In the Supreme Court of Florida

DONALD DAVID DILLBECK,

Appellant,

v.

CASE NO.: SC20-178
CAPITAL CASE

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The State objects to an oral argument being conducted in this appeal of this third successive postconviction motion involving a case where the conviction and death sentence became final in 1995. This Court should ***not*** hold an oral argument regarding this third successive postconviction motion involving a claim that is both untimely and meritless.

PRELIMINARY STATEMENT REGARDING THE RECORD

The record on appeal will be referred to by the year of the postconviction appeal, 2020, followed by the designation "SuccPC" to denote it is a successive postconviction appeal, followed by the designation "ROA" to refer to the record on appeal, followed by the page number in the record on appeal. (2020 SuccPC ROA page).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from the trial court's summary denial of a third successive postconviction motion in a capital case raising a claim of newly discovered evidence based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE).

The facts of the crime are recited in the Florida Supreme Court's direct appeal opinion:

> 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.

Dillbeck v. State, 643 So.2d 1027, 1028 (Fla. 1994). In short, Dillbeck was in prison for life, after entering a plea to the murder of an on-duty deputy with the deputy's own gun, when he escaped from a work-detail at the Quincy Vocational Center and stabbed a woman to death in the Tallahassee Mall parking lot in an attempt to steal her car to further his escape.

On February 26, 1991, the jury convicted Dillbeck of first-degree murder, armed robbery, and armed burglary in the guilt phase. *Dillbeck*, 643 So.2d at 1028 (noting Dillbeck was convicted of first-degree murder, armed robbery, and armed burglary). On March 1, 1991, the jury recommended a sentence of death by a vote of 8 to 4. The trial court found five aggravating circumstances: 1) Dillbeck committed the murder while under a sentence of imprisonment; 2) Dillbeck previously had been convicted of another capital felony; 3) Dillbeck committed the murder during the course of a robbery and burglary; 4) Dillbeck

committed the murder to effect escape; and 5) the murder was especially heinous, atrocious, or cruel (HAC). *Dillbeck v. State*, 882 So.2d 969, 971, n.3 (Fla. 2004).

Dillbeck appealed his convictions and death sentence to the Florida Supreme Court raising ten issues on appeal including a claim that the trial court erred in refusing to allow him to present evidence of fetal alcohol effect caused by his mother's alcoholism during pregnancy in the guilt phase to rebut the specific intent necessary to commit premeditated first-degree murder rather than being limited to presenting fetal alcohol effect as mitigation in the penalty phase. *Dillbeck*, 643 So.2d at 1028-30.[1] The Florida Supreme Court agreed that it was error not to allow Dillbeck to present that defense during the guilt phase but found the error was harmless due to the jury's special verdict finding both premeditated murder and felony murder. *Id.* at 1029-30. The Florida Supreme Court affirmed the convictions and sentence. *Id.* at 1031.

Dillbeck filed a petition for writ of certiorari in the United States Supreme Court from the direct appeal, which the High Court denied. *Dillbeck v. Florida*, 514 U.S. 1022 (1995). Dillbeck's conviction and sentence became final on March 20, 1995.

On April 23, 1997, Dillbeck filed an initial motion for postconviction relief. On April 16, 2001, Dillbeck filed an amended motion to vacate the judgments of conviction and sentence which raised eight claims including a claim of ineffectiveness for introducing the defendant's prior crimes during the penalty phase. (Vol. 3 485-531). The trial court held an evidentiary hearing on April 1,

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[1] The ten issues were: 1) juror qualifications; 2) evidence of fetal alcohol effect to negate specific intent; 3) requiring Dillbeck to submit to a psychological exam by the State's expert; 4) flight instruction; 5) testimony of the State's mental health expert; 6) instruction on HAC; 7) the finding of HAC; 8) the escape instruction; 9) proportionality; and 10) the allocating of the burden of proof in the penalty phase. *Dillbeck v. State*, 643 So.2d 1027, n.3 (Fla. 1994).

2002, at which both Dillbeck and Dillbeck's trial counsel, Assistant Public Defender Randy Murrell, testified. The trial court denied the motion for postconviction relief in a written order stating "only that Dillbeck's motion was without grounds for relief and ... there would be no benefit from a further recitation of the facts or argument by this Court." *Dillbeck*, 882 So.2d at 971 (quoting *State v. Dillbeck*, Case No. 90-2795-AF (Fla. 2d Cir. Ct. order filed Sept. 3, 2002)).

In the postconviction appeal to the Florida Supreme Court, Dillbeck, represented by registry counsel George Blow, raised five claims. The Florida Supreme Court addressed the claim that defense counsel was not *per se* ineffective for conceding guilt. *Dillbeck*, 882 So.2d at 971. The Florida Supreme Court rejected the ineffectiveness claim holding "as a matter of law, that Dillbeck is not entitled to relief under the *Nixon* line of cases." *Id.* at 976. But the Florida Supreme Court remanded to the trial court for a more completed order regarding the other four claims. *Id.* at 972 (remanding the case to the circuit court "to enter findings of fact and conclusions of law as to all the claims . . ."). Following the remand for a more detailed order, Dillbeck raised five claims in the postconviction appeal from the remand. *Dillbeck v. State*, 964 So.2d 95 (Fla. 2007).[2] The Florida Supreme Court found the claim regarding the trial court adoption of the State's proposed order to be "without merit" and then rejected the four claims of ineffectiveness of trial counsel. *Id.* at 98-106.

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[2] The five issues were: 1) the trial court erred in adopting virtually verbatim the proposed findings of fact and conclusions of law submitted by the State; 2) his trial counsel was ineffective because he conceded the HAC aggravating factor; 3) his trial counsel was ineffective because he failed to conduct proper voir dire; 4) his trial counsel was ineffective because he failed to move for a change of venue; and 5) his trial counsel was ineffective because he introduced details of Dillbeck's previous criminal activity to the jury during the penalty phase. *Dillbeck v. State*, 964 So.2d 95, 98 (Fla. 2007).

Dillbeck also filed a state habeas petition in his first postconviction appeal raising a claim that Florida's capital sentencing statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court denied the *Ring* claim noting that "one of the aggravating circumstances found by the trial court in this case was Dillbeck's prior conviction of a violent felony, a factor which under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring* need not be found by the jury." *Dillbeck*, 882 So.2d at 976-77.[3]

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[3] That reasoning is equally valid today in light of this Court's recent decision in *State v. Poole*, ___ So.3d ___, 45 Fla. L. Weekly S41, 2020 WL 370302 (Fla. Jan. 23, 2020), receding from *Hurst v. State*, 202 So.3d 40 (Fla. 2016). Under *State v. Poole* and *Hurst*, all the jury must determine is eligibility, which is a finding of one aggravator. First, any Sixth Amendment right-to-a-jury-trial claim fails on the merits due to Dillbeck's prior murder conviction and his being under a sentence of imprisonment. *Smith v. State*, ___ So.3d ___, 2020 WL 1057243, *6 (Fla. Mar. 5, 2020) (SC18-42) (rejecting a *Hurst* claim and explaining the "existence of previous violent felonies was an aggravating circumstance that rendered Smith eligible for the death penalty and satisfied the mandates of the United States and Florida Constitutions"). Both of those recidivist aggravators are exempt from *Hurst*. Second, any Sixth Amendment right-to-a-jury-trial claim fails on the merits due to Dillbeck's admissions during his testimony at trial. Dillbeck personally admitted the escape aggravator. Dillbeck testified during the guilt phase admitting the underlying facts of the crime. (T. XIII 1972-2006). He admitted that he escaped from Quincy Vocational Center. (T. XIII 1974-1975). Dillbeck admitted the escape aggravator personally under oath during his testimony at trial. *United States v. Booker*, 543 U.S. 220, 244 (2005) (explaining any fact, other than a prior conviction, "which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict *must be admitted by the defendant or* proved to a jury beyond a reasonable doubt") (emphasis added); *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (explaining that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict *or admitted by the defendant*") (emphasis added). Dillbeck personally admitted under oath to the escape aggravator and therefore, he cannot raise a *Hurst* challenge to the escape aggravator. Third, the Sixth Amendment right-to-a-jury-trial claim fails on the merits due to the jury convicting Dillbeck of armed robbery and armed burglary in the guilt phase. *Hurst* was satisfied in the guilt phase when the jury convicted him of armed robbery and armed burglary thereby finding the third aggravating factor of felony murder. *State v. Poole*, 2020

On March 28, 2014, Dillbeck, now represented by registry counsel Baya Harrison, filed a first successive postconviction motion raising three claims: 1) a claim of ineffectiveness of trial counsel for presenting mitigation that opened the door to damaging evidence; 2) a claim that the escape aggravating circumstance does not apply; and 3) a claim of newly discovered evidence based on new studies. The state postconviction court denied the first successive motion. The Florida Supreme Court affirmed the denial of the first successive postconviction motion in an unpublished order. *Dillbeck v. State*, 168 So.3d 224, 2015 WL 1787416 (Fla. 2015).

On April 11, 2016, Dillbeck, represented by registry counsel Baya Harrison, filed a second successive postconviction motion raising a claim based on the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), in the state trial court. On January 23, 2017, Dillbeck filed a "supplemental memorandum of law regarding the applicability of *Hurst v. Florida* and a motion to lift stay." On April 28, 2016, the State filed an answer asserting both that *Hurst v. Florida* did not apply retroactively and that there was no violation of the right-

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WL 370302 at *15 (noting that Poole's jury unanimously found in the guilt phase the felony murder aggravator when the jury convicted him of attempted first-degree murder, sexual battery, armed burglary, and armed robbery and explaining under "this Court's longstanding precedent interpreting *Ring v. Arizona* and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt"); *Dillbeck*, 643 So.2d at 1028 (noting Dillbeck was convicted of first-degree murder, armed robbery, and armed burglary). So, Dillbeck was eligible for the death penalty based on the prior conviction and being under a sentence of imprisonment before the trial even started. Then he was eligible for the death penalty again based on his admissions during the trial to the escape aggravator. And then he became eligible yet again when the jury convicted him of the contemporaneous crimes in the guilt phase. Dillbeck was eligible for the death penalty four times over before the penalty phase even began.

to-a-jury-trial due to both the contemporaneous convictions in the guilt phase and the recidivist aggravators. The trial court summarily denied the *Hurst* relief.

On January 24, 2018, the Florida Supreme Court affirmed the denial of the *Hurst* claim in the appeal of the second successive motion. *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018), *cert. denied*, *Dillbeck v. Florida*, 139 S.Ct. 162 (2018). The Florida Supreme Court explained that because Dillbeck's death sentence was final in 1995, neither *Hurst v. Florida* nor *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S.Ct. 2161 (2017), applied retroactively to him. *Dillbeck*, 234 So.3d at 559 (citing *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017)).

Recent litigation in the related non-capital case

Dillbeck has a prior murder conviction for the murder of a Lee County deputy. Dillbeck previously pled guilty in 1979 to the murder of an on-duty deputy and was serving a life with parole sentence for that murder when he escaped and committed this murder in 1990. The prior murder of the deputy was used as the basis for prior violent felony aggravator in this capital case.

On April 27, 2018, Dillbeck, represented by Roseanne Eckert, filed a rule 3.800(a) motion to correct an illegal sentence in the non-capital case. *State v. Dillbeck*, 79-335-CF (20th Jud. Cir. Lee Cty.). Dillbeck, relying on *Atwell v. State*, 197 So.3d 1040 (Fla. 2016), asserted that his life with parole sentence for the murder of the deputy was the functional equivalent of a life sentence and that he was entitled to a resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012), because he was a juvenile at the time he murdered the deputy. The trial court summarily denied the motion based on the Florida Supreme Court's new decision in *Franklin v. State*, 258 So.3d 1239 (Fla. 2018), *cert. denied*, *Franklin v. Florida*, 139 S.Ct. 2646 (2019), which overruled *Atwell*. Under *Franklin*, because the

sentence was a life with parole rather than a life without parole sentence, *Miller* does not apply to the prior conviction. Dillbeck appealed the denial of his 3.800(a) motion to the Second District. *Dillbeck v. State*, 2D19-0765. That appeal is currently pending in the Second District.

On May 9, 2019, Dillbeck, represented by Marie-Louise Samuels Parmer, also filed a successive rule 3.850 postconviction motion in the non-capital murder case in the trial court. *State v. Dillbeck*, 79-335-CF (20th Jud. Cir. Lee Cty.). That successive postconviction motion asserts that the plea to the murder of the deputy was involuntary based on the new diagnosis of ND-PAE. On December 9, 2019, the trial court stayed the successive postconviction motion in the non-capital case

pending the disposition of the appeal of the earlier motion in the Second District.[4]

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[4] Because only the sentence related to the prior conviction for the murder of the deputy is being attacked in the first postconviction motion pending on appeal in the Second District, no claim based on *Johnson v. Mississippi*, 486 U.S. 578 (1988), is possible in the related capital case regardless of the outcome of the Second District appeal. A valid *Johnson v. Mississippi* claim requires that the conviction be vacated, not merely that the sentence be reduced. Regardless of the sentence, the plea for the murder of the deputy will remain valid and properly used as an aggravator in this case. So, the outcome of the 3.800(a) appeal can have no possible effect on the capital case.

The successive postconviction motion attacking the prior murder conviction of the deputy on the basis of newly discovered evidence of ND-PAE, however, could theoretically give rise to a valid *Johnson v. Mississippi* claim, if the plea is vacated ***and*** Dillbeck is acquitted at any subsequent trial. But no *Johnson v. Mississippi* claim is valid until the prior conviction is actually vacated and resolved. *Wickham v. State*, 124 So.3d 841, 864 (Fla. 2013) (rejecting claim of ineffective assistance of appellate counsel for not raising a *Johnson v. Mississippi* claim which would have been meritless because the two prior felonies used to support the prior violent felony aggravator had not been vacated citing *Phillips v. State*, 894 So.2d 28, 36 (Fla. 2004)); *Lukehart v. State*, 70 So.3d 503, 513 (Fla. 2011) (rejecting claim of ineffective assistance of trial counsel for not raising a *Johnson v. Mississippi* claim as meritless because the prior violent felony conviction for child abuse had not been vacated and was still a valid conviction and therefore, this was "not a cognizable claim"); *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006) (rejecting a *Johnson v. Mississippi* claim because the two prior felonies used to support the prior violent felony aggravator had not been vacated and were still valid convictions citing *Buenoano v. State*, 708 So.2d 941, 952 (Fla. 1998)); *Bundy v. State*, 538 So.2d 445, 447 (Fla. 1989) (rejecting a *Johnson v. Mississippi* claim because the Utah conviction for aggravated kidnapping, which was a basis for the prior violent felony aggravator, had not been vacated citing *Straight v. State*, 488 So.2d 530 (Fla. 1986)).

But the successive postconviction motion in the prior conviction of the deputy that is raising the same claim of newly discovered evidence of ND-PAE that is being raised in this appeal, is even more untimely than that successive postconviction motion in this capital case. The plea to the murder of the deputy was entered in 1979. The successive postconviction motion in the Lee County case is decades late. Newly discovered evidence claims should not be permitted in plea cases. *But see Long v. State*, 183 So.3d 342, 345 (Fla. 2016) (permitting a claim of newly discovered evidence in a plea case but noting the "conundrum in applying the *Jones* test in a case where a defendant has entered a plea because there is no trial at which evidence was introduced"). But, even assuming that a

Current successive postconviction proceedings in the capital case

On May 9, 2019, Dillbeck, represented by registry counsel Baya Harrison, filed a third successive postconviction motion raising a claim of newly discovered evidence of mitigation based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). (2020 SuccPC ROA 4-28). Dillbeck asserts that he suffers from ND-PAE based on the reports of several mental health experts that he attached to the 2019 third successive postconviction motion. (2020 SuccPC ROA 29-287).

The attachments to the 2019 third successive postconviction motion included several experts' reports. (2020 SuccPC ROA 29-287).[5] Dr. Natalie Novick Brown of Northwest Forensic Associates in Washington State, who is a clinical and forensic psychologist with a specialty in developmental disabilities, wrote a 67-page report, dated May 1, 2019. (Att. A at 1-67). She examined Dillbeck on March 18, 2019, administering a series of psychological tests. (Att. A at 3). She diagnosed Dillbeck as suffering from ND-PAE. (Att. A at 2-3, 56). She observed

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new diagnosis can be used to attack a plea, the new diagnosis of ND-PAE is a form of a diminished capacity defense which is not admissible under Florida law. *Chestnut v. State*, 538 So.2d 820, 825 (Fla. 1989); *Evans v. State*, 946 So.2d 1, 11 (Fla. 2006); *Lukehart v. State*, 70 So.3d 503, 515 (Fla. 2011); *Morris v. State*, 283 So.3d 436, 439 (Fla. 1st DCA 2019); *Wagner v. State*, 240 So.3d 795, 798 (Fla. 1st DCA 2017). A defense that is not a legally valid defense cannot operate to render a plea involuntary. The new diagnosis of ND-PAE does not render the 1979 plea to the murder of the deputy involuntary. The successive postconviction motion in the non-capital case is both untimely and meritless.

[5] The attachments and appendix to the successive postconviction motion filed in the trial court are confusing. Some materials have no page numbers. Some of the experts' reports are reproduced inside other reports and attachments and appendix are labeled with the same letters. For example, Dr. Richard Adler's report is labeled as Attachment A and then is labeled as Appendix D, and then again, it is labeled as Attachment E. Another example is there is both an Attachment C as well is an Appendix C but Attachment C contains different material than Appendix C.

that the "diagnosis was first made possible in 2013 with the publication of DSM-5." (Att. A at 2, 53-54). Dr. Brown's report included an analysis of Dillbeck's school records. (Att. A at 5-6). Those school records show Dillbeck's IQ score on a SRA Primary Mental Abilities test, taken in September of 1976, when he was 13 years old, to be 96 and his score on a SRA Primary Mental Abilities test, taken in October of 1978, when he was 15 years old, to be 100. (Att. A at 5). She discussed Dillbeck's score on the Fetal Alcohol Behavior Scale (FABS) and assessed Dillbeck at a score of 18. (Att. A at 28-29). She discussed the Centers for Disease Control's 2004 protocol for measuring Fetal Alcohol Spectrum Disorders (FASD). (Att. A at 42, 52). She also discussed the CDC's 2016 online publication for diagnosing ND-PAE. (Att. A at 55). Additionally, she discussed research on FASD from 2006 and 2012. (Att. A at 51). Dr. Brown consulted with two other mental health experts regarding the quantitative electroencephalography (qEEG) testing results — Dr. Paul Connor and Dr. Richard Adler. (Att. A at 3, 51-52).

Attached to Dr. Brown's report were the reports of Dr. Paul Connor, Dr. Wesley D. Center, and Dr. Richard Adler. (Att. A at 70; Att. A at 79; Att. A at 119-136). Dr. Paul Connor's report showed Dillbeck's full scale IQ on a WAIS-IV test, given in April of 2019, to be 99. (App. B at 70-75). Dr. Connor's report also includes the results of numerous other neuropsychological tests including the Texas Functional Living Scale and the Vineland Adaptive Behavior Scale administered to his sister. The report of Dr. Wesley D. Center's of Brain & Behavior Associates in Ft. Worth, Texas, stated that Dillbeck's qEEG results were "deviant from normal" but also reported that Dillbeck's Brain Function Index (BFI) was "moderate" at 6.45. (App. C). Dr. Richard Adler's report is also included in Dr. Brown's report. (App. D).

Dr. Faye E. Sultan of Northpoint Psychological Associates in Davidson, North Carolina, who is a psychologist, wrote a 22-page report, dated May 1, 2019. (Att.

C). Dr. Sultan conducted a three-hour interview with Dillbeck on May 10, 2018. (Att. C at 2). Dr. Sultan listed the various documents she reviewed, including a Florida Department of Correction's psychological evaluation dated June 13, 1979, which listed Dillbeck's IQ as 93. (Att. C at 3). Dr. Sultan also reviewed a report from Dr. John Shobris, the Psychological Services Director at Union Correctional Institution, dated January 25, 2013, prepared as part of the clemency proceedings, which concluded that Dillbeck was of average intelligence and suffered from no major mental illness. (Att. C at 7-8). Dr. Sultan, using school records from Anderson Public School System in Indiana, noted that Dillbeck's full scale IQ was 100. (Att. C at 8). Dr. Sultan concluded that Dillbeck was suffering from "complex trauma" due to his childhood. (Att. C at 13, 17, 18-19). Dr. Sultan discussed the impact of alcohol on the adolescent brain. (Att. C at 14-16; 16-17). Dr. Sultan also discussed the impact of prenatal exposure to alcohol. (Att. C at 16). Dr. Sultan diagnosed Dillbeck with Post-traumatic Stress Disorder and Depressive Disorder. (Att. C at 19).[6]

Dr. Richard S. Adler of Seattle, Washington, who is a forensic psychiatrist, wrote a report, dated May 1, 2019. (Att. E). Dr. Richard S. Adler reviewed a CNS-VS and a qEEG administered to Dillbeck. (Att. E). Dr. Adler reported the qEEG results "were consistent" with ND-PAE. (Att. E). Dr. Adler stated that CNS-VS is "a neuropsychological screening test battery" and that Low-Resolution Brain Electromagnetic Tomography (LORETA) is a "powerful qEEG analytic technique." (Att. E). Dr. Adler stated that Dillbeck's qEEG results "as a whole" were "clearly and markedly abnormal." (Att. E).

On May 30, 2019, the State filed an answer to the successive postconviction motion asserting that the claim was untimely and meritless. (2020 SuccPC ROA

[6] Attachment D is Dr. Sultan's Curriculum Vitae. (Att. D).

288-312). The State first discussed the recent Florida Supreme Court case of *Long v. State*, 271 So.3d 938 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). (2020 SuccPC ROA 302-304). The State then asserted the claim was untimely. (2020 SuccPC ROA 304-308). Alternatively, the State asserted that Dillbeck did not meet either of the two prongs of the test for newly discovered evidence because 1) the related diagnosis of fetal alcohol syndrome was known at the time of trial and presented as mitigation evidence and 2) the diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE), would not result in a life sentence. (2020 SuccPC ROA 308-311).

On June 21, 2019, Dillbeck filed a reply. (2020 SuccPC ROA 319-330). The reply asserted that there was a difference between a diagnosis of fetal alcohol effect and a diagnosis of ND-PAE. Dillbeck also argued that the relevant date should be the date of the diagnosis, not the date of the publication of the new diagnosis in the Diagnostic and Statistical Manual, Fifth Edition (DSM-V), published in 2013, as the State asserted. (2020 SuccPC ROA 320-322). Dillbeck also attempted to distinguish *Long v. State*, 271 So.3d 938 (Fla. 2019). (2020 SuccPC ROA 324-328). On July 8, 2019, the defendant filed a memorandum of law regarding the timeliness of the successive motion. (2020 SuccPC ROA 360-368). The State did not file a response to the defense memorandum on timeliness. (2020 SuccPC ROA 369-371).

On June 28, 2019, the state postconviction court held a case management conference, commonly referred to as a *Huff* hearing,[7] to hear the arguments of counsel. (2020 SuccPC ROA 331-359).

[7] *Huff v. State*, 622 So.2d 982 (Fla. 1993) (mandating that a 3.851 movant be given an opportunity to orally argue the postconviction motion).

On January 28, 2020, the state postconviction court summarily denied the claim of newly discovered evidence and dismissed the successive motion as untimely. (2020 SuccPC ROA 372-375).[8]

This successive postconviction appeal follows.

[8] Judge Steinmeyer presided over the trial and the initial postconviction proceedings. Judge Dempsey presided over the 2016 successive *Hurst* litigation. Judge Hobbs and then Judge Marsh presided over the third successive postconviction proceedings at issue in this appeal.

SUMMARY OF THE ARGUMENT

Dillbeck asserts the trial court erred in summarily denying his claim of newly discovered evidence of mitigation based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE) and dismissing the successive motion as untimely. Dillbeck's claim of newly discovered evidence is based on quantitative electroencephalography (qEEG) testing using the LORETA technique.

The evidence of ND-PAE is not actually new. Dillbeck presented evidence of fetal alcohol effect during the first penalty phase and the sentencing court found fetal alcohol effect as mitigation. The "new" diagnosis of ND-PAE is simply a variation of the old diagnosis of fetal alcohol effect. A defendant may not premise a claim of newly discovered evidence on a diagnosis that is similar to the diagnosis already presented at the prior penalty phase. This is not a valid claim of newly discovered evidence.

The third successive postconviction motion is untimely. Dillbeck may not rely on the exception to the time limitation for newly discovered evidence because the evidence of ND-PAE is not new. The diagnosis of fetal alcohol effect was presented and found as mitigation. The new diagnosis of ND-PAE is simply a variation of the old diagnosis of fetal alcohol effect. The diagnosis of ND-PAE is merely a twist on the old diagnosis of fetal alcohol effect. Because the diagnosis of ND-PAE is not new, the exception to the time-bar for claims of newly discovered evidence does not apply and the successive postconviction motion is untimely.

This Court recently rejected similar claims of newly discovered evidence of mitigation in both *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019) (*Rodgers V*), and *Long v. State*, 271 So.3d 938 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019). A new name for an known condition or a new testing method regarding an old diagnosis is not sufficient to establish a claim of newly discovered

evidence. Under the reasoning of *Rodgers V* and *Long*, the diagnosis of ND-PAE does not amount to new evidence.

Alternatively, even viewing the diagnosis of ND-PAE as new, the successive postconviction motion remains untimely because it was not filed within one year of the discoverability of the diagnosis of ND-PAE. According to Dillbeck's own postconviction motion, the new diagnosis of ND-PAE was included in the Diagnostic and Statistical Manual, Fifth Edition (DSM-V), published in 2013, yet the successive postconviction motion raising the claim of ND-PAE was not filed until 2019. The claim is over four years late even treating the diagnosis as new. The successive postconviction motion remains untimely regardless of whether the diagnosis is viewed as new or not.

On the merits, Dillbeck does not meet the test for newly discovered evidence established in *Jones v. State*, 709 So.2d 512 (Fla. 1998). The *Jones* test for newly discovered evidence requires that 1) the evidence be unknown at the time of the trial; and 2) the evidence would be likely to result in a life sentence at any new penalty phase.

Regarding the first prong of the test for newly discovered evidence, the related diagnosis of fetal alcohol effect was known to defense counsel, the jury, and the judge at the time of trial. Indeed, Dillbeck presented evidence of fetal alcohol effect during the penalty phase and the sentencing court found fetal alcohol effect as mitigation. The evidence of fetal alcohol effect was known at the time of the trial by defense counsel, who presented it as mitigation; by the defense experts, who testified regarding it; by the jury who heard that testimony regarding it; and by the sentencing court that found it as mitigation. The evidence was known to all. Additionally, Dillbeck was not diligent in obtaining the diagnosis of ND-PAE. So, Dillbeck fails the first prong of the *Jones* test.

Regarding the second prong of the test for newly discovered evidence, the qEEG scans and new diagnosis of ND-PAE would not result in a life sentence at any new penalty phase. The new evidence must be admissible to be a valid basis for a claim of newly discovered evidence and the qEEG scans are not. Under current Florida Supreme Court precedent, the qEEG scans would not be admissible at any new penalty phase. *Hernandez v. State*, 180 So.3d 978, 1006-10 (Fla. 2015); *Lebron v. State*, 232 So.3d 942, 953-55 (Fla. 2017). qEEG scans do not meet either the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), standard or the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), standard for the admissibility of scientific evidence. Newly discovered evidence necessarily has to be admissible to result in a different outcome at a new trial or at a new penalty phase. If the new mitigation evidence is not admissible at the penalty phase, it, by definition, will not result in a different sentence. Because the qEEG results would not be admissible at any new penalty phase, Dillbeck necessarily fails the second prong of the *Jones* test.

Alternatively, even if the results were admissible, the qEEG scans and the diagnosis of ND-PAE would not likely result in a life sentence at any new penalty phase. There are five aggravators in this case including the heinous, atrocious, or cruel aggravator, the under-sentence-of-imprisonment aggravator, and the prior capital felony aggravator. The prior capital felony aggravator was based on the murder of an on-duty deputy. Dillbeck entered a plea to the murder of an on-duty deputy. Given the five aggravators which included a prior murder of an on-duty deputy, the additional mitigation of ND-PAE would not result in a life sentence. The facts are equally as compelling. Dillbeck nearly killed a man while attempting to steal his truck and then, when fleeing from that crime, murdered an on-duty deputy with the deputy's own gun. And, then many years later, Dillbeck escaped from a work detail and murdered yet again, this time stabbing a woman to death

as part of his escape attempt. Any marginal additional mitigating value of the "new" diagnosis of ND-PAE would be outweighed by the compelling facts of this murder and the five aggravators. Given the facts and aggravation present in the case, the new diagnosis would not change the sentence. Dillbeck fails the second prong of the *Jones* test.

Dillbeck fails both prongs of the *Jones* test for newly discovered evidence.

The trial court properly summarily denied the newly discovered evidence claim as untimely and properly dismissed the third successive postconviction motion.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF NEWLY DISCOVERED EVIDENCE OF MITIGATION BASED ON A DIAGNOSIS OF NEURODEVELOPMENTAL DISORDER ASSOCIATED WITH PRENATAL ALCOHOL EXPOSURE AS UNTIMELY? (Restated)

Dillbeck asserts the trial court erred in summarily denying his claim of newly discovered evidence of mitigation based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE) and dismissing the successive motion as untimely. Dillbeck's claim of newly discovered evidence is based on new quantitative electroencephalogram (qEEG) testing using the LORETA technique. But, as the trial court concluded, the third successive postconviction motion was untimely. Dillbeck may not rely on the exception for newly discovered evidence because the diagnosis of ND-PAE is not actually new. Dillbeck presented evidence of fetal alcohol effect during the penalty phase and the sentencing court found fetal alcohol effect as mitigation. The diagnosis of ND-PAE is simply a variation of the old diagnosis of fetal alcohol syndrome. Under the reasoning of this Court's recent decision in *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019) (*Rodgers V*), and in *Long v. State*, 271 So.3d 938 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019), a new name for, or new testing method regarding, an old diagnosis is not sufficient to establish a claim of newly discovered evidence. Because the diagnosis is not new, the successive postconviction motion is untimely. Alternatively, even treating the diagnosis as new, the motion remains untimely because the claim was not raised within a year of the "new" diagnosis. The DSM-V manual recognizing the diagnosis of ND-PAE was published in 2013. So, the claim should have been brought by 2014. But the third postconviction motion was filed in 2019, which was over five years late. Even treating the diagnosis of ND-PAE as new, the claim remains untimely.

On the merits, Dillbeck does not meet the test for newly discovered evidence. The test for newly discovered evidence requires that 1) the evidence be unknown at the time of the trial; and 2) the evidence would be likely to result in a life sentence at any new penalty phase.

Regarding the first prong of the test for newly discovered evidence, the diagnosis of fetal alcohol syndrome was known to defense counsel, the jury, and the judge at the time of trial. Dillbeck presented evidence of fetal alcohol effect during the penalty phase and the sentencing court found fetal alcohol effect as mitigation. A similar diagnosis was known, presented, and found as mitigation. Nor was Dillbeck diligent in obtaining the "new" diagnosis. Dillbeck fails the first prong of the test for newly discovered evidence.

Regarding the second prong of the test for newly discovered evidence, the qEEG scans and new diagnosis of ND-PAE would not result in a life sentence at any new penalty phase. The new evidence must be admissible to be a valid basis for a claim of newly discovered evidence and the qEEG scans are not. Under current Florida Supreme Court precedent, the qEEG scans would not be admissible at any new penalty phase. *Hernandez v. State*, 180 So.3d 978, 1006-10 (Fla. 2015); *Lebron v. State*, 232 So.3d 942, 953-55 (Fla. 2017). qEEG scans do not meet either the *Frye* standard or the *Daubert* standard for the admissibility of scientific evidence. Newly discovered evidence necessarily has to be admissible to result in a different outcome at a new trial or at a new penalty phase. If the new mitigation evidence is not admissible at the penalty phase, it, by definition, will not result in a different sentence. Because the qEEG results would not be admissible at any new penalty phase, Dillbeck necessarily fails the second prong.

Alternatively, even if the results were admissible, the qEEG scans and the diagnosis of ND-PAE would not likely result in a life sentence at any new penalty phase. There are five aggravators in this case including the heinous, atrocious,

or cruel aggravator, the under-sentence-of-imprisonment aggravator, and the prior capital felony aggravator. The prior capital felony aggravator was based on Dillbeck entering a plea to the first-degree murder of an on-duty deputy. The facts are equally as compelling. Dillbeck nearly killed a man while attempting to steal his truck and then, when fleeing from that crime, he murdered an on-duty deputy with the deputy's own gun. And, then many years later, while serving a life sentence, Dillbeck escaped from a work detail and murdered yet again, this time stabbing a woman to death as part of his escape attempt. Any marginal additional mitigating value of the "new" diagnosis of ND-PAE would be outweighed by the compelling facts of this murder and the five aggravators. Given the facts and aggravation present in the case, the new diagnosis would not change the sentence. Dillbeck fails the second prong of the test for newly discovered evidence as well.

Dillbeck fails both prongs of the test for newly discovered evidence.

The trial court properly summarily denied the newly discovered evidence claim as untimely and properly dismissed the third successive postconviction motion.

The postconviction court's ruling

The postconviction court summarily denied the claim of newly discovered evidence of mitigation and dismissed the successive postconviction motion. (2020 SuccPC ROA 372-375). The trial court ruled that the claim was "untimely." (2020 SuccPC ROA 372, 374). The postconviction court observed that the claim of newly discovered evidence was "based on three report written in 2019 by three doctors" who diagnosed Dillbeck with ND-PAE. *Id.* at 373. The postconviction court then noted that this diagnosis was "first recognized in the 2013 publication of the Diagnostic and Statistical Manual, Fifth Edition, commonly referred to as the DSM-5." *Id.* The postconviction court also noted that Dillbeck acknowledged that he presented evidence of the effects of "fetal alcohol exposure" at his original

sentencing but asserts that these new reports constituted "new scientific advancements" that can serve the basis for a claim of newly discovered evidence regardless. *Id.* The postconviction court then discussed the legal standard for claims of newly discovered evidence established by the Florida Supreme Court in *Jones v. State*, 109 So.2d 512, 521 (Fla. 1998). The postconviction court relied heavily on this Court's recent decision in *Long v. State*, 271 So.3d 938 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019), which it characterized as "remarkably similar" to Dillbeck's claim. (2020 SuccPC ROA at 373-374). The postconviction court noted that *Long* was an unanimous opinion from this Court and that under its reasoning, because Dillbeck and his counsel knew he had brain damage related to fetal alcohol exposure, they were "obliged" to pursue new testing "within a year of the new research they cite." *Id.* at 373. The postconviction court concluded that Dillbeck "failed the due diligence prong by not pursuing testing earlier." *Id.* at 374. The postconviction court observed that Dillbeck presented evidence of fetal alcohol exposure at his penalty phase, which was the same set of facts "as in *Long*." *Id.* (citing *Long*, 271 So.3d at 943 (concluding, in the alternative, that Long did not meet the second prong of the test for newly discovered evidence because Long had presented testimony and evidence regarding his traumatic brain injury (TBI) and his temporal lobe epilepsy at his 1989 penalty phase yet Long's "jury still unanimously recommended that the death penalty be imposed" and the sentencing court found that Long had established the two statutory mental health mitigators based on that testimony)). The postconviction court also observed, that as in *Long*, the sentencing court had found fetal alcohol effect as mitigation and indeed, as the "most compelling" mitigation. *Id.* at 374 (quoting the sentencing order which the postconviction court attached as Attachment A). While the postconviction court acknowledged that the sentencing court had stated that "testing had not yet been developed to properly

assess" the effect of fetal alcohol exposure, the postconviction court noted that the sentencing court had really lessened the weight given to the mitigation of fetal alcohol effect because those effects did not seem to have actually significantly impaired Dillbeck's mental abilities based on Dillbeck's manifested abilities, such as his ability to play chess and accumulate college credits. *Id*. at 374. The postconviction court concluded that the new diagnosis of ND-PAE was "not of such a nature" that it "would probably yield a less severe sentence in a new penalty phase." *Id*. (quoting *Long*, 271 So.3d at 943). The postconviction court then dismissed the claim as untimely and dismissed the successive postconviction motion. *Id*. at 374, 375.

Preservation

This issue is preserved for appellate review. Opposing counsel filed a successive 3.851 motion in the trial court raising the specific issue that is being raised in the appeal and obtained a ruling from the trial court on the claim. *Sparre v. State*, 289 So.3d 839, 848-49 (Fla. 2019) (explaining that to preserve an issue for appellate review, a litigant must present the issue to the trial court in a timely, specific manner and obtain a ruling and concluding that the claim of ineffectiveness of trial counsel issue was not preserved in a capital postconviction appeal).

Standard of review

The standard of review of a summarily denied postconviction claim is *de novo*. *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019) (explaining a postconviction court's decision regarding whether to grant an evidentiary hearing is a pure question of law and is reviewed *de novo* citing *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013)), *cert. denied*, *Bowles v. Florida*, 2019 WL 3977767 (Aug. 22,

2019) (No. 19-5617)); *Jimenez v. State*, 265 So.3d 462, 474 (Fla. 2018) (explaining that because "a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review" citing *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009)), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018).

Not new evidence at all

The diagnosis of ND-PAE is not new evidence. Dillbeck presented evidence of fetal alcohol effect during the first penalty phase in 1991 and the sentencing court found fetal alcohol syndrome as mitigation. *Dillbeck v. State*, 643 So.2d 1027, 1028-30 (Fla. 1994) (finding the trial court's error in refusing to permit evidence of fetal alcohol syndrome during the guilt phase to be harmless and noting the evidence was admitted in the penalty phase and found as mitigation in the sentencing order); *Dillbeck v. State*, 964 So.2d 95, 100 (Fla. 2007) (noting that trial counsel had argued in closing in the penalty phase that Dillbeck suffered from fetal alcohol syndrome which resulted in brain damage); *Dillbeck v. State*, 882 So.2d 969, 970, n.5 (Fla. 2004) (noting that the sentencing court found as non-statutory mitigation that "Dillbeck suffers from fetal alcohol effect as a result of his mother's alcohol consumption").

At the penalty phase, Dr. Thomas, a geneticist, testified for the defense regarding fetal alcohol syndrome. (T. XV 2492-2493). Dr. Robert Berland, a board certified forensic pathologist, also testified at the penalty phase as a defense mental health expert. (T. XV 2336). He administered the MMPI and WAIS IQ tests. (T. XV 2345). Dillbeck's IQ was 98 to 100 which is average. (T. XV 2406). He testified that Dillbeck had a mild psychotic disturbance. (T. XV 2388). Dr. Berland testified that while neither statutory mental mitigator applied, Dillbeck

was, definitely and significantly, impaired. (T. XV 2407-2408, 2411-2412). Additionally, Dr. Woods, a neuropsychologist, who was a professor at Bowman Gray School of Medicine and an expert in developmental disorders, testified as a defense mental health expert. (T. XV 2429, 2432-2433). He examined Dillbeck and concluded that he suffers from a disorder that resembles schizophrenia referred to as schizotypal personality disorder. (T. XV 2433-2434). He testified that Dillbeck was vulnerable to true psychotic episodes, where he completely blows up and becomes "totally crazy." (T. XV 2453). The two disorders interact making the disorder worse. (T. XV 2453). Dr. Woods referred to a psychological assessment from the Department of Corrections (DOC) which said "pretty much the same thing," which defense counsel introduced. (T. XV 2454). Dr. Woods testified that Dillbeck was under the influence of an extreme mental disturbance. (T. XV 2463-2464). Dr. Woods also testified that Dillbeck's capacity to conform his conduct to the requirements of the law was substantially impaired. (T. XV 2464). He administered half a dozen tests to Dillbeck who scored very poorly. (T. XV 2436,2439,2444). Dr. Woods testified that Dillbeck's test results were consistent with a person who suffers from fetal alcohol syndrome but this was not his area of expertise. (T. XV 2446).[9] As is clear from this testimony at the 1991

[9] The State's expert, Dr. Harry McClaren, on the other hand, diagnosed Dillbeck as having anti-social personality disorder. Dr. McClaren, a forensic psychologist, testified for the State at the penalty phase. (T. XVI 2582). Dr. McClaren administered several tests including the WAIS IQ test, the MMPI, and the Bender-Gestalt test. (T. XVI 2591). Dillbeck had an average IQ. (T. XVI 2591-2592). Dr. McClaren testified that he found no evidence of schizophrenia or related syndromes. (T. XVI 2593). Dr. McClaren diagnosed Dillbeck with anti-social personality disorder. (T. XVI 2594-2598). Dr. McClaren testified Dillbeck "absolutely" did not have schizoid personality disorder. (T. XVI 2599). Dr. McClaren testified Dillbeck did not suffer from lack of impulse control based on his lack of difficulties in controlling his behavior while incarcerated. (T. XVI 2600-2601). Dr. McClaren testified, based on his review of Dillbeck's prison records, that if Dillbeck suffered from impulse control there would have been many more

penalty phase, the diagnosis of ND-PAE is not new. Dillbeck is just presenting additional defense experts who have a new spin on the old diagnosis of fetal alcohol effect.

In *Rodgers v. State*, 288 So.3d 1038 (Fla. 2019) (*Rodgers V*), this Court recently addressed a similar claim of newly discovered evidence based on a new diagnosis. Rodgers argued that his new diagnosis of gender dysphoria was newly discovered evidence of his incompetency to plead guilty to first-degree murder. *Rodgers V*, 288 So.3d at 1039. This Court agreed with the trial court that the claim of newly discovered evidence was untimely. *Id.* This Court concluded that the diagnosis of gender dysphoria was "not newly discovered." *Id.* As this Court explained, Rodgers' depression, self-mutilation, suicidality were well known at the time of plea and the waivers. *Id.* at 1040 (citing *Rodgers v. State*, 242 So.3d 276, 277 (Fla. 2018) (Pariente, J., concurring) (*Rodgers IV*), *cert. denied*, *Rodgers v. Florida*, 139 S.Ct. 592 (2018)). This Court reasoned that, while the medical community's new diagnosis of gender dysphoria assigned a name to the cause of those well-known symptoms, that is "not newly discovered evidence." *Rodgers V*, 288 So.3d at 1040. This Court also noted that 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." *Id.* (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), and Fla. R. Crim. P. 3.851(d)(1)-(2)). This Court then stated that Rodgers' claim of newly

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disciplinary reports than the two reports there actually were. (T. XVI 2601-2602). Dr. McClaren testified that Dillbeck was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of the law. (T. XVI 2619). On cross, Dr. McClaren admitted that his test result on the schizophrenia scale was even higher than Dr. Berland's result. (T. XVI 2624-2625). Dr. McClaren also admitted that Dillbeck has a degree of brain dysfunction. (T. XVI 2626). Dr. McClaren additionally admitted that there was a suggestion of organisity in the digit symbol test. (T. XVI 2627).

discovered evidence was not filed within the one year. This Court explained that Rodgers knew of the gender dysphoria diagnosis at some point between his evaluation by a psychiatrist and the filing of an earlier successive motion containing that diagnosis but the claim of newly discovered evidence based on that diagnosis had not been filed after the one year time limit on such claims elapsed. And therefore, this Court concluded the claim of newly discovered evidence was "time-barred." *Id.* at 1039.

Here, as in *Rodgers V*, the diagnosis of ND-PAE is not new evidence. Here, as in *Rodgers V*, the psychological community, in its latest version of its professional manual, the DSM-V, merely assigned a new name to Dillbeck's well-known symptoms. Indeed, here, the psychological community simply assigned a new name to an old diagnosis that was previously listed in a prior version of that manual. So, as in *Rodgers V*, the diagnosis of ND-PAE is not new evidence.

This Court recently addressed a similar claim of newly discovered evidence in *Long v. State*, 271 So.3d 938 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019), and rejected the claim. Long argued that scientific advances in the assessment of brain injury and brain damage since his first penalty phase in 1989 constituted newly discovered evidence of mitigation that entitled him to a new penalty phase. *Long*, 271 So.3d at 941. Specifically, Long relied on two scientific tests that had recently become available, NeuroQuant imaging and a new test for chronic traumatic encephalopathy, as the basis for his claim of newly discovered evidence. *Id.* at 942. The trial court summarily denied the claim. *Id.* at 941. This Court found that the evidence was "not newly discovered." *Id.* at 942. This Court found that Long had been aware of his condition for decades and had presented evidence of his traumatic brain injury (TBI) and temporal lobe epilepsy diagnoses at the 1989 penalty phase. The *Long* Court acknowledged the two new advances of NeuroQuant imaging and CTE testing, but reasoned the new type of testing was

not critical to his claim. *Id.* (citing *Schwab v. State*, 969 So.2d 318, 325-26 (Fla. 2007)).

Here, as in *Long*, the evidence is not new. Dillbeck, like Long, has been aware of his condition, due to his mother's drinking while pregnant, for decades and had presented evidence of fetal alcohol effect as mitigation at his 1991 penalty phase. Indeed, Dillbeck raised the admissibility of the fetal alcohol effect as an issue in the direct appeal asserting that, while he had been permitted to present fetal alcohol effect during the penalty phase as mitigation, he was prohibited from presenting fetal alcohol effect "caused by his mother's alcoholism during pregnancy," during the guilt phase as well, to rebut premeditation. *Dillbeck v. State*, 643 So.2d 1027, 1028-30 (Fla. 1994) (agreeing that it was error for the trial court not to permit him to "show that his mother's intemperance during pregnancy damaged" him in the guilt phase but finding the error to be harmless due to the "jury's written verdict finding both premeditated and felony murder"). Dillbeck was clearly aware of his condition at the time of his trial and therefore, as in *Long*, the evidence is not "new."

But, here, unlike *Long*, the scientific testing that is the basis for the claim of newly discovered evidence in this case is not new either. The testing at issue in *Long* had just become available within the last year, as this Court acknowledged in its opinion, but that is not true in this case. *Long*, 271 So.3d at 942 ("Long relied on two tests that became available within the last year — NeuroQuant imaging and a new test for chronic traumatic encephalopathy (CTE)."). The testing that opposing counsel is relying upon in this case as the basis for the claim of newly discovered evidence is ***not*** new. Dillbeck is raising a claim of newly discovered evidence of mitigation of a diagnosis of ND-PAE that is based on the qEEG testing. But neither qEEG testing nor LORETA are new. *Lebron v. State*, 232 So.3d 942, 954 (Fla. 2017) (noting the testimony at the *Frye* hearing of

defense expert neuropsychologist that qEEG has been "used since 2005."); *Hernandez v. State*, 180 So.3d 978, 1009 (Fla. 2015) (stating that "qEEG technology is not newly discovered evidence" in a 2015 opinion and noting that qEEG testing existed in 2007 at the time of the trial). Both qEEG testing and LORETA were available more than a decade before this claim of newly discovered evidence was made. The testing that is the basis of the "new" diagnosis is not new. So, there is even less reason to view the diagnosis of ND-PAE in this case as truly involving "new" evidence than there was in *Long*.

Opposing counsel relies on *Saunders v. State*, 148 So.3d 843, 845 (Fla. 5th DCA 2014), in which the Fifth District affirmed the denial of a claim of newly discovered evidence based on a new diagnosis of hypothyroidism because the defendant did not claim that he had the disease during the commission of the offense, at the time of his plea, or at the time of sentencing and thus, he failed to show how the newly discovered evidence would have changed the outcome. IB at 21. *Saunders* is a Fifth District case which, of course, is not controlling precedent in this Court. *Saunders* is not persuasive precedent either because it was decided before this Court's recent decisions in *Rodgers V* and *Long*. Additionally, the actual holding in *Saunders* was an affirmance of the denial of the claim of newly discovered evidence, so the language opposing counsel is relying on is pure dicta.

Opposing counsel also relies on *Vega v. State*, 288 So.3d 1252 (Fla. 5th DCA 2020), in which the Fifth District remanded for an evidentiary hearing regarding a claim of newly discovered evidence based on a series of recent medical articles regarding short-distance falls of children. IB at 27. Vega was convicted decades ago at trial of the first-degree murder of his girlfriend's three-year-old son based in part on the medical examiner's testimony that the injuries to the child were the result of someone striking the young child and child abuse, not from the child falling down the stairs. *Id.* at 1254-55. Years later, Vega filed a successive

postconviction motion based on another medical examiner's report regarding the medical community's new opinion based on a series of medical articles that short-distance falls can actually cause the death of children and that the child victim's injuries in the case could have been the result of an accident. *Id.* at 1255-56. The Fifth District noted that "case specific studies" that "cast doubt" on critical State evidence can also constitute newly discovered evidence, provided that the study or report is more than just a new opinion based on a compilation of analyses of previously existing data and scientific information. *Id.* at 1257 (citing *Wyatt v. State*, 71 So.3d 86, 99-100 (Fla. 2011), and *Henry v. State*, 125 So.3d 745, 750 (Fla. 2013)). The Fifth District determined that the medical examiner's report was newly discovered evidence because it was both case specific and suggested a significant change in the consensus view of the medical community regarding the cause of the fatal injury. *Vega*, 288 So.3d at 1259. The Fifth District concluded that the report weakened the State's case against Vega and "casts doubt on the validity of his conviction." *Id.* The Fifth District did not grant a new trial, however. Instead, the Fifth District remanded for an evidentiary hearing. *Id.* The main issue in *Vega* was whether the manifest injustice exception to the law of the case doctrine applied. *Id.* at 1257-58, 1259.

Vega is also a Fifth District case. But, more importantly, the basic logic of *Vega* does not apply to this case. Here, the new diagnosis of ND-PAE does not "cast doubt" on the original diagnosis of fetal alcohol effect presented at the first penalty phase. Rather, one diagnosis is merely a version of the other diagnosis. Even under opposing counsel's view, the new diagnosis enhances the old diagnosis; it does not cast doubt on the old diagnosis. The new diagnosis does not undermine the old diagnosis So, the reasoning of the Fifth District in *Vega* does not apply here.

Neither *Saunders* nor *Vega* govern; rather, this Court's decisions in *Rodgers V* and *Long* govern. And, here, as in *Rodgers V* and *Long*, the evidence is not new.

The diagnosis of ND-PAE is not new evidence. This is simply not a valid claim of newly discovered evidence. On this basis alone, this Court should affirm the trial court's dismissal of this claim of newly discovered evidence.

Untimely

As the trial court properly concluded, the third successive postconviction motion was untimely. Dillbeck's conviction and sentence became final on March 20, 1995, when the United States Supreme Court denied the petition for certiorari from his direct appeal. *Dillbeck v. Florida*, 514 U.S. 1022 (1995). Furthermore, the denial of Dillbeck's initial postconviction motion was affirmed by this Court in 2007. *Dillbeck v. State*, 964 So.2d 95 (Fla. 2007). Under the rule of criminal procedure governing postconviction motions in capital cases, rule 3.851, any postconviction motion had to be filed within one year of the case becoming final after the direct appeal to be timely. Fla. R. Crim. P. 3.851(d)(1) (providing: "Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final.").[10] Dillbeck had to file any successive postconviction motion by March 1996 for that motion to be timely but this successive postconviction motion was not filed until May 9, 2019. The third successive postconviction motion is over 20 years late. The third successive postconviction motion is untimely.

[10] Rule 3.851 applies to Dillbeck because his conviction became final after its effective date. *In re Rule of Crim. Procedure 3.851*, 626 So.2d 198, 199 (Fla. 1993) ("This rule will govern the cases of all death-sentenced individuals whose convictions and sentences become final after January 1, 1994.").

The exception to the rule does not apply

Dillbeck attempts to rely on the exception to the time limitation in rule 3.851 for newly discovered evidence. IB at 19; Fla. R. Crim. P. 3.851(d)(2)(A) (providing that no postconviction motion filed beyond the one-year time limitation shall be considered 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"). But, as explained above, under *Rodgers V* and *Long*, the diagnosis of ND-PAE is not new evidence. Because the evidence is not new, the exception does not apply and the third successive postconviction motion remains untimely.

Alternatively, even viewing the diagnosis of ND-PAE as new, the successive postconviction motion would still be untimely. To be considered timely under the exception, a claim of newly discovered evidence must be filed within a year of the date the new evidence became discoverable and a capital defendant must be diligent in discovering the new evidence. *Mungin v. State*, ___ So.3d ___, 45 Fla. L. Weekly S65, 2020 WL 728179, *2 (Fla. Feb. 13, 2020) (citing *Reed v. State*, 116 So.3d 260, 264 (Fla. 2013), and concluding a successive motion raising a claim of newly discovered evidence was untimely because the new evidence was "discoverable through due diligence more than a year before the motion was filed"); *Dailey v. State*, 283 So.3d 782, 788 (Fla. 2019) (stating to "be timely, a claim based on newly discovered evidence must be brought within one year of the date upon which it became discoverable" citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008), *pet. for cert. filed*, *Dailey v. Florida*, No. 19-1094 (Mar. 5, 2020); *Jimenez v. State*, 997 So.2d 1056, 1064-65 (Fla. 2008) (because the claim of newly discovered evidence "was not filed within one year" of the discovery of the new evidence, the evidence "does not provide a basis to review the merits" of the claim). And it is the defendant's burden to establish the timeliness of any postconviction

motion. *Mungin*, ___ So.3d at ___, 2020 WL 728179 at *2 (citing *Rivera v. State*, 187 So.3d 822, 832 (Fla. 2015)).

Dillbeck did not file the current postconviction motion within one year of the "new" diagnosis being discoverable. He was not diligent in obtaining the new diagnosis. Dillbeck acknowledged in the successive motion that the diagnosis of ND-PAE was included in the Diagnostic and Statistical Manual, Fifth Edition (DSM-V), which was published in May of 2013. (Att. A at 2 - Dr. Brown's May 1, 2019, report observing that the "diagnosis was first made possible in 2013 with the publication of DSM-5"). Dillbeck should have obtained this diagnosis of ND-PAE from his mental health experts years ago and filed this claim by May of 2014. The current successive postconviction motion which should have been filed by May of 2014 was not filed until May of 2019. The third successive motion is five years late. The claim of newly discovered evidence is time-barred, even if the diagnosis is viewed as new.

Dillbeck argues against starting the one year clock under *Jimenez* from the date of the publication of the new diagnosis in the DSM-V in 2013, claiming that it is "draconian" and that there is no case announcing such a rule. IB at 22. Dillbeck asserts that the one-year clock should not start until a formal diagnosis is actually made by a defense expert. But that assertion ignores this Court's caselaw that says the clock starts from the date when the new evidence was "discoverable," not from the date when it is actually discovered. *Mungin*, 2020 WL 728179 at *2 (using the word "discoverable"); *Dailey*, 283 So.3d at 788 (using the word "discoverable"). A new type of diagnosis, that was recently recognized by the DSM-V, is "discoverable" shortly after the criteria for that new diagnosis is published.

Additionally, one year from the criteria for the new diagnosis being published in the DSM-V is plenty of time for the expert to examine the defendant and write

a report and for postconviction counsel to receive that report and then write and file the postconviction motion raising a single claim. So, any claim based on a new diagnosis listed in a new version of the DSM must be filed within one year of the publication of the new version of the DSM because that is when the new diagnosis becomes discoverable.

Furthermore, there is a disconnect between the basis for the claim of newly discovered evidence and the starting of the clock being the date of the examination, as proposed by opposing counsel. Opposing counsel refers to Dr. Brown's qEEG scans revealing "quantifiable brain damage and dysfunction" and to "a casual link" that "was not available prior to qEEG testing." IB at 32. But qEEG testing became available over a decade before this successive postconviction motion was filed in May of 2019. *Lebron v. State*, 232 So.3d 942, 954 (Fla. 2017) (noting the testimony at the *Frye* hearing of defense expert neuropsychologist that qEEG has been "used since 2005"); *Hernandez v. State*, 180 So.3d 978, 988, 1006-10 (Fla. 2015) (referring to the testimony at the *Frye* hearing conducted as part of the postconviction evidentiary hearing regarding the admissibility of qEEG testing to a trial held in 2007). Opposing counsel also refers to "new scientific literature recognizing ND-PAE as a possible diagnosis under criteria published in the DSM-5." IB at 34. Because the qEEG scans and the publication of the new diagnosis in the DSM-V are the objective events that form the actual basis for this claim of newly discovered evidence, those events are the events that start the one-year clock for purposes of *Jimenez*.

The timing of the qEEG testing being performed on the defendant, on the other hand, is not an objective event. To the contrary, that event is in the total control of defense postconviction counsel. Timing the restart provision of rule 3.851(d)(2)(A) from the date of the defense experts' examination or the date of the defense experts' report puts control of the clock in the defense's hands. Restart

provisions, like the restart provision of 3.851(d)(2)(A), should not be in the control of defense attorneys or defense experts because the defense then controls the restart date and it empowers them to manipulate the restart provision at will merely by delaying having the expert examine the defendant or having the expert delay writing the report. After all, the provision of the rule governing newly discovered evidence operates to restart a clock which often has expired years ago, if not decades ago, and any court should be wary of interpreting a provision that restarts a time frame in a broad manner that put control of the timing in one party's hands exactly because it is a reset button.

Allowing defense counsel to control the restart provision in this manner would negate the diligence requirement which has been part of this Court's test for claims of newly discovered evidence for over two decades. *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) (explaining "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" citing *Torres–Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994)). Allowing postconviction counsel to take his sweet time in having the defendant examined by a defense expert is not diligence. Requiring the restart provision of 3.851(d)(2)(A), to be tied to objective events rather than events within one party's complete control is hardly "draconian," especially not when postconviction counsel has an entire year to file that one claim.

Opposing counsel was required to have his client examined for the new diagnosis and file the successive postconviction motion within one year of the recognition of the new diagnosis and he did not. Dillbeck and opposing counsel were not diligent in obtaining the new diagnosis.

The third successive postconviction motion is untimely under *Jimenez* and its progeny, even if the diagnosis of ND-PAE is viewed as new. Thus, the trial court properly summarily denied the claim of newly discovered evidence as untimely.

Merits

On the merits, Dillbeck is not entitled to a new penalty phase based on the "new" diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). Dillbeck fails both prongs of the test for newly discovered evidence. The diagnosis was known at the time of trial and would not result in a life sentence, even if it were actually new. The related diagnosis of fetal alcohol effect was known at the time of the trial. Indeed, fetal alcohol effect was presented at the first penalty phase and found as mitigation. *Dillbeck v. State*, 882 So.2d 969, 970, n.5 (Fla. 2004) (noting that the sentencing court found as non-statutory mitigation that "Dillbeck suffers from fetal alcohol effect as a result of his mother's alcohol consumption"). So, Dillbeck fails the first prong of the test for newly discovered evidence.

He also fails the second prong. The qEEG scans that are the basis for the diagnosis of ND-PAE are not admissible under Florida law. qEEG scans are not admissible under either *Frye* or *Daubert*. The new evidence must be admissible to be a valid basis for a claim of newly discovered evidence and the qEEG scans are not. Because the qEEG results would not be admissible at any new penalty phase, Dillbeck necessarily fails the second prong. Alternatively, the diagnosis of ND-PAE, even if admissible, would not result in a life sentence at any new penalty phase given the five aggravators in this case and the facts of this crime. Dillbeck stabbed a woman to death during an escape attempt while he was serving a life sentence for the murder of an on-duty deputy. This case involves one of the weightiest of all aggravators — a prior murder conviction where the victim was a

law enforcement officer performing his duties when Dillbeck murdered him. A jury would still recommend a death sentence and a trial court would still sentence Dillbeck to death regardless of the "new" diagnosis of ND-PAE. Dillbeck fails both prongs of the test for newly discovered evidence. The claim of newly discovered evidence is meritless.

Recent Florida Supreme Court precedent on newly discovered evidence

The trial court relied heavily upon this Court's recent opinion addressing a similar claim of newly discovered evidence in *Long v. State*, 271 So.3d 938 (Fla. 2019), *cert. denied*, *Long v. Florida*, 139 S.Ct. 2635 (2019), to reject this claim. In *Long*, this Court held that new advances in testing regarding brain damage were not newly discovered evidence in a capital case. Long argued that scientific advances in the assessment of brain injury and brain damage since his first penalty phase in 1989 constituted newly discovered evidence of mitigation that entitled him to a new penalty phase. *Long*, 271 So.3d at 941. Specifically, Long relied on two scientific tests that had recently become available, NeuroQuant imaging and a new test for chronic traumatic encephalopathy, as the basis for his claim of newly discovered evidence. *Id.* at 942. The trial court summarily denied the claim. *Id.* at 941.

The Florida Supreme Court explained that to be entitled to a new penalty phase based on newly discovered evidence, a defendant must make the two-prong showing required by *Jones v. State*, 709 So.2d 512 (Fla. 1998). *Long*, 271 So.3d at 942. The first prong of *Jones* requires that the evidence 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." *Id.* (citing *Jones*, 709 So.2d at 521). This Court also explained that because Long is seeking to vacate his death sentence, not his conviction, the second prong

"requires that the newly discovered evidence would probably yield a less severe sentence." *Id.* (citing cases). This Court then concluded that Long did not satisfy "either prong of the *Jones* test." *Id.*

This Court concluded that Long did not meet the first prong of the test because the evidence was "not newly discovered." *Long*, 271 So.3d at 942. This Court, following the trial court, observed that Long was clearly aware of his traumatic brain injury and temporal lobe epilepsy diagnoses since the 1989 penalty phase because he presented both at his first penalty phase. *Id.* (citing *Long v. State*, 610 So.2d 1268, 1271-72 (Fla. 1992) (summarizing the mental health evidence presented during Long's first penalty phase regarding his head injuries, temporal lobe epilepsy, and damage to brain tissue.). This Court reasoned that although Long relied on two tests that became available within the last year, his motion referenced research and studies that were much older "than one year prior to the date that Long filed his motion." *Long*, 271 So.3d at 942. This Court determined that the two new tests were not critical to the claim. This Court concluded that "with the exercise of due diligence, Long could have pursued this claim years before his death warrant was signed." *Id.* (citing cases).

This Court also concluded that Long did not meet the second prong of the test because the evidence would not result in a life sentence at a second penalty phase. *Long*, 271 So.3d at 943. The Florida Supreme Court reasoned that Long had already presented testimony and evidence regarding his TBI and temporal lobe epilepsy at the first penalty phase and the jury unanimously recommended death anyway and the sentencing court had found the two statutory mental health mitigators based on that evidence. And this Court also noted the four aggravators in the case included both the HAC aggravator and the CCP aggravator which are "some of the weightiest aggravators in Florida's capital sentencing scheme," so the new advances were "not of such a nature that it would probably yield a less severe

sentence in a new penalty phase." *Id*. The Florida Supreme Court affirmed the trial court's summary denial of the newly discovered evidence claim.

Under this Court's decision in *Long*, the diagnosis of ND-PAE is not newly discovered evidence. And, here, as in *Long*, Dillbeck cannot establish either of the two prongs of the *Jones* test for newly discovered evidence. Here, as in *Long*, Dillbeck cannot establish the first prong of the *Jones* test for newly discovered evidence. Dillbeck was aware of his condition relating to his mother's drinking during her pregnancy because he presented it as mitigation at the first penalty phase. Here, as in *Long*, Dillbeck was not diligent because qEEG testing was available many years before the motion was filed. Indeed, here, unlike *Long*, the test that is the basis of the new diagnosis, qEEG testing, is not new. Rather, qEEG testing was available for over a decade before the motion was filed in 2019. Here, as in *Long*, Dillbeck cannot establish the second prong of the *Jones* test for newly discovered evidence. Here, as in *Long*, the evidence would not be likely to result in a life sentence at a new penalty phase due to the extensive aggravation. And, in this case, there is even more extensive aggravation than there was in *Long*.

Opposing counsel attempts to distinguish *Long* on five different grounds, most of which have nothing to do with the reasoning of this Court in *Long*. IB at 23-34.

Opposing counsel attempts to distinguish *Long* on the basis that the sentencing discounted the substantially impaired mitigator based on a lack of impulse control by pointing to Dillbeck's good prison record. IB at 31. Opposing counsel asserts that the new qEEG scans would change the analysis regarding the substantially impaired mitigator but that argument ignores the sentencing court also relied on Dillbeck's playing chess and taking college classes to discount the fetal alcohol effect. As the postconviction court noted, the sentencing court had given little weight to the mitigation of fetal alcohol effect because those effects did not seem to have actually significantly impaired Dillbeck's mental abilities based

on Dillbeck's manifested abilities, such as his ability to play chess and accumulate college credits. (2020 SuccPC ROA at 374). Any new sentencing court would be just as likely to discount the diagnosis of ND-PAE both as to the substantially impaired mitigator and as stand alone mitigation, based on the chess playing and taking college classes, as the original sentencing court did. Dillbeck's actual, real-world abilities undermine his new diagnosis just like they undermined his old diagnosis.

Long is not distinguishable from this case on any of the numerous bases opposing counsel attempts to do so. This Court should follow *Long* and reject this claim of newly discovered evidence.

The *Jones* test for newly discovered evidence

The test for newly discovered evidence, established by this Court in *Jones v. State*, 709 So.2d 512 (Fla. 1998), requires that: 1) the evidence be unknown at the time of the trial and not discoverable with diligence; and 2) the evidence would be likely to result in a life sentence at any new penalty phase. *Matthews v. State*, 288 So.3d 1050, 1058 (Fla. 2019) ("the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial . . ."); *Bogle v. State*, 213 So.3d 833, 850 (Fla. 2017) ("If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence" quoting *Marek v. State*, 14 So.3d 985, 990 (Fla. 2009)). The defendant must meet both prongs of the test. *Matthews*, 288 So.3d at 1058 (stating that to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements). Dillbeck fails both prongs.

This mitigation evidence was known at the time of the first penalty phase

The first prong of the *Jones* test for newly discovered evidence requires that "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." *Matthews*, 288 So.3d at 1058. But Dillbeck presented evidence of fetal alcohol effect during the 1991 penalty phase and the sentencing court found fetal alcohol syndrome as mitigation. *Dillbeck*, 643 So.2d at 1028-30; *Dillbeck*, 964 So.2d at 100; *Dillbeck*, 882 So.2d at 970, n.5. At the penalty phase, Dr. Thomas, a geneticist, testified for the defense regarding fetal alcohol syndrome. (T. XV 2492-2493). And Dr. Woods, a neuropsychologist, testified that Dillbeck's test results were consistent with a person who suffers from fetal alcohol syndrome. (T. XV 2446).

Here, the condition was known to all at the time of the trial. The diagnosis of fetal alcohol effect was known to defense counsel who presented expert testimony regarding it at the 1991 penalty phase and then argued it in closing to the jury. And it was known to the jury who learned of the diagnosis via the testimony of the defense mental health experts who testified during the penalty phase regarding it. And it was also known to the sentencing judge, who found it as non-statutory mitigation in his sentencing order. That Dillbeck's condition was known to all is also clear from the direct appeal in which Dillbeck raised a claim that he should have been permitted to raise fetal alcohol effect as a defense in the guilt phase, not merely as mitigation in the penalty phase. *Dillbeck v. State*, 643 So.2d 1027, 1028-30 (Fla. 1994). The diagnosis of fetal alcohol effect was known to all at the time of the first penalty phase.

Furthermore, Dillbeck was not diligent because qEEG testing was available over a decade ago and the new diagnosis was available from the date of the

publication of the DSM-V in 2013. *Lebron v. State*, 232 So.3d 942, 954 (Fla. 2017) (noting the testimony at the *Frye* hearing of defense expert neuropsychologist that qEEG has been "used since 2005"). But Dillbeck did not file this claim until years later in 2019. Dillbeck was not diligent. *Long*, 271 So.3d at 942 (concluding that Long was not diligent because he "could have pursued this claim years before his death warrant was signed" citing cases).

Dillbeck does not meet the first prong of the *Jones* test for newly discovered evidence.

This mitigation evidence would not result in a life sentence

The second prong of the *Jones* test for newly discovered evidence requires "that the newly discovered evidence would probably yield a less severe sentence." *Long*, 271 So.3d at 942 (quoting *Walton v. State*, 246 So.3d 246, 249 (Fla. 2018), and *Swafford v. State*, 125 So.3d 760, 767 (Fla. 2013)). Newly discovered evidence necessarily must be admissible to result in a different outcome at any new trial or at any new penalty phase. *Dailey v. State*, 279 So.3d 1208, 1213 (Fla. 2019) ("regardless of whether the evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted unless the evidence would be admissible at trial citing *Sims v. State*, 754 So.2d 657, 660 (Fla. 2000)), *pet. for cert. filed*, *Dailey v. Florida*, No. 19-1094 (Mar. 5, 2020); *Matthews v. State*, 288 So.3d 1050, 1058 (Fla. 2019) (explaining that to determine whether the newly discovered evidence warrants a new trial, "the postconviction court must consider all newly discovered evidence which would be admissible" citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)) (emphasis added).[11] As this Court has

[11] *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991) ("the trial judge should consider all newly discovered evidence which would be admissible . . ."); *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998) ("Based on our evaluation of all the

explained, in considering the second prong of the test for newly discovered evidence, "the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility." *Jones*, 709 So.2d at 521 (citing *Johnson v. Singletary*, 647 So.2d 106, 110-11 (Fla. 1994)). If the new mitigation evidence would not be admissible at the new penalty phase, it, by definition, will not result in a different sentence.

One of the Fifth District's cases opposing counsel relies upon notes that the new evidence must be admissible. *Vega*, 288 So.3d at 1257 (citing *Jones*, 709 So.2d at 521). But opposing counsel does not address the admissibility of the qEEG scans. The new evidence must be admissible to be the basis for a valid basis for a claim of newly discovered evidence and the qEEG scans and testimony regarding those scans are not admissible.

The new mitigation based on qEEG testing would not be admissible at any new penalty phase under this Court's precedent. In *Hernandez v. State*, 180 So.3d 978, 1006-10 (Fla. 2015), this Court affirmed a postconviction court's ruling that qEEG technology and testimony would not have met the *Frye* test for admissibility. *Id.* at 1006. This Court noted the testimony of the State's expert, Dr. Peter Kaplan, at the *Frye* hearing conducted as part of the postconviction evidentiary hearing, "a medical doctor and neurologist" who is "board certified in psychiatry, neurology, and neurophysiology, and is a professor of neurology at Johns Hopkins University School of Medicine" who "is an expert in the use of electroencephalogram (EEG) technology." *Id.* Dr. Kaplan explained that qEEG is a computer program that uses data provided by and chosen from the EEG test and compares that chosen EEG data to a database made up of an aggregate of

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admissible evidence, . . .").

subjects. *Id.* at 1007. Dr. Kaplan testified that neurologists use EEG to help diagnose neurological conditions, and that, although qEEG has been used in different settings to diagnose epilepsy, he testified that qEEG "is not widely accepted by neurologists." *Id.* Dr. Kaplan also testified that he agreed with the statement in a prominent article that "qEEG should not be used in judicial settings because of the propensity of false positives and because results can be dramatically altered during the subjective process of selecting portions of the EEG for quantitative analysis." *Id.* at n.11 (citing Marc Nuwer, M.D., Ph.D., *Assessment of Digital EEG; Quantitative EEG and EEG Brain Mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiological Society*, 49 NEUROLOGY 277 (1997)). Dr. Kaplan testified that the flaws in qEEG were present in 2007 as well as "currently." *Id.* at 1007.[12] Both defense experts preswented at the evidentiary hearing agreed that many neurologists do not use qEEG. *Id.* One of the defense experts, Dr. J. Lucas Koberda, a neurologist, testified that, while there was no real controversy in using qEEG to help diagnose memory problems, Alzheimer's disease, dementia, or epilepsy, there was controversy over its use to diagnose brain damage. *Id.* Dr. Turner, one of the defense experts at trial, noted that there was a dispute about the validity of qEEG testing. *Id.* The *Hernandez* Court discussed both the *Frye* and *Daubert* standards. *Id.* at 1008. This Court determined that the date of the trial and penalty phase in 2007 was the critical date, not the date of the appeal, because

[12] The reference to 2007 was the date of the penalty phase in *Hernandez* that was the focus of the claim of ineffective assistance for not presenting qEEG evidence as mitigation and "currently," as used in the opinion, means in 2012 when the evidentiary hearing was held in *Hernandez*. *Hernandez*, 180 So.3d at 988 (noting the evidentiary hearing in the case was held in four parts during 2012).

the claim at issue was a claim of ineffective assistance of counsel. This Court also determined that the relevant scientific community for *Frye* purposes was neurologists. *Id.* at 1008-09. This Court agreed with the trial court that Hernandez had failed to prove by a preponderance of evidence that qEEG was generally accepted in the relevant scientific community at the time of trial. *Id.* at 1009. This Court concluded, based on Dr. Kaplan's testimony, that "qEEG is not a reliable method for determining brain damage and is not widely accepted by those who diagnose neurologic disease or brain damage." *Id.* This Court noted that "all the testifying experts agreed that qEEG was not generally accepted by that scientific community as a method of diagnosing brain damage." *Id.* This Court noted that a number of judicial decisions at the time of trial had held that qEEG testing was not admissible. *Id.*[13]

Alternatively, this Court determined that, even if the qEEG results were admissible, those results would probably not result in a life sentence due to the "heavily weighted aggravators." *Hernandez*, 180 So.3d at 1009-10.

Alternatively to his ineffectiveness claim, Hernandez also argued that the qEEG test should be considered as newly discovered evidence. *Hernandez*, 180 So.3d at 1009-10. But this Court rejected that claim concluding that "qEEG technology is not newly discovered evidence." *Id.* at 1009.

Furthermore, as this Court noted in another capital case, qEEG testing and LORETA are "misleading because they colored large areas as if the entire area of a brain was damaged even though the data only supported a conclusion that there was damage somewhere in that area." *Lebron v. State*, 232 So.3d 942, 953-55 (Fla.

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[13] *Hernandez*, 180 So.3d at 1009 (citing *In re Breast Implant Litigation*, 11 F.Supp.2d 1217 (D. Colo. 1998) (using the *Daubert* standard); *Craig v. Orkin Exterminating Co., Inc.*, 2000 WL 35593214, *3 (S.D. Fla. 2000) (using the *Daubert* standard); and *Falksen v. Sec'y, Dep't of Health and Human Svcs*, 2004 WL 785056, *11 (Fed. Cl. 2004) (using the *Daubert* standard)).

2017) (affirming the trial court's exclusion of qEEG tests and LORETA to support mitigation evidence of traumatic brain injury for several reasons using the *Frye* standard).

Under the current Florida Supreme Court precedent of *Hernandez* and *Lebron*, Dr. Brown's qEEG scans and his testimony about those results would not be admissible at any new penalty phase. And, while the current standard for admissibility of scientific evidence is *Daubert*, not *Frye*, qEEG testing does not meet the new *Daubert* standard either. *In re Amendments to Fla. Evidence Code*, 278 So.3d 551 (Fla. 2019) (adopting the "*Daubert* amendments" as codified in § 90.702, Florida Statutes (2019), and § 90.704, Florida Statutes (2019), as rules of court). qEEG testing is not admissible under *Daubert*. All of the flaws of qEEG testing identified by this Court in both *Hernandez* and *Lebron* would still be present in any *Daubert* analysis. As the Ninth Circuit has observed, qEEG is "error-prone." *Nadell v. Las Vegas Metro. Police Dep't*, 268 F.3d 924, 927-28 (9th Cir. 2001) (using *Daubert*). Relying on the testimony of the leader of a joint task force of the American Academy of Neurology and the American Clinical Neurophysiology Society, the Ninth Circuit observed that the qEEG technique's subjectivity and tendency to produce "false positives" have kept it from achieving general acceptance. *Nadell*, 268 F.3d at 927-28. The *Daubert* standard was adopted by the Florida Legislature to exclude more questionable scientific evidence and testimony than was admissible under *Frye*. So, any evidence and testimony that was inadmissible under *Frye*, is necessarily inadmissible under *Daubert*. *cf. Marsh v. Valyou*, 977 So.2d 543, 546-47 (Fla. 2007) (noting that both courts and commentators have debated "whether the *Daubert* standard is more lenient or more strict" than the *Frye* standard citing cases and law reviews); *but cf. Anderson v. State*, 220 So.3d 1133, 1151-52 (Fla. 2017) (characterizing the *Daubert* standard as more lenient). Mitigation evidence based on qEEG testing is not

admissible at any penalty phase in Florida. Because the qEEG results would not be admissible at any new penalty phase, Dillbeck necessarily fails the second prong of *Jones*.[14]

Alternatively, even if the results were admissible under *Daubert*, the qEEG scans and the diagnosis of ND-PAE would not likely result in a life sentence at any new penalty phase. The "new" diagnosis of ND-PAE, is merely a twist on the old diagnosis of fetal alcohol effect. The first jury heard the old diagnosis of fetal alcohol effect yet recommended a death sentence regardless. And the judge would not change his finding of non-statutory mitigation based on the diagnosis going from fetal alcohol effect to ND-PAE into statutory mitigation or significantly increase the weight given to that particular type of mitigation. *Long*, 271 So.3d at 943 (concluding that the new testing would not result in a life sentence, in part, because Long already presented testimony and evidence regarding his condition at the first penalty phase albeit without the new test results but Long's "jury still unanimously recommended that the death penalty be imposed").

And, even if the diagnosis of ND-PAE somehow increased the mitigation value of the old diagnosis of fetal alcohol effect in the eyes of either the jury or the judge, it would still not outweigh the compelling facts of this case or the powerful aggravation present in this case. Dillbeck nearly killed a man in Indiana while attempting to steal his truck. And then, after fleeing from that crime to Florida, about two weeks later, Dillbeck murdered an on-duty deputy by shooting the

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[14] The *Long* Court did not discuss the admissibility under *Daubert* of NeuroQuant imaging or the new test for chronic traumatic encephalopathy that were the basis for the claim of newly discovered evidence. *Long*, 271 So.3d at 942. But *Long* was a warrant case where the issue of the admissibility of the two new tests may not have been raised because it often requires an evidentiary hearing if there is no controlling authority. *Id.* at 940 (noting "Long a prisoner under sentence of death and an active death warrant"). But here there is controlling authority from this Court regarding the admissibility of qEEG testing.

deputy twice with the deputy's own gun. And, then many years later, Dillbeck escaped from a work detail while serving a life sentence and murdered yet again, this time stabbing a woman to death in an attempt to further his escape. That factual scenario speaks for itself in terms of aggravation.

Moreover, the aggravators would still outweigh the mitigation even if the weight of the mitigation increased. *Hernandez*, 180 So.3d at 1009-10 (determining that even if the qEEG results were admissible, those results would probably not result in a life sentence due to the "heavily weighted aggravators"); *Long*, 271 So.3d at 943 (concluding that the newly discovered evidence of mitigation would not result in a life sentence at a new penalty phase, in part, because the mitigation would be countered by the aggravation which included "some of the weightiest aggravators in Florida's capital sentencing scheme"). There are five aggravators in this case: 1) under a sentence of imprisonment; 2) prior conviction of another capital felony; 3) during the course of a robbery and burglary; 4) committed the murder to effect escape; and 5) HAC. *Dillbeck*, 882 So.2d at 970, n.3. Here, as in *Long*, the HAC aggravator is present, which the *Long* Court characterized as one of the "weightiest aggravators in Florida's capital sentencing scheme." *Long*, 271 So.3d at 943. And two of the remaining aggravators in this case are recidivist aggravators which are also weighty aggravators, particularly if the prior violent felony aggravator involves a serious prior felony or is a capital felony, as is the case here, based on Dillbeck's prior first-degree murder conviction. And the prior capital felony aggravator is particularly weighty when the victim was an on-duty officer. *Bevel v. State*, 983 So.2d 505, 525 (Fla. 2008) (concluding the death sentence was proportionate in a single aggravator case, in part, because the prior violent felony aggravator was "very weighty" because it was based on a prior first-degree murder conviction); *Morris v. State*, 219 So.3d 33, 45 (Fla. 2017) (concluding the death sentence was proportionate in a case involving

"the shooting of two law enforcement officers on duty"). But, here, there are five aggravators in contrast to the four aggravators in *Long*. Even if the new diagnosis operated to increase the weight of the mitigation, it would not overcome these compelling facts and this powerful aggravation. Dillbeck would be sentenced to death again at any new penalty phase. Dillbeck, therefore, does not meet the second prong of the *Jones* test for newly discovered evidence.

Dillbeck fails both prongs of *Jones* and therefore, the claim of newly discovered evidence of mitigation is meritless.

Accordingly, the trial court properly summarily denied the claim of newly discovered evidence of mitigation regarding the diagnosis of ND-PAE and properly dismissed the third successive postconviction motion as untimely.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to Baya Harrison III, P.O. Box 102, Monticello, FL 32345-0102; phone: (850) 997-8469; email: bayalaw@aol.com this 22th day of April, 2020.

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