IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: SC20-178

L.T. No. 1990-CF-2795A

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA,
J. LEE MARSH, CIRCUIT JUDGE

INITIAL BRIEF OF APPELLANT

FOR APPELLANT:

Baya Harrison, III
Fla. Bar No. 99568
P.O. Box 102
Monticello, Florida 32345
Tel: (850) 997-8469
Email: bayalaw@aol.com

Table of Contents

Table of Authorities

Preliminary Statement

This is a capital collateral appeal from the Circuit Court's order dismissing Appellant's successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The Appellant, Donald Dillbeck, was the defendant in the lower court and is referred to herein as "Appellant" or "Dillbeck." The Appellee, the State of Florida, was the plaintiff in the lower court and is referred to herein as "the State."

Statement Regarding Oral Argument

Oral argument is not requested.

Statement of the Case and Facts

In 1991, Dillbeck was convicted of first-degree murder, armed robbery and armed burglary (R. 4). The jury recommended death by a vote of 8-4. The court imposed the death penalty and found five aggravating factors: (1) murder committed while under sentence of imprisonment, (2) prior violent felony, (3) murder committed in course of committing robbery, burglary or kidnapping, (4) murder committed for purpose of avoiding arrest and effecting escape from custody, and (5) murder was especially heinous, atrocious or cruel. The under sentence and prior violent felony aggravators were based on Dillbeck's 1979 conviction for murder in Lee County, Florida, when he was 15 years old (R. 4-5).

During the penalty phase, Dillbeck was diagnosed with fetal alcohol effects (FAE) (R. 32). Dr. Berland did not diagnose Dillbeck with a mental condition (R. 86). Dr. Wood, a second defense expert, testified that Dillbeck had something wrong with his brain, and had a disorder that resembled, but was not as severe as, schizophrenia. These diagnoses did not explain Dillbeck's developmental disabilities or his criminal behavior (R. 86).

The trial court found one statutory mitigating circumstance, that Dillbeck's capacity to conform his conduct to the requirements of the law was substantially impaired (R. 382-83). See § 921.141(6)(f), *Fla. Stat.* (1990) However, the court found that Dillbeck's claimed lack of impulse control was rebutted by evidence of

his good prison disciplinary record (R. 388). The court found that Dillbeck was not under the influence of extreme mental or emotional disturbance as provided in § 921.141(6)(b), Fla. Stat. (1990) (R. 381-82).

Dillbeck asserted several non-statutory mitigating factors, which the trial court either rejected outright or found unworthy of significant weight: (1) abused childhood "does not weigh heavily as a mitigating circumstance" (R. 384); (2) fetal alcohol effect was established, "but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree" (R. 385); (3) mental illness "not of such significance as to weigh heavily as a non-statutory mitigating circumstance" (R. 385); (4) amenability to treatment not entitled to any substantial weight (R. 385-86); (5) substantial mental or emotional disturbance "rejected as a separate non-statutory mitigating circumstance" (R. 386); (6) diminished capacity was already considered as a statutory mitigator (R. 386); (7) incarceration in a violent prison at an unusually early age was established, but "[t]he Court does not view this factor as having any substantial mitigating weight" (R. 386); (9) [sic] good prison record "is of no practical mitigation" (R. 387); (10) loving family worthy of "only slight mitigation" (R. 387); (11) remorse not given any substantial weight (R. 387).

The trial court imposed the death penalty by written sentencing order, which addressed the fetal alcohol effect evidence as follows:

> The existence of the condition known as fetal alcohol effect was established by the testimony; however, the impression given to the court by those who testified about it was that the conclusions reached by them were tenuous and made in the early stages of their research so that while the physical effects of fetal alcohol syndrome are well documented, the extent of the mental effects of the fetal alcohol effect can vary widely and sufficient testing has not been developed to document the degree of disability. The stated conclusion was that there was a lack of impulse control, but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree.

(R. 385).

The trial court found the evidence insufficient to establish the statutory mental health mitigator based on extreme mental disturbance, and also declined to give it weight as a non-statutory mitigating factor:

> All mental health professionals who testified agreed that there was a mental disorder of some type although they differed as to what it was and the degree to which it controlled the Defendant's actions. The Court is reasonably convinced that the Defendant suffers from some mental disorder as all must who commit acts of this violent nature, but the Court finds that it is not of such significance as to weigh heavily as a non-statutory mitigating circumstance.

(R. 385).

The trial court also found that Dillbeck's good prison record negated the diminished capacity mitigator because it showed that the fetal alcohol effects had no impact on his capacity to control his behavior:

> The claim of lack of impulse control does not stand when considering Defendant's exemplary record of only two disciplinary reports in eleven years of incarceration, a large portion of which was spent in the most violent institution in the state corrections system. Surely, if the Defendant had any difficulty in controlling his impulses his prison record would be substantially different.

(R. 388). Thus, the fetal alcohol effects evidence resulted in no mitigating weight, either as a statutory mental health mitigator or as a non-statutory mitigator.

Dillbeck appealed to the Supreme Court of Florida, raising the following ten claims of trial court error: (1) error in juror qualifications; (2) refusing to admit evidence on specific intent; (3) requiring Defendant to submit to examination by State's mental health expert; (4) instructing the jury on flight; (5) allowing State expert to invade province of jury on issue of Defendant's purposeful behavior; (6) instructing the jury on HAC aggravator; (7) finding HAC aggravator; (8) instructing the jury on avoid arrest/effect escape aggravator; (9) proportionality; and (10) failing to allocate burden of proof in instructing jury on aggravating and mitigating factors. The Court affirmed. *Dillbeck v. State,* 643 So. 2d 1027 (Fla. 1994). A petition for writ of certiorari to the United States Supreme Court was denied. *Dillbeck v. Florida,* 115 S. Ct. 1371 (1995).

On April 23, 1997, Dillbeck filed a motion to vacate the judgment of conviction and sentence. Dillbeck filed an amended motion on April 26, raising the following claims: (a) Denial of effective assistance of counsel generally; (b) Per se

ineffective assistance for conceding guilt; (c) Denial of presumption of innocence by forcing Defendant to wear restraints in presence of jury; (d) Ineffective assistance of counsel for conceding HAC aggravator; (e) Ineffective assistance of counsel for failing to conduct adequate voir dire; (f) Ineffective assistance of counsel for failing to move for change of venue; (g) Ineffective assistance of counsel for failing to obtain medical evidence to establish mitigating factor; and (h) ineffective assistance of counsel for introducing evidence of prior uncharged bad acts during penalty phase (R. 6).

The court conducted an evidentiary hearing, and then denied the motion. Dillbeck appealed to the Supreme Court of Florida, and also filed a petition for writ of habeas corpus, asserting that Florida's capital sentencing statute is unconstitutional. On August 26, 2004, the Florida Supreme Court affirmed the denial of one ground and denied the petition for writ of habeas corpus, but remanded to the trial court to enter findings of fact and conclusions of law on the remaining claims. *Dillbeck v. State,* 882 So. 2d 969 (Fla. 2004).

On remand, the court entered new findings on the postconviction claims and denied the motion, and the Supreme Court affirmed. *Dillbeck v. State,* 964 So. 2d 95 (Fla. 2007).

On September 7, 2007, Dillbeck filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida. He

subsequently amended the petition, raising a total of seven claims: (1) Ineffective counsel for failing to conduct proper voir dire; (2) trial court error in qualifying jurors; (3) Ineffective counsel for conceding HAC aggravator; (4) Ineffective counsel for introducing prior bad acts; (5) trial court error in instructing jury on HAC aggravator; (6) trial court error in failing to properly instruct jury on burden of proof during penalty phase; and (7) unconstitutional death penalty scheme (R. 7).

The U.S. District Court dismissed claims 2, 5 and 6 as untimely, and entered a final order denying the amended petition and denying a certificate of appealability. *Dillbeck v. McNeil,* 2010 WL 419401 (N.D. Fla., January 29, 2010). Dillbeck appealed to the Eleventh Circuit Court of Appeals, which remanded for reconsideration of the Defendant's equitable tolling argument on three claims. The District Court again denied relief. *Dillbeck v. McNeil,* 2010 WL 3958639 (N.D. Fla., October 7, 2010). The Eleventh Circuit denied a certificate of appealability.

On March 28, 2014, Dillbeck filed a successive motion for postconviction relief, raising the following three grounds for relief: (1) ineffective penalty phase counsel for presenting inconsistent mitigation evidence; (2) jury's consideration of invalid aggravating circumstance violates Eighth Amendment; and (3) newly discovered evidence supporting age mitigator. The court denied the motion on June

5, 2014, and the Florida Supreme Court affirmed on April 16, 2015. *Dillbeck v. State,* 168 So. 3d 224 (Fla. 2015) (R. 8).

In April of 2016, Dillbeck filed a second successive motion for postconviction relief, asserting a denial of his right to trial by jury under *Hurst v. Florida,* 136 S. Ct. 616 (2016). The trial court summarily denied the claim and the Florida Supreme Court affirmed. *Dillbeck v. State,* 234 So. 3d 558 (Fla. 2018), *cert. denied, Dillbeck v. Florida,* 139 S. Ct. 162 (2018) (R. 8).

On April 27, 2018, Dillbeck filed a motion to correct illegal sentence in the Lee County case for which the under sentence and prior violent felony aggravators were applied in this case. He asserted that his sentence of life imprisonment for a crime committed as a juvenile was imposed in violation of *Atwell v. State,* 197 So. 3d 1040 (Fla. 2016) (R. 8-9).

During the course of that litigation, Dillbeck was evaluated by Dr. Faye Sultan, Ph.D., who conducted a forensic psychological evaluation on May 10, 2018 to determine whether Dillbeck suffered from any maturity or childhood issues relevant to his juvenile sentencing proceeding. That evaluation indicated the possibility of a fetal alcohol spectrum disorder ("FASD"), at which point additional experts in FASD were brought in. The multidisciplinary team consisted of Dr. Natalie Novick Brown, a clinical psychologist with a post-doctoral fellowship in fetal alcohol spectrum disorders (R. 170), Dr. Wes Center, Dr. Paul

Connor, Ph.D., Dr. Richard Adler, and Dr. Sultan. Additional evaluations and testing were performed through March and into April of 2019 (R. 9).

On May 1, 2019, Dr. Brown, Dr. Adler and Dr. Sultan issued their final written reports, which were then provided to the undersigned registry counsel. Dr. Brown found that Dillbeck met the diagnostic criteria for Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE).

ND-PAE was first recognized as a mental health diagnosis in the Diagnostic and Statistical Manual, Fifth Edition (DSM-5) in 2013 (R. 33). Prior to the publication of the DSM-5, there was no specific mental health diagnosis for the central nervous system dysfunction associated with fetal alcohol spectrum disorders (R. 84). In order for a person to be diagnosed with ND-PAE, seven factors must be present: (1) prenatal exposure to alcohol, (2) at least one neurocognitive impairment, (3) at least one self-regulation impairment, (4) at least two adaptive impairments, (5) childhood onset, (6) clinically significant distress or impairment in social, occupational, or other important areas of functioning, and (7) the disorder is not better explained by other causes (R. 84-85).

Dr. Brown, whose report incorporates the testing and findings of the entire team, found that Dillbeck suffers from significant and quantifiable cognitive and adaptive functioning deficits that had a direct causal link to his criminal conduct in both the 1979 case and in the instant case (R. 33-34). She also found that

Dillbeck's test results "exceed diagnostic requirements for ND-PAE." (R. 84).

Quantitative electroencephalogram testing (qEEG), which was not available at the time of trial, revealed widespread and markedly abnormal brain function in multiple areas of the brain, particularly in areas that regulate executive function, planning, mood and impulse control (R. 150, 156-157, 165). As a result of prenatal alcohol exposure, Dillbeck's brain resembled that of someone who had suffered a traumatic head injury (R. 166). This damage and the resulting impaired judgment rendered Dillbeck developmentally disabled and biologically predisposed to overreact to stress (R. 34).

Cognitive testing also revealed a significant disparity between Dillbeck's functioning on structured tests as opposed to unstructured tests. Dillbeck scored in the average range on structured tests with concrete guidelines or examiner guidance, but was in the deficient range on tests that required abstraction or problem-solving (R. 76). This context-dependent functioning meant that Dillbeck would do well in a controlled prison environment, but not on his own in the community (R. 77).

On May 9, 2019, Dillbeck filed a third successive motion for postconviction relief under Fla. R. Crim. P. 3.851 ("motion"), asserting a single claim of newly discovered evidence based on the new diagnosis of ND-PAE and the results of brain scans and neurological testing that were not available at the time of trial (R.

4-28). The expert reports were filed with the trial court as an appendix (R. 29).

In the motion, Dillbeck alleged that the testing revealed quantifiable brain damage in certain areas of the brain that could explain his criminal conduct in a manner that the defense experts at trial were unable to provide (R. 21-22). Dillbeck also alleged that the testing revealed a significant disparity in adaptive functioning in structured versus unstructured environments, undercutting the trial court's finding that his good behavior in prison was evidence of good impulse control in the community (R. 22-24).

On May 30, 2019, the State filed an answer to the motion (R. 288). Dillbeck then requested leave to file a reply (R. 315), which was granted (R. 318). Dillbeck filed his reply on June 21, 2019 (R. 319).

The trial court conducted a status conference hearing on June 28, 2019 (R. 331). The State argued that the motion was untimely because it was not filed within one year of the discovery of the new evidence (R. 344). The State agreed that the triggering event was the diagnosis of ND-PAE, but asserted that it was the date the diagnosis was first published in the DSM-5 and became available that started the time, not the date on which Dillbeck was actually diagnosed by a qualified expert (R. 344).

The State also argued that the evidence wasn't new because the jury heard that Dillbeck's mother drank alcohol to excess and that it affected his development

(R. 346).

The prosecutor conceded that even though she's been a capital litigator for 20 years, she doesn't read the DSM-5 either, and it would be an "extraordinary [sic] high standard" to require counsel to be aware of every possible diagnosis as soon as it was published (R. 353). The court granted Dillbeck 30 days to file a written response to the State's argument (R. 354), and concluded the hearing (R. 358).

On July 8, 2019, Dillbeck filed a memorandum of law addressing the timeliness of his claim (R. 360).

On January 30, 2020, the trial court entered a final order dismissing the Rule 3.851 motion as untimely (R. 372). The court cited this Court's recent decision in *Long v. State,* 271 So. 3d 938 (Fla. 2019), which it described as "remarkably similar" to this case (R. 373). The court found that Dillbeck was obliged to pursue testing within a year of the "new research" (R. 373). Therefore, Dillbeck did not exercise due diligence (R. 374).

In the alternative, the trial court found that "evidence of Mr. Dillbeck's fetal alcohol exposure was presented at his penalty phase hearing," which the court "gave significant weight" in its sentencing order (R. 374). The court also cited Dillbeck's good prison record as outweighing the fetal alcohol effects, essentially repeating the original findings (R. 374). The court concluded that the new

diagnoses would probably not yield a less severe sentence (R. 374).

This appeal follows.

Summary of the Argument

The trial court erred in dismissing Dillbeck's newly discovered evidence claim as untimely. The claim was based on a new diagnosis of Neurodevelopmental Disorder based on Fetal Alcohol Exposure (ND-PAE), as well as the underlying quantitative electroencephalogram (qEEG) and neurocognitive test results that supported it. Neither the diagnosis nor the testing methods were available at the time of trial, and the new evidence differs markedly from that which was presented at the original penalty phase.

ND-PAE has strict diagnostic criteria, which could only be established by extensive testing. Dillbeck filed his motion within one year of the initial evaluation that revealed the possibility that he met the criteria, and just eight days after being officially diagnosed.

The trial court ruled that Dillbeck failed to diligently pursue his claim because the triggering date for filing a new motion was when ND-PAE was first recognized in the scientific literature as a mental health diagnosis rather than when he was evaluated and diagnosed. Such a rule would place an impossible burden on counsel to anticipate what a medical expert's opinion might be. No Florida case has put postconviction counsel in constructive notice of research studies or literature he's unaware of and hasn't read. Case law consistently holds that the

triggering date for a newly discovered evidence is claim is the date the new diagnosis and supporting data are obtained.

The case relied on by the trial court is distinguishable. In that case, the new evidence was testing methods that weren't critical to the claim, didn't establish a cause for the defendant's criminal conduct, and which didn't result in a new diagnosis. In addition, the statutory mental health mitigators were already applied at the original trial. In this case, the newly discovered evidence involves a new diagnosis based on test results that are critical to establishing the new diagnosis and providing a causal link to Dillbeck's crimes that was previously missing and cited as the reason for discounting Dillbeck's mental health mitigation at the original penalty phase.

The order of dismissal should be reversed with directions to consider the claim.

Argument

I. THE TRIAL COURT ERRED IN DISMISSING DILLBECK'S NEWLY DISCOVERED EVIDENCE CLAIM AS UNTIMELY

The trial court erred in dismissing Dillbeck's third successive motion for postconviction relief as untimely. This Court's standard of review on the issue of whether a postconviction defendant is procedurally barred from obtaining relief is de novo. *State v. McBride,* 848 So. 2d 287 (Fla. 2003); *see also Rogers v. State,* 288 So. 3d 1038, 1039 n.2 (Fla. 2019) (reviewing summary denial of newly discovered evidence claim de novo).

Dillbeck's motion raised a single claim of newly discovered evidence. The timeliness of the claim is governed by Fla. R. Crim. P. 3.851, which provides in pertinent part as follows:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence….

Fla. R. Crim. P. 3.851(d)(2).

To establish that he is entitled to a new penalty phase based on newly discovered evidence, a capital defendant must make the two-prong showing required by *Jones v. State,* 709 So. 2d 512 (Fla. 1998):

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

Long v. State, 271 So. 3d 938, 942 (Fla.), *cert. denied,* 139 S. Ct. 2635 (2019). (quoting *Jones).* When the defendant is challenging only the death sentence rather than the conviction, the second prong requires that the new evidence would probably yield a less severe sentence. *Id.*

The trial court found that Dillbeck failed to meet both prongs of the *Jones* test. The court found that he failed to use due diligence in pursuing his claim, and that the new evidence was not of such a nature that it would yield a less severe sentence. However, the court did not deny the motion, but dismissed it (R. 374).

The possibility that Dillbeck might suffer from and meet the diagnostic criteria for ND-PAE first arose on May 10, 2018, when he was evaluated by Dr. Faye Sultan during the juvenile sentencing litigation in the Lee County case. The official diagnosis was provided to counsel on May 1, 2019, and counsel filed the Rule 3.851 motion on May 9. Thus, the motion was filed within one year of the initial evaluation, and barely a week after the official diagnosis was received.

Numerous Florida cases in various contexts have recognized that a new medical diagnosis is the triggering event for a new claim or reopening of a case.

See Saunders v. State, 148 So. 3d 843 (Fla. 5th DCA 2014) (stating that new diagnosis of hypothyroidism was newly discovered evidence but affirming denial of relief because defendant didn't allege he had condition at time of offense or at time of trial); *Hughes v. Denny's Restaurant,* 328 So. 2d 830 (Fla. 1976) (reinstating modification of worker's compensation disability award where evidence presented involved a new diagnosis that "could not have been discovered by use of medical technology available to the treating physician at the time of the original examination"); *Delgado v. Allstate Ins. Co.,* 731 So. 2d 11 (Fla. 4th DCA 1999) (reinstating verdict in favor of plaintiff, where trial court had ordered new trial based on erroneous belief that second expert's testimony was cumulative and shouldn't have been admitted; second surgeon made new diagnosis based on new MRI test results not reviewed by first surgeon); *Cf. Sochor v. State,* 883 So. 2d 766, 778 (Fla. 2004) (newly discovered evidence did not warrant relief because trial expert testified that her original diagnosis was unaffected by the new information).

The one-year filing time for successive motions begins when the facts supporting the new claim are discovered or discoverable through due diligence. *Rogers,* 288 So. 3d at 1038. In Dillbeck's case, these facts are the new diagnosis of ND-PAE and the qEEG and other neurocognitive test results supporting it. As the original sentencing order states, sufficient testing did not exist at the time of trial to

quantify the brain damage caused by Dillbeck's fetal alcohol exposure, or to establish a causal link between that damage and his criminal behavior (R. 385). The qEEG test results obtained by Dr. Brown and her team during the evaluations conducted in 2018 and 2019, and the conclusions and expert opinions derived from them, are the new evidence relied upon in this case. Thus, the triggering event for establishing the timeliness of Dillbeck's motion is either Dr. Sultan's initial evaluation on May 10, 2018, or Dr. Brown's official diagnosis of ND-PAE on May 1, 2019. In either instance, the motion was timely filed on May 9, 2019.

To get around this fact, the State argued that Dillbeck was required to file his motion within one year of ND-PAE first being recognized as a mental disorder in the DSM-5 in 2013 (R. 344-345). However, the State cited no case announcing such a draconian rule. Even the Assistant Attorney General admitted that she, a capital litigator with twenty years of experience, doesn't read the DSM-5, and that to require defense counsel to be aware of every new medical or scientific development as soon as it was published would be an extraordinarily high standard (R. 353). A thorough search has revealed no case where a defendant or his attorney was held to such a high standard of constructive knowledge.

The trial court ruled that Dillbeck was required to "pursue new testing within a year of the new research they cite." (R. 373). This presumably refers to the research studies and articles referenced in Dr. Brown's report (R. 373).

However, counsel was not aware of those research studies until receiving Dr. Brown's report on May 1, 2019, nor are those studies the basis for the newly discovered evidence claim.

Despite these facts, the trial court essentially held counsel to the standard of a medical expert, imposing on him a duty to be aware of all new research studies and diagnostic manuals as soon as they are published, to be able to interpret them and perceive that they apply to his client, and immediately request testing and diagnosis. To avoid a procedural bar, capital defense counsel would be required to request the appointment of experts at state expense in order to have every client tested and diagnosed regardless of whether there was a factual basis to justify such a request. The effect this would have on the administration of justice is obvious.

In the order dismissing Dillbeck's motion, the trial court relied on this Court's opinion in *Long,* which it described as "remarkably similar" to Dillbeck's case (R. 373). However, *Long* is easily distinguished in several important respects that were critical to the outcome, and the trial court's reliance on that case is misplaced.

In *Long,* the defendant filed a successive motion for postconviction relief following the issuance of a death warrant. One of Long's claims was based on newly discovered evidence. He claimed that scientific advances in the assessment, quantification and consequences of brain injury since his original sentencing

entitled him to a new penalty phase. *Long,* 271 So. 3d at 941. The trial court summarily denied the motion and Long appealed. *Id.*

On appeal, this Court affirmed the summary denial. Applying the two-prong test in *Jones,* the Court held first that the evidence was not newly discovered. *Id* at 942. The Court reasoned that Long was aware of his traumatic brain injury and temporal lobe epilepsy diagnoses since the original trial. Those diagnoses remained unchanged even after the new testing. *Id.* The only things that were new were the testing methods and research studies that weren't available at the original trial. However, there was no evidence that the new testing methods were critical to Long's claim, and the research studies themselves could not be considered new evidence. *Id* (citing *Schwab v. State,* 969 So. 2d 318 (Fla. 2007). Therefore, the Court concluded that with the exercise of due diligence, Long could have pursued his claim years earlier, and the claim was untimely. *Id* at 942-943.

The Court also held that the evidence would not produce a less severe sentence. *Id* at 943. The Court reasoned that Long already presented evidence of the same diagnoses at trial, the trial court already applied both statutory mental health mitigators based on diminished capacity and extreme mental disturbance, and the jury recommended death unanimously even after hearing evidence of the two diagnoses. *Id*.

Significantly, the new evidence also failed to establish a causal link between the diagnoses and the defendant's criminal behavior. The Court said:

> None of the scientific advances at issue establishes that traumatic brain injury or temporal lobe epilepsy is the sole cause of offenses such as those that Long committed against the victim in this case; nor do they negate the sentencing court's finding that the evidence is inconsistent with Long's claim that he could not control his behavior.

Id. This Court then affirmed the trial court's summary denial of the claim. *Id.*

Long differs from Dillbeck's case in several key respects. First, whereas Long's new evidence did not result in a new or different diagnosis than what was presented at trial, Dillbeck's new evidence does result in a new mental health diagnosis that differs significantly from what was presented at trial. During the original penalty phase, Dillbeck presented evidence of fetal alcohol effects, a medical condition based on limited testing that failed to establish a causal link to Dillbeck's criminal behavior. The trial court noted that the experts' conclusions were tenuous, based on the early stages of research, and insufficient testing methods existed to document the degree of mental disability or its impact on Dillbeck's actions (R. 385).

By comparison, the new diagnosis of ND-PAE is based on qEEG scans that show precise and quantifiable damage to different areas of the brain responsible for impulse control, self-regulation, higher reasoning and judgment. Dr. Brown and

her team concluded that Dillbeck's ND-PAE "explains all of Mr. Dillbeck's behavioral history," including the 1979 and 1990 offenses (R. 34, 85-86, 88).

This is not a case where the new diagnosis is merely the medical community's assignment of a new name to old information. *Compare Rodgers, supra,* (holding that new diagnosis of gender dysphoria was not newly discovered evidence because underlying evidence and symptoms remained unchanged and were considered by court in accepting defendant's plea and waiver of rights). Dr. Brown's report and Dillbeck's motion set forth important differences between the old diagnosis of fetal alcohol effects and the new diagnosis of ND-PAE. In applying *Long* to dismiss Dillbeck's motion, the trial court gave those differences no consideration.

Because new diagnoses are involved, the trial court erred in stating that Dillbeck was required to file his motion when the new research was published. The diagnoses were not available until the experts conducted qEEG and neurocognitive testing and rendered their opinions in the written reports appended to the motion. The research itself is not evidence. *Schwab v. State,* 969 So. 2d 318 (Fla. 2007).

The second distinguishing factor is the importance of the new testing methods to Dillbeck's claim. In *Long,* the Court found that the new testing methods cited by the defendant were not critical to his claim. *Long,* 271 So. 3d at

942. In essence, this meant that Long could have raised his claim using previously available data.

However, in Dillbeck's case, the qEEG and other new testing methods are necessary to establish the neurocognitive and self-regulation impairments required for an ND-PAE diagnosis. As the trial court noted in the original sentencing order, the testing methods available at the time of trial were not sophisticated enough to quantify the extent of Dillbeck's mental disorder. Furthermore, prior to the DSM-5 there was no mental health diagnosis available for the central nervous system dysfunction now observable in fetal alcohol spectrum disorders (R. 84). There was also no way to link the brain damage with the severe kind of mental disturbance behind Dillbeck's offenses (R. 88). All of that has now changed.

New, case-specific scientific evidence that casts doubt on critical state evidence can constitute newly discovered evidence, provided it is more than just a new opinion based on an analysis of previously existing data and information. *Vega v. State,* 288 So. 3d 1252, 1257 (Fla. 5th DCA 2020) (citing *Wyatt v. State,* 71 So. 3d 86 (Fla. 2011); *see also Duncan v. State,* 232 So. 3d 450 (Fla. 2nd DCA 2017) (allowing defendant to rely on new science showing that victim's injuries could have resulted from medical condition rather than abuse). In this case, both the expert opinions and the underlying data are new.

A third distinguishing factor between *Long* and Dillbeck is the fact that the newly discovered evidence supports new mitigating factors that were either not found at trial or were not given any mitigating weight. In *Long,* both statutory mental health mitigators were already applied at trial. *Long,* 271 So. 3d at 943. In Dillbeck's case, the court found the evidence insufficient to support the extreme mental disturbance statutory mitigator, and found that the diminished capacity aggravator was rebutted by Dillbeck's good prison record. Furthermore, the court declined to assign "any substantial weight" to the fetal alcohol evidence as non-statutory mitigation (R. 385-86).

In his motion, Dillbeck alleged that the new diagnosis of ND-PAE would support both statutory mental health mitigators, in addition to providing non-statutory mitigation and lessening the effect of the State's aggravating circumstances. (R. 21-25). Dr. Brown and Dr. Sultan both specifically found that Dillbeck suffered from a severe mental disturbance at the time of his crimes, and that his capacity to conform his conduct to the requirements of the law was substantially impaired when Dillbeck was left to his own devices compared to when he was in a structured environment such as prison (R. 88-89, 218).

The presence of new or weightier mitigating factors shows that the newly discovered evidence is likely to produce a less severe sentence, contrary to the trial court's finding. It further shows that the claim could not have been filed when the

ND-PAE research was first published, as it relies on the expert opinions not rendered until the May 1, 2019 reports were provided to counsel.

A fourth distinguishing factor that this Court cited in *Long* was the unanimous jury verdict, which indicated that the jury was wholly unpersuaded by the defendant's mental health mitigation despite hearing evidence of the traumatic brain injury and temporal lobe epilepsy diagnoses. *Id*. In this case, even with only weak evidence of fetal alcohol effects, no causal link between the brain damage and the murder, and little to no mental health mitigation, Dillbeck's jury only recommended death by a vote of 8 to 4. Thus, this is a much closer case than *Long*, and it is much more likely that the newly discovered diagnoses, test results and expert conclusions would result in a less severe sentence for Dillbeck.

The trial court acknowledged this distinction in the order dismissing Dillbeck's newly discovered evidence claim, but disregarded it because "the Court gave significant weight to the effects of fetal alcohol exposure in its written sentencing order." (R. 374). Respectfully, this finding is not supported by the record. The sentencing order clearly shows that the trial court did not give significant weight to either of the statutory mental health mitigators. As to the extreme mental disturbance mitigator, the court stated:

> The Court has reviewed the evidence independently and is not reasonably convinced that the Defendant was under the influence of <u>extreme</u> mental or emotional disturbance

> at the time of the commission of the capital felony and, therefore, rejects this as a mitigating circumstance.

(R. 382) (emphasis in original).

As to the diminished capacity mitigator, the sentencing court found that Dillbeck's capacity to appreciate the wrongfulness of his conduct was not substantially impaired, but his capacity to conform his conduct to the requirements of the law was substantially impaired (R. 383). However, the court later found that this mitigator was rebutted by evidence of Dillbeck's good disciplinary record in the prison system:

> The claim of lack of impulse control does not stand when considering Defendant's exemplary record of only two disciplinary reports in eleven years of incarceration, a large portion of which was spent in the most violent institution in the state corrections system. Surely, if Defendant had any difficulty in controlling his impulses his prison record would be substantially different.

(R. 388).

The court also declined to give the fetal alcohol effects evidence any weight as non-statutory mitigation:

> The existence of the condition known as fetal alcohol effect was established by testimony; however, the impression given to the Court by those who testified about it was that the conclusions reached by them were tenuous and made in the early stages of their research so that while the physical effects of fetal alcohol syndrome are well documented, the extent of the mental effects of the fetal alcohol effect can vary widely and sufficient testing has not been developed to document the degree of

> disability. The stated conclusion was that there is a lack of impulse control, but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree.

(R. 385). A fair reading of the sentencing order does not support the trial court's conclusion that the fetal alcohol effects evidence was given significant weight at the original penalty phase.

This leads to the fifth and final distinguishing factor, which is the fact that the new evidence in *Long* failed to undercut key findings made by the sentencing court, whereas the new evidence in Dillbeck's case does undercut some of the critical findings in the written sentencing order. In *Long,* this Court said:

> None of the scientific advances at issue establishes that traumatic brain injury or temporal lobe epilepsy is the sole cause of offenses such as those that Long committed against the victim in this case; nor do they negate the sentencing court's finding that the evidence is inconsistent with Long's claim that he could not control his behavior.

Id at 943. Without a causal link or a showing that Long lacked impulse control, this Court concluded that the new evidence was not likely to produce a less severe sentence. *Id.*

In this case, Dr. Brown's report directly impacts two key findings contained in the original sentencing order. First, the sentencing judge discounted the fetal alcohol effects evidence because it was not shown that Dillbeck's fetal alcohol exposure "impacted the Defendant's actions to any substantial degree." (R. 385).

However, Dr. Brown's report shows that the qEEG scans reveal quantifiable brain damage and dysfunction in specific areas of the brain that predicted Dillbeck's lifelong pattern of behavior, showing deficits in "self-regulation, conscious decision-making, and the suppression of socially unacceptable responses." (R. 24, 61-62). Dr. Brown's forensic opinion is as follows:

> [A]t the time of the offense, Donald Dillbeck was a developmentally disabled adult with the mental defect ND-PAE, which substantially impaired his judgment, intentionality, and impulse control. Because of his prenatal alcohol exposure, he was biologically predisposed to overreact to stress. Therefore, it is likely that at the time of the offenses in 1979 and 1990, Mr. Dillbeck's mental defect influenced his offense behavior.

(R. 34). Dr. Brown later concluded that ND-PAE explained all of Dillbeck's behaviors, beginning in childhood and continuing through his commission of the criminal offenses in 1979 and 1990 (R. 88). Thus, a causal link now exists that was not available prior to the qEEG testing and the May 1, 2019 expert reports.

Second, the new evidence also undercuts the finding that Dillbeck's good prison record shows that he had good impulse control at the time of the 1990 murder. Dillbeck's neurocognitive test results showed a significant difference between his performance on highly controlled and structured tests compared to tests that required independent judgment and abstracting. Dr. Brown discussed these differences at length, describing them as a context-dependent performance (R. 76-77). Dillbeck performed in the average range on structured tests, which

aligned with how he behaved in a structured prison environment. However, Dillbeck performed much more poorly on tests that required independent thinking and decision-making. In the community setting where external structure and support were limited, Dillbeck's social behavior was in the second or third percentile, "consistent with intellectual disability" (R. 77).

This disparity indicates that Dillbeck's good prison record was not indicative of his ability to control his impulses and exercise socially appropriate judgment when at large in the community and "left to his own devices" (R. 77). Dr. Brown compared Dillbeck's behavioral history with his adaptive assessments and concluded that "his behavior tended to improve significantly in direct proportion to the amount of structure and guidance in his environment" (R. 73). She specifically referenced his periods of incarceration both as a juvenile and as an adult when that was the case (R. 73). Had the court been armed with this information, it would not have found that Dillbeck's prison record was proof of good impulse control at the time of the crime.

Based on these five distinguishing factors, this Court's decision in *Long* does not support the trial court's conclusion that Dillbeck failed to diligently pursue his claim. The new evidence includes new mental health diagnoses, new test results, a new causal link between Dillbeck's brain damage and his criminal behavior, and new mitigating factors that alter the evidentiary landscape to be

considered by a penalty phase trier-of-fact. The mere fact that Dr. Brown's report references research more than a year old does not mean that Dillbeck or his counsel should be held to constructive knowledge of its existence and procedurally barred for not asking the court to appoint experts based solely on the publishing of a new disorder in the DSM-5.

Conclusion

No prior decision of this Court supports the trial court's finding that Dillbeck's newly discovered evidence claim is untimely because his counsel was unaware of new scientific literature recognizing ND-PAE as a possible diagnosis under criteria published in the DSM-5. This is particularly true when the diagnosis could only be made using new testing methods not previously available and based on brain scan data that was not known or available to counsel. Neither the diagnosis nor the underlying data supporting it were known or discoverable by counsel prior to receiving Dr. Brown's written report on May 1, 2019. Even if Dr. Sultan's initial evaluation on May 10, 2018 provided a factual basis for investigating the claim, the motion was still filed within one year of that date. There has been no lack of diligence.

The order dismissing Dillbeck's newly discovered evidence claim should be REVERSED, and this cause remanded for an evidentiary hearing on the claim.

/s/ Baya Harrison
Baya Harrison, III
Fla. Bar No. 099568
P.O. Box 102
Monticello, Florida 32345
Tel: (850) 997-5554
Email: bayalaw@aol.com

Designation of Email Address

Pursuant to Fla. R. Jud. Admin. 2.516, the undersigned attorney designates his service email address as bayalaw@aol.com.

Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing initial brief by electronic service to Charmaine Millsaps, Assistant Attorney General, at charmaine.millsaps@myfloridalegal.com; and Eddie Evans, Assistant State Attorney, at evanse@leoncountyfl.gov, on April 13, 2020.

/s/ Baya Harrison
Baya Harrison

Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Times New Roman 14-point font, per Fla. R. App. 9.210.

/s/ Baya Harrison
Baya Harrison