

IN THE SUPREME COURT OF FLORIDA

Case No. SC23-15

Lower court Case No. 1994-CF-537

FLOYD DAMREN,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF THE APPELLANT

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel

KARIN L. MOORE
Assistant CCRC-North
Florida Bar No. 351652

ELIZABETH C. SPIAGGI
Assistant CCRC-North
Florida Bar No. 1002602

Office of the Capital Collateral
Regional Counsel-North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
Counsel for Appellant

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PRELIMINARY STATEMENT

This is an appeal from the circuit court's summary denial of Appellant's successive motion for post-conviction relief filed pursuant to Fla. R. Crim P. 3.851(e)(2.)

The following will be used to designate references to the record: "PCRIII" followed by the page number will be used to refer to the record on appeal of the successive post-conviction on appeal from the trial court which is the subject of the instant appeal. Additional citations will be self-explanatory.

Floyd Damren will be referred to as either Damren or Appellant throughout.

REQUEST FOR ORAL ARGUMENT

Damren has been sentenced to death. Resolution of the issues presented will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to address the issues through oral argument would be appropriate, given the seriousness of the claims presented and the

stakes involved. Appellant, through counsel, respectfully requests this Court to hear oral argument in this cause.

STANDARD OF REVIEW

Where the circuit court denies Fla. R. Crim. P. 3.851 post-conviction claims without an evidentiary hearing, this Court reviews the circuit court's decisions *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009.)

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit in and for Clay County, Florida entered the judgments of conviction and sentence at issue. On May 17th, 1995, Damren was tried by a jury in Clay County, Florida and found guilty of first-degree murder. *Damren v. State*, 696 So. 2d 709, 710 (Fla. 1997.) The advisory jury unanimously recommended death. *Id.* After holding a hearing under *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), the trial court sentenced Damren to death on May 25th, 1995 and made the following factual findings as to the mitigating and aggravating factors: The trial court gave “little” or “some” weight to the following non statutory mitigating factors: 1) the underlying burglary did not involve a preconceived plan to use weapons or violence; 2) Defendant did not act alone; 3) Defendant had an alcoholic father and had an alcohol problem himself; and 4) Defendant had been a good prisoner. *Id.* The trial court found the following aggravators: 1) Defendant had previously been convicted of a violent felony; 2) the murder took place during commission of a burglary; 3) the murder was especially heinous,

atrocious or cruel; and 4) the murder was committed in a cold, calculated and premeditated manner. *Id.*

On Damren's direct appeal the following nine issues were raised:

1. The trial court erred in permitting testimony of a prior crime to be admitted during the guilt phase. (This Court ruled that the testimony was properly admitted.)
2. The trial court erred in refusing to give the standard *Williams* rule instruction for "similar fact" evidence in relation to the testimony of a prior theft. (This Court ruled that the instruction was only required for "similar" evidence, but the crime here was only "relevant," not "similar.");
3. The trial court erred in overruling the defendant's objection to the prosecutor's misstatement of the law on the intoxication defense. (This Court ruled that error, if any, was harmless.);
4. The trial court erred in allowing the victim's daughter and wife to read prepared statements in the penalty phase. (This Court ruled that the evidence comported with the law on victim impact evidence.);
5. The trial court erred in allowing hearsay statements from three individuals as to what Damren's accomplice had told them about the incident. (This Court found that the statements were properly admitted as excited utterances and there was opportunity to cross-examine the witnesses.);
6. The trial court erred in finding that the murder was especially heinous, atrocious, and cruel. (This Court found that argument was meritless.)
7. The evidence failed to establish that the murder was committed in a cold, calculated, and premeditated manner. (This Court found that argument was meritless.)
8. The trial court abused its discretion in rejecting or in assigning only slight or little weight to the non-statutory mitigating factors. (This Court ruled that any error was harmless.); and
9. The imposition of the death penalty in this case is not proportionate with the imposition of the death penalty in other cases. (This Court ruled that argument was meritless..)

The Florida Supreme Court affirmed the convictions and sentence of death. *Damren v. State*, 696 So.2d 709 (Fla. 1997), *cert. denied*, 422 U.S. 1054 (1998.)

On Damren's initial postconviction the following claims were raised:

1. Requiring Damren to file a motion for postconviction relief within one year after the affirmance of his convictions violates his constitutional rights.
2. Damren is innocent of first-degree murder.
3. Newly discovered evidence establishes that Damren's capital conviction and sentence are unreliable.
4. Damren is innocent of the death penalty.
5. Damren was denied his constitutional rights when the prosecutor suggested to the jury that the law required the jury to recommend a sentence of death.
6. The rule prohibiting Damren's counsel from interviewing jurors is unconstitutional.
7. Damren's trial counsel rendered ineffective assistance by failing to call certain witnesses.
8. Florida's death penalty statute is unconstitutional on its face and as applied in this case.
9. Damren's constitutional rights were violated because no reliable transcript of the trial exists.
10. Damren was denied a fair trial because the court permitted the State to introduce gruesome and shocking photographs.
11. Damren's trial counsel rendered ineffective assistance during voir dire proceedings.
12. The trial court instructed the jury erroneously regarding the standard to apply to expert witnesses.
13. The trial court failed to find and weigh mitigating evidence which was clearly established in the record.
14. Introducing non-statutory aggravators resulted in an arbitrary imposition of the death penalty.

15. Damren's trial counsel failed to object to the prosecutor's statement regarding the believability of the star state witness.
16. The sentencing jury was misled by erroneous instructions and arguments that diminished its sense of responsibility.
17. Damren was denied effective assistance of counsel at both the guilt and penalty phases.
18. Damren's trial counsel rendered ineffective assistance by failing to adequately employ the services of available mental health experts.
19. The application of the aggravating circumstances violated Damren's constitutional rights.
20. Improper consideration of character and victim impact statements violated Damren's constitutional rights.
21. During the penalty phase, the burden of proof was improperly shifted to the defense.
22. The prosecutor's closing arguments during the guilt and penalty phase denied Damren a reliable trial.
23. The jury was incorrectly informed as to its role during the penalty phase.
24. The trial court erred in permitting the State to argue a lack of remorse.
25. The state withheld exculpatory evidence and presented misleading evidence.
26. Based on cumulative errors Damren is entitled to a new trial.

The trial court denied any relief and this Court affirmed that ruling. *Damren v. State*, 838 So. 2d 512 (Fla. 2003.)

A. Writ of Habeas Corpus

Damren filed a writ of habeas corpus that raised the following claims:

1. The finding of the aggravating factor of heinous, atrocious, and cruel violated the eighth amendment, *Lewis v. Jeffers*,

- 110 S. Ct. 3092 (1990), because no rational factfinder could find the elements of this aggravator proven beyond a reasonable doubt.
2. Florida's statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad in violation of the eighth and fourteenth; The facial invalidity of the statute was not cured in Damren's case where the jury did not receive adequate narrowing instructions. As a result, Damren's sentence of death is premised upon fundamental error which must be corrected in light of Florida law *Espinosa v. Florida*, 505 U.S. 1079 (1992) and *Richmond v. Lewis*, 506 U.S. 40 (1992.)
 3. Damren's trial counsel was ineffective by leading the jury to believe that the responsibility for determining the appropriateness of Damren's death sentence rests elsewhere.

This Court denied relief on Damren's habeas petition.

Damren, 838 So.2d at 514.

B. Successive Motion to Vacate Judgments of Conviction and Sentence

Damren filed a successive motion for postconviction relief in 2017 based upon rulings by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court's ruling in *Hurst v. State*, 202 So.3d 40 (2016.) The circuit court denied the motion. This Court affirmed the lower court's ruling and all relief was denied. *Damren v. State*, 236 So.3d 230 (Fla. 2018.), *cert. denied*, 139 S.Ct. 181 (2018).

On June 10, 2022, Damren filed his second successive motion for postconviction relief with two newly discovered evidence claims related to previously undiscoverable and undiagnosed Autism Spectrum Disorder (“ASD”) and Posttraumatic Stress Disorder (“PTSD”). (PCRIII:6-48.) The circuit court denied the motion without an evidentiary hearing after a case management hearing on October 13, 2022. (PCRIII:754-59.) This appeal follows.

FACTS RELEVANT TO BOTH ISSUES

Damren is a 71-year old death sentenced Vietnam veteran. (PCRIII:55.) During counsel’s continuing investigation of Damren’s case, undersigned counsel retained Dr. Marlyne Israelian, a licensed clinical psychologist and developmental neuropsychologist, to conduct a comprehensive neuropsychological forensic evaluation of Damren, including an evaluation for PTSD, during the middle of a worldwide pandemic.¹ (PCRIII:55, 57, 776, 787.) She was not tasked with evaluating Damren for ASD as counsel had no reason to believe

¹It was difficult to find experts who would enter the prison to conduct evaluations from the Spring of 2020 through Spring of 2021 due to the COVID-19 pandemic. Dr. Israelian was retained after arrangements for a retired Army general who is a neuropsychologist failed because he would not risk his health to enter the prison. (PCRIII:776.)

he suffered from it.² (PCRIII:787.) Dr. Israelian conducted a clinical evaluation of Damren over a two-day period in May, 2021 at Union Correctional Institution. She closely observed him over the ten-hour evaluation. (PCRIII:11, 56.) She reviewed hundreds of pages of historical, military, prison and court records and investigative reports from interviews with Damren's family, childhood friends, and veterans who served with him, *inter alia*. (PCRIII:11, 56.) Also, she conducted an exhaustive battery of standard psychological and intelligence tests including the Wechsler Adult Intelligence Test-Version IV, the Wide Range Achievement Test-Version 5, the Wisconsin Card Sorting Test, and the Victoria Symptom Validity Test.³ (PCRIII:11, 80.)

² Counsel suspected PTSD because many of the veterans Damren served with who were located and interviewed suffered from PTSD and it was odd that Damren was stoic and seemingly unaffected by the trauma of his Vietnam experience.

³ Other tests conducted were the Boston Naming Test, the Benton Facial Recognition Test, the Rey-Osterreith Complex Figure Test, the Continuous Performance Test-3, the Wechsler Memory Scale IV (BCSE, Logical Memory and Visual Reproduction), the DELIS Kaplan Executive Functioning System (Trails, Design Fluency, Verbal Fluency, Color Word Interference Test, Sorting Test), and the Grooved Pegboard Test.

On June 10, 2021, Dr. Israelian shared her “surprising” findings from her evaluation of Damren with undersigned counsel.⁴ (PCRIII:11.) Dr. Israelian’s professional opinion is that Damren suffers from ASD and PTSD. (PCRIII:11-12, 56.) In support of her findings, Dr. Israelian described Damren’s childhood as difficult, chaotic, unpredictable and marked by poverty, neglect and maltreatment by his parents. (PCRIII:94.) He experienced social isolation, bullying, and interpersonal torment as a child. (PCRIII:94.) Despite wanting to connect with others he could not no matter how hard he tried. (PCRIII:72.) He enlisted in the Army shortly after turning 18 and was deployed to Vietnam. (PCRIII:69.) Dr. Israelian reported that Damren liked the structure and discipline of the Army compared to the chaos of his childhood. (PCRIII:11.) But this was a time when he experienced unspeakable horrors and lived under constant threat as an infantryman. (PCRIII:11.) His base was routinely shelled by the enemy and he was sent to perform defoliation tasks, place landmines, and provide security for helicopters and for

⁴Dr. Israelian wrote a report with her findings and conclusions that was filed with the circuit court on July 5, 2022 pursuant to Fla. R. Crim. P. 3.851 (5)(A.) (PCRIII:53-124.)

the perimeter of his base, among other things. (PCRIII:155-56.) He was exposed to high levels of noise and suffered permanent hearing loss. (PCRIII:11.)

When he returned from Vietnam, Damren slid into a downward spiral of alcohol and drug abuse, relationship failures, depression and anxiety. (PCRIII:11.)

Under the criteria set forth by the American Psychiatric Association in its manual entitled *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-5TR”), Dr. Israelian concluded that Damren has suffered from Autism Spectrum Disorder or “ASD” (previously referred to as Asperger’s Syndrome in the DSM-5TR) since birth and throughout his life.⁵ (PCRIII:85-95.) She described ASD as a condition evident from childhood that is associated with abnormalities in brain structure and function. (PCRIII:12.) She also found that Damren suffered from Post-Traumatic Stress Disorder (“PTSD”) as a result of his ASD, his horrific childhood, and his Vietnam experience. (PCRIII:12.)

⁵The DSM-4 was in effect at the time of the offense. The DSM-5TR is the current version and the criteria for ASD are the same as in the DSM 4.

According to Dr. Israelian, the DSM-5TR has classified ASD as a neurodevelopmental disorder that manifests in early childhood. (PCRIII:88-89.) Common symptoms are the inability to form and keep long-term relationships and friendships, social isolation, and poor non-verbal communications. (PCRIII:78,89,99.) ASD is usually inherited from a parent.⁶ (PCRIII:93.) ASD's essential features, called diagnostic criteria in the DSM-5TR, are: (A) Persistent deficits or impairment in reciprocal social communication and social interaction; (B) Restricted, repetitive patterns of behaviors, interests or activities; (C) Symptoms appear in childhood; (D) Symptoms limit or impair everyday functioning; and (E) Disturbances are not attributable to intellectual disability or global developmental delay. (PCRIII:89.) Dr. Israelian found ample evidence of these symptoms as set forth below.

A. Persistent deficits or impairment in reciprocal social communication and social interaction.

The DSM-5TR breaks this down into the following three

⁶ Dr. Israelian is of the opinion that Damren inherited his disorder from his mother, Ruby Damren Chesser, based upon anecdotal evidence from the Damren family and others who knew her. Ms. Chesser died on January 11, 2000.

categories:

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions. DSM-5TR.

Dr. Israelian gave examples from her evaluation and her review of materials that Damren rarely initiated conversations, but would instead respond to questions. (PCRIII:89.) He rarely showed emotion. (PCRIII:93.) He had difficulty responding to complex social cues, especially in high stress situations. (PCRIII:91.) Despite developing some compensation skills, he still struggles in novel situations and must consciously guess what he should do or say when that would be intuitive for most individuals. (PCRIII:92.) He tends to interpret language literally. (PCRIII:79) People appear puzzled or bewildered by things he says to them. (PCRIII:63,92) He has difficulty knowing when or how to join a conversation. (PCRIII:92.) He cannot see the big picture. (PCRIII:13.) As a child, he had few friends and most were girls as they were more forgiving. (PCRIII:13.) He has an affinity for animals as they are not as complex as humans. (PCRIII:13.)

2. Deficits in non-verbal communicative behaviors used for social interaction, ranging for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions. DSM-5TR.

Dr. Israelian found ample evidence of these deficits. During her lengthy evaluation of Damren, she observed that he had atypical eye contact as he avoided eye contact or pretended to be reading or focused on written materials when he was overwhelmed during the evaluation. (PCRIII:89.) His facial expressions remained flat and he would quickly deflect eye contact or shut down when his emotions were about to surface. (PCRIII:89.) He did not use expressive gestures. (PCRIII:13.) She observed that he had poor integration of eye contact, gestures, prosody (the rhythm, stress and intonation of speech), and facial expressions. (PCRIII:13.) He contradicted himself repeatedly. She described him as emotionally flat with a restricted range of affect. (PCRIII:13.)

3. Deficits in developing, maintaining, and understanding relationships ranging, for example, from difficulties in behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers. DSM-5TR.

Dr. Israelian found ample evidence of these deficits in the records she reviewed. According to Damren's childhood girlfriend, Dorothy Macomber, Damren had only one friend as a child. (PCRIII:68.) He had nearly non-existent relationships with his siblings. (PCRIII:14.) His relationships were always one-sided. (PCRIII:90.) His second wife only married him to get away from her family and he never had an attachment to her. (PCRIII:14.) Damren told Dr. Israelian that he always thought people did not like him. (PCRIII:93.)

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history. DSM-5TR.

The DSM lists four categories for this criterion.

1. Stereotyped or repetitive motor movements, use of objects or speech.

Dr. Israelian found evidence of this in her study of Damren's artwork in which she found repeated patterns, lettering, and designs that he would told her he would practice over and over again. (PCRIII:90, 44,46,48.)

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior. DSM-5TR.

Dr. Israelian found evidence of this category in deposition testimony of witnesses who testified that he always wore old blue jeans and an old camouflage hat. (PCRIII:91.)

3. Highly restricted, fixated interests that are abnormal in intensity or focus. DSM-5TR.

Dr. Israelian described Damren's fascination with learning the Hebrew language to gain a better understanding of the Bible as an example of this behavior as an example. (PCRIII:91.) Additionally, his obsession with gymnastics in his youth was similar. (PCRIII:91.) She observed that he will engage a listener on topics he is interested in only. (PCRIII:91.)

4. Hyper- or hyporeactivity to sensory input or unusual interest in sensory aspects of the environment. DSM-5TR.

Damren self-reported this category.

C. Symptoms must be present in the early developmental period. DSM-5TR.

Dr. Israelian reviewed anecdotal evidence from family members who reported that Damren was a strange, odd child, who exhibited the deficits described herein. (PCRIII:91.) Dr. Israelian has stated that Damren was born with ASD and that his brain was wired differently at birth. (PCRIII:14.)

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning. DSM-5TR.

Dr. Israelian found ample evidence of Damren's impaired functioning. She observed from the materials she reviewed, her evaluation of Damren, and the conduct that has placed him on death row that there is a large gap between his near genius intelligence and his adaptive functioning. (PCRIII:15.) He has never lived up to his potential as evidenced by his IQ score in the 99th percentile. (PCRIII:15.) He is prone to anxiety and depression as are most adults and adolescents with ASD. (PCRIII:15.) After his return from Vietnam he used alcohol and drugs to self-medicate. (PCRIII:15.) He already had a genetic propensity for alcoholism from his father. (PCRIII:15.)

Damren, like most individuals with ASD, was (and still is) highly sensitive to stress and experiences extreme distress when he perceives danger, especially when he is caught off guard or surprised as he was at the time of the murder with the sudden appearance of the victim at the burglary scene. (PCRIII:15.)

E. These symptoms are not better explained by intellectual disability or global developmental delay. DSM-5TR.

Dr. Israelian administered the Wechsler Adult Intelligence Test to Damren. (PCRIII:80.) His full-scale score was 127, which placed him in the 97th percentile. (PCRIII:81.) She described him as almost a savant in mathematics and art. (PCRIII:15.) He is not intellectually disabled. (PCRIII:15.)

Dr. Israelian concluded that Damren suffered from ASD at the time of the murder for which he was sentenced to death. She concluded in her report that “Mr. Damren’s previously undiagnosed ASD and PTSD, when considered in the context of his developmental background, high frequency hearing loss, and subsequent alcohol and substance abuse would have been a significant mitigating factor in sentencing.” (PCRIII:57.)

Dr. Israelian could explain at an evidentiary hearing that ASD establishes the statutory mitigation that Damren could not conform his conduct to the requirements of law and that he had an existing mental illness. (PCRIII:778, 98-100.) Indeed, she could explain to the circuit court at an evidentiary that most people are capable of reassessing a course of conduct as it progresses, ASD patients are

impaired in their ability to recognize and act on available alternatives. (PCRIII:16.) They have significant problems with impulse control, thus, their ability to conform conduct to requirements of law is substantially impaired. (PCRIII:16.) While a neurotypical person can regulate their emotions and behave according to anticipated social norms, a person with ASD lacks the ability to recognize what the societal norm for conduct is, and how to regulate their emotions accordingly.⁷ (PCRIII:16.) Even if the jury did not find this as mitigation, understanding Damren’s ASD diagnosis would have given them critical context to the circumstances of the murder. (PCRIII:16.) In this case the court found two of the weightiest aggravators, HAC and CCP, largely based on Damren’s “ruthless” act even after the victim and Damren’s co-defendant “begged” for the victim’s life. (PCRIII:16.) Damren’s diagnosis with ASD puts that situation in a whole new light. (PCRIII:16.) It is difficult for people with ASD to navigate *normal* situations, let alone being caught in a criminal act. Evidence of Damren’s ASD and PTSD, coupled with his use of copious

⁷ Neurotypical is the term used in the Autism literature to refer to those who do not have Autism.

amounts of alcohol on the night of the murder would have offered the judge and jury proof that his ability to conform his conduct was impaired, diminishing his moral culpability. (PCRIII:16.) This would not have excused his conduct, but it would have lessened his moral responsibility and made a life sentence a reasonable and merciful sentence. (PCRIII:16.)

Dr. Israelian could explain at an evidentiary hearing that the ASD diagnosis also puts Damren's entire life history in a different perspective. Growing up, Damren had difficulties making friends and relating to his siblings. (PCRIII:16.) He is remembered as "odd" and "always alone." Floyd Damren's childhood was characterized by instability. (PCRIII:16.) He is the son of an alcoholic father, who was largely absent and was abusive when present. (PCRIII:16-17.) His mother was emotionally distant and ill-equipped to properly care and nurture her children. (PCRIII:17.)

Compared to his childhood, the structure of the military gave him some guidance as far as social expectations for his behavior. (PCRIII:17.) More importantly, while he did struggle to connect with his fellow soldiers, he found acceptance with the Vietnamese people. (PCRIII:17.) Dr. Israelian opines that people with ASD are frequently

more comfortable in foreign settings as foreigners are more forgiving of seemingly “odd” behavior. (PCRIII:17.) Upon returning from Vietnam, Damren hastily entered into a marriage with a woman who ultimately cheated on him with another serviceman. (PCRIII:17.) Damren did not have the emotional skills to cope with that situation, and attempted suicide. (PCRIII:17.) This, along with other irrational behavior led to him being discharged from the military. (PCRIII:17.) Losing his identity as a serviceman was devastating and Damren quickly devolved into a lifestyle characterized by alcohol, drugs and petty criminal offenses. (PCRIII:17.) His inability to form relationships made him particularly vulnerable to predatory relationships, in which he was manipulated in return for a fleeting semblance of friendship. (PCRIII:17.)

Because of his ASD it is difficult for Damren to express remorse in the way the state or victim’s kin might expect and understand. (PCRIII:17.) One of the defining characteristics of ASD is an inability to empathize with others. (PCRIII:17.) While legally courts in this state are not supposed to consider a defendant’s *lack* of remorse, it may be something a jury takes into account nonetheless. (PCRIII:17.)

Dr. Israelian could have explained to the circuit court that much of Damren's mannerisms may have been misinterpreted by the jury. (PCRIII:93-94.) The ASD gives his demeanor a flat affect. He can appear bored or disinterested. (PCRIII:93.) This is due to what psychologists explain as a "theory of mind." (PCRIII:17.) Damren does not realize how he is perceived, because he is unable to make these perceptions about others. (PCRIII:93.) He is unaware of what his body language is communicating. (PCRIII:17.) This was extremely detrimental during his jury trial as jurors observed him. (PCRIII:93.)

Dr. Israelian found that Damren's early childhood experiences fraught with poverty, neglect, bullying, isolation and lack of secure attachments with either parent, in concert with his autism diagnosis would have increased the likelihood that Damren would develop PTSD in response to his Vietnam war experiences. (PCRIII:94.)

Dr. Israelian diagnosed Mr. Damren with PTSD. (PCRIII:94-95.) According to the DSM-4 or DSM-5, PTSD is a mental health condition or disorder that may occur in people who have experienced or

witnessed a traumatic event or events.⁸ (PCRIII:94.) Characteristic symptoms vary widely and include involuntary flashbacks of the traumatic event or events, avoidance of reminders of the traumatic event, inability to remember the trauma, negative feelings about oneself or others, and alterations in arousal and reactive symptoms like irritability and angry outbursts, hyperarousal and hypervigilance, among other things. (PCRIII:95.)

Dr. Israelian found that Mr. Damren's PTSD developed in early childhood based upon a chaotic childhood fraught with poverty, neglect, bullying, and isolation. (PCRIII:99.) Mr. Damren escaped his chaotic childhood by enlisting in the Army at the earliest possible age to fight one of the most unpopular wars this country has ever experienced. (PCRIII:69, 20-21.) There, he experienced extreme danger and stress, adding to his childhood PTSD. (PCRIII:99.) He recounted finding the body of a child embedded in the soil after being run over by a tank. (PCRIII:156.)

⁸The DSM-4 was in effect the year of the offense. The criteria for the PTSD are slightly different in the DSM-5 but Dr. Israelian's diagnosis is the same under any version.

Dr. Israelian explains that symptoms relating to combat induced stress emerge “months or even years after a soldier’s tour of duty.” (PCRIII:95.) Coupled with his ASD, Damren did not turn to friends and family for support and comfort as most “neurotypical” people do when under great stress. (PCRIII:97.) He had no one to turn to for support and sought relief in alcohol and drugs. (PCRIII:99.) His PTSD, ASD and alcohol and substance abuse were additive and compounded his emotional reactivity and lack of self-control in situations where he was surprised or felt out of control. (PCRIII:98.)

People who served with Damren recounted harrowing experiences that “still haunt them to this day.” (PCRIII:70.) Mr. Przybylo, who served with Damren, felt helpless nearly all the time during his tour in Vietnam. (PCRIII:70.)

One of the most difficult things about serving in Vietnam was you didn’t know who the enemy was. We called them Charlies, NVA (North Vietnamese Army) or VC (Viet Cong.) They disguised themselves as children, women and men of all ages. They would hide anywhere they could, in dense vegetation, rice fields, bushes, trees, holes, pits, oil drums, hooches (houses), churches, schools, tunnels, or anywhere they wouldn’t be seen. They could be anywhere at any time. This caused a lot of stress

and uncertainty to American soldiers at all times. (PCRIII:70.)

Sgt. Harvey "Skip" Hoornstra, Damren's platoon sergeant in Vietnam, recalls how difficult it was to adjust to everyday life upon return from Vietnam. (PCRIII:71.) There was no program to help transition soldiers back to civilian life. He and many others turned to alcohol. (PCRIII:71.) Damren similarly declined upon his return from Vietnam. (PCRIII:75.) One of his later supervisors stated:

In the last three months Damren made a change I couldn't believe. He began to come in late with no valid reason. He began to get insubordinate with the N.C.O. I became his squad leader on 15 Jan 73. Since that time Damren has shown me nothing...I had him as a fine team leader but had to replace him with a P.F.C. because I couldn't get any cooperation out of him. (PCRIII:75.)

Upon his return from Vietnam he entered into a hasty marriage, drank too much, and even attempted suicide when his wife cheated on him with a fellow serviceman. (PCRIII:73-74.) He himself stated:

The thing with Betty was the red line for me. After that I didn't much care what happened to me or what I did. I started drinking and drugging and ruined my life. I feel like my time in Vietnam was the last thing I did right in my life. (PCRIII:160.)

Dr. Israelian would have testified at the evidentiary hearing that Damren's PTSD was mitigation evidence.

Additionally, Dr. Israelian would have testified that because the ASD masked the PTSD symptoms, trial counsel could not have been aware of the existence of the PTSD and cannot be faulted for not exploring it. Without the benefit of knowing that he suffered from ASD, a clinician could not have accurately evaluated whether he met diagnostic criteria for PTSD because he or she would lack the ability to judge the magnitude and severity of symptom presentation. (PCRIII:95-98).

Dr. Israelian would have testified to her findings and the difficulty of diagnosing Damren with ASD and PTSD before her involvement in the case had the circuit court granted an evidentiary hearing. (PCRIII:56-57.)

Additionally, counsel would have presented the testimony of David Ferrier, an expert on PTSD, who diagnosed and treated veterans for eight years at the Veterans Administration's Vietnam Veteran Outreach Program. (PCRIII:153.) Mr. Ferrier was retained after counsel was informed of Dr. Israelians' PTSD diagnosis of Damren to evaluate Damren further on the Vietnam experience. He reviewed voluminous military and case records. *Id.* Mr. Ferrier

conducted an evaluation of Damren at the prison in August 2021. *Id.* Mr. Ferrier could have explained to the circuit court that Damren enlisted in the Army at a time when public support for the Vietnam war was at its lowest and thousands of drafted young men and men eligible for the draft fled the country. More than a thousand American service men and women were being killed monthly and desertion rates were at an all-time high. (PCRIII:155.) He could have described Damren's military assignments and the grave dangers faced by Damren and other soldiers on a daily basis. Damren received promotions and was decorated for his combat service. *Id.* He received an Honorable Discharge after his extended tour in combat. (PCRIII:162.) Despite the grave danger he faced, Damren reenlisted for a six-year term after he was sent stateside to Tennessee. (PCRIII:158.) Damren was recommended for Ranger training, which was an honor. (PCRIII:159.) Damren's military career and life were destroyed by his ill-fated marriage and subsequent descent into alcoholism and drug use that resulted in his suicide attempt. (PCRIII:159-60.)

Mr. Ferrier is available to testify at an evidentiary hearing as to his findings that Damren suffers from PTSD.

SUMMARY OF ARGUMENT

- I. The circuit erred in summarily denying without an evidentiary hearing Damren's newly discovered evidence claim that he has suffered from Autism Spectrum Disorder (ASD) since birth that would have supported statutory mitigation that he could not conform his conduct to the requirements of the law as he had an existing mental illness at the time of his offense. The claim was timely filed as Damren's condition could not have been discovered earlier and the successive motion was filed within one-year of the discovery of that condition.
- II. The circuit court erred in denying an evidentiary hearing on Damren's newly discovered evidence claim that he suffered from Posttraumatic Stress Disorder (PTSD) at the time of the capital offense that would have offered as mitigation to the jury had it been known. The claim was timely filed as Damren's condition could not have been discovered earlier as the Asperger's Spectrum Disorder Syndrome masked the PTSD symptoms and the motion was filed within one-year of the discovery of that condition.

ARGUMENT

ISSUE 1: THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT’S NEWLY DISCOVERED EVIDENCE CLAIM THAT HE HAS SUFFERED FROM AUTISM SPECTRUM DISORDER SINCE BIRTH

The circuit court denied as not timely filed Damren’s newly discovered evidence claim that Damren suffered from ASD. PCRIII:755-58. The claim was properly and timely filed.

This circuit court, in its order, suggested that the motion could have been filed in 2021 or earlier, however there it is well established that successive Rule 3.851 motions based upon newly discovered evidence are considered timely if filed “within one year of the date upon which the claim became discoverable through due diligence.” *Mills v. State*, 684 So.2d 801, 804-05 (1996); *Jimenez v. State*, 997 So. 2d 1056, 1064 (2008); *James v. State*, 323 So. 3d 158, 160 (Fla. 2021).

The rule itself provides the following with respect to time limitation:

(d) Time Limitation.

(1) Any motion to vacate judgment of conviction and sentence shall be filed by the defendant within 1 year after the judgment and sentence became final.

(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:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.

Fla. R. Crim. P. 3.851(d)(1-2.)

The standard for newly discovered evidence is that it not be (1) "known by the trial court, the party, or counsel at the time of trial, and it must also appear that neither the defendant nor defense counsel could have known of such evidence by the use of diligence," and (2) that it "be of a nature that it would probably produce an acquittal on retrial or yield a less severe sentence." *Davis v. State*, 26 So. 3d 519, 526 (2009) citing *Jones v. State*, 709 So. 2d 512, 521 (1998) (*Jones II*.)

In *Davis*, the Florida Supreme Court found that it was error for a newly discovered evidence claim to be dismissed for a failure to plead due diligence stating, "Under the first prong of *Jones II*, the statements made during the *Huff* hearing in conjunction with the

assertions in the motion established a prima facie case of diligence sufficient to require an evidentiary hearing.” *Id.* In *Davis* the newly discovered evidence was a recantation of a witness. While the witness was still located in Davis’ hometown, investigators were unable to locate and speak to him for years. Nonetheless, the court reasoned that “regardless of the time span from the time of trial to the discovery of the new testimony, recanted testimony cannot be discovered until the witness *chooses* to recant.” *Id.*

This Court did contemplate that perhaps after hearing additional testimony the recantation would not have been categorized as newly discovered evidence, but for the purposes of granting an evidentiary hearing, the issue of due diligence was sufficiently pleaded when looking at both the motion and the preliminary hearing together. *Id.* This logic was again reiterated in *Nordelo v. State*, 93 So.3d 178, 185 (Fla. 2012) in which the Court stated, “The determination of whether the statements in an affidavit provided as newly discovered evidence are true and meet the due diligence and probability prongs of *Jones v. State*, 709 So. 2d 512, 521 (1998) (Jones II) “usually requires an evidentiary hearing to evaluate credibility unless the affidavit is inherently incredible or obviously

immaterial to the verdict and sentence.” *Nordelo*, 93 So. 3d at 185, quoting *Davis* at 526. Dr. Israelian’s and Mr. Ferrier’s reports finding that Damren suffered from ASD and PTSD compel an evidentiary hearing in this case. Their findings as reported are material to the death sentence imposed as they offered statutory and nonstatutory mitigation that the jury never heard.

Much like in *Davis, supra*, Damren may have been available to counsel and various experts, but there was no indication to previous counsel or undersigned counsel that he suffered from ASD that masked the PTSD. Therefore, the newly discovered evidence was not discoverable until Dr. Israelian made her surprising diagnosis. Counsel exercised due diligence by having Damren examined in 2017 with suspicions of traumatic brain injury, a fact that was brought out at the *Huff* hearing. (PCRIII:771.) Counsel retained an expert to examine him for a traumatic brain injury based on their knowledge that he had served in Vietnam and had hearing loss. The retained expert did not find any traumatic brain injury.

Counsel exercised due diligence from the moment her agency was appointed to represent Damren in his postconviction proceedings and never stopped investigating potential claims. This

is consistent with Fla. R. Crim. P. 3.851, which anticipates the filing of successive motions based on newly discovered evidence, *Brady* discoveries, and changes in the law.⁹ Counsel's duty to investigate begins when the case is received and continues throughout their representation, otherwise their representation would be quite shallow.

As such, counsel proceeded with investigations pursuant to Fla. Stat. §27.711(8) and located and interviewed veterans around the country who served with Damren.¹⁰ Their stories spoke to a very intense experience in Vietnam, riddled with trauma that affects them to this day. (PCRIII:776.) This was in stark contrast to what Damren

⁹ Additionally the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases provide that it is counsel's duty to "continue an aggressive investigation of all aspects of the case. American Bar Association, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1080 (2003)

¹⁰ Fla. Stat. 27.711(8) states that: By accepting court appointment under s. 27.710 to represent a capital defendant, the attorney agrees to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced, or carried out. While this statute applies to registry counsel, the continuing duty is presumably the same for CCRC attorneys.

presented to counsel. (PCRIII:776.) Damren recounted his Vietnam experiences with little emotion and appeared almost stoic about his experiences. (PCRIII:777.)

In light of this conflict, counsel retained yet another expert to evaluate Damren in 2020. (PCRIII:776.) Unfortunately, this being at the height of the pandemic, the expert, a retired Army general, refused to travel to Raiford, Florida to examine Damren at Union Correctional Institution. (PCRIII:776.) Instead the expert asked that Damren be transferred to a facility closer to him. This of course, was an impossibility and counsel began searching for yet another expert, ultimately retaining Dr. Israelian to assess the client for PTSD (Post-Traumatic Stress Disorder) and brain function in the summer of 2021. (PCRIII:777.)

It was only after Dr. Israelian's visit that the diagnosis of ASD was discovered. Not having asked Dr. Israelian to assess for ASD, it was mere serendipity that she had extensive training and experience in diagnosing and treating ASD in adults was able to diagnose him. (PCRIII:777.)

Diagnosing Damren with ASD as an adult would have been extremely difficult at the time of his trial in 1995. (PCRIII:21.) As

noted in Dr. Israelian's report ASD "was historically diagnosed in *young children with low intellectual abilities, profound deficits in their ability to relate to others, and significant delays in their language abilities.*" (PCRIII:56.) Damren has a high IQ and is not non-verbal. (PCRIII:775.) Dr. Israelian opines that as the understanding of ASD became more nuanced doctors recognized that even children with "normal language development" and "superior intellectual abilities" still exhibited the social impairments and restricted repetitive behaviors indicative of ASD. (PCRIII:56.) Even that nuanced understanding is predicated on individuals being diagnosed as children. It should be noted that at the time of Damren's trial in 1995, ASD was not a disorder being diagnosed in adults, so his trial counsel could not have known to explore that mitigation. This was something that Dr. Israelian noted in her report and could have testified to at an evidentiary hearing.

Again, similar to the recantation in *Davis*, the question of due diligence and whether the evidence could have been discovered earlier is something that needs to be developed through testimony at an evidentiary hearing. Damren has sufficiently pleaded in his motion and argued facts at the *Huff* hearing that are not conclusively

rebutted by the record, and therefore necessitate an evidentiary hearing.

Testimony regarding Damren's ASD could have served as powerful mitigation in the penalty phase, served as a statutory mitigator, and would have impacted how counsel conducted the trial. Given Damren's flat affect Dr. Israelian opines that others are "not likely to give him the benefit of the doubt or temper their judgment of him with understanding and compassion." (PCRIII:93-94.) The way that Damren likely presents himself to a jury is prejudicial to him and necessitates an expert to explain that his mannerisms are the result of a neurological disorder.

Previously the United States Supreme Court has found in *Riggins v. Nevada*, 112 S. Ct. 1810 (1992) that the defendant's demeanor in front of the jury was relevant and that his forcible medication interfered with his insanity defense. Prior to trial, Riggins was put on antipsychotic medications, which helped alleviate the voices he would hear in his head. *Id.* at 1812. However, at trial, his attorneys moved for him to not be medicated. *Id.* He was presenting an insanity defense as the voices in his head had been active the

night of the murder and had told him to kill the victim. *Id.* Riggins argued that being forced to take the medication violated his right to due process as the jurors had the right to see him in his "true mental state." *Id.* The trial court did not permit Riggins to stop taking the antipsychotic medication. *Id.* at 1813. The defense did present testimony from an expert on the effect of the antipsychotics. *Id.* In spite of that ameliorating testimony from the expert, the Supreme Court still found that it was "clearly possible" that the side effects of the medication "had an impact upon not just Riggins' outward appearance, but also...his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* at 1816. The Supreme Court also acknowledged that identifying "the precise consequences...cannot be shown from a trial transcript. " *Id.* at 1811. Here, as in *Riggins*, there is no record evidence of the impact of Damren's demeanor on the jury, but the expert, Dr. Israelian, opines that the jury would have misconstrued his outward appearance as cold, remorseless and not deserving of mercy.

In Mr. Damren's case, the jury did not have the benefit an expert explaining Mr. Damren's demeanor. In addition to shedding light onto the circumstances of the crime and Mr. Damren's life history,

an expert would have been able to explain Mr. Damren's seemingly disinterested and detached demeanor.

Additionally, like intellectual disability, ASD is an organic brain disorder. It impairs Mr. Damren's ability to conform to social norms and is relevant to the degree of moral responsibility he should bear for his actions.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the execution of intellectually disabled individuals was cruel and unusual punishment under the Eighth Amendment. Similarly, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court ruled that the execution of individuals who were under the age of 18 at the time of their offense was also cruel and unusual punishment. The rationale for both rulings, *inter alia*, was that both classes of offenders, those who were intellectually disabled and those who were under the age of 18, had diminished personal culpability or blameworthiness as a result of their disability. The same rationale should apply here. Individuals with ASD suffer from an organic brain disorder that impairs their ability to conduct themselves appropriately and conform their conduct to the law. Their judgment

and impulse control are diminished. They should not be eligible for execution.

At the very least, had the jury or the sentencing court heard this evidence, though, there is a reasonable probability that the sentence would have been life. Damren's death sentence is unreliable under the Fifth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

ISSUE 2: THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S NEWLY DISCOVERED EVIDENCE CLAIM THAT HE SUFFERS FROM POST TRAUMATIC STRESS DISORDER AS A RESULT OF HIS SERVICE IN VIETNAM

In addition to ASD, Dr. Israelian diagnosed Damren with PTSD. Although the existence of the PTSD does not establish a statutory mitigator, it certainly could have been presented as mitigation to the jury and the sentencing judge under *Lockett v. Ohio*, 438 U.S. 586 (1978) (A jury should hear any evidence that could be considered as mitigation) and *Porter v. McCollum*, 558 U.S. 30 (2009) (finding that trial counsel should have presented evidence of a veteran's struggle to regain a normal life upon his return from combat and that evidence

of a brain abnormality could have “influenced the jury’s appraisal of . . .moral culpability.”)

Here, because the ASD masked the PTSD symptoms, trial counsel could not have been aware of the existence of the PTSD and cannot be faulted for not exploring it. It would have been impossible for an expert to diagnose Damren with PTSD without first identifying him as autistic. Because of his undiagnosed ASD he did not present with typical PTSD symptoms. Because other experts were not aware that he has ASD they have been unable to detect his PTSD. Even exercising due diligence counsel was unable to discover the PTSD diagnosis until Damren was assessed by Dr. Israelian, who purely by happenstance has a strong background in ASD.

Indeed, counsel had previously retained another neuropsychologist to assess Damren who merely found that Damren did not have a traumatic brain injury. Counsel is entitled to rely on the opinion of their experts. *State v. Sireci*, 502 So. 2d 1221 (1987); *Darling v. State*, 966 So. 2d 366 (2007.) Having retained and consulted with an expert in 2017, counsel exercised due diligence. Counsel continued investigations nonetheless, locating and traveling the country to hear from other veterans who had served with

Damren. Their memories outlined a very traumatic and stressful communal experience that Damren too had gone through. Based on this, counsel attempted to have Damren interviewed by another neuropsych, who ultimately would not enter the prison during a worldwide pandemic. While she has impeccable credentials, Dr. Israelian was largely retained because of her willingness to enter the prison and meet with the client face to face. Damren's PTSD was not discoverable by due diligence until he was diagnosed with ASD and counsel has exercised due diligence in attempting to ascertain his precise mental impairment. Had the jury or the sentencing court heard this evidence, though, there is a reasonable probability that the sentence would have been life.

Damren's death sentence is unreliable under the Fifth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

Damren should have been granted an evidentiary hearing on both his ASD and PTSD diagnosis. An evidentiary hearing is also necessary to properly assess the issue of due diligence.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing and the record before this Court, Damren respectfully urges this Court to reverse the circuit court, grant a new trial, and grant such other relief as this Court deems just and proper.

CERTIFICATE OF COUNSEL

I hereby certify that a true and correct copy of the foregoing brief has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Steven Woods, Assistant Attorney General on the 6th day of March, 2023.

/s/ Karin L. Moore

Karin L. Moore
Assistant CCRC-North
Florida Bar No. 351652
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922

Elizabeth C. Spiaggi
Assistant CCRC-North
Florida Bar No. 1002602

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was computer generated in compliance with the word count and font requirements pursuant to Fla. R. App. P. 9.045 and 9.210.

/s/ Karin L. Moore
Karin L. Moore
Assistant CCRC-North
Florida Bar No. 351652