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In the Supreme Court of Florida

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

DONALD DAVID DILLBECK,

Appellant,

v. CASE NO.: SC23-190
ACTIVE WARRANT CAPITAL CASE

STATE OF FLORIDA,

Appellee.
_____/

RECEIVED, 02/15/2023 12:21:22 PM, Clerk, Supreme Court

MOTION TO STRIKE EXTRA-RECORD MATERIAL

On February 14, 2023, Dillbeck, represented by registry counsel Baya Harrison III and the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed a "notice of filing" of a second supplemental appendix in support of the fourth successive postconviction motion. The supplemental appendix contains a declaration in support of Claim II on appeal, which is a claim of newly discovered evidence of witnesses who could testify as to Dillbeck's mental condition around the time Dillbeck murdered Deputy Hall in 1979. The declaration, however, was not

part of the record in the lower court. It, therefore, is not properly part of the record on appeal in this Court. All extra record material should be stricken by this Court.

Background facts

The second supplemental appendix contains a declaration from Roberta Lynn Harsh, also known as Bobbie Harsh, who worked for the Public Defender's Office in Ft. Myers, Florida in 1979. She recalls meeting with Mr. Dillbeck several times while he was in the jail. She states that Dillbeck struck her as not being "all there mentally" and as being "off." His behavior was "erratic" because, at times, he was "hyper" and "bouncing off the walls," while, at other times, he was "non-responsive" and would just stare into space. He had "mood swings," and was, at times, "very angry." The Harsh declaration was dated February 13, 2023, and the appendix containing the declaration was filed with this Court on February 14, 2023 with the reply brief.

The prohibition on extra record material in appeals

The "record on appeal" in any appeal consists only of the pleadings, filings, and evidence that was actually before the lower court. Fla. R. App. P. 9.200(a)(1) (stating that the record on appeal "shall consist of all documents filed in the lower tribunal, all exhibits that are not physical evidence, and any transcript(s) of proceedings filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, and other discovery"); *see also* Fed. R. App. P. 10(a) (stating the "following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk).

It is "a basic tenet of the appellate process that an appeal is based only on evidence presented to the lower tribunal." *Agency for Health Care Admin. v. Orlando Reg'l Healthcare Sys., Inc.*, 617 So.2d 385, 389 (Fla. 1st DCA 1993). That an appellate court may not consider matters outside the record is "so elemental that there is no excuse for

any attorney to attempt to bring such matters before the court." *Konoski v. Shekarkhar*, 146 So.3d 89, 90 (Fla. 3d DCA 2014) (quoting *Altchiler v. State*, 442 So.2d 349, 350 (Fla. 1st DCA 1983)). Affidavits outside the record on appeal cannot be considered. *Fla. Livestock Bd. v. Hygrade Food Prod. Corp.*, 141 So.2d 6 (Fla. 1st DCA 1962) (stating that the affidavit in the appendix "was not submitted to the trial court" and therefore, "is not a part of the record on appeal"); *see also Lambert v. Bd. of Trustees*, 793 Fed. Appx. 938, 940, n.1 (11th Cir. 2019) (stating that citing *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 609–10 (11th Cir. 1991)). If a party includes in an appendix, material or matters outside the record, or refers to such material or matters in its brief, it is proper for the court to strike the appendix and brief. *Konoski*, 146 So.3d at 90 (quoting *Altchiler*, 442 So.2d at 350). Materials that were not filed below with the clerk of the court are not properly part of the appellate record and should be stricken. The appendix should be stricken.[1]

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[1] The notice of filing is entitled "second" supplemental appendix, but the State is unaware of a "first" supplemental appendix. The "second" supplemental appendix is the only supplemental appendix listed on this Court's docket. But, to the extent that there is any other

Dilatory declaration violates this Court's order

Furthermore, filing declarations in this Court at this late a date is a violation of this Court's order that all proceedings in the trial court be completed by February 7, 2023, at 3:00 p.m., over a week ago. And the declaration was filed the day after the State filed its answer brief in appeal. *Cf. Sparre v. State*, 289 So.3d 839, 849 (Fla. 2019) (finding a postconviction claim was not properly raised in the trial court because while it was raised in the postconviction motion, the particular evidence supporting the claim was not pointed out until the simultaneously written closing arguments, when it "was too late for the State to respond"). This Court should also formally strike the appendix to signal in future warrant cases that such dilatory filings will be stricken.

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extra material that was not filed in the trial court, the State moves to strike that material as well based on the same rationale.

Accordingly, this Court should strike all extra-record material in this appeal.[2]

[2] The appellate court merely ignoring the extra-record material instead of formally striking the material is not sufficient in criminal cases due to the federal habeas review. It is important that the record on appeal be clear for proper federal habeas review. *Shoop v. Twyford*, 142 S.Ct. 2037, 2043 (2022) (noting the AEDPA "restricts the ability of a federal habeas court to develop and consider new evidence" because review of factual determinations of the state courts "is expressly limited to the evidence presented in the State court proceeding" under § 2254(d)(2)); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (holding that review of legal decisions of the state court is "limited to the record that was before the state court," under § 2254(d)(1)). In the wake of these decisions, the state court record needs to accurately reflect the actual record on appeal and accurately reflect the material the appellate court actually considered. If not, then whether the material was part of the record or not becomes an issue in federal habeas court. Florida appellate courts need to strike extra-record material in all criminal and postconviction cases in the wake of *Twyford* and *Pinholster*.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ *Charmaine Millsaps*
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com
COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO STRIKE EXTRA-RECORD MATERIAL has been furnished via the e-portal to BAYA HARRISON III, P.O. Box 102, 736 Silver Lake Rd, Monticello, FL 32345, phone: 850-997-8469; email: bayalaw@aol.com and LINDA McDERMOTT, Chief, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 33301; phone: (850) 942-8818; email: Linda_Mcdermott@fd.org this 15th day of February, 2023.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida