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

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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INDEX TO APPENDIX

Appendix A

Supreme Court of Florida

No. SC2023-0015

FLOYD WILLIAM DAMREN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

September 14, 2023

PER CURIAM.

Floyd William Damren, a prisoner under sentence of death, appeals the circuit court's order summarily denying his second successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

I. BACKGROUND

Damren was convicted of the 1994 first-degree murder of Don Miller and sentenced to death. *Damren v. State*, 696 So. 2d 709, 710-11 (Fla. 1997). This Court affirmed Damren's convictions and

sentences[1] on direct appeal. *Id.* at 714. We thereafter affirmed the denial of Damren's initial motion for postconviction relief and denied his habeas petition. *Damren v. State*, 838 So. 2d 512 (Fla. 2003). We also affirmed the denial of Damren's first successive motion for postconviction relief. *Damren v. State*, 236 So. 3d 230 (Fla. 2018).

On June 10, 2022, Damren filed his second successive motion, in which he raised two claims: (1) newly discovered evidence of his autism spectrum disorder (ASD) renders his death sentence unreliable; and (2) newly discovered evidence of his post-traumatic stress disorder (PTSD) at the time of the offenses renders his death sentence unreliable. Damren claimed that these diagnoses qualified as newly discovered evidence because ASD was not being diagnosed or recognized in adults at the time of his 1995 trial and his PTSD was undiagnosed because it was being "masked" by his previously undiagnosed ASD. His claims relied on a report of a 2021 neuropsychological evaluation by Marlyne Israelian, Ph.D., a

1. Damren was also convicted of armed burglary and aggravated assault arising out of the same incident, for which he was sentenced as a habitual felony offender to life imprisonment and ten years' imprisonment, respectively.

clinical psychologist, which resulted in the ASD and PTSD diagnoses.

The postconviction court summarily denied Damren's motion as untimely. The postconviction court found that there did not appear to be any dispute that Damren exhibited the symptoms of ASD prior to 2019, yet Damren provided no explanation why he could not have been diagnosed in 2019 or any time prior to 2021 through due diligence. The court noted that Dr. Israelian's report of her recent evaluation of Damren cited to articles related to adults with ASD that were published in 2019 and 2020. As to the PTSD diagnosis, the postconviction court assumed that it could have only been discovered in conjunction with Damren's ASD, but because Damren provided no explanation why he could not have been diagnosed with ASD in 2019 or any time prior to 2021, the postconviction court found that there was also no reason his PTSD could not have been discovered prior to 2021. This appeal followed.

II. ANALYSIS

We find no error in the postconviction court's summary denial of Damren's second successive motion for postconviction relief. Damren's claims were facially insufficient and untimely.

In *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), this Court set forth the test for a conviction to be set aside on the basis of newly discovered evidence as follows:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

(Alteration in original) (citations omitted); *see Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). Because Damren sought to vacate his death sentence rather than his conviction, the second prong of *Jones* "requires that the newly discovered evidence would probably yield a less severe sentence"—i.e., a life sentence—rather than an acquittal. *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (quoting *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013)). Thus, to raise a facially sufficient claim based on newly discovered evidence here, it was necessary for Damren to assert that there is evidence that was not and could not have been known by the use of due diligence at the time of trial and that the evidence is of such nature that it would probably produce a life sentence on retrial. *See Hutchinson*

v. State, 343 So. 3d 50, 53 (Fla. 2022) ("To be facially sufficient, a claim of newly discovered evidence must meet the two-part *Jones* test."), *cert. denied*, 143 S. Ct. 601 (2023).

Damren failed to allege the second prong of the *Jones* standard in both claims of his second successive motion. In his first claim, Damren alleged that evidence of his

> ASD and PTSD, discussed in Claim 2, coupled with his use of copious 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. 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.

Alleging that the asserted newly discovered evidence would have "made a life sentence a reasonable and merciful sentence" is a far cry from alleging that it would probably produce a life sentence on retrial. In his second claim, Damren alleged that "[h]ad the jury or the sentencing court heard [evidence that Damren has PTSD] there is a reasonable probability that the sentence would have been life." Alleging a reasonable probability of a life sentence at retrial is not equivalent to alleging a probable life sentence at a retrial and yields a facially insufficient claim.

The requirement in the second prong of the *Jones* test that the alleged newly discovered evidence be of such a nature that it would "probably" produce an acquittal on retrial is on par with the "more likely than not" standard of prejudice. *See Gaskin v. State*, 822 So. 2d 1243, 1247 n.3 (Fla. 2002) (noting that the "more likely than not" standard is "invoked when a defendant asserts entitlement to a new trial on the basis of newly discovered evidence"). The "reasonable probability" prejudice standard—which is used, for example, in assessing claims of ineffective assistance of counsel or the materiality of exculpatory information not disclosed to the defense by the prosecution—is a lower standard of prejudice than "preponderance of the evidence" or "more likely than not."[2] *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984); *see also Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (noting that *Strickland*'s "reasonable probability" prejudice standard "does not require a showing that counsel's actions 'more likely than not

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2. We have explained that "[a] 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' *Black's Law Dictionary* 1201 (7th ed. 1999), or evidence that 'more likely than not' tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000) (citing *American Tobacco Co. v. State*, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997)).

altered the outcome' "); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (explaining that when the "reasonable probability" of a different result standard of prejudice is employed, "[t]he question is not whether the defendant would more likely than not have received a different verdict"). In other words, while the "reasonable probability" prejudice standard means a probability higher than mere chance, it does not mean a probability greater than fifty percent; conversely, the "probably" prejudice standard (and, accordingly, the "more likely than not" standard) *does* mean a probability greater than fifty percent. Thus, because Damren failed to allege that he *probably* would be sentenced to life if the jury or trial court were told that he has ASD or PTSD, his claims of newly discovered evidence were facially insufficient. We therefore affirm the summary denial of relief.

We also affirm the summary denial because Damren has not established that his claims were timely. A motion for postconviction relief must be filed within one year of the date that the defendant's conviction and sentence became final. Fla. R. Crim. P. 3.851(d)(1). Damren's convictions and sentences became final when the United States Supreme Court denied certiorari review of his direct appeal

proceedings on January 12, 1998. *Damren v. Florida*, 522 U.S. 1054 (1998); *see* Fla. R. Crim. P. 3.851(d)(1)(B) ("For the purposes of this rule, a judgment is final . . . on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). The one-year time limit therefore expired in 1999. But there is an exception to the one-year time limit for motions alleging "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)(2)(A). "To be considered timely filed as newly discovered evidence, [a] successive rule 3.851 motion [i]s required to have been filed within one year of the date upon which the claim became discoverable through due diligence." *James v. State*, 323 So. 3d 158, 160 (Fla. 2021) (quoting *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008)), *cert. denied*, 142 S. Ct. 1678 (2022).

For purposes of this proceeding, we accept as true Damren's assertion that the 2021 ASD and PTSD diagnoses are the facts on which his claims are based. Damren claims that Dr. Israelian informed counsel on June 10, 2021, that he has ASD and PTSD and thus believes the claims were timely filed one year later on

June 10, 2022. As to timeliness, Damren argued that his ASD diagnosis "could not have been raised at the time of the initial trial in 1994 as autism, or Asperger's as it was known then,[3] was not diagnosed in adults." He argued that his PTSD could not have been diagnosed before he was diagnosed with ASD because "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"—in other words, the ASD "masked" the PTSD.

At the case management conference on his motion, Damren's counsel advised the postconviction court that Damren was evaluated in 1995 for "organic deficits" and in 2017 "for traumatic brain injury"

> [a]nd as [counsel] sort of spoke with friends of [Damren's] and got to see the photos he had taken in Vietnam, we sort of felt that there was no way that he had, you know,

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3. "Asperger syndrome, or Asperger's, is a previously used diagnosis on the autism spectrum. In 2013, it became part of one umbrella diagnosis of Autism Spectrum Disorder (ASD) in the Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5)." *What is Asperger Syndrome?*, Autism Speaks, https://www.autismspeaks.org/types-autism-what-asperger-syndrome (last visited June 5, 2023).

> served in Vietnam and not been affected by that experience. So we did hire another expert in 2020, and that was a neuropsych[ologist] with a military background. However, that was sort of at the height of COVID and that particular doctor refused to go to the prison in person, and they wouldn't allow him to evaluate Mr. Damren by Zoom.
>
> Now, sort of by happenstance, we had retained Dr. Israelian in another case and knew that she was willing to go see him in person, and so it was really just chance that we ended up with this particular expert evaluating him, who does have—and she does have a strong background in both PTSD and autism. So that was how the evaluation came about.

Damren also argued below that "[n]ot 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 and was able to diagnose him."

Instead of enlightening the postconviction court or this Court as to when ASD became diagnosable in adults so as to establish when Damren's ASD and PTSD became discoverable by the exercise of due diligence, Damren seems to argue that regardless of when ASD became diagnosable in adults, no amount of diligence could have led to his diagnoses before June 10, 2021, because ASD was only diagnosed at that time by "chance," "happenstance," or "serendipity"—due to the substitution of Dr. Israelian in place of the

doctor who was supposed to have evaluated Damren in 2020—and the PTSD could not be diagnosed until the ASD was diagnosed. We disagree.

Damren's ASD diagnosis became discoverable through due diligence whenever it was that ASD became diagnosable in adults. That date would have served as the triggering date for filing a claim based on newly discovered evidence of ASD within one year under rule 3.851(d)(2)(A). *Cf. Dillbeck v. State*, 304 So. 3d 286, 288 (Fla. 2020) ("Thus, the facts on which the claim is predicated—a diagnosis of ND-PAE and qEEG results—could have been discovered by the exercise of due diligence as early as 2013, when ND-PAE became a diagnosable condition."). Damren's claim that there was no indication to counsel that he suffered from ASD strains credibility. Dr. Israelian's report noted that Damren has exhibited since childhood a number of the better-known characteristics of ASD—at least some of which we would expect qualified capital counsel to have recognized—including difficulty recognizing different expressions of speech; a tendency to interpret things very literally; difficulty initiating and maintaining a reciprocal conversation; speaking extensively about his interests

regardless of their relevance to the task at hand or the interests of his audience; a flat affect; and difficulty maintaining eye contact. *See* Am. Psych. Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 56 (5th ed., text rev., 2022). In any event, counsel's ignorance does not result in a triggering date that manifests only when counsel decides to enlighten himself.

"It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim," *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020), but without credibly offering the date on which his claims became discoverable, Damren has failed to establish that they were timely raised. Thus, the postconviction court did not err in denying Damren's motion as untimely.

III. CONCLUSION

For these reasons, we affirm the circuit court's summary denial of Damren's second successive motion for postconviction relief.

It is so ordered.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Clay County,
Steven B. Whittington, Judge
Case No. 101994CF000537XXAXMX

Robert Friedman, Capital Collateral Regional Counsel, and Elizabeth Spiaggi, Assistant Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida,

for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida,

for Appellee

Appendix B

IN THE CIRCUIT COURT, FOURTH CIRCUIT, IN AND FOR CLAY COUNTY, FLORIDA

CASE NO.: 1994-CF-537

DIVISION: A

STATE OF FLORIDA

v.

FLOYD WILLIAM DAMREN,
Defendant.
_____/

ORDER DENYING SUCCESSIVE RULE 3.851 MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

This matter comes before the Court on Defendant's Successive Rule 3.851 Motion to Vacate Judgments of Conviction and Sentence (Motion) filed through counsel on June 10, 2022. The State filed its response to the Motion on July 19, 2022. The Court held a case management conference on August 9, 2022. Karin Moore and Elizabeth Spiaggi, Assistant Capital Collateral Regional Counsel, presented argument for Defendant. Steven Woods, Assistant Attorney General, presented argument for the State.[1] Upon consideration of the Motion, the State's response, the record, the arguments made at the case management conference, and the applicable laws, the Court concludes that an evidentiary hearing is not necessary on the Motion and denies the Motion for the reasons stated below.

In 1995, a jury found Defendant guilty of first-degree murder, armed burglary, and aggravated assault. Damren v. State, 696 So. 2d 709, 710 (Fla. 1997). The jury recommended unanimously that Defendant be sentenced to death for the murder. Motion Ex. B. The Court

[1] Ashley Terry, Assistant State Attorney, was also present.

ultimately sentenced Defendant to death for the first-degree murder, life in prison for the armed burglary, and ten years in prison for the aggravated assault. Motion Ex. B. Defendant appealed and the Florida Supreme Court affirmed Defendant's convictions and sentences in 1997. Damren, 696 So. 2d at 710. On January 12, 1998, the United States Supreme Court denied Defendant's petition for writ of certiorari. Damren v. Florida, 522 U.S. 1054 (1998).

Later in 1998, Defendant filed his first motion to vacate his convictions and sentences pursuant to Florida Rule of Criminal Procedure 3.851 asserting twenty-six claims for relief. See Damren v. State, 838 So. 2d 512 (Fla. 2003). The Court denied the motion and Defendant appealed. Id. The Florida Supreme Court affirmed the Court's denial of the motion in 2003. Id.

In 2017, Defendant filed another rule 3.851 motion asserting relief under Hurst v. Florida, 577 U.S. 92 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). See Damren v. State, 236 So. 3d 230 (Fla. 2018). The Court denied the motion and Defendant appealed. Id. The Florida Supreme Court affirmed the Court's denial of the motion on February 2, 2018. Id. The mandate issued on February 20, 2018.

In the instant Motion, Defendant alleges two claims for relief based on newly discovered evidence.[2] In claim one, Defendant argues that his sentence is unreliable because he suffered from autism spectrum disorder (ASD). In claim two, Defendant argues that his sentence is unreliable because he suffered from post-traumatic stress disorder (PTSD).

"To be facially sufficient, a claim of newly discovered evidence must meet the two-part Jones[3] test." Rogers v. State, 327 So. 3d 784, 787 (Fla. 2021).

> First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use

[2] The State argues that the Motion should be summarily denied for three reasons: (1) it is procedurally barred, (2) it is untimely, and (3) Damren cannot establish that the evidence would probably yield a less severe sentence.
[3] Jones v. State, 709 So. 2d 512 (Fla. 1998).

> of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Tompkins v. State, 994 So. 2d 1072, 1086 (Fla. 2008). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008).

Additionally, a newly-discovered-evidence claim brought in a successive rule 3.851 motion must meet the timeliness requirement. Generally, a rule 3.851 motion must be filed within one year after a defendant's judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Here, Defendant's judgment and sentence because final on January 12, 1998. See Fla. R. Crim. P. 3.851(d)(1)(B) ("For the purposes of this rule, a judgment is final ... on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed."). Therefore, Defendant had until January 12, 1999, to file a timely rule 3.851 motion. However, an exception is made for a newly-discovered-evidence claim brought in a successive rule 3.851 motion, if the motion is "filed within one year of the date upon which the claim became discoverable through due diligence." Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008).

Defendant asserts that evidence of his ASD could not be raised at his 1995 trial because ASD was not being diagnosed or recognized in adults at that time. Further, Defendant asserts that evidence of his PTSD could not be raised at his 1995 trial because his trial counsel had no reason to believe he had it and it was "masked" by his ASD.

Defendant's counsel asserts that she became aware of Defendant's ASD and PTSD diagnoses on June 10, 2021, after Dr. Isralian completed Defendant's evaluation, and because the Motion was filed within one year of her awareness, it is timely. The Court disagrees.

Defendant acknowledges in a footnote that the American Psychiatric Association Association's Diagnostic and Statistical Manual of Mental Disorders DSM-IV was in effect at the

time of his offense, and the criteria for ASD in DSM-IV is the same as the current version, DSM-V. Dr. Isralian's report provides that DSM-IV classified ASD under disorders diagnosed in infancy, childhood, and infancy; however, in 2013, the DSM-V was published and it embraced the understanding that although ASD was more likely to be recognized in childhood, it was a lifelong condition.

Dr. Isralian's report provides that "[i]t is only recently that psychologists and psychiatrists have begun diagnosing adults with ASD," but it does not state exactly when adults began to be diagnosed. The Court notes however that Dr. Isralian cites to a couple of articles related to adults with ASD published in 2019 and 2020. Thus, there is evidence that as early as 2019, adults were being diagnosed with ASD and it does not appear to be any dispute that Damren exhibited the symptoms of ASD prior to 2019. Damren provides no explanation why he could not have been diagnosed in 2019 or any time prior to 2021 through due diligence.

Further, PTSD has been a diagnosable condition since before Defendant's offenses.[4] Damren acknowledges that at the time of his trial, PTSD was a recognized disorder, but states PTSD could not have been raised "because the trial lawyers had no reason to believe [Damren] had it." Motion at 16. Moreover, Damren contends that "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." Motion at 15, 17.

Assuming Damren's PTSD could have only been discovered in conjunction with his ASD, the Court has already determined that Damren provides no explanation why he could not have been diagnosed with ASD in 2019 or any time prior to 2021. Thus, a PTSD diagnosis could have

[4] Dr. Isralian's report provides that a PTSD diagnosis was included in the DSM-III.

been discovered prior to 2021 as well.

Because Damren has failed to demonstrate that the Motion is timely, it must be denied. See Mungin v. State, 320 So. 3d 624, 626 (Fla. 2020) ("It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim."). Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Successive Rule 3.851 Motion to Vacate Judgments of Conviction and Sentence is **DENIED**.

This is a final order. Defendant shall have thirty (30) days from the entry of this order to take an appeal, by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Green Cove Springs, Clay County, Florida on this 13 day of October, 2022.

1994CF000537

e-Signed 10/13/2022 2:12 PM 1994CF000537
STEVEN B. WHITTINGTON
Circuit Judge

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10/14/2022

Floyd William Damren
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Appendix C

Supreme Court of Florida

MONDAY, NOVEMBER 20, 2023

Floyd William Damren,
Appellant(s)
v.

State of Florida,
Appellee(s)

SC2023-0015
Lower Tribunal No(s).:
101994CF000537XXAXMX

Appellant's Motion for Rehearing is hereby denied.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.

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Test:

SC2023-0015 11/20/2023

John A. Tomasino
Clerk, Supreme Court

SC2023-0015 11/20/2023

KC

Served:

CLAY CLERK
TIMOTHY ARTHUR FREELAND
PAMELA J. HAZEL
HON. MARK H. MAHON
ELIZABETH SPIAGGI
HON. STEVEN B. WHITTINGTON

Appendix D

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR CLAY COUNTY, FLORIDA.

CASE NO.: 10-1994-CF-537

DIVISION: A

STATE OF FLORIDA

-vs-

FLOYD WILLIAM DAMREN,

Defendant/

STATE OF FLORIDA)

COUNTY OF CLAY)

Proceedings before the Honorable Steven Whittington, Circuit Judge at the Clay County Courthouse, Green Cove Springs, Florida, on Tuesday, August 9, 2022, commencing at 5:00 p.m., as recorded by Angela M. Mathis, Registered Professional Reporter, Florida Professional Reporter, and Notary Public in and for the State of Florida at Large.

A P P E A R A N C E S

STEVEN E. WOODS, ATTORNEY AT LAW
Assistant Attorney General
Appearing on behalf of the State of Florida

KAREN MOORE and ELIZABETH SPIAGGI,
ATTORNEYS AT LAW
Assistant CCRC North
Appearing on behalf of the Defendant.

Also Appearing:
Ashley Terry, Esquire, Assistant State Attorney
Harriet Myrick-Jones, Esquire, Judicial Staff Attorney

- - -

P R O C E E D I N G S

5:00 p.m. August 9, 2022

THE COURT: Mr. Woods will be on Zoom, so I'm going to bring him in.

Mr. Woods...

MR. WOODS: Yes, sir. Good afternoon, Your Honor.

THE COURT: Good afternoon. I'm Judge Whittington. I've got Ashley Terry from the State Attorney's Office here in the courtroom with me, as well is Ms. Moore and Ms. Spiaggi from the Capital Case Office, and I've got our clerk and our staff attorney, Ms. Harriet Myrick.

We are here on a case management conference. Floyd Damren. Case Number 94CF537.

I've reviewed the Defendant's Successive Rule 3.851 Motion to Vacate Judgments of Conviction and Sentence, as well as the State's answer to Defendant's Successive Motion for Post-Conviction Relief.

I saw that the defense has filed a witness list and an exhibit list today. There's an attachment to the witness list. I did not have a chance to review that. It was filed today. That's the one thing I did not read, so...

MS. SPIAGGI: Your Honor, the attachment is one of our expert's reports which are required by the Rule to be attached.

THE COURT: Right.

MS. SPIAGGI: And we had previously filed our other expert's report back on July 5th. I hope you received that as well.

THE COURT: I did. I did.

MS. SPIAGGI: Okay. Good.

THE COURT: All right.

MS. SPIAGGI: Jump into it?

THE COURT: Let's do.

MS. SPIAGGI: I wanted to go over, briefly, the -- sort of the post-conviction history here.

The initial post-conviction motion was filed in 1998 by Mr. Morrow. In that motion he raised a claim of ineffective assistance of counsel based on counsel not giving medical records to Dr. Miller that would have allowed Dr. Miller to opine that Mr. Damren had possible brain damage due to a cocaine induced seizure.

That post-conviction motion was denied in 2003.

In 2003 that was the year that Mr. Damren's federal habeas should have been filed, but Mr. Morrow missed that deadline. When Mr. Morrow was appointed

to the bench in 2008, this case was not reassigned, so it actually sat until 2016 when the Attorney General moved to have our office appointed.

In 2017, we retained a neuropsych to evaluate Mr. Damren for a brain injury, as he had never actually been evaluated. The claim that we're bringing now is based on a diagnosis from a different neuropsych, Dr. Israelian, based on Asperger's or Autism Spectrum Disorder. And please forgive me, I am a bit clumsy with some of the medical jargon which I think just emphasizes the need for a hearing where you could hear from our expert for yourself.

The State has argued that the claim of Autism Spectrum Disorder is procedurally barred, as he's -- it's already -- Mr. Morrow already raised a claim based on a mental defect, I believe was the State's term. I believe they're using that term "mental defect" to sort of try and equate these two very distinct mental issues.

As I said, the previous claim was for ineffective assistance of counsel for not giving the records that would have allowed them to opine that he had brain damage due to the seizure, and the current claim is a newly discovered evidence claim based on his Asperger's diagnosis.

As it's a distinct claim, I think the prejudice would -- the analysis of the prejudice would also be distinct from the prior claim.

We'd also -- the Court also needs to look at the combined diagnoses of Asperger's and PTSD, as the expert has opined that the Asperger's has sort of a masking effect on the PTSD.

I think the prejudice in these claims is very different. The weight a jury would give to possible brain damage from drug use, I think, is very different from how a jury would view the mitigation of a congenital brain disease that has gone undiagnosed for Mr. Damren's -- basically his whole life.

Additionally, in the 3.851, we argued that it's not just a question of mitigation, but also the affect that Mr. Damren has because of Asperger's could have -- the way that the jury is going to interpret his demeanor during a trial is going to be very detrimental to him.

The State has also --

THE COURT: What evidence is there that they had that feeling about him in 1994?

MS. SPIAGGI: There's no evidence of that.

If you were to see Mr. Damren, I think you would

-- I'll leave that. There's no record evidence of that. But that has been raised in other cases. The courts have held that the way that a jury interprets someone's -- someone's mental illness can impact the jury's findings, and I believe we cite to that case in our 3.851 motion.

THE COURT: Can you cite anything in this record that there was that understanding by a jury or that affect -- feeling by a jury that he's acting in a way or has an affect in a way that is off pudding?

MS. SPIAGGI: No. I mean, we haven't moved to interview jurors. I don't think anyone ever happened to have feedback from jurors as to that.

THE COURT: Okay.

MS. SPIAGGI: The other argument that the State makes as to the Autism Spectrum Disorder diagnosis is that trial counsel and post-conviction counsel could have discovered this by due diligence before June of 2021, and the State correctly cites to the Jones test that: In order for a newly discovered evidence claim to be granted, the evidence must not have been known by the trial court or counsel at that time, and it must appear that the Defendant or defense counsel could not have known of it by use of due diligence.

As far as trial counsel's due diligence, the

State argued that having observed him as odd, and knowing his history, they should have investigated and done the proper testing for Autism Spectrum Disorder at that point.

It seems that the State is trying to suggest that trial counsel should have somehow foreseen or diagnosed Mr. Damren with autism, and then asked experts to do confirmatory testing. I mean, the trial counsel did retain experts. Someone from Dr. Kropp's office examined the Defendant. And there's a long established principle that counsel is entitled to rely on the evaluations that are done by qualified mental health experts, and that's State versus Sireci, 502 So.2d 1221 Florida 1987 and then Darling v. State 966 So.2d 366 Florida, 2007. I'm sorry. All those cites made me lose my train of thought.

As they had retained experts who evaluated him, I think that trial counsel really did all that they could, as far as seeking to find some sort of diagnosis.

Asperger's was only added to the DSM, which is the manual they use to diagnosis people, it was only added in 1994, and this trial occurred in 1995. So it's not something that trial counsel would have been

on notice of at all and it's not really even something that those doctors who don't specialize in developmental disorders would have been on notice for.

Prior to 1995, the criteria articulated for autism, more generally autism, were severe impairment in communication, lack of interest in people, and bizarre responses to the environment.

Mr. Damren is not nonverbal. He's high functioning. He has a high IQ. Back then, even now, it's really more of a disorder that's diagnosed in children, not in grown adults.

When we came onto the case in 2016, we did have him evaluated in 2017 by a neuropsychologist who was evaluating him for traumatic brain injury. I'm sorry. If I could go back to trial counsel just briefly.

THE COURT: Sure.

MS. SPIAGGI: So trial counsel had retained Dr. Kropp and Doctor -- I think it's Sherry Risch was the one who did the examination, and that's -- that report was actually entered at the first evidentiary hearing by Morrow. And it's interesting to see that report because she does note many of the symptoms of Asperger's, but it's just as if she doesn't have that

label for it at that time -- and I do have a copy of the report if you'd like to have it. It's a little hard to find in the record.

THE COURT: And this is a report introduced when?

MS. SPIAGGI: This was introduced at the evidentiary hearing by Mr. Morrow in 2001, but the assessment was done in 1995, pursuant to Mr. Chipperfield's investigation at the time of trial.

THE COURT: Okay.

MS. SPIAGGI: As far as our diligence in investigating, as I said, we did have him evaluated in 2017. After that evaluation, we have a continuing duty to investigate even after we filed a post-conviction motion. And as we sort of spoke with friends of his and got to see the photos he had taken in Vietnam, we sort of felt that there was no way that he had, you know, served in Vietnam and not been affected by that experience. So we did hire another expert in 2020, and that was a neuropsych with a military background. However, that was sort of at the height of COVID and that particular doctor refused to go to the prison in person, and they wouldn't allow him to evaluate Mr. Damren by Zoom.

Now, sort of by happenstance, we had retained Dr. Israelian in another case and knew that she was willing to go see him in person, and so it was really just chance that we ended up with this particular expert evaluating him, who does have -- and she does have a strong background in both PTSD and autism. So that was how the evaluation came about.

Now, as far as the PTSD, the State makes the same arguments, that there's already been a claim brought of a mental defect, and they've already found that there was no prejudice for the other -- for the possible brain damage.

Again, I think PTSD -- combat PTSD is very different mitigation from possible brain damage.

And again, as far as being untimely, Dr. Israelian would say that Asperger's is sort of the main presentation, and for anyone else to diagnosis him with PTSD would be very difficult if they didn't first diagnosis him with Asperger's, to sort of be able to see through that to the trauma.

In the past when we have talked to Mr. Damren about his service, he's been very sort of stoic. And we always interpreted that as stoicism, but come to find out it's -- that affect is part of his Asperger's. So I think that also lends to how it was

missed by other evaluations.

I guess in conclusion, I would say that we've presented the claim and even the procedural bars and the untimeliness I think would be better explained by a full hearing where you could hear about sort of the history of diagnosing autism and Asperger's and now back to what it's called currently: Autism Spectrum Disorder.

So I guess for those reasons, I would ask that you grant us an evidentiary hearing on those claims.

THE COURT: Okay. Thank you.

Mr. Woods, would you like to respond?

MR. WOODS: Yes, sir. Good afternoon. Good afternoon.

Your Honor, if I could begin with claim one and untimeliness.

As it goes first as we argued, the State respectfully maintains that they are trying -- the defense is trying to sort of back door this untimeliness into when, in fact, it was discovered, when the standard is when it became discoverable through the exercise of due diligence. And we would emphasize that it's just simply not true, that Mr. Damren's newly discovered evidence was undiscoverable until June of 2021.

As you heard the defense outline in their argument, that they did know that Mr. Damren -- there's all this stuff in the record, he was, well, an estranged child. Didn't connect. Had these one-sided relationships and one friend. This stuff having been known, it could have been investigated and it could have been discovered many years before 2021.

And of course, even if this allegation is true -- I'm sorry. Even if this contention is true that: Well, this wasn't diagnosed in the '90s. It was primary a disease that was -- excuse me, a condition. It was diagnosed in children. There, of course, was the previous motion in 2017 and it could have been raised in that.

The defense hasn't -- the defense really cannot -- we would respectfully point out, they can't say why they didn't raise this in 2017.

And the argument, that as the defense pointed out, we maintained this was previously litigated because it is a mental defect of some sort. Our response to what their defense says is that: Well, the Supreme Court said, essentially, that brain damage -- that there can be no prejudice shown with brain damage. And our response would be that, well,

brain damage is probably much worse than what they raise now, much worse than autism and must worse than PTSD.

When the Florida Supreme Court wrote this opinion in 2003, they noted, of course, Mr. Damren's high IQ. I think the data indicated his full scale IQ is something like in the 97 percentile. Something like the 99 with respect to mathematical and spatial reasoning.

The prongs, to put it as concisely as I can, the aggravators, the CCP, the HAC, and of course there's a prior violent felony and, of course, this murder took place during a burglary, all of that weighs very heavily and would respectfully maintain that the mitigation would be slight at best.

So, when the Florida Supreme Court went through this, they addressed each aggravating factor individually. And I'd also point out briefly that there's no reason stated that of course under I believe it's E2C4, that they have to state why Dr. Israelian would have been previously unavailable, and that's just not done.

And getting to the merits, what I was saying before about the Florida Supreme Court in 2003. They really -- that they went through each aggravating

factor and based on that, our position is even if they're correct about -- suppose that, you know, the State is wrong about untimeliness and suppose the State is wrong about procedurally barred. We maintain we still have to prevail under the Jones test because they could never show that it would be a probable Life sentence.

Even what the -- given the aggravators, I'll go through this as briefly as I can. The CCP -- and the Florida Supreme Court noted what happened. You have a poor victim begging for his life. The Defendant has this -- what the Florida Supreme Court said was a sufficient period of reflection, and this is a ruthless act done with consciousness intent.

So, of course, it's a situation where this guy is working and he gets hit with this metal plate and he says: Well, you know, please don't kill me. I want to go on vacation and fishing with my grandson. And Mr. Damren, you know, he takes his time, cases and ponders and thinks it over, and is quintessential, it is textbook cold, calculated, and certainly premeditated. Worse still, he's hit in the head no fewer than seven times with a metal pipe which leads nicely into the next aggravator, the HAC, which was given considerable weight.

Of course, the court noted the extensive injuries, his pain, his suffering. The fact that he knew he was going to die.

The Victim's skull was actually split open and his brain was exposed underneath.

Your Honor, he was hit ten times while still conscious. This was given considerable weight, as, of course, was the CCP, and the court also assigned some weight. The fact that it occurred during the second burglary of RCG and the Court also gave -- I believe it was little weight to the fact that there was a previous felony.

So, against everything I just mentioned, they say: Well, you know, Mr. Damren has been diagnosed with autism, according to Dr. Israelian. And in support of their position they say: Well, you know, because of this, he is -- he can be extremely stressed, stressed when surprised. But he wasn't surprised. He chose this confrontation. He confronted the Victim purposefully.

Now Mr. Damren complains to have been caught off guard in the very situation that he caused. He caused it and now he complains to have been caught off guard by it.

And then I suppose the next argument that they

make is that given the autism, Mr. Damren says: Well, I can't conform my behavior to the requirements of law. Yet during this incident, he had every opportunity to think about what he was doing it, to consider his actions at length.

The case he pondered, interestingly, even the other burglar said, you know: Please don't kill this man, and he did it. He bludgeoned him to death after having considered, early, what to do.

And they also say, well, you know, he was -- given the situation with the disorder, he's distressed by perceived danger. He was not the one in danger. During this -- there's this vicious and prolonged beating and, of course, only one person in danger.

As the Supreme Court noted in 2003, there are no deficiencies. No deficiency in impulse control. No deficiency in problem-solving. And no deficiency in cognitive flexibility.

So, the jury having heard all of the aggravation and having heard the -- I believe it was four nonstatutory mitigators, unsurprisingly, they voted unanimously for Death. And that -- given the big picture, the same thing would happen again with or without this evidence of -- with or without this

evidence of PTSD and autism.

The arguments with respect to PTSD are very similar, Your Honor, and I'll go through them as quickly as I can.

First, as far as untimeliness goes.

The defense says this could not have been previously raised because the trial orders had no reason to believe that Mr. Damren had PTSD.

Our position is they could have known by the exercise of due diligence. It would have been discovered. Of course, everyone knew he fought in Vietnam. This was presented as mitigation.

Having known about his service in Vietnam, this is something that they could have presented to the mental health experts and asked Mr. Damren about the PTSD. And any of his multiple experts, I believe there were three, could have discovered PTSD long before June of 2021. As I think the defense acknowledges. They say autism, well, that wasn't recognized in medical back in the '90s. But at the time of the trial, PTSD was recognized, and I believe that is in the -- I believe that's in the motion that the defense recognizes that.

We do make the same argument, which I won't repeat and make the same procedurally barred argument

with respect to PTSD and autism.

And lastly, a similar argument with respect to why Mr. Damren can't establish that he would have received a probable Life sentence.

The defense's argument was: Well, he was hyper-aroused and felt out of control.

Again, he never felt out of control. This is something that he, personally, caused. He sought out this confrontation. He critically approached and suddenly attacked.

So, this is a situation in which the Defendant was always in control. When the Victim is begging for his life -- he had to beg because he was not in control and the Defendant was.

And, of course, then you have the cold decision to beat this man to death after he has begged for his life.

So given just the brutality or ruthlessness, the malice of this crime, there is nothing, nothing, that would change with this newly discovered evidence. It would not change the sentence. And on that ground, neither prong that's shown is met. It is facially insufficient. It should be summarily denied.

Summarily denied for untimeliness, Your Honor. Summarily denied for being procedurally barred. And

summarily denied for facial insufficiency. Thank you. Nothing further.

THE COURT: All right. Thank you, Mr. Woods.

MS. MOORE: Your Honor, may I do the rebuttal, if I may.

THE COURT: You may.

MS. MOORE: And it will be brief.

I would point out that autism or Asperger's was not discoverable at the time of Mr. Damren's trial in 1995. At that point in time it had just been recognized in the DSM and it applied to children and people with very low IQs.

Mr. Damren has a very high IQ so he didn't fit that. And it wasn't raised in adults until many, many years later.

Mr. Damren had no State court counsel, in effect, from 2003 to 2016. The State filed a motion to have our office appointed because of that.

Mr. Damren languished on Death Row without any State court counsel. Mr. Morrow blew his federal habeas deadline in federal court.

In 2017, we filed a successor based upon what we relied upon with another neuropsych who was not trained in Asperger's or autism, and not particularly trained in PTSD, but we used him because we were

looking to see if Mr. Damren had traumatic brain injury and dementia. And that doctor advised that there was no traumatic brain injury.

It was just through happenstance and our duty to continue to investigate, which we always have, from his birth through current times, the circumstances of Mr. Damren's life. And we did that. We traveled the country interviewing people who served with Mr. Damren, and interviewing old friends, something that was not done by Mr. Morrow. And we certainly couldn't have done anything before we were appointed, obviously.

So we found these witnesses who spoke to things that we decided we needed to look again at what was going on with him, and we found Dr. Israelian. Exceptionally well-trained in Asperger's. And she didn't expect to find this, but she did. And she found it in June of 2020 and we filed within the one year that the Rule requires us to.

We filed within the one year of finding that he suffered from the Asperger's autism and the PTSD.

I think a hearing here would be very informative for everyone and for the Court, so that Dr. Israelian could explain how this autism was missed by experts over the years.

And as far as the Jones argument, the standard today in capital punishment is that only one juror has to be convinced that there's a reason for Life. And the aggravating circumstances explained by the State obviously existed, but mitigation can outweigh. And if a jury -- one juror could hear that this isn't -- this isn't a Vietnam vet that wasn't affected by this. This was a Vietnam vet who had Asperger's, by birth.

Dr. Israelian describes how it existed probably for generations before Mr. Damren was born. It's a congenital birth problem. It's a brain disorder at birth. A jury, or one juror, might have been convinced: Look. Yes. This was a horrific crime, but there is mitigation here.

Here's a Vietnam vet who served at a time when it was unpopular for Veterans, or for people, to serve, who had a brain defect from birth. And maybe that mitigation would have convinced one juror, so, it's different than what was offered before.

Couldn't have been discovered by Mr. Chipperfield back in the '90s, and our first expert didn't discover it. It just took -- just serendipitously finding an expert who happens to specialize in this and was willing to go into the

prison during the height of the pandemic, and that's how we discovered it, and we've timely filed it within the one year of discovery.

So we would ask the Court for an evidentiary hearing to flush out all those issues so that you could hear from Dr. Israelian and for others who served with Mr. Damren, and from the military expert, Mr. Ferrier, that we disclosed with his report.

So that's all I have in reply.

THE COURT: All right. I appreciate that.

MR. WOODS: Thank you.

THE COURT: I'm going to take it under advisement. Let me look through everything again, read some case law, but mostly I want to give it some thought before I make a decision.

MR. WOODS: Yes, sir.

THE COURT: I can obviously let you all know that by written order.

Do we need to set another case management conference?

MR. WOODS: Just a status conference.

THE COURT: A status.

MR. WOODS: Yes, sir.

THE COURT: What's the time frame, Harriett?

MS. MYERS: 90 days.

THE COURT: Within 90.

MS. MYERS: Uh-huh.

THE COURT: Let's do that now while we are all here.

Madam Clerk, do you have about A 90-day --

THE CLERK: Off the top of my head, Your Honor, can we do -- if you want midafternoon October 14th at 1:30.

(There was an off the record discussion regarding scheduling, after which the following occurred:)

THE COURT: Mr. Woods, October 14?

MR. WOODS: Yes. Yes, sir. Thank you.

THE COURT: All right. Hold on.

(There was an off the record discussion regarding scheduling, after which the following occurred:)

THE COURT: October 18th. That's Tuesday at 1:30.

Since it may not take as long, if I'm just making a ruling, maybe I'll call you up first and then last, unless you want to stay and see me in action again.

Mr. Woods, you missed all the excitement of a felony docket on a Tuesday afternoon.

(There was an off the record discussion, after which the following occurred:)

THE COURT: All right. So we'll set it at 1:30, October 18th, that's a Tuesday, for status.

And I'll give you a heads-up. Maybe we can talk about whether to call you up first or at the end of docket like we did today. Depends on, I guess, where I am and all that.

So, anything else before we conclude this hearing?

MS. MOORE: May we appear by Zoom for the status conference?

THE COURT: Of course. Of course. Everybody can appear by Zoom. I guess y'all will be here in person anyway.

So, get with Ms. Durham about that. And we'll do like we did with Mr. Woods. If it's at the end, you'll just be waiting by your computer and dial in when I will get to you.

(There was an off the record discussion, after which the following occurred:)

THE COURT: See you in October.

(Thereupon, the proceedings as to this defendant were concluded.)

* * *

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Angela M. Mathis, Registered Professional Reporter and Florida Professional Reporter, hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 27th day of October, 2022.

/s/ Angela M. Mathis
Angela M. Mathis, RPR, FPR
Registered Professional Reporter
Florida Professional Reporter

Appendix E

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IN THE SUPREME COURT OF FLORIDA

FLOYD W. DAMREN,
Appellant,

CASE NO. SC23-15
L.T. NO. 1994-CF-537

v.

STATE OF FLORIDA,
Appellee.
_____/

MOTION FOR REHEARING

Appellant, **Floyd W. Damren**, pursuant to Fla. R. App. P. 9.330, respectfully moves this Court to reconsider its decision of September 14, 2023, denying Mr. Damren's appeal. Rehearing is appropriate because this Court has overlooked or misapprehended points of fact from the record.

As a preliminary issue this Court has found that Appellant's Successive 3.851 was facially insufficient. This issue was not raised in front of the circuit court, and the circuit court never explicitly addressed the facial sufficiency of the motion. By addressing an issue that was not raised before the circuit court, this Court usurps the discretion of the circuit court.

The circuit court may not have considered the inexacting wording of appellant, "a far cry" from the appropriate language, but

rather a negligible departure unworthy of comment. Also the possibility exists that the circuit court found the wording to be sufficient. The circuit court has the discretion to allow the movant to amend a facially insufficient motion.[1] This Court has previously held that it is a denial of due process and an abuse of discretion not to allow an amended motion correcting any facial insufficiencies. *Bryant* at 819. If this Court disagrees with the circuit court's acceptance of the motion, the appropriate action would be to remand the case so that the circuit court can strike the motion and allow amendment.

In addressing the facial insufficiency this court comments that appellant's 3.851 motion sought only for his death sentence to be vacated. However, appellant's 3.851 motion also addressed Mr. Damren's conviction and argued that the jury's perceptions of Mr. Damren would have been affected by their interpretation of his flat affect. (PCR. 17-18). Appellant cited to *Riggins* in his 3.851, where

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[1] Fla. R. of Crim. P. 3.850 f(2) and f(3) codify this amendment process for initial motions on non-capital cases, but it is also common practice for motions filed under 3.851, including successive motions. *See Bryant v. State*, 901 So. 2d 810 (Fla. 2005); *Davis v. State*, 26 So. 3d 519, 527 (Fla. 2009). In

a defendant was forced to take medication, which affected his demeanor in court, and impacted the credibility of his insanity defense. *Riggins v. Nevada*, 112 S. Ct. 1810 (1992). In recognizing that a jury's *perception* of the defendant may impact the outcome of the trial the Supreme Court stated "the precise consequences...cannot be shown from a trial transcript." *Id.*

This court erred in upholding the denial of an evidentiary hearing. This court agrees that the motion is untimely by presuming that there is a fixed date on which Autism Spectrum Disorder became diagnosable in adults. Appellant is not attempting to obfuscate a known fact. There is no known fixed date. An evidentiary hearing is necessary for an expert to educate the court on the difficulties with diagnosing adults with Autism Spectrum Disorder. As cited in appellant's reply brief, many adults with Autism Spectrum Disorder still remain undiagnosed. (RB. 4). An evidentiary hearing is needed to better understand the feasibility and probability of when Mr. Damren reasonably *could* have been first diagnosed.

Appellant would ask this court to revisit *Nordelo* where this 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 v. State*, 93 So. 3d 178, 185 (2012) (cleaned up).

This court has made clear that the timeliness of these claims turns on when appellant could have been diagnosed with Autism Spectrum Disorder through due diligence. In order to assess this an evidentiary hearing is needed to better understand the feasibility and probability of when Mr. Damren reasonably could have been first diagnosed.

WHEREFORE, Mr. Damren respectfully requests this Court to grant rehearing and reconsider the opinion of September 14, 2023 denying Mr. Damren's appeal.

Respectfully submitted, this 29th day of September, 2023.

/s/ Elizabeth C. Spiaggi
ELIZABETH C. SPIAGGI
Assistant CCRC-North
Florida Bar No. 1002602
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day September 29, 2023, via electronic service to Timothy Freeland, Assistant Attorney General, at timothy.freeland@myfloridalegal.com and capapp@myflorida legal.com.

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Appendix F

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
IN AND FOR CLAY COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

FLOYD DAMREN,

Defendant.
_____/

Case No.: 1994-CF-537
CAPITAL CASE

STATE'S ANSWER TO DEFENDANT'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW, the State of Florida, by and through undersigned counsel, and hereby responds to Defendant Floyd Damren's successive motion for postconviction relief ("Motion") filed on June 10, 2022 by postconviction counsel, Ms. Karin L. Moore, Esquire, of the Capital Collateral Regional Counsel —North.

Defendant alleges two newly-discovered-evidence claims. In the first, Damren maintains that his sentence is unreliable because he suffers from autism spectrum disorder (ASD). In the second, he argues that his sentence is unreliable because he suffers from post-traumatic stress disorder (PTSD). This Honorable Court should summarily deny the motion because (a) each claim is procedurally barred, (b) each claim is untimely, and (c) Defendant cannot establish that a more lenient sentence is probable on retrial.

STATEMENT OF THE CASE

The facts of this case were set forth in Defendant's initial direct appeal as follows:

> Floyd W. Damren entered the grounds of R.G.C. Mineral Sands [R.G.C.], stole equipment, and told a friend: "There [is] ... some more good stuff down there I'd like to get." Several weeks later, after drinking beer with friends, Damren returned at night, May 1, 1994, with an accomplice, Jeff Chittam, and the two burglarized the electrical shop in the maintenance barn. As Chittam was taking a break, he was confronted by the duty electrician, Don Miller. Damren then snuck up behind Miller and struck him with a steel pipe. As Miller fell to the ground, he pleaded for mercy, saying he was going on vacation the next day and was taking his grandson fishing. Chittam too begged Damren not to hurt Miller any more. Damren paced the floor for a while, then proceeded to bludgeon Miller. As Damren was dragging Miller's body across the floor, the shift supervisor, Michael Knight, entered the building and hollered at Damren. Damren turned, looked Knight "dead in the eye," and came at him with the pipe. Knight ran from the building, yelling. Damren fled. Miller died later that night.
>
> Knight immediately identified Damren to police (Damren had lived in Knight's neighborhood since childhood) and Damren was arrested and charged with first-degree murder, armed burglary, and aggravated assault. At trial, the medical examiner testified that the victim, Miller, had been struck a minimum of seven times on the head and four on the body. Four of the head wounds would have caused unconsciousness and death, including one "chopping wound that basically goes from the base of the nose all the way across the head," breaking open the skull and exposing the lacerated surface of the brain underneath. Miller had numerous defensive wounds.
>
> Evidence against Damren included the following: Knight testified as to what he saw when he entered the maintenance building that night; several witnesses testified that Damren had made incriminating statements to them following the murder; and blood stains on Damren's pants matched Miller's blood. Chittam was not charged, nor did he testify-he became the victim of a separate homicide, in which Damren was charged.

> Damren relied principally on an intoxication defense, arguing that he had drunk several beers that day. He was convicted as charged. During the penalty phase, numerous relatives and friends testified on Damren's behalf. The jury voted unanimously for death and the judge imposed a sentence of death based on four aggravating circumstances, no statutory mitigating circumstances, and four nonstatutory mitigating circumstances.

Damren v. State, 696 So. 2d 709, 710-11 (Fla. 1997) (footnote omitted). The Florida Supreme Court affirmed his conviction and capital sentence. Id. at 712.

Postconviction Proceedings

In 1998, Damren filed his initial motion for postconviction relief, which this Court denied. He appealed and filed a Petition for Writ of Habeas Corpus. The Florida Supreme Court affirmed the ruling of this Court and denied the Petition. Damren v. State, 838 So. 2d 512, 521 (Fla. 2003).

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

APPLICABLE LEGAL STANDARDS

Summary Denial of Postconviction Claims and Evidentiary Hearing

When deciding whether to grant an evidentiary hearing on a Rule 3.851 motion, a postconviction court must base its decision on the written materials before it. The circuit court may summarily deny a postconviction claim if it is (1)

procedurally barred, (2) conclusively refuted by the record, (3) facially or legally insufficient as alleged, or (4) without merit as a matter of law. See Fla. R. Crim. P. 3.851(e)(1); Franqui v. State, 59 So. 3d 82, 101 (Fla. 2011).

The burden is on the defendant to establish a prima facie case, based upon a legally valid claim. Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006). Conclusory allegations are insufficient to meet this burden. Foster v. State, 132 So. 3d 40, 62 (Fla. 2013). In order for a motion to be facially sufficient, a defendant must allege specific legal and factual grounds that demonstrate a cognizable claim for relief. If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and must be summarily denied. See Davis v. State, 875 So. 2d 359, 368 (Fla. 2003).

In addition to establishing a prima facie case, a defendant must demonstrate the timeliness of his or her postconviction claim. Mungin v. State, 320 So. 3d 624, 625–26 (Fla. 2020). Generally, if a postconviction claim is filed more than one year after the judgment and sentence becomes final, it is untimely. There is an exception for a newly-discovered-evidence claim: such a claim is timely, if filed within one year of the date on which the evidence became discoverable by the exercise of due diligence. Id.

Further, since 2002, successive motions based on newly discovered evidence, Brady, or Giglio must provide the following:

> (i) the names, addresses, and telephone numbers of all the witnesses supporting the claim;

(ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;

(iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and

(iv) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available.

Fla. R. Crim. P. 3.851(e)(2)(C).

CLAIM I: NEWLY DISCOVERED EVIDENCE (AUTISM SPECTRUM DISORDER)

To be facially sufficient, a newly-discovered-evidence claim must meet the two-part Jones test: (a) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (b) the newly discovered evidence must be of such a nature that it would probably produce a less severe sentence on retrial. Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); Hildwin v. State, 951 So. 2d 784, 797 (Fla. 2006).

Further, it is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. Rivera v. State, 187 So. 3d 822, 832 (Fla. 2015). Generally, postconviction claims in capital cases are untimely if filed more than a year after the judgment and sentence became final. Fla. R. Crim. P. 3.851(d). For an otherwise untimely claim to be considered timely as newly discovered evidence,

it must be filed within a year of the date on which the claim became discoverable through the exercise of due diligence. Reed v. State, 116 So. 3d 260, 264 (Fla. 2013).

Claim I should be denied because (a) each claim is procedurally barred, (b) each claim is untimely, and (c) Defendant cannot establish that a more lenient sentence is probable on retrial.

a. Defendant's claim is procedurally barred.

An issue litigated in a prior postconviction motion cannot be reraised in a successive motion. See Fla. R. Crim. P. 3.851(e)(2); Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007). Because Damren has already litigated whether prejudice can be established with evidence of a mental defect, Claim I is procedurally barred.

On appeal from this Court's denial of the initial motion for postconviction relief, the Florida Supreme Court emphasized "the strong aggravating factors,"[1] characterized the mitigation from Damren's mental problems, if any, as "minimal," and concluded that Defendant could not establish prejudice given that the fairness and reliability of his trial were not affected. Damren, 838 So. 2d at 517. Notably, the court concluded that Damren, whose IQ is "high average," has no deficiency in impulse control, problem solving, or cognitive flexibility. Id. Because this issue has been litigated, it should be summarily denied.

[1] The aggravating factors were the following: CCP, HAC, prior violent felonies, and the fact that the crime was committed during the course of a burglary.

Damren asserts that his newly discovered evidence "could not have been raised at the time of the initial trial in 1994 as autism . . . was not diagnosed in adults." (Defendant's Motion-14). Even if autism were undiagnosable in adults in 1994 and when Defendant filed his initial 3.851 motion, Claim I would still be barred because it could have been raised in Defendant's 2017 successive motion for postconviction relief. Fla. R. Crim. P. 3.851(e)(2)(B). The State respectfully points out that Damren has not and cannot state the reason(s) that he did not raise Claim I in his 2017 motion. Hill v. State, 921 So. 2d 579, 584 (Fla. 2006) (holding that Hill's postconviction claim was procedurally barred because he provided no reason that he could not have raised this claim in his previous successive motion for postconviction relief).

Lastly, Damren has not provided "a statement of the reason[s] . . . the witness . . . was not previously available." Fla. R. Crim. P. 3.851(e)(2)(C)(iv). Despite being based upon newly discovered evidence, Defendant's claim omits a statement of the reason(s) that Dr. Israelian was previously unavailable. For this reason too, Claim I should be denied.

b. Defendant's claim is untimely

Generally, postconviction claims in capital cases are untimely if filed more than a year after the judgment and sentence became final. Fla. R. Crim. P. 3.851(d). For an otherwise untimely claim to be deemed timely as newly discovered evidence, it must be filed within a year of the date on which the claim

became discoverable through the exercise of due diligence. Reed, 116 So. 3d at 264. Defendant's motion (filed June 10, 2022) is untimely because the newly discovered evidence would have been discovered long before June of 2021, if Damren had exercised due diligence.

Attempting to establish timeliness, Damren relies on when his lawyer in fact discovered the evidence.[2] However, a defendant cannot establish timeliness based on when the evidence was actually discovered; rather, he or she must establish (a) when the evidence became discoverable through the exercise of due diligence and (b) that the motion was filed within one year thereof. Reed, 116 So. 3d at 264. It is plainly untrue that Damren's newly discovered evidence was undiscoverable until June of 2021.

By the exercise of due diligence, trial counsel and postconviction counsel could have discovered Damren's autism before June of 2021. Trial counsel had reason to have Defendant tested for autism. Damren was "a strange, odd child" who did not connect with his siblings, had "always one-sided" relationships, and had "only one friend . . . ." (Defendant's Motion-5, 8). Trial counsel should have investigated Damren's history, learned the foregoing, informed his multiple experts thereof, and had the proper specific testing done. Either of the two experts who evaluated Damren before trial could have tested him for autism. Damren, 838 So.

[2] Defendant's "counsel was informed on June 10, 2021 that Mr. Damren suffered from ASD and PTSD" and the "claim [was] filed within the one-year deadline . . . ." (Defendant's Motion-14).

2d at 517. Further, a third expert, a Dr. Miller, could have examined Defendant and been provided with his medical records. Id. However, trial counsel made a strategic decision that Dr. Miller would neither interview Defendant nor review his medical records. Id.

Having had three experts who could have diagnosed him with autism, Defendant cannot establish that the newly discovered evidence did not become available until June of 2021. Id. at 521. Had the defense exercised due diligence, it would have learned of the newly discovered evidence many years ago. Damren's evidence is not newly discovered merely because he has been reexamined by a different expert. Asay v. State, 210 So. 3d 1, 23 (Fla. 2016). ("Merely obtaining a new expert to review the same records does not create newly discovered evidence."); Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007) ("[T]his Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence."). Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2017) (holding that a report cannot be newly discovered evidence because the information therein was previously available).

Because the burden of establishing timeliness is on the Defendant and he cannot meet it, the instant motion is untimely and therefore should be summarily denied. Mungin, 320 So. 3d at 625–26.

c. Defendant cannot satisfy either prong of Jones.

Where a defendant seeks to vacate a death sentence, he or she must demonstrate that the newly discovered evidence would probably yield a less severe sentence. Jones, 591 So. 2d at 915; Hildwin, 951 So. 2d at 797. Because Damren cannot establish that evidence of autism would yield a life sentence, he cannot satisfy the second prong of Jones. Accordingly, his motion is facially insufficient and therefore should be summarily denied.

Even with the newly discovered evidence, Defendant would not receive a life sentence. The four aggravating factors (CCP, HAC, prior violent felony, and the murder having been committed during a burglary) weigh heavily, and, even with the newly discovered evidence, Damren's mitigation is de minimis.[3]

With respect to the CCP aggravator, the trial court emphasized (a) that the victim begged for his life, (b) that Damren had "a sufficient period of obvious reflection," and (c) that the murder was "ruthless and done with conscious intent . . . ." (Defendant's Motion-Attachment B, Page 33). Begging for his life, the victim mentioned his plan to take his grandson fishing, which gave Damren pause. Defendant paced and pondered the victim's fate. During his "period of . . .

[3] The trial court concluded that the aggravating circumstances "clearly outweigh[ed]" the "little, if any mitigation." (Defendant's Motion-Attachment B, Page 33). The trial court also gave some weight to Damren's good behavior in jail and little weight to the facts that (a) he did not act alone and (b) he did not have a sophisticated plan to use violence. (Defendant's Motion-Attachment B, Page 29). The trial court gave no weight to the following: Defendant's alcohol impairment, his bad childhood, his kindness to family, his kindness to children, his generosity to friends, and his military service. (Defendant's Motion-Attachment B, Page 29).

reflection," Damren decided to murder the victim and shortly thereafter bludgeoned his skull with a metal pipe no fewer than seven times.

With respect to the HAC aggravator, the trial court emphasized the victim's extensive injuries (including many defensive wounds), his pain and suffering, his fight for his life, his knowledge of his impending death, and the murder weapon: a heavy, metal pipe, which the trial court characterized as a "particularly atrocious and cruel instrument of death and torture." (Defendant's Motion-Attachment B, Page 33). With that instrument, Damren struck the victim's skull causing a "chopping wound . . . go[ing] from the base of the [the victim's] nose all the way across the head." Damren, 838 So. 2d at 514. So ferocious and forceful was Damren that he "br[o]ke[] open [the victim's] skull and expos[ed] the lacerated surface of [his] brain underneath." Id. In addition to cracking the victim's skull and exposing his brain, Damren struck the victim elsewhere on his body four times. While conscious, the victim was bludgeoned *at least ten times*. (Defendant's Motion-Attachment B, Page 26). He suffered numerous contusions, extensive bruising, a fractured nose, and other injuries. (Defendant's Motion-Attachment B, Page 26).

This Court gave considerable weight to both the CCP and the HAC aggravators. (Defendant's Motion-Attachment B, Page 28-29). Some weight was given to the fact that the murder occurred during a burglary —Damren's second burglary of R.G.C. (Defendant's Motion-Attachment B, Page 27). Little weight

was given to the fact that Damren had been previously convicted of a felony involving the threat of force against a person. (Defendant's Motion-Attachment B, Page 27).

Against the heavily weighted aggravating factors, Damren would present ASD as mitigation, and it would be given little to no weight. Damren complains that he experiences extreme distress when "caught off guard or surprised . . . ." (Defendant's Motion-10). Yet, Damren was not surprised. Defendant chose to confront the victim. Only the victim was surprised —surprised by Damren's furtive and cowardly approach, surprised by being repeatedly bludgeoned with a heavy metal pipe, and surprised by having his skull split open and his brain tissue seep therefrom. Unlike the victim, Damren was not surprised. Damren chose —for a second time— to bulgarize R.G.C., and he purposefully caused the confrontation by which he now claims to have been "caught off guard." (Defendant's Motion-10). Defendant's "high[] sensitiv[ity]" to stress during the commission of his crimes has nothing to do with autism.

The State respectfully disagrees with Defendant's contention that the ASD diagnosis lends credence to the notion that Damren "could not conform his conduct to the requirements of law . . . ." (Defendant's Motion-10). Damren's actions were considered at length; he had every opportunity to conform his conduct to the requirements of law. Contrary to what Defendant maintains, he did not have an "impaired . . . ability to recognize and act on available alternatives." (Defendant's

Motion-11). During his "period of . . . reflection," Damren obviously was aware of the available alternative (*not* bludgeoning the victim to death). Having thought it through, Damren decided against the alterative and beat the victim to death.

Additionally, Damren complains that he is distressed by perceived danger. (Defendant's Motion-10). But there was no perceived danger for Damren. Only the victim perceived danger. After Damren gutlessly snuck up behind the victim and subjected him to a prolonged and vicious beating, the latter was helpless and the former was not imperiled in the least. During the attack, the victim, for a time, remained conscious; he begged for his life, attempting —unsuccessfully— to find a scintilla of rectitude or mercy in Damren. Knowing that he was safe, Damren paced and pondered the victim's fate. Having heard, considered, and rejected multiple pleas for mercy, Damren —who has no deficiency in problem solving, impulse control, or cognitive flexibility— saw fit to beat the victim to death with a metal pipe. Damren, 838 So. 2d at 517.

Unsurprisingly, the jury voted unanimously for death, and the judge imposed death. Id. The same would happen with or without Damren's newly discovered evidence. Given "the total picture" and "all the circumstances of the case," another death sentence is all but certain. Hildwin, 141 So. 3d at 1184. Considering the heavily weighted aggravating circumstances and the lack of mitigation from the newly discovered evidence, Damren cannot establish a probable life sentence on

retrial.[4] Given the foregoing, Damren's motion is facially insufficient and therefore should be summarily denied.

CLAIM II: NEWLY DISCOVERED EVIDENCE (POSTTRAUMATIC STRESS DISORDER)

Like Claim I, Claim II should be denied because (a) each claim is procedurally barred, (b) each claim is untimely, and (c) Defendant cannot establish that a more lenient sentence is probable on retrial.

a. Defendant's claim is procedurally barred.

For the reasons stated in Claim I, Claim II is procedurally barred.

b. Defendant's claim is untimely

For the reasons stated below and in Claim I, Claim II is untimely. Damren acknowledges that at the time of his trial PTSD was a recognized disorder but maintains that Claim II could not have been previously raised "because the trial lawyers had no reason to believe [Defendant] had [PTSD]." (Defendant's Motion-17).

However, trial counsel or postconviction counsel would have discovered Damren's PTSD before 2021, if they had exercised due diligence. Trial counsel

[4] Nor can Defendant meet the first prong of Jones. His assertion (that at the time of his trial, autism was not diagnosed in adults) is insufficient to establish that he could not have known of the ASD before trial. Defendant's atypical behaviors could have been observed by his lawyers, and he could have been evaluated for ASD. The defense cannot establish that it could not have known of the newly discovered evidence by the exercise of due diligence. Jones, 709 So. 2d at 521.

knew that Damren fought in the Vietnam War and presented Defendant's military service as mitigation. (Defendant's Motion-Attachment B, Page 32). Given what Damren's trial counsel knew, they should have informed the mental-health experts of Defendant's military service and had Damren evaluated for PTSD. As previously stated, Damren was evaluated by multiple experts before trial, and he had a third expert, who —by trial counsel's strategic choice— did not interview him or review his medical records. Damren, 838 So. 2d at 517. Any of Defendant's three experts could have discovered the PTSD years before June of 2021. Jones, 709 So. 2d at 521. Because the burden of establishing timeliness is on the Defendant and he cannot meet it, the instant motion is untimely and therefore should be summarily denied. Mungin, 320 So. 3d at 625–26.

c. Defendant cannot satisfy either prong of Jones.

Where a defendant seeks to vacate a death sentence, he or she must demonstrate that the newly discovered evidence would probably yield a less severe sentence. Jones, 591 So. 2d at 915; Hildwin, 951 So. 2d at 797. Because Damren cannot establish that evidence of posttraumatic stress disorder would yield a life sentence, he cannot satisfy the second prong of Jones. Accordingly, Claim II is facially insufficient and therefore should be summarily denied.

Even with the newly discovered evidence, Defendant would not receive a life sentence. Even with evidence of ASD and PTSD, the mitigation is de minimis. As previously argued, this Court was correct to give considerable weight to the

CCP and HAC aggravators. Against the heavily weighted aggravating factors, Damren would present PTSD as mitigation, and it would be given little or no weight.

Damren maintains that his posttraumatic stress disorder rendered him "emotionally reactive" and "hyper-aroused" because he was surprised and felt out of control. (Defendant's Motion-16). But, as previously argued, Damren was not surprised, and the situation was never out of his control. The confrontation between Defendant and victim occurred only because the former purposefully caused it. Seeking confrontation, Damren furtively approached and suddenly attacked, at which time the situation was not out of Damren's control. During the prolonged and vicious beating, Damren remained in control. The victim could only beg for his life, and Defendant, while in complete control, coldly decided to bludgeon the victim to death.

Damren was neither "emotionally reactive" nor "hyper-aroused." Damren's actions were considered and deliberate. Knowing that he was in control, Defendant meandered and carefully weighed his options. Damren considered the victim's plea for mercy and Chittam's pleas on the victim's behalf. The State reiterates that the murder occurred only after a "sufficient period of . . . reflection." The State further reiterates that Damren has no deficiency in problem solving, impulse control, or cognitive flexibility. Damren, 838 So. 2d at 517. Further, given the prolonged nature of the attack and the number and severity of the blows, the murder was

clearly not impulsive. Having deliberated at length and concluded that he was going to kill the victim, Damren bludgeoned him approximately a dozen times. The attack was so savage that the victim's skull was split and his brain tissue exposed. Without question, Damren's actions were calculated and purposeful; they have nothing to do with posttraumatic stress disorder.

Given the nature of the crime, the sentence was predictable, and nothing would change with Damren's evidence of PTSD. Considering the totality of the circumstances (especially the HAC and CCP aggravators), Damren cannot establish a probable life sentence on retrial.

Lastly, PTSD was recognized at the time of trial. (Defendant's Motion-17). Having investigated Damren's background and knowing of his military service during the Vietnam War, Defendant could have been evaluated for PTSD before trial. The defense cannot establish that it could not have known of the newly discovered evidence by the exercise of due diligence. Jones, 709 So. 2d at 521. Damren meets neither prong of Jones.

Accordingly, Damren's motion is facially insufficient and therefore should be summarily denied.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests that this Honorable Court summarily deny the instant motion.

ASHLEY MOODY
Attorney General

/s/ *Steve Woods*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing State's Answer to Defendant's Second Successive Motion for Postconviction Relief has been furnished via the Florida E-Filing portal to all counsel of record, this 20th day of July of 2022.

ASHLEY MOODY
Attorney General

/s/ *Steve Woods*
STEVEN WOODS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0092613

Appendix G

MARLYNE K. ISRAELIAN, PH. D.
Clinical Psychologist

1145 Sheridan Road, N.E., Atlanta, Georgia 30324
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FORENSIC NEUROPSYCHOLOGICAL ASSESSMENT REPORT

NAME: Floyd William Damren
DATE OF BIRTH: May 27, 1951
PLACE OF BIRTH: Portsmouth, Virginia
AGE: 71
RACE: Caucasian
EDUCATION: GED and some community college classes DATES OF EVALUATION: May 25, 2021 & May 26, 2021; August 2, 2021 & August 6, 2021
PLACE OF EVALUATION: Union Correctional Institution, Raiford, Florida

Floyd William Damren is a 71-year old death-sentenced Vietnam Veteran, currently housed on death row at the Union Correctional Institution in Raiford, Florida. On May 17, 1995, he was convicted of first-degree murder, armed burglary, and aggravated assault in connection with the May 1994, burglary of the R.G. C. Mineral Sands Mine and the murder of Don Miller, a mine employee who happened upon Mr. Damren and his accomplice, Jeff Chittam as they were burglarizing the electrical shop in the maintenance barn. A jury of his peers recommended a death sentence by unanimous vote. Judge Robert Foster sentenced Mr. Damren to death on May 25, 1995. I was hired by Mr. Damren's legal team in April 2021 to conduct a comprehensive neuropsychological evaluation of Mr. Damren in preparation for an impending clemency board hearing. This report was generated as a summary of my findings. The opinions expressed herein are based on procedures and instruments routinely used by professionals in my field and are formed to a reasonable degree of scientific certainty. I reserve the right to change my conclusions or make addendums as necessary should additional information come to light.

In conducting this evaluation, I focused on Mr. Damren's developmental history, clinical interview, behavioral observations, neuropsychological testing, review of documents detailing his military and civilian history, records from the department of corrections, court transcripts, other third-party sources of information, statements and declarations made by family members and military personnel who served with Mr. Damren in Vietnam, and a review of relevant research literature.

It is my professional opinion, based on my comprehensive evaluation of Mr. Damren, diagnostic guidelines set in the current American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V-TR), and the latest research in the field, that Mr. Damren suffers from Autism Spectrum Disorder (ASD) and Posttraumatic Stress Disorder (PTSD).

ASD is neurodevelopmental disorder that 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. It was not until we recognized that children with average to superior intellectual abilities, and seemingly normal language development also exhibited marked, pervasive and persistent impairments in socio-emotional functioning and restricted and repetitive behaviors and interests did we realize this was a disorder that fell on a spectrum that impacted people with a broad range of intellectual abilities across the entire lifespan. But as our understanding of this disorder grew, it became evident that there were many undiagnosed adults with ASD.

ASD is a significant risk factor for developing PTSD in response to traumatic life events. ASD also alters the manner and course of a person's trauma response. Because PTSD manifests differently in ASD than in normally developing populations, we realized that the

practice of using diagnostic criteria based upon a neurotypical population was not valid. Just as we failed to identify, diagnose and treat adults whose behaviors fell on the autism spectrum, we also failed to identify, diagnose, and treat PTSD in that same population.

Mr. Damren is representative of this population in both respects. The scientific knowledge necessary for accurate diagnoses was unfortunately unavailable at the time of his trial and sentencing. That knowledge and those diagnoses could have significantly impacted the outcome of his trial, precisely because ASD and PTSD contribute to disordered thinking and mood, which in turn contribute to impaired judgement and maladaptive behavior. More specifically, both of these disorders interfere with a person's ability to accurately assess and appropriately respond to potential threat.

To that end, it is my opinion that on the night of Mr. Miller's tragic death, Mr. Damren's behavior was a function of exaggerated fear which triggered a conditioned behavioral response learned during the course of his military service in Vietnam. Mr. Damren misjudged both the situation and appropriate course of action in response to being ambushed by enacting a protocol aimed at neutralizing mortal threat.

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.

Qualifications

I am a clinical neuropsychologist licensed in Georgia by the Georgia Board of Psychology Examiners. I earned a Bachelor of Science degree in Psychology from

McGill University in Montreal, Canada, and a Doctor of Philosophy degree in Clinical Psychology from Emory University in Atlanta, Georgia.

As part of the requirements for my doctoral degree I completed internship training at the University of Alabama in Birmingham, specializing in child development and assessment, and neuropsychological evaluation. My postdoctoral years were spent at the Regents Center for Learning Disorders at Georgia State University where I further specialized in the assessment of learning disabilities, attention deficits hyperactivity disorder, emotional disorders, and developmental and acquired cognitive deficits in adults and children.

Currently I participate in the training of doctoral students at Emory University as an Adjunct Assistant Professor of psychology. In my private practice, I diagnose and treat patients for a variety of psychological problems and mental illnesses and conduct neuropsychological evaluations for the purpose of informing academic instruction and psychological intervention. My particular areas of expertise are neurodevelopmental disorders, head injury, and mood and anxiety disorders in children and adults.

I have conducted hundreds of evaluations of children, adolescents and adults with a broad range of developmental disorders, neurological conditions, genetic diseases, emotional problems, and head injuries for the purpose of psychological intervention and academic/vocational programing.

In my capacity as a forensic psychologist, I conduct neuropsychological evaluations to inform the court in matters pertaining to competence to waive Miranda rights, competence to stand trial, legal culpability, mitigation and sentencing. I have been retained as an expert in developmental neuropsychology in Georgia, Florida, Alabama, Kentucky, South Carolina, North Carolina, Indiana, and Arizona. A copy of my resume is attached herein.

Confidentiality Warning

I explained the nature and purpose of a forensic neuropsychological evaluation to Mr. Damren prior to this evaluation. I informed him that the usual relationship between psychologist and patient did not exist in this circumstance and that the information I obtain during the course of my evaluation is not private or confidential and may be shared verbally and in writing with his attorneys in preparation for his clemency hearing. He was informed that he had the right to refuse to participate in this evaluation at any point during this process. Mr. Damren acknowledged and appeared to understand those conditions and was a willing participant in the process.

BACKGROUND AND DEVELOPMENTAL HISTORY

Floyd William Damren is the eldest of three children born from the union of Ruby Welch and Glenwood Damren. Multiple accounts suggest that Ruby and Glenwood's marriage was highly dysfunctional. They separated and reunited multiple times over the course of their relationship, ultimately divorcing when Mr. Damren was 23-years old. Both parents eventually remarried. Ruby married Otis Chesser and lived with him in Live Oak, Florida until she passed away of lung disease. Glenwood married a woman named Madelin and lived with her in Portsmouth, Virginia until he died of cancer in 1990.

Ruby was the oldest of 6 children born to Earlon Sr. and Mary Welch, she was followed in birth by Bernice, William, Earlon Jr., Raymond, and Betty. Bernice is described as a difficult and jealous person. William passed away as an infant. Earlon Jr. committed suicide at age 64, and Raymond was shot and killed. Betty (Welch) Mattis, the youngest of Ruby's siblings, is by comparison the most successful and well adjusted.

Mary, was reportedly 12-years old when she gave birth to Ruby. Earlon Sr. was considerably older than Mary. According to Betty, Earlon Sr. was a "pedophile" who unabashedly bragged about impregnating his child bride. He also, by Betty's own account, sexually molested her as a child. Both she and Mr. Damren suspect Earlon Sr. may have also sexually molested Ruby.

A photograph of the Welch family, in Appendix A, shows a much older Earlon Sr. standing with a very young-looking Mary. She looks so young that she could easily be mistaken for as sibling to her children rather than their mother. Betty describes her mother as an exceptionally intelligent and talented woman who could teach herself to do almost anything. For instance, Mary independently wired their house for electricity.

Mr. Damren's mother, Ruby, was reportedly very much like her mother: intelligent, inquisitive, and exacting. Pressured to drop out of school in the 8th grade to help care for her younger sibling, Ruby apparently satisfied her love of learning by voraciously reading books and magazines. According to Mr. Damren, his mother particularly enjoyed reading encyclopedias and National Geographic magazine. With her sharp mind and excellent memory, Ruby learned and retained facts with ease. Mr. Damren recalled that his mother was especially fascinated with Australia and would share her extensive knowledge of that country whenever possible, regardless of whether or not her audience shared her interest or enthusiasm.

Mr. Damren's father was far less remarkable. One of 6 children, Mr. Damren's father, Glenwood, joined the Navy when he was 16 years old. His sons, in-laws, surviving siblings, and their respective family members speak very poorly of him. A Damren family photo in Appendix B shows Glenwood, standing alongside his family with a gun tucked into the waistband of his pants.

According to Mr. Damren, and corroborated by multiple other sources, Glenwood was mostly absent and when he was around, he was self-absorbed and abusive. A belligerent and dysregulated alcoholic, he drank heavily on a daily basis and was, either inappropriately permissive or else, excessively harsh with his children. There is a long family history of alcoholism on the Damren side of the family.

Glenwood was also reportedly emotionally and physically abusive towards Ruby when he was drinking. Mr. Damren recalled hearing his mother cry in the back bedroom while his father "slapped her around." On at least one occasion, Glenwood reportedly tried to prostitute his wife. Mr. Damren remembers men coming to their house offering to pay his mother for sex at Glenwood's direction.

Glenwood failed at nearly every aspect of parenthood. According to Mr. Damren, he was singularly focused on gratifying his own needs and chasing after both men and women, often dragging his young sons along for the ride, making them unwitting accomplices of his infidelity towards their mother.

Mr. Damren grew up with little love, affection, guidance, or supervision from either parent. His mother Ruby, like her mother Mary before her, was averse to touch. She did not hug or hold her children, even when they were young. Extended family members recalled Ruby as distant and cold. She was very thin and always looked sick.[1] According to Cathy Damren Lewis, one of Mr. Damren's first cousin's, he and his siblings, "were never given a fair deck of cards."[2] Ruby showed her love for her children by working hard to support them financially as best she could. She worked multiple jobs while Glenwood "drank the family

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[1] Interview with Kenny Carver, July 22, 2021.
[2] Interview with Cathy Damren Lewis on July 20, 2021.

poor."[3] Although Glenwood was in the Navy for many years he never advanced in rank and could not remain employed in any meaningful capacity after he retired from the military. His brother Floyd Damren (the uncle Mr. Damren is named after) described Glenwood as " a smart ass" and "the black sheep of the family" who failed at almost everything he tried. He was kicked out of Winthrop High School, and fired from multiple jobs, in addition to underachieving in the military.[4]

Although Ruby worked hard to support the family, they were by all accounts very poor. Mr. Damren's first cousin, Linda Travers, in a letter addressed to the clemency board recalled that the family lived in a state of "total squalor" with "dirty dishes everywhere, dried food spills on the counters, table, and floors, piles of dirty clothes scattered over the floors, and a bathroom that would have been condemned by any health department."[5] Roaches and flies were apparently abundant in their home. Another cousin added that if it were up to Ruby, her children would go weeks without bathing.[6] According to both cousins, Ruby was not a bad mother. She was simply overwhelmed and limited by demons from her own childhood, with a worthless husband who contributed nothing of value to his family.

In addition to a history of alcoholism on his paternal side of the family, there is a history of completed suicide, starting with Glenwood Sr. who shot himself. Appendix C contains a photo of Glenwood Sr. and his wife Hilda. Two second-cousins, grandchildren of his uncle Floyd also committed suicide, within 3 months of one another.

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[3] Ibid.
[4] Interview with Floyd Damren.
[5] Letter from Linda Damren Travers to the clemency board.
[6] Interview with Cathy Damren.

Growing up, Mr. Damren had two younger brothers, Keith and Barry, and a younger sister, Lori. Barry passed away relatively recently. Mr. Damren was never close to either one of his brothers. His brother Keith reported that they were the poorest family in Green Cove, Florida. Their mother could not control any of her boys. She was very straightforward and would "tell it like it is." Yet, she apparently lacked common sense even though she tended to "over think things." According to Keith, Mr. Damren is a lot like his mother in that regard.

Keith reported that Mr. Damren has always been artistically inclined. As a child, he would compulsively practice writing the letter of the alphabet over and over again for hours. Mr. Damren still practices not only lettering, but also numbers, patterns, designs, and flowers, over and over again before incorporating them into his artwork.[7]

Keith and his wife Bobbie describe Mr. Damren as arrogant and opinionated.[8] Bobbie, reported that although she tried to build a relationship with her brother-in-law by writing to him in prison, she grew tired of Mr. Damren telling her how she should be doing things. Rachel, his sister Lori's daughter would apparently also write to Mr. Damren but she too, like Bobbi, stopped because he was always talking about himself and giving advice.[9]

A former girlfriend, Arlene Sturgill, apparently stopped writing to Mr. Damren because his emails became too religious. She said he had always been very adamant about his belief including very rigid ideas about how things should be. His tendency to constantly try to give advice significantly hurt their relationship. Mr. Damren apparently does not make allowances for the fact that other people may not think the way he does or want to act the way

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[7] See Attachment D for examples of his lettering and drawings.
[8] Interview with Bobbie Damren, July 7, 2021.
[9] Interview with Lori Miller and her daughter Rachel Miller on July 9, 2021.

he thinks they should act. In essence, he seems to have difficulty seeing things from another person's perspective.[10]

Mr. Damren apparently tends to be rigid in his thinking. Keith reported that on one occasion he and his daughter were planning a hiking trip to the Appalachian mountains. They were trying to see how light they could get their back packs. Mr. Damren apparently insisted that their packs should weigh exactly 80 lbs. Another example of Mr. Damren's rigid and off-putting behavior involves a letter he wrote to one of their relatives complete with a 30-day deadline for responding.

Mr. Damren has always had a special love for dogs it seems because they have a way of seeing past appearances. As he stated, "dogs don't judge you, they don't care what you've done, they always forgive you." Prior to his incarceration on death row, he had a tiny chihuahua named Cheeba. During my time with him he admitted that he has a picture of Cheeba posted prominently on the wall of his cell.[11]

Early Educational and Social History

Glenwood was still active in the Navy when Mr. Damren was born. The family moved from Virginia, to Maine, then Georgia, back to Virginia, then to Florida, back to Virginia, and then back to Maine again between 1951 and 1955. Mr. Damren entered elementary school in Maine in 1955. The family moved to Green Cove Springs, Florida in 1958. Mr. Damren finished elementary school and junior high school in Florida. Mr. Damren moved to Maine with his father Glenwood after he was released from juvenile detention. From September 1966 to June 1969. A list of all the schools he has attended is presented below:

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[10] Interview with Arlene Sturgill, July 27, 2021.
[11] Please see Attachment E for a picture of Mr. Damren holding Cheeba.

From	To	School	Town
6/1955	11/1958	Mt. Vernon Village Elementary	Mt. Vernon, Maine
11/1958	6/1963	Charles E. Bennett Grade School	Green Cove Springs, Florida
9/1963	6/1966	Green Cove Springs Junior High	Green Cove Springs, Florida
9/1966	1/1968	Winthrop High School	Winthrop, Maine
1/1968	4/1968	Woodrow Wilson High School	Portsmouth,, Virginia
4/1968	6/1968	Clay County High School	Green Cove Springs, Florida
9/1968	4/1969	Winthrop High School	Winthrop, Maine
4/1969	6/1969	Warren Harding High School	Bridgeport, Connecticut

Mr. Damren dropped out of Warren Harding High School prior to graduating with his high school diploma. He got his GED while in the Army. He completed 25 semester hours towards an Associates Degrees through Clay County Community College while incarcerated in 1977.

Mr. Damren shares his mother's love of learning and natural ability to independently educate himself about things that interest him. A voracious reader like his

mother, he could read the newspaper by the time he was 3-years old. He was reading at a 6th grade level by the 2nd grade. Presently, he is reading the bible in Hebrew, after having taught himself the Hebrew language. When asked why, he insisted that the Hebrew version would allow for a more accurate interpretation of the text, stressing that meaning is often lost in translation.

Although Mr. Damren was intellectually precocious as a child, often outperforming Keith and Barry academically, his brothers were more socially adept. Generally liked by their peers, they always had more friends in comparison. Keith in particular was "a natural people person." In contrast, Mr. Damren was repeatedly described as an odd "outsider" who was "always by himself." The few people who might have passed as a "friend" were reportedly either just as odd as Mr. Damren or getting him into trouble by instigating acts of mischief for which Mr. Damren almost always took the fall. A neighborhood boy named Buckey for instance was often putting him up to doing things that he later regretted, including the time he was sent to juvenile detention for vandalism after spray painting graffiti.

Although Mr. Damren was initially unhappy about being in juvenile detention, it was favorable to his chaotic home life. He responded especially well to structured settings with clear and predictable rules and expectations. He attended school by day, and returned to the detention center in the afternoon. He fell into the habit of regularly doing his homework after school, and made straight As in his classes.

Mr. Damren was apparently looking forward to being sent to Marianna's Reform School after juvenile detention. Somehow his father managed to convince the judge to allow Mr. Damren to return home to his parents. Instead of returning home though, Glenwood took his son to Maine to live with his sister Alice Prescott. Although most boys in junior high school

would be very unhappy about moving away from their home to attend a new school, Mr. Damren was happy to move to Maine. He preferred living there instead of living in Florida. It was a "cleaner and simpler way of life" and "the people there were friendlier to him," at least when he first moved there. He particularly liked the changing seasons, spending time outside in nature, and learning to hunt.

While he lived with his Aunt Alice, he attended Winthrop High School where he was introduced to and developed a passion for gymnastics. He especially loved tumbling, so much so that he took to spontaneously performing summersaults out in public.

For a short period of time, his mother and brothers moved to Maine from Florida to live with him and his father. Ruby disliked Maine and the family promptly moved back to Florida with Mr. Damren in tow. Back in Florida, he completed the 10th grade at Clay High School. He moved back to Maine to attend Winthrop High School in the 11th grade, motivated in part by a desire to return to the school's gymnastics program.

Instead of living with his Aunt, he moved in with Clara Collins, a friend of his father's, and her seven children. During his 11th grade year, with the exception of girls who had "crushes" on him, he had little positive peer interaction. The boys either put him up to committing petty crimes, ignored him, bullied, or beat him on a regular basis.

In the middle of his 11th grade year, Mr. Damren moved to Bridgeport, Connecticut where he lived with Ruby's sister, Betty. The school he attended in Bridgeport proved to be the most hostile school setting yet. Not only was he brutally bullied there, Mr. Damren was also, according to his self-report, ambushed and viciously mugged by a gang of boys in the restroom.

Nearly every weekend, Glenwood, who was also living in Bridgeport at the time, would drive back to Maine with Mr. Damren to visit friends at a dance hall near the town of Redfield. It was there that Mr. Damren met Dorothy "Dottie" Macomber. They were friends at first and eventually romantically involved not long thereafter. Mr. Damren's cousin from his father's side, Cathy Damren Lewis, was the same age as Dottie and recalled that she was a lot like Mr. Damren: smart, shy, and "weird."[12]

According to Ms. Macomber, Mr. Damren was very smart but "incredibly quiet."[13] She confirmed that he was indeed very passionate about gymnastics. His classmates made fun of him in high school and he often skipped school to escape the bullying. His only friend in high school, Arthur Morgan, was equally unpopular. Although Ms. Macomber has many fond memories of Mr. Damren, including "a special song that was just theirs" along with gifts, and photographs and love letters Mr. Damren sent her from Vietnam, Mr. Damren was quite flat when speaking of Ms. Macomber. It was indeed surprising to learn of the many gifts and love letters they had exchanged while he was in the military.[14] Although they eventually lost touch, Ms. Macomber remembers him with warmth and affection. She holds a master's degree and was previously employed as a special education teacher. She recently wrote a letter to the clemency board on Mr. Damren's behalf.

Arthur Morgan lived in Redfield, across the street from Mr. Damren. They both attended Winthrop High School and they participated in gymnastics program together. According to Arthur, Mr. Damren was always on the floor doing flips and other stunts. Even Ms. Macomber's sister recalls seeing him perform a running handspring summersault out in

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[12] Interview with Cathy Damren Lewis on July 20, 2021 in Redfield.
[13] Interview with Dorothy Macomber, July 22, 2021.
[14] Interview and correspondence from Dorothy Macomber.

public. Apparently, such spontaneous displays of gymnastics were common, albeit odd and out of place.[15] Even a distant cousin, Kenny Carver, remembered Mr. Damren as "a phenomenal gymnast" with the ability to "flip his large body around."[16]

Arthur Morgan remembers Glenwood as a "live wire" and severe alcoholic who would bring his old military friends around and stay at his mother, Corrie Morgan's house, usually in the same bed. According to Mr. Morgan, Glenwood was "queer" and would sleep with both men and women much to his son's chagrin.[17]

In Connecticut, displeased with the fact that Mr. Damren left every weekend to go to Maine, his Aunt Betty kicked him out of her house. Months short of graduating from high school, Mr. Damren packed up his possessions, which consisted primarily of books, and moved into the Maine woods. Remarkably self-sufficient, he lived alone in an abandoned cabin for several months until he joined the Army, 4 months after his 18th birthday.

Military History

On September 2, 1969, Mr. Damren emerged from the Maine woods and enlisted in the Army. He scored within the 91st percentile (i.e. in the top 9%) on the Armed Forces Qualification Test (AFQT). Given his superior performance on the AFQT his military training as an infantryman was intellectually and physically challenging. Mr. Damren met and exceeded all expectations. After basic training and advanced infantry training as a noncommissioned officer, he completed airborne paratrooper training prior to deploying to Vietnam as a combat infantryman. He was stationed with the 173rd Airborne Brigade at Landing Zone "LZ" English in Bong Son, Bihn Dihn Province. LZ English was a forward firing base in

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[15] Correspondence from Dorothy Macomber.
[16] Interview with Kenny Carver, on July 20, 2021.
[17] Interview with Arthur Morgan, July 22, 2021.

the central highlands that straddled Highway 1, a critical supply route, running from north to south.[18] The platoon at LZ English was assigned 24 hour, 7-day a week perimeter duty at the firebase. They positioned defensive explosives, set razor wire and trip flares, provided security and recovery for downed aircraft, rode as armed guards on truck convoys, and guarded an underground triage hospital for wounded soldiers. LZ English was a prime target for continuous and deadly attacks by the enemy. As an M60 machine gunner, Mr. Damren's primary duty was to man a bunker along the perimeter of LZ English, a job that entailed 8-10 hour shifts with only one additional soldier.[19] This bunker was both the first line of defense against intruders and a primary target for enemy combatants. Although he lived under the specter of constant threat, Mr. Damren excelled as a soldier.

John Przybylo III, a fellow soldier who served with Mr. Damren at LZ English, described him as a "very intelligent soldier, a go-getter and someone you wanted to go to war with." Many things about the Vietnam war experience were supremely and relentlessly traumatic. According to Mr. Przybylo:

> 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 the 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.[20]

Mr. Przybylo remembers feeling helpless nearly all the time during his tour in Vietnam. After all these years, he is still haunted by his memories.[21] By the end of his tour,

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[18] See Attachment F for a description of a firebase in Vietnam through the Army Heritage and Education Center's website.
[19] See Attachment G for a photograph of Mr. Damren in his bunker in Vietnam.
[20] Declaration of John Joseph Przybylo III, signed March 24, 2021.
[21] Ibid.

drugs were rampant and it was common to see soldiers with little jars of cocaine, heroin or marijuana, hanging from their necklaces. According to Mr. Pryzbylo, he never saw Mr. Damren do any drugs while he was in Vietnam. Mark Stokes, another Vietnam Veteran who was stationed with Mr. Damren similarly described him as a fine soldier that did not do any drugs or drink alcohol. He certainly did not do so before going to Vietnam as well, according to his brother Keith.

SGT Harvey "Skip" Hoornstra, Mr. Damren's Platoon Sergeant at LZ English was in charge of handing out daily orders or details.[22] Sgt. Hoornstra described the horrific details of his platoon's daily existence in Vietnam during the period of time Mr. Damren was stationed at LZ English in great detail in declarations and in a short documentary video produced by Mr. Damren's legal team. In both his declaration and the video, SGT Hoonstra recalled how it was a struggle for him to adjust to everyday life upon his return to from Vietnam. While he was there, he was living day-by-day, always watching over his back and it was hard to not do so when he returned home. There wasn't a program to help transition soldiers back to civilian life. Like many others, he turned to alcohol for relief.

Sgt. Hoornstra admitted that during those years, after his return, he was a "loose cannon with a short-fused temper." The smallest things would irritate him. He felt like he was not in control of anything. He remembers being in multiple physical altercations. He could not hold a stable job and nothing made him happy. He started having marital problems and although he knew he needed help, he had blacked out much of his memory and could not talk about the horrors he witnessed for nearly 30 years. It was not until the early 2000s that he was

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[22] See Attachment H for a picture of Mr. Damren in Vietnam, waiting with a security platoon, for his daily assignment.

finally diagnosed with PTSD and began to receive treatment through a Veteran's Administration Hospital. He knows he was not alone in his experience and he believes that there are still many Vietnam Veterans out there who suffer alone without the benefit of a diagnosis or treatment for their PTSD. He firmly believes Mr. Damren is among those veterans who are still suffering alone with PTSD.

Despite the atrocities of war, military life suited Mr. Damren. He stated that it was "a good feeling to meet new people and get a fresh start." For the first time in his life, he "got along with everyone." Roles and expectations were well delineated. There were rules governing behavior and clear expectations and opportunities to engage with others is less ambiguous, more prescribed ways. For someone who had struggled socially all of his life, this more prescribed and rigid way of interacting with others was a godsend. Because of the constant imminent threat, it was understood among soldiers, that it was best to keep each other at arm's length and keep friendships casual. As a person who was never able to connect with others on a deeper level, this unspoken rule suited Mr. Damren well.

American casualties around the time of Mr. Damren's tour in Vietnam were among the highest. He was fortunate to survive the continuous threat of death but he did not leave Vietnam unscathed. Physically, he suffered high frequency hearing loss caused by exposure to loud sounds. Mr. Damren has had difficulty with his hearing ever since his return from Vietnam. He experiences speech as muffled and reports having difficulty understanding conversations, especially when there is extraneous noise or if the conversation involves more than two people. His difficulties with auditory perception only exacerbated his feeling disconnected from other.

Relations with the Vietnamese

LZ English was surrounded by a displaced and dispossessed population of civilians. Mr. Damren was very fond of the Vietnamese people he met in the village adjoining LZ English. His affection and respect toward them grew out of an appreciation for their nonjudgmental acceptance of him and their ability to survive much hardship with little more than their resourcefulness and ingenuity. The Vietnamese. in turn, were grateful, accepting, and nonjudgmental of Mr. Damren.

Post-Deployment Decline

Despite the psychological and physical harm he sustained in Vietnam, Mr. Damren has consistently said that joining the military and going to Vietnam was "the last best thing [he] did." By all accounts, he was a very good soldier during his deployment which lasted from July 3, 1970 through August 25, 1971.

For his service in Vietnam, Mr. Damren was promoted to the rank of Specialist Fourth Class, awarded the Vietnam Campaign Medal, Vietnam Service Medal, the National Defense Medal and the Combat Infantryman's badge. He was issued a fully Honorable Discharge for his first term of service in the Army. He reenlisted as soon as he returned to the United States from his first tour with the hope of being deployed to Korea. He was stationed at Fort Campbell in Kentucky and assigned to the 101st Airborne Division, the legendary World War II "Screaming Eagles." A lifetime career in the military became his life's ambition.

Mr. Damren met Betty McNabb while stationed at Fort Campbell. Barely 20-years old at the time, Betty had two small boys, a 4 and 2-years old, from two different fathers: an ex-husband, and an ex-boyfriend. Although Mr. Damren did not feel ready to make such a big commitment, he succumbed to the pressure and married Betty, convincing himself that

after seeing so much death in Vietnam, "he wanted to live [his] life fully." Getting married was not the only impulsive decision he made. Swept up in this desire to live life fully, the young couple made expensive purchases they could ill-afford.

Within 6 months of their wedding, Mr. Damren volunteered for Ranger Training. Although it was poor timing for the newly-weds to be separated 8-10 weeks so early into their marriage, Mr. Damren felt that this was an important step towards a military career. He left for training in the fall believing that he would be gone through the Christmas holidays. When he was unexpectedly granted leave, he returned home unannounced to surprise Betty. He found her in bed with another man.

A medical record in his military file dated Dec 20, 1972, indicated that Mr. Damren was admitted to a psychiatric hospital following a drug overdose.[23] Four days prior to admission, shortly after her affair was discovered, Betty asked for a divorce. In response Mr. Damren "felt that his world was falling apart" and "decided to attempt suicide." Betty called for help after finding an empty bottle of pills by his side. Mr. Damren was admitted as an inpatient. He responded well to psychotherapy, decided to grant Betty the divorce, and was discharged back to active duty on January 12, 1973, following a 23-day inpatient stay.

At discharge, he was diagnosed with adult situation reaction, severe, acute, manifested by intense depression, rumination over his problem, and suicidal attempt (DSM-I: 326.6). This diagnosis was typically given to patients when the clinical picture was primarily one of "superficial maladjustment to a difficult situation with no evidence of any serious underlying personality defects or chronic patterns."[24]

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[23] Clinical Note written by Dr. Patrick Carone, M.D., at USAD, Fort Campbell, Kentucky.
[24] Diagnostic and Statistical Manual of Mental Disorders, DSM-I (1952). Can be found on-line at: https://www.turkpsikiyatri.org/arsiv/dsm 1952.pdf.

Despite an otherwise successful inpatient hospitalization, Mr. Damren's behavior continued to deteriorate in the coming months. For the first time since he enlisted in the Army, he was not functioning well in his capacity as a soldier. In a witness statement dated March 6, 1973, SSG Eddie McKinney describes how previously once one of his best soldiers, Mr. Damren was behaving in a highly uncharacteristic manner.[25] In the statement, that may also be found in Appendix G, he states the following:

> 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 fine team leader but had to replace him with a P.F.C. because I couldn't get any cooperation out of him.[26]

Mr. Damren's mood and behavior continued to deteriorate after his return from Vietnam. He met and became fleetingly involved with a number of women, including Linda Anderson, who became pregnant with his daughter, Brandy Luby.[27] Due to their lack of financial constraint, Mr. Damren and his ex-wife had amassed a considerable amount of debt that he could not afford to pay back on his own. Approximately a year later, he was convicted of concealing stolen property and sentenced to 3-5 years of prison in Tennessee.

On August 2, 1974, Mr. Damren was discharged from the army "under conditions less than honorable." He appealed this decision on August 4, 1975. He asked to either be reinstated into the Army to finish his five-year reenlistment or have his discharge status changed to General Discharge. His request was denied. He was devastated having lost the place that

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[25] See Attachment J for a copy of SSG McKinney's notes.
[26] Witness Statement dated March 6, 1973, by SSG Eddie McKinney. Appended to this report in Attachment E.
[27] See Attachment J for photos of Brandy and her son, Mr. Damren's grandson Dillan, that he keeps in his cell at UCI.

afforded him the stability, consistency, and predictability he craved in order to function as a valuable and valued member of society. Mr. Damren slid even further down a spiral of alcohol, drug abuse, relationship failure, hopelessness, and depression. After serving a 6-month prison term Mr. Damren was assigned to a work release program in Memphis, Tennessee. Six month later, he found a short-lived job in a meatpacking plant, followed by an equally short-lived job building boats. Mr. Damren subsequently moved to Saint Augustine, Florida. He worked for a boat building company. When it went out of business he moved back to Green Cove.

Mr. Damren met Tina Lee Smith in November of 1976. They married the following December and divorced two years later. During that time he was arrested for burglarizing a house. At this point he was drinking heavily and doing "heavy drugs." He was sentenced to 15 years. He served two years of that sentence and was paroled out.

Mr. Damren subsequently met and started dating a woman named Rose. He continued to drink heavily and abuse drugs which led to a string of more bad decisions. He was also associating with the wrong people. He worked several different jobs, was arrested for robberies and drug charges, and was sentenced to more prison time. The gap between his abilities and his everyday functioning grew wider and wider with each passing year just as his behavior became more and more dysregulated and destructive. He had become his own worst enemy and still did not have a single well-meaning friend. As the string of failed relationships, burglaries, drug charges, and substance abuse grew, so too did his lack of judgment and reasoning. In the period immediately preceding his arrest on capital murder changes, his life was in a tailspin.

Mr. Damren was ultimately convicted and sentenced to death. He admits that during that period of his life, "nothing felt like home", he felt lost, directionless, and hopeless. In

contrast to those twenty years after his return from Vietnam, death row "feels like home" to him. He is surrounded by his books and spends his time reading, teaching himself Hebrew, studying the bible, and making art. There is still so much that he wants to learn and as long as he has access to books and is capable of learning, he is content.

Department of Corrections records dating back to 1977 confirm that he is a model prisoner. He takes advantage of every opportunity he has to further his education, he is not a disciplinary problem, and his adjustment to incarceration has always been excellent. In 1989, while serving time for charges on possession of cocaine he attended drug counselling. Records suggest that he was free-basing cocaine at that point. His drinking was out of control at that point as well as reports suggesting he was drinking all day. Mr. Damren has adjusted well to incarceration at UCI. With regard to his physical health, records dating back to March 11 2020, indicate a history of hypertension, hyperlipidemia, chronic back pain, and a positive Hepatitis C test from September 29, 2019.[28]

On April 26, 2021, his prescriptions included the following for the treatment of high blood pressure: Amlodipine (10 mg), Losartan (50 mg); Chlorthalidone (25 mg) and Metoprolol (25 mg).[29] Similar records contained in his FDOC medical file suggest that at least since, July 2020, he has demonstrated changes in his vision consistent with age related macular degeneration.

RESULTS OF CURRENT NEUROPSYCHOLOGICAL EVALUATION

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[28] Florida Department of Corrections, Gastrointestinal Baseline History and Procedures, dated 3/1/2020.

[29] Florida Department of Corrections, Chronological Record of Health Care, dated 4/26/2021, signed by Jessica Putney.

I met with Mr. Damren on four separate occasions, and spent an initial 10 hours conducted a clinical interview and administered a comprehensive battery of neuropsychological tests. I subsequently returned to meet with him again on August 2nd and 6th to discuss my findings and to interview him further about his background and history.

Behavioral Observations

Mr. Damren's evaluation took place in an attorney consultation room at UCI. He was oriented to person, place, time, and situation. Neatly dressed in prison garb and well groomed, he was very soft-spoken, polite, and cooperative. He did not appear nervous or apprehensive and spoke at length about topics that were of particular interest to him regardless of whether or not they were relevant to the task at hand or of any interest to me. It took effort on my part to curb his tendency to talk about interest areas in great depth and breadth. He was far less inclined to talk in any capacity about negative life experiences and traumatic events including his troubled family life, the difficulties he faced making and keeping friends, his Vietnam war experiences, Betty's infidelity and the break-up of his marriage, and the difficult decades that preceded his death sentence. He expressed little emotion in both verbally and nonverbally with the exception of the day we spoke of how tormented he was by his peers in elementary, middle, and high school. Only when he spoke of the bullying, taunting, and beatings of those years, did his face and the tone of his voice convey the depth of his pain.

Mr. Damren reported that he startles easily and sometimes wakes up shaken from his sleep. He is not a hard sleeper. He is otherwise very regimented and steady in most things. There is not a lot of fluctuation in his mood, appetite or sleep.

During testing, he was careful in formulating his answers and appeared to be putting forth his best effort. Although he is reportedly color-blind, and beginning to show early

signs of macular degeneration, his visual acuity was adequate with corrective lenses. Mr. Damren suffers from high frequency hearing loss secondary to exposure to loud sounds during his military service in Vietnam. In order to compensate, I spoke more slowly, clearly, and louder than usual and repeated questions and instructions as needed, to the extent that doing so did not violate standardized administration.

Mr. Damren was alert and attentive. His speech was fluent albeit slow and measured with little to no variability in rate, volume, and prosody. His though processes were logical and coherent despite being tangential at times. His thought content was for the most part unremarkable although he did tend to dominate the conversation with talk about topics that were of interest only to him. At times, he had difficulty recognizing sarcasm, jokes, and expressions of speech. Although his vocabulary was advanced and he had a good command of language, he tended to interpret things very literally. He had difficulty initiating and maintaining a reciprocal conversation. His processing speed was slow at times.

With regard to his memory, Mr. Damren stated that it is generally good with the exception of his ability to recall the names of actors or actresses. On average he sleeps about 5 and a half hours a night. He reportedly has never been a hard sleeper. He wakes up easily, has nightmares, and is easily startled.

Generally compliant and cooperative, his mood was flat and his affect was constricted. His demeanor was calm and at times he seemed emotionally flat. Although he was able to make eye contact, he had difficulty maintaining it. Overall, it is believed that the results of this evaluation are a valid representation of his current cognitive functioning.

Tests Administered

I administered the following tests to Mr. Damren.[30]

Wechsler Adult Intelligence Test-Version IV
Wide Range Achievement Test- Version 5
Boston Naming Test
Benton Facial Recognition Test
Rey-Osterreith Complex Figure Test.
Continuous Performance Test-3
Wechsler Memory Scale IV: BCSE, Logical Memory, Visual Reproduction Wisconsin Card Sorting Test-CV
DELIS Kaplan Executive Functioning System: Trails, Design Fluency, Verbal Fluency, Color Word Interference Test, Sorting Test
Grooved Pegboard Test
Finger Tapping Test
Victoria Symptom Validity Test

[30] Mr. Damren's scores may be found in Attachment F

Measures of Effort

The Victoria Symptom Validity Test (VSVT), is a standardized measure of effort used to rule out possible malingering, exaggerating, and feigning of symptoms. Mr. Damren's performance on this and other embedded measures of effort suggested that he was putting forth his best effort. As such, the current assessment represents a valid estimate of his cognitive functioning.

Intellectual Functioning

The WAIS-IV is an individually administered, standardized test of intellectual functioning. In addition to providing an estimate of an individual's global intelligence (FSIQ), the WAIS-IV also allows for the assessment of an individual's verbal comprehension abilities (Verbal Comprehension Index), visual-perceptual organization abilities (Perceptual Organization Index), working memory (Working Memory Index), and visual scanning/visual-motor speed and accuracy (Processing Speed).

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[30] Mr. Damren's scores may be found in Attachment F.

On this administration of the WAIS-IV, Mr. Damren obtained a Full-Scale IQ score of 129, consistent with general cognitive ability within the superior range of functioning. He scored within the very superior range on the perceptual reasoning index (PRI= 133, 99th percentile) and within the superior range on the verbal comprehension index (VCI=127, 96th percentile). In contrast, his performance fell within the high average range on the working memory index (WMI=114, 82 percentile) and processing speed index (PSI=114, 82nd percentile). Index level discrepancy comparisons indicated a significant difference between his verbal comprehension index score and his perceptual reasoning index score versus his working memory index and processing speed index scores. As is always the case when conducting a neuropsychological evaluation the goal is to obtain the best estimate of the individual's abilities. In such cases, the Generalized Ability Index, an estimate of intellectual ability independent of processing speed and working memory, is believed to be the best estimate of intellectual ability. Mr. Damren obtained a GAI score of 133 placing him in the very superior range of intellectual functioning as compared to same age peers. His performance on this administration of the WAIS-IV is consistent with his very superior performance on the Army Beta IQ test (IQ = 106).[31] as reported in his military records.

Academic Achievement

Mr. Damren completed the 11th grade in high school and a GED in the Army. Scores on the California Achievement Test, reported in 1974 on the Reception and Diagnostic Center Admission Summary were commensurate with what would be expected of an individual with his academic background at that time. His performance on individual subtests placed him

[31] Reception and Diagnostic Center Admission Summary dated 1974.

within the 11th grade, 7th month range in language arts, the 11th grade in reading, and the 9th grade in arithmetic.

Mr. Damren has taken some college level courses while incarcerated at the Union Correction Institute. He is a voracious reader with an appetite for learning and mastery akin to his maternal grandmother and mother before him. In the time since his incarceration on death row, he has set his sights on reading the Holy Bible in Hebrew. To that end, he has taught himself the Hebrew language. He is self-taught in many advanced skills and has always been this way.

I administered the Wide Range Achievement Test -5th Revision, to Mr. Damren as part of my comprehensive evaluation. He scored within the 12th grade, 9-month range (the highest-grade equivalent score on this test) in word reading, arithmetic, spelling, and reading comprehension. Even in a restricted setting with limited resources, Mr. Damren demonstrates a commitment to learning and intellectual growth, consistent with his stated desire to better himself in whatever way possible despite his circumstances.

Cognitive Processing Areas

Language Mr. Damren performed within the very superior range on measure of word knowledge (WAIS-IV: Vocabulary, 99th percentile) and word retrieval (DKEFS: Letter Fluency & Category Fluency, 98th percentile). His abstract verbal reasoning, general knowledge, and confrontation naming abilities fell within the superior range (WAIS-IV: Similarities & Information; Boston Naming Test, 95th percentile).

Visual-Spatial/Visual-Motor Abilities Mr. Damren's performance on measures of perceptual and fluid reasoning, spatial processing, and visual-motor integration consistently fell within the superior to very superior range. Similar to his performance on the Spatial

Aptitude subtest of the General Aptitude Test Battery, he has a distinct strength in thinking visually of geometric forms and comprehending the two-dimensional representation of three-dimensional objects. This very specific ability, falls in what lay people refer to as the "genius range." His artistic genius is clearly evident in his works presented in Attachment L. Mr. Damren has an affinity for repeated geometric shapes and patterns. It is not surprising that he particularly likes Zentangle art which involves creating art with repetitive, structured patterns. This same ability underlies his ship building and cabinet making skills.

Nonverbal memory Mr. Damren was administered the Rey-Osterreith Complex Figure Test. The Copy portion of the test is a visuoconstruction drawing task in which the examinee is asked to copy a relatively complex figure. Mr. Damren's successfully copied all 36 elements of the figures and was able to organize them in an accurate and meaningful manner. His organized copy of the figure aided with encoding it into memory which in turn resulted in his ability to successfully recall the figure from memory under immediate and delayed recall conditions as well as on a recognition task.

Mr. Damren's performance on the Visual Reproduction subtest of the Wechsler memory Scale-IV confirmed superior nonverbal memory for relatively simple visual shapes under immediate, delayed, and recognition recall conditions.

Verbal Memory The Logical Memory I subtest of the WMS-IV assesses narrative memory under a free recall condition. Short stories are orally presented and the examinee is asked to retell each story from memory immediately after hearing it. Mr. Damren's performance on the LMI was consistent with his performance on other measures of immediate auditory memory, falling within the superior range of functioning

Logical Memory II assesses long-term narrative memory with a free recall and a recognition task. The examinee is asked to retell both stories from memory in the free recall condition. Then the examinee is asked yes/no questions about both stories in the recognition task. Mr. Damren's ability to recall orally presented stories, following a 30-minute delay, also fell within the superior range.

Mr. Damren's performance on the California Verbal Learning Test-II confirmed superior verbal memory even in the face of otherwise underwhelming executive functioning skills. Indeed his serial memory was very impressive in comparison.

Attention and Concentration The Conners Continuous Performance Test 3rd Edition (Conners CPT 3™) is a 14-minute, 360-trial, computer-administered test of attention. Examinees are required to respond when any letter appears on the computer screen, except the nontarget letter "X." Mr. Damren's performance was not consistent with a primary disorder of attention even though he had some difficulty distinguishing targets from nontargets.

Executive Functions Mr. Damren's auditory working memory fell within the high average range. His executive functioning abilities were further assessed on selective subtests of the Delis-Kaplan Executive Functions System (DKEFS). Results revealed adequate mental flexibility, response inhibition, and abstract reasoning.

Processing Speed Index The Processing Speed Index measures the ability to quickly and accurately scan, sequence, and discriminate between simple visual information. Mr. Damren's performance across subtests that comprise the processing speed index ranged from ranged from average to superior. His visual attention, motor speed and manual dexterity was average. In contrast, his speeded visual attention and processing fell within the superior range.

Less a problem of processing speed and more a function of average fine motor coordination and dexterity.

Motor Abilities Mr. Damren's motor speed and dexterity were assessed on the Grooved Pegboard test and the Finger Tapping Test. His performance consistently fell within the average range consistent across tests and across trials.

Summary of Neuropsychological Profile

Mr. Damren's cognitive abilities, as assessed on the current battery of intelligence, academic achievement, and cognitive abilities revealed superior intellectual abilities, an impressive vocabulary, extraordinary ability to learn and retain information, and an exceptional ability to recognize complex patterns and sequences. Even a casual analysis of his artwork speaks to his superior visual-spatial abilities.

ANALYSIS AND SYNTHESIS

Mr. Damren suffers from Autism Spectrum Disorder, without intellectual or language impairment.

In 1942, Leo Kanner published his iconic article, "Autistic Disturbances of Affective Contact," in *The Nervous Child.*. He identified the core characteristic of autism as "the children's *inability to relate themselves* in the ordinary way to people and situations from the beginning of life." Kanner believed that there was "from the start an *extreme autistic aloneness* that, whenever possible, disregards, ignores, shuts out anything that comes to the child from the outside." Following a detailed study of 11 cases, Kanner described an "anxiously obsessive desire for the maintenance of sameness" and "an inability to experience wholes without full attention to the constituent parts." He also noted that some of these children had "an astounding vocabulary… phenomenal memory…and the precise recollection of complex patterns and sequences." Language is not used as a tool for receiving and imparting meaningful

messages. All "activities and utterances are governed rigidly and consistently by the powerful desire for aloneness and sameness."

Disputing the notion that autism is a form of childhood schizophrenia, he argued that while the schizophrenic tries to solve his problem by stepping out of a world of which he has been a part and with which he has been in touch, children with autism gradually *compromise* by extending cautious feelers into a world in which they have been total strangers from the beginning. Ahead of his time, Kanner argued "these children have come into the world with innate inability to form the usual, biologically provided affective contact with people, just as other children come into the world with innate physical or intellectual handicaps."

Unfortunately, it took nearly 73 years for the field to arrive at an understanding of autism as intuitive and elegant and as Kanner's. The word "Autism" was derived from the Greek word *autos* (*αὐτός*, meaning self) to suggest a state of "detachment from reality, together with the relative and absolute predominance of the inner life." Eugen Bleuler coined the term "autism" and used it formally in 1911 to describe psychotic features of schizophrenia.

From the time of Mr. Damren's first birthday until he dropped out of high school at age 17, the DSM classification of autism was associated with the concept of childhood schizophrenia. When the first edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-I) was published in 1952 "autism" is used to describe "Schizophrenic Reactions Appearing Before Puberty."

Although the DSM-II (1968) was an improvement over the DSM-I, autism was still classified as a disorder associated with symptoms of schizophrenia before puberty and, for the first time, associated with mental retardation (presently referred to as intellectual

disability.) With the DSM-II, the stage was set to associate, for decades to come, the term autism with a severe and pervasive disorder in children with low intellectual capacity.

By the time Mr. Damren was 29 years old, Autism appeared as an independent diagnosis for the very first time in the DSM-III (1980.) By then it was discovered that there is a genetic cause as well as some environmental factors contributing to autism and various studies suggested that autism was actually rooted in brain development.

The DSM-III described autism as a "pervasive developmental disorder" that is separate from schizophrenia, listing three essential characteristics that needed to be observed for diagnosis. These criteria were severe impairment in communication, lack of interest in people, and bizarre responses to the environment. The diagnostic criteria also stipulated that these features would have to develop within the first 30 months of the life. The DSM-IV(1994) continued to classify autism under Disorders First Diagnosed in Infancy, Childhood, or Adolescence, but officially identified it as a spectrum disorder, identifying 4 diagnostic categories: Autistic Disorder, Pervasive Developmental Disorder, Asperger's Disorder (Asperger's Syndrome), Rett's Disorder (Rett's Syndrome), and Childhood Developmental Disorder.

Finally, with the DSM-V (2013) and the DSM-VTR (2022), Kanner's conceptualization resurfaced with an understanding of autism as a disorder falling on a spectrum, which although more likely to be recognized in childhood, especially with more severe cases, represents a lifelong condition. Instead of forcing individuals on the spectrum with higher than average intelligence and without severe delays in language into an ill-fitting Asperger's Syndrome diagnosis, the current diagnostic criteria placed autism under the category of neurodevelopmental disorders that affect the structure and functioning of the brain

over the course of an individual's lifetime. The DSM-VTR recognized that people with Autism Spectrum Disorder suffer from impairments in social interactions, including deficits in social reciprocity, nonverbal communication used for social interaction, and skills in developing, maintain, and understanding relationships. Additionally, it recognized that they have a need for consistency and predictability and they engage in very restrictive and repetitive interests and activities.

Recognizing that ASD is a life-long condition, 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. Studies in 2009, with high-functioning school aged children, suggest that they remain the most underdiagnosed group. In a recent Centers for Disease Control report, published in 2020, it was estimated that 2.21 percent of adults in the United Stated are on the autism spectrum.[32]

Although ASD is a neurological condition that impacts individuals across their lifespan, many remain undiagnosed even under the current diagnostic guidelines.

Without the benefit of a diagnosis, Mr. Damren, spent seven decades of his life investing significant amounts of energy trying unsuccessfully to fit into a neurotypical world, a process that was both mentally and physically costly and exhausting.

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

DSM-5TR Diagnostic Criteria for Autism Spectrum Disorder

Autism spectrum disorder is characterized by (a) persistent deficits in social communication and social interaction across multiple contexts, (b) restricted, repetitive patterns of behavior, interests, or activities, (c) the presence of symptoms in the early developmental period, (d) symptoms that cause clinically significant impairment in social, occupational, or other important areas of current functioning, and (e) these disturbances are not better accounted for by intellectual developmental disorder or global developmental delay. Mr. Damren meets all five criteria for a diagnosis of Autism Spectrum Disorder (ASD).[33]

Criterion A. Mr. Damren, both currently and by history exhibits deficits in social emotional reciprocity. He talks at people, rather than with them, due to an abnormal social approach and failure of normal back-and-forth conversation. He lectures people without listening to and appreciating that they may have differing points of view. Conversation with him are so one-sided that people eventually tire of his lecture and stop trying to communicate with him. Instead of viewing him as a person with a wealth of valuable information to impart, they see him as arrogant and condescending. Conversations or correspondence feel one-sided rather than a meaningful and respectful sharing of ideas and emotions. He writes letter with explicit timelines for acceptable replies. It is difficult to engage him in conversation. He neither initiates such conversation nor responds when others attempt to do so.

Mr. Damren demonstrates deficits in non-verbal communicative behaviors used for social interaction, ranging from poorly integrated verbal and nonverbal communication to abnormalities in eye contact and body language, along with use of deficient use of gestures, with limited range of facial gestures. He had difficulty integrating eye contact, gestures,

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[33] See Attachment M for full DSM-VTR diagnostic criteria for ASD.

prosody and facial expressions when communicating. Although Mr. Damren was able to make eye contact he had difficulty sustaining it. He limited eye contract by periodically breaking away and pretending to read something on the table in front of him. His facial expressions were flat. Nonverbal gestures were not employed to express emotion. His tone of voice lacked prosody and intonation. In general he appeared affectively flat.

Mr. Damren exhibited deficits in developing, maintaining, and understanding relationships. Historically, he has difficulty adjusting behavior to suit various social contexts. He also has difficulties in making friends. Nearly everyone said he had no friends, was often alone on the sidelines, and by himself. It appears as though he has difficulty in developing, maintaining, and/or understanding relationships. More than one person recalled that during the time he was passionate about gymnastics, in locations not necessarily designed for a suited for gymnastics, he would spontaneously engage in tumbling summersaults.

Criterion B. Mr. Damren both currently and in the past has exhibited restricted, repetitive patterns of behavior, interest, or activities. He engages in stereotyped and repetitive motor movements. For instance, it appears as though both as a child and currently, he engages in hours of writing and drawing the same or similar objects over and over again. These repetitive motor behaviors are meditative in nature and help calm anxiety and increase focus by decreasing hyper-arousal. Multiple examples of his drawings and art are presented in a number of attachments to this report. His Zentangle drawings, consisting of multiple repeated patterns is a very good example of his affinity for repetition.

It is difficult to ascertain insistence on sameness, inflexible adherence to routine, or ritualized patterns of behavior in a correctional facility. However, he reports that he very regimented and steady in most things. He does not experience a lot of fluctuation in his

daily routine. Previously, people have remarked that he tends to wear the same or similar clothes on a regular basis.[34] The picture of him with his dog Cheeba confirms reports that he always wore the same camouflage cap.[35]

Mr. Damren's fixation with gymnastics as a teenager and his current interest in learning Hebrew to study the Bible are examples of interests that are abnormal in intensity and focus. Not only is his interest abnormally intense, his tendency to steer conversation towards his interests was also confirmatory.

Mr. Damren reported a long-standing history of hyper-reactivity to sensory input with a heightened startle response. Consistent with an ASD diagnosis, Mr. Damren reported that he experiences great distress when he is in an environment that feels unsafe or is around people he does not fully trust. He is primed to respond defensively and feels flooded with emotion when he perceives a potential for danger or is otherwise caught off guard.

Criterion C. Mr. Damren reported and anecdotal reports from friends and family confirmed symptoms and behaviors consistent with ASD during the developmental period.

Criterion D. Despite his many talents and skills, Mr. Damren was never able to sustain a level of adaptive functioning in vocational and interpersonal pursuits to enjoy a reasonably consistent and stable degree of success and contentment. Even in work environment where he was clearly gifted (e.g. boat building) his interest in and ability to function consistently well was lacking. This pattern of relatively poor adaptive functioning in the presence of otherwise above average to superior intellectual ability is one of the hallmarks of ASD, especially with individuals without impairments in intellect and language. Many things could be contributing to this

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[34] Deposition testimony of Wendy Hedley, p. 9.
[35] See Attachment E.

discrepancy but the research literature is consistent in this regard. An inability to sustain employment or multiple failed marriages and relationships are common in people on the autism spectrum.

Criterion E. Psychological testing both currently and in his military and corrections records revealed superior intellectual ability, memory, word knowledge, fund of information, and visual-spatial processing abilities. These symptoms are not better explained by intellectual disability or global developmental delay. Mr. Damren's neurocognitive profile on a comprehensive battery of neuropsychological test confirmed high average to very superior abilities.

For most individuals with ASD, simple daily social interactions are mentally and physically exhausting. More often than not, individuals with ASD report spending a significant amount of time and energy pretending to be something they are not. The feeling of having to be constantly "in character" and "on scene" can be incredibly stressful. High levels of sustained chronic stress led to depression and anxiety.

Consistent with an ASD diagnosis, Mr. Damren has experienced long-standing deficits in social communication, social interaction, social reciprocity, nonverbal communication, and the ability to develop and maintain long term relationships. Also consistent with a diagnosis of ASD, Mr. Damren engages in very restrictive and repetitive interests or activities while exhibiting excessive interest in such activities.

As an individual with ASD, Mr. Damren lacks the ability to understand and empathize with the emotions of others. He may therefore appear arrogant, cold, callous, and insensitive in daily interaction. He has difficulty entering into conversation and engaging in dialogue leaving many feeling like he is talking at them instead of with them. He is also

distracted by his own thoughts and anxieties, and thus has difficulty remaining engaged with and attentive to others. In nearly all social situations, he experiences tremendous distress, dread, and feelings of being overwhelmed. To regulate this feeling, he has adopted coping strategies that including diverting his gaze. While this method may work to regulate his emotions, others can sense his withdrawal and may experience it as evidence that he is detached, uncaring, and unaffected. The sad irony of the situation is that he is overloaded because he cares tremendously. Living with ASD is living with the feeling that no matter how good your intentions may be, you simply cannot help but fail, you will invariably disappoint someone, embarrass yourself, fall short of expectations, or engender anger in the person or persons you are trying your hardest to please. No other group is so regularly misunderstood and mistreated. When Mr. Damren was informed of this diagnosis, he was noticeably relieved, as he said, "I always thought there was something wrong with me that people did not like me. I understand now that it is not that they didn't like me, they did not understand me."

As human beings we are the most social of animals and much of our survival depends on our ability to communicate our feelings and our intentions in words and gestures. We instinctively distrust people who are not socially adept or who, through no fault of their own, based on their appearance and their interpersonal style, frighten us or intimidate us. Mr. Damren is a tall man with an imposing stature. He is intimidating and it is easy to misjudge his intentions and misinterpret his emotionally flat yet simultaneously intense manner of communicating as hostile. Without the benefit of knowing that he suffers from a neurological disorder that he most likely inherited from his mother (and perhaps even his grandmother), through no fault of his own, people are not likely to give him the benefit of the doubt or temper

their judgement of him with understanding and compassion. It is hard to imagine a jury doing so in the context of a murder trial.

Mr. Damren had a very difficult childhood marked by poverty, neglect, and maltreatment. His home life was chaotic and unpredictable. No matter how hard he tried, there remained an emotional distance between himself and others that he simply could not bridge. As a young child with ASD, growing up in a chaotic family with little stability, security, or predictability, everyday life was extremely stressful. Adding to the trauma of his childhood, were years of bullying, including merciless teasing and physical beatings, even by his own brothers. These adverse childhood experiences, in addition to ASD are known risk factors for developing a number of psychological problems including Posttraumatic Stress Disorder (PTSD).

Mr. Damren suffers from Posttraumatic Stress Disorder secondary to his combat experiences in Vietnam.

Drawing on the work of mental health practitioners who served in the military during the Second World War, the DSM-I stated that a "gross stress reaction" could occur among soldiers in combat, even among those who showed no previous history of mental problems.[36] A gross stress reaction was described as a temporary condition produced by extreme environmental stress and it was argued that this stress reaction should disappear when the individual is removed from the stressful situation.

These diagnostic criteria failed to account for relevant studies demonstrating that (1) for some combat soldiers, the stress reaction does not occur on the battlefield but sometime afterward and (2) that for some, symptoms persist for months, even years.[37] These

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[36] Kardiner, Abram (1947). War, Stress and Neurotic Illness. New York: Paul B. Roeber.
[37] Grinker, RR & Spiegel, JP (1945). Men Under Stress. Philadelphia: Blakiston.

observations suggested a need to recognize "delayed" and "chronic" components of the gross stress reaction.

When published in 1968, "gross stress reaction" was omitted altogether in the DSM-II. In fact, the DSM-II contained no diagnosis for a combat induced psychiatric diagnosis at all. The implication was that the emotional distress experience during or after combat could be accounted for in full by standard psychiatric symptoms of depression, alcoholism, and schizophrenia.

After years of discussions about "shell shock" and "combat fatigue," the Vietnam War provided the catalyst for creating the diagnosis of PTSD as a specific disorder. American soldiers came home with what psychiatrists began calling "delayed psychiatric trauma" and "post-Vietnam syndrome." Symptoms often emerged months or even years after a soldier's tour of duty, and often included a share presentation: nervousness, anger, excessive emotional reactions, sleeplessness, intense guilt and shame, and intrusive flashbacks and nightmares. Approximately a decade after young men were deployed to and returned from Vietnam, the DSM-III finally included a relevant and meaningful diagnosis of post-traumatic stress disorder.

ASD and PTSD

Adults like Mr. Damren, who are not diagnosed with ASD in childhood, can spend an entire lifetime not recognizing or understanding why they struggle interpersonally, academically, and vocationally. These same individuals may have also been under- or misdiagnosed on a number of other mental illnesses because persons with autism do not present with exactly the same symptoms as those who are not on the spectrum. Studies have demonstrated that, as a group, individuals with ASD suffer from high rates of co-occurring

psychiatric disorders, with ADHD, anxiety disorders and depression being the most commonly comorbid.[38]

Individuals with ASD face an increased risk of experiencing traumatic events and being significantly affected by them.[39] Individuals with ASD are at increased risk of developing post-traumatic stress disorder (PTSD) following exposure to a broad range of traumatic life events.[40]

Currently, there are few studies that examine the comorbidity between ASD and PTSD, in adults. More recently, a group out of scientists out of Israel have examined the relationship between autistic traits in typically developing adults as a way to understand the association between autistic traits (AT) and PTSD.[41] Autistic traits (AT), also known as "broad autism phenotype" or "subthreshold autism", are representations of ASD characteristics, which have been shown to continuously distribute across the general population, with people diagnosed with ASD positioned at the extremes.[42],[43]

Studies have shown that individuals with ASD show distinct symptomatology in response to stressful and traumatic events, including more somatic complaints, increased anger and hyperactivity [17]. Research out of Israel focused on examining the possibility of a

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[39] Kerns CM, Newachaffer CJ, Berkowitz SJ. (2015). Traumatic childhood events and autism spectrum disorder. Journal of Autism and Other Developmental Disabilities; 45(11):3475–86.
[40] Rimball, F, Happe, F,& Grey, N. (2020). Experience of Trauma and PTSD Symptoms in Autistic Adults: Risk of PTSD Development Following DSM-5 and Non-DSM-5 Traumatic Life Events. Autism Research, Dec; 13(12):2122-2132.
[41] Haruni-Lamdan, N., Ledendiger, S., Golan, O., & Horesh, D. (2019) Are PTSD and autistic traits related? An examination among typically developing Israeli adults. Comprehensive Psychiatry, 89:22-27.
[42] Constantino JN, Todd RD (2003). Autistic traits in the general population. Archives of General Psychiatry; 60(5):524.
[43] Baron-Cohen S (2010). Empathizing, systemizing, and the extreme male brain theory of autism. In: Savic I, editor. Sex differences in the human brain, their underpinnings and implications. Amsterdam, Netherlands: Elsevier Science BV; pp. 167–75.

specific PTSD phenotype associated with AT suggest a symptomatic profile characterized by enhanced hyper-arousal.

It has been argued that the positive association between AT and PTSD symptoms may be associated with less adaptive coping strategies both during and after exposure to traumatic events.[44]

Moreover, AT were found to be associated with increased threat perception, which, in turn, is often key in the development and persistence of post-traumatic symptoms.[45] Furthermore, communication deficits may get in the way of reporting traumatic experiences, and seeking help or treatment. It is also possible that there are shared underlying mechanisms that may play a role in both PTSD and ASD independently.[46] Finally, individuals with high levels of AT tend to be more socially isolated, and may lack the social support networks that have been shown to protect or buffer the effects of traumatic exposure.[47]

In the study out of Israel, individuals high in AT showed a PTSD clinical picture where hyperarousal is relatively more dominant. This may be attributed to several factors. First, this PTSD cluster holds strong similarities and overlaps with anxiety symptoms, which are quite common among the ASD population.[48] Additionally, the relative dominance of hyper-

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[44] Hirvikoski T, Blomqvist M (2014). High self-perceived stress and poor coping in intellectually able adults with autism spectrum disorder. Autism: 22–7.
[45] Ehlers A. Clark, MC (2000). A cognitive model of posttraumatic stress disorder. Behaviour Research and Therapy;38:319–45.
[46] Haruni-Lamdan, N., Ledendiger, S., Golan, O., & Horesh, D. (2019) Are PTSD and autistic traits related? An examination among typically developing Israeli adults. Comprehensive Psychiatry, 89:22-27.
[47] Bauminger N, Kasari C (2000). Loneliness and friendship in high-functioning children with autism. Child Development 2000;71:447–56.
[48] van Steensel FJA, Bögels SM, Perrin S (2011). Anxiety disorders in children and adolescents with autistic spectrum disorders: a meta-analysis. Clinical Child and Family Psychology Review: 14:302–17.

arousal may be related to sensory hyper-responsivity, which is a defining characteristic of ASD. Sensory hyper-responsivity may alter the perception and interpretation of stressful situations and render them more threatening for the individual. Thus, those showing this sensitivity may become overly aware of their surroundings, and adopt a more hypervigilant stance. Moreover, sensory hyper responsivity has been associated with anxiety disorders and with sleep problems in individuals with ASD.[49], [50] Thus, autonomic arousal may be a dominant pathway for the expression of post-traumatic stress among those high in AT.

As a person with ASD, Mr. Damren will experience extreme distress when he perceives impending danger, especially when he is caught off guard. Given this vulnerability it is not difficult to imagine that his experiences in Vietnam were profoundly traumatic for him. Although he may have entered the military prone to perceive threat in unpredictable situations, the lived experience of true chaos and tangible threat in Vietnam only compounded his emotional reactivity and heightened his sense of panic.

When Mr. Damren deployed to Vietnam he was even more vulnerable to trauma than the average person because of his ASD. Upon returning to the United States, he experienced a number of disappointments which triggered the onset of a posttraumatic stress disorder. Unfortunately, knowledge of combat related PTSD was in its infancy at that point in time, and the presentation of his PTSD symptoms would have already been complicated by symptoms of ASD. In nearly every single significant life transition and/or circumstance, Mr.

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[49] Green SA, Ben-Sasson A (2010). Anxiety disorders and sensory over-responsivity in children with autism spectrum disorders: is there a causal relationship? Journal of Autism and Developmental Disorders: 40(12):1495–504.

[50] Mazurek MO, Petroski GF(2015). Sleep problems in children with autism spectrum disorder: examining the contributions of sensory over responsivity and anxiety. Sleep Medicine:16(2):270–9.

Damren has been left feeling misunderstood and rejected. Unable to turn to others for comfort and reassurance, he, like many veterans, turned to alcohol and drugs as a way to cope with intense feelings of discomfort and stress. Individuals with ASD also disproportionately turn to alcohol and drugs as a way to cope with intense emotions and social isolation. ASD and PTSD when combined with alcohol and drug abuse, will lead to even more maladaptive emotional reactivity with even less control over one's behavior.

Mr. Damren's childhood was marked by chaos, instability, poverty, and neglect. He did not have the benefit of a stable family life to mitigate the deleterious consequences of ASD or PTSD. As previously discussed, his childhood experiences increased the likelihood of developing PTSD. His ASD diagnosis similarly increased the likelihood of developing PTSD. The science is increasingly pointing to hyperarousal as the primary manifestation of PTSD in individuals with ASD. ASD is also, independently associated with hyperarousal, and with heightened threat perception. The body of literature on children raised in chronically stressful, chaotic, and neglectful circumstances suggests both increased hyperarousal but also a tendency to misperceive threat under more benign circumstances.

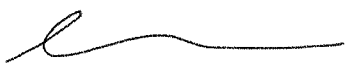
If Mr. Damren's ASD and childhood circumstances resulted in a bias to perceive threat in the absence of threat, this bias would have worked in his favor in a setting like Vietnam where even a split second of hesitation could have cost him and his fellow soldiers their lives. Similarly, Mr. Damren's primary assignment at LZ English was to man the bunker and watch for threats. His superior perceptual-reasoning/visual-spatial abilities would have served him well in this setting because success at this task requires the ability to detect even the slightest differences in the appearance of one's surroundings. As fellow soldiers

who served with him in Vietnam have stated, Mr. Damren was the soldier you wanted by your side.

What rendered Mr. Damren a good soldier, is also what rendered even more vulnerable for developing PTSD upon his return. Yet, because of his undiagnosed ASD, he did not present with typical PTSD symptoms, and even if he had, history reveals that many soldiers returning from Vietnam with PTSD were not identified and treated. Sadly, many still do to this day. Mr. Damren was one of these soldiers, who also was also undiagnosed and treated to ASD.

Like many soldiers who returned with PTSD, Mr. Damren turned to drugs and alcohol, but unlike most of them, he had the added burden of ASD which added the burden of less adaptive coping skills, heightened threat perception, and more social isolation. When combined with his service related hearing loss, undiagnosed ASD and undiagnosed PTSD, in the context of his childhood, poses multiple mitigating circumstances that were never brought to light during his trial and sentencing. Given the significant advances in science since the time of his trial in both the diagnosis of ASD and PTSD, a new sentencing trial seems both indicated and justified.

Respectfully submitted this date, June 30, 2022,



Marlyne K. Israelian, Ph.D.

Attachment A

CIR CT MINUTE 25 PAGE 643

IN THE CIRCUIT COURT

ST. JOHNS COUNTY, FLORIDA

SPRING TERM 19 77

STATE OF FLORIDA

CASE NO. 77-123 CF

vs.

FLOYD WILLIAM DAMREN
Defendant

A TRUE COPY
CARL "BUD" MARKEL
Clerk Circuit Court
By [signature]
Deputy Clerk

JUDGMENT AND SENTENCE

You, FLOYD WILLIAM DAMREN being personally before this Court, represented by FRANK G. HOWATT, Assistant Public Defender, your attorney of record,

having ~~been tried and found guilty of the crime of~~ entered a plea of guilty to the crime of ~~entered a plea of Nolo Contendere to the crime of~~ BURGLARY OF A DWELLING in violation of F.S. 810.02(3)

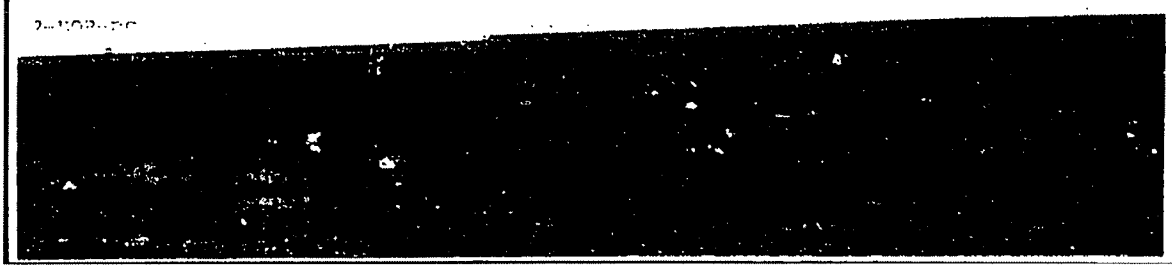
the Court, at this time, gives you an opportunity to be heard and show cause why you should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence. No cause being shown, it is, thereupon:

ORDERED, that you, FLOYD WILLIAM DAMREN are hereby adjudged guilty of the crime of BURGLARY OF A DWELLING in violation of F.S. 810.02(3). It is the sentence of the law that you be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of FIFTEEN (15) YEARS in the institution in the State Correctional System to which said Department may cause you to be confined. It is further,

ORDERED, that you shall be allowed 115 days credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. It is, further,

ORDERED, that the Sheriff of St. Johns County, Florida, is hereby ordered and directed to deliver you to the Department of Offender Rehabilitation, together with a copy of this Judgment and Sentence.

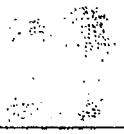
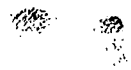
The Court does now advise you that it is your right to appeal from this Judgment and Sentence within thirty (30) days from this date, and you are further advised that you are entitled to the assistance of counsel in the filing and preparation of your appeal. Upon your request, and upon your showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.



CIR CT MINUTE 25 PAGE 644

The following are the fingerprints of the above-named Defendant, FLOYD WILLIAM DAMREN:

(FINGERPRINTS)

1. RIGHT THUMB	2. RIGHT INDEX	3. RIGHT MIDDLE	4. RIGHT RING	5. RIGHT LITTLE
				
6. LEFT THUMB	7. LEFT INDEX	8. LEFT MIDDLE	9. LEFT RING	10. LEFT LITTLE
				

DONE AND ORDERED IN Open Court at St. Johns County, Florida, this 12th day of August, A. D. 19 77.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, FLOYD WILLIAM DAMREN, and that they were placed thereon by said Defendant in my presence in Open Court this date.

CIRCUIT JUDGE

FILED AND RECORDED IN PUBLIC RECORDS OF ST. JOHNS COUNTY, FL

AUG 12 4 00 PM '77

CLERK CIRCUIT COURT

Page No. 9 Case No. 77-123 CF

Attachment B

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR CLAY COUNTY, FLORIDA.

CASE NO: 95-537-CF

DIVISION: B

STATE OF FLORIDA

vs.

FLOYD DAMREN

SENTENCE

The defendant, Floyd William Damren, was convicted by jury on May 17, 1995, of:

1. The First Degree Murder of Donald Miller;
2. Armed Burglary of R.G.C. Mineral Sands; and
3. Aggravated Assault on Michael Knight.

Conviction for the first count is punishable by either life imprisonment without the possibility of parole for twenty five years or death by electrocution.

On May 19, 1995, an advisory sentencing hearing was held as to the first count and the same jury, by a vote of twelve to zero, recommended that a sentence of death be imposed upon Floyd Damren for the crime of first degree murder.

The case was passed to May 25, 1995, for a sentencing hearing, and to June 1, 1995, for a hearing on whether defendant meets the criteria of an habitual felony offender. The case was then passed until today for sentencing.

Defendant, through counsel, expressly waived preparation and submission of a presentence investigation report.

FACTS OF THE CRIMES

The facts of these crimes were:

The defendant had previously burglarized the business of R.G.C. Mineral Sands to steal a piece of equipment and had stated that he had seen some other "good stuff" that he wanted to get. On May 1, 1994, defendant returned to R.G.C. Mineral Sands with Jeff Chitham with the intent to steal certain items. Both, unlawfully and without permission, entered the maintenance building of R.G.C. Mineral Sands. While in the process of burglarizing the business, the victim, Donald Miller, an employee of R.G.C. Mineral Sands, came upon Jeff Chitham and the defendant and the defendant began to beat the ~~defendant~~ victim with a pipe or other heavy object. A witness and employee of R.G.C. Mineral Sands, Michael Knight, came into the maintenance building looking for Donald Miller. At that time Michael Knight saw the victim on his back on the ground with Floyd Damren pulling at his leg, and saw Floyd Damren acting as if to strike the victim with a large object.

The witness screamed at Floyd Damren, who looked at the witness, and, with a heavy pipe or other large metal object, chased Michael Knight out of the maintenance building. Michael Knight recognized Floyd Damren as someone he had known since childhood. Michael Knight ran from the maintenance building as a result of Floyd Damren chasing him. The witness, Michael Knight, was afraid and in fear of immediate harm. Michael Knight's fear was reasonable under the circumstances.

As a result of the blows inflicted on the victim by the defendant, he died. Dr. Marguerite Arruza, Associate Medical

Examiner, testified that she performed the autopsy on the body of the victim and reported extensive injuries to the victim, including numerous contusions, abrasions, extensive bruising, lacerations, a fractured nose, and other injuries. The defendant struck the victim on his body and his face at least ten times before the victim lost consciousness and he continued to strike the victim with four deadly blows. Dr. Arruzo established that the cause of death was cranial cerebral injuries.

DEFENSE EVIDENCE

The defense called three witnesses who had been with the defendant at varying times on the day of the murder, May 1, 1994, to establish the defendant's beer drinking that day. Roger Proutt testified that the defendant drank that day but was not drunk. Bart Greenway saw the defendant drink but was not sure if the defendant was drunk. Mr. Greenway had himself consumed a case of beer that day. Walter Carry observed the defendant that evening and testified that the defendant did not act drunk. The defense then presented the opinion testimony of Dr. Ernest Miller as to the effect of defendant's possible drinking.

ALL EVIDENCE AND TESTIMONY CONSIDERED

Before imposing sentence, this Court has considered all of the evidence and testimony elicited at trial and during the advisory penalty phase hearing. The Court has also considered argument of counsel, defendant's Sentencing Memorandum, the laws applicable to this case and any other factor bearing on this matter.

AGGRAVATING CIRCUMSTANCES

THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO SOME PERSON.

The defendant was found guilty on May 17, 1995, of Aggravated Assault on Michael Knight. On May 1, 1994, the defendant chased Michael Knight with a large object. Michael Knight was afraid and in fear of immediate harm. His fear was reasonable.

This is an aggravating circumstance. Because it occurred contemporaneous with or at about the same time as the murder, the Court gives this circumstance little weight.

THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF OR ATTEMPTED COMMISSION OF THE CRIME OF ARMED BURGLARY AND WAS COMMITTED FOR FINANCIAL GAIN.

The defendant had previously burglarized R.G.C. Mineral Sands and stolen a piece of equipment. He decided to return to steal other items. While burglarizing the business and in the course of stealing, the defendant killed the victim, who happened upon him. The jury convicted the defendant of the armed burglary at the time of the murder.

This is an aggravating circumstance. The Court gives some weight to this circumstance.

THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The victim suffered at least ten blows from a pipe or other heavy object before being knocked unconscious. He sustained numerous contusions, abrasions and bruises to his arms, legs,

chest, nose, ears, cheek and head. His nose was fractured. The injuries were to both front and back and several to the arm were defensive wounds, showing that the victim was trying to protect himself. Several of the wounds to the face were inflicted upon the victim while he was still conscious and moving his head in an effort to avoid being hit. It is clear that the victim's death was preceded by a great deal of pain, suffering and fear, and finally by the knowledge that his death was at hand. The defendant's choice of weapons, a heavy metal pipe or other heavy metal object, to beat the victim to death was especially atrocious and cruel.

This is an aggravating factor. The Court gives considerable weight to this circumstance.

THE CRIME FOR WHICH THE DEFENDANT WAS SENTENCED WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

After the defendant's first blow, his partner in crime, Jeff Chitham, "begged" the defendant not to hurt the victim. Chitham told the defendant not to hit the victim again and asked him to leave. The victim also begged the defendant not to hit him and begged for his life. The victim told the defendant he was going on vacation the next day and was taking his grandson fishing and asked to be let go. All this time the defendant was pacing and surely contemplating the situation, considering the pleas of Chitham and the victim and reflecting on his next course of action. The result of defendant's musing was an act of deliberate ruthlessness: the resumption of his attack on the victim and the cold, calculated and premeditated murder of Donald Miller. Despite being interrupted by

Mike Knight and suspending his beating of the victim to chase Knight, he again returned to continue. Defendant's actions demonstrate a heightened premeditation.

This is an aggravating circumstance. The Court gives considerable weight to this circumstance.

SUMMARY OF MITIGATING CIRCUMSTANCES PRESENTED BY DEFENSE

MITIGATION RELATING TO THE OFFENSE

THE BURGLARY DID NOT INVOLVE A SOPHISTICATED PLAN OR A PRECONCIEVED PLAN TO USE WEAPONS OR VIOLENCE.

This was a "planned" burglary. History had shown the defendant that sophistication was not needed--the defendant had burglarized R.G.C. Mineral Sands before and had not been caught. He had decided to return to steal again. Obviously, he did so on the assumption that he would not be caught again. The Court gives little weight to this circumstance.

ALCOHOL IMPAIRED MR. DAMREN'S JUDGMENT AND THINKING BEFORE HE WENT TO RGC.

Assuming that defendant had consumed beer throughout the day on May 1, 1994, there was no testimony from anyone that he was impaired in any way. Roger Proutt and Wendy Hendley stated the defendant was not drunk. No witness who observed the defendant that day testified that he was drunk, appeared drunk or was impaired in any way. In fact, one witness described the defendant's ability to drive and maneuver his truck in a small and crowded area with no apparent difficulty. The Court gives no weight to this circumstance.

ALCOHOL IMPAIRED MR. DAMREN'S JUDGMENT AND THINKING WHEN HE AND JEFF CHITHAM WERE AT RGC.

Again, the testimony of those who observed the defendant both before and after he went to R.G.C. Mineral Sands fails to lend any credence to this argument. The testimony of those who were with the defendant throughout the day of May 1, 1994, shows he was able to reflect on all his actions both before and after his visit to R.G.C. Mineral Sands. No credible evidence was offered to show any sudden or temporary impairment during the actual commission of these crimes. The Court gives no weight to this circumstance.

MR. DAMREN DID NOT ACT ALONE, AND THE EXACT ROLE OF EACH ACCOMPLICE IS NOT CLEAR.

Jeff Chitham begged for the victim's life and then fled the scene when the defendant began to chase Mike Knight. The victim was being struck from the front at that time and presumably the fatal blow had yet to be struck. Upon the defendant's return from chasing Knight, Chitham was gone and unavailable to inflict any blows on the victim. The Court gives little weight to this circumstance.

MITIGATION CONCERNING MR. DAMREN'S LIFE

MR. DAMREN SUFFERED EMOTIONAL DEPRIVATION AND LITTLE PARENTAL SUPPORT AS A CHILD.

Defendant's father was in the U. S. Navy and was absent for long periods of time. When home, the father was strict, undemonstrative and drank alot. Defendant's mother did all she could to make a good home, but had difficulty disciplining the defendant and his siblings. The Court gives no weight to this

circumstance.

MR. DAMREN HAD AN ALCOHOLIC FATHER AND HAS SUFFERED WITH HIS OWN ALCOHOL PROBLEMS.

Defendant's deceased father drank excessively, but was generally absent on military duty. Defendant drinks alcohol, primarily beer, but the testimony of employees and friends was clear that his drinking "didn't affect his work any" or his ability to function. The Court gives little weight to this circumstance.

MR. DAMREN HAS HELD JOBS AND HAS PERFORMED WELL IN HIS WORK.

Several employers testified that defendant was a good worker and got along well with others. None complained of any drinking problems of defendant. The Court gives no weight to this circumstance.

MR. DAMREN HAS BEEN KIND TO HIS MOTHER, SISTER AND BROTHER.

Defendant has been a good son. He fixes things for his mother, takes her to doctors' appointments and visits her in the hospital. His devotion to his mother belies, in part, his claim of little parental support as a child. Defendant has sent his younger sister money on several occasions and allowed her to live with him for 2 1/2 weeks at one time when she was having marital problems. His brother evidenced no closeness to the defendant and has no plans to maintain any contact with him. The Court gives no weight to this circumstance.

MR. DAMREN HAS SHOWN PATIENCE WITH AND AFFECTION FOR CHILDREN.

Defendant helped with his aunt's, Betty Mathes, children when he was a teenager. Defendant also treated his girlfriend's daughter and granddaughter well when he lived with them.

Additionally he took Roger Proutt's son fishing. The Court gives no weight to this circumstance.

MR. DAMREN HAS BEEN A GENEROUS AND DEVOTED FRIEND WHO HAS GONE OUT OF HIS WAY TO DO THINGS FOR HIS FRIENDS.

In the early 1970's, defendant took Delores Hill grocery shopping, she relied on the defendant and his car at that time. Defendant has filled Roger Proutt's propane tank and gotten him firewood. Defendant was paid to build a shop for him. Defendant also befriended an older women, Anne Parker, for several years and helped her move things and built shelves for her. These isolated acts of friendship are commendable, but it is hyperbole to label them "generous" and "devoted." The Court gives no weight to this circumstance.

MR. DAMREN SERVED HIS COUNTRY IN THE UNITED STATES ARMY AND IN VIETNAM.

The defendant was in the U.S. Army during the early 1970's and in 1970-71 was stationed in Viet Nam. He was a model soldier, better than most, who got along with everyone. As distant in time as this circumstance is, the Court gives it no weight.

MR. DAMREN MAINTAINED A RELATIONSHIP WITH NANCY WALDRUP AND TREATED TESSA MOSLEY LIKE A DAUGHTER.

Defendant had a relationship with Ms. Waldrup for 3 1/2 years and treated her daughter as his own. Ms. Waldrup is not sure if she will maintain contact with the defendant. The Court gives no weight to this circumstance.

MR. DAMREN EXHIBITED GOOD BEHAVIOR IN THE CLAY COUNTY JAIL DURING THE LAST YEAR.

Sergeant Murphy testified that defendant has never complained nor caused a problem. The Court gives some weight to this circumstance.

SUMMARY OF WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

The circumstances relating to the offense presented by the defense offer little, if any, mitigation. The circumstances relating to the defendant's life do not constitute mitigation. They demonstrate a life remarkably absent of good deeds, except for a few isolated, sporadic and uneventful acts of kindness that collectively do not rise to the level of mitigation. An empty, non-productive and vacuous existence is not an excuse for criminal behavior and cannot justify or ameliorate the act of the defendant in murdering Donald Miller.

The taking of a life is wrong, but does not mandate imposition of the death penalty unless aggravating circumstances are proven and are of such a nature as to warrant it. The senseless murder of Donald Miller by the defendant was done after two individuals, the victim and Jeff Chitham, "begged" for the defendant's life. The killing was done after a sufficient period of obvious reflection by the defendant. It was an act that was ruthless and done with conscious intent and the Court gives considerable weight to the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The evidence shows that the victim sustained numerous injuries to his body from a heavy metal object. These injuries caused great pain and suffering, and yet he continued to fight for his life as

evidenced by the defensive wounds on his arm and the wounds on his head, showing movement of his head in an attempt to avoid blows. The senseless and continued beating of the victim was with a particularly atrocious and cruel instrument of death and torture. The victim suffered and must have known that his death was at hand. The Court gives considerable weight to the aggravating circumstance that the murder was especially heinous, atrocious or cruel.

The Court finds that that statutory aggravating circumstances, in the aggregate, clearly outweigh the circumstances urged as mitigation.

SENTENCE

The Jury by a vote of twelve to zero has recommended that you be sentenced to death. After close examination of all the facts and circumstances I have concluded that death is the appropriate sentence.

You, Floyd William Damren, having been found guilty by jury of the crimes of Murder in the First Degree; Armed Burglary; and Aggravated Battery, I hereby adjudge you to be guilty on each count and sentence you as follows:

1. FIRST COUNT: MURDER IN THE FIRST DEGREE- I sentence you to **DEATH**. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution. That on such date you be put to death by having electrical currents passed through your body in such amounts and frequency until you are dead.

2. SECOND COUNT: ARMED BURGLARY- I sentence you to **LIFE** imprisonment as an habitual felony offender. The Defendant

qualifies as an habitual offender as is more fully shown below. The sentence in this count shall be served concurrent to the sentence imposed in Count I.

3. THIRD COUNT: AGGRAVATED ASSAULT- I sentence you to ten years in the Florida State Prison as an Habitual Felony Offender. The defendant qualifies as an habitual offender as is more fully shown below. The sentence in this count shall be served concurrent to the sentences imposed in Count I and II.

PROVISIONS FOR EXTENDED TERM OF IMPRISONMENT

FOR HABITUAL FELONY OFFENDER

FLORIDA STATUTE 775.084 PROVIDES FOR AN EXTENDED PRISON SENTENCE IF THE DEFENDANT MEETS THE CRITERIA OF AN HABITUAL FELONY OFFENDER.

FINDINGS BY COURT

Upon hearing in open court with full rights of confrontation, cross examination and representation by counsel - the Court finds by a preponderance of evidence presented:

A. Defendant was convicted in Case No. 89-325-CF, August 3, 1989, of Possession of Cocaine, in Clay County, Florida.

B. Defendant was convicted in Case No. 89-586-CF, August 3, 1989, of Possession of Cocaine, (Count I) and Tampering with Evidence (Count II), in Clay County, Florida.

C. Defendant was convicted in Case No. 84-264-CF, on June 8, 1984, of Grand Theft, in Clay County, Florida.

D. That the Defendant has not received a pardon for the felony convictions set forth in paragraphs A, B and C above.

E. That the felony convictions in paragraphs A, B and C above have not been set aside in any post conviction proceeding.

F. That the crimes for which defendant is to be sentenced herein were committed within five years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within five years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment

imposed as a result of a prior conviction for a felony or other qualified offense.

G. That defendant meets the criteria of an habitual felony offender.

SEPARATE PROCEEDING FOR HABITUAL FELONY OFFENDER 775.084

This Court has conducted a separate proceeding to determine if Defendant is an habitual felony offender and should be sentenced as such. The proceeding was in open court with full rights of confrontation, cross-examination and representation by counsel. I find by a preponderance of the evidence that:

A. A written notice of the state's intention to seek an extended sentence as a habitual felony offender under the provisions of F.S. 775.084 was served upon defendant and his attorney a sufficient time prior to the imposition of sentence so as to allow the preparation of a submission on behalf of defendant.

B. That defendant is now to be sentenced for convictions of felonies which were committed within 5 years from the date of the last prior felony conviction or within 5 years of release or parole from sentence thereon.

C. That the defendant is an habitual felony offender and should be sentenced to an extended term of imprisonment for the protection of the public.

In making the determination to sentence defendant as an habitual felony offender, the Court has considered:

A. The facts and circumstances of the present crime for which defendant is to be sentenced.

B. The fact that defendant meets the criteria of an habitual felony offender.

C. The protection of the public.

D. The appropriate punishment for the defendant.

Defendant shall pay $200.00 felony court costs, plus $50.00 to the Crime Compensation Fund, plus $3.00 to the Criminal Justice

Trust Fund.

CONDITIONS OF SENTENCE

This sentence, as to the Second and Third counts, imposed under F.S. 775.084 (as an habitual felony offender), is not subject to the provision of F.S. 921.001 (Sentencing Guidelines), nor shall the provisions of F.S. 947 (Parole) apply to this defendant.

Because this sentence is imposed under the provisions of F.S. 775.084 (as an habitual felony offender), the defendant shall not be eligible for gain-time granted by the Department of Corrections except as provided for in F.S. 944.275(4)(B).

Defendant is advised he has thirty days from today within which to take an appeal in writing. Should he fail to take an appeal within 30 days, then he waives, forfeits and gives up the right to such an appeal.

I hereby appoint the Office of the Public Defender to represent the defendant, should he decide to take an appeal.

May God have mercy on your soul.

Done and Ordered at Green Cove Springs, Florida, this 2nd day of June, 1995.

Robert M. Foster
ROBERT M. FOSTER
CIRCUIT JUDGE

cc:

State Attorney
Public Defender
Floyd William Damren

Attachment C

Attachment D

Attachment
E

Appendix H

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

STATE OF FLORIDA,

v. **CASE NO. 1994-CF-537**

FLOYD DAMREN,

Defendant.
_____/

DEFENDANT'S SUCCESSIVE RULE 3.851 MOTION
TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

Defendant FLOYD DAMREN, through counsel, moves for post-conviction relief from his sentence of death under Fla. R. Crim. P. 3.851(e)(2). This motion is filed in light of newly discovered evidence.

PROCEDURAL HISTORY

1. Judgment and Sentence

The Circuit Court of the Fourth Judicial Circuit, Clay County, entered the judgments of conviction and sentence under consideration. *See* Judgment of Conviction and Sentence (Attachment "A"). On May 17th, 1995, Mr. 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 court sentenced Mr. 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.*

2. Issues Raised on Appeal and Disposition

The following issues nine issues were raised in Mr. Damren's direct appeal:

1. The trial court erred in permitting testimony of a prior crime to be admitted during the guilt phase. (The trial court's ruling was affirmed as 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. (The trial court's ruling was affirmed as the instruction is 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. (Error, if any, was harmless.);
4. The court erred in allowing the victim's daughter and wife to read prepared statements in the penalty phase. (The trial court's ruling was affirmed as it comports with law on victim impact evidence.);
5. The court erred in allowing hearsay statements from three individuals as to what Mr. Damren's accomplice had told them about the incident. (Affirmed as 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. (Affirmed as the argument was meritless.);
7. The evidence failed to establish that the murder was committed in a cold, calculated, and premeditated manner. (Affirmed as the 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. (Affirmed as the error, if any, was harmless.);
9. The imposition of the death penalty in this case is not proportionate with the imposition of the death penalty in other cases. (Affirmed as the argument was meritless.)

The Florida Supreme Court affirmed the convictions and sentence of death. *Damren v. State*, 696 So.2d 709 (Fla. 1997).

3. Disposition of All Previous Postconviction Claims

A. Initial Motion to Vacate Judgments of Conviction and Sentence

Mr. Damren raised the following claims in his initial postconviction motion filed on November 18, 1998:

1. The rule of criminal procedure requiring Mr. Damren to file a motion for postconviction relief within one year after the affirmance of his convictions violates his constitutional rights.
2. Mr. Damren is innocent of first-degree murder.
3. Newly discovered evidence establishes that Mr. Damren's capital conviction and sentence are unreliable.
4. Mr. Damren is innocent of the death penalty.
5. Mr. 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 Mr. Damren's counsel from interviewing jurors is unconstitutional.
7. Mr. 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. Mr. Damren's constitutional rights were violated because no reliable transcript of the trial exists.
10. Mr. Damren was denied a fair trial because the court permitted the State to introduce gruesome and shocking photographs.
11. Mr. 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 nonstatutory aggravators resulted in an arbitrary imposition of the death penalty.
15. Mr. 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 which diminished its sense of responsibility.
17. Mr. Damren was denied effective assistance of counsel at both the guilt and penalty phases.
18. Mr. 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 Mr. Damren's constitutional rights.
20. The jury's improper consideration of character and victim impact statements violated Mr. Damren's constitutional rights.
21. During the Penalty phase, the burden of proof was shifted to Mr. Damren.
22. The prosecutor's improper closing arguments during the guilt and penalty phase denied Mr. 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 Mr. Damren is entitled to a new trial.

All claims were denied after an evidentiary hearing and the trial court's rulings were affirmed on appeal. *Damren v. State*, 838 So.2d 512 (Fla. 2003).

B. Writ of Habeas Corpus

Mr. Damren raised the following issues in his state court habeas corpus petition filed concurrently with the appeal of the denial of his postconviction motion.

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 Mr. Damren's case where the jury did not receive adequate narrowing instructions. As a result, Mr. Damren's sentence of death is premised upon fundamental error which must be corrected in light of Florida law *Espinosa v. Florida* and *Richmond v. Lewis*.
3. Mr. Damren's trial counsel was ineffective by leading the jury to believe that the responsibility for determining the appropriateness of Mr. Damren's death sentence rests elsewhere.

The rulings of the state court were affirmed and all relief was denied. *Damren v. State*, 838 So.2d 512 (Fla. 2003). ,

C. Successor Motion to Vacate Judgments of Conviction and Sentence

On November 18, 1998, Mr. Damren filed his first successive motion for postconviction relief claiming that his death sentence was unconstitutional under the Sixth and Eighth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution in light of *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State,* 202 So.3d 40 (2016).

D. Nature of Relief Sought

Mr. Damren seeks to set aside his sentence of death and receive a new penalty phase.

E. Claims for Which an Evidentiary Hearing Is Sought and Grounds for Postconviction Relief

CLAIM 1

NEWLY DISCOVERED EVIDENCE OF MR. DAMREN'S AUTISM SPECTRUM DISORDER RENDERS HIS DEATH SENTENCE UNRELIABLE

This claim is evidenced by the following:

All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motion to vacate his judgments and sentence of death, and all evidence presented by him during the previously conducted evidentiary hearing are incorporated herein by specific reference.

Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. *See Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014), *citing Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or his counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id.* "Newly discovered evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability'." *Id. citing Jones*, 709 So. 2d at 526. The Florida Supreme Court has held that newly discovered evidence may support the granting of a new sentencing trial if the evidence is of such a nature that the sentence would probably have been life if the jury had heard it. *See Jones v. State*, 591 So.2d 911, 915 (Fla. 1991).

"[T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial." *Hildwin*, 141 So. 2d at 1184, *citing Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). "In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the

evidence so there is a 'total picture' of the case and 'all the circumstances of the case'." *Id.*

During counsel's continuing investigation of Mr. Damren's case, undersigned counsel retained Dr. Marlyne Israelian, a licensed clinical psychologist and developmental neuropsychologist, to conduct a comprehensive forensic evaluation. For that purpose, she conducted a clinical interview of Mr. Damren over a two-day period in May, 2021 at Union Correctional Institution. She administered psychological and intelligence tests designed to measure his mental abilities and intelligence. She reviewed hundreds of pages of historical and court records and closely observed his behavior over the ten-hour evaluation.

On June 10, 2021, Dr. Israelian shared her findings from her evaluation of Mr. Damren with undersigned counsel. She described his childhood as difficult, chaotic, unpredictable and marked by poverty, neglect and maltreatment. He experienced social isolation, bullying, and interpersonal torment as a child. Despite wanting to connect with others he could not no matter how hard he tried. He enlisted in the Army after he completed the 11th grade and was deployed to Vietnam. Dr. Israelian reported that Mr. Damren liked the structure and discipline of the Army compared to the chaos of his childhood. But this was a time when he experienced unspeakable horrors and lived under constant threat as an infantryman. He was exposed to high levels of noise and suffered permanent hearing loss.

When he returned from Vietnam, Mr. Damren slid into a downward spiral of alcohol and drug abuse, relationship failures, depression and anxiety.

Under the criteria set forth by the American Psychiatric Association in its manual entitled *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5TR"), she concluded that Mr. 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.[1] Dr. Israelian's report is forthcoming. She described ASD as a condition evident from childhood that is associated with abnormalities in brain structure and function. She also found that Mr. Damren suffered from Post-Traumatic Stress Disorder ("PTSD") as a result of his ASD, his horrific childhood, and his Vietnam experience.

The DSM-5TR has classified ASD as a neurodevelopmental disorder that manifests in early childhood. Common symptoms are the inability to form and keep long-term relationships and friendships, social isolation, lack of empathy, poor non-verbal communications, and poor impulse control. ASD is usually inherited from a parent.[2] 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. These criteria and Dr. Israelian's findings are discussed in more detail below:

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

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

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[1] The 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.

[2] Dr. Israelian is of the opinion that Mr. 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.

Dr. Israelian found ample evidence of these deficits. Dr. Israelian gave examples from her evaluation and her review of materials that Mr. Damren rarely initiated conversations, but would instead respond to questions. He rarely showed emotion. He had difficulty responding to complex social cues, especially in high stress situations. 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. He tends to interpret language literally. People appear puzzled or bewildered by things he says to them. He has difficulty knowing when or how to join a conversation. He cannot see the big picture. As a child, he had few friends and most were girls as they were more forgiving. He has an affinity for animals as they are not as complex as humans.

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 Mr. 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. His facial expressions remained flat and he would quickly deflect eye contact or shut down when his emotions were about to surface. He did not use expressive gestures. She observed that he had poor integration of eye contact, gestures, prosody (the rhythm, stress and intonation of speech), and facial expressions. He contradicted himself repeatedly. She described him as emotionally flat with a restricted range of affect.

3. Deficits in developing, maintaining, and understanding relationships ranging, for example, from difficulties 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 Mr. Damren's childhood girlfriend, Dorothy Macomber, Mr. Damren had only one friend as a

child. He had nearly non-existent relationships with his siblings. His relationships were always one-sided. His second wife only married him to get away from her family and he never had an attachment to her. Mr. Damren told Dr. Israelian that he always thought people did not like him.

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 Mr. Damren's artwork in which she found repeated patterns, lettering, and designs that he would told her he would practice over and over again. *See* Attachments C, D and E, samples of Mr. Damren's artwork.

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 he always wore old blue jeans and an old camouflage hat.

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

Dr. Israelian described Mr. 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. She observed that he will engage a listener on topics he is interested in only.

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

Mr. 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 Mr. Damren was a strange, odd child, who exhibited the deficits described herein. Dr. Israelian has stated that Mr. Damren was born with ASD and that his brain was wired differently at birth.

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

Dr. Israelian found ample evidence of Mr. Damren's impaired functioning. She observed from the materials she reviewed, her evaluation of Mr. 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. He has never lived up to his potential as evidenced by his IQ score in the 99th percentile. He is prone to anxiety and depression as are most adults and adolescents with ASD. After his return from Vietnam he used alcohol and drugs to self-medicate. He already had a genetic propensity for alcoholism from his father.

Mr. 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.

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 Mr. Damren. His full-scale score was 127, which placed him in the 97th percentile. She described him as almost a savant in mathematics and art. He is not intellectually disabled.

Dr. Israelian concluded that Mr. Damren suffered from ASD at the time of the murder for which he was sentenced to death.

Argument

Compelling evidence of Mr. Damren's ASD would have also established additional critical mitigation for the jury. A diagnosis of ASD would have supported statutory mitigation that Mr. 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 and act on available alternatives. They have significant problems with impulse control, thus, their ability to conform conduct to requirements of law is substantially impaired. While a neurotypical[3] 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. Even if the jury did not find this as mitigation, understanding Mr. Damren's ASD diagnosis would have given them critical context to the circumstances of the murder. In this case the court found two of the weightiest aggravators, HAC and CCP, largely based on Mr. Damren's "ruthless" act even after the victim and Mr. Damren's co-defendant "begged" for the victim's life. Mr. Damren's diagnosis with ASD puts that situation in a whole new light. It is difficult for people with ASD to navigate *normal* situations, let alone being caught in a criminal act. Evidence of Mr. Damren's ASD and PTSD, discussed in Claim 2, coupled with his use of copious 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. 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.

The ASD diagnosis also puts Mr. Damren's entire life history in a different perspective. Growing up, Mr. Damren had difficulties making friends and relating to his siblings. He is remembered as "odd" and "always alone." Floyd Damren's childhood was characterized by instability. He is the son of an alcoholic father, who was largely absent and was abusive when

[3] Neurotypical is the term used in the Autism literature to refer to those who do not have Autism

present. His mother was emotionally distant and ill-equipped to properly care and nurture her children.

Compared to his childhood, the structure of the military gave him some guidance as far as social expectations for his behavior. More importantly, while he did struggle to connect with his fellow soldiers, he found acceptance with the Vietnamese people. Dr. Israelian opines that people with ASD are frequently more comfortable in foreign settings as foreigners are more forgiving of seemingly "odd" behavior. Upon returning from Vietnam, Mr. Damren hastily entered into a marriage with a woman who ultimately cheated on him with another serviceman. Mr. Damren did not have the emotional skills to cope with that situation, and attempted suicide. This, along with other irrational behavior led to him being discharged from the military. Losing his identity as a serviceman was devastating and Mr. Damren quickly devolved into a lifestyle characterized by alcohol, drugs and petty criminal offenses. 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.

Because of his ASD it is difficult for him to express remorse in the way the state or victim's kin might expect and understand. One of the defining characteristics of ASD is an inability to empathize with others. 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.

Much of Mr. Damren's mannerisms may have been misinterpreted by the jury. The ASD give his demeanor a flat affect. He can appear bored or disinterested. This is due to what psychologists explain as a "theory of mind." Mr. Damren does not realize how he is perceived, because he is unable to make these perceptions about others. He is unaware of what his body

language is communicating. This must have been extremely detrimental during his jury trial as jurors observed him.

A similar situation was examined in *Riggins v. Nevada*, 112 S. Ct. 1810 (1992). In *Riggins* the Supreme Court recognized that the defendant's demeanor and presentation 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. However, at trial, his attorneys moved for him to not be medicated. 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. 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." The trial court did not permit Riggins to stop taking the anti-psychotic medication. The defense did present testimony from an expert on the effect of the antipsychotics. 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." The Supreme Court also acknowledged that identifying "the precise consequences...cannot be shown from a trial transcript. "

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 usual 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 and not to do so violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and its corresponding Florida Constitutional provisions, *Atkins* and *Roper*, *supra. See also Lockett v. Ohio,* 438 U.S. 586 (1978) and *Porter v. McCollum*, 558 U.S. 30 (2009). 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.

Timeliness of the Motion.

Undersigned counsel was informed on June 10, 2021 that Mr. Damren suffered from ASD and PTSD by Dr. Israelian. This claim is being filed within the one-year deadline under Fla. R. Crim. P. § 3.851 (e)(1) and (e)(2)(C).

This evidence could not have been raised at the time of the initial trial in 1994 as autism, or Asperger's as it was known then, was not diagnosed in adults. It simply was not recognized as defense for adults at the time of his trial and he was not diagnosed with it as a child.

Mr. Damren is entitled to a new penalty phase.

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CLAIM 2

NEWLY DISCOVERED EVIDENCE OF MR. DAMREN'S POST TRAUMATIC STRESS DISORDER AT THE TIMEOF THE OFFENSES RENDERS HIS DEATH SENTENCE UNRELIABLE

All facts alleged in Claim 1 are incorporated herein.

In addition to ASD, Dr. Israelian diagnosed Mr. Damren with PTSD. According to the DSM-5TR[4], PTSD is a mental health condition or disorder that may occur in people who have experienced or witnessed a traumatic event or events. It may occur at any age after the first year of life. 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. Again, symptoms vary among individuals with PTSD.

Dr. Israelian found that Mr. 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 Mr. Damren would develop PTSD in response to his Vietnam war experiences.

In addition, 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.

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. There,

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

he experienced extreme danger and stress, adding to his childhood PTSD. He recounted finding the body of a child embedded in the soil after being run over by a tank.

According to Dr. Israelian, Mr. Damren's PTSD symptoms from his childhood and Vietnam made him more hyper-aroused and reactive. He had (and still has) constant heightened anxiety. Coupled with his ASD, Mr. Damren did not turn to friends and family for support and comfort as most "neurotypical" people do when under great stress. He had no one to turn to for support and sought relief in alcohol and drugs. His PTSD, ASD and alcohol and substance abuse compounded his emotional reactivity and lack of self-control in situations where he was surprised or felt out of control, as he would have the night of the murder.

Although 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. Had the jury or the sentencing court heard this evidence, though, there is a reasonable probability that the sentence would have been life.

Timeliness of the claim

As with the ASD claim above, undersigned counsel has filed the claim within the one-year time limit set forth in the rule. At the time of the trial, PTSD could not have been raised because the trial lawyers had no reason to believe he had it. He did not evince symptoms

typically associated with "shell-shocked" combat veterans as they were still perceived then. More importantly, 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.

And although PTSD was included in the DSM at that time, many experts in the field still attributed it to the veteran's personal and moral flaws and weaknesses.

Conclusion

Mr. Damren is entitled to a new sentencing trial.

Witnesses to Claims 1 and 2

The witnesses listed below are available to testify under oath to the facts alleged in this motion at an evidentiary hearing in this cause should one be granted. These witnesses were never contacted about the claims raised and therefore were not previously available to address them.

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1145 Sheridan Road, N. E.
Atlanta, GA 30324
404-325-8512 ext. 726

Lori Miller
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Keith Damren
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Betty Mathis
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Stratford, CT 06615

Cathy Lewis
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Dorothy Macomber
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Charlie Read
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Dave Ferrier
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Rockledge, FL 32955

Art Cody
210 Ackerman Ave.
Ridgewood, NJ 07450

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, this Court should vacate Mr. Damren's death sentence and order a new trial.

Respectfully submitted this 10th day of June, 2022.

/s/ Karin L. Moore

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Counsel- North

Florida Bar Number 1002602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day, June 10, 2022, via electronic service to the Office of the Attorney General, (capapp@myfloridalegal.com), Pamela Hazel, Asst. State Attorney, (Phazel@coj.net) and by U. S. mail to Floyd Damren, DOC no. 061360, Union Correctional Institution, P. O. Box 1000, Raiford, FL 32083.

/s/ Karin L. Moore
KARIN L. MOORE

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851(e)

Pursuant to Fla. R. Crim. P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that she has discussed the contents of this motion fully with Mr. Damren, that she has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

/s/ Karin L. Moore
Karin L. Moore
Asst. CCRC
Counsel for Mr. Damren

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Attachment A

OR BK MINUTE 25 PAGE 643

IN THE CIRCUIT COURT

ST. JOHNS COUNTY, FLORIDA

SPRING TERM 19 77

STATE OF FLORIDA

CASE NO. 77-123 CF

vs.

FLOYD WILLIAM DAMREN
Defendant

A TRUE COPY
CARL "BUD" MARKEL
Clerk Circuit Court
By [signature]
Deputy Clerk

JUDGMENT AND SENTENCE

You, FLOYD WILLIAM DAMREN being personally before this Court, represented by FRANK G. HOWATT, Assistant Public Defender, your attorney of record,

having ~~been tried and found guilty of the crime of~~ entered a plea of guilty to the crime of ~~entered a plea of nolo contendere to the crime of~~

BURGLARY OF A DWELLING in violation of F.S. 810.02(3)

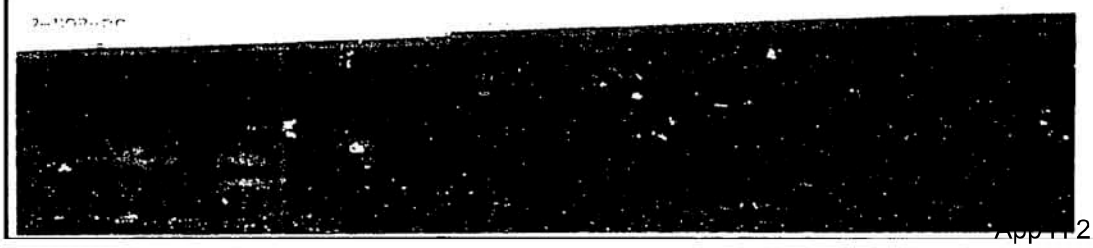
the Court, at this time, gives you an opportunity to be heard and show cause why you should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence. No cause being shown, it is, thereupon:

ORDERED, that you, FLOYD WILLIAM DAMREN are hereby adjudged guilty of the crime of BURGLARY OF A DWELLING in violation of F.S. 810.02(3). It is the sentence of the law that you be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of FIFTEEN (15) YEARS in the institution in the State Correctional System to which said Department may cause you to be confined. It is further,

ORDERED, that you shall be allowed 115 days credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. It is, further,

ORDERED, that the Sheriff of St. Johns County, Florida, is hereby ordered and directed to deliver you to the Department of Offender Rehabilitation, together with a copy of this Judgment and Sentence.

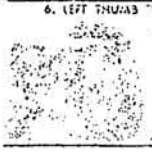
The Court does now advise you that it is your right to appeal from this Judgment and Sentence within thirty (30) days from this date, and you are further advised that you are entitled to the assistance of counsel in the filing and preparation of your appeal. Upon your request, and upon your showing that you are entitled to an attorney at the expense of the State, the Court will appoint one for you.



CIR CT MINUTE 25 PAGE 644

The following are the fingerprints of the above-named Defendant, FLOYD WILLIAM DAMREN:

(FINGERPRINTS)

1. RIGHT THUMB	2. RIGHT INDEX	3. RIGHT MIDDLE	4. RIGHT RING	5. RIGHT LITTLE
				
6. LEFT THUMB	7. LEFT INDEX	8. LEFT MIDDLE	9. LEFT RING	10. LEFT LITTLE
				

DONE AND ORDERED IN Open Court at St. Johns County Florida, this 12th day of August, A. D. 19 77.

I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, FLOYD WILLIAM DAMREN, and that they were placed thereon by said Defendant in my presence in Open Court this date.

CIRCUIT JUDGE

FILED AND RECORDED IN PUBLIC RECORDS OF ST. JOHNS COUNTY, FL

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CLERK CIRCUIT COURT

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Page No. 9 Case No. 77-123 CF

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Attachment B

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR CLAY COUNTY, FLORIDA.

CASE NO: 95-537-CF

DIVISION: B

STATE OF FLORIDA

vs.

FLOYD DAMREN

SENTENCE

The defendant, Floyd William Damren, was convicted by jury on May 17, 1995, of:

1. The First Degree Murder of Donald Miller;
2. Armed Burglary of R.G.C. Mineral Sands; and
3. Aggravated Assault on Michael Knight.

Conviction for the first count is punishable by either life imprisonment without the possibility of parole for twenty five years or death by electrocution.

On May 19, 1995, an advisory sentencing hearing was held as to the first count and the same jury, by a vote of twelve to zero, recommended that a sentence of death be imposed upon Floyd Damren for the crime of first degree murder.

The case was passed to May 25, 1995, for a sentencing hearing, and to June 1, 1995, for a hearing on whether defendant meets the criteria of an habitual felony offender. The case was then passed until today for sentencing.

Defendant, through counsel, expressly waived preparation and submission of a presentence investigation report.

FACTS OF THE CRIMES

The facts of these crimes were:

The defendant had previously burglarized the business of R.G.C. Mineral Sands to steal a piece of equipment and had stated that he had seen some other "good stuff" that he wanted to get. On May 1, 1994, defendant returned to R.G.C. Mineral Sands with Jeff Chitham with the intent to steal certain items. Both, unlawfully and without permission, entered the maintenance building of R.G.C. Mineral Sands. While in the process of burglarizing the business, the victim, Donald Miller, an employee of R.G.C. Mineral Sands, came upon Jeff Chitham and the defendant and the defendant began to beat the ~~defendant~~ victim nt with a pipe or other heavy object. A witness and employee of R.G.C. Mineral Sands, Michael Knight, came into the maintenance building looking for Donald Miller. At that time Michael Knight saw the victim on his back on the ground with Floyd Damren pulling at his leg, and saw Floyd Damren acting as if to strike the victim with a large object.

The witness screamed at Floyd Damren, who looked at the witness, and, with a heavy pipe or other large metal object, chased Michael Knight out of the maintenance building. Michael Knight recognized Floyd Damren as someone he had known since childhood. Michael Knight ran from the maintenance building as a result of Floyd Damren chasing him. The witness, Michael Knight, was afraid and in fear of immediate harm. Michael Knight's fear was reasonable under the circumstances.

As a result of the blows inflicted on the victim by the defendant, he died. Dr. Marguerite Arruza, Associate Medical

Examiner, testified that she performed the autopsy on the body of the victim and reported extensive injuries to the victim, including numerous contusions, abrasions, extensive bruising, lacerations, a fractured nose, and other injuries. The defendant struck the victim on his body and his face at least ten times before the victim lost consciousness and he continued to strike the victim with four deadly blows. Dr. Arruzo established that the cause of death was cranial cerebral injuries.

DEFENSE EVIDENCE

The defense called three witnesses who had been with the defendant at varying times on the day of the murder, May 1, 1994, to establish the defendant's beer drinking that day. Roger Proutt testified that the defendant drank that day but was not drunk. Bart Greenway saw the defendant drink but was not sure if the defendant was drunk. Mr. Greenway had himself consumed a case of beer that day. Walter Carry observed the defendant that evening and testified that the defendant did not act drunk. The defense then presented the opinion testimony of Dr. Ernest Miller as to the effect of defendant's possible drinking.

ALL EVIDENCE AND TESTIMONY CONSIDERED

Before imposing sentence, this Court has considered all of the evidence and testimony elicited at trial and during the advisory penalty phase hearing. The Court has also considered argument of counsel, defendant's Sentencing Memorandum, the laws applicable to this case and any other factor bearing on this matter.

AGGRAVATING CIRCUMSTANCES

THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO SOME PERSON.

The defendant was found guilty on May 17, 1995, of Aggravated Assault on Michael Knight. On May 1, 1994, the defendant chased Michael Knight with a large object. Michael Knight was afraid and in fear of immediate harm. His fear was reasonable.

This is an aggravating circumstance. Because it occurred contemporaneous with or at about the same time as the murder, the Court gives this circumstance little weight.

THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF OR ATTEMPTED COMMISSION OF THE CRIME OF ARMED BURGLARY AND WAS COMMITTED FOR FINANCIAL GAIN.

The defendant had previously burglarized R.G.C. Mineral Sands and stolen a piece of equipment. He decided to return to steal other items. While burglarizing the business and in the course of stealing, the defendant killed the victim, who happened upon him. The jury convicted the defendant of the armed burglary at the time of the murder.

This is an aggravating circumstance. The Court gives some weight to this circumstance.

THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The victim suffered at least ten blows from a pipe or other heavy object before being knocked unconscious. He sustained numerous contusions, abrasions and bruises to his arms, legs,

chest, nose, ears, cheek and head. His nose was fractured. The injuries were to both front and back and several to the arm were defensive wounds, showing that the victim was trying to protect himself. Several of the wounds to the face were inflicted upon the victim while he was still conscious and moving his head in an effort to avoid being hit. It is clear that the victim's death was preceded by a great deal of pain, suffering and fear, and finally by the knowledge that his death was at hand. The defendant's choice of weapons, a heavy metal pipe or other heavy metal object, to beat the victim to death was especially atrocious and cruel.

This is an aggravating factor. The Court gives considerable weight to this circumstance.

THE CRIME FOR WHICH THE DEFENDANT WAS SENTENCED WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

After the defendant's first blow, his partner in crime, Jeff Chitham, "begged" the defendant not to hurt the victim. Chitham told the defendant not to hit the victim again and asked him to leave. The victim also begged the defendant not to hit him and begged for his life. The victim told the defendant he was going on vacation the next day and was taking his grandson fishing and asked to be let go. All this time the defendant was pacing and surely contemplating the situation, considering the pleas of Chitham and the victim and reflecting on his next course of action. The result of defendant's musing was an act of deliberate ruthlessness: the resumption of his attack on the victim and the cold, calculated and premeditated murder of Donald Miller. Despite being interrupted by

Mike Knight and suspending his beating of the victim to chase Knight, he again returned to continue. Defendant's actions demonstrate a heightened premeditation.

This is an aggravating circumstance. The Court gives considerable weight to this circumstance.

SUMMARY OF MITIGATING CIRCUMSTANCES PRESENTED BY DEFENSE

MITIGATION RELATING TO THE OFFENSE

THE BURGLARY DID NOT INVOLVE A SOPHISTICATED PLAN OR A PRECONCIEVED PLAN TO USE WEAPONS OR VIOLENCE.

This was a "planned" burglary. History had shown the defendant that sophistication was not needed--the defendant had burglarized R.G.C. Mineral Sands before and had not been caught. He had decided to return to steal again. Obviously, he did so on the assumption that he would not be caught again. The Court gives little weight to this circumstance.

ALCOHOL IMPAIRED MR. DAMREN'S JUDGMENT AND THINKING BEFORE HE WENT TO RGC.

Assuming that defendant had consumed beer throughout the day on May 1, 1994, there was no testimony from anyone that he was impaired in any way. Roger Proutt and Wendy Hendley stated the defendant was not drunk. No witness who observed the defendant that day testified that he was drunk, appeared drunk or was impaired in any way. In fact, one witness described the defendant's ability to drive and maneuver his truck in a small and crowded area with no apparent difficulty. The Court gives no weight to this circumstance.

ALCOHOL IMPAIRED MR. DAMREN'S JUDGMENT AND THINKING WHEN HE AND JEFF CHITHAM WERE AT RGC.

Again, the testimony of those who observed the defendant both before and after he went to R.G.C. Mineral Sands fails to lend any credence to this argument. The testimony of those who were with the defendant throughout the day of May 1, 1994, shows he was able to reflect on all his actions both before and after his visit to R.G.C. Mineral Sands. No credible evidence was offered to show any sudden or temporary impairment during the actual commission of these crimes. The Court gives no weight to this circumstance.

MR. DAMREN DID NOT ACT ALONE, AND THE EXACT ROLE OF EACH ACCOMPLICE IS NOT CLEAR.

Jeff Chitham begged for the victim's life and then fled the scene when the defendant began to chase Mike Knight. The victim was being struck from the front at that time and presumably the fatal blow had yet to be struck. Upon the defendant's return from chasing Knight, Chitham was gone and unavailable to inflict any blows on the victim. The Court gives little weight to this circumstance.

MITIGATION CONCERNING MR. DAMREN'S LIFE

MR. DAMREN SUFFERED EMOTIONAL DEPRIVATION AND LITTLE PARENTAL SUPPORT AS A CHILD.

Defendant's father was in the U. S. Navy and was absent for long periods of time. When home, the father was strict, undemonstrative and drank alot. Defendant's mother did all she could to make a good home, but had difficulty disciplining the defendant and his siblings. The Court gives no weight to this

circumstance.

MR. DAMREN HAD AN ALCOHOLIC FATHER AND HAS SUFFERED WITH HIS OWN ALCOHOL PROBLEMS.

Defendant's deceased father drank excessively, but was generally absent on military duty. Defendant drinks alcohol, primarily beer, but the testimony of employees and friends was clear that his drinking "didn't affect his work any" or his ability to function. The Court gives little weight to this circumstance.

MR. DAMREN HAS HELD JOBS AND HAS PERFORMED WELL IN HIS WORK.

Several employers testified that defendant was a good worker and got along well with others. None complained of any drinking problems of defendant. The Court gives no weight to this circumstance.

MR. DAMREN HAS BEEN KIND TO HIS MOTHER, SISTER AND BROTHER.

Defendant has been a good son. He fixes things for his mother, takes her to doctors' appointments and visits her in the hospital. His devotion to his mother belies, in part, his claim of little parental support as a child. Defendant has sent his younger sister money on several occasions and allowed her to live with him for 2 1/2 weeks at one time when she was having marital problems. His brother evidenced no closeness to the defendant and has no plans to maintain any contact with him. The Court gives no weight to this circumstance.

MR. DAMREN HAS SHOWN PATIENCE WITH AND AFFECTION FOR CHILDREN.

Defendant helped with his aunt's, Betty Mathes, children when he was a teenager. Defendant also treated his girlfriend's daughter and granddaughter well when he lived with them.

Additionally he took Roger Proutt's son fishing. The Court gives no weight to this circumstance.

MR. DAMREN HAS BEEN A GENEROUS AND DEVOTED FRIEND WHO HAS GONE OUT OF HIS WAY TO DO THINGS FOR HIS FRIENDS.

In the early 1970's, defendant took Delores Hill grocery shopping, she relied on the defendant and his car at that time. Defendant has filled Roger Proutt's propane tank and gotten him firewood. Defendant was paid to build a shop for him. Defendant also befriended an older women, Anne Parker, for several years and helped her move things and built shelves for her. These isolated acts of friendship are commendable, but it is hyperbole to label them "generous" and "devoted." The Court gives no weight to this circumstance.

MR. DAMREN SERVED HIS COUNTRY IN THE UNITED STATES ARMY AND IN VIETNAM.

The defendant was in the U.S. Army during the early 1970's and in 1970-71 was stationed in Viet Nam. He was a model soldier, better than most, who got along with everyone. As distant in time as this circumstance is, the Court gives it no weight.

MR. DAMREN MAINTAINED A RELATIONSHIP WITH NANCY WALDRUP AND TREATED TESSA MOSLEY LIKE A DAUGHTER.

Defendant had a relationship with Ms. Waldrup for 3 1/2 years and treated her daughter as his own. Ms. Waldrup is not sure if she will maintain contact with the defendant. The Court gives no weight to this circumstance.

MR. DAMREN EXHIBITED GOOD BEHAVIOR IN THE CLAY COUNTY JAIL DURING THE LAST YEAR.

Sergeant Murphy testified that defendant has never complained nor caused a problem. The Court gives some weight to this circumstance.

SUMMARY OF WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

The circumstances relating to the offense presented by the defense offer little, if any, mitigation. The circumstances relating to the defendant's life do not constitute mitigation. They demonstrate a life remarkably absent of good deeds, except for a few isolated, sporadic and uneventful acts of kindness that collectively do not rise to the level of mitigation. An empty, non-productive and vacuous existence is not an excuse for criminal behavior and cannot justify or ameliorate the act of the defendant in murdering Donald Miller.

The taking of a life is wrong, but does not mandate imposition of the death penalty unless aggravating circumstances are proven and are of such a nature as to warrant it. The senseless murder of Donald Miller by the defendant was done after two individuals, the victim and Jeff Chitham, "begged" for the defendant's life. The killing was done after a sufficient period of obvious reflection by the defendant. It was an act that was ruthless and done with conscious intent and the Court gives considerable weight to the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The evidence shows that the victim sustained numerous injuries to his body from a heavy metal object. These injuries caused great pain and suffering, and yet he continued to fight for his life as

evidenced by the defensive wounds on his arm and the wounds on his head, showing movement of his head in an attempt to avoid blows. The senseless and continued beating of the victim was with a particularly atrocious and cruel instrument of death and torture. The victim suffered and must have known that his death was at hand. The Court gives considerable weight to the aggravating circumstance that the murder was especially heinous, atrocious or cruel.

The Court finds that that statutory aggravating circumstances, in the aggregate, clearly outweigh the circumstances urged as mitigation.

SENTENCE

The Jury by a vote of twelve to zero has recommended that you be sentenced to death. After close examination of all the facts and circumstances I have concluded that death is the appropriate sentence.

You, Floyd William Damren, having been found guilty by jury of the crimes of Murder in the First Degree; Armed Burglary; and Aggravated Battery, I hereby adjudge you to be guilty on each count and sentence you as follows:

1. FIRST COUNT: MURDER IN THE FIRST DEGREE- I sentence you to **DEATH**. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution. That on such date you be put to death by having electrical currents passed through your body in such amounts and frequency until you are dead.

2. SECOND COUNT: ARMED BURGLARY- I sentence you to **LIFE** imprisonment as an habitual felony offender. The Defendant

qualifies as an habitual offender as is more fully shown below. The sentence in this count shall be served concurrent to the sentence imposed in Count I.

3. THIRD COUNT: AGGRAVATED ASSAULT- I sentence you to ten years in the Florida State Prison as an Habitual Felony Offender. The defendant qualifies as an habitual offender as is more fully shown below. The sentence in this count shall be served concurrent to the sentences imposed in Count I and II.

PROVISIONS FOR EXTENDED TERM OF IMPRISONMENT

FOR HABITUAL FELONY OFFENDER

FLORIDA STATUTE 775.084 PROVIDES FOR AN EXTENDED PRISON SENTENCE IF THE DEFENDANT MEETS THE CRITERIA OF AN HABITUAL FELONY OFFENDER.

FINDINGS BY COURT

Upon hearing in open court with full rights of confrontation, cross examination and representation by counsel - the Court finds by a preponderance of evidence presented:

A. Defendant was convicted in Case No. 89-325-CF, August 3, 1989, of Possession of Cocaine, in Clay County, Florida.

B. Defendant was convicted in Case No. 89-586-CF, August 3, 1989, of Possession of Cocaine, (Count I) and Tampering with Evidence (Count II), in Clay County, Florida.

C. Defendant was convicted in Case No. 84-264-CF, on June 8, 1984, of Grand Theft, in Clay County, Florida.

D. That the Defendant has not received a pardon for the felony convictions set forth in paragraphs A, B and C above.

E. That the felony convictions in paragraphs A, B and C above have not been set aside in any post conviction proceeding.

F. That the crimes for which defendant is to be sentenced herein were committed within five years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within five years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment

imposed as a result of a prior conviction for a felony or other qualified offense.

G. That defendant meets the criteria of an habitual felony offender.

SEPARATE PROCEEDING FOR HABITUAL FELONY OFFENDER 775.084

This Court has conducted a separate proceeding to determine if Defendant is an habitual felony offender and should be sentenced as such. The proceeding was in open court with full rights of confrontation, cross-examination and representation by counsel. I find by a preponderance of the evidence that:

A. A written notice of the state's intention to seek an extended sentence as a habitual felony offender under the provisions of F.S. 775.084 was served upon defendant and his attorney a sufficient time prior to the imposition of sentence so as to allow the preparation of a submission on behalf of defendant.

B. That defendant is now to be sentenced for convictions of felonies which were committed within 5 years from the date of the last prior felony conviction or within 5 years of release or parole from sentence thereon.

C. That the defendant is an habitual felony offender and should be sentenced to an extended term of imprisonment for the protection of the public.

In making the determination to sentence defendant as an habitual felony offender, the Court has considered:

A. The facts and circumstances of the present crime for which defendant is to be sentenced.

B. The fact that defendant meets the criteria of an habitual felony offender.

C. The protection of the public.

D. The appropriate punishment for the defendant.

Defendant shall pay $200.00 felony court costs, plus $50.00 to the Crime Compensation Fund, plus $3.00 to the Criminal Justice

Trust Fund.

CONDITIONS OF SENTENCE

This sentence, as to the Second and Third counts, imposed under F.S. 775.084 (as an habitual felony offender), is not subject to the provision of F.S. 921.001 (Sentencing Guidelines), nor shall the provisions of F.S. 947 (Parole) apply to this defendant.

Because this sentence is imposed under the provisions of F.S. 775.084 (as an habitual felony offender), the defendant shall not be eligible for gain-time granted by the Department of Corrections except as provided for in F.S. 944.275(4)(B).

Defendant is advised he has thirty days from today within which to take an appeal in writing. Should he fail to take an appeal within 30 days, then he waives, forfeits and gives up the right to such an appeal.

I hereby appoint the Office of the Public Defender to represent the defendant, should he decide to take an appeal.

May God have mercy on your soul.

Done and Ordered at Green Cove Springs, Florida, this 2nd day of June, 1995.

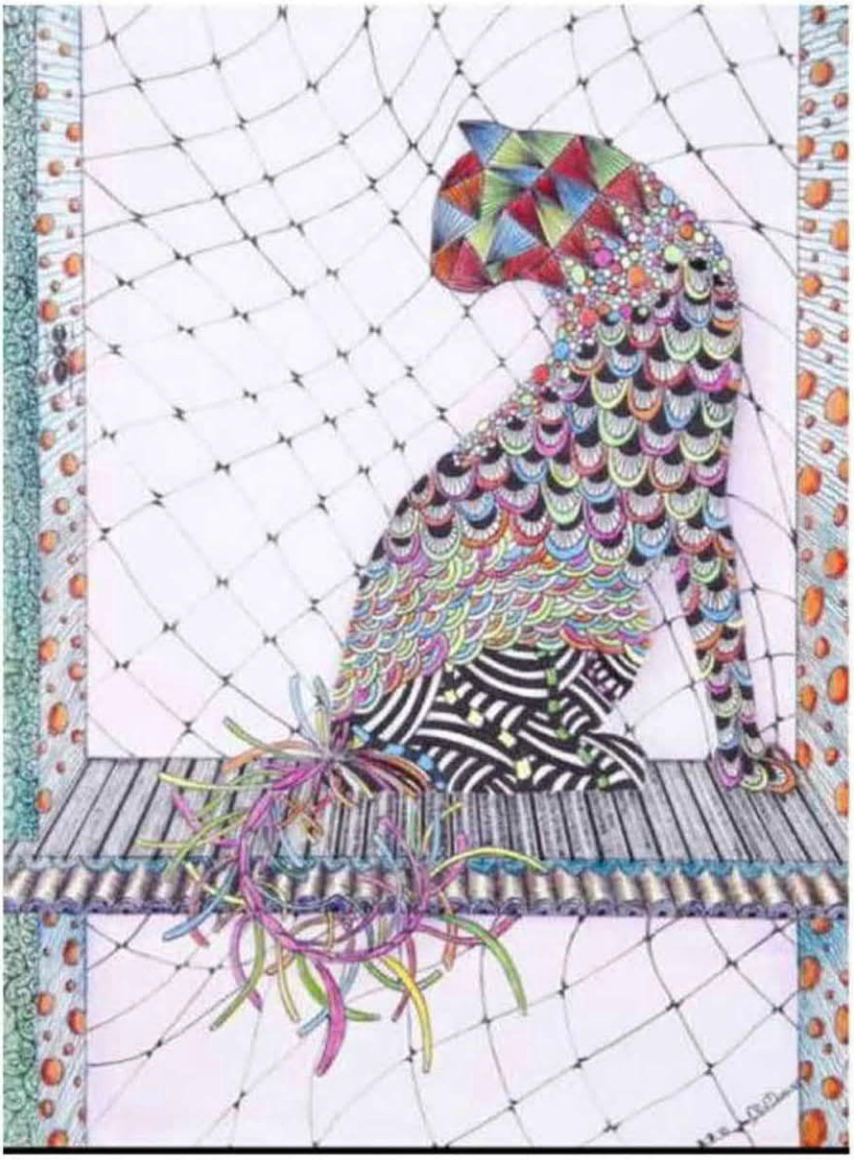
Robert M. Foster
ROBERT M. FOSTER
CIRCUIT JUDGE

cc:

State Attorney
Public Defender
Floyd William Damren

eFiled Date: 06/10/2022, Accepted: 06/13/2022 07:45 AM

Attachment C



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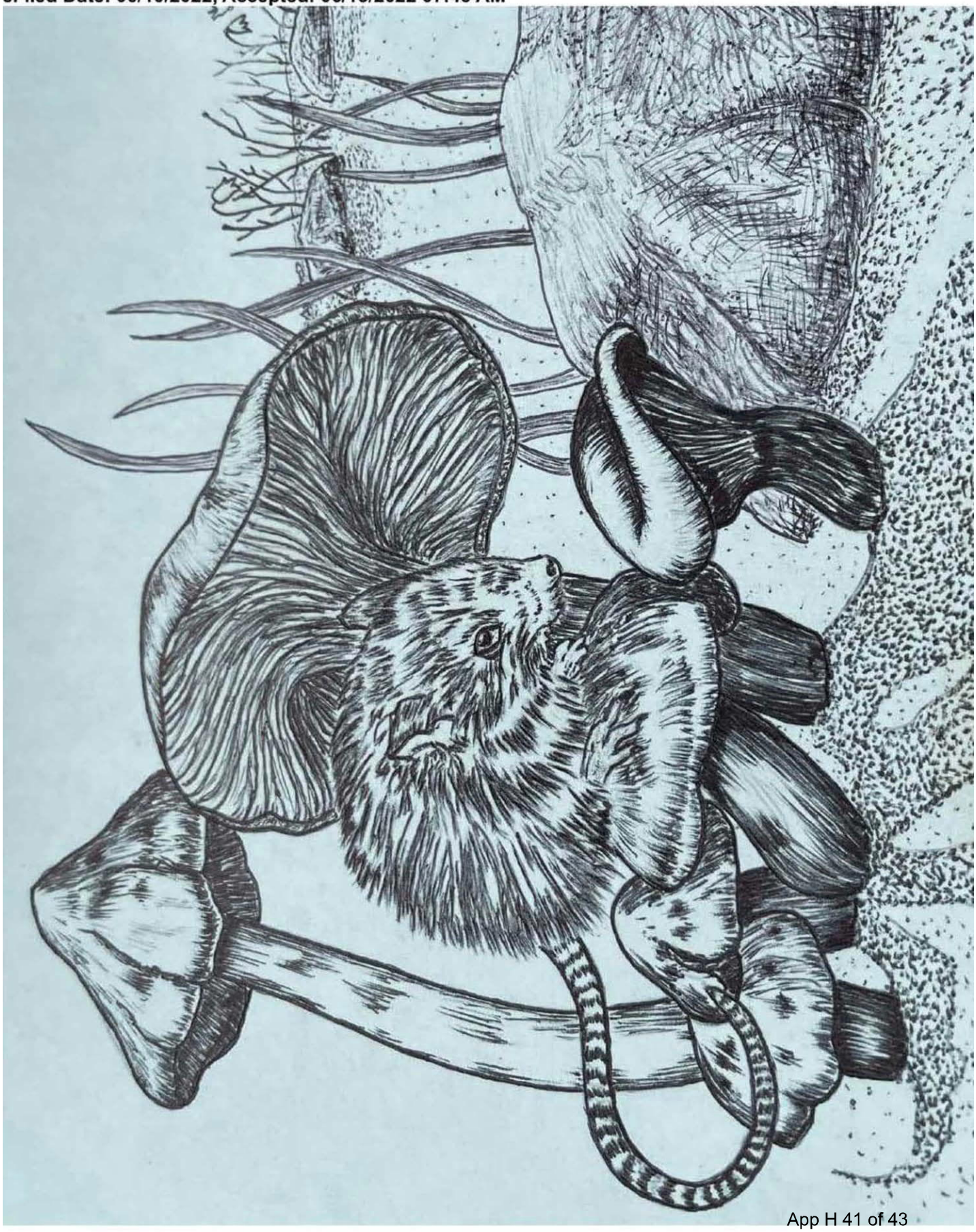
Attachment D



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Attachment E

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