No. 23-6807

In The
Supreme Court of the United States

FLOYD DAMREN,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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Floyd Damren was sentenced to death in 1995 after he bludgeoned a man to death during a botched burglary of a mining company in Green Cove Springs, Florida. The Florida Supreme Court affirmed his death sentence and later rejected two subsequent postconviction challenges. Some twenty years later, Damren hired a new expert, Dr. Israelian, who opined for the first time in 2021 that Damren suffers from Autism Spectrum Disorder as well as Post Traumatic Stress Disorder. The Florida Supreme Court affirmed the lower court's summary denial on two grounds- not only was Damren's claim facially insufficient, but even had it been properly plead, it was procedurally barred because both disorders could have been discovered either within the one year deadline following Damren's conviction as is required under Florida law, or in any event, far earlier than 2021. Damren seeks certiorari review of only one of those grounds, however- whether Florida's time bar on newly discovered evidence violates the United States Constitution. Damren's argument gives rise to the following question before this Court:

CAPITAL CASE

QUESTION PRESENTED

1. Whether this Court should grant certiorari to review the constitutionality of Florida's rule which imposes a one year filing deadline for newly discovered evidence where, in any event, Florida's high court denied relief on independent grounds (that the claim was facially insufficient) which are not being challenged by the prisoner?

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PARTIES TO THE PROCEEDINGS

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

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

OPINION BELOW

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

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) and Sup. Ct. R. 13.3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth Amendment, Sixth Amendment, Eighth Amendment and Fourteenth Amendment due process provision, as well as the Eighth Amendment prohibition on cruel and unusual punishment:

The Fifth Amendment to the United States Constitution, provides:

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

U.S. Const. amend. V.

The Sixth Amendment provides, in relevant part:

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

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution, provides:

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

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Floyd Damren is a Florida prisoner sentenced to death for the murder of Don Miller. His judgment and sentence was affirmed by the Florida Supreme Court, *Damren v. State*, 696 So. 2d 709 (Fla. 1997). Certiorari review was denied, *Damren v. Florida*, 522 U.S. 1054 (1998). Denial of his initial motion for postconviction relief was affirmed, *Damren v. State*, 838 So. 2d 512 (Fla. 2003), as was his first successive postconviction motion, *Damren v. State*, 236 So. 3d 230 (Fla. 2018). Certiorari review of the latter was denied. *Damren v. Florida*, 580 U.S. 1101 (2017). Damren's federal habeas corpus petition was dismissed with prejudice because it was not timely filed. *Damren v. Florida*, 776 F.3d 816 (11th Cir. 2015). Certiorari review was denied. *Damren v. Florida*, 137 S. Ct. 830 (2017).

Damren hired Dr. Israelian in 2021. This new expert concluded that Damren suffers from previously undiagnosed Autism Spectrum Disorder (ASD) which was masked by previously undiagnosed Post Traumatic Stress Disorder (PTSD), the latter likely resulting from Damren's experiences as a soldier in the Vietnam war. Florida's high court found Damren's newly discovered evidence claim untimely because while Damren may not have been diagnosed until 2021, the record plainly indicated that the symptoms of ASD were present from childhood and diligent counsel could have secured the services of an expert like Dr. Israelian to diagnose Damren prior to 2021. And while the Court was not certain when a diagnosis for ASD might have been available, it concluded that it was Damren 's burden to establish and he failed to do so. To the contrary, his argument made clear that a diagnosis for ASD was plainly available prior

to 2021; that Damren failed to establish exactly when such a diagnosis was possible was a failure on Damren's part to carry his burden of establishing that his claim was timely.

Finally, the Florida Supreme Court also concluded that even had Damren's newly discovered evidence been timely filed, his claim was facially insufficient. To merit relief, Damren was required to allege that his newly discovered evidence would "probably" produce a more lenient sentence; Damren, however, merely asserted that had his jury known of his ASD and PTSD, it would have "made a life sentence a reasonable and merciful sentence" and that a more lenient sentence would have been a "reasonable possibility." His failure to plead the correct standard was a second ground for the Florida Supreme Court to deny relief. Oddly, Damren's Petition before this Court merely addresses the constitutionality of Florida's time limitations on newly discovered evidence while leaving in place the Florida high court's other ground for denying relief.

REASONS FOR DENYING THE WRIT

The Court should decline to grant certiorari review of the constitutionality of Florida's rule which imposes a one year filing deadline on newly discovered evidence where, in any event, Florida's high court denied relief on independent grounds (that the claim was facially insufficient) which are not being challenged by the prisoner.

Petitioner Damren seeks certiorari review of the Florida Supreme Court's holding that his newly discovered evidence claim was untimely under state law. This Court should not grant review of an issue that is time barred under state law. This Court does not review decisions that are based solely on state law. Furthermore, there is no conflict between this Court's decisional law and the Florida Supreme Court's decision. This Court has repeatedly held that a constitutional right may be forfeited by the failure to timely assert the right. Nor is there any conflict between the Florida Supreme Court's determination that Damren's claim is untimely and that of any other federal appellate court or state supreme court. Damren cites no opinion from any federal appellate court or state supreme court holding that newly discovered evidence claims may not be time barred. Because the petition presents an issue that is time barred as a matter of state law about which there is no conflict, this Court should deny review of this claim.

The Florida Supreme Court's decision in this case

The state trial court denied Damren's successive postconviction motion because it was time barred. On appeal, the Florida Supreme Court agreed. *Damren v. State*, ____ So. 3d ____, 2023 WL 5968167 (Fla. Sept. 14, 2023) (SC2023-0015). In holding that Damren's newly discovered evidence claim was untimely, the Florida Supreme Court

relied on their prior precedent of *Dillbeck v. State*, 304 So. 3d 286 (Fla. 2020), *Mungin v. State*, 320 So. 3d 624 (Fla. 2020), and *James v. State*, 323 So. 3d 158 (Fla. 2021), *cert. denied*, 142 S. Ct. 1678 (2022). The Florida Supreme Court found that the claim was untimely because the facts on which the claim was based were documented and available to counsel at the time of Damren's trial and while counsel asserted that there was no indication that Damren suffered from ASD, "counsel's ignorance does not result in a triggering date that manifests only when counsel decides to enlighten himself." *Damren, id.* at p. 12. And, as noted previously, the Florida Supreme Court also found that Damren's claim was facially insufficient and timely or no, his failure to allege that his claim met the requisite standard of proof provided independent grounds for denial.

Untimely as a matter of state law

Florida's high court concluded that Damren's newly discovered evidence claim was untimely under Florida Rule of Criminal Procedure 3.851. The Court found that the claim should have been raised whenever ASD became diagnosable. And while the Court made no clear finding as to when that was, it found that based on the record, the triggering date was surely long before the 2021 diagnosis.

This Court does not grant review of claims that are grounded solely on state law. *Michigan v. Long*, 463 U.S. 1032 (1983) (explaining that respect for the "independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground" for the decision). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v.*

Powell, 559 U.S. 50 (2010). As justice Story explained, over 200 years ago the Judiciary Act of 1789 vested this Court with no jurisdiction unless a federal question is being raised. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). There is no federal question presented in the petition.

The Florida Supreme Court decided the timeliness of the claim as a matter of state law and therefore, the state court's decision is not subject to review by this Court. On this basis alone, review should be denied.

No conflict with this Court's jurisprudence

Furthermore, there is no conflict with this Court's decisions. There is no case from this Court holding that a newly discovered evidence claim may not be time barred. To the contrary, this Court has stated that constitutional claims can be forfeited if not raised in a timely manner. *Peretz v. United States*, 501 U.S. 923 (1991) (observing that the "most basic rights of criminal defendants are similarly subject to waiver" citing cases including *Yakus v. United States*, 321 U.S. 414 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.")). This Court has observed that a "constitutional claim can become time-barred just as any other claim can." *Block v. N. Dakota ex rel. Bd. Of Univ. and Sch. Lands*, 461 U.S. 273 (1983). Moreover, this Court has held that claims pursued in a dilatory manner in capital cases should be dismissed. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (stating that courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based

on speculative theories"); *Calderon v. Thompson*, 523 U.S. 5348 (1998) ("The federal courts can and should protect States from dilatory or speculative suits.").

Damren appears to take the position that some combination of the Fifth, Sixth, Eighth and Fourteenth Amendments prohibit the Florida Supreme Court from imposing any time bar in his case. But both this Court and lower federal courts routinely enforce time bars and procedural bars in capital habeas cases, including in capital cases raising basic constitutional claims. *Lawrence v. Florida*, 549 U.S. 327 (2007) (affirming the dismissal of a capital habeas petition as untimely). There is no conflict between this Court's view of the forfeiture of constitutional rights and the Florida Supreme Court's holding in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991). Similarly, Rule 10(b) of this Court's Rules lists conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review. In the absence of such conflict, certiorari is rarely granted.

The State is not aware of any federal circuit court opinion or state supreme court decision holding that newly discovered evidence claims cannot be time barred. And any such opinion would have to explain this Court's observations to the contrary in *Peretz*, *Yakus*, and *Block*.

Florida's newly discovered evidence rule is found at Florida Rule of Criminal Procedure 3.851 and requires that all postconviction claims be raised within one year after a criminal conviction becomes final, with the exception of claims that were unknown

to counsel and which could not have been discovered with diligence within the one year time limit; further, the new evidence must be of a character that (in the sentencing context) the jury would probably impose a more lenient sentence. Application of Florida's rule is explained in *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). And whereas Damren contends that Florida's application of *Jones* to his case violates an assortment of constitutional rights, he cites to no case that supports his position.

Indeed, Florida's rule regarding newly discovered evidence essentially mirrors Rule 33 motions under the Federal Rules of Criminal Procedure, which the Federal courts have interpreted (as does Florida) to require both diligence on the part of counsel and materiality, which requires that the evidence in question be of such quality that it would probably produce a different outcome on retrial. *See, E.g., United States v. Kahn*, 472 F.2d 272, 287 (2d Cir. 1973); *United States v. Rodriguez*, 437 F.2d 940, 942 (5th Cir. 1971), *United States v. Curran*, 465 F.2d 260, 264 (7th Cir. 1972). Respondent is unaware of any case suggesting that Rule 33's strict time limitations violates any constitutional right. Accordingly, if Florida's rule on timeliness violates the constitution, so does Rule 33.

Even in the absence of time bar, Damren's claim fails

But Florida's high court did not merely affirm the lower court's denial of relief on timeliness grounds, but also because Damren's motion was facially deficient. To prevail under Florida's newly discovered evidence rule, the evidence in question must be material, i.e., that it would probably produce a different outcome on retrial. But Damren's motion merely alleged that had the jury known about his ASD and PTSD disorders, that

"it would have lessened his moral responsibility and made a life sentence a reasonable and merciful sentence." Later Damren suggested that introduction of this new evidence would have created a "reasonable probability that the sentence would have been life."

Neither of these assertions, the Florida Supreme Court held, was sufficient. Whereas the "reasonable probability" standard is proper where the effectiveness of counsel is at issue, the correct standard in newly discovered evidence claims in both the State and Federal rules is that the evidence "more likely than not" would have resulted in a different outcome- a standard the Florida Supreme Court reasoned was equivalent to being a higher than fifty percent chance of a different outcome. Reasonable probability is a lower standard and Damren's failure to allege the proper standard rendered his claim facially insufficient. Damren utterly ignores the fact that Florida's high court also rejected his claim on this second independent ground. Thus, even if this Court were inclined to grant relief and find that Florida's high court erred in finding his claim untimely, it would make no difference to Damren because there remains a completely different ground for denying relief which Damren has not asked this Court to review and has not bothered to brief.

Accordingly, this Court should deny certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

KeyCite Blue Flag – Appeal Notification
Petition for Certiorari Docketed by FLOYD WILLIAM DAMREN v. FLORIDA, U.S., February 22, 2024

2023 WL 5968167

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

Floyd William DAMREN, Appellant,

v.

STATE of Florida, Appellee.

No. SC2023-0015

|

September 14, 2023

Synopsis

Background: Following the affirmance of defendant's first-degree murder conviction and death sentence, 696 So.2d 709, the denial of his initial motion for postconviction relief, 838 So.2d 535, and the denial of his first successive motion for postconviction relief, 236 So.3d 230, defendant filed his second successive motion for postconviction relief. The Circuit Court, 4th Judicial Circuit, Clay County, Steven B. Whittington, J., summarily denied the motion as untimely. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant's claims to vacate his death sentence, on basis that his recent autism spectrum disorder (ASD) and post-traumatic stress disorder (PTSD) diagnoses were newly discovered evidence, were facially insufficient, and

[2] defendant's ASD became discoverable through due diligence whenever it was that ASD became diagnosable in adults, triggering one-year period to seek postconviction relief.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (11)

[1] **Criminal Law** ⇐ Newly discovered evidence

The test for a conviction to be set aside on the basis of newly discovered evidence is 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; and, second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

[2] **Sentencing and Punishment** ⇐ Post-conviction relief

To vacate a death sentence rather than a conviction on the basis of newly discovered evidence, the defendant must show the newly discovered evidence would probably yield a less severe sentence—i.e., a life sentence—rather than an acquittal.

[3] **Sentencing and Punishment** ⇐ Post-conviction relief

To raise a facially sufficient postconviction claim to vacate a defendant's death sentence rather than his conviction based on newly discovered evidence, it is necessary for the defendant 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.

[4] **Sentencing and Punishment** ⇐ Post-conviction relief

Defendant failed to allege that he probably would be sentenced to life, rather than receive a death sentence for first-degree murder, if the jury or trial court were told that he had autism spectrum disorder (ASD) or post-traumatic stress disorder (PTSD), and thus, his postconviction claims to

vacate his death sentence, on the basis that his recent ASD and PTSD diagnoses were newly discovered evidence, were facially insufficient; defendant alleged that his ASD and PTSD, coupled with his use of copious amounts of alcohol on the night of the murder, would have lessened his moral responsibility and made life a reasonable and merciful sentence, and that, had the jury or sentencing court heard evidence that he had PTSD, there was a reasonable probability that his sentence would have been life.

[5] **Criminal Law** ⇐ Newly discovered evidence

The requirement in the second prong of the *Jones* test, 709 So. 2d 512, for a conviction to be set aside on the basis of newly discovered evidence, namely 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.

[6] **Criminal Law** ⇐ Degree of proof

Criminal Law ⇐ Prejudice in general

Criminal Law ⇐ Materiality and probable effect of information in general

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." U.S. Const. Amend. 6.

[7] **Criminal Law** ⇐ Prejudice in general

Criminal Law ⇐ Materiality and probable effect of information in general

While 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, means a probability higher than mere chance, it does not mean a probability greater than 50 percent. U.S. Const. Amend. 6.

[8] **Criminal Law** ⇐ Newly discovered evidence

The "probably" prejudice standard for vacating a conviction based on newly discovered evidence (and, accordingly, the "more likely than not" standard) means a probability greater than 50 percent.

[9] **Sentencing and Punishment** ⇐ Post-conviction relief

Capital murder defendant's autism spectrum disorder (ASD) became discoverable through due diligence whenever it was that ASD became diagnosable in adults, with that date serving as the triggering date for one-year period for defendant to file successive claim for postconviction relief from his death sentence based on the newly discovered evidence of his ASD diagnosis; prior to his diagnosis, and indeed since childhood, defendant exhibited a number of better-known characteristics of ASD, including difficulty recognizing different expressions of speech, tendency to interpret things very literally, difficulty initiating and maintaining reciprocal conversation, speaking extensively about his interests regardless of their relevance to task at hand or interests of his audience, a flat affect, and difficulty maintaining eye contact. Fla. R. Crim. P. 3.851(d)(1), 3.851(d)(2)(A).

[10] **Criminal Law** ⇐ Proceedings

To be considered timely filed as newly discovered evidence, a successive rule motion for postconviction relief is required to have been filed within one year of the date upon which the claim became discoverable through due diligence. Fla. R. Crim. P. 3.851(d)(2)(A).

[11] **Criminal Law** ⇐ Proceedings

It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. Fla. R. Crim. P. 3.851(d)(1).

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

Attorneys and Law Firms

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Opinion

PER CURIAM.

***1** 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 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.

[1] [2] [3] 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:

> ***2** 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.,

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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*, —— U.S. ——, 143 S. Ct. 601, 214 L.Ed.2d 354 (2023).

[4] 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.

[5] [6] [7] [8] 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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Harrington v. Richter*, 562 U.S. 86, 111-12, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (noting that *Strickland*'s "reasonable probability" prejudice standard "does not require a showing that counsel's actions 'more likely than not altered the outcome' "); *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (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.

*3 [9] [10] 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, 118 S.Ct. 706, 139 L.Ed.2d 648 (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*, ---- U.S. ----, 142 S. Ct. 1678, 212 L.Ed.2d 583 (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, 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.

*4 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.

[11] "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.

All Citations

--- So.3d ----, 2023 WL 5968167, 48 Fla. L. Weekly S173

Footnotes

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.

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)).

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).

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No. 23-6807

In The
Supreme Court of the United States

FLOYD DAMREN,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

APPENDIX B

Filing # 182939474 E-Filed 09/29/2023 04:22:42 PM

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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In The
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BRIEF IN OPPOSITION
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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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SC2023-0015 11/20/2023
John A. Tomasino
Clerk, Supreme Court
SC2023-0015 11/20/2023

KC

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HON. STEVEN B. WHITTINGTON