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IN THE SUPREME COURT OF FLORIDA

FLOYD DAMREN,

Appellant,

CASE NO. SC23-15
L.T. No. 94-537-CF

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

STEVEN WOODS
ASSISTANT ATTORNEY GENERAL
Florida Bar No.: 0092613
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3606 (tel)
(850) 487-0997 (fax)
capapp@myfloridalegal.com
steven.woods2@myfloridalegal.com
COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellant, FLOYD DAMREN, was the Defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by name.

Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the State, or the Prosecution.

All references to the Record on Appeal will be by a citation to "R-" followed by any appropriate page number(s), all in parentheses.

"IB-" will designate Appellant's Initial Brief, followed by any appropriate page number(s), all in parentheses.

Absent an indication to the contrary, emphasis by italicization is contained within the original quotation.

ORAL ARGUMENT

The State respectfully opposes Damren's request for oral argument because each claim is untimely, fails the Jones[1] test, and is procedurally barred.

[1] Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

STATEMENT OF THE CASE AND FACTS

On May 1, 1994, Appellant Floyd Damren and an accomplice (Mr. Chittam) burglarized a local business, R.G.C. Mineral Sands (R.G.C.). Damren v. State**,** 696 So. 2d 709, 710 (Fla. 1997). When an employee (the victim) confronted Chittam, Damren approached from behind and struck the victim in the head with a steel pipe. Id.

After the victim fell to the ground, he begged for his life, stating his plans to take his grandson fishing the next day. Id. Even Chittam begged Damren to spare the victim's life. After pacing and thinking it over, Appellant resumed his attack, bludgeoning the victim with the metal pipe. Id.

As Damren was dragging the victim's body across the floor, the shift supervisor (Mr. Knight) entered the building and hollered at Damren, who turned and looked Knight "dead in the eye." Id. The Defendant then charged Knight with the pipe. Id. Having chased Knight away, Damren returned to the victim and resumed the attack. Id.

Damren bashed the victim's skull causing a "chopping wound . . . go[ing] from the base of the [victim's] nose all the way across the

head." Damren v. State, 838 So. 2d 512, 514 (Fla. 2003). So ferocious and forceful was Damren that he "br[o]ke[] open [the victim's] skull and expos[ed] the lacerated surface of [his] brain underneath." Id. In addition to splitting the victim's skull and exposing his brain tissue, Damren struck the victim elsewhere on his body multiple times.

At trial, Damren relied principally on an intoxication defense, emphasizing to the jury that he had consumed several beers on the day he bludgeoned the victim to death. He did not prevail.

During the penalty phase, numerous relatives and friends testified on Damren's behalf. The jury voted unanimously for death, and the judge imposed it, finding four aggravating circumstances and four non-statutory mitigating circumstances.

In its order, the trial court listed the aggravating factors: (i) the Defendant had been previously convicted of a felony involving violence against a person or the threat thereof; (ii) the murder was committed while the Defendant was engaged in the commission of attempted armed burglary; (iii) the murder was especially heinous, atrocious, and cruel; and (iv) the murder was committed in a cold,

calculated, and premeditated manner without any pretense of moral or legal justification.

With respect to the first aggravating factor, the trial court noted that the aggravated assault was committed at about the same time as the murder and therefore gave this factor "little" weight. (R-29).

With respect to the second aggravating factor, the trial court noted that the murder occurred during Appellant's second burglary of R.G.C. (R-32) When Appellant returned to steal more items from R.G.C., he happened upon the victim, whom he brutally murdered during the burglary. (R-32). The trial court gave this factor "some" weight.

With respect to the third aggravating factor (HAC), the trial court emphasized the great deal of pain, suffering, and fear that preceded the victim's death. The trial judge noted that the victim — before being knocked unconscious— suffered at least ten blows with the metal pipe. (R-33). The victim sustained numerous contusions, abrasions, and bruises to his arms, legs, chest, head, ears, cheek, and to his nose, which was fractured during the vicious

beating. The victim had several defensive wounds, which he sustained while attempting to protect himself. The head wounds were inflicted while the victim was still conscious and moving his head in an attempt to avoid the blows. (R-34). Lastly, the trial court noted the nature of the murder weapon, a heavy metal object. The trial court gave this factor "considerable" weight.

With respect to the fourth aggravating factor (CCP), the trial judge emphasized that the victim begged for his life. The latter pleaded with Damren, telling him of his plans to take his grandson fishing the next day. Even Damren's accomplice in the burglary begged the Defendant to leave and do no further harm. After reflecting on what should be done, Damren resumed his "act of deliberate ruthlessness." Even after Damren had to chase Knight away, he returned to the victim to continue bludgeoning him to death. The trial court gave this factor "considerable" weight.

The sentencing order listed four weighted mitigating circumstances: (i) the burglary did not involve a sophisticated plan (little weight); (ii) Damren did not act alone, and the respective roles of Damren and Chittam are not clear (little weight); (iii) Damren had

an alcoholic father and has his own alcohol problems (little weight); and, (iv) Damren has been well behaved while incarcerated. (some weight).[2]

Considering the sufficiency of the aggravating factors, the trial court emphasized that multiple persons begged for the victim's life, that the victim's life was taken after Damren had "a sufficient period of obvious reflection," and that his crime was "ruthless and done with conscious intent . . . ." (R-33). The trial judge further considered the victim's fight for his life, his numerous injuries, and his pain and suffering shortly before his death. (R-33). The trial court emphasized the "senseless" and episodic nature of the beating with "a particularly atrocious and cruel instrument of death and torture." (R-38-39).

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[2] The trial judge gave no weight to the following: (i) before the burglary, Damren consumed alcohol and therefore his judgment was impaired before the crimes; (ii) Damren's judgment was impaired during the crimes; (iii) Damren suffered emotional deprivation and had little parental support as a child; (iv) Damren has been kind to his mother, brother, and sister; (v) Damren has shown patience with and affectional for children; (vi) Damren has been a generous and devoted friend; (vii) Damren served his country in the Vietnam War; and (viii) Damren maintained a relationship with Nancy Waldrup and treated Tessa Mosley like a daughter. (R-35-38).

Considering the evidence presented by the defense, the trial court concluded that the circumstances relating to Damren's life did not constitute mitigation. (R-38). Apart from "a few isolated, sporadic and uneventful acts of kindness that collectively do not rise to the level of mitigation," Damren's was "a life remarkably absent of good deeds . . . ." (R-38). The trial court added, "an empty, non-productive and vacuous existence is not an excuse for criminal conduct and cannot justify or ameliorate the [murder]." (R-38). The trial court concluded that, on the whole, the defense had presented "little, if any, mitigation." (R-38).

Having considered the aggravation and the mitigation, the trial court concluded that the former "clearly outweigh[ed]" the latter and sentenced Damren to death. (R-39).

Postconviction Proceedings

In 1998, Damren filed his initial motion for postconviction relief, which the trial court denied. He appealed and filed a Petition for Writ of Habeas Corpus. This Honorable Court affirmed the ruling of the trial court and denied the petition. Damren, 838 So. 2d at 521.

In 2017, Damren filed a successive motion for postconviction relief in which he argued that he was entitled to retroactive application of Hurst v. Florida, 136 U.S. 616 (2016). The trial court denied the successive motion. Damren appealed, and this Honorable Court affirmed. Damren v. State, 236 So. 3d 230, 231 (Fla. 2018).

In 2022, Damren filed a successive motion for postconviction relief based on alleged newly discovered evidence: (i) Appellant's autism and (ii) his posttraumatic stress disorder.

Addressing Appellant's first claim, the trial judge observed that according to the authorities cited by Damren's expert (Dr. Israelian), autism was diagnosable in adults well before June of 2021. The trial court noted pre-2021 articles establishing that autism was diagnosable in adults, and the trial judge observed that the DSM-V —published in 2013— established that autism is a lifelong condition. Emphasizing Damren's failure to explain why his autism diagnosis could not have been made before 2021, the trial court concluded that Appellant had failed to establish timeliness.

With respect to the second claim, the trial court noted that PTSD was diagnosable long before 2021. The trial judge concluded that Appellant had failed to demonstrate timeliness, noting that even accepting Damren's "masking" claim (i.e., that his autism masked his PTSD), the Defendant still could not explain why he could not have discovered his PTSD before mid-2021. The trial court concluded that Appellant had failed to establish timeliness with respect to both claims and summarily denied the motion.

SUMMARY OF THE ARGUMENT

Issue I: Given (a) that Claim One is untimely and (b) that Damren cannot establish that evidence of his autism would probably result in a life sentence, summary denial was proper.

Damren cannot establish that his June 2022 motion was filed within one year of the date on which the evidence became discoverable by the exercise of due diligence. Evidence of Damren's autism would have been discovered before June of 2021, if his counsel had exercised due diligence. Even Damren's expert (Dr. Israelian) acknowledges that autism was diagnosable in adults well before mid-2021.

Damren's claim that his autism was undiscoverable until Dr. Israelian made her "surprising diagnosis" in 2021 is conclusively refuted by the record. Given Damren's history and the pre-2021 authorities establishing that autism was diagnosable in adults, this claim should have been discovered before 2021 and therefore is untimely.

Even if it were timely, Appellant still could not prevail because he cannot establish that evidence of his autism would probably

yield a life sentence. Evidence of Damren's autism would be inconsequential given (a) the collectively great weight of the aggravating factors, (b) Damren's "little, if any mitigation," and (c) the fact that the former far outweighed the latter.

Considering all the circumstances of the case, another death sentence is virtually certain. Accordingly, Damren cannot satisfy the Jones[3] test, and, even if he could, this claim is procedurally barred since he has previously litigated whether prejudice can be established by producing evidence of a mental disorder.

Issue II: Given (a) that Claim Two is untimely and (b) that Damren cannot establish that evidence of his PTSD (posttraumatic stress disorder) would probably result in a life sentence, summary denial was proper.

Even if Damren were correct in his contention that his PTSD could have been diagnosed only in conjunction with his autism, he still could not establish timeliness since autism became diagnosable in adults well before mid-2021. With the exercise of due diligence, Damren's lawyers would have discovered both his autism and his

[3] Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

PTSD well before 2021. Damren's lawyers should have fully investigated their client's history, informed their experts thereof, and had their client evaluated for PTSD specifically.

Given the simple fact that Damren fought in Vietnam, he — decades ago— should have been evaluated for and diagnosed with PTSD. Being aware that wartime military service can be traumatic and stressful, Damren's lawyers should have had their client evaluated for PTSD at the time of trial. Because this claim was raised decades after the date on which the evidence became discoverable by the exercise of due diligence, the trial court properly denied it as untimely.

Even if it were timely, Appellant still could not prevail because he cannot establish that evidence of his PTSD would probably yield a life sentence. Such evidence would have no effect on Damren's sentence for the previously stated reasons: (a) the great collective weight of the aggravating factors, (b) Appellant's "little, if any mitigation," and (c) the fact that the former far outweighed the latter.

Considering all the circumstances, another death sentence is virtually certain. Accordingly, Damren cannot satisfy the Jones test, and, even if he could, this claim is procedurally barred since he has previously litigated whether prejudice can be established by producing evidence of a mental disorder.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE NEWLY-DISCOVERED-EVIDENCE CLAIM BASED ON APPELLANT'S AUTISM.

An order summarily denying a 3.851 motion is reviewed de novo; this Honorable Court accepts the factual allegations as true to the extent that they are not refuted by the record. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003); Fla. R. Crim. P. 3.851(f)(5)(B). This Court affirms the trial court's ruling if the record conclusively shows that the Defendant is entitled to no relief. Id.

Given (a) that Claim One is untimely and (b) that Damren cannot establish that evidence of his autism would probably result in a life sentence, summary denial was proper.

Attempting to establish timeliness, Damren relies on when his lawyer discovered the evidence. A defendant, however, cannot

establish timeliness based on when the evidence was actually discovered; rather, he or she must establish (a) when the evidence became discoverable through the exercise of due diligence and (b) that the motion was filed within one year thereof. Reed v. State, 116 So. 3d 260, 264 (Fla. 2013).

Appellant's newly discovered evidence would have been discovered well before June of 2021, if his counsel had exercised due diligence. Even the defense's own expert (Dr. Israelian) acknowledges that autism was diagnosable in adults well before mid-2021. Dr. Israelian cited a 2019 article pertaining to scientific examinations of autistic traits in adults. (R-96). Further, the doctor cited a CDC report —published in 2020— estimating that over 2.2% of American adults are on the autism spectrum. (R-88). Lastly, Dr. Israelian cites to the DSM-V, which was published in 2013 and establishes that autism is "a lifelong condition." (R-87).

Yet Damren maintains that his autism was undiscoverable until Dr. Israelian made her "surprising diagnosis" in mid-2021. (IB-8, 30). According to Appellant, there was "no indication to previous counsel or undersigned counsel that [Damren] suffered

from [autism] that masked the PTSD." (IB-30). This claim, however, is conclusively refuted by the record.

Damren's lawyers had compelling reasons to have their client evaluated for autism. Speaking with Appellant's family members would have revealed that Damren was "a strange, odd child" who had only one friend, had "always one-sided" relationships, and who had failed to connect both with his siblings and his spouse. (R-14). In addition to his inability to develop and maintain relationships, Damren had anxiety and depression, both of which are potential indicators of autism. (R-15). Damren's lawyers should have ascertained the foregoing, informed their experts thereof, and had the proper, specific evaluations conducted for autism.

Even Damren's trial counsel could have had their client evaluated for autism. Either of the two experts who evaluated Damren before trial could have tested him for autism. Damren, 838 So. 2d at 517. Further, a third expert, a Dr. Miller, could have been provided with the relevant information and examined Damren. Id. However, trial counsel made a strategic decision that Dr. Miller would neither interview Damren nor review his medical records. Id.

Even Damren implicitly acknowledges that his autism was discoverable before 2021, stating that a diagnosis at the time of trial would have been "extremely difficult." (IB-32). The diagnosis, though it may have been to some extent difficult, was certainly possible —even in 1995 at the time of trial.

In any case, the diagnosis certainly could have been made before 2021. Given the multiple authorities to which Dr. Israelian cited, this claim would have been raised between 2013 and 2019 or before, if Damren's lawyers had exercised due diligence.

Appellant's counsel attempts to explain away the delay, highlighting a supposed contrast between Damren's experience in Vietnam and that of his fellow servicemen: while Damren seemed "almost stoic" about his service in the Vietnam war, his fellow servicemen described the war as "a very intense experience . . . riddled with trauma that affects [them] to this day." (IB-31).

The State respectfully points out that Appellant does not attempt to explain how his counsel could have been unaware that war can be intense and traumatic. Nor does Appellant state why his counsel did not have him detail his experiences in Vietnam.

Knowing that Damren fought in Vietnam, his lawyers should have asked him pointed questions about the nature and effects of his military service, e.g., whether he suffered flashbacks, nightmares, anxiety, et cetera. Even in the face of Damren's "stoic appearance," his lawyers could have learned the specifics of his wartime experience and learned the effects thereof. (IB-32).

Because of the above-described "conflict," says Appellant, his counsel had to retain another expert, an Army General, who because of the pandemic, refused to travel to Raiford to interview Damren. (IB-32). For unstated reason(s), no attempt was made to have the General interview Damren by video conference. Appellant's lawyers began searching for another expert and found Dr. Israelian, who in mid-2021 diagnosed Damren with autism by "mere serendipity." (IB-32).

But serendipity was not needed; due diligence would have sufficed. Given (a) the 2013 publication of the DSM-V, which established that autism is a lifelong condition, (b) the 2019 article pertaining to the scientific examinations of autistic traits in adults, and (c) the 2020 report estimating that over 2.2% of American

adults are on the spectrum, autism was certainly diagnosable in adults well before mid-2021.

Given the foregoing, the summary denial of Claim One was proper. The record conclusively shows that the Defendant is entitled to no relief because this claim is untimely.

Even if it had been timely filed, Appellant still could not prevail because he cannot establish that evidence of his autism would probably yield a life sentence. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

Appellant —who, for strategic reasons, decided that his doctor would not interview him or review his medical records— now seeks a second trial in which he would present medical evidence, which, he says, could be "powerful mitigation." (IB-34). The State respectfully disagrees, emphasizing (a) the collectively great weight of the aggravating factors, (b) Damren's "little, if any mitigation," and (c) the fact that the former far outweighs the latter.

The four aggravating factors (CCP, HAC, prior violent felony, and the murder having been committed during a burglary) collectively weighed very heavily. Moreover, even with the alleged

newly discovered evidence, Damren's mitigation remains de minimis, and that rather trivial mitigation would be easily outweighed by the appalling nature of his calmly considered, freely chosen, and horrendous acts. Given the bases for the aggravating factors and the considerable weight assigned thereto, evidence of Damren's autism would be without consequence.

With respect to the CCP aggravator, the trial court emphasized (a) that the victim begged for his life, (b) that Damren had ample time to reflect, and (c) that the murder was "ruthless and done with conscious intent." (R-33-34, 38). Begging for his life, the victim mentioned his plan to take his grandson fishing, which caused Damren to pause, pace, and ponder the victim's fate. (R-33, 38). Damren shortly thereafter chose to murder the victim and then bludgeoned his skull with a metal pipe no fewer than seven times.

With respect to the HAC aggravator, the trial court emphasized the victim's extensive injuries (including many defensive wounds), his pain and suffering, his fight for his life, his knowledge of his impending death, and the murder weapon: a heavy, metal pipe,

which the trial court characterized as a "particularly atrocious and cruel instrument of death and torture." (R-32-33).

With that instrument, Damren bashed the victim's skull causing a "chopping wound . . . go[ing] from the base of the [victim's] nose all the way across the head." Damren, 838 So. 2d at 514. So ferocious and so forceful was Damren that he "br[o]ke[] open [the victim's] skull and expos[ed] the lacerated surface of [the victim's] brain . . . ." Id. In addition to splitting the victim's skull and exposing his brain, Damren repeatedly struck the victim below the head. While conscious, the victim was bludgeoned *at least ten times*. (R-31). He suffered numerous contusions, extensive bruising, a fractured nose, and other injuries. (R-31).

The trial court gave considerable weight to both the CCP and the HAC aggravators. (R-33-34). Some weight was given to the fact that the murder occurred during a burglary —Damren's second burglary of R.G.C. (R-32). Little weight was given to the fact that Damren had been previously convicted of a felony involving the threat of force against a person. (R-32).

Against the comparatively great collective weight of the aggravation, Damren would present his “little, if any” mitigation from trial plus his evidence of autism, which he claims is relevant to explain the “extreme distress” he experiences when surprised. (IB-15). Yet, Damren was never surprised. He *chose* to confront the victim. Only the victim was surprised —surprised by Damren’s furtive and cowardly approach, surprised by being repeatedly bludgeoned with a heavy metal pipe, surprised by having his skull split open and his brain tissue seep therefrom, and surprised to meet his demise shortly before his would-have-been vacation with his grandson.

Unlike the victim, Damren was not surprised. His actions were deliberate. Appellant chose —for a second time— to burglarize R.G.C., and he purposefully caused the confrontation by which he now claims to have been "caught off guard." (R-15).

The State disputes Appellant’s contention that his autism diagnosis is relevant. Specifically, the State respectfully disagrees with Damren’s contention that his autism diagnosis indicates that he lacks impulse control. (IB-36-37). Notably, this Honorable Court

has already concluded that Damren, whose IQ is "high average," has no deficiency in impulse control, problem solving, or cognitive flexibility. Damren, 838 So. 2d at 517.

In any case, Damren's actions were not impulsive; they were considered at length. During his period of reflection, Damren could have decided to "conform [his] conduct to the law" by not bludgeoning the victim to death. (IB-36). However, Damren, having had ample time to think it through, brutally murdered the victim.

Appellant also claims that he is distressed by perceived danger. (IB-15). But Damren did not perceive any danger; only the victim did. After Damren gutlessly snuck up behind the victim and subjected him to a prolonged and vicious beating, the latter was helpless and the former was not imperiled in the least. During the attack, the victim begged for his life, attempting —unsuccessfully— to find a scintilla of decency, rectitude, or mercy in Damren. Knowing that he was safe, Damren paced and pondered the victim's fate. Having heard, considered, and rejected multiple pleas for mercy, Appellant —who has no deficiency in problem solving,

impulse control, or cognitive flexibility— saw fit to beat a grandfather to death with a metal pipe. Damren, 838 So. 2d at 517.

Damren deserves death. Unsurprisingly, the jury unanimously voted for it, the judge imposed it, and the outcome would be the same with or without evidence of the autism diagnosis. Given "all the circumstances of the case," another death sentence is virtually certain. Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014). Considering the great collective weight of the aggravating factors and the lack of mitigation (even with evidence of the autism diagnosis), Damren cannot establish a probable life sentence upon retrial.

Even if he could, his claim is procedurally barred since he has previously litigated whether prejudice can be established by producing evidence of a mental disorder. Fla. R. Crim. P. 3.851(e)(2); Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007). On appeal from the denial of Damren's initial motion for postconviction relief, this Honorable Court characterized the mitigation from Appellant's mental problems as "minimal," emphasizing "the strong aggravating factors" and concluding that Appellant could not

establish prejudice since the fairness and reliability of his trial were not affected. Damren, 838 So. 2d at 517.

ISSUE II: WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE NEWLY-DISCOVERED-EVIDENCE CLAIM BASED ON APPELLANT'S POSTTRAUMATIC STRESS DISORDER**.**

An order summarily denying a 3.851 motion is reviewed de novo; this Honorable Court accepts the factual allegations as true to the extent that they are not refuted by the record. Coney, 845 So. 2d at 137; Fla. R. Crim. P. 3.851(f)(5)(B). This Court affirms the trial court's ruling if the record conclusively shows that the Defendant is entitled to no relief. Id.

Given (a) that Claim Two is untimely and (b) that Damren cannot establish that evidence of his PTSD would probably result in a life sentence, summary denial was proper.

Appellant maintains that Claim Two is timely because it would have been "impossible . . . to diagnose Damren with PTSD without first identifying him as autistic." (IB-38). The PTSD, however, could have been discovered well before mid-2021 even if Damren were correct that his lawyers could not have been aware of the PTSD because it was "masked" by his autism. (IB-38). For the reasons

fully stated in Issue One, Damren should have been diagnosed with autism long before 2021, if his lawyers had exercised due diligence.

Damren's counsel had reason to have their client tested for autism. Speaking with Appellant's family members would have revealed that Damren was "a strange, odd child" who had only one friend, had "always one-sided" relationships, and did not connect with his siblings or his spouse. (R-14). In addition to his inability to develop and maintain relationships, Damren had anxiety and depression, both of which are potential indicators of autism. (R-15).

Damren's lawyers should have investigated his history, learned the foregoing, informed their experts thereof, and had the proper, specific evaluations conducted for autism. Even if Damren's PTSD could have been diagnosed only in conjunction with his autism, he still could not establish timeliness since autism became diagnosable in adults well before 2021. Such was established by the authorities to which Dr. Israelian cited: (a) the 2013 publication of the DSM-V, which established that autism is a lifelong condition, (b) the 2019 article pertaining to the scientific examinations of autistic traits in adults, and (c) the 2020 report estimating that over

2.2% of American adults are on the spectrum. With the exercise of due diligence, Damren's lawyers would have discovered both his autism and his PTSD before 2021.

Decades ago, Damren's PTSD should have been discovered simply because his counsel was aware of his military service. Appellant attempts to explain the delay in raising the PTSD issue, stating that during "continued investigations," his lawyers "travel[ed] the country to hear from other veterans who had served with Damren" and learned that Appellant's fellow soldiers found their time in Vietnam to have been "very traumatic and stressful . . . ." (IB-38-39).

But Damren's lawyers should have been aware that military service in Vietnam was traumatic and stressful. The State respectfully points out how well known and how easily known it is that trauma and stress are incident to war; such an obvious point does not require decades to learn, nor does it require traveling the country to conduct interviews.

Having exercised due diligence by asking the proper questions, Damren's lawyers would have learned the details of their client's

experience in Vietnam. Specifically, Damren's lawyers should have questioned their client about the effects of his military service, e.g., whether he suffered from flashbacks, nightmares, anxiety, et cetera.

Claiming to have exercised due diligence, Damren emphasizes that his lawyers had him examined for traumatic brain injury. (IB-30, 38). Further, Damren asserts that he is entitled to rely on the opinion of his expert, citing to State v. Sireci, 502 So. 2d 1221, 1223 (1987) and Darling v. State, 966 So. 2d 366, 377 (2007), (IB-30, 38). But neither Sireci nor Darling has anything to do with the point at issue; the relevant issue in those cases is whether defense counsel rendered ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) —not whether postconviction counsel exercised due diligence in attempting to uncover new evidence. In any case, Damren's expert never offered an opinion about whether he suffered from PTSD —only that he did not have a traumatic brain injury.

Given the foregoing, the trial court's summary denial of Claim Two was proper. The record conclusively shows that the Defendant is entitled to no relief because his motion is untimely.

Even if it were timely, Appellant still could not prevail because he cannot establish that evidence of his PTSD diagnosis would probably yield a less severe sentence. Jones, 709 So. 2d at 521.

Damren argues that his PTSD diagnosis would have been additional mitigation. (IB-38). However, the State respectfully disagrees for the reasons set forth in Issue One: (a) the collective weight of the aggravating factors, (b) Damren's "little, if any mitigation," and (c) the fact that the former far outweighs the latter.

The four aggravating factors (CCP (considerable weight), HAC (considerable weight), prior violent felony (slight weight), and the murder having been committed during a burglary (some weight)) collectively weighed very heavily. Moreover, even with the evidence of the PTSD diagnosis, the entirety of Damren's mitigation is insignificant and would be easily outweighed should Appellant be granted a new trial. Given the bases for the aggravating factors and the considerable weight assigned thereto, evidence of Damren's PTSD diagnosis does not increase the probability of a life sentence.

Considering Damren's cruelty and coldness and the immense suffering of the victim, another death sentence is all but certain.

Unsurprisingly, the jury unanimously voted for it, the judge imposed it, and the outcome would be the same with or without evidence of the PTSD diagnosis. Given "the total picture"/"all the circumstances of the case," another death sentence is virtually certain. Hildwin, 141 So. 3d at 1184. Damren cannot prevail because he cannot establish a probable life sentence on retrial. Lastly, even if he could, Damren's claim is procedurally barred for the reasons stated in Issue One.

CONCLUSION

Appellee, the State of Florida, respectfully requests this Court affirm the ruling of the trial court.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ Steve Woods
Steven Edward Woods
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0092613
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3606
Facsimile: (850) 487-0997
capapp@myfloridalegal.com
steven.woods2@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **March 27, 2023**, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Mr. Robert S. Friedman, Esquire, at robert.friedman@ccrc-north.org; Ms. Karin L. Moore, Esquire, at karen.moore@ccrc-north.org; and Ms. Elizabeth C. Spiaggi, Esquire, elizabeth.spiaggi@ccrc-north.org.

CERTIFICATE OF FONT AND WORD LIMIT COMPLIANCE

1. This document complies with the word limits of Fla. R. App. P. 9.210 and Fla. R. App. P. 9.045 because, excluding the parts of the document exempted by Fla. R. App. P. 9.045(e), it contains fewer than 13,000 words.

2. This document complies with the typeface and type size requirements of Fla. R. App. P. 9.045(b) because it has been prepared using Microsoft Word and in a proportionally spaced typeface: 14-point Bookman Ole Style.

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA
/s/ Steve Woods
STEVEN WOODS