to the effects of fetal alcohol exposure in its written sentencing order. *Attachment A (Sentencing Order)* at 3172. In fact, the Court described it as "[t]he most compelling evidence of mitigating circumstances." *Id.*

And although the 1991 Court acknowledged that "sufficient testing [had] not [yet] been developed" to properly assess the mental effects of fetal alcohol exposure, *id.* at 3169, it still considered its impact on Mr. Dillbeck's "intelligence level and [his] lack of impulse control." The Court found any effects fetal alcohol had on him did not outweigh his intellectual and behavioral strengths given his "exemplary [prison] record," his ability "to play chess," his ability "to accumulate 12 hours of college credits," his ability "to perform work so that a supervisor will describe him as 'one of the best inmates I'd ever worked'," and his ability "to formulate a plan for escape which took years to implement." *Id.* at 3172. For these reasons, these new diagnoses related to fetal alcohol exposure are "not of such a nature that [they] would probably yield a less severe sentence in a new penalty phase." *Long*, 271 So. 3d at 943.

The motion must be dismissed as untimely filed.

WHEREFORE IT IS

ORDERED AND ADJUDGED that Defendant's Third Successive Motion for Postconviction Relief Based on Newly Discovered Evidence is hereby **DISMISSED**. Defendant has **30 days from the date of this order** to file a notice of appeal.

DONE AND ORDERED this 28th day of January, 2020.

J. LEE MARSH
CIRCUIT JUDGE

Copies to:
All counsel of record

ATTACHMENT A

48590

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

CASE NO. 90-2795

3-15-91

STATE OF FLORIDA,

vs.

DONALD DAVID DILLBECK,

Defendant.

FINDINGS IN SUPPORT OF THE SENTENCE OF DEATH

THIS COURT, after due consideration of the facts presented at the guilt and penalty phases of the trial in the above-styled cause, notwithstanding the recommendation of a majority of the jury, after weighing the aggravating and mitigating circumstances, and being otherwise advised in the premises, sets forth the following findings upon which the sentence of death is imposed upon DONALD DAVID DILLBECK:

AGGRAVATING CIRCUMSTANCES: Florida Statutes 921.141(5)

(a) The capital felony was committed by a person under sentence of imprisonment.

The evidence showed, through Defendant's admissions, that on June 22, 1990 DONALD DAVID DILLBECK escaped from a work detail of the Quincy Vocational Center and Work Camp, Department of Corrections, where he was serving a life sentence without the possibility of parole for 25 years which had been imposed by the Circuit Court of the Twentieth Judicial Circuit, In and For Lee County, Florida on June 6, 1979 for the offense of First Degree

Murder (State's Exhibit No. 50). Although the Defendant was not actually "serving" the sentence on June 24, 1990 when this offense was committed, he was, nevertheless, "under a sentence of imprisonment" at that time as defined in Florida Statutes 921.141(5)(a). Bundy v State, 471 So.2d 9 (Fla. 1985).

Therefore, the Court finds that this aggravating circumstance was proved beyond a reasonable doubt.

> *(b) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.*

The Defendant had been previously convicted of another capital felony on June 6, 1979 in the Circuit Court of the Twentieth Judicial Circuit, In and For Lee County, Florida when he entered a plea of guilty as charged and was convicted of the offense of First Degree Murder (State's Exhibit No. 50).

Therefore, this Court finds that this aggravating factor was proved beyond a reasonable doubt.

> *(c) The Defendant knowingly created a great risk of death to many persons.*

No evidence was presented as to this aggravating circumstance, no instruction was given to the jury in this regard and the Court finds that this aggravating circumstance does not exist.

> *(d) The capital felony was committed while the Defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery,*

sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

The existence of this aggravating circumstance was confirmed by the verdict of the jury in the guilt-innocence phase of the trial when the Defendant was found guilty of Armed Robbery and Armed Burglary in addition to First Degree Murder. Brown v State, 473 So.2d 1260 (Fla. 1986); Mills v State, 476 So.2d 172 (Fla. 1986); and Lowenfield v Phelps, 108 S.Ct. 546 (1989). The Defendant's testimony was that he purchased the knife to use as a weapon to force someone to transport him out of Tallahassee and, in fact, that was his purpose in approaching the victim.

The evidence was clear that this aggravating circumstance was applicable, the jury was instructed with regard to it, and the Court finds that it was proved beyond a reasonable doubt.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The Defendant testified that a part of his plan to effect his escape from the Quincy Vocational Center and Work Camp work detail was to obtain transportation out of the Tallahassee area by force and that the murder occurred during his attempt to obtain transportation. Uncontroverted evidence established that the Defendant escaped from custody, that he intended to use deadly force to further his escape plan and that he, in fact, did use deadly force to further his escape from custody. The Defendant

testified that he did not begin stabbing the victim until she began blowing the horn of the automobile to attract attention thereby making the dominant motive of the murder the elimination of a witness or a killing to avoid detection.

The jury was instructed on this aggravating circumstance and it was established beyond a reasonable doubt.

(f) The capital felony was committed for pecuniary gain.

This aggravating circumstance was not considered and the jury was not instructed on it. Since the murder was committed during an Armed Robbery and an Armed Burglary with the Defendant's motive to obtain the victim's car this circumstance was included in the consideration of the aggravating circumstance set forth in Florida Statutes 921.141(5)(d).

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

No evidence was presented on this aggravating circumstance, the jury was not instructed on it and no consideration was given to it.

(h) The capital felony was especially heinous, atrocious, or cruel.

Evidence was presented on this aggravating circumstance and the jury was instructed on it. The Medical Examiner testified without contradiction that there were 20-25 stab wounds inflicted by the Defendant on the victim. The wounds were made by a knife with a serrated blade which had been selected and purchased by the

Defendant for the specific purpose of its use as a weapon. The stab wounds were clustered in the throat, the abdomen and the upper back. One of the wounds to the upper back was approximately 4" long. The Medical Examiner further testified that the victim died as a result of one of the stab wounds severing the windpipe causing the victim to drown in her own blood. He also testified that the victim struggled for an extended period of time while the stabs were being inflicted before she lost consciousness. The evidence also showed that she attempted to flee from the automobile but the Defendant held her while he continued to stab her. The Court finds that it was proved beyond a reasonable doubt.

> *(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.*

> *(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.*

> *(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.*

No evidence was presented on these aggravating circumstances, the jury was not instructed on them and no consideration was given to them.

MITIGATING CIRCUMSTANCES: Florida Statutes 921.141(6)

The Court has evaluated the possible application of each of the statutory mitigating circumstances set forth in Florida Statutes 921.141(6), without regard to the argument of defense counsel. Also, the Court has considered all of the nonstatutory mitigating circumstances that were presented by counsel or suggested by the evidence.

(a) The Defendant has no significant history of prior criminal activity.

This mitigating circumstance does not apply, no request was made by defense counsel for an instruction to the jury on it and, in fact, the Defendant has a significant history of prior criminal activity as was admitted by the Defendant in his testimony. The jury was not instructed on it and the Court determines that it does not apply.

(b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

The Defendant contended that this mitigating circumstance was applicable, presented testimony with regard to it and counsel argued it to the jury. The defense witness, Robert Berland, a Board Certified Clinical Psychologist testified as to the extensive examination made by him of the Defendant but stated specifically on cross examination that while he found evidence of mental and emotional disturbances he did not consider it extreme. Other expert witnesses did testify with regard to the Defendant's mental and emotional condition in a manner from which the jury could have

been reasonably convinced that this mitigating circumstance was proved. The jury was instructed on this mitigating circumstance. The Court has reviewed the evidence independently and is not reasonably convinced that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the capital felony and, therefore, rejects this as a mitigating circumstance. However, as is set forth hereinafter, this evidence was considered to establish the mitigating circumstance in subparagraph (f) below.

> *(c) The victim was a participant in the Defendant's conduct or consented to the act.*
>
> *(d) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.*
>
> *(e) The Defendant acted under extreme duress or under the substantial domination of another person.*

These mitigating circumstances are not applicable to this case. The evidence does not indicate such, the jury was not instructed on them, the defense did not request instructions on them, and the Court rejects them as mitigating circumstances.

> *(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

Evidence was presented by the defense with regard to this mitigating circumstance, the jury was instructed on it and there was sufficient evidence upon which the jury could have been

reasonably convinced that this mitigating circumstance was established. The Court has made an independent review of the evidence and is reasonably convinced that it was established.

It is difficult to allocate the evidence as to this mitigating circumstance from its applicability to the mitigating circumstance in Florida Statutes 921.141(6)(b). It would appear and the Court finds that the Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. The Court is not convinced that the capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.

(g) The age of the Defendant at the time of the crime.

This mitigating circumstance is not applicable to this case. The evidence was that the Defendant is 27 years of age and there was no indication that was any factor whatsoever in this offense. The defense did not request an instruction on it or argue it and no instruction was given.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The jury was instructed that they should consider any other aspect of the Defendant's background, character or record and any other circumstances of the offense.

The Court has received and considered the Sentencing Memorandum from the defense and for the sake of clarity will discuss the non-statutory mitigating circumstances defined in that memorandum which covers all of the evidence presented in mitigation of the offense.

1. The Defendant suffered an abused and deprived childhood.

Substantial emphasis was placed on this factor in the penalty phase and without question the evidence was overwhelming that the first four (4) and one-half years of the Defendant's life were shocking. However, this must be considered in light of the almost overwhelming love that has been exhibited between the Defendant and his adoptive parents. He was with them from approximately age six to age fifteen. His adoptive parents actually gave up their established life in Indiana when he committed his first premeditated murder and moved to Florida near the institution in which the Defendant was located. They visited, talked by telephone and corresponded almost weekly with the Defendant. Defendant's father testified that the Defendant was his whole life.

The Defendant's natural sister testified that she was in the same circumstances until she was seven years of age and endured similar abuse as the Defendant, testifying also that she was thrown against an object by the mother which split her head open. The Defendant's sister is an attractive, poised young lady who is employed in a nearby city with a large national firm and appears to be well adjusted.

From a review of all of the evidence regarding the Defendant's childhood this circumstance simply does not weigh heavily as a mitigating circumstance. Kight v. State, 512 So.2d 922 (Fla. 1987); Remeta v State, 522 So.2d 825 (Fla. 1988).

2. *The Defendant suffered from brain damage due to his mother's consumption of three to four six-packs of beer a day throughout her pregnancy.*

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 is a lack of impulse control, but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree.

3. The Defendant suffers from a mental illness.

All mental health professionals who testified agreed that there was a mental disorder of some type although they differed as to what it was and the degree to which it controlled the Defendant's actions. The Court is reasonably convinced that the Defendant suffers from some mental disorder as all must who commit acts of this violent nature, but the Court finds that it is not of such significance as to weigh heavily as a non-statutory mitigating circumstance. The Court further finds that the evidence in this regard is that evidence which was considered to establish the statutory mitigating circumstances found in Florida Statutes 921.141(6)(f) and should, therefore, not be considered here as a separate mitigating circumstance.

4. The Defendant's mental illness and brain damage can be treated.

The Court saw and heard both Dr. Berland and Dr. Wocd testify and although there was testimony to support the Defendant's statement to this effect, the Court is not convinced that this is a non-statutory mitigating circumstance that is entitled to any substantial weight.

> 5. *The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme or substantial mental or emotional disturbance.*

The testimony relied upon by the Defendant to establish this non-statutory mitigating circumstance is the same evidence that was considered by the Court in finding the existence of the statutory mitigating circumstance found in Florida Statutes 921.141(6)(f) and, therefore, is rejected as a separate non-statutory mitigating circumstance.

> 6. *The capacity of the Defendant to conform his conduct to the requirements of the law was either substantially or significantly impaired.*

This has been discussed previously with regard to the statutory mitigating circumstances set forth in Florida Statutes 921.141(6)(f).

> 7. *The Defendant entered one of Florida's most violent prisons at an unusually early age.*

This circumstance was established. The Court does not view this factor as having any substantial mitigating weight. It is regrettable that the State of Florida maintained any institution

with such a reputation, however, in light of the prior acts of the Defendant it appears that he was properly placed in that institution.

9. (Actually 8.) The Defendant has been a good, well-behaved inmate.

The State conceded this non-statutory mitigating circumstance and the Court is reasonably convinced that it does exist. The Court believes that this is of no practical mitigation because it appears to the Court that it detracts from the other mitigating factors found in the Defendant's behalf. It is obvious that most of the Defendant's good behavior was a conscious effort to further his plans which included escape resulting in this offense.

10. The Defendant has the love and support of his family.

The heart-rending testimony of his devoted adoptive parents clearly established this mitigating circumstance. It is obvious, however, that the love that the Defendant returned to his adoptive parents was not sufficient to overcome his intentional criminal action and the obvious knowledge of the pain that would be caused to them by it. While great empathy is felt for the Defendant's parents, only slight mitigation results to the Defendant from it.

11. The Defendant has demonstrated remorse for his crime.

There is very little evidence to support this mitigating factor and the simple statement from the Defendant on the witness stand or at the sentencing hearing to that effect is not persuasive to the Court that this should be given any substantial weight.

CONCLUSION

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.

A review of all of the evidence, the testimony and demeanor of the witnesses causes the evidence in mitigation to pale into insignificance when considering the enormity of the proved aggravating factors and compels the sentence in accordance with the recommendation of the jury.

WHEREFORE, based on the foregoing reasons, this Court has determined that it is appropriate to follow the jury recommendation and to impose the death penalty upon the Defendant DONALD DAVID DILLBECK.

DONE AND ORDERED in Open Court at Tallahassee, Leon County, Florida, this 15th day of March, 1991.

F. E. STEINMEYER III
Circuit Judge

Copies furnished to:

Thomas F. Kirwin
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Randy P. Murrell
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