Filing # 171170691 E-Filed 04/17/2023 04:20:08 PM

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

REPLY BRIEF OF APPELLANT

KARIN MOORE
Assistant CCRC-North
Florida Bar No. 351652

ELIZABETH 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ARGUMENT IN REPLY.....1

I. The circuit court erred in summarily denying Appellant's newly discovered evidence claim that he has suffered from Autism Spectrum Disorder since birth.....1

Summary Denial.....1

Timeliness.....3

Evidence of Damren's Autism Spectrum Disorder would probably yield a life sentence.....7

II. The circuit court erred in summarily denying Appellant's newly discovered evidence claim that he suffers from Posttraumatic Stress Disorder as a result of his service in Vietnam.....12

Summary Denial.....12

Timeliness.....13

Evidence of Damren's Post-Traumatic Stress Disorder would probably yield a life sentence.....15

CONCLUSION AND RELIEF SOUGHT.....17

CERTIFICATE OF SERVICE.....18

CERTIFICATE OF COMPLIANCE.....18

TABLE OF AUTHORITIES

Cases

Darling v. State, 966 So. 2d 366 (2007).....6

Davis v. State, 26 So. 3d 519, 528–29 (Fla. 2009).....2

Foster v. State, 810 So. 2d 910, 914 (Fla. 2002).....1

Hildwin v. State, 141 So. 3d 1178 (Fla.2014).....8

Hunter v. State, 29 So. 3d 256, 269 (Fla. 2008).....1

Jones v. State, 709 So. 2d 512, 521 (1998).....8

Lockett v. Ohio, 438 U.S. 586 (1972).....11, 16

Peede v. State, 748 So.2d 253, 257 (Fla.1999).....1

Porter v. McCollum, 558 U.S. 30 (2009).....9, 14, 16

Nordelo v. State, 93 So. 3d 178, 186 (Fla. 2012).....1

Riggins v. Nevada, 504 U.S. 127 (1992).....2, 11, 12

State v. Sireci, 502 So. 2d 1221 (1987).....6

Walton v. State, 3 So. 3d 1000, 1005 (Fla.2009).....1

Other Authorities

National Estimates of Adults with Autism Spectrum Disorder. Dietz PM, Rose CE, McArthur D, Maenner M. (2020). Journal of Autism and Developmental Disorders. Dec: 50(12); 4258-4266.....4

Are PTSD and autistic traits related? An examination among typically developing Israeli adults, Haruni-Lamdan, N., Ledenidiger, S., Golan, O., & Horesh, D. (2019) Comprehensive Psychiatry, 89:22-27.....3

Fla. Standard Jury Instruction in Criminal Cases 7.11 (2023).....8

ARGUMENT IN REPLY

I. The circuit court erred in summarily denying Appellant's newly discovered evidence claim that he has suffered from Autism Spectrum Disorder since birth.

In its Answer Brief, Appellee asserts that (1) summary denial of this claim was proper because (2) it is untimely; and (3) even if it were timely, Damren cannot establish that evidence of his autism would probably yield a life sentence. (AB. 10-11.)

Summary Denial

When a claim in a motion filed pursuant to Fla. R. Crim. P. 3.851 is summarily denied, the reviewing court must accept the movant's factual allegations as true to the extent they are not refuted by the record. *Peede v. State,* 748 So.2d 253, 257 (Fla.1999); *Foster v. State*, 810 So. 2d 910, 914 (Fla. 2002); *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009); *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012).

This Court has held that an evidentiary hearing may be necessary to determine whether counsel exercised due diligence in discovering the claim presented in the successive 3.851 motion. *Hunter v. State*, 29 So. 3d 256, 269 (Fla. 2008). Additionally,

in *Davis*, this Court held that where the Rule 3.851 motion is sufficiently pled, the [circuit] court should "allow the opportunity to prove through the testimony of witnesses that the threshold requirement of due diligence was satisfied." *Davis v. State*, 26 So. 3d 519, 528–29 (Fla. 2009).

Damren's 3.851 motion asserted that he was diagnosed by Dr. Israelian with Autism Spectrum Disorder and Post-Traumatic Stress Disorder in June of 2021. The Autism diagnosis could not have been discovered at the time of trial as it was not being diagnosed in adults. (PCRIII:19.) These allegations are not refuted by the record, but rather supported by it and at a minimum the court should have held an evidentiary hearing solely on the issue of timeliness.

The sub-claim, that Damren's trial was affected by a *Riggins* error is also not refuted by the record. The 3.851 motion alleged that jurors would have perceived Damren's flat affect as callous and uncaring. (PCRIII:17-18.) This is a perception that was detrimental to Damren. Nowhere in the record is this perception refuted, nor does the State in its answer cite to anything that refutes this. Just as in *Riggins* the jurors' misinterpretation of the defendant's personal presentation or affect is "clearly possible." As such, Damren should

be afforded an evidentiary hearing to develop the record as to his trial counsel's observations of the jury.

Timeliness

In support of its assertion that this claim is untimely, Appellee argues that Damren's autism should have been discovered prior to June of 2021, had his counsel exercised due diligence, as autism was diagnosable in adults well before mid-2021. (AB. 10.)

Appellee points to the report of Dr. Israelian which cited a 2019 article pertaining to scientific examinations of autistic traits in adults. (AB. 14.) However, a closer look at the article reveals that it has nothing to do with whether adults were commonly diagnosed with autism. *See* Haruvi-Lamdan N, Lebendiger S, Golan O, Horesh D. *Are PTSD and autistic traits related? An examination among typically developing Israeli adults.* 89 COMPR PSYCHIATRY. Feb. 2019, at 22-27. Rather, the article examined the association between autistic traits and PTSD, "a topic rarely assessed before." *Id.* In conclusion, the article indicates that "further research is needed in order to understand the associations between the two conditions." *Id.* Appellee's reliance on this article is misplaced. This article does not conclusively prove that autism was routinely being diagnosed in

adults prior to 2021. Instead, this article illustrates that autistic traits were still being investigated by researchers in 2019. *Id.*

Appellee also points to a 2020 report by the Centers for Disease Control ("CDC") which estimated that over 2.2% of American adults are on the Autism Spectrum. *See* Dietz PM, Rose CE, McArthur D, Maenner M. *National and State Estimates of Adults with Autism Spectrum Disorder*. 50 J AUTISM DEV DISORD. Dec. 2020, at 4258-4266. However, this article posits that the estimate covers both diagnosed and undiagnosed adults, and that the *purpose* of the estimates was to "help states estimate the need for diagnosing and providing services to those unidentified." *Id.* As there was *no data on the prevalence of ASD in adults*, the study devised a way to estimate the number of adults, using the data that exists for children. *Id.* Again, this shows that although the occurrence of autism in adults was actively being studied, it was not being regularly diagnosed in adults during that time period. *Id.*

Appellee further points to the DSM-V, which was published in 2013, and notes that autism is a lifelong condition. (AB. 14.) This assertion by Appellee misses the point. Although autism is a lifelong condition, until recently, it was only being diagnosed in children. Dr.

Israelian's report makes clear that it was the 2022 DSM-VTR that really pushed clinicians to start thinking about adults who had, as of yet, not been diagnosed with Autism. (PCRIII:88.)

> The DSM-VTR set the stage for previously undiagnosed adults to finally get the attention and help they needed. It is only recently that psychologists and psychiatrists have begun diagnosing adults with ASD. Even now, a significant proportion of high-functioning children and adults on the autism spectrum, remain undiagnosed.
> (PCRIII:88.)

Appellee argues that "Damren's lawyers had compelling reasons to have their client evaluated for autism." (AB. 15.) In support of this assertion, Appellee cites to evidence that Damren was a strange and odd child, had only one friend, always had one-sided relationships, failed to connect with people, was unable to develop and maintain relationships, and suffered from anxiety and depression. (AB. 15).

Appellee asserts that based on this evidence, Damren's attorneys should have suspected that he had autism. (AB. 15.) However, previous experts that had evaluated Damren were also aware of these symptoms, and yet did not voice any suspicions about

autism.[1] It is simply unreasonable to expect defense attorneys to diagnose a client, rather than relying on their experts for a diagnosis. Lacking specific guidance on what constitutes due diligence in each unique situation, this Court should take guidance from the cases where counsel was not found ineffective when they relied on an expert to inform them of issues relating to their client. *State v. Sireci,* 502 So. 2d 1221 (1987); *Darling v. State*, 966 So. 2d 366 (2007). Although the state does not think these standards are applicable to undersigned counsel, they do not contest that these standards would apply to trial counsel.

Appellee claims that Damren's odd behavior during childhood and his difficulties maintaining relationships should have alerted counsel to a possible autism diagnosis. (AB. 15.) However, there are many individuals who find themselves alienated and without friends, especially children that are constantly moving around and being uprooted by their parents. This does not necessarily indicate that they are on the autism spectrum. Furthermore, many individuals on

[1] Undersigned counsel again retained an expert in 2020, who ultimately did not see Damren as it was the height of the pandemic and he refused to travel to the prison in person. The prison would not permit Damren to meet with him via Zoom. (PCRIII:776).

death row suffer from anxiety and depression based on their current situation. None of these behaviors would lead an attorney to automatically assume that Damren had autism when no other expert that had evaluated him had expressed any such suspicions. As stated in Appellant's initial brief, it was only when Damren was evaluated for PTSD, based on counsel's investigation into his service in Vietnam, that an expert noted for the first time that Damren had ASD. (IB.32.)

Damren should have been allowed the opportunity to prove that he has satisfied the timeliness and due diligence requirements at an evidentiary hearing.

Evidence of Damren's Autism Spectrum Disorder would probably yield a life sentence.

Appellee argues that even if the claim were timely, Damren cannot show that his autism would probably yield a life sentence. (AB. 10-11; 18.) Appellee asserts that the four aggravating factors "collectively weighed very heavily", that "even with the alleged newly discovered evidence, Damren's mitigation remains de minimis", and that "Damren's autism would be without consequence." (AB. 18-19.)

Appellee misapprehends the way in which mitigation is weighed. It is not a rote balancing of aggravators versus mitigators. At a new trial the jury would be instructed, "If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and *give that evidence such weight as you determine it should receive* in reaching your conclusion as to the sentence to be imposed." *Fla. Standard Jury Instruction in Criminal Cases 7.11* (2023)(emphasis added).

Additionally, it is not simply the ASD that this Court should consider in determining whether the newly discovered evidence would likely result in a life sentence. This Court must do a comprehensive, holistic analysis, which includes all the evidence that would be presented at a new trial. *Jones v. State,* 709 So. 2d 512, 522 (Fla. 1998); *Hildwin v. State*, 141 So. 3d 1178, 1181 (Fla. 2014).

Contrary to the State's argument, the ASD diagnosis is unique from the mental disorder that was previously litigated in his initial postconviction. (AB at 23.) The claim raised by previous counsel Morrow was a claim of ineffective assistance of counsel for failing to investigate brain damage caused by substance abuse. The circuit court's denial of that claim in the early 2000s does not procedurally

bar newly discovered evidence of this congenital disease of ASD. In fact, consistent with *Jones* and *Hildwin*, the evidence developed in Morrow's post-conviction would need to be assessed in conjunction with the newly discovered evidence raised in the present motion.

A diagnosis of ASD would have supported statutory mitigation that Damren could not conform his conduct to the requirements of the law and had an existing mental illness. While most people are capable of reassessing a course of conduct as it progresses, ASD patients are impaired in their ability to recognize, weigh and act on alternatives. Even if the jury did not find this as mitigating, understanding Damren's ASD diagnosis would have given them context to the circumstances of the murder. Critically, this diagnosis of ASD would have explained to the jury Damren's flat affect at trial. Without any explanation or context, jurors perceived this demeanor as callous and uncaring. (PCRIII:17-18.)

Furthermore, it is not just the diagnoses that the jury would hear, but the lived experience Damren had of being an individual with autism whose idiosyncrasies created a barrier between him and the world for his entire life. "Evidence about the defendant's background and character is relevant because of the belief, long held

by society, that defendants who commit criminal acts that are attributable to a disadvantaged background…may be less culpable." *Porter v. McCollum*, 558 U.S. 30, 41, (2009). Damren was viewed as a loner and odd, and in his desire to have friends, frequently fell victim to being used or manipulated by others. (PCRIII:66, 67.) A jury would hear how this eventually landed him in a juvenile detention center, which Damren found preferable to his chaotic home life.[2] (PCRIII:66.) At home, Damren was witness to his father abusing his mother physically and prostituting her. (PCRIII:61.) Dr. Israelian noted in her report that Damren's father was "singularly focused on gratifying his own needs and chasing both men and women, often dragging his young sons along for the ride, making them unwitting accomplices of his infidelity toward their mother." (PCRIII: 61, 69.) After Damren left the detention center, his father moved him to Maine. (PCRIII:66.) Damren had no qualms about leaving Florida, in part because his existence here was miserable

[2] The defense's expert is of the opinion that Damren's mother, Ruby, may have also been on the Autism spectrum. While, admittedly not a bad woman, she was cold and emotionless with her children, worked excessively, and was plagued by her own childhood. Her sister and Mr. Damren suspect that she (Ruby) was molested by her father. (PCRIII: 60.)

anyways. Unfortunately, his school experience in Maine and Connecticut proved no better as he was bullied by the other high school kids and on one occasion was physically attacked and mugged in the boys' bathroom. (PCRIII:67.)

In *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964–65 (1978), the United States Supreme Court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* at 604.

In Damren's case, the outcome of the ability of a jury to use Damren's newly discovered diagnosis of ASD and PTSD to put into context all the experiences of his childhood, military service, and subsequent life to see and to understand what Damren's life was like cannot be so easily discounted as Appellee tries to make it. As in Riggins, "[e]fforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been

granted would be purely speculative." *Riggins v. Nevada*, 504 U.S. 127, 137-38, 112 S. Ct. 1810, 1816 (1992).

Damren's case of newly discovered evidence and his life history compels that he at least be granted an evidentiary hearing on the issues presented.

II. The circuit court erred in summarily denying Appellant's newly discovered evidence claim that he suffers from Posttraumatic Stress Disorder as a result of his service in Vietnam.

In its Answer Brief, Appellee asserts that (1) summary denial of this claim was proper because: (2) it is untimely; and (3) even if it were timely, Damren cannot establish that evidence of his PTSD would probably yield a life sentence. (AB. 11-12.)

Summary Denial

Summary denial of Damren's claim relating to his PTSD diagnosis is improper as Damren Defendant's successive 3.851 sufficiently pled the reason for Damren's PTSD not being diagnosed until 2021. As stated in both the motion and in Dr. Israelian's report, Damren's Autism has had a masking effect on the PTSD and his Autism could not have been diagnosed earlier. (PCRIII: 22, 98.)

Naturally, the State contests this factual allegation, but as the claim was summarily denied this Court must accept the factual allegation as true. An evidentiary hearing is appropriate and would allow testimony from the defense's expert explaining how Damren's PTSD cannot be diagnosed without the clinician first knowing that Mr. Damren is on the Autism spectrum. As Mr. Damren's diagnosis with PTSD hinges on his ASD diagnosis, an evidentiary hearing is necessary to determine whether due diligence was satisfied as it relates to the ASD claim.

Timeliness

In support of its assertion that this claim is untimely, Appellee argues that Damren should have been diagnosed with PTSD decades ago, simply because Damren fought in the Vietnam War. (AB. 12.) Appellee also asserts that even if Damren is correct that his PTSD could only have been discovered in conjunction with his ASD, he still could not establish timeliness since autism became diagnosable in adults well before mid-2021. (AB. 11.)

Appellee seems to assume that everyone who served in the military during wartime will have the same experiences and the same resulting mental health issues. Appellee claims that PTSD should

have been immediately apparent, as war is well known to be traumatic. However, Damren enjoyed his time in the military. (PCRIII:72,155.) He refers to it as "the last thing [he] did right in his life." (PCRIII:160.) When asked about Vietnam, Damren does not talk about the trauma of his combat experience, but rather focuses on his admiration for the Vietnamese people. (PCRIII:73, 157-58.) It was one of the first times he was accepted and not labeled as odd. (PCRIII:73.) Damren even extended his tour another six months after having already been there for a year. (PCRIII:158.)

Not knowing that Damren suffered from ASD, counsel accepted Damren's sentiments about his service, but continued to investigate and interview other servicemen about a possible *Porter v. McCollum* claim. *See 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.").

It was only after locating and interviewing men that had served in Vietnam with Damren that the true impact of what he experienced began to unfold. It was only then that counsel suspected that Damren

may suffer from PTSD, due to the PTSD that was suffered by those with whom he served. As argued in Issue I, *supra*, it was at this time when Damren was being evaluated for PTSD that Dr. Israelian diagnosed him with ASD.

Summary denial of Damren's claim relating to his PTSD diagnosis is improper as Damren Defendant's successive 3.851 sufficiently pled the reason for Damren's PTSD not being diagnosed until 2021.

Evidence of Damren's Post-Traumatic Stress Disorder would probably yield a life sentence.

Appellee argues that even if the claim were timely, Damren cannot show that his autism would probably yield a life sentence. (AB. 11-12; 28.) Appellee asserts that the weight of the aggravating factors and Damren's "little, if any mitigation" would preclude a life sentence.

As stated in Issue I, *supra*, it is up to the jury to decide the weight of the aggravating and mitigating factors. It is not a mere rote balancing of aggravators versus mitigators. And jurors are never required to sentence a defendant to death. The jury would consider

not only the diagnosis of PTSD, but how it is masked by ASD, as well as how those two diagnoses affected Damren's life.

While 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).

As related to PTSD, the jury would hear that at the age of 17 Damren joined the military when this country was at war. Similar to his time in the juvenile detention center, Damren enjoyed the structure and discipline of the military. (PCRIII:151.) While Damren tends to focus on his admiration for the Vietnamese people and the time he spent with the girlfriend he bought property for, his fellow servicemen speak of the constant uncertainty and stress they experienced. (PCRIII:158.) Damren was an M60 machine gunner and one of his duties was to guard a bunker on the edge of his base, LZ English. (PCRIII: 70.) The bunker was the first line of defense against intruders and a constant target for enemy combatants. *Id.* Damren recalls the way even gruesome sights became routine and you become accustomed to it. (PCRIII: 156.)

He returned a veteran from a war that was extremely unpopular and servicemen were being met with hostility. (PCRIII:155.) Upon his return he impulsively married a woman he had only just met. (PCRIII:74.) Their marriage ended when Damren found her in bed with a fellow serviceman. (PCRIII:160.) Damren attempted suicide. (PCRIII:74.) He went into a downward spiral and started using marijuana and other drugs as well as drinking heavily. (PCRIII:160.) His fellow serviceman Skip Hoornstra recalls an unstable existence upon return. (PCRIII:71.) He angered quickly and could not shed the mentality he had developed in Vietnam of constantly being on alert. (PCRIII:71.) There was no program to help servicemen transition back to daily life in the States and many turned to alcohol or drugs. (PCRIII:71.) Damren fell into petty crimes doing short stints in prison eventually escalating to the present crime. (PCRIII: 76.)

An evidentiary hearing is required on this claim.

CONCLUSION AND RELIEF SOUGHT

Accepting the movant's factual allegations as true, this Court should reverse the trial court's ruling and remand this case for an

evidentiary hearing on the claims presented as well as the issue of timeliness.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished via electronic service to all counsel of record, on this 17th day of April, 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
Karin.Moore@ccrc-north.org

ELIZABETH SPIAGGI
Assistant CCRC-North
Florida Bar No.: 1002602
Elizabeth.Spiaggi@ccrc-north.org

CERTIFICATE OF COMPLIANCE

This is to certify that the Reply Brief of Appellant was generated in Bookman Old Style 14-point font and contains (not to exceed 10,000 words) 3,365 words excluding the title page, tables, certificates and signature block, pursuant to Fla. R. App. P. 9.045 and 9.210.

/s/ Karin L. Moore
KARIN L. MOORE