No. _____

IN THE

Supreme Court of the United States

FLOYD DAMREN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Does Florida's rule 3.851(d)(2)(A), which establishes a one year timeline (from the time that the evidence became discoverable) violate petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments when applied to newly discovered scientific evidence?

Parties To The Proceedings

Petitioner Floyd Darmen, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

RELATED PROCEEDINGS

Per Supreme Court Rule 14.1 (b)(iii), the following cases relate to this petition:

Trial:
Circuit Court of Clay County, Florida
State of Florida v. Floyd Damren, Case No. 1994-CF-0537
Judgment Entered: May 25, 1995

Direct Appeal:
Florida Supreme Court (No. SC86,003)
Floyd Damren v. State, 696 So. 2d 709 (Fla. 1997)
Judgment Entered: May 8, 1997 (affirming conviction and sentence)
Rehearing denied: July 8, 1997

Petition for Writ of Certiorari Denied:
Supreme Court of the United Stated (No. 97-6428)
Floyd Damren v. Florida, 522 U.S. 1054 (1998)
Judgment Entered: January 12, 1998

Initial Postconviction Proceedings:
Circuit Court of Clay County, Florida
State of Florida v. Floyd Damren, Case No. 1994-CF-0537
Judgment Entered: June 22, 2001 (denying motion for postconviction relief)

Florida Supreme Court (Nos. SC01-1469 & SC01-2808)
Floyd Damren v. State, 838 So. 2d 512 (Fla. 2003)
Judgment Entered: January 23, 2008 (affirming denial of postconviction relief and denying petition for habeas corpus)

Federal Habeas Proceedings:
District Court for the Middle District of Florida
William Greg Thomas v. James R. McDonough, Floyd Damren v. James R. McDonough, Case No. 3:03-cv-397-J-32
Thomas v. McDonough, 452 F. Supp. 2d 1203, 1214 (M.D. Fla. 2006)
Judgment entered: September 25, 2006 (Dismissed with prejudice)

District Court for the Middle District of Florida
Floyd Damren v. Sec. of the Fl Dep't of Corr., Case No. 3:03-cv-397-J-32JRK
Judgment Entered: January 20, 2009 (Dismissed with prejudice)

United States Court of Appeals for the Eleventh Circuit
Floyd Damren, v. State of Florida, Case No. 3:03-cv-397-TJC-LLL (Appeal No. 09-10965-P)

Judgment Entered: July 8, 2010 (remanding case in light of *Holland v. Florida*, 560 U.S. 631 (2010)

District Court for the Middle District of Florida
Floyd Damren v. Sec. of the Fl Dep't of Corr., Case No. 3:03-cv-397-J-32JRK
Judgment Entered: September 24, 2013 (Dismissed with prejudice)

United State Court of Appeals for the Eleventh Circuit
Floyd Damren v. Florida, 776 F.3d 816 (11th 2015)
Judgment Entered: January 21, 2015 (affirming dismissal of petition)

Petition for Writ of Certiorari Denied:
Supreme Court of the United Stated (No. 16-6498)
Floyd Damren v. Florida, 580 U.S. 1101 (2017)
Judgment Entered: January 23, 2017

First Successive Postconviction Proceedings:
Circuit Court of Clay County, Florida
State of Florida v. Floyd Damren, Case No. 1994-CF-0537
Judgment Entered: May 5, 2017 (denying motion for postconviction relief)

Florida Supreme Court (No. 2017-1080)
Floyd Damren v. State, 236 So. 3d 230 (Fla. 2018)
Judgment Entered: February 2, 2018

Petition for Writ of Certiorari Denied:
Supreme Court of the United Stated (No. 17-9493)
Floyd Damren v. Florida, 139 S. Ct. 181 (2018)
Judgment Entered: October 1, 2018

Second Successive Postconviction Proceedings:
Circuit Court of Clay County, Florida
State of Florida v. Floyd Damren, Case No. 1994-CF-0537
Judgment Entered: October 13, 2022 (denying motion for postconviction relief)
Motion for rehearing denied: December 5, 2022

Florida Supreme Court (No. SC2023-0015)
Floyd Damren v. State, 2023 WL 5968167 (Fla. 2023)
Judgment Entered: September 14, 2023
Rehearing Denied: November 20, 2023

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The decision of the Florida Supreme Court is reported at *Damren v. State,* No. SC2023-0015, 2023 WL 5968167 (Fla. Sept. 14, 2023), reh'g denied, No. SC2023-0015, 2023 WL 8013110 (Fla. Nov. 20, 2023), and is attached to this petition as Appendix A. Petitioner's Motion for rehearing was denied on November 20, 2023, and the denial is attached to this petition as Appendix C.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying relief on September 14th, 2023, and denied rehearing on November 20, 2023.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and, to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

INTRODUCTION

Floyd Damren had the misfortune of being born with Autistic Spectrum Disorder (ASD) before that was a well understood and identifiable disorder. He grew up socially isolated and awkward. He leaned on his strengths, his superior intelligence and his spatial awareness, to get him through and enlisted in the army at eighteen with the intention of serving in Vietnam. He served his country well, but like many Vietnam veterans had difficulties re-adjusting to civilian life when he returned.

While many veterans feel isolated upon their return, this was compounded in Mr. Damren's life as his Autism put yet another barrier between him and a Post-Traumatic Stress Disorder (PTSD) diagnosis. Mr. Damren relied heavily on alcohol and drugs and increasingly committed petty crimes. The murder for which he is on death row started as a burglary of a mine during which he was caught unaware by the victim. At the time of Mr. Damren's trial Asperger's (high functioning Autism Spectrum Disorder) was not being diagnosed in adults, and his counsel, the jury, and the court remained unaware that Mr. Damren's flat affect and seeming indifference was anything more than a stoic personality trait. There was no expert to explain to the jury how Mr. Damren's Autism Spectrum Disorder would have

his development of PTSD post-war. The jury did not hear how these disorders would have contributed to his inability to reason through the situation he found himself in on the night of the murder.

Today, ASD is better known and increasingly diagnosed in adults. Were Mr. Damren to receive a new trial, he would have the benefit of the medical community's increased understanding of this disorder and the jury and judge would be able to take these things into consideration. Unfortunatley, Florida's rigid rule on newly discovered evidence, makes no allowances for advances in the scientific community that cannot be precisely dated.

TRIAL AND DIRECT APPEAL

Mr. Damren was convicted of murder in a Clay County, Florida court. *Damren v. State*, 696 So. 2d 709, 710 (Fla. 1997). At trial Mr. Damren argued an intoxication defense, that he was too drunk to form the requisite specific intent. *Id*. at 711. His intoxication was also argued as mitigation during the penalty phase, but was rejected by the Court. Appendix H at 29-30. On direct appeal, the Florida Supreme Court noted that the prosecutor's comments on the law involving intoxication were incorrect, but found the error harmless. *Id.* at 712.

Mr. Damren was sentenced to death by the trial judge after his weighing of the aggravators and mitigators. *Id.* at 710. With the exception of giving "some weight" to Mr. Damren's good behavior while in jail, the court gave little to no weight to any of the mitigation presented. Appendix H at 30-32. The mitigation that was given no weight included, in part, that Mr. Damren suffered emotional deprivation and little

parental support as a child and Mr. Damren served his country in the U.S. Army and in Vietnam.[1] Appendix H at 30-32.

The trial judge found that four aggravating circumstances had been proven beyond a reasonable doubt, and that those aggravating circumstances were "sufficient" for the death penalty and not outweighed by the mitigation.[2]

PRIOR POSTCONVICTION PROCEEDINGS

Mr. Damren's initial state post-conviction motion was filed in 1998 and denied in 2001. In 2003, the Florida Supreme Court affirmed the denial of post-conviction relief. *Damren v. State*, 838 So. 2d 512, 521 (Fla. 2003). Mr. Damren's Habeas Petition was filed on November 24, 2003. It was dismissed as untimely because his counsel filed the petition late and the court found that equitable tolling did not apply. *Damren v. McNeil*, No. 3:03-CV-397-J-32, 2009 WL 129612 (M.D. Fla. Jan. 20, 2009). The United States Court of Appeals for the Eleventh Circuit remanded for the district court to analyze whether *Holland v. Florida*, 560 U.S. 631 (2010), applied in Mr.

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[1] The court gave "no weight" to the following mitigating circumstances: (1) Mr. Damren has held jobs and has performed well in his work; (2) Mr. Damren has been kind to this mother, sister, and brother; (3) Mr. Damren has shown patience and affection for children; (4) Mr. Damren has been a generous and devoted friend who has gone out of his way to do things for his friends; (5) and Mr. Damren maintained a relationship with Nancy Waldrup and treated Tessa Mosley like a daughter. The court gave "little weight" to the following mitigation: (1) the underlying burglary did not involve a preconceived plan to use weapons or violence; (2) Mr. Damren did not act alone; and (3) Mr. Damren had an alcoholic father and had an alcohol problem himself. Appendix H at 30-32.

[2] The aggravating circumstances found by the judge were: (1) Mr. Damren 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. Appendix H at 27-29.

Damren's case. *Id.*, ECF No. 137. The district court, noted that "[t]his is one of a number of troubling capital cases in this Court in which federal habeas counsel failed to file the federal habeas petition on time," but nonetheless found that *Holland* did not apply and re-imposed its order dismissing the § 2254 petition as untimely. *Damren v. Sec'y, Fla. Dep't Of Corr.*, No. 3:03-CV-397-J-32JRK, 2013 WL 5353246, at *1 (M.D. Fla. Sept. 24, 2013). The Eleventh Circuit affirmed. *Damren v. Florida*, 776 F.3d 816 (11th Cir. 2015).

Mr. 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 the Florida Supreme Court's opinion in *Hurst v. State*, 202 So. 3d 40 (2016.) The circuit court denied the motion. The Florida Supreme Court affirmed the lower court's ruling and all relief was denied. *Damren v. State*, 236 So. 3d230 (Fla. 2018), cert, denied, 139 S.Ct. 181 (2018).

INSTANT POSTCONVICTION PROCEEDINGS

In June of 2022 Mr. Damren filed a motion for postconviction relief brought under Fla. R. of Crim. P. 3.851 raising his 2021 diagnoses of Asperger's/Autism Spectrum Disorder (ASD) and Post-Traumatic Stress Disorder (PTSD). (App. H). The motion alleged that ASD was not historically diagnosed in adults. (Appendix H at 14). The trial court allowed further arguments and counsel outlined that Mr. Damren was evaluated by a psychologist at the time of trial in 1994 and was again evaluated by a neuropsychologist in 2017. (App. D at 8-10). He was set to be evaluated once again in 2020 but due to COVID-19 limitations he was unable to be

evaluated until 2021. (App. D at 10-11). It was during the 2021 evaluation that he was diagnosed with PTSD and ASD for the first time. A timely motion for postconviction relief was filed within a year of that evaluation. (App. H at 14). A copy of the expert's report was also filed with the lower court. (App. at J). The report included some history as to the classification of ASD and PTSD and explained the difficulties with diagnosing an adult with ASD. (App. at J).

The trial court summarily denied the motion as untimely without holding an evidentiary hearing. (App. B). On appeal, the Florida Supreme Court (FSC) upheld the ruling and reasoned that counsel should have recognized the "better-known characteristics" as defined in the Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 56 (5th ed., text rev., 2022). (App. A at 11-12).

Additionally, the FSC found *sua sponte* that both claims were facially insufficient. (App. A at 1). Mr. Damren filed a motion for rehearing noting that the trial court has the discretion to allow a facially insufficient motion to be corrected and that the issue of timeliness and due diligence usually requires an evidentiary hearing. (App. E). Rehearing was denied on November 20, 2023. (App. C).

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to recognize that the Florida Rule for bringing forward newly discovered evidence violates due process by disallowing the sentencer to consider relevant scientific mitigation.

The precedents of this Court establish that the sentencer in capital cases cannot be precluded from considering the circumstances of the offense as well as the characteristics of the person who committed the crime.

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

In *Lockett* this Court found that Ohio's statute violated the defendant's rights under the Eighth and Fourteenth Amendments as it ensured a death sentence for any person whose mitigating evidence did not fall into one of the factors listed in the statute, and "a death penalty statute must not preclude consideration of relevant mitigating factors." *Id* at 608.

This reasoning is found again in *Eddings v. Oklahoma*, where this Court held that the sentencer cannot "as a matter of law" refuse to consider mitigating evidence. 455 U.S. 104, 113 (1982). In *Eddings*, the trial judge stated that he could not consider the defendant's "violent background" as mitigation. *Id*. Part of the rationale underpinning this is the desire for consistency between capital sentences, and ignoring the individual characteristics of the offender creates a "false consistency." *Id* at 112.

This Court has also recognized that the jury's perception of the defendant is tied to his right to due process. *Riggins v. Nevada*, 112 S. Ct. 1810 (1992). In *Riggins* the defendant was forcibly medicated, which made his insanity defense less credible.

Id. This Court even acknowledged that "the precise consequences…cannot be shown from a trial transcript."

At Mr. Damren's trial there was no consideration of his combat induced PTSD or of his lifelong struggles with ASD. Neither the judge nor the jury heard about his deteriorating mental health upon his return from Vietnam. Nor did they hear about the social difficulties and constant anxiety that Mr. Damren lived with. Without the benefit of a diagnosis, he had no way to adequately cope with the ways in which ASD hindered him. The jury and the sentencer were additionally precluded from considering how these aspects of Mr. Damren's character would have affected him on the night of the crime. Additionally, unlike in *Riggins*, Mr. Damren did not have the benefit of the jury hearing from an expert who would have explained Mr. Damren's seemingly disinterested and detached demeanor.

The jury heard that on the night of the offense Mr. Damren and Mr. Chittam had been drinking and were burglarizing a local mine, when an employee came upon them. (Appendix H at 25). But the jury did not have the benefit of an expert, explaining that individuals with ASD are extremely sensitive to stress and will experience hyper-arousal under impending danger, especially when caught off guard. (Appendix G at 46). "He is primed to respond defensively and feels flooded with emotion when he perceives a potential for danger or is otherwise caught off guard." (Appendix G at 39).

Additionally, they heard Mr. Damren's defense at trial was intoxication, but were able to discount that as "one witness described the defendant's ability to drive

and maneuver his truck in a small area with no apparent difficulty." (Appendix H at 29). They did not hear that, like many individuals with ASD, Mr. Damren has certain areas where he has savant-like intelligence and that he is in the "genius range" for visual-spatial/visual-motor abilities, the very skills that correlate most precisely with one's driving ability. (Appendix G at 33).

In its sentencing order the Court separated mitigation into "Mitigation Relating to the Offense" and "Mitigation Concerning Mr. Damren's Life." (Appendix H at 29, 30). Both of these diagnoses are integral to understanding the circumstances of the crime as well as Mr. Damren's life history and they are being excluded based solely on the timing of the diagnoses.

In Florida a motion for postconviction relief must be filed within a year of the conviction becoming final, unless based on newly discovered evidence. A postconviction motion based on newly discovered evidence may be filed within one year of its discovery, when "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. of Crim. P. 3.851(d)(2)(A). The Florida Rule of Criminal Procedure 3.851(d)(2)(A) prohibits the sentencer from considering relevant mitigation if that mitigation is not brought within one year of when it becomes discoverable through due diligence.

This court has made clear that any avenues made available for redress "are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his

life or liberty contrary to the 14th Amendment." *Frank v. Mangum*, 237 U.S. 309, 327 (1915). The *Frank* opinion states that while an appellate process is not mandatory, where one is provided, it is "obvious" that it needs to comport with the Fourteenth Amendment. *Id*. "The state laws respecting crimes, punishments, and criminal procedure are, of course, subject to the overriding provisions of the United States Constitution." *Payne v. Tennessee,* 501 U.S. 808, 824 (1991).

Florida's seemingly simple exception for newly discovered evidence is frustrated when applied to medical diagnoses and other ever evolving sciences, which do not lend themselves to articulating a fixed date upon which they became discoverable. The trial court and the Florida Supreme Court found that the claims involving the PTSD and ASD diagnoses were untimely as they should have been filed within a year of "whenever it was that ASD became diagnosable in adults." Appendix A at 11. The Florida Supreme Court implies that there is a fixed date on which ASD became "diagnosable" in adults. However, the expert's report, which was filed with the lower court and included in the record available to the Florida Supreme Court, indicates just the opposite, that diagnosing ASD in high functioning children and adults remains a difficult task and many are still undiagnosed. Appendix J at 34. The denial disposes of the claims on the basis that they are untimely because Mr. Damren could have been diagnosed earlier through due diligence. By summarily denying the claims based on untimeliness, the sentencer is precluded from considering the mitigation.

The Florida Supreme Court's misapprehension of the simplicity of fixing a date upon which Mr. Damren's ASD became diagnoseable, makes clear that an evidentiary hearing is necessary to even determine the threshold issue of timeliness. Failing to provide for an evidentiary hearing in these instances, when the timeliness of a newly discovered evidence claim relies upon expert knowledge of the "diagnosability" of a condition, is a violation of due process. This misunderstanding of the way that scientific research and consensus works is an ongoing issue that repeatedly results in the denial of potentially meritorious petitions. Many denials in Florida have relied on this willful ignorance of scientific developments. *See, e.g.*, *Barwick v. State*, 361 So. 3d 785, 793-94 (Fla. 2023) (rejecting Eighth Amendment claim that relied on new scientific research as untimely); *Foster v. State*, 258 So. 3d 1248, 1253 (Fla. 2018) (same); *Branch v. State*, 236 So. 3d 981, 984-87 (Fla. 2018) (same); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (same).

What makes the violation so clear is the "inconsistency" this rule creates. An individual with ASD who was diagnosed in childhood, or prior to trial, would be able to place this mitigating circumstance in front of the jury/sentencer, but those like Mr. Damren who have the misfortune of being born when the understanding of ASD was still in its infancy are not receiving a sentence based on their individual characteristics.

Florida courts are in need of this Court's guidance and intervention in properly creating a rule of Criminal Procedure which does not impermissibly limit the sentencer's ability to consider relevant mitigating evidence.

CONCLUSION

Petitioner, Floyd Damren, requests that certiorari review be granted.

Respectfully submitted,

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