In the Supreme Court of Florida

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

CASE NO. SC23-220

DONALD D. DILLBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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 petition for writ of habeas corpus in this Court in this active warrant case raising three claims. The successive habeas petition is an abuse of the writ because successive habeas petitions are not envisioned by the applicable rule of court governing warrant litigation. The successive habeas petition should be dismissed as an abuse of the writ.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

Standard of review

The standard of review is de novo because all three claims are issues of law. *Velazco v. State*, 342 So.3d 614, 616, n.3 (Fla. 2022) (stating that questions of law based on undisputed facts are subject to de novo review); *Knight v. State*, 286 So.3d 147, 151 (Fla. 2019) (stating that when an issue presents a question of law, the standard of review is de novo). Whether a claim is procedurally barred is also reviewed de novo. *State v. McBride*, 848 So.2d 287, 289 (Fla. 2003).

Abuse of the writ

The Rule of Criminal Procedure governing collateral relief in capital cases, Rule 3.851(d)(3), provides:

> *All* petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writs of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the

> death-sentenced defendant in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

(emphasis added). There are no exceptions for untimely filed habeas petitions, much less for successive habeas petitions. *Griffin v. McCollum*, 22 So.3d 67 (Fla. 2009) (stating there are no exceptions for untimely filed habeas petitions).

Additionally, the successive habeas petition is an abuse of the writ because habeas petitions are not provided for in the applicable rule of court governing warrant litigation. Fla. R. Crim. P. 3.851(h). This Court should not permit habeas petitions that operate to evade the requirements of the rule of court governing warrant litigation. Rule 3.851(h) envisions all warrant claims be raised in the one authorized motion filed in the trial court, not that new additional claims are raised for the first time in the appellate court. The successive habeas petition violates the established procedures governing warrant litigation.

The successive habeas petition is also an transparent attempt to evade the 25-page limit on successive postconviction motions. Fla. R.

Cri. P. 3.851(h)(5) (providing that "all motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule including that a "successive motion shall not exceed 25 pages"). The successive postconviction motion filed in the trial court was 25 pages and the successive habeas petition filed in this court raising three entirely new claims was 26 pages for a total of 51 pages. There is little point in this Court creating rules and issuing detailed scheduling orders for when the proceedings in the trial court must be completed, if the rules and this Court's orders can be evaded by simply filing a successive habeas petition.

Moreover, all three of the claims raised in the successive habeas petition are procedurally barred and dilatory. The first claim should have been raised in direct appeal or, at the latest, in the second successive postconviction motion raising a related claim. The second claim is only properly raised in the direct appeal. And the third claim was already found to be procedural barred in the first successive postconviction motion. Instead of being raised at the proper time, the

three claims are being raised for the first time in an appellate court, at the last minute, on the eve of an execution.

This Court should enforce its rules by dismissing, rather than denying, the successive habeas petition. *McCleskey v. Zant*, 499 U.S. 467, 483 (1991) (noting that "abuse-of-the-writ" principles limited a habeas petitioner's ability to file repetitive petitions); *Williams v. Sec'y for Dept. of Corr.*, 130 Fed. Appx. 296, 297 (11th Cir. 2005) (dismissing a claim that could have been raised earlier, as an abuse of the writ). The successive habeas petition should be dismissed as an abuse of the writ.

ISSUE I

WHETHER THE EIGHTH AMENDMENT REQUIRES JURY SENTENCING IN CAPITAL CASES?

Dillbeck is basically asserting that the Eighth Amendment requires jury sentencing in capital cases. He claims that a jury must be the actual sentencer, not the judge, and that the jury must also unanimously agree on a death sentence. But the Eighth Amendment claim is procedurally barred and dilatory. Furthermore, the Eighth Amendment does not apply; it is the Sixth Amendment right-to-a-jury-trial provision that applies to questions regarding the jury's role in capital sentencing. And, under the Sixth Amendment, both the United States Supreme Court and the Florida Supreme Court agree that the only finding a penalty phase jury must make is the finding of one specific aggravating factor. *McKinney v. Arizona*, 140 S.Ct. 702, 707-08 (2020); *State v. Poole*, 297 So.3d 487, 505 (2020), *cert. denied*, *Poole v. Florida*, 141 S.Ct. 1051 (2021) (No. 20-250). As the United States Supreme Court recently stated, "States that leave the ultimate life-or-death decision to the judge may continue to do so." *McKinney*, 140 S.Ct. at 708. The Eighth Amendment does not require jury

sentencing in capital cases.

Procedural bar

The Eighth Amendment claim is procedurally barred. As both the applicable statute governing appeals and this Court's precedent mandates, claims must be raised at the earliest point. The "terms and conditions of appeals and collateral review in criminal cases" statute, § 924.051(8), Florida Statutes (2022), provides:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all *claims of error are raised and resolved at the first opportunity*. It is also the Legislature's intent that *all procedural bars* to direct appeal and collateral review *be fully enforced by the courts of this state*.

(emphasis added).

And this Court has repeatedly held that a habeas petition "cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings." *Sweet v. Dixon*, 2021 WL 5550079 (Fla. Nov. 29, 2021) (quoting *Denson v. State*, 775 So.2d 288, 289 (Fla. 2000)), *cert. denied*, *Sweet v. Florida*,

143 S.Ct. 137 (2022); *Breedlove v. Singletary*, 595 So.2d 8, 10 (Fla. 1992) (noting a habeas petition cannot be used to litigate or relitigate issues which could have been, should have been, or were raised on direct appeal"). This Court enforced procedural bars before the enactment of the criminal appeals statute, as shown by *Breedlove*, and it certainly should do so after its enactment, given it is now the expressed intent of the legislature that Florida courts do so. Claims should be raised at the first opportunity, not the last, which is exactly what the appeals statute and the procedural bar doctrine are designed to achieve.

The Eighth Amendment claim could have been raised in the direct appeal, or, more recently, it certainly could have been raised in the second successive postconviction motion filed in 2016, raising claims based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018) (noting "Dillbeck was sentenced to death following a jury's recommendation for death by a vote of eight to four" and rejecting a *Hurst* claim based on non-retroactivity principles). Dillbeck instead waited more than seven years after *Hurst v. Florida* was decided to raise

this claim in an unauthorized successive habeas petition filed on the eve of an execution.

The Eighth Amendment claim is procedurally barred.

Dilatory

Even ignoring rule 3.851(d)(3) limiting habeas petitions to the initial postconviction appeal, the Eighth Amendment claim is dilatory. Justice Breyer first expressed the view that the Eighth Amendment mandated jury sentencing in capital cases in 2002, and then again in 2016. *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring); *Hurst v. Florida*, 577 U.S. 92, 103 (2016) (Breyer, J., concurring). Even allowing for the issue to be raised in a habeas petition based on developments in the law, and, even assuming a concurring opinion can be viewed as a development in the law, the Eighth Amendment claim is dilatory.

This Eighth Amendment claim regarding jury sentencing could have been raised in Dillbeck's first habeas petition filed in 2003, using the concurring opinion in *Ring v. Arizona* as support. Indeed, Dillbeck

actually raised a *Ring v. Arizona* claim in his first habeas petition but he did not raise this Eighth Amendment claim. *Dillbeck v. State*, 882 So.2d 969, 976 (Fla. 2004) (SC03-1123).

Alternatively, the Eighth Amendment claim could have been raised in the second successive postconviction motion filed in 2016, which raised claims based on *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016). This Eighth Amendment claim regarding jury sentencing could have been included in that successive postconviction motion, using Justice Breyer's concurring opinion in *Hurst v. Florida* as support, since Dillbeck was already raising a *Hurst* claim. *Dillbeck v. State*, 234 So.3d 558 (Fla. 2018) (rejecting a *Hurst* claim based on non-retroactivity principles).

Instead, Dillbeck waited more than seven years after *Hurst v. Florida* was decided to raise this claim in an unauthorized successive habeas petition filed on the eve of an execution. Successive habeas petitions should not be permitted to be a vehicle to raise dilatory claims — dilatory habeas claims are still dilatory claims. The Eighth Amendment claim is dilatory.

Merits

Jury sentencing in capital cases is not required by the Eighth Amendment. The Eighth Amendment limits types of punishments to those that are not cruel and unusual; it does not address jury involvement at sentencing. The Eighth Amendment does not apply to questions regarding what findings the jury must make or what role a jury must play in sentencing. It is the Sixth Amendment that applies to those types of questions. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (relying on the Sixth Amendment right-to-a-jury-trial provision and due process); *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) (relying on the Sixth Amendment right-to-a-jury-trial provision). And, under the Sixth Amendment, according to both the United States Supreme Court and this Court, the only jury finding that is required to make a defendant eligible for the death penalty is the finding of one aggravating factor beyond a reasonable doubt. *McKenzie v. State*, 333 So.3d 1098, 1105 (Fla. 2022) (stating "only the existence of a statutory aggravating factor must be found" by the jury "beyond a reasonable doubt" citing *State v. Poole*, 297 So.3d at 505 and *McKinney*, 140 S.Ct.

at 707-08), *cert. denied*, *McKenzie v. Florida*, 143 S.Ct. 230 (2022) (No. 22-5088).

Constitutionally, under the current jurisprudence, a capital jury could identify one particular aggravating factor on a verdict form and then be discharged. A judge could make all of the additional findings required to impose a death sentence, including the findings of any additional aggravating factors, the findings regarding mitigating circumstances, perform the weighing, and then determine the ultimate sentence of life or death alone. In the words of the United States Supreme Court, "States that leave the ultimate life-or-death decision to the judge may continue to do so." *McKinney*, 140 S.Ct. at 708 (quoting Justice Scalia's concurring opinion in *Ring v. Arizona*, 536 U.S. 584, 612 (2002)). Indeed, constitutionally, a jury could make the finding of one particular aggravator at the end of the guilt phase and not even be present for the penalty phase. No jury recommendation regarding a death sentence is constitutionally required, much less an unanimous recommendation. While Florida's current death penalty statutes require a jury unanimous recommendation of death, the U.S.

constitution does not. § 921.141(2)(c), Fla. Stat. (2022); § 921.142(3)(c), Fla. Stat. (2022) (capital drug trafficking).

Only one Justice of the United States Supreme Court has taken the position that the Eighth Amendment applies and requires jury sentencing in capital cases. *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring); *Hurst v. Florida*, 577 U.S. 92, 103 (2016) (Breyer, J., concurring). But no other Justice joined either of these two concurring opinions. Indeed, Justices Scalia and Thomas specifically rejected that view. *Ring*, 536 U.S. at 612 (Scalia, J., concurring) (disagreeing with Justice Breyer's invoking the Eighth Amendment because "today's judgment has nothing to do with jury sentencing" rather, the ruling only requires that the jury find "that an aggravating factor existed").

It is not accurate to imply that jury sentencing in capital cases was the norm at the time of the adoption of the Eighth Amendment. In 1971, and for many decades afterwards, the jury determined the defendant's guilt of a capital crime, and, then, based on the jury's guilty verdict, the judge imposed a death sentence. And the judge had

no discretion — a death sentence was mandatory for certain crimes. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (noting at the time "the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses"). And mandatory death sentences were not limited to the crime of murder at the time of the founding. Indeed, cattle rustling or stealing a horse often carried a mandatory death sentence, imposed by the judge alone. *People v. Love*, 366 P.2d 33, 40 (1961) (McComb, J., dissenting) (noting that many western states, including California, imposed the death penalty for cattle rustling); *Com. v. Stewart*, 3 Va. 114, 115 (Va. Gen. Ct. 1795) (reporting a case that involved a death sentence for stealing a horse in 1793 that was later reduced). The original meaning of the Eighth Amendment lends no support to the notion that jury sentencing is required by the U.S. constitution, given the "uniform" practice of automatic and mandatory death sentences, imposed by judges alone, at the time of the founding.

Opposing counsel's argument invoking the original meaning of

the Eighth Amendment at the time of the founding but then also invoking the modern concept of the evolving-standards-of-decency is contradictory. Justice Alito has observed, the philosophical basis for the evolving-standards-of-decency test, first established in 1958, by *Trop v. Dulles*, 356 U.S. 86 (1958), was "problematic from the start." *Miller v. Alabama*, 567 U.S. 460, 510-11 (2012) (Alito, J., dissenting). But he noted that, at least, when the evolving standards are based on the positions taken by state legislatures and Congress, it is an objective test. The modern standard of *Trop* has been roundly criticized by some of the Justices, as having no textual support in the Eighth Amendment and especially when applied to sentencing practices that are common among the states. *Graham v. Florida*, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) (noting the text of the Constitution was silent regarding the sentencing practice at issue and the practice would not have offended the standards that prevailed at the time of the founding of the nation, but under the modern view of evolving standards, it was grossly disproportionate, which would have "surprised" Congress and the 37 States that then currently allowed

the practice). Opposing counsel may invoke the modern test of evolving-standards-of-decency as a basis for this Eighth Amendment claim, but not historical practice. Jury sentencing in capital cases was not the historical practice.

The Nebraska Supreme Court recently rejected a claim that sentencing by a three-judge panel in capital cases violates the Eighth Amendment. *State v. Trail*, 981 N.W.2d 269, 309 (Neb. 2022). Trail invoked the evolving-standards-of-decency test of *Trop* to argue that allowing judges to determine the selection criteria and to make the ultimate life-or-death decision was a violation of the Eighth Amendment. *Trail*, 981 N.W.2d at 309. He asserted that jurors more reliably express society's consensus regarding the appropriate punishment than judges. The Nebraska Supreme Court, in an unanimous opinion, found the claim lacked "merit." *Id*. at 309. The Court reasoned that Eighth Amendment principles were not "pertinent" to whether a jury, as opposed to a judge, weighs the aggravation against the mitigation and makes the ultimate sentencing decision. *Id*. at 310. The Nebraska Supreme Court relied on the

reasoning of *Clemons v. Mississippi*, 494 U.S. 738 (1990), noting it had recently been reaffirmed by the United States Supreme Court in *McKinney v. Arizona*, 140 S.Ct. 702 (2020), against a challenge based on the Sixth Amendment cases of *Ring* and *Hurst*. *Trail*, 981 N.W.2d at 310. In *Clemons*, the High Court held it did not violate the Eighth Amendment for an appellate court to perform the reweighing of the aggravation against the mitigation rather than remanding for the jury to do the reweighing. The *Clemons* Court explained that an appellate court can comply with the Eighth Amendment requirements of individualized and reliable sentencing determinations just as well as a jury. The Nebraska Supreme Court upheld Nebraska's statutory death penalty scheme which delegates to a three-judge panel the determinations of whether the aggravating circumstances justify the death penalty and the weighing of the aggravating circumstances against the mitigating circumstances. *Id*. at 311.

The Eighth Amendment does not require jury sentencing in capital cases.

ISSUE II

WHETHER THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTOR PROPERLY NARROWS THE CLASS OF CONVICTED MURDERERS, AS REQUIRED BY THE EIGHTH AMENDMENT?

Dillbeck asserts that the heinous, atrocious, and cruel aggravating factor (HAC) is unconstitutional because it does not narrow the class of first-degree murders warranting the death penalty, as required by the Eighth Amendment. He argues that because this Court, on rare occasion, has permitted the HAC aggravator to be applied to cases involving shooting murders, was well as to stabbing murders and strangulation murders, the HAC aggravator basically applies all murders. But the constitutional challenge to the HAC aggravator is procedurally barred because it was not raised in the direct appeal. It is also dilatory. Furthermore, Florida's HAC aggravator is sufficiently narrow. This Court generally does not permit a finding of HAC as applied shooting murders; this Court only affirms the finding of the HAC aggravator in shooting murders in certain situations. The HAC aggravator, as applied in Florida, genuinely narrows the class of murders that warrant the death penalty.

Procedural bar

The constitutional challenge to the HAC aggravator is procedurally barred. Again, both the appeals statute and this Court's precedent require claims be raised at the first opportunity. § 924.051(8), Fla. Stat. (2022); *Sweet*, 2021 WL 5550079 (quoting *Denson*, 775 So.2d at 289); *Breedlove*, 595 So.2d at 10. The first opportunity to raise claims that are clear from the face of the trial transcript, such as challenges to any aggravating factors, is in the direct appeal. Any constitutional attacks on the aggravators must be raised in the direct appeal. *Barwick v. State*, 88 So.3d 85, 111 (Fla. 2011) (finding a constitutional challenge to an aggravator was procedurally barred because it was not raised in the direct appeal); *Grim v. State*, 971 So.2d 85, 103 (Fla. 2007) (finding a constitutional challenge to the jury instructions was procedurally barred because it was not raised in the direct citing *Miller v. State*, 926 So.2d 1243, 1256 (Fla. 2006)).

Dillbeck may not raise this issue for the first time nearly 31 years after the initial brief in the direct appeal was filed, in a

successive habeas petition, much less in a successive habeas petition filed on the eve of an execution. The constitutional challenge to the HAC aggravator is procedurally barred.

Dilatory

Even ignoring rule 3.851(d)(3) limiting habeas petitions to the initial postconviction appeal, the challenge to the constitutionality of the HAC aggravator is dilatory. Dillbeck waited more than a decade after the two main cases he relies upon to attack the HAC aggravator were decided to raise this challenge to the HAC aggravator. Pet. at 20-21 (citing *Hudson v. State*, 992 So.2d 96, 115 (Fla. 2008); *McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010)). And Dillbeck raised this claim for the first time in an unauthorized successive habeas petition filed on the eve of an execution. Successive habeas petitions should not be permitted to be a vehicle to raise dilatory claims — dilatory habeas claims are still dilatory claims. The HAC aggravator challenge is dilatory.

Merits

A capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence" in order to "vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005).

The application of the HAC aggravator in Florida does not violate the Eighth Amendment narrowing requirement. Under this Court's caselaw, while gunshot murders can qualify as HAC, they only qualify "if the events preceding the death cause the victim fear, emotional strain, and terror." *Colley v. State*, 310 So.3d 2, 14-15 (Fla. 2020) (citing *Marquardt v. State*, 156 So.3d 464, 488 (Fla. 2015), and *Lynch v. State*, 841 So.2d 362, 369 (Fla. 2003)).

In *Marquardt v. State*, 156 So.3d 464, 488 (Fla. 2015), this Court

stated that normally the HAC aggravator "does not apply if the victim died instantaneously." This Court affirmed the HAC finding as to one victim of the two victims who had been both shot and stabbed. She was shot three times including in the back which severed her spinal cord and caused her to collapse and then, while conscious, she was stabbed three time in the neck. And her daughter, granddaughter, and grandson were all in the house at the time. But this Court reversed the HAC finding as to the daughter who was shot and "died quickly." *Id.* at 488. *Marquardt* is a good example of this Court carefully determining which shooting murders the HAC aggravator may properly be applied to. The HAC aggravator as applied in Florida genuinely narrows the class of murders that warrant the death penalty. *Marquard v. Sec'y, Fla. Dep't. of Corr.*, 429 F.3d 1278, 1316-17 (11th Cir. 2005) (discussing the Eleventh Circuit's three-part for determining whether the HAC aggravator is sufficiently narrow and noting the Eleventh Circuit had previously held that Florida has sufficiently limited its HAC aggravator to pass constitutional scrutiny in *Scott v. Singletary*, 38 F.3d 1547, 1554 (11th Cir. 1994)).

And, of course, none of these concerns about the HAC aggravator even apply to this case. This was a stabbing murder, not a shooting murder. Dillbeck stabbed the victim 20-25 times with a knife including in her neck causing her to drown in her own blood. This case is a classic example of a murder where the HAC aggravator was indisputably applied properly based on the facts. The HAC aggravator was properly found in this case.

ISSUE III

WHETHER THE ESCAPE AGGRAVATING FACTOR APPLIES AND WHETHER THE EVIDENCE SUPPORTING THE ESCAPE AGGRAVATOR WAS SUFFICIENT?

Dillbeck asserts that the escape aggravating factor is limited in the same manner as the avoid arrest agrgravating factor and requires the prosecution prove that the main purpose of the murder was to further the escape. Dillbeck further asserts that the evidence supporting the escape aggravator was insufficient because, while he attempted to kidnap the victim to further his escape, he murdered her because she resisted. He asserts, in fact, her murder ended his escape, not furthered it. The challenge to the escape aggravator claim is procedurally barred twice over. First, because any such challenge to the evidence supporting the aggravator should have been raised in the direct appeal and then because this exact claim was already rejected by this Court in the first successive postconviction motion. On the merits, the escape aggravator is not limited in the same manner as the avoid arrest aggravator. Alternatively, even if the escape aggravator is limited in the same manner, any error in finding

the escape aggravator was harmless in light of the other four aggravators, including the HAC aggravator and the prior violent felony aggravator based on a prior murder conviction.

Procedural bar

The attack on the escape aggravating factor is procedurally barred by the law-of-the-case doctrine. The law-of-the-case doctrine bars reconsideration of legal issues that were actually considered and decided in a former appeal. *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001). And the law-of-the-case doctrine, which is designed to prevent relitigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047 (Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003)); *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013). The law-of-the-case doctrine also applies regardless of whether the claim is a slight variation of a prior claim or whether a party employs different arguments when reraising the same claim. *Sireci v. State*, 773 So.2d 34, 40-41 (Fla. 2000) (finding claims to be procedurally barred

and observing that even if a defendant uses a different argument to relitigate the same issue, the claim remains procedurally barred); *Mills v. State*, 684 So.2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely a variation of another prior postconviction claim). Indeed, this claim is procedurally barred by the law-of-the-case doctrine twice over.

First, in the direct appeal, this Court found the evidence was sufficient to support the escape aggravating factor. *Dillbeck v. State*, 643 So.2d 1027, 1031 (Fla. 1994). In the direct appeal, Dillbeck argued that because he escaped from custody by walking away from a catering detail forty miles from Tallahassee two days prior to the murder, the escape was completed before the murder. *Id.* at 1031. But this court rejected that attack on the escape aggravator because Dillbeck "had not abandoned his flight, and was attempting to secure transportation from the area" to further his escape. *Id.* This Court concluded that the crime "was intended to facilitate the continuing escape." *Id.* This Court concluded that the escape aggravator was properly applied to this case. The challenge to escape aggravator

raised in the direct appeal procedurally bars him from raising a similar challenge in any successive habeas petition.

Second, Dillbeck raised this exact same claim in his first successive postconviction motion arguing that the escape aggravator was improperly applied to him because the prosecution did not prove that the primary motive for the killing of the victim was witness elimination. This Court concluded that the claim was procedurally barred. *Dillbeck v. State*, 168 So.3d 224 (Fla. 2015). The challenge to escape aggravator raised in the prior successive postconviction motion procedurally bars him from raising the same exact challenge in any successive habeas petition.

This claim regarding the escape aggravator is procedurally barred by the law-of-the-case doctrine twice over. Dillbeck may not raise this issue for a third time in a successive habeas petition, much less in a successive habeas petition filed on the eve of an execution.

Dilatory

Even ignoring rule 3.851(d)(3) limiting habeas petitions to the

initial postconviction appeal, the challenge to the escape aggravator is dilatory. Dillbeck waited more than two decades after the main cases he bases his attack on the escape aggravator upon were decided, to raise this challenge to the escape aggravator. Pet. at 22-23 (citing *Jackson v. State*, 502 So.2d 409 (Fla. 1986), *Cook v. State*, 542 So.2d 964 (Fla. 1989), *Trease v. State*, 768 So.2d 1050, 1056 (Fla. 2000), and *McLean v. State*, 29 So.3d 1045 (Fla. 2010)). Dillbeck raised this claim for the first time in an unauthorized successive habeas petition filed on the eve of an execution. Successive habeas petitions should not be permitted to be a vehicle to raise dilatory claims — dilatory habeas claims are still dilatory claims. The escape aggravator claim is dilatory.

Merits

The escape aggravator is not limited in the same manner as the avoid arrest aggravator. Florida's death penalty statute, § 921.141(5)(e), Florida Statutes (1990), provided: the "capital felony was committed for the purpose of avoiding or preventing a lawful

arrest or effecting an escape from custody." While this Court has established caselaw limiting the avoid arrest aggravator to situations where avoiding arrest is the sole or dominant motive for the murder, this Court has never expanded that caselaw to the escape aggravator. *See, e.g.*, *Calhoun v. State*, 138 So.3d 350, 361-62 (Fla. 2013)(explaining that when the victim is not a police officer, the evidence supporting the avoid arrest aggravator must prove that the sole or dominant motive for the killing was to eliminate a witness quoting *Buzia v. State*, 926 So.2d 1203, 1209-10 (Fla. 2006), and striking the avoid arrest aggravator). Much of the concern of this Court underlying its holdings regarding the avoid arrest aggravator was that the logic of witness elimination could be applied to nearly all murders which could make the aggravator insufficiently narrow. *Cruz v. State*, 320 So.3d 695, 728 (Fla. 2021) (referring to the avoid arrest aggravating circumstance as also being known as the "witness elimination" aggravator). But that concern does not apply to the escape aggravator, which is a relatively rare aggravator. In this case, the aggravator was applied based on an escape rationale only, not on a "witness elimination" rationale.

Furthermore, the evidence supporting the aggravator is straight from the defendant himself. Dillbeck testified that he was not going to let anything get in the way of his escape. (T. Vol. XIII 1983-84). Dillbeck's entire purpose for carjacking the victim's car and threatening her with a knife, that he had purchased immediately before accosting her to force her to drive him out of town, was to further his escape from prison.

Alternatively, even if the escape aggravator should not have been found, the error in considering the escape aggravator was harmless. *Hall v. State*, 107 So.3d 262, 278 (Fla. 2012) (stating that when an aggravating factor is stricken on appeal, the harmless error test applies); *Marquardt v. State*, 156 So.3d 464, 489 (Fla. 2015) (concluding the error in finding the HAC aggravator as to one of the victims was harmless citing *Hall*).

The trial court found five aggravating factors: 1) under sentence of imprisonment; 2) previously convicted of another capital felony; 3) the murder was committed during the course of a robbery and burglary; 4) the murder was committed to avoid arrest or effect

escape; and 5) the murder was especially heinous, atrocious, or cruel. *Dillbeck*, 643 So.2d at 1028, n.1. Even without the escape aggravator, there are four remaining aggravators, two of which, the HAC aggravator and the prior violent felony aggravator based on a prior murder conviction, are particularly strong aggravators, both as a matter of law and in this particular case. Dillbeck's contemporaneous attacks on the constitutionality of the HAC aggravator in this successive habeas petition and his challenge to the prior violent felony aggravator in the appeal, do not alter the harmless error analysis regarding the escape aggravator. Neither the HAC aggravator nor the prior violent felony aggravator have been stricken by any court. So, both aggravators remain a proper part of any harmless error analysis.

Because Florida is a weighing state, it is probably more correct to perform appellate reweighing of the aggravation against the mitigation than a traditional harmless error analysis. *McKinney v. Arizona*, 140 S.Ct. 702 (2020) (reaffirming appellate reweighing established in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and expanding the concept to omitted mitigation). The only major difference between

appellate reweighing and traditional harmless error analysis is the mitigation and its strength is also considered. The trial court found one of the statutory mental mitigators, *i.e.*, that his capacity to conform his conduct to the requirements of the law was substantially impaired. *Dillbeck v. State*, 882 So.2d 969, 970, n.4 (Fla. 2004). The trial court also found eight non-statutory mitigators but gave most of them little weight. *Dillbeck*, 882 So.2d at 970, n.5. Any error in finding the escape aggravator was harmless in light of the other four aggravators, including the HAC aggravator and the prior violent felony aggravator balanced against the mitigation. Any error in finding the escape aggravator was harmless.

Accordingly, the successive habeas petition should be dismissed as an abuse of the writ.

CONCLUSION

The State respectfully requests that this Honorable Court dismiss the successive habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to the state petition for writ of habeas corpus has been furnished by email to 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 13th day of February, 2023.

/s/ *Charmaine Millsaps*
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 14 point font.

/s/ *Charmaine Millsaps*
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