

**SUPREME COURT
OF FLORIDA**

CASE NO: 1990 CF 2795A

SUPREME CT. NO: SC23-190

DONALD DAVID DILLBECK,

APPELLANT,

V.

STATE OF FLORIDA,

APPELLEE.

**RECORD ON
APPEAL**

**FROM THE CIRCUIT COURT
OF LEON COUNTY, FLORIDA
THE HONORABLE ANGELA DEMPSEY**

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ATTORNEY FOR APPELLEE

RECEIVED, 02/09/2023 01:31:21 PM, Clerk, Supreme Court

CERTIFICATE OF SERVICE

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

CASE NO: 1990 CF 2795A

SUPREME COURT NO: SC23-190

DONALD DAVID DILLBECK,

APPELLANT

V.

STATE OF FLORIDA,

APPELLEE,

3.851
SUPPLEMENTAL

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

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

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 1990 CF 2795
CAPITAL CASE

DONALD DAVID DILLBECK,

Defendant.

_____/

**ORDER FOLLOWING CASE MANAGEMENT CONFERENCE
AND NOTICE OF EVIDENTIARY HEARING**

THIS MATTER comes before the Court upon Defendant's Fourth Successive Motion for Postconviction Relief, filed January 30, 2023, brought pursuant to Fla. R. Crim. P. 3.851; and the State's response to the motion, filed January 31, 2023. In his motion, Mr. Dillbeck raises four claims for relief.

On February 1, 2023, this Court conducted a case management conference pursuant to Fla. R. Crim. P. 3.851(h)(6) to determine which, if any claims necessitated an evidentiary hearing.¹ After hearing the arguments of counsel, this Court has determined that an evidentiary hearing is necessary to address claims One and Two of Defendant's successive motion.

¹ Present at the hearing were Assistant Attorneys General Charmaine Millsaps and Jason Rodriguez; Assistant State Attorney Eddie Evans; state Registry counsel Baya Harrison; and Assistant Federal Public Defender Linda McDermott.

CLAIM ONE

In this claim, Mr. Dillbeck alleges that he suffers from an intellectual disability-equivalent condition, and is thus exempt from execution under the Eighth and Fourteenth Amendments. He asserts that because this claim involves the categorical prohibition of his execution, it is not waivable or subject to a procedural bar; alternatively, he has asserted diligence in presenting the claim. The State disputes Mr. Dillbeck's procedural allegations, as well as his eligibility for constitutional protection from execution.

Although the issue of whether a categorical exemption claim may be waived or barred involves a strictly legal question, the issue of whether Mr. Dillbeck has been diligent is a question of fact. Mr. Dillbeck's substantive assertion that he suffers from an intellectual disability-equivalent condition also presents a question of fact.

When a factual dispute exists, and the files and records do not conclusively show the movant is not entitled to relief, an evidentiary hearing is necessary. Fla. R. Crim. P. 3.851(f)(5)(B); *see also, e.g., Tompkins v. State*, 994 So. 3d 1072 (Fla. 2008) (in determining whether an evidentiary hearing is necessary, a court must accept the defendant's allegations as true to the extent they are not conclusively refuted by the record). Although a death warrant expedites the holding of an evidentiary hearing, Fla. R. Crim. P. 3.851(h), it does not alter the standard for granting one. *See Valle v. State*, 70 So. 3d 525, 526 (Fla. 2011) (staying death warrant because successive 3.851 raised "a factual dispute, not conclusively refuted" and required an evidentiary hearing).

Because this claim involves disputes of fact related to both timeliness and the underlying merits, an evidentiary hearing is necessary.

CLAIM TWO

In Claim two, Mr. Dillbeck alleges newly discovered evidence based on previously unknown witness observations describing Mr. Dillbeck's erratic behavior in relation to his 1979 crime, which was subsequently used as a prior violent felony aggravating circumstance in the instant case. Mr. Dillbeck further alleges as newly discovered evidence the reports of Drs. Crown and Toomer which gave consideration to the new revelations.

Mr. Dillbeck states that the newly discovered evidence 1) establishes that the prior violent felony aggravating circumstance is invalid given that Mr. Dillbeck's capacity was diminished during the crime, he was insane at the time of the crime, and he was incompetent to stand trial when he pleaded guilty; and 2) diminishes the aggravated nature of Mr. Dillbeck's prior violent felony conviction, bolsters the weight of previously established mitigating factors, and establishes the existence of mitigating factors previously rejected by the trial court.

Finally, Mr. Dillbeck claims he has been diligent on the basis that 1) prior to his counsel's 2023 investigation, no police report or witness statement ever disclosed Mr. Dillbeck's bizarre behavior; and 2) the findings by Drs. Crown and Toomer could not have been made until after discovery of the 2023 statements, nor could they have been made before the relevant scientific and medical advances upon which they relied.

The State disputes Mr. Dillbeck's allegations on both procedural and substantive grounds.

As with Claim one, this Court finds that because this issue involves disputes of fact related to both timeliness and the underlying merits, an evidentiary hearing is necessary.

ACCORDINGLY, IT IS ORDERED and ADJUDGED as follows:

1. An evidentiary hearing is **GRANTED** as to claims One and Two as alleged in Defendant's motion;

2. **NOTICE OF HEARING:** The evidentiary hearing on Defendant's Fourth Successive Motion for Postconviction Relief is scheduled for **Friday, February 3, 2023, at 9:00 a.m. E.S.T.**, to be convened in Courtroom 3A, 2nd Judicial Circuit of Florida, Leon County Clerk of Courts and Comptroller, 301 South Monroe Street, Tallahassee, Florida 32301;
3. A transport order has already been issued to secure Defendant's appearance at the evidentiary hearing;
4. Witnesses who, due to location or other commitments, would suffer hardship by traveling on such short notice will be provided the opportunity to testify remotely via Zoom, or telephonically;
5. The evidentiary hearing shall be reported by the Official Court Reporters for Leon County, Florida.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

DONE AND ORDERED in chambers at Tallahassee, Leon County, Florida this _____
February, 2023.

Angela C. Dempsey
Circuit Judge

Copies to all counsel of record

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

STATE OF FLORIDA,

v.

Case No. 1990-CF-2795

DONALD DAVID DILLBECK,

Defendant.

**EMERGENCY MOTION, CAPITAL CASE, DEATH
WARRANT SIGNED; EXECUTION SET FOR
FEBRUARY 23, 2023**

**NOTICE OF FILING SUPPLEMENTAL APPENDIX IN SUPPORT OF FOURTH
SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF**

COMES NOW, Donald David Dillbeck, by and through undersigned counsel, and hereby provides notice of the filing of the attached supplemental appendix in support of the Fourth Successive Motion for Postconviction Relief currently before this Court. The supplemental appendix includes the newly acquired signed declaration of assistant public defender Eugenie Gollup regarding her role representing Mr. Dillbeck during the proceedings related to his 1979 conviction. *See Attachment A.*¹

I. Introduction

On January 30, 2022 Mr. Dillbeck filed the Fourth Successive Motion for Postconviction Relief raising a claim regarding his prior 1979 conviction which was used as an aggravating factor in his sentence of death, for which he faces an imminent execution. In the claim, Mr. Dillbeck raised two subclaims based on newly discovered evidence regarding his bizarre actions and mental state at the time of the crime. Of relevance here, Dr. Barry Crown indicated in his 2023 report that

¹ Under Fla. R. Crim. P. 3.851(e)(2)(C), Mr. Dillbeck provides the following contact information for Gollup as a witness in support of the claims raised in his Rule 3.851 Motion: Eugenie Gollup Rehak, 52 Lagoon Dr North Fort Myers, FL 33903, 239-410-6197. For clarity, this motion will refer to her as Eugenie Gollup, which was her name at the time of the 1979 proceedings.

the plea colloquy in the 1979 contained red flags regarding Mr. Dillbeck's mental state and competency to plead guilty:

The transcript of Mr. Dillbeck's 1979 guilty plea is of particular interest, particularly when viewed in light of the fact that less than two months prior, counsel in that case had filed documents indicating concerns about Mr. Dillbeck's current competency as well as sanity at the time of the offense. It is noteworthy that Mr. Dillbeck had no therapeutic interventions between the time of those motions and the entering of his plea. Nor does it appear that he was examined for competency during this time by a defense or court appointed expert. As a result, I have grave doubts as to Mr. Dillbeck's competency at the time of this plea. **As a brain-damaged juvenile under extreme physical and emotional stress related to his then-capital charges, Mr. Dillbeck would have at best had minimal capacity. Further, appears that Mr. Dillbeck had been primed to say "yes" during his plea colloquy. The records I reviewed indicate that Mr. Dillbeck's lawyers and family members compelled him to enter the guilty plea, and while this was likely well-intentioned due to the fact that he was facing the death penalty at age 15-16, I suspect Mr. Dillbeck did not have the functional agency to make a reasoned decision regarding his decision to plead. And, with what later expert testing and opinions shows, it appears to me that Mr. Dillbeck did not have the capacity to consider the long-term consequences of his guilty plea.**

Fourth Successive Motion for Postconviction Relief, Attachment O, at 2-3 (emphasis added).

In the State's answer and at the *Huff* hearing, the State relied heavily upon the plea colloquy conducted in the 1979 case in urging this Court to deny an evidentiary hearing and deny relief. In particular, the State has argued that this claim should be denied because "the plea colloquy with Dillbeck was exhaustive" and because Mr. Dillbeck was "represented by the elected Public Defender for Lee County (Douglas M. Midgley), a Chief Assistant Public Defender (Robert Jacobs), and an Assistant Public Defender (Eugenie Gollop)." Answer at 11. The State also relied upon the fact that the trial court in the Lee County case "found that Dillbeck's 'decision to plead guilty' was 'freely, voluntarily, and intelligently made, and that he 'had the advice and counsel of a competent lawyer.'" *Id.*

II. Declaration of assistant public defender Eugenie Gollup

Mr. Dillbeck has now obtained the signed declaration of juvenile assistant public defender, Eugenie Gollup, who worked on the 1979 Lee County case. Gollup's declaration calls the validity of the plea colloquy into serious question. Gollup has now confirmed that her role in the 1979 case was solely to "ensure [Mr. Dillbeck] invoked his right to counsel after being arrested." Att. A, at 1. She met with Mr. Dilleck on April 11, 1979, the day he was arrested, but had no other contact with him. *Id.* She never discussed the facts of the case with Mr. Dillbeck. *Id.* Additionally, she was not consulted by Douglas Midgley, the public defender who actually represented Mr. Dillbeck—Gollup "does not recall" being consulted but believes she would remember if she had been. *Id.*²

The newly discovered statement of Gollup demonstrates inaccurate representations made during the plea colloquy:

Mr. Midgley:	Have you and I fully discussed the facts and circumstances of your case?
Mr. Dillbeck:	Yes.
Mr. Midgley:	And any possible defenses that we might have in relationship to those charges?
Mr. Dillbeck:	Yes.
Mr. Midgley:	Have you also discussed the facts of the case with Chief Assistant Public Defender, Robert Jacobs?
Mr. Dillbeck:	Yes.
Mr. Midgley:	Have you also discussed the facts of the case with Assistant Public Defender, Eugenie Gollup?
Mr. Dillbeck:	Yes.
Mr. Midgley:	Have I explained that you are entitled to a jury trial if you wish to have one
Mr. Dillbeck:	Yes.
Mr. Midgley:	Did we discuss what a jury trial is?
Mr. Dillbeck:	Yes.
Mr. Midgley:	Do you want a jury trial, or do you wish to plead guilty?
Mr. Dillbeck:	No, I don't want a jury trial.
Mr. Midgley:	Do you wish to plead guilty to the charge?
Mr. Dillbeck:	Yes.

² Gollup has otherwise very strong memories of Mr. Dillbeck, including wanting to get him a birthday cake for his sixteenth birthday. *Id.*

Plea Transcript, at 13-14 (emphasis added). Because Gollup was not in the courtroom during the plea colloquy, Att. A, at 1, she was not previously aware that Mr. Dillbeck's attorney was making inaccurate representations in order to bolster the ostensible validity of the plea colloquy. According to Gollup, it seems that Mr. Dillbeck answered yes "because he did not want to contradict Mr. Midgley." *Id.* This confirms Dr. Crowns finding that "Mr. Dillbeck had been primed to say 'yes' during his plea colloquy." Motion, Att. O, at 3. Moreover, this inaccurate misrepresentation calls into question the representations made by Midgley and Mr. Dillbeck in the colloquy.

III. Conclusion

For the foregoing reasons, Mr. Dillbeck respectfully provides notice of the attached appendix in support of his request that this Court hold an evidentiary hearing on Claim 2 raised in his Fourth Successive Motion for Postconviction Relief and ultimately that this Court vacate his death sentence.

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by electronic service to all counsel of record on this 2nd day of February, 2023.

/s/ Linda McDermott
LINDA MCDERMOTT

ATTACHMENT A

State of Florida

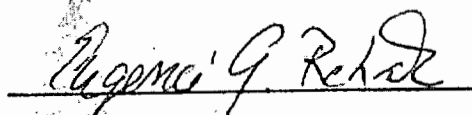
County of Lee

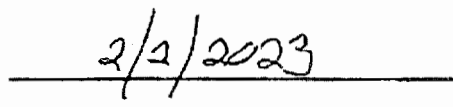
Declaration of Eugenie Gollup Rehak

I, Eugenie Rehak, hereby state the following as true and correct:

1. My name is Eugenie Rehak. I am a licensed Florida attorney. I joined the Florida bar in 1978.
2. In April of 1979 I was a misdemeanor attorney for the Public Defender's Office in Lee County, FL. I started with the Public Defender's Office in January of 1979.
3. On April 11th, 1979, I was the attorney on call for the Public Defender's Office. In that capacity, I was summoned to advise Donald Dillbeck after he invoked his right to counsel after being arrested in relation to a fatal shooting.
4. My purpose in meeting with Mr. Dillbeck was ensure he invoked his right to remain silent. I did not interview Mr. Dillbeck, nor did I question him to determine his psychological state.
5. My strong, lasting impression of Mr. Dillbeck is that of a terrified little kid. He was so young it broke my heart. I think that is why I remember him after all these years.
6. I also recall that he had his sixteenth birthday in jail. My heart hurt for him so much that I wanted to bring him a cake. Of course, I couldn't.
7. As a junior attorney, I was not consulted about, nor privy to, the strategy in this case. Neither Mr. Midgley, Robert Jacobs, nor any other personnel in the office asked my opinion or consulted with me about Mr. Dillbeck pleading guilty. I was not in the courtroom during the guilty plea, and I had no contact with Mr. Dillbeck after the day he was arrested.
8. I understand that in Mr. Dillbeck's plea colloquy in the 1979, Lee County case, he answered affirmatively when asked if he had discussed the facts of his case with me. I do not recall this. I feel this is something I would remember. I can only imagine that he answered affirmatively because he did not want to contradict Mr. Midgley.

Further Declarant Sayeth Naught.


Eugenie Gollup Rehak


Date

CERTIFICATE OF CLERK

STATE OF FLORIDA

COUNTY OF LEON

I, Gwen Marshall, Clerk and Comptroller Leon County, Florida, do hereby certify that the foregoing page(s) of the inclusive contains the record DONALD DAVID DILLBECK V. STATE OF FLORIDA of all such papers and proceedings in said cause as appears in the records and files in my office that have been directed to be included in said record pursuant to the Florida Rules of Appellate Procedure.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said FEBRUARY 9, 2023.

GWEN MARSHALL
CLERK AND COMPTROLLER
LEON COUNTY, FLORIDA

BY: DAVID L. HUBERT
David L. Hubert, Deputy Clerk