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

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

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 1990 CF 2795
ACTIVE WARRANT CAPITAL CASE

DONALD DAVID DILLBECK

Defendant.

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ORDER DENYING DEFENDANT'S FOURTH SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF AND MOTION FOR STAY OF EXECUTION

THIS CAUSE comes before the Court on the Defendant's Fourth Successive Motion for Postconviction Relief ("Motion") raising four claims, and Motion for Stay of Execution predicated on those claims both filed pursuant to Florida Rule of Criminal Procedure 3.851 on January 30, 2023. Pursuant to the Florida Supreme Court's Scheduling Order entered January 23, 2023, and this Court's own scheduling order, on February 1, 2023, the Court held a Huff [1] case management hearing. The Court having considered all the pleadings, heard the arguments of counsel, and read the entire transcript of both the guilt/innocence and penalty phases of the trial, hereby finds as follows:

1. On February 26, 1991, after a seven day trial, the jury found Defendant guilty of First Degree Murder (count 1), Armed Robbery (count 2), and Armed Burglary (count 3). On March 1, 1991, after a three day penalty phase, the jury recommended that the Court impose the death penalty for the First Degree Murder conviction. On March 15, 1991, the Court sentenced

Defendant to death for count 1 and issued written findings in support thereof and consecutive life sentences on counts 2 and 3. The Florida Supreme Court affirmed Defendant's judgment and sentence. Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994) (Dillbeck I).

2. Defendant filed a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 on April 23, 1997, and an amended motion on April 16, 2001. The trial Court held an evidentiary hearing on April 1, 2002, and denied the motion and amendment by order dated September 3, 2002. Defendant filed an appeal and also filed a Petition for Writ of Habeas Corpus. On August 26, 2004, the Florida Supreme Court denied the Petition for Writ of Habeas Corpus, and affirmed-in-part and remanded-in-part the postconviction motion, for the Court to make findings of fact and conclusions of law. Dillbeck v. State, 882 So. 2d 969 (Fla. 2004) (Dillbeck II). The trial Court entered a detailed order on July 22, 2005, which was affirmed by the Florida Supreme Court. Dillbeck v. State, 964 So. 2d 95 (Fla. 2007) (Dillbeck III).

3. On March 28, 2014, Defendant, represented by registry counsel Baya Harrison filed his first successive postconviction motion raising three claims: 1) ineffective assistance of counsel during the penalty phase for presenting mitigating factors of lack of impulse control, model prisoner evidence, and prior bad acts that opened the door to damaging evidence; 2) escape was not a proper aggravator because the state did not prove the primary motive for the killing was witness elimination; and 3) a claim of newly discovered evidence based on new studies regarding the effects of juvenile incarceration in adult prisons. This Court denied the first successive motion and that denial was affirmed on appeal in a written, but unpublished order.[2] The Florida Supreme Court found claims 1 and 2 to be procedurally barred and claim 3 to be both untimely and without merit. Dillbeck v. State, 168 So.3d 224 (Fla. 2015) (Dillbeck IV).

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[1] See Rule 3.851(f)(5)(B), Fla. R. Crim. Pro. and Huff v. State, 622 So. 2d 982 (Fla. 1993).

[2] The order is available online at: https://efactssc-public.flcourts.org/casedocuments/2014/1306/2014-1306_disposition_131521.pdf

4. On April 11, 2016, Defendant, represented by Baya Harrison filed a second successive postconviction motion raising a claim based on Hurst v. Florida, 136 S.Ct. 616 (2016). This Court denied the second successive motion and that denial was affirmed on appeal in Dillbeck v. State, 234 So. 3d 559 (Fla. 2018) (Dillbeck V), cert denied, Dillbeck v. Florida, 139 S.Ct. 162 (2018).

5. On May 9, 2019, Defendant, represented by Baya Harrison filed a third successive postconviction motion raising a claim of newly discovered evidence of a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). The State answered and the court denied the third successive motion as untimely. On January 28, 2020, the Florida Supreme Court affirmed finding the claim untimely because the ND-PAE diagnosis was first recognized in 2013. Dillbeck v. State, 304 So. 3d 286 (Fla. 2020) (Dillbeck VI), cert denied, Dillbeck v. Florida, 141 S.Ct. 2733 (2021).

6. Defendant also filed a Petition for Writ of Habeas Corpus in the U.S. District Court for the Northern District of Florida. The District Court dismissed three claims as untimely, denied the other claims, and declined to issue a certificate of appealability. Dillbeck v. McNeil, 2010 WL 419401 (N.D. Fla., January 29, 2010); Dillbeck v. McNeil, 2010 WL 610309 (N.D. Fla., February 19, 2010); Dillbeck v. McNeil, 2010 WL 3958639 (N.D. Fla., October 7, 2010). Defendant subsequently filed a Petition for a Writ of Certiorari, which the U.S. Supreme Court denied. Dillbeck v. Tucker, 132 S.Ct. 203 (U.S. 2011).

7. The following statement of facts is found in Dillbeck I:

> Dillbeck was sentenced to life imprisonment for killing a policeman with the officer's gun in 1979. While serving his sentence, he walked away from a public function he and other inmates were catering in Quincy, Florida. He walked to Tallahassee, bought a paring knife, and attempted to hijack a car and driver from a shopping mall parking lot on June 24, 1990. Faye Vann, who was seated in the car, resisted and Dillbeck stabbed her several times, killing her. Dillbeck attempted to flee in the car, crashed, and was arrested shortly thereafter and charged with first-degree murder, armed robbery, and armed burglary. He was

> convicted on all counts and sentenced to consecutive life terms on the robbery and burglary charges, and, consistent with the jury's eight-to-four recommendation, death on the murder charge. The court found five aggravating and numerous mitigating circumstances.

Dillbeck I at 1028.

8. In the instant motion, Defendant raises four claims discussed below. At the Huff hearing on February 1, 2023, Defendant acknowledged that Claims 3 and 4 are purely legal questions that can be resolved without further testimony. Regarding Claims 1 and 2, the Court finds there is no need for an evidentiary hearing. Additionally, for the reasons set forth below, Defendant's motion is denied in its entirety.

9. This Court may summarily deny a postconviction claim that is conclusively rebutted by the existing record. Rule 3.851(f)(5)(B), Fla. R. Crim. P. This Court may also deny successive postconviction claims that are untimely. Rodgers v. State, 288 So. 3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, Rodgers v. Florida, 141 S.Ct. 398 (2020). To be considered timely filed as newly discovered evidence, a successive rule 3.851 motion must be 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); see also Rule 3.851(d), Fla. R. Crim. P. Additionally, the court may summarily deny purely legal claims that are meritless under controlling precedent. Mann v. State, 112 So. 3d 1158, 1162-63 (Fla. 2013).

CLAIM 1

DEFENDANT'S DIAGNOSIS OF NEURODEVELOPMENTAL DISORDER ASSOCIATED WITH PRENATAL ALCOHOL EXPOSURE (ND-PAE), EXEMPTS HIM FROM EXECUTION.

10. This claim is very similar to and relies on the same studies offered for the claim raised in Dillbeck's Third Successive Motion for Postconviction Relief Based on Newly

Discovered Evidence at pp. 5-8. In that 2019 motion, Dillbeck offered a report created by a multidisciplinary team consisting of Dr. Natalie Novick Brown, Dr. Wes Center, Dr. Paul Connor, Ph.D., Dr. Richard Adler, and Dr. Faye Sultan, Ph.D. Id. This team diagnosed Dillbeck with Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) and found he suffered from significant and quantifiable cognitive and adaptive functioning deficits as a result. Id. at 6.

11. Currently, for Claim 1, Dillbeck relies upon that same diagnosis in an attempt to fashion new arguments based upon what has already been presented to this Court and dismissed as untimely. See Order Dismissing Defendant's Postconviction Motion entered January 28, 2019. As discussed above, that dismissal was affirmed by the Florida Supreme Court in Dillbeck VI. The Florida Supreme Court wrote:

> [T]he facts on which the claim is predicated—a diagnosis of ND-PAE and qEEG results—could have been discovered by the use of due diligence as early as 2013, when ND-PAE became a diagnosable condition. Dillbeck and his counsel failed to exercise due 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.

Dillbeck V, 304 So. 3d at 288.

12. The same is true for the current claims. The clock began in 2013, and therefore, Dillbeck had until 2014 to pursue his claims that his ND-PAE diagnosis makes him categorically exempt from execution under Atkins. In addition to the law of the case, other caselaw also supports this conclusion. Long v. State, 271 So. 3d 938 (Fla. 2019), cert. denied sub nom. Long v. Florida, 139 S.Ct. 2635 (Fla. 2019) (finding Long's knowledge of his brain damage since his penalty phase and references to "research and studies much older than one year prior to the date that Long filed his motion" made the motion untimely); see Branch v. State, 236 So. 3d 981, 986 (Fla. 2018) (holding "[S]cientific research with respect to brain development does not qualify as newly discovered evidence.").

13. Although opinions of the scientific and medical communities do evolve, Dillbeck knew of and presented evidence of his Prenatal Alcohol Exposure at trial[3] and in his third successive postconviction motion and could have "discovered similar research" over the years to timely make this claim. Morton v. State, 995 So. 2d 233, 245 (Fla. 2008) (finding that even though a 2004 brain mapping study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time.); Davis v. State, 142 So. 3d 867 (Fla. 2014) (holding studies cited by Davis, addressing the effects of alcoholism and sexual abuse on brain development, do not constitute newly discovered evidence.)

14. A successive postconviction motion may not be used to re-litigate a claim that has been raised and rejected on direct appeal or prior postconviction motion. Hendrix v. State, 136 So. 3d 1122 (Fla. 2014); see generally Swain v. State, 911 So. 2d 140, 144 (Fla. 3d DCA 2005) (applying the doctrine of res judicata to claims presented in 3.850 motions). Defendant is procedurally barred from re-litigating his claim regarding ND-PAE.

15. Defendant also asks this court to extend Atkins to Defendant due to his ND-PAE diagnosis based on evolving standards of decency. Atkins prohibits the execution of intellectually disabled defendants.[4] This Court declines to expand Atkins to include other mental conditions, such as ND-PAE. This Court is required to follow United States Supreme Court Eighth Amendment jurisprudence and may not expand those holdings. Art. 1, § 17, Fla. Const. When the United States Supreme Court establishes a categorical rule, expanding the category, violates that rule. Kearse v. Sec'y, Fla. Dep't of Corr., 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (citing Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239, 1257-59 (11th Cir. 2015)).

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[3] The Trial Court found it was the "most compelling" mitigator in its Findings in Support of the Sentence of Death entered March 15, 1991, See Conclusion.

[4] Aktins and Nita A. Farahany, *Cruel and Unusual Punishments*, Vol. 86 Wash. U. Law. Rev. 859 (2009), attached to Defendant's motion as Attachment A use the older term "mentally retarded" rather than intellectually disabled.

Furthermore, the Florida Supreme Court has repeatedly refused to expand Atkins to other types of mental conditions and illnesses. See, e.g., Gordon v. State, 350 So.3d 25, 37 (Fla. 2022). Atkins is limited to claims of intellectual disability and therefore the additional evidence of ND-PAE will not be considered.

16. Additionally, the Atkins claim, as a claim of intellectual disability, is untimely. Atkins was decided in 2002. Under Florida Rule of Criminal Procedure 3.203, as the rule then provided, any Atkins claim had to be raised in 2004 but this Atkins claim is being raised for the first time in 2023. Bowles v. State, 276 So. 3d 791, 793-94 (Fla. 2019) (citing Harvey v. State, 260 So. 3d 906, 907 (Fla. 2018), Blanco v. State, 249 So. 3d 536, 537 (Fla. 2018), and Rodriguez v. State, 250 So. 3d 616 (Fla. 2016)). The claim of intellectual disability is being raised nearly two decades too late.

17. Alternatively, the claim of intellectual disability is meritless because the record establishes that Dillbeck has normal intellectual functioning. Defendant alleges that despite his average IQ score and lack of formal diagnosis, he "embodies the lessened culpability" described in Atkins v. Virginia, 536 U.S. 304 (2002). One of Defendant's mental health experts at the penalty phase, Dr. Berland, a board-certified forensic pathologist, testified that he administered the WAIS IQ test to Dillbeck. (Trial Transcript(TT), Vol. 15, pp. 2336, 2345). Dr. Berland testified that Dillbeck's IQ was 98 to 100, which is average. (TT, Vol. 15, p. 2406). The existing record conclusively rebuts the Atkins claim.

18. Because the claim of intellectual disability is procedurally barred, untimely and conclusively rebutted on the merits by the existing record, this Court denies Claim 1.

CLAIM 2

NEWLY DISCOVERED EVIDENCE DIMINSHES THE AGGRAVATING NATURE OF THE 1979 CAPITAL FELONY CONVICTION.

19. Dillbeck's second claim alleges newly discovered evidence about his 1979 guilty plea to the First Degree Murder of Deputy Hall in Lee County Case No. 1979 CF 335. The Court separates Claim 2 into two subclaims: (A) the newly discovered evidence establishes that the 1979 conviction used to aggravate his capital case is "invalid" and therefore his capital sentence violates Johnson v. Mississippi, 486 U.S. 578 (1988) and (B) the newly discovered evidence not presented at his penalty phase mitigates or rebuts the 1979 murder conviction. The Court finds neither warrant an evidentiary hearing.

20. As an initial matter, the Court finds both subclaims are untimely. As discussed above, it is proper to summarily deny postconviction claims that are untimely. Mungin, 320 So. 3d 624, 626 (Fla. 2020); Rodgers v. State, 288 So. 3d at 1039. Florida Rule of Criminal Procedure 3.851(d)(1)(2)(A) categorically bars claims filed outside the one-year time limitation unless, "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." "For an otherwise untimely claim to be considered timely as newly discovered evidence, it must be filed within a year of the date the claim became discoverable through due diligence." Mungin, 320 So. 3d at 625-26. The clock does not restart when new expert opinions based on previously available evidence are presented. Booker v. State, 336 So. 3d 1177, 1182 n.5 (Fla. 2022). Nor is it restarted by affidavit statements from known witnesses previously available to testify. Mungin, 320 So. 3d at 625-26. Good cause for failing to assert successive claims earlier is also required. Rule 3.851(e)(2), Fla. R. Crim. P.

21. In 2023, Dillbeck relies on the following "newly discovered" evidence to challenge his *1979* prior violent felony conviction in his *1991* capital penalty phase: (1) Robert

Schienle's statement that he interacted with Dillbeck *before the 1979 shooting of Deputy Hall* and thought something was not right; (2) witness statements from Karen Haubert, and Jon and Carol Herbster, that they saw Dillbeck walk out of the ocean covered in seaweed *back in 1979*; (3) Linda Kunz's statement that Dillbeck "looked like he had a break from reality" and was unfocused after shooting Deputy Hall *back in 1979*; (4) Carl Krieg (a childhood friend of Dillbeck's) stating he believed Dillbeck was on pure adrenaline *back in 1979*, that it always seemed like something was wrong with him, that he used amphetamines, and that he was beaten in school; and (5) 2023 reports from Drs. Crown and Toomer expressing doubt about Dillbeck's mental state at the time of his 1979 crime and guilty plea.

22. The claim is decades late. The doctor's reports are not newly discovered evidence themselves. See Booker, 336 So. 3d at 1182 n.5.[5] And neither are witnesses that have always been available to testify to things they witnessed in 1979 (12 years before Dillbeck's 1991 penalty phase, 22 years before his first 3.851 motion, and over 43 years before today). Mungin, 320 So. 3d at 625-26. See also White v. State, 964 So. 2d 1279, 1285 (Fla. 2007) (finding the Defendant failed to explain why his proposed witness, Frank Marasa, could not have been discovered by diligent efforts either prior to trial, in preparing his 1983 postconviction motion).

23. In an attempt to argue this claim is timely, Dillbeck relies on two Florida Supreme Court cases, Waterhouse v. State, 82 So. 3d 84, 104 (Fla. 2012) and Mungin v. State, 79 So. 3d 726, 737 (Fla. 2011), and adds an exception into the timeliness requirement that is simply not there. In Waterhouse, the Florida Supreme Court held due diligence was established where two elements were met: (1) a witness previously spoke to law enforcement and the information included in the report is inaccurate or false and (2) defense counsel swears he relied on the report

[5] Dillbeck makes a perfunctory remark that these reports relied on medical advances not available in 1979, but neither Dr. Crown nor Dr. Toomer rely on any new advancement available less than a year before Dillbeck's present motion. See Dillbeck's App'x Vol. II, 0-P.

and did not investigate further because the report indicated the witness would not have any more information about the crime. 82 So. 3d at 104; see also Mungin, 79 So. 3d at 737 ("We are troubled by the possibility that a false police report was submitted and then relied on by defense counsel.").

24. Omissions are not falsities, making Waterhouse and Mungin clearly inapplicable to these facts. Those cases also went to trial and involved alleged Brady violations. Here Dillbeck alleges: Schienle gave a statement to law enforcement in 1979 that did not include the information he gives now; Kunz gave a statement saying Dillbeck was "pacing hard and looked messed up"; and Krieg gave no statement at all. See Motion at 13 n.24-26. Even based on Dillbeck's statement of these facts, there was nothing inaccurate or false about the information contained in the police reports. Instead, this case is governed by another Mungin case issued by the Florida Supreme Court in 2020. See Mungin v. State, 320 So. 3d 624, 626 (Fla. 2020) (finding lack of diligence because the witness who executed a 2016 affidavit "was a known witness who was available to the defense since Mungin's 1997 trial").

25. More to the point, Dillbeck was there in 1979 and knew all the facts he now relies on. Dillbeck's assertion that he could not have disclosed his behaviors to counsel because he was an "incompetent and insane 15 year old" is insufficient. See Motion at 15 n.27. This explanation offers nothing to establish how diligence could not have been performed to pursue or procure these statements since his penalty phase in 1991, his first motion for postconviction relief in 1997, his amended motion for postconviction relief in 2001, his first successive motion for postconviction relief in 2014, his second successive motion for postconviction relief in 2016, and his third successive motion for postconviction relief in 2018. "In a successive postconviction motion, it is incumbent on the defendant to demonstrate that his claims could not have been raised in the initial postconviction motion through the exercise of due diligence."

Rivera v. State, 187 So. 3d 822, 832 (Fla. 2015).

26. Dillbeck testified to numerous details of the 1979 murder when he pled guilty.[6] See Plea Hearing, pp. 22-31, 36, 38. Also, he was certainly not incompetent or insane during his 1991 capital trial where he testified about the 1979 first-degree murder in vivid detail. (See TT, Vol. X15, pp. 2275-79, 2333-34; TT, Vol. 16, pp. 2506-07). Dillbeck's personal, under-oath testimony in 1991 includes the following account of the 1979 murder: (1) he stabbed someone in Indiana before fleeing to Florida and shooting Deputy Hall; (2) the stabbing occurred because the man in Indiana tried to stop him from stealing a CB radio from someone's car at night while Dillbeck was high on speed; (3) the Indiana man walked up to him and tried to get him to go inside; (4) he got out of the passenger side of the car, walked to the man, stabbed him, and took off running; (5) he stole a car and fled Indiana when police came and took a picture of him; (6) he drove for two days on about three hours sleep before coming to Florida; (7) he parked on a Florida beach and was counting some money when Deputy Hall shone a flashlight in the car window; (8) he pretended to be asleep; (9) he lied to Deputy Hall and said he was waiting for a motel; (10) Deputy Hall asked for his identification and Dillbeck lied again and said it was in the trunk; (11) he lied about where his ID was because he was "just looking for a chance to run"; (12) Deputy Hall found a hash pipe and bag of Marijuana and began to arrest Dillbeck; (13) Dillbeck hit Deputy Hall "in his nuts" and took off running; (14) Deputy Hall caught him and they began to struggle; (15) Dillbeck pulled Deputy Hall's gun out of his holster and shot him twice; (16) Dillbeck took off running; (17) he tried to get the car started but it was stuck; (18) he returned to the car "a couple of times" to get some things out of it; and (19) he was captured the next morning. (TT, Vol. 15, pp. 2275-79).

27. Any argument that Dillbeck could not remember what occurred in 1979 to excuse

his belated 3.851 claims in this 2023 active warrant case is conclusively refuted by the record. Dillbeck testified about what happened in vivid detail and under oath both in his 1979 plea colloquy and 1991 penalty phase. He cannot excuse waiting 30 more years to add more details. See Rule 3.851(d)(2)(A), Fla. R. Crim. P. (newly discovered evidence claims cannot rely on facts known to the "movant or the movant's attorney"). He has not established "good cause" for waiting until the death warrant was signed to assert these claims.

Subclaim A: Johnson v. Mississippi, 486 U.S. 579 (1988)

28. The Eighth Amendment of the United States Constitution requires "reexamination of" a "death sentence based in part on a *vacated* conviction." Johnson v. Mississippi, 486 U.S. 578, 584 (1988). The Florida Supreme Court has made it clear that a valid Johnson claim requires showing the prior aggravating conviction was actually vacated. See Wickham v. State, 124 So. 3d 841, 864 (Fla. 2013); Phillips v. State, 894 So. 2d 28, 36 (Fla. 2004) (finding Johnson did not apply because the defendant did not indicate his conviction had been set aside, vacated, or reversed). If the defendant cannot show the underlying aggravating conviction has been vacated, set aside, or reversed, a Johnson claim is not cognizable. Johnson v. State, 104 So. 3d 1010, 1025 (Fla. 2012) (citing Lukehart v. State, 70 So. 3d 503, 513 (Fla. 2011)). Dillbeck's 1979 conviction for first-degree murder remains valid. See Lee County Case No. 1979 CF 335. Because Dillbeck cannot show the 1979 conviction used to aggravate his capital case was vacated, set aside, or reversed, his Johnson claim is not cognizable and must be summarily denied.

29. Even if the 1979 conviction was vacated at some future date, the Johnson claim would still fail under both harmless error and permissible court-reweighing analysis. McKinney v. Arizona, 140 S.Ct. 702 (2020) (reaffirming the concept of reweighing). In addition to the prior

[6] Dillbeck's 45 page plea hearing was very thorough and incidentally a few pages longer than the 69

capital felony conviction aggravator, the Court found the following aggravating circumstances: 1) the capital felony was committed by a person under sentence of imprisonment; 2) escape/avoid arrest aggravator; 3) the capital felony was committed while Defendant was engaged in the commission of a robbery and burglary; and 4) the capital felony was especially heinous, atrocious, or cruel (HAC)[7]. Id. The HAC aggravator is one of the most serious. Hoskins v. State, 75 So. 3d 250, 256 (Fla. 2011); Butler v. State, 100 So. 3d 638, 667 (Fla. 2012) (affirming a single aggravator case when that sole aggravator was HAC). HAC alone would be sufficient to reaffirm Dillbeck's death sentence. Additionally, the state argued it was the heaviest of the five. (TT, Vol. 16, pp. 2704 – 2708), and the Trial Court made detailed findings to support HAC in its Findings in Support of the Sentence of Death entered March 15, 1991.

30. Therefore, if the Court were to perform a reweighing analysis of the aggravating and mitigating circumstances without the prior violent felony aggravator under McKinney v. Arizona, 140 S.Ct. 702 (2020), it would find death to be the appropriate sentence. Id. (reaffirming court reweighing and expanding the concept to mitigation as well as to the more traditional striking of an aggravator); Johnson, 486 U.S. at 591 (White, J., concurring with Rehnquist, C.J.) ("It is left to the Mississippi Supreme Court to decide whether to reweigh the two untainted aggravating circumstances against the mitigating circumstances" and "determine the appropriate sentence."). For similar reasons, the Court would not find the that the evidence without the 1979 conviction would probably produce a life sentence. See infra, Subclaim (B), Point Two.

31. If Dillbeck is arguing this Court should hear evidence and vacate the 1979 Lee

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minute Huff hearing in this case.

[7] Dr. Thomas Wood, the medical examiner, testified that the victim sustained 20 – 25 stab wounds including some deep wounds to the abdomen and neck. The wound to the neck that cut through muscle, the esophagus and some cartilage caused the victim's death after she sucked blood into her windpipe. TT, Vol. 12, pp. 1913 – 1918, 1926 – 1928, 1931 – 1933.

County conviction, this Court lacks jurisdiction to do so. See, E.g., James v. Jones, 244 So. 3d 352, 353 (Fla. 1st DCA 2018) (holding a circuit judge in the 14th Judicial Circuit had no jurisdiction to review the legality of a judgment imposed by the 20th Judicial Circuit despite the petitioner's allegation that the original judge had no jurisdiction to impose the penalty it did). Under Rule 3.851, this Court has no jurisdiction to vacate a conviction entered by a circuit judge sitting in a different judicial circuit.[8] And even if this Court had such power, the harmless error and reweighing analysis discussed previously, means this Court would decline to vacate the conviction, and summary denial is still appropriate.

32. It is also worth mentioning that Dillbeck's Plea Colloquy (which was introduced during the 1991 penalty phase as State's Exhibit #54) refutes any claim that he was incompetent to enter a plea of guilty. (TT, Vol. 14, p. 2190). A plea agreement is a contract between the Defendant and the State. Garcia v. State, 722 So. 2d 905, 907 (Fla. 3d DCA 1998). Thus, the rules of contract law apply, and "[a] party may waive any right to which he is legally entitled under the Constitution, a statute, or a contract." Id. As such, a "defendant cannot accept the benefit of the bargain without accepting its burden." Id. at 52. By entering a plea to First Degree Murder in 1979, Dillbeck waived his right to investigate the case and go to trial. Where a specific sentence is imposed pursuant to a plea agreement, that agreement cannot be circumvented. State v. Gutierrez, 10 So. 3d 158, 159 (Fla. 3d DCA 2009) (finding a defendant could not circumvent his plea agreement by filing a motion to mitigate).

33. The plea colloquy from Dillbeck's 1979 Lee County case demonstrates he freely, voluntarily, and intelligently entered a plea of guilty with the advice of competent counsel, as found by the Honorable Jack R. Schoonover. Brady v. United States, 397 U.S. 742, 758 (1970)

[8] Dillbeck has challenged the 1979 conviction in the 20th Circuit. See Facts of Crime and Procedural History, pp. 21 - 24 filed by the State in this case on January 25, 2023. The denial of the

(noting the expectation that "courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel"); Transcript of Plea Hearing in Case No. 1979 CF 335. Dillbeck cannot now circumvent that which he freely entered into. See Garcia, 722 So. 2d at 907. In his 1979 case, Dillbeck was represented by the elected Public Defender for Lee County (Douglas M. Midgley), a Chief Assistant Public Defender (Robert Jacobs), and an Assistant Public Defender (Eugenie Gollop)[9]. See Plea Hearing at 13. The State and Defense *negotiated* a guilty plea, Public Defender Midgley was personally present for the length plea colloquy (along with Dillbeck's parents), and Public Defender Midgley expressly withdrew his motion for a competency evaluation and to expand the insanity defense. Plea Hearing, pp. 10-11, 34-35. The plea colloquy with Dillbeck was exhaustive.

34. While a defense attorney's "expressed doubt" about a defendant's competence is a factor in determining whether to appoint competency experts, the express intentional, withdrawal of a request for a competency determination by experienced and capable counsel solidifies that Dillbeck was competent to plead guilty in 1979. Cf. Drape v. Missouri, 420 U.S. 162, 179 (1975). Any lingering doubt is negated by the fact that the 1979 trial judge administered a lengthy colloquy with Dillbeck and clearly did not find any competency issue which would impede his acceptance of the plea. This is reinforced by the fact that the Supreme Court's chief competency cases (Dusky,[10] Pate,[11] and Drape) were well established when Dillbeck plead in 1979, and the Supreme Court had long held an incompetent defendant could not plead guilty.

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postconviction motions directed toward the 1979 conviction have all been affirmed or abandoned. See State v. Dillbeck, 296 So. 3d 416 (Fla 2d DCA 2020), including a claim based on the ND-PAE Diagnosis.

[9] On February 2, 2023, Defendant filed an affidavit from Ms. Rehak, f/k/a Gollop who was a misdemeanor attorney at the time and discussed the case with Dillbeck after he invoked his right to counsel at First Appearance. Nothing in that affidavit is sufficient to change the Court's analysis.

[10] Dusky v. United States, 362 U.S. 402 (1960).

[11] Pate v. Robinson, 382 U.S. 375 (1966).

Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (holding a defendant may not plead guilty unless he does so "competently and intelligently"); Brady, 397 U.S. at 758.

35. To the extent Dillbeck argues he could not form the requisite intent to commit first-degree murder in 1979, his arguments are untimely, waived by his plea, and refuted by the plea colloquy. The trial judge took great pains to ensure Dillbeck had the requisite intent to commit first-degree murder before allowing him to plead guilty:

> The COURT: One more time, Mr. Dillbeck. At the time you pulled the trigger, after having pointed the gun at Mr. Hall, did you know what you were about to do and that the probable result from pulling that trigger would be to kill Mr. Hall?
> The DEFENDANT: Yes, sir.

Plea Hearing at 38; see also Plea Hearing at 27-30, 36.

The Court also required Dillbeck to recount the murder in his own words and mostly unprompted. Plea Hearing, pp. 23-31, 36, 38. His 1979 intent was also extensively litigated at the 1991 penalty phase. Subclaim (A) must be summarily denied because Dillbeck's 1979 First Degree Murder conviction is still intact, the Court lacks jurisdiction to vacate the conviction, any attempt to vacate it is more than four decades late, and there is no basis to vacate it anyway.

Subclaim (B): Newly Discovered Evidence to Mitigate/Rebut the 1979 Aggravator

36. A valid newly discovered evidence claim requires two elements: (1) *admissible* evidence unknown during trial and that could not have been discovered through due diligence; and (2) that the newly discovered evidence would probably produce a life sentence when considered with all evidence that would be admissible in a new penalty phase. Dailey v. State, 329 So. 3d 1280, 1288 (Fla. 2021); Dillbeck v. State, 304 So. 3d 286, 287 (Fla. 2020); Calhoun v. State, 312 So. 3d 826, 836 (Fla. 2019); Marek v. State, 14 So. 3d 985, 990 (Fla. 2009).

37. Subclaim (B) fails for two reasons. First, as mentioned, it is untimely and there is no good cause to excuse the failure to raise it earlier. Alternatively, even if the claim were timely, the "new" evidence would probably not produce a life sentence. Five aggravators were

proven in this case: (1) under sentence of imprisonment; (2) murder committed during a robbery/burglary; (3) murder committed to avoid arrest/effect escape; (4) murder was especially heinous, atrocious, or cruel; and (5) prior violent felony for the first-degree murder of Deputy Hall. Dillbeck, 643 So. 2d at 1028 n.1. Dillbeck proved the following mitigation: (1) he was substantially impaired under § 921.141(6)(f), Florida Statutes (1989); (2) childhood abuse; (3) fetal alcohol effects; (4) treatable mental illness; (5) imprisonment at an early age in a violent prison; (6) good behavior; (7) a loving family; and (8) remorse. Id. at n.2. Overall, little weight was given to this mitigation by the Court.

38. Dillbeck's new evidence (at most) shows he was acting oddly before and after he killed Deputy Hall and that two doctors, who have evaluated this evidence in 2023, doubt his competence to plead guilty and form premeditated intent in 1979. That barely alters the profile of the aggravating and mitigating circumstances, especially considering intent was litigated extensively in 1991, his 1979 plea colloquy was introduced to the jury, and the State would still be able to use the non-vacated 1979 conviction to prove the prior violent felony aggravator. Accordingly, there is no reasonable probability Dillbeck would receive a life sentence based on this "new" evidence, and his claim fails.

39. Finally, even if the prior violent felony aggravator was not considered, there is no reasonable probability Dillbeck would receive a life sentence given the remaining weighty aggravators in this case, including HAC, as discussed above. The HAC aggravator in this case was based on Dillbeck repeatedly stabbing the victim with a knife he had purchased as part of a plot to kidnap someone and force them at knife point to drive him to Orlando. Faye Vann was the victim because, as he himself testified, he believed she would be an easy target. The HAC aggravator alone would be sufficient to reaffirm Dillbeck's death sentence. This aggravator is also accompanied by three other aggravators. Therefore the alleged newly discovered evidence

would not result in a life sentence. Even if the prior capital felony conviction aggravator had not been found in this case, a sufficient basis nevertheless would have existed for imposing the death penalty. See generally Calhoun v. State, 138 So. 3d 350 (Fla. 2013); Aguirre-Jarquin v. State, 9 So. 3d 593 (Fla. 2009); Reynolds v. State, 934 So. 2d 1128 (Fla. 2006).

40. Additionally, the newly discovered evidence regarding the witnesses to Dillbeck's behavior in 1979 when he shot Deputy Hall and the two experts reports are untimely. Dillbeck was not diligent in obtaining the statements from the known witnesses to the 1979 murder or in attempting to discover the unknown witnesses to the 1979 murder. This claim is summarily denied as not cognizable and untimely.

CLAIM 3

DEFENDANT ARGUES DUE PROCESS ENTITLES HIM TO ANOTHER CLEMENCY PROCEEDING.

41. Dillbeck asserts a claim that his due process rights regarding clemency proceedings were violated when he was denied the opportunity to provide additional information to support clemency. However, the minimal due process rights regarding clemency, established by the United States Supreme Court in Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280-81 (1998), do not apply to clemency updates. In fact, there is no constitutional right to clemency. Bowles v. DeSantis, 934 F.3d 1230, 1242 (11th Cir. 2019) (citing Herrera v. Collins, 506 U.S. 390, 414 (1993) (noting the Constitution "does not require the States to enact a clemency mechanism"). There is no specific procedure mandated in the clemency process. Johnston v. State, 27 So. 3d 11, 25-26 (Fla. 2010). The Florida Supreme Court has rejected arguments that the first clemency hearing was inadequate because it was conducted before the capital defendant's "full life history and mental illness history were developed." Id.; Grossman v. State, 29 So. 3d 1034, 1044 (Fla. 2010). Discussing Woodward, the Florida Supreme Court noted that

none of the opinions "required any specific procedures or criteria to guide the executives signing of warrants for death sentenced inmates." Marek v. State, 14 So 3d 985, 998 (Fla. 2009) (denying a due process challenge to Florida's clemency proceeding where the Governor reviewed the case "without input from Marek").

42. The Florida Supreme Court has also rejected claims that a time lapse between a defendant's clemency proceeding and the signing of his death warrant renders the clemency process inadequate or entitles the defendant to a second proceeding. Pardo v. State, 108 So. 3d 558, 568 (Fla. 2012). Finally, clemency is an executive function and therefore, in accordance with the doctrine of separation of powers, courts generally will not second-guess the executive's determination that clemency is not warranted. Id. (citing Johnston). Therefore, the due process claim regarding clemency is summarily denied.

CLAIM 4

DEFENDANT'S EXECUTION AFTER A 30 YEAR DELAY VIOLATES THE EIGHTH AMENDMENT.

43. Dillbeck raises a claim that the 30 years he has spent on death row, in what he terms "solitary" confinement, violates the Eighth Amendment's prohibition on cruel and unusual punishment and requires this Court to vacate his capital sentence.[12] Such claims are often referred to as Lackey claims because they stem from a dissenting opinion from the denial of certiorari in Lackey v. Texas, 514 U.S. 1045 (1995). The Florida Supreme Court has consistently rejected Lackey claims including most recently in Long v. State, 271 So. 3d 938, 946 (Fla. 2019).

[12] Florida's confinement practices do not amount to the solitary confinement that would be considered cruel and unusual under the Eighth Amendment. Compare In re Medley, 134 U.S. 160, 167-68 (1890) (defining the phrase "solitary confinement" as "complete isolation of the prisoner from all human society" and confinement in a cell such that "he had no direct intercourse with or sight of any human being"), *with* Davis v. Dixon, No. 3:17-CV-820-MMH-PDB, 2022 WL 1267602, at *3 (M.D. Fla. Apr. 28, 2022) (settlement providing for "greater access to multimedia kiosks . . . increased access to telephones," and improved "conditions for outdoor exercise").

44. Defendant seems to be arguing that he should have been executed immediately rather than being afforded numerous appeals. Defendant also alleges that at a minimum he should have been executed after the 2013 clemency proceedings. Defendant of course has the option of exercising his appellate rights, but should not benefit from the delay required in order for him to do so. Defendant admits that the Florida Supreme Court has consistently rejected this claim. See Lambrix v. State, 217 So. 3d 977, 988 (Fla. 2017). However, Defendant attempts to distinguish his argument by citing what he alleges is the "original meaning" of cruel and unusual punishment. Indeed, there is no legal support for such an Eighth Amendment claim. As Justice Thomas stated, he was "unaware of any constitutional support for the argument." Johnson v. Bredesen, 558 U.S. 1067 (2009) (Thomas, J., concurring in the denial of certiorari).

45. The Florida Supreme Court has also observed that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment." Booker v. State, 969 So. 2d 186, 200 (Fla. 2007); Knight v. State, 746 So. 2d 423, 437 (Fla. 1998). Furthermore, the appropriate remedy for a claim that prolonged solitary confinement violates the Eighth Amendment is to challenge the condition of the confinement, not to vacate a death sentence. To the extent Dillbeck's stay in the Department of Corrections violated his Eighth Amendment rights, he received all the remedy he was entitled to in the recent settlement litigation. Davis v. Dixon, No. 3:17-CV-820-MMH-PDB, 2022 WL 1267602, at *1 (M.D. Fla. Apr. 28, 2022).

46. This Court summarily denies the Eighth Amendment claim as being meritless as a matter of law under Florida Supreme Court controlling precedent.

Motion for Stay of Execution

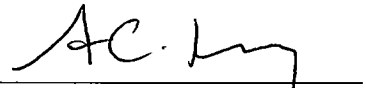
47. A stay of execution is warranted only when there are substantial grounds upon which relief might be granted. Davis v. State, 142 So. 3d 867, 873-74 (Fla. 2014) (quoting

Buenoano v. State, 708 So. 2d 941, 951 (Fla.1998), and denying a stay); Chavez v. State, 132 So. 3d 826, 832 (Fla. 2014); Howell v. State, 109 So. 3d 763, 778 (Fla. 2013). However, none of the four claims are substantial. All four claims are procedurally barred, untimely, or without merit.

48. 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. 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). The long delays between the time an offender is sentenced to death and his execution are excessive. Id. The answer is not to reward those who interpose delay with a decree ending capital punishment by judicial fiat. Id. The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. As the United States Supreme Court has emphasized, last-minute stays of execution should be "the *extreme* exception, not the norm." Id. (emphasis added). Therefore, the motion for stay is denied.

ORDERED and ADJUDGED that Defendant's Fourth Successive Motion for Postconviction Relief, filed January 30, 2023, and Motion for Stay of Execution are DENIED.

DONE and ORDERED in Leon County, Florida, on February 2, 2023.



ANGELA C. DEMPSEY
Circuit Judge

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