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IN THE SUPREME COURT OF FLORIDA

**DONALD DAVID DILLBECK,**

Appellant,

v.

**STATE OF FLORIDA,**

Appellee.

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Case No.: **SC14-1306**

L.T. No. 1990-CF-2795  
CAPITAL CASE

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ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL  
CIRCUIT, LEON COUNTY, FLORIDA,  
HON. ANGELA DEMPSEY, CIRCUIT JUDGE

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**INITIAL BRIEF OF APPELLANT**

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### **Preliminary Statement**

This is a capital collateral appeal from the Circuit Court's summary denial of 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 "Defendant." The Appellee, the State of Florida, was the plaintiff in the lower court and is referred to herein as "the State."

Appellant raised three claims for relief in the successive Rule 3.851 motion, referred to herein as "the motion." The instant appeal presents three issues, one for each claim in the order presented in the motion.

References to the three-volume record on appeal will be designated by volume/page number(s).

### **Statement Regarding Oral Argument**

Oral argument is not requested.

### **Statement of the Case and Facts**

Appellant was indicted by a grand jury in the Circuit Court of the Second Judicial Circuit, Leon County, Florida, for first-degree murder (Count I), armed robbery (Count II) and armed burglary (Count III) (1/100). Appellant entered a plea of not guilty and proceeded to trial. A jury of twelve persons found Appellant guilty as charged and recommended a sentence of death by a vote of 8-4. The trial court sentenced Appellant to death on the murder charge and to consecutive sentences of life imprisonment for the robbery and burglary (1/100).

The essential facts of the case are set forth in this Court's opinion on direct appeal:

Dillbeck was sentenced to life imprisonment for killing a policeman with the officer's gun in 1979. While serving his sentence, he walked away from a public function he and other inmates were catering in Quincy, Florida. He walked to Tallahassee, bought a paring knife, and attempted to hijack a car and driver from a shopping mall parking lot on June 24, 1990. Faye Vann, who was seated in the car, resisted and Dillbeck stabbed her several times, killing her. Dillbeck attempted to flee in the car, crashed, and was arrested shortly thereafter and charged with first-degree murder, armed robbery, and armed burglary. He was convicted on all counts and sentenced to consecutive life terms on the robbery and burglary charges, and, consistent with the jury's eight-to-four recommendation, death on the murder charge.

*Dillbeck v. State*, 643 So. 2d 1027, 1028 (Fla. 1994).

The trial court found the following five aggravating circumstances:

- (1) Under sentence of imprisonment, F.S. 921.141(5)(a) (1990);
  - (2) Prior Capital Felony, F.S. 921.141(5)(b);
  - (3) Committed during course of robbery, burglary or kidnapping, F.S. 921.141(5)(d);
  - (4) Committed for purpose of avoiding arrest or effecting escape from custody, F.S. 921.141(5)(e); and
  - (5) Especially heinous, atrocious or cruel (HAC), F.S. 921.141(5)(h). The court did not assign individual weight to each aggravator.
- (1/100; 2/337-341).

The trial court found one statutory mitigating circumstance as set forth in the written “Findings in Support of the Sentence of Death:”

*(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

Evidence was presented by the defense with regard to this mitigating circumstance, the jury was instructed on it and there was sufficient evidence upon which the jury could have been reasonably convinced that this mitigating circumstance was established. The Court has made an independent review of the evidence and is reasonably convinced that it was established.

It is difficult to allocate the evidence as to this mitigating circumstance from its applicability to the mitigating circumstance in Florida Statutes 921.141(6)(b). It would appear and the Court finds that the Defendant’s capacity to conform his conduct to the requirements of law was substantially impaired. The



Court is not convinced that the capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.

(2/343-344). Thus, the trial court found only that portion of the mitigating circumstance established that pertains to Appellant's capacity to conform his conduct to the requirements of the law. However, the trial court did not assign weight to this mitigating circumstance.

The trial court then considered eleven non-statutory mitigating circumstances advanced by Appellant during the penalty phase, to wit:

1. *The Defendant suffered an abused and deprived childhood (2/344).*

The trial court found that "this circumstance simply does not weigh heavily as a mitigating circumstance." (2/345).

2. *The Defendant suffered from brain damage due to his mother's consumption of three to four six-packs of beer a day throughout her pregnancy*

(2/345). As to this mitigating circumstance, the written order states that "the Court is not persuaded that this impacted the Defendant's actions to any substantial degree." (2/346).

3. *The Defendant suffers from a mental illness.*

The court found:

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. The Court further finds that the evidence in this regard is that evidence which was considered to establish the statutory mitigating circumstances found in Florida Statutes 921.141(6)(f) and should, therefore, not be considered here as a separate mitigating circumstance.

(2/346).

4. *The Defendant's mental illness and brain damage can be treated.*

(2/346). As to this mitigating circumstance, the trial court stated:

The Court saw and heard both Dr. Berland and Dr. Wood testify and although there was testimony to support the Defendant's statement to this effect, the Court is not convinced that this is a non-statutory mitigating circumstance that is entitled to any substantial weight.

(2/347).

5. *The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme or substantial mental or emotional disturbance.*

(2/347). The court found as follows as to this mitigating circumstance:

The testimony relied upon by the Defendant to establish this non-statutory mitigating circumstance is the same evidence that was considered by the Court in finding the existence of the statutory mitigating circumstance found in Florida Statutes 921.141(6)(f) and, therefore, is rejected as a separate non-statutory mitigating circumstance.

(2/347).

6. *The capacity of the Defendant to conform his conduct to the requirements of the law was either substantially or significantly impaired.*

The court found this non-statutory mitigator to be subsumed within the statutory mitigator under § 921.141(6)(f) (2/347).

7. *The Defendant entered one of Florida's most violent prisons at an unusually early age.*

The court found as follows as to this mitigating circumstance:

This circumstance was established. The Court does not view this factor as having any substantial mitigating weight. It is regrettable that the State of Florida maintained an institution with such a reputation, however, in light of the prior acts of the Defendant it appears that he was properly placed in that institution.

(2/347-8).

9. *(Actually 8) The Defendant has been a good, well-behaved inmate.*

This non-statutory mitigating circumstance will be referred to herein as the model prisoner mitigator. The trial court made the following findings:

The State conceded this non-statutory mitigating circumstance and the Court is reasonably convinced that it does exist. The Court believes that this is of no practical mitigation because it appears to the Court that it detracts from the other mitigating factors found in the Defendant's behalf. It is obvious that most of the Defendant's good behavior was a conscious effort to further his plans which included escape resulting in this offense.

(2/348).

10. *The Defendant has the love and support of his family.*

As to this mitigating circumstance, the trial court stated:

The heart-rending testimony of his devoted adoptive parents clearly established this mitigating circumstance. It is obvious, however, that the love that the Defendant returned to his adoptive parents was not sufficient to overcome his intentional criminal action and the obvious knowledge of the pain that would be caused to them by it. While great empathy is felt for the Defendant's parents, only slight mitigation results to the Defendant from it.

(2/348).

11. *The Defendant has demonstrated remorse for his crime.*

The trial court found that "[t]here is very little evidence to support this mitigating factor and the simple statement from the Defendant on the witness stand or at the sentencing hearing to that effect is not persuasive to the Court that this should be given any substantial weight." (2/348).

After making these findings, the trial court then evaluated the mitigating circumstances as a whole, making the following findings:

The most compelling evidence of mitigating circumstances is with regard to the fetal alcohol effects which resulted in Defendant's borderline normal intelligence level and Defendant's lack of impulse control. When Defendant's borderline normal intelligence level is considered with other evidence it simply becomes insignificant in the overall picture. The Defendant's ability to play chess, to accumulate 12 hours of college credits, to perform work so that a supervisor will describe him as "one of the best inmates I'd ever

worked” and to formulate a plan for escape which took years to implement far outweigh any mitigating effect of his low intelligence level.

The claim of a lack of impulse control does not stand when considering Defendant’s exemplary record of only two disciplinary reports in 11 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.

A review of all of the evidence, the testimony and demeanor of the witnesses causes the evidence in mitigation to pale into insignificance when considering the enormity of the proved aggravating factors and compels the sentence in accordance with the recommendation of the jury.

(2/349) (emphasis added). The court then imposed the death penalty.

On direct appeal to this Court, Appellant raised the following ten claims of trial court error: (a) error in juror qualifications; (b) refusing to admit evidence on specific intent; (c) requiring Defendant to submit to examination by State’s mental health expert; (d) instructing the jury on flight; (e) allowing State expert to invade province of jury on issue of Defendant’s purposeful behavior; (f) instructing the jury on HAC aggravator; (g) finding HAC aggravator; (h) instructing the jury on avoid arrest/effect escape aggravator; (i) proportionality; and (j) failing to allocate burden of proof in instructing jury on aggravating and mitigating factors. (1/100-101).

In a written opinion rendered April 21, 1994, this Court affirmed the convictions and sentence of death. *Dillbeck*, 643 So. 2d 1027. The Court found that the trial court erred in refusing to allow Appellant to introduce evidence of his fetal alcohol syndrome during the guilt phase to negate the element of premeditation, but found the error harmless in light of the jury's verdict finding both premeditated and felony murder. *Id* at 1029-30.

The Court also held that it was not error to find as an aggravating circumstance that Appellant committed the murder while effecting an escape from custody. *Id* at 1031. Responding to Appellant's argument that the escape was committed a full two days before the murder and 40 miles away, the Court reasoned that Appellant "was still in geographical proximity to the prison, had not abandoned his flight, and was attempting to secure transportation from the area." *Id*. The Court concluded that these facts support a conclusion that the murder was intended to facilitate the continuing escape. *Id* (quoting *Ayendes v. State*, 385 So. 2d 698, 699 (Fla. 1<sup>st</sup> DCA 1980)).

Appellant filed a petition for writ of certiorari to the United States Supreme Court, which was denied. *Dillbeck v. Florida*, 115 S. Ct. 1371 (1995) (1/101).

On April 23, 1997, Appellant filed his first motion to vacate the judgment of conviction and sentence. Appellant 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 (1/101-102).

The trial court conducted an evidentiary hearing on the motion on April 1, 2002. On September 3, 2002, the trial court entered an order denying the motion on all grounds (1/102).

Appellant appealed to this Court, and also filed a petition for writ of habeas corpus, asserting one claim that Florida's capital sentencing statute is unconstitutional (1/102).

On August 26, 2004, this Court rendered an opinion affirming the denial of one ground alleging per se ineffective assistance of counsel for conceding guilt. The Court also 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 remainder of Appellant's postconviction claims. *Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004).

On remand, the trial court entered “Findings of Fact and Conclusions of Law” on July 15, 1005, again denying all claims presented in the Rule 3.851 motion (1/102-103). After briefing by the parties, this Court affirmed the denial of the motion. *Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007).

On September 7, 2007, Appellant filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the U.S. District Court for the Northern District of Florida (1/103). Appellant subsequently amended the petition on December 28, 2007, 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 (1/103).

The District Court dismissed claims 2, 5 and 6 as untimely, and entered a final order denying the amended petition and certificate of appealability on January 29, 2010. *Dillbeck v. McNeil*, 2010 WL 419401 (N.D. Fla., January 29, 2010). Appellant appealed to the Eleventh Circuit Court of Appeals, which remanded to the District Court for reconsideration of Appellant’s equitable tolling argument for the three claims dismissed as untimely in light of the Supreme Court’s decision in



*Holland v. Florida*<sup>1</sup>. The District Court ruled that Appellant was still not entitled to equitable tolling and again denied a certificate of appealability. *Dillbeck v. McNeil*, 2010 WL 3958639 (N.D. Fla., October 7, 2010). The Court of Appeals then denied a certificate of appealability on January 18, 2011 (1/103-104).

The undersigned was appointed to represent Appellant on postconviction matters in the trial court on September 11, 2013 (1/95-96). The undersigned entered an appearance as counsel on September 18, 2013 (1/97).

On March 28, 2014, Appellant filed a successive motion for postconviction relief under Fla. R. Crim. P. 3.851 (“Motion”) (1/99). The motion raised the following three grounds for relief:

I. Ineffective assistance of penalty phase counsel for employing an unreasonable strategy of seeking two inconsistent mitigating circumstances that canceled each other out, and which led to the introduction of prior bad acts;

II. Violation of Eighth Amendment to allow jury to consider escape aggravator for which essential element of witness elimination motive was unsupported by sufficient evidence and not included in jury instruction; and

III. Newly discovered evidence that incarceration in adult prison as a juvenile results in stunted maturity and development, supporting a non-statutory mitigating circumstance based on Appellant’s age at time of prior violent felony.

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<sup>1</sup> 560 U.S. 631, 130 S. Ct. 2549 (2010)

(1/104, 114, 126).

The State filed an answer to the motion on April 21, 2014 (1/139). The State argued that the first claim was addressed by this Court's opinion affirming the convictions on direct appeal, the second claim is procedurally barred, and the third claim is barred because this Court holds that scientific studies are not newly discovered evidence (1/141-142). Appellant filed a reply on May 19, 2014 (1/29, 3/525).

The trial court held a Huff<sup>2</sup>/case management hearing on May 20, 2014 (3/523). Undersigned counsel stated that an evidentiary hearing was not required for claims one and two of the motion, as they were purely legal matters based on facts already in the record that did not need to be supplemented (3/526). Counsel asked the court to consider a hearing on claim three (3/526).

The State argued that claim three was already presented at the penalty phase when counsel argued that Appellant was incarcerated in a violent prison at an early age, and that there is nothing new to consider because the jury already heard that he was incarcerated at a young age (3/531). The State also argued that this Court's prior decisions hold that research studies do not qualify as newly discovered evidence (3/532). The trial court then took the matter under advisement (3/537-538).

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<sup>2</sup> *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

On June 5, 2014, the trial court entered an order summarily denying the motion on all grounds (1/165). The court ruled that claim one was untimely because it was filed more than one year after the factual predicate for the claim was discovered during the evidentiary hearing on Appellant's first postconviction motion (1/168). The court also ruled that the claim was successive to the extent it argued the prior bad acts evidence (1/168-169). The court also found that trial counsel's penalty phase strategy was reasonable and that there was no prejudice (1/170-171). The court ruled that claim two was untimely and that the evidence was sufficient to support the escape aggravator, and that any error did not affect the sentence (1/173-174). The court ruled that claim three was untimely, that studies do not constitute newly discovered evidence, and that age mitigation was already presented during the penalty phase and further mitigation would not have changed the sentence (1/175-177).

Appellant filed a motion for rehearing on June 22, 2014 (3/500-516). Appellant also filed a motion to consider the motion for rehearing out of time (3/517-518). On July 1, 2014, the trial court denied the motion for rehearing (3/519-520). A timely notice of appeal was filed on July 2, 2014 (3/521-522).

This appeal follows.

### **Summary of the Argument**

The trial court erred in denying Appellant's first claim, which did not arise until the evidentiary hearing on Appellant's first postconviction motion when trial counsel asserted that his introduction of uncharged crimes evidence against his own client was part of a strategy to prove two mitigating circumstances. Prior collateral counsel's failure to raise a new claim based on this testimony within one year of the hearing was excusable neglect because counsel had to appeal the denial of the first motion and there was no concurrent jurisdiction.

Trial counsel's strategy was objectively unreasonable because the two mitigating circumstances were inconsistent and refuted each other. Evidence that Appellant was a model prisoner refuted counsel's argument that Appellant lacked impulse control, a fact cited by the trial court in giving no mitigating weight to either factor. This strategy also placed highly prejudicial and otherwise inadmissible evidence of uncharged crimes before the jury, with no offsetting benefit to the defense.

The trial court also erred in denying Appellant's second claim. The jury was instructed to consider the escape aggravating circumstance during the penalty phase, even though there was no evidence to show that the sole or dominant motive for the murder of the civilian victim was to eliminate her as a witness. This is an essential element of the escape/avoid arrest aggravator if the victim is not a law

enforcement officer, and the jury was not instructed on this element and was completely unaware of the motive requirement or the insufficiency of the evidence.

This claim was not preserved in the trial court and could not have been raised on direct appeal. Prior counsel's failure to raise the claim in the first postconviction motion was neglect and ineffective assistance that should not be imputed to Appellant to bar the claim on procedural grounds.

The error is prejudicial because even with the invalid aggravator included, four jurors voted not to impose the death penalty. Had just two jurors voted differently, Appellant would not have been sentenced to death. The trial court failed to assign individual weight to each of the remaining aggravating circumstances as required by law, preventing a reviewing court from finding that the error had no effect on the decision to impose the death penalty. To sustain the death sentence without an individualized sentencing determination would be arbitrary and violate the Eighth Amendment.

Finally, the trial court erred in denying Appellant's newly discovered evidence claim without an evidentiary hearing. Appellant recently discovered several scientific studies that rely on recent tracking data on released juvenile offenders. This information shows that juvenile offenders incarcerated in adult prisons suffer from stunted maturity and emotional development. They show decreased maturity, less economic and social growth, and no decrease in offending

with age compared to juveniles who were incarcerated in juvenile facilities. This evidence would have established a link between Appellant's age of 15 at the time he was incarcerated and his subsequent commission of a capital felony, making his age a significant mitigating factor.

The trial court erred in holding that studies are per se not newly discovered evidence. This Court's precedents hold that whether studies constitute new evidence or not depends on whether the underlying information supporting the studies was available at the time of trial. Furthermore, the trial court's findings that this issue was already presented during the penalty phase and supported by expert testimony are not supported by the record. Appellant argued during the penalty phase that his incarceration in a violent prison was mitigating because of the abuse that he suffered, and the court rejected any mitigation based on age. The defense mental health experts only testified that Appellant suffered from mental illness due to brain damage, not from psycho-social effects or a reaction to bad circumstances.

Appellant stated a facially sufficient claim and should be afforded an opportunity to establish the facts supporting the mitigating circumstance at a hearing.

Therefore, this Court should reverse the trial court's order and vacate Appellant's sentence of death, or remand for further proceedings.

## Argument

### **I. WHETHER TRIAL COUNSEL PURSUED AN UNREASONABLE STRATEGY DURING THE PENALTY PHASE THAT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT**

#### a. Introduction and Standard of Review:

The trial court erred in denying claim one of Appellant's motion. This claim alleged that penalty phase counsel pursued an unreasonable strategy, revealed at the evidentiary hearing on Appellant's first motion for postconviction relief, of seeking two inconsistent and mutually exclusive mitigating circumstances that canceled each other out, resulting in no mitigation and opening the door to prejudicial evidence of uncharged crimes and prior bad acts (1/104-113). The trial court denied the claim on three grounds: (1) that it is untimely, (2) that it is successive, and (3) that there was no deficient performance or prejudice because counsel's strategy was reasonable and no other course of action would have changed the outcome (1/167-171).

The standard of review on a trial court's application of a procedural bar is de novo. *State v. McBride*, 848 So. 2d 287 (Fla. 2003). On the merits, a reviewing court defers to the trial court's factual findings but reviews the ultimate legal conclusions on deficient performance and prejudice de novo. *Bruno v. State*, 807 So. 2d 55 (Fla. 2001).

b. Timeliness

The trial court erred in ruling that this claim is procedurally barred because it is untimely. Appellant alleged that the claim did not arise until the evidentiary hearing on his first postconviction motion, and therefore could not have been raised in the first motion. Citing this Court's decision in *Byrd v. State*, 14 So. 3d 921 (Fla. 2009), the trial court countered that the claim should have been filed within one year of the evidentiary hearing when the factual predicate for the claim was discovered (1/168). Because it wasn't, the court concluded that the claim was still untimely.

However, this claim falls within another exception to the time bar that is expressly provided for in Fla. R. Crim. P. 3.851(d)(2). The rule provides:

(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:

\* \* \*

(C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). *See Griffin v. McCollum*, 22 So. 3d 67 (Fla. 2009) (stating that exception in Rule 3.851(d)(2)(C) applies to motions for postconviction relief in capital cases).

In this case, postconviction counsel appealed the trial court's denial of the first postconviction motion to this Court, including the claim of ineffective



assistance for introducing the prior bad acts. Because the instant claim is based on a trial strategy defense to that claim, the two claims are related and the trial court would not have had concurrent jurisdiction to consider a successive motion at that time. *See Hulick v. State*, 644 So. 2d 117 (Fla. 3<sup>rd</sup> DCA 1994) (holding that trial court lacks jurisdiction to hear motion during pendency of appeal of similar motion).

The appeal of the first postconviction motion was not final until the motion for rehearing was denied by this Court on August 27, 2007. This is well beyond the one-year time period cited by the trial court as the deadline for raising this claim. It would have been legally impossible for prior postconviction counsel to file a successive motion raising the instant claim within that one-year time frame. It would be an unfair game of legal gotcha to time bar the claim on that basis.

In addition, after the first postconviction appeal was final, counsel proceeded to immediately attack the conviction in federal court on a writ of habeas corpus, again raising the ineffective assistance claim based on counsel's introduction of the prior bad acts. Those proceedings were not complete until October of 2011, nearly a decade after the evidentiary hearing. The undersigned was subsequently appointed to take over the case.

Appellant argued in the trial court that previous counsel's failure to simultaneously file a successive Rule 3.851 motion in the trial court while the

habeas petition was pending was neglect within the meaning of Rule 3.851(d)(2)(C) that should not be imputed to Appellant (3/502-504). Given the complexity of capital postconviction litigation and the time limitations involved, it is not reasonable to expect counsel to litigate multiple motions in multiple courts at one time. On the facts of this case, the failure to do so is excusable neglect that should not bar consideration of the claim.

c. Successiveness

The trial court also erred in finding the claim a successive relitigation of a prior claim. The issue in the prior motion was whether it was unreasonable for counsel to introduce evidence during the penalty phase of uncharged crimes and bad acts by Appellant (1/181-184). Counsel defended himself against this claim by testifying that this was a strategic decision he made as part of proving the model prisoner and mental health mitigation because he believed his mitigation strategy opened the door to this evidence and he wanted to steal the prosecutor's thunder by introducing the prior bad acts first (2/207-212). The trial court found, and this Court agreed, that it was a reasonable strategy for counsel to anticipatorily introduce this evidence in order to prove the mental health and model prisoner mitigators, as these were the mitigating circumstances most persuasively supported by the evidence. *Dillbeck v. State*, 964 So. 2d 95, 105-106 (Fla. 2007). Whether

seeking the two mitigators was reasonable or not was not an issue in those proceedings, and was neither argued nor discussed.

The instant claim concerns the reasonableness of counsel's strategic defense announced at the evidentiary hearing. Counsel testified that he deliberately introduced evidence of his client's prior uncharged crimes in order to prove the impulse control and model prisoner mitigators. What was not litigated or discussed in the prior motion or appeal is the fact that the trial court found that these two mitigating circumstances disproved one another and canceled each other out.

In the written findings supporting the death penalty, the trial court stated that the model prisoner evidence was of no practical mitigation because it detracts from the other mitigating factors, namely, the statutory impulse control mitigator (2/348). The court then rejected the impulse control mitigator altogether, finding that the allegation "does not stand" because of the model prisoner evidence (2/349). As a result, neither mitigating circumstance was afforded any mitigating weight by the court. Thus, counsel's strategy produced no mitigation at all.

Counsel's strategy of anticipatorily introducing prior bad acts in order to establish mitigating circumstances might conceivably have been reasonable if properly implemented. However, counsel's choice of two inconsistent mitigating circumstances rendered that strategy unreasonable because it produced the very result counsel was hoping to avoid: no substantial mitigation.

The performance of counsel must be judged under the totality of the circumstances. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). Therefore, the introduction of the prior uncharged crimes is relevant to a determination of whether counsel's overall penalty phase strategy was deficient performance. Appellant is not relitigating the issue of whether introduction of the bad act evidence constitutes ineffective assistance by itself. Rather, that decision must be considered along with counsel's choice of mitigating circumstances in assessing whether the overall strategy was objectively reasonable.

Counsel knew or should have known that he was pursuing an inconsistent mitigation strategy, with the evidence supporting one factor tending to negate the other and vice versa. Adding extensive evidence of prior uncharged crimes by Appellant to that equation is absolutely relevant to the question of deficient performance, and the prior denial of a separate claim based solely on the prior bad acts does not bar consideration of that factor now or require the instant claim to be decided in a vacuum.

The prior bad acts are also relevant to a prejudice determination. As discussed above, the prior escape and inmate stabbing directly contradicted counsel's argument that Appellant was a model prisoner. This significantly weakened the mitigating impact of the model prisoner argument. In addition, the number and severity of uncharged crimes that counsel felt had to be placed before

the jury amplified the aggravating effect of the prior violent felony aggravator by portraying Appellant as an habitually violent criminal with a propensity for stabbing people, the manner of death in the instant capital murder. Although the uncharged crimes were not the basis for a separate aggravating circumstance, they reflected badly on Appellant's background and were inherently and presumptively prejudicial and likely to affect the jury's deliberations. *See Castro v. State*, 547 So. 2d 111 (Fla. 1989) (stating that introduction of inadmissible collateral crimes evidence is presumptively harmful to the defendant's case).

Therefore, it was entirely proper for Appellant to cite to the prior bad act evidence in arguing the prejudicial effect of counsel's penalty phase strategy of seeking both the mental health and model prisoner mitigation at the same time. This does not render the instant claim successive or procedurally barred.

d. Merits of Ineffectiveness Claim

On the merits, the trial court erred in finding that counsel's strategy was reasonable and not deficient performance under *Strickland v. Washington*<sup>3</sup>. To explain why counsel's strategy was unreasonable, it is first necessary to set forth in some detail what transpired at the penalty phase of the trial and during the evidentiary hearing on Appellant's first postconviction motion.

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<sup>3</sup> 466 U.S. 668, 104 S. Ct. 2052 (1984).

# 1. Penalty Phase

During the penalty phase, defense counsel argued one statutory mitigating circumstance and eleven non-statutory mitigators. The statutory mitigator was based on Appellant's diminished capacity to conform his conduct to the requirements of the law. One of the non-statutory mitigators was based on Appellant's exemplary prison record and ability to abide by prison rules (2/343-344, 348).

As discussed above, counsel's argument that Appellant was a model prisoner opened the door to contradictory evidence of his violent misconduct in prison. This included evidence of a prior unsuccessful escape attempt and the violent stabbing of another inmate (1/106). To show a lack of impulse control, counsel also introduced evidence of uncharged crimes committed by Appellant in Indiana prior to his arrest in 1979 for the murder of a police officer. This included a vehicle theft, yet another stabbing, and Appellant's drug possession (1/106, 2/207-210).

In the written findings in support of the death penalty, the trial court initially found the statutory impulse control mitigator established, but later concluded that it was refuted by the model prisoner evidence. As stated above, the court found that a claim of poor impulse control cannot stand in the face of Appellant's exemplary disciplinary record while in prison. The court reasoned that if Appellant actually suffered from diminished impulse control, then his prison record would have been

much worse (2/349). Thus, although the impulse control mitigator was technically established, it was given no mitigating weight by the court because it was negated by the evidence supporting the model prisoner mitigator.

The trial court also found the model prisoner mitigator established, but again afforded no mitigating weight because it conflicted with the impulse control argument, stating: “The Court believes that this is of no practical mitigation because it appears to the Court that it detracts from the other mitigating factors found in the Defendant’s behalf.” (2/348).

Therefore, due to the conflicting evidence presented by counsel, neither of these mitigating circumstances was afforded any weight by the court, and counsel’s strategy of seeking inconsistent mitigating circumstances resulted in no mitigation at all. Although the court found some of the other non-statutory mitigators established, the only one given any weight at all was that Appellant had the love and support of his adoptive parents, which the court found was “slight mitigation.”

## 2. First motion for postconviction relief

In his first motion to vacate the judgments and sentences, Appellant raised a claim of ineffective assistance of counsel for introducing the bad act evidence. At the hearing on that claim, counsel revealed that the introduction of these uncharged crimes was a conscious choice on his part and part of a trial strategy of proving the

impulse control and model prisoner mitigators. The trial court found that it was reasonable for counsel to introduce the collateral crimes in anticipation of the State doing so on rebuttal. This Court affirmed that ruling, finding that it was reasonable for counsel to introduce the prior bad acts in order to gain the benefit of the mitigators and avoid having no mitigation at all. *Dillbeck*, 964 So. 2d at 105-106.

What was not litigated in the prior motion was the question of whether there actually was any benefit to proving the two mitigating circumstances. The only act or omission by counsel that was challenged in the prior proceeding was the introduction of the prior bad acts. Counsel's decision to pursue inconsistent mitigating circumstances was not at issue. Both the trial court and this Court presumed without deciding that because the mitigating circumstances were established and found by the trial court, that they actually provided mitigating weight. As shown above, that was not the case.

### 3. Why the overall strategy was unreasonable

Counsel's strategy of pursuing the two conflicting mitigating circumstances was objectively unreasonable under *Strickland* for three reasons. First, the model prisoner evidence provided minimal value as a mitigating factor because of the prior inmate stabbing and escape attempt. Reasonable jurors would not judge an inmate who stabs other inmates and tries to escape to be a model prisoner. To the



extent the inmate stabbing had to be introduced in order to argue the model prisoner mitigator, this alone probably did more harm than good.

Second, any mitigating benefit of the model prisoner evidence was substantially outweighed by the prejudicial impact of the extensive collateral crimes evidence. In addition to the inmate stabbing, the jury also heard about the Indiana stabbing, the prior unsuccessful escape attempt, the Indiana motor vehicle theft, and the drug possession. Defense counsel himself referred to these prior bad acts as “terrible, terrible things” that were “chillingly similar” to the capital murder (1/106-107). Thus, whereas the State proved the existence of one prior violent felony, counsel’s strategy revealed a pattern of violent criminality. The number and severity of these incidents portrayed Appellant as an habitually violent individual, leading the court to find (and probably the jury as well) that Appellant’s good behavior in prison was just an act designed to further his escape plans (2/348-349).

The trial court noted in its order of denial that a limiting instruction was given to the jury, directing them not to consider the other crimes as separate aggravating circumstances (1/170, 2/250). However, this only partially ameliorated the prejudicial effect of this evidence. In addition to suggesting bad character and propensity and a likelihood that Appellant would continue to be violent and pose a risk to others if given another life sentence, the evidence of crimes committed

while incarcerated also directly undercut the model prisoner mitigator. This would suggest to the jury that they should disregard that mitigating circumstance.

The State also argued in its penalty phase closing that the prior crimes were relevant evidence of Appellant's background (1/107-108), weakening several of the non-statutory mitigating circumstances that were based on Appellant's background, such as his abusive childhood and mother's alcohol abuse. See § 921.141(6)(h), Fla. Stat. (1990) (providing a catch-all mitigating circumstance based on "any other factors in the defendant's background that would mitigate against imposition of the death penalty"). The State effectively used the evidence that defense counsel introduced to ensure that Appellant's background did not mitigate against imposition of the death penalty.

Thus, even if the introduction of the prior crimes was not ineffectiveness in itself, it significantly undermined counsel's stated strategy of seeking as much mitigation as possible and offsetting the State's aggravating circumstances. The prior crimes negated the model prisoner mitigator, suggested bad character and criminal propensity, and highlighted Appellant's status as a prior violent felon, adding further weight to one of the State's aggravating circumstances.

The State also rehashed the prior crimes during its cross-examination of Appellant (1/107), and again during its penalty phase closing argument. This negated the benefit of counsel introducing the evidence ahead of time and stealing

the prosecutor's thunder. In reality, it simply led to the jury hearing about the prior crimes twice.

The third and most important reason that counsel's strategy was unreasonable was because of the inherent conflict between the model prisoner and impulse control mitigators. Instead of choosing between two mitigators or no mitigation at all, counsel could have pursued only the statutory mitigating circumstance based on diminished impulse control that was established by the expert medical testimony. This could have been accomplished without introducing all or most of the prior uncharged crimes, and would have produced substantial mitigating weight to offset the State's aggravating circumstances.

Instead, counsel introduced evidence of Appellant's good prison disciplinary record in a vain attempt to add on the model prisoner mitigator. This had the effect of negating the impulse control mitigating circumstance, Appellant's lone statutory mitigator, while producing no mitigating benefit of its own. Instead of increasing the number of strong mitigating circumstances from one to two, counsel's strategy reduced that number to zero. The end result was no substantial mitigation at all to balance against the State's aggravating circumstances, depriving Appellant of a fair penalty phase and any chance of avoiding the death penalty.

The trial court reasoned that the jury's 8-4 vote supports a finding that counsel's strategy was reasonable. However, the written findings in support of the

death penalty refute this conclusion. The findings show that counsel's strategy produced virtually no mitigation weight, including no weight on the one statutory mitigating circumstance that was supported. In light of these findings, counsel cannot take credit for the four jurors who voted for a life sentence. If anything, the split verdict was in spite of, not because of, counsel's strategy. The State's aggravating circumstances were virtually unopposed.

The trial court also ruled that "inconsistency in mitigation evidence alone is not a basis for relief," citing this Court's decision in *Gonzalez v. State*, 990 So. 2d 1017, 1030 (Fla. 2009) (1/170). This is an overstatement of the holding in *Gonzalez*, which does not stand for the proposition that inconsistency in mitigation testimony can never be the basis for postconviction relief.

*Gonzalez* is distinguishable from the instant case in four key respects. First, the inconsistency in the mitigation evidence in the instant case does not stand alone as a basis for relief. In addition to pursuing conflicting mitigating circumstances that refuted one another, counsel also introduced prejudicial evidence of prior uncharged crimes by Appellant that further negated the mitigating factors. Under the totality of the circumstances, the combination of counsel's acts in pursuing the inconsistent mitigators and introducing prejudicial bad acts is greater evidence of deficient performance than was present in *Gonzalez*.

Second, the mitigation evidence is more directly conflicting and inconsistent in this case than it was in *Gonzalez*. In *Gonzalez*, the defendant claimed that counsel was ineffective for presenting the testimony of three mental health experts at the penalty phase when he should have only called one. *Id.* at 1030. Dr. Eisenstein testified that the defendant had organic brain damage, which caused poor impulse control and established the extreme mental or emotional disturbance mitigator. *Id.* Dr. Wagshul testified that the defendant had organic brain damage, but that it would not cause him to rob a bank and kill. *Id.* The defendant alleged that this inconsistency caused the trial court to reject the emotional disturbance mitigator. *Id.*

On appeal, this Court affirmed the trial court's denial of the ineffectiveness claim. The Court reasoned that "the extreme mental or emotional disturbance mitigator was rejected due to the lack of credibility of Dr. Eisenstein's own testimony and not a comparison of his testimony to the other experts." *Id.* Therefore, "[b]ecause Dr. Eisenstein's opinion lacked credibility on its own," any inconsistency between his testimony and that of Dr. Wagshul did not hurt the defendant's case and counsel could not be deemed ineffective for calling Dr. Wagshul to testify. *Id.* Thus, the conflict between the two mitigation witnesses was not the reason that the defendant's mitigating circumstances were rejected.

In the instant case, the trial judge specifically relied upon the incongruity between the evidence supporting the impulse control mitigator and the evidence supporting the model prisoner mitigator as his reason for affording the two circumstances no mitigating weight. Whereas the conflict between the penalty phase witnesses in *Gonzalez* was not the basis for the trial court's rejection of a mitigating circumstance, it was the basis for the trial court's rejection of both mitigators in this case. The court found the mitigators established but gave them no weight. That is tantamount to finding them unproven.

Third, Gonzalez's attorney actually obtained some benefit for his client by calling the two additional doctors during the penalty phase, despite the fact that they conflicted somewhat with Dr. Eisenstein. Dr. Wagshul's credible testimony agreeing that the defendant suffered from organic brain damage supported a mitigating circumstance based on the defendant's low intelligence and learning disability, and which was given mitigating weight by the court. *Id* at 1031. In addition, the testimony of Dr. Fisher established another mitigating circumstance based on lack of future dangerousness. *Id*.

In this case, Appellant received absolutely no benefit from counsel's penalty phase strategy. Neither the impulse control mitigator nor the model prisoner mitigator received any significant mitigating weight by the judge in the written findings. Counsel's strategy resulted in virtually no mitigation at all and highly

prejudicial evidence of uncharged crimes and collateral bad acts that worked against Appellant. The net result was probably worse than presenting no penalty phase case at all, and certainly worse than just presenting the impulse control mitigation alone without the model prisoner evidence and uncharged crimes.

Fourth, the trial strategy that was found reasonable in *Gonzalez* did not include counsel introducing evidence of prior uncharged crimes against his own client. It is not enough for counsel to say that he made a strategic decision to defeat a claim of ineffective assistance. A strategic decision must be reasonable, and “patently unreasonable decisions, although characterized as tactical, are not immune.” *Light v. State*, 796 So. 2d 610 (Fla. 2<sup>nd</sup> DCA 2001) (internal quotation marks omitted). Florida courts have recognized that it is questionable whether eliciting evidence of uncharged crimes against one’s own client could ever be considered a reasonable trial strategy, as such evidence is inherently and highly prejudicial. *See Gibson v. State*, 835 So. 2d 1159, 1161 (Fla. 2<sup>nd</sup> DCA 2002); *see also Bowers v. State*, 929 So. 2d 1199, 1202 (Fla. 2<sup>nd</sup> DCA 2006) (holding that questions to client about his prior convictions were a “patently unreasonable” strategy when they placed prior crime, prison sentence and habitual offender status before the jury).

Therefore, in order for the introduction of prior bad acts to be part of a reasonable trial strategy, there must be substantial benefit to the defense in doing

so. *See e.g. Owen v. State*, 986 So. 2d 534 (Fla. 2008) (finding strategy reasonable where prior bad act was consistent with mental state defense being raised, providing probative weight to the defense with minimal prejudice). *Owen* is distinguishable from the instant case because counsel admitted at the evidentiary hearing that the prior bad acts were a necessary evil that tended to negate his mitigating circumstances rather than support them.

Based on the foregoing, *Gonzalez* is materially distinguishable from the instant case and does not support a denial of ground one. Even assuming that introducing evidence of uncharged crimes or inconsistent mitigation witnesses could potentially be a reasonable strategy in order to establish strong mitigation, counsel failed to execute that strategy effectively in this case because his strategy did not provide any of the intended benefits to the defense. *See Bowers*, 929 So. 2d at 1201 (stating that “[e]ven if we were to conclude that counsel’s strategy of being completely candid about Bowers’ prior record was somehow reasonable, counsel’s execution of the strategy defeated the intent.”) Because the conflicting mitigation evidence defeated counsel’s stated reason for introducing the prior bad acts, the overall strategy was patently unreasonable and subject to collateral attack.

#### 4. Prejudice

The trial court also erred in finding no prejudice. There is a reasonable probability that but for counsel’s unreasonable penalty phase strategy, Appellant



would not have been sentenced to death, even with four<sup>4</sup> valid aggravating circumstances. This is true for several reasons.

First, had counsel not introduced the model prisoner evidence, the court would have given substantial mitigating weight to the mental health/impulse control mitigating factor. The court found this mitigator established by the evidence, and described it in the written findings as the most compelling evidence mitigating against imposition of the death penalty. This would have provided substantial mitigation to balance against the State's aggravating factors.

Second, counsel would not have had to introduce the prior uncharged crimes, especially the inmate stabbing and prior escape. This evidence weakened the model prisoner mitigator, the family background mitigators (as argued by the prosecutor in closing), and strengthened the State's prior violent felony aggravator.

Third, even with counsel pursuing an unreasonable strategy that resulted in virtually no mitigation, four jurors voted not to impose the death penalty. Had counsel sought only the mental health mitigation without the contradictory model prisoner evidence, the aggravating factors would not have been unopposed. There is a reasonable probability that two more jurors would have voted to recommend a life sentence, and Appellant would not have been sentenced to death.

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<sup>4</sup> The invalidity of the escape aggravator as set forth below in issue II should be considered in the prejudice analysis.

## **II. WHETHER JURY'S UNKNOWNING CONSIDERATION OF UNSUPPORTED AGGRAVATING CIRCUMSTANCE DURING THE PENALTY PHASE VIOLATED THE EIGHTH AMENDMENT**

The trial court erred in denying claim two of Appellant's motion. In this claim, Appellant alleged that the jury's recommendation of death violates the Eighth Amendment and the Supreme Court's decision in *Sochor v. Florida*<sup>5</sup> because the jury was permitted to consider an invalid aggravating circumstance that was not supported by sufficient evidence on an essential element, an element on which the jury was not instructed and was unaware. The court ruled that the claim was (1) untimely, (2) not cognizable on a motion for postconviction relief, (3) that the evidence was sufficient to support the aggravator, and (4) that trial counsel was not ineffective.

Application of a procedural bar is a question of law reviewed de novo on appeal. *McBride*, 848 So. 2d 287 (Fla. 2003). The standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance in a death penalty case is for competent, substantial evidence. *Guardado v. State*, 965 So. 2d 108, 115 (Fla. 2007).

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<sup>5</sup> *Sochor v. Florida*, 504 U.S. 527, 112 S. Ct. 2114 (1992) (holding that it is a violation of the Eighth Amendment for a penalty phase jury to weigh an invalid aggravating circumstance).

a. Sufficiency of the evidence for escape/avoid arrest aggravator

It is an aggravating circumstance supporting the imposition of the death penalty if the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 921.141(5)(e) (1990). The State argued to the jury during the penalty phase that this aggravating circumstance applied under the effect escape alternative. The jury recommended death by an 8-4 vote and the trial court sentenced Appellant to death.

However, when the murder victim is not a law enforcement officer, this aggravating circumstance only applies if the State proves beyond a reasonable doubt that the sole or primary motive for the killing was the elimination of a witness to avoid detection. *McLean v. State*, 29 So. 3d 1045 (Fla. 2010). This rule applies for both the avoid arrest and effecting escape alternatives, and the proof of the requisite intent must be very strong. *Armstrong v. State*, 399 So. 2d 953 (Fla. 1981). It is undisputed in this case that the murder victim was a civilian, not a law enforcement officer.

The evidence was wholly insufficient to prove the motive requirement for the avoid arrest aggravating circumstance. Appellant testified at trial that his plan was to take the victim with him so that she could drive the car, as he had been imprisoned since age 15 and did not know how to drive. He only drove a car three times in his life, had difficulty driving to Florida when he was 15, and had not

driven in the 12 years since his incarceration. This testimony is corroborated by the fact that Appellant immediately crashed the victim's car when he attempted to drive it himself (1/115).

Appellant also said that he obtained a knife because he anticipated that he might have to force the victim to give him a ride, not because he planned to kill her (1/115). Both the State and the trial court cited this testimony and made no attempt to refute or discredit it. Appellant then said that he did not plan ahead of time to kill the victim, but only stabbed her after she grabbed him by the hair and bit him, at which point he panicked and "went off." (1/115). Appellant's testimony revealed that his calculated plan was not to kill the victim at all, much less to eliminate her as an identifying witness. This was not disputed by the State.

This testimony disproves the motive requirement for the escape aggravator. Killing a victim suddenly or instinctively because she resists a robbery, either physically or by attempting to draw attention, is insufficient to support the avoid arrest/escape aggravator because there is no proof of a calculated plan to eliminate the witness. *Cook v. State*, 542 So. 2d 964 (Fla. 1989); *see also Routly v. State*, 440 So. 2d 1257, 1264 (Fla. 1983) (stating that aggravator does not apply if the victim physically resisted the robbery or attempted to attract attention, providing alternative motives for the killing other than witness elimination). This reasoning

mirrors the facts of this case, with testimony establishing both a physical struggle inside the car and the victim blowing the horn to draw attention.

The evidence demonstrating that witness elimination was not the motive for the killing in this case is overwhelming. Appellant wore no mask or gloves to conceal his identity, yet the crime occurred in broad daylight in a crowded public place with other eyewitnesses present besides the victim. Thus, eliminating one witness would have accomplished nothing. The victim did not know Appellant and could not have identified him by name. Appellant was also fleeing from a life sentence for a prior murder conviction, so being identified in a robbery or carjacking would make little difference in terms of incarceration risk<sup>6</sup>.

The trial court did find that Appellant took steps to avoid being apprehended during the course of his continuing escape:

During his escape, [Appellant] took many precautions to avoid being caught, such as walking through the woods, burying himself under brush, stealing clothes to change out of his prison uniform, and purchasing and wearing a hat and sunglasses to disguise his identity.

(1/173). However, all of these measures were taken prior to Appellant's encounter with the victim and none of them were directed at her. None of these measures would have been intended to prevent the victim from identifying Appellant after

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<sup>6</sup> The prosecutor himself argued that the motive for the killing was something other than witness elimination. While questioning Dr. Berland, the defense mental health expert, the prosecutor confronted him with the fact that the Defendant stabbed the victim just to shut her up and get her car away from her (1/115).

the carjacking, and except maybe for the sunglasses, none of them would have had that effect. Moreover, the fact that Appellant wore a hat and sunglasses to conceal his identity from the victim is proof that he did not plan to kill her to prevent her from identifying him. *See Jennings v. State*, 718 So. 2d 144, 151 (Fla. 1998) (citing fact that defendant did not wear a mask when assaulting victims who personally knew him as evidence showing that he planned to eliminate them).

The fact that Appellant hid from the authorities during the two days prior to the carjacking attempt is not competent and substantial evidence that the sole or primary motive for the murder was the elimination of a witness. The requisite proof of intent must be “very strong” in cases where the murder victim is not a law enforcement officer. *Id.* The evidence cited by the trial court is insufficient.

Killing the victim was actually inconsistent with Appellant’s plan to effect his escape from the area because he needed her to drive the car. If the plan was to have the victim drive Appellant out of danger to a position of relative safety, then killing her frustrated rather than effected Appellant’s plan for escape. This forecloses any likelihood of a calculated plan or motive to kill the victim at the scene of the carjacking in order to facilitate the escape.

b. The trial court's order

The trial court's order states that the evidence is sufficient because Appellant "committed the murder to facilitate his continuing escape." (1/171). However, it is not enough to prove only that the murder was intended to facilitate the escape. In order to apply the escape aggravator to the murder of a person who is not a law enforcement officer, the State must prove that the murder was intended to facilitate the escape *by the elimination of a potential witness*. See *McLean v. State*, supra, 29 So. 3d 1045. If the murder was intended to facilitate the escape in some other way, such as by overcoming the resistance of a carjacking victim, then witness elimination was not the motive for the killing and the aggravator does not apply.

The trial court's order also points to this Court's statement in the opinion on direct appeal that the evidence was sufficient to prove the escape aggravator (1/171). However, the trial court is taking this Court's statement out of context. The only issue raised on direct appeal concerning the escape aggravator was whether the crime was complete upon Appellant leaving his catering job in Quincy or if it was a continuing offense that was still ongoing when he committed the murder two days later and 40 miles away. This Court held that the escape was an ongoing offense that could be used as an aggravating circumstance for a murder committed some time later and some distance away. *Dillbeck*, 643 So. 2d at 1031.

The issue of the witness elimination motive was not raised on direct appeal. This Court was not asked to consider whether the State proved that additional requirement, and the Court did not volunteer any statements on that point. The Court only held that the evidence was sufficient to prove that Appellant was still engaged in a continuing escape when he committed the murder, and that the murder facilitated that escape. *Id.* To extend this Court's ruling to an issue not presented or argued in the direct appeal would be a perversion of the law of the case doctrine, in addition to repudiating the witness elimination motive requirement that is so clearly not met in this case.

The trial court's other rationalizations are also without support. The court mentions that the standard instruction on the escape aggravator was read to the jury. As alleged in the motion, however, this does nothing to cure the insufficiency of the evidence because the instruction does not mention the motive element. Therefore, the jury remained unaware of the motive requirement and had no opportunity to decide whether the evidence supported it.

The order also notes that this Court approved the standard instruction and held that a trial court is not required to instruct the jury on the witness elimination motive, citing *Davis v. State*, 698 So. 2d 1182 (Fla. 1997) (1/172). It is true that the trial court is not required to instruct the jury on the witness elimination motive, *provided the evidence is sufficient to prove the motive element*. If the evidence is



insufficient, the court is not supposed to submit the aggravating factor to the jury at all, with or without an instruction.

Therefore, the lack of a required instruction on motive does not hurt Appellant's claim, but actually supports it. Had the jury been instructed on the motive element, they could be presumed to have disregarded this aggravating circumstance because motive was not established. *See Johnson v. Singletary*, 612 So. 2d 575, 576 (Fla. 1993) (stating that jury is presumed to have disregarded an unsupported aggravating factor on which it has been properly instructed); *see also Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466 (1991) (stating that when jurors have been left the option of relying upon a legally inadequate theory, there is no presumption that they disregarded it). In this case, the jury was completely unaware of the State's burden of proving a witness elimination motive in order for the escape aggravator to apply. Therefore, they cannot be presumed to have disregarded this factor based on the State's failure to meet that evidentiary burden.

The trial court also found that trial counsel "objected to the aggravator being included and when that objection was overruled he requested a special jury instruction on the State's burden of proof." (1/172). However, counsel did not object to the aggravator on the basis of the State failing to prove the witness elimination motive. Instead, counsel argued only that the escape was not a continuing offense, the argument that was raised unsuccessfully on direct appeal

and rejected by the Court. Thus, counsel neither apprised the court of the motive issue nor preserved it for appellate review.

In addition, the special instruction on the State's burden of proof that counsel asked for was legally incorrect, and affirmatively misstated the motive element so as to eliminate the witness elimination requirement. The requested instruction read:

To establish this circumstance there must be proof that the purpose of effecting an escape from custody was the dominant motive for the killing.

(1/120-121). Such an instruction would be contrary to this Court's well-established precedents, which require that the dominant motive for the killing be the elimination of a witness, not merely effecting the escape. *See e.g. Trease v. State*, 768 So. 2d 1050, 1056 (Fla. 2000); *Jackson v. State*, 502 So. 2d 409 (Fla. 1986).

As a result, the requested instruction was a misstatement of the law. The trial judge did not give this instruction, but even if he had, it would have done nothing to apprise the jury of the witness elimination motive requirement. Therefore, the fact that counsel requested this instruction does nothing to show counsel's effectiveness or to prove that the jury made an informed decision about the escape aggravator. The jury remained completely unaware of the unproven motive requirement, which is why their consideration of this aggravating circumstance violates the Eighth Amendment.

Finally, the trial court found that the jury's consideration of this aggravating circumstance was not prejudicial because four other aggravating circumstances were found: (1) the capital felony was committed by a person under sentence of imprisonment, (2) Appellant was previously convicted of another capital felony or a felony involving the use or threat of violence, (3) the capital felony was committed while Appellant was engaged in the commission of a robbery and burglary, and (4) the capital felony was especially heinous, atrocious, or cruel (1/174). The court reasoned that because of the existence of these other aggravating circumstances, "even if the escape/avoid arrest aggravator had not been found in this case, a sufficient basis nevertheless would have existed for imposing the death penalty." (1/174-175). In support of this conclusion, the trial court cited to three prior decisions by this Court holding that the erroneous finding of the avoid arrest aggravator was harmless error: *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013), *Aguirre-Jarquín v. State*, 9 So. 3d 593 (Fla. 2009), and *Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006).

The trial court's prejudice analysis is incorrect for three reasons. First, a determination that an error is harmless or prejudicial is not based on the sufficiency of the remaining evidence. *See e.g. Wilhelm v. State*, 568 So. 2d 1 (Fla. 1990) (stating that error is not necessarily harmless if other evidence in the case is sufficient or even overwhelming). The inquiry is not whether Appellant could still

have qualified for the death penalty, but whether he would still have been sentenced to death. Only eight jurors voted to recommend death, with four voting not to impose the death penalty even with the invalid aggravating circumstance included in their deliberations. If two jurors had voted differently, Appellant would have received a life sentence.

Second, the invalidity of the escape aggravator must be considered in conjunction with trial counsel's unreasonable penalty phase strategy as discussed above in issue one. Had counsel sought only the mental health mitigation and not introduced the contradictory model prisoner and prior bad act evidence, Appellant would have had a much stronger position in terms of mitigation to outweigh the aggravating factors. This requires a new sentencing hearing, as this Court stated in *Aldridge v. Wainwright*:

In *Elledge*<sup>7</sup>, we held that when this Court strikes an aggravating factor because it is unsupported by the evidence and there remain valid statutory aggravating factors sufficient to justify the imposition of the death sentence, and there are no mitigating circumstances, statutory or otherwise, found by the trial judge or apparent in the record, then remand for resentencing is not necessary. On the other hand, if there are mitigating circumstances present, *Elledge* directed a remand for resentencing.

*Aldridge v. Wainwright*, 433 So. 2d 988, 989 (Fla. 1983).

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<sup>7</sup> *Elledge v. State*, 346 So. 2d 998 (Fla. 1977).

In this case, the court found the statutory mitigating circumstance of Appellant's diminished capacity to conform his conduct to the requirements of the law. The court also found the non-statutory mitigating circumstance that Appellant had the love of his family, and assigned it slight weight. These alone require re-sentencing under *Elledge*, but if the prejudicial effect of trial counsel's unreasonable penalty phase strategy is also taken into account, the case for a new sentencing hearing is even greater because there would have been more mitigation.

Third, the cases cited by the trial court are distinguishable because no individual weight was assigned to the remaining aggravators in the instant case, in violation of the procedure established in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). The trial court is required to evaluate each aggravating circumstance individually to satisfy the constitutional requirement of individualized sentencing in capital cases and facilitate meaningful appellate review. *Fennie v. State*, 855 So. 2d 597, 608 (Fla. 1990). This includes assigning a weight to each aggravating factor. *Id* at 608. The trial court's failure to do so precludes any meaningful harmless error analysis in this case.

For example, in *Calhoun*, this Court held that the evidence did not support the avoid arrest aggravator, but that the error was harmless beyond a reasonable doubt. *Calhoun*, 138 So. 3d at 362. This Court reasoned that there was no reasonable possibility that the avoid arrest aggravator affected the sentence

because the court also found the CCP<sup>8</sup> aggravator *and assigned it very great weight*, and found the kidnapping aggravator *and assigned it great weight. Id.*

In *Aguirre-Jarquin*, the error in finding the avoid arrest aggravator was also found to be harmless error because the trial court also found several other aggravating circumstances, including HAC, prior felony, and vulnerable victim, and “*which were assigned great weight.*” *Aguirre-Jarquin*, 9 So. 3d at 608 (emphasis added). There was also a stronger 9-3 vote by the jury in that case. *Id.*

In *Reynolds*, this Court found competent and substantial evidence to support the avoid arrest aggravator. *Reynolds*, 934 So. 2d at 1158. In addition, there were several other aggravating circumstances found as to each of the murder victims, and all seven of these factors were given great weight. *Id.* at 1138.

Thus, in all three cases cited by the trial court, there were several other aggravating circumstances found that were individually weighted by the sentencing court during the *Spencer*<sup>9</sup> hearing, and which were afforded great weight or very great weight. This allowed a reviewing court to find beyond a reasonable doubt that there was no reasonable possibility that the invalid aggravator affected the sentence because the remaining aggravators outweighed the mitigation. None of these factors is present in the instant case.

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<sup>8</sup> See § 921.141(5)(i) (2013) (defining aggravating factor based on a cold, calculated and premeditated killing).

<sup>9</sup> *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

During the penalty phase of this case, the trial court made no individual finding as to the weight to be given each aggravating circumstance. Instead, the court merely considered the aggravators collectively and determined that they outweighed the evidence in mitigation. It is not possible to remove one aggravating circumstance from that equation, reweigh the remaining aggravating circumstances more than twenty years later on a cold record, and say beyond a reasonable doubt that there is no possibility that the escape aggravator affected the sentence.

Mr. Justice Sundberg's eloquent reasoning in *Elledge* sums up why individualized sentencing is so vitally important in capital cases:

[T]he procedure to be followed by the trial judges and juries is not a mere counting of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . . If this be so, then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

\* \* \*

Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the court for a new sentencing trial at which the [impermissible] factor shall not be considered.

*Elledge*, 346 So. 2d at 1003 (internal citations omitted).

The proper remedy in this case is to vacate the death sentence.

c. Timeliness and Cognizability

The trial court's order states that this claim is untimely "[f]or the reasons set forth in Ground 1." (1/171). However, claim one was deemed untimely because it was based on a newly discovered factual predicate and Appellant filed his claim more than one year after discovery. This claim is not based on newly discovered facts, but involves a pure legal matter based on the existing record. It is not clear how the trial court's findings on timeliness from claim one translate to this claim.

The trial court also said that the issue should have been raised on direct appeal. However, this was not possible due to a lack of preservation. Counsel challenged the escape aggravator, but on other grounds. He did not present the specific argument that the State failed to prove a witness elimination motive or even that evidence of such a motive was required. It is well-established that "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." *Allen v. State*, 137 So. 3d 946, 958 (Fla. 2013).

It is conceivable that Appellant could have raised this issue in a prior postconviction motion, although the trial court did not bar it on that basis. If so, the failure to do so was due to neglect by previous postconviction counsel that should



not be imputed to Appellant to bar consideration of the claim. See Fla. R. Crim. P. 3.851(d)(2)(C)<sup>10</sup>. This explanation for Appellant's failure to raise this claim in his first postconviction motion was included in the allegations as required by Fla. R. Crim. P. 3.851(e)(2)(B). In the alternative, Appellant asserted in the trial court that the error was fundamental because the escape aggravator was wholly lacking in evidentiary support on an essential element. Appellant also intends to raise this Eighth Amendment issue in federal court by asserting that prior counsel's failure to raise the issue in the first postconviction motion constitutes ineffective assistance of counsel that establishes cause and prejudice for any procedural default. *See Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Appellant therefore asserts that this claim was cognizable on a successive motion for postconviction relief, and the trial court erred in imposing a procedural bar to avoid the constitutional question.

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<sup>10</sup> In *Gore v. State*, 91 So. 3d 769 (Fla. 2012), this Court held that ineffective assistance of collateral counsel does not provide an independent basis for relief. The Court did not address the question of whether such ineffectiveness provides the basis for a successive motion under Rule 3.851(e)(2)(B), nor did it preclude a finding that simple neglect by counsel provides an exception to the time limitations under Rule 3.851(d)(2)(C).

### **III. WHETHER APPELLANT'S INCARCERATION IN ADULT PRISON AT AGE 15 IS A MITIGATING CIRCUMSTANCE SUPPORTED BY NEWLY DISCOVERED EVIDENCE SHOWING ADVERSE EFFECT OF IMPRISONING CHILDREN WITH ADULTS**

The trial court erred in summarily denying claim three of Appellant's motion. Claim three alleged that new scientific studies show that incarcerating juveniles in adult prisons produces stunted development and maturity, which makes Appellant's age at the time of his incarceration on the prior violent felony a mitigating factor by showing that he lacked the maturity expected of a person with a chronological age of 27 when he committed the capital felony in 1990.

#### **a. Standard of Review**

The trial court denied the claim as untimely (1/175). Application of a procedural bar is reviewed de novo on appeal. *State v. McBride*, 848 So. 2d 287 (Fla. 2003).

On the merits, the court ruled that the studies do not constitute newly discovered evidence, and that they are not of a nature that would probably produce a less severe sentence (1/175-177). The standard of review governing claims of newly discovered evidence in the sentencing context is (1) that the evidence must not have been known at the time of the trial and it must appear that the defendant or counsel could not have known of it by the use of diligence, and (2) it must be of such a nature that it would probably yield a less severe sentence. *Preston v. State*,

970 So. 2d 789, 797 (Fla. 2007). On appeal, the trial court's application of this legal standard to the facts is reviewed de novo. *Id.*

b. Timeliness

As the trial court acknowledges, the studies relied upon by Appellant were published as recently as 2012, yet the court concludes that Appellant's claim "should have been raised years ago, and it is now untimely." (1/175). Apparently, the trial court would construe the due diligence requirement to mean that a defendant must discover a new scientific study the instant it is published and is held to constructive knowledge of its contents from that very moment. This Court has never construed the due diligence requirement so harshly against a defendant, and the trial court cites no authority for such a draconian rule.

When a defendant alleges recent discovery of evidence supporting a new claim, the trial court cannot summarily deny the claim for lack of due diligence without some analysis or record evidence to support its finding that the evidence could have been discovered earlier through the exercise of reasonable diligence. *Benjamin v. State*, 793 So. 2d 147, 148 (Fla. 2<sup>nd</sup> DCA 2001); *see e.g. Glock v. Moore*, 776 So. 2d 243 (Fla. 2001) (affirming denial of claim for lack of due diligence where record revealed numerous reported cases raising same issue, and where report relied on by defendant referenced ten years of litigation on the subject matter of the report). There is no such record evidence in this case.

The scientific studies relied on by Appellant were published from varying sources all over the United States. There were no reports of litigation or recent reported cases citing these or similar reports in the context of using juvenile incarceration in adult prison as a mitigating factor in Florida. There is no basis in the record for finding that Appellant could and should have discovered the studies sooner. The claim is therefore not subject to a time bar on that basis.

c. Merits

On the merits, the trial court cited four prior decisions of this Court for the proposition that “new studies are not considered to be new evidence.” (1/175). However, this general statement is overbroad and exceeds the holdings in those cases. This Court has never held that a scientific study is per se inadmissible as newly discovered evidence.

For example, in *Henry v. State*, this Court found that an ASAM policy statement containing a revised definition of addiction as a brain disorder was not newly discovered evidence because it was based on a compilation and analysis of previously existing data and information, and was the culmination of several decades of scientific study that predated the defendant’s crime. *Henry v. State*, 125 So. 3d 745 (Fla. 2013). It was because the raw data underlying the study was available at the time of trial that the Court ruled it was not newly discovered evidence, not the fact that it appeared in a study. *See also Rutherford v. State*, 940

So. 2d 1112, 1117 (Fla. 2006) (holding that ABA report was not newly discovered evidence because it was a compilation of previously available information).

In *Johnston v. State*, also cited by the trial court, a National Academy of Sciences report was not newly discovered evidence because the report cited existing publications that were published before the murder in that case. *Johnston v. State*, 27 So. 3d 11, 20-21 (Fla. 2010). Again, the underlying information in the report was previously available at the time of trial, leading the Court to conclude that there was no new evidence.

Whether a scientific study qualifies as new evidence that warrants an evidentiary hearing depends upon the information contained in the study. For example, in *Hill v. State*, this Court considered whether a research letter constituted new evidence that Florida's lethal injection protocol subjects condemned inmates to unnecessary pain and suffering. *Hill v. State*, 921 So. 2d 579 (Fla. 2006). The Court analyzed the study and observed that it used autopsy reports from other states and compared them to lethal injection protocols that differ from Florida's. *Id* at 582-583. No toxicology data from Florida was used. *Id* at 583. The study also admitted that Florida uses a larger dose of sodium pentothal, and stopped short of asserting that the dosage used in Florida was insufficient to render the prisoner unconscious. *Id*. The Court held that the study was inconclusive and failed to call

into question a prior decision analyzing and validating the lethal injection protocol in Florida. *Id.*

In this case, the trial court conducted no analysis or review of the studies cited in Appellant's motion or the evidence contained therein. Instead, the court applied a blanket rule that studies are never admissible as newly discovered evidence. This was error.

The trial court also ruled that the claimed evidence would not produce a different sentence because Appellant already introduced evidence of his age during the penalty phase, and because defense experts testified about Appellant's "lack of maturity and stunted psychological development." (1/177). Both of these findings are incorrect and are not supported by the record.

First, the evidence presented during the penalty phase focused on the violent nature of Sumter Correctional Institution and the abuse Appellant suffered there<sup>11</sup>. Although it was mentioned that Appellant was 15 years old at the time, Appellant's age was not the focus of the mitigating circumstance being argued. The trial court did not even mention age when addressing this mitigator in the written findings. The court simply concluded that Appellant's placement in a violent institution was unfortunate but necessary given his conduct.

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<sup>11</sup> Appellant called two employees of the Department of Corrections to establish that Sumter Correctional Institution had an abysmal record as by far the most violent institution in the state in terms of reported assaults on inmates.

Furthermore, the fact that a defendant is youthful, standing alone, is not a mitigating factor. *Mahn v. State*, 714 So. 2d 391, 400 (Fla. 1998). This Court has held that “if a defendant’s age is to be accorded any significant weight as a mitigating factor, ‘it must be linked with some other characteristic of the defendant or the crime such as maturity.’” *Id* (quoting *Echols v. State*, 484 So. 2d 568, 575 (Fla. 1985)). Thus, introducing evidence of Appellant’s youthful age without additional evidence linking that age to the crime by showing a lack of maturity was insufficient to establish mitigation. Therefore, the evidence at issue in this claim is not cumulative to anything that was presented during the penalty phase.

Second, contrary to the trial court’s order, there was no evidence presented at the penalty phase concerning the psychosocial effects of Appellant’s incarceration in adult prison as a juvenile on his maturity or development relative to his chronological age at the time of the capital felony. The order states:

In addition to the foregoing, studies regarding the general psychological effects of imprisonment at a young age would not have resulted in a less severe sentence in this case, because evidence of Defendant’s *actual* psychological development was presented. During the penalty phase, Dr. Robert Berland, a forensic psychologist, testified that he examined Defendant in November 1990. *Exhibit 13* at pp. 2336, 2343. Dr. Berland further testified regarding the details of his examination and conclusions regarding Defendant’s lack of maturity and stunted psychological development. *Id* at pp. 2344, 2345, 2355-2380, 2387-2412. Additionally, Dr. Frank Wood, a neuro-psychologist, testified regarding Defendant’s cognitive deficits and inability to process

interpersonal and social information. *Id* at pp. 2429, 2433-2483.

(1/177) (emphasis in original). The Court then concluded that the studies alleged in this claim would not have made any difference in light of this evidence.

An examination of the cited testimony reveals that the trial court's findings are unsupported. Dr. Berland's testimony focused on the results of the MMPI test for mental illness (2/389) and a WAIS intelligence test (2/399). He found that Appellant suffered from some form of psychotic disturbance (3/407). The signs of mental illness he found were biologically caused, and not a reaction to bad circumstances (3/409-410). He reviewed Appellant's family history, but did not discuss his history of incarceration (3/414).

Dr. Berland said that most subjects test lower on the mania scale - which measures impulse control - after being incarcerated for a while, but could only speculate on the reasons for this (2/393-394). There was some reason to believe that Appellant's symptoms got worse in the years following his incarceration in 1979, but he did not describe how or why or elaborate on this statement (3/429).

Similarly, Dr. Wood testified that while clinical psychologists would study the interpersonal and psychosocial factors that relate to mental illness, his focus as a neuro-psychologist was to study physical brain disorder (3/445). He expressed no opinion or findings on the effects of youthful incarceration on Appellant.



Therefore, neither of the defense experts cited by the trial court ever addressed the effects of being incarcerated in adult prison as a juvenile or any similar psychosocial effects of imprisonment on Appellant. They were only concerned with physical, biological brain injury.

Dr. Berland's testimony that prisoners typically show signs of depression and a lower score on the mania scale, and that Appellant showed signs of worsening symptoms in the years following his incarceration, suggests that the studies showing how youthful incarceration in adult prisons leads to stunted development would have aided the defense during the penalty phase. The studies show a direct correlation between incarceration of children in adult prisons and decreased relationship maturity, less economic and social growth, and no decrease in recidivism with age compared to other juveniles who tend to outgrow their criminal behavior over time.

This evidence would have established the required link between Appellant's age of 15 years when incarcerated and his commission of the capital felony after escaping from prison. Evidence tending to show that Appellant's incarceration left him with a lower mental and emotional age relative to his chronological age would have made his age at the time of the prior violent felony a mitigating circumstance. Because no evidence of Appellant's immaturity was presented, the court only

considered Appellant's chronological age of 27 at the time of the capital felony, finding the statutory age mitigator inapplicable (2/344).

Therefore, Appellant pled a facially sufficient claim of newly discovered evidence supporting a mitigating circumstance not previously raised, and which is not refuted by any evidence in the record. The information relied on was not available at trial and could not have been discovered through reasonable diligence. The evidence is of a nature that would produce a more lenient sentence. The order of summary denial should be reversed for further consideration of this claim.

### **Conclusion**

Based on the foregoing, the Appellant requests the following relief:

1. As to claims one and two, find that the result of the penalty phase is unreliable and vacate the sentence of death; or
2. As to claim three, reverse for an evidentiary hearing.

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**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, Esq., Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399, on this 24<sup>th</sup> day of August, 2014.

*/s/ Baya Harrison, III*  
Baya Harrison, III, Esq.

**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, III*  
Baya Harrison, III, Esq.