IN THE SUPREME COURT OF FLORIDA

FLOYD DAMREN,

Appellant,

v. CASE NO. SCO1-1469

STATE OF FLORIDA,

Appellee.

___________________/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CURTIS M. FRENCH
SENIOR ASSISTANT ATTORNEY GENERAL

FLORIDA BAR NO. 291692

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES . . . . ii-iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1-2

STATEMENT OF THE FACTS 2-16

SUMMARY OF ARGUMENT 17-19

ARGUMENT

ISSUES I AND II

TRIAL COUNSEL WAS NOT INEFFECTIVE AT EITHER PHASE OF THE TRIAL FOR FAILING TO INVESTIGATE AND PRESENTED ALLEGED EVIDENCE OF BRAIN DAMAGE 20-27

ISSUE III

THE CIRCUIT COURT'S IN CAMERA REVIEW OF STATE ATTORNEY EXEMPT DOCUMENTS WAS NOT INADEQUATE FOR ANY REASON URGED 28-30

CONCLUSION 31

CERTIFICATE OF SERVICE 31

CERTIFICATE OF TYPE SIZE AND FONT 32

TABLE OF AUTHORITIES

FEDERAL CASES

Brady v. Maryland,
373 U.S. 83 (1963) 19

Damren v. Florida,
522 U.S. 1054 (1998) 1

Foster v. Dugger,
823 F.2d 402 (11th Cir. 1987) 18

Harich v. Dugger,
844 F.2d 1464 (11th Cir. 1989 15

Kimmelman v. Morrison,
477 U.S. 365, 106 S. Ct. 2574,
91 L. Ed. 2d 305 (1986) 12

Spaziano v. Singletary,
36 F.3d 1028, 1041 (11th Cir. 1994) 15

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 12

Williamson v. Moore,
221 F.3d 1177 (11th Cir. 2000) 21

STATE CASES

Asay v. State,
769 So. 2d 974 (Fla. 2000) 14

Cherry v. State,

659 So. 2d 1069 (Fla. 1995) 12

Damren v. State,
696 So. 2d 709 (Fla. 1997) 1

Haliburton v. State,
691 So. 2d 466 (Fla. 1997) 14

James v. State,
489 So. 2d 737 (Fla. 1986) 15

Johnson v. State,
769 So. 2d 990 (Fla. 2000) 11

Occhicone v. State,
768 So. 2d 1037 (Fla. 2000) 15

Porter v. State,
788 So. 2d 917 (Fla. 2001) 13

Rutherford v. State,
727 So. 2d 216 (Fla. 1998) 17

Walls v. State,
641 So. 2d 381 (Fla. 1994) 16

Wike v. State,
27 Fla. L. Weekly S95 at S98 (Fla. January 24, 2002) 12

Williamson v. Dugger,
651 So. 2d 84 (Fla. 1994) 12

PRELIMINARY STATEMENT

The record on this capital 3.850 appeal consists of three volumes, plus one supplemental volume (with, inter alia, a transcript of the Huff hearing) and one volume containing copies of Defendant's Exhibits 1 and 2. The three main volumes of record on the instant appeal will by cited to as "R" with reference to the volume number (e.g., 2R 280). The supplemental volume will be cited to as "Supp R." The Defendant's exhibits will be referred to by number.

In addition, the State will reference the original trial record, which the State will cite to as "TR" plus the volume number.

STATEMENT OF THE CASE

Floyd Damren was convicted in Clay County, Florida of first-degree murder, burglary and aggravated assault. The jury unanimously recommended a death sentence for the first-degree murder. The trial judge imposed the recommended sentence, finding four statutory aggravating circumstances (Damren had previously been convicted of a violent felony; the murder had taken place during the commission of a burglary; the murder was especially heinous, atrocious, or cruel; and the murder was committed in a cold, calculated and premeditated manner), no statutory mitigating circumstances, and some nonstatutory mitigation. Damren's conviction and sentence were affirmed by this Court. Damren v. State, 696 So.2d 709 (Fla. 1997). Damren's

Petition for Writ of Certiorari was denied by the United States Supreme Court. Damren v. Florida, 522 U.S. 1054 (1998).

On November 9, 1998, Damren filed a motion for postconviction relief in circuit court. He amended his motion on July 20, 2000. An evidentiary hearing was conducted in the circuit court, on April 10, 2001. The parties timely submitted post-hearing memoranda, and the circuit court denied all relief by order dated June 20, 2001. It is from this judgment that Damren appeals.

STATEMENT OF THE FACTS

Review of the claims of ineffective assistance of counsel raised by Damren requires consideration of the evidence presented at the postconviction evidentiary hearing and, as well, the evidence presented at the original trial. The State will therefore summarize first the evidence presented at trial during the guilt and penalty phases, and then the evidence presented at the postconviction evidentiary hearing.

A. The Trial Evidence

1. The evidence presented at the guilt phase: At 8:30 p.m. on May 1, 1994, Michael Knight was making the rounds at RGC Mineral Sands (a titanium mine) when he heard a supervisor paging Donald Miller (7TR 379-80). Knight decided to check on him (7TR 382-83). As Knight neared Miller's work area, he heard the sound of a metal pipe hitting a concrete floor. Through a doorway, Knight saw a man dragging

Miller across the floor by his "britches leg" (7TR 384). When the man struck Miller, Knight hollered at him. The man turned and lunged at Knight, holding a piece of pipe in one hand and a crescent wrench in the other (7TR 385-86, 407, 413). Knight recognized the assailant as Floyd Damren, whom Knight had known since childhood (7TR 389-90). Knight screamed and ran away. When he returned with a gun, Damren was gone. Miller was lying on the floor, moaning faintly. A few feet away, outside a door, Knight observed a puddle of blood (7TR 415-17). Tools and other equipment were out of place, including a battery charger sitting outside the door instead of in a bay in the mill shop where it should have been, an open tool chest that should have been closed and locked, and an expensive ratchet wrench lying out that should have been put away and locked up (7TR 405-06, 418). Miller died shortly after midnight (7TR 441). The medical examiner testified that Miller had suffered a minimum of seven blows to his head and at least four to his body, that most likely had been administered by three different weapons, including a steel pipe, a ratchet wrench and a crescent wrench (7TR 427-29, 437-39, 444).

At about 8:45 p.m. (fifteen minutes after Knight had interrupted the burglary/murder in progress), Damren and Jeff Chittam arrived at Wendy Hedley's trailer, where Chittam had been living. According to Tessa Mosley, Chittam stated upon his arrival that "they had done something wrong . . . something real bad down

at the mines" (7TR 481). Wendy Hedley arrived 10-15 minutes later, from a visit to her mother's house (7TR 451). Hedley testified that she berated Damren for being there, and then took Chittam aside and demanded to know why he was so dirty (7TR 465). He told her that he and Damren had done something really bad (7TR 453).

Damren was confronted by Hedley and Mosley. At first, he feigned ignorance. Then he blamed Chittam, saying, "Jeff was the one who hurt that guy." Damren stated that just for being at the scene of the crime, he could get the electric chair, and that he had to get rid of Chittam. (7TR 454, 482-84).

Damren left with Chittam, stopping briefly at his girlfriend's trailer, where he told his girlfriend that something bad had happened at the mines, that he would get the electric chair for it, that Chittam had seen what had happened and that he had to get rid of him (7TR 498-501).[1] The girlfriend testified that Damren did not appear to be intoxicated, and drank nothing during the fifteen minutes he was there (7TR 500).

Damren was arrested the next day, hiding under his girlfriend's trailer (7TR 506-07). Blood on the trousers he was wearing at the time of his arrest was analyzed and

---

[1] Evidence was presented at trial that Chittam planned to return to his wife and children in Alabama and that Petitioner was supposed to take him to the bus station. At the time of this trial, Damren had been charged, but not yet convicted, of Chittam's murder. By stipulation and agreement of the parties (2TR 312), the jury never learned that Petitioner got rid of Chittam by murdering him.

found to be consistent with that of only 1.1% of the population, including the victim, but excluding Damren (7TR 543-45).

The defense called four witnesses: Roger Prout, Bart Greenway, Walter Cary, and Dr. Ernest Miller. A few hours before the robbery/murder at the RCG mines, Damren, Jeff Chittam, Prout and Greenway had been at Cary's house, watching Prout installing a rebuilt motor in Cary's car (8TR 553-55). All had been drinking. Cary testified that he drank five to eight beers that afternoon (8TR 584); Greenway drank "at least" a case (8TR 566-68); and Prout drank 6-7 (8TR 561). These three testified that Damren had been drinking, too. Although none of them had been keeping "track," they knew that Damren could "suck them down," and estimated that Damren had consumed anywhere from 4-5 beers to "maybe" a twelve pack (8TR 557-58, 570, 574, 584-85). However, none believed him to be drunk. Greenway testified that he had never seen Damren "actually staggering drunk" (8TR 571). Prout testified that Damren was not drunk when he left them; he could walk and talk well, and nothing indicated he was impaired (8TR 560). Cary testified that Damren did not act drunk, and was coordinated and able to communicate (8TR 583-86).

Dr. Ernest C. Miller, a psychiatrist, testified for the defense about intoxication. He had not examined Damren (8TR 604); he testified generally about the effects of alcohol on the brain, and then answered a hypothetical question about the probable

blood alcohol level of a 43-year-old man weighing 180 pounds assuming he had eaten nothing all afternoon, but had drunk a dozen 12-ounce beers between 4 and 7:30 p.m. (8TR 593). His estimate was .19 grams/percent, which, according to Dr. Miller, would have "profound" effects on the human brain, even if by habitual use the person had developed a tolerance for alcohol (8TR 594-95, 599-600). On cross-examination, Dr. Miller acknowledged that slurred speech, lack of coordination, unsteady gait, nystagmus and flushed face were characteristics commonly associated with intoxication due to alcohol (8TR 608). He further acknowledged that if, instead of 12 beers, the hypothetical man had drunk only 4-5 beers over a three and a half hour period, his blood alcohol level would have been very low (8TR 600-01). Even if Damren's blood alcohol level had been .19, Dr. Miller could not say that Damren would have been incapable of forming the intent to steal, that his ability to conform his conduct to the requirements of the law would have been substantially impaired, or that he would have been acting under the influence of extreme mental or emotional disturbance (8TR 605-06).

2. The evidence presented to the jury at the penalty phase:

Mosley and Hedley testified in greater detail at the penalty phase about Chittam's statements to them.[2] He had told them that, while he and Damren were at the mines, a man had confronted Chittam and demanded to know what he was doing. According to Chittam, Damren sneaked up from behind and hit the man with a metal pipe, knocking him to the ground. The victim was still conscious, and begged for them to let him go. Chittam reported that, as Damren paced back and forth, the victim told them that he was going on vacation and was going to take his grandson fishing. A person was paged over the intercom, and the victim told them, "Hey, that's me." Chittam urged Damren to let the man go. Another person arrived, and Chittam got scared and ran away (9TR 799, 805-07, 815-16, 824).

The victim's wife and daughter testified that the victim had planned to go on a vacation the next day and to take his grandson fishing (9TR 832-34, 836).

The defense called fourteen witnesses at the penalty phase. His mother, Ruby Chesser, testified that Damren's father had been in the Navy and was often absent and uninvolved (9TR 840-42). When he was present, he was strict with the children (9TR

---

[2] Pursuant to a stipulated agreement between the State and the defense, only an abridged version of Chittam's statements was presented at the guilt phase. The parties acknowledged that the State would attempt to introduce "further hearsay statements [of Jeff Chittam] during the penalty phase" (9TR 715), and that the Petitioner would object to such additional statements. On appeal, this Court upheld the admission of Jeff Chittam's statements at the penalty phase.

841). He was also an alcoholic who drank daily (9TR 843). When Damren was 12-14 years old, his father took him to Maine, where he stayed for two years, living with various relatives (9TR 844-45). Damren got good grades in school and his attendance was "just about" perfect (9TR 850). At the time of the murder, Damren live 14 miles away from his mother, and she saw him regularly; he would visit, help her with things, and take her to the doctor (9TR 847-49).

Damren's brother Keith confirmed that their father was seldom around (9TR 850-53). He drank daily, and never did anything with his sons except take them fishing occasionally (9TR 853-54). He never showed any affection for them, until five years before he died of cancer (TR 855).

Damren's sister Lori Ann Miller, who is 12 years younger than he, confirmed that their father drank and was often absent (9TR 860-62). She testified that Damren was generous and kind: he once gave his mother $100; he went fishing with his brother; he took her on outings; and he once let her stay with him when she was having marital problems (9TR 862-63).

Damren's aunt Betty Ann Mathis testified that Damren's father had been "like a big kid ... who never grew up," drinking and playing games (9TR 865-67). For entertainment, he would take Damren off drinking with him (9TR 870). Because he

was a “20 year Navy man,” he spent little time with his family, and Damren’s mother was unable to establish discipline in the absence of a father (9TR 867-68).

Damren’s aunt Alice Prescott testified by telephone from Maine that Damren’s father did not spend “an awful lot of time” with his children; he was an alcoholic who ran around with his buddies and with other women (9TR 873-76).

Doloris Hill testified by telephone from Tennessee (9TR 880). She had known Damren when he was in the army in the early 1970s (9TR 881-82, 885). Damren had been helpful to her and to her daughter, taking them shopping and other places (9TR 882-83). He had also been helpful to a woman who was paralyzed from the neck down (9TR 884-85).

Jail supervisor Linda Murphy testified that Damren had behaved himself while in jail following his arrest and had been a model inmate (9TR 886-89).

Mark Stokes, of Grand Rapids, Michigan, testified that he had served in the army with Damren, and that Damren had been a model soldier (9TR 889-96).

William Wise, Sr., plant superintendent at Southern Specialties, a railcar repair facility located in Jacksonville, testified that Damren had worked there on several occasions, and was a good worker who got along well with other employees (10TR 898-901).

In a similar vein, Steve Brown, welding supervisor at a truck-building plant, testified that Damren was a good welder and fitter who got along well with other employees (10TR 903-05).

Roger Prout testified that Damren had helped him on several occasions and had taught his son how to fish (10TR 905-09).

Bart Greenway testified that when he and Jeff Chittam had gone to the store to get beer and meat for the cookout on the afternoon before the murder, Chittam had tried to talk him into stealing gasoline (10TR 910-11).

John Shagg testified that Damren had built him a shed and had done a good job (10TR 911-13).

Finally, Damren's girlfriend Nancy Waldrup testified that she and Damren had been together for three and a half years, that Damren had helped her raise her granddaughter, and had helped her daughter through a difficult period (10TR 916-20).[3]

B. The Postconviction Testimony

At the evidentiary hearing on his 3.850 motion, Damren presented testimony from Dr. Ernest C. Miller, Arlene DeLong and trial counsel Alan Chipperfield.

---

[3] Waldrup's stepdaughter, however, had testified at the guilt phase that Damren flirted with her and that Waldrup had warned her not to let Damren hang around when Waldrup was not present (7TR 473).

Dr. Miller testified that he recently had reviewed Damren's medical records from Clay Memorial Hospital relating to a stay in June of 1989, when Damren apparently was hospitalized following a cocaine overdose (3R 362-63). These records indicated that Damren suffered a "seizure" during this hospitalization (3R 363). Dr. Miller testified that seizures result in brain damage; therefore, Damren probably has some brain damage (3R 363). He estimated a 90-95% probability that Damren is brain-damaged (3R 365).

On cross-examination, Dr. Miller acknowledged that he could not quantify the amount of possible brain damage simply from reviewing the 1989 hospital records (3R 367). He acknowledged that he had never before seen Damren, much less examined him (3R 367). Nor had he ever seen the results of any testing for brain damage that may have been conducted, including a 1995 report by Dr. Sherry Risch (3R 367). He would guess, however, that any brain damage "would probably be quantifiable as minimal to mild" (3R 368).

On redirect examination, Dr. Miller was shown the 1995 report of Dr. Risch (3R 369). He noted that this testing showed no significant spread between Damren's verbal and performance IQ (3R 369). A significant disparity between verbal and performance IQ can indicate brain damage; the absence of such a spread is an indicator (although not a "solid" one) that the person is not brain damaged (3R 370).

Dr. Miller noted that there “is a great deal of redundancy built into the brain;” we have “ten thousand million neurons” and we may lose “ten thousand of them” and still function well in “all appearances through most testing” (3R 370). Even with neurological testing, it might be difficult to identify subtle impairments without some sort of pre-brain-damage baseline to compare a subject’s performance to (3R 370).

On recross examination, Dr. Miller acknowledged that on the “category test” and, as well, the “Wisconsin card sorting test,” Damren’s performance fell within normal limits, meaning that there are no deficits with Damren’s problem solving skills and cognitive flexibility (3R 371-72). Furthermore, Damren has a high average intellectual ability (IQ 116) with particularly strong vocabulary and incidental learning skills (3R 372-73). Overall, the testing done previously is void of organic implications (3R 372-73).

Arlene DeLong testified that she has known Damren for 23 years, having first met him in 1979 (3R 375-76). At one point, she got pregnant by him, but he was using cocaine heavily and could not handle the responsibility (3R 376-78). He sent her money to have an abortion (3R 378). She waited for a while to see if he would change his mind, but eventually went through with the abortion, afterwards having a nervous

breakdown (3R 379). She would have testified at his trial if she had been asked (3R 379).

DeLong acknowledged on cross-examination that she had met Damren in prison, after corresponding to him (3R 380). When he got out, she allowed Damren to be around her son even though she knew that Damren was abusing cocaine at the time (3R 381). Her pregnancy by Damren occurred in late 1988; she got her abortion in early 1989 - some five years before Damren's trial for the murder at issue in this 3.850 proceeding (3R 382). They were out of touch with each other during this time (3R 382). Damren (she learned later) had tried to contact her in 1992, but she had moved, did not have a phone and was not in contact with her former friends, so she never got his message, and she did not learn of his trial until after it was over (3R 382-83).

Damren's trial attorney Allen Chipperfield testified that he is an experienced capital litigator with the office of the public defender (3R 385). He did not recall whether or not he tried to contact Arlene Long, but it appeared from his notes that he did not (3R 386). He was unaware of their relationship (3R 386). He was not sure that he would have called Ms. DeLong if he had known about her and could have located her, as he had made a conscious decision not to introduce any evidence of Damren's cocaine history, for two reasons (3R 387). First, Damren was not under the influence

of cocaine when he murdered Donald Miller (3R 387). Second, although cocaine abuse can be mitigating, juries often are not favorably impressed by such evidence (3R 387-88). Chipperfield's strategy was to portray Damren as a drunk rather than a coke addict (3R 387).

Chipperfield was reluctant to call as a witness Dr. Phillips (a Washington, D.C., psychiatrist), because he did not want to open the door to Damren's extensive criminal history of committing burglaries (3R 388). Chipperfield obtained the hospital records from Damren's 1989 cocaine overdose (3R 392). He called Dr. Miller at trial only to support a defense of intoxication (3R 390). Chipperfield would have elicited Dr. Miller's testimony about brain damage if it strengthened the defense of intoxication and did not open the door to prior convictions or other hurtful things (3R 390, 396).

On cross-examination, Chipperfield testified that he specifically had requested Dr. Risch to interview and test Damren for possible brain damage and her conclusion was that there was none (3R 399-400). He was not sure he would want to use evidence of brain damage based on a hospital report that Damren had a seizure following an overdose of cocaine, but might if he could find a doctor who could relate such brain damage to intoxication by exacerbating alcohol's effects (3R 400-01).

Chipperfield acknowledged that, in his pre-trial discussions with Damren, Damren had admitted his involvement in the crime, although he blamed his co-

defendant to a greater degree (3R 404-05). Damren had eight prior felony convictions, and, besides the instant Clay County murder case, had been charged in St. Johns County for the murder of his co-defendant (Chittam) in the Clay County case (3R 403-04). Chipperfield, an experienced capital litigator himself, discussed this case with 4-5 other lawyers (3R 402-03, 406). In addition to Dr. Risch, Chipperfield consulted Dr. Phillips, a psychiatrist from Washington, D.C., who flew down to Clay County and interviewed Damren (3R 406-08). Dr. Phillips could not have helped at all at the guilt phase, and any help he could have offered at the penalty phase would, in Chipperfields' view, have been outweighed by "the detriment" of allowing the jury to learn of Damren's extensive criminal record and his drug use (3R 408). Chipperfield also consulted with various experts on intoxication before finally settling on Dr. Miller (3R 409-10). Chipperfield limited Miller's testimony to a calculation of blood alcohol level based on Damren's weight and the amount he had drunk according to defense witnesses (3R 410-11). Chipperfield chose not to allow Dr. Miller to examine Damren personally, as he was concerned (in light of Damren's good memory of the events of the crime and his goal-directed activity in committing the crime and afterwards), that Dr. Miller would have concluded that Damren was not intoxicated to the point that he could not premeditate (3R 411-12). Furthermore, even if Dr. Miller had concluded from his examination of Damren that he was highly intoxicated at the time of the crime,

Chipperfield knew that any statements Damren made to Dr. Miller about the details of the crime would be explored on cross-examination (3R 412).

Chipperfield showed the 1989 hospital records to Dr. Phillips, but not to Dr. Risch (3R 418). Dr. Risch had told him that if he wanted an evaluation, she would need a history; if he wanted test data, she would do a blind evaluation (3R 418). He chose the latter, thinking that if she came up with brain damage, there would be no problem revealing Damren's prior record if she testified (3R 418). However, she found no indication of brain damage (3R 421). Dr. Phillips did review the 1989 medical records, but, like Dr. Risch, failed to find any indication of brain damage and failed to offer any other helpful conclusions (3R 418-19, 422).

SUMMARY OF THE ARGUMENT

Damren argues[4] three issues:

1 & 2. In his first two issues, Damren contends his trial counsel was ineffective at the guilt and penalty phases for failing to present hospital records from Damren's 1989 cocaine overdose to Dr. Miller and to present Dr. Millers testimony based upon his review of those records that, because Damren had a seizure, he has brain damage. Trial counsel, however, had Damren evaluated by a psychologist and a psychiatrist, neither of whom found any indication of brain damage, with or without the 1989 hospitalization records. Merely finding an expert years later who can testify more favorably is insufficient to demonstrate deficient attorney performance. This is not a case in which trial counsel failed to prepare. Trial counsel was an experienced capital litigator who investigated thoroughly, decided on an appropriate defense theory of the case (Damren was basically a good person with an alcohol problem), and then presented witnesses to support that theory, including **fourteen** witnesses at penalty phase. Damren does not even argue that Dr. Miller's testimony about brain damage

---

[4] The Table of Contents of Damren's brief sets out five issues. However, Arguments III and IV as listed in the Table of Contents are not argued, and Argument V is argued in the brief as Argument III. Initial Brief of Appellant at 38-39. The State will (and can only) argue the three issues as to which Damren presents argument.

would have been admissible at the guilt phase, and he has failed to demonstrate that trial counsel's performance at the penalty phase was constitutionally deficient.

Moreover, Damren has failed to demonstrate prejudice. Dr. Miller has never evaluated Damren. His testimony is based solely upon his review of Damren's 1989 hospitalization records showing that Damren had a seizure. In essence, Dr. Miller is saying no more than that almost everyone who has ever had a seizure has lost some brain cells and, ergo, has "brain damage." The extent of such loss is variable. Dr. Miller cannot say how many brain cells Damren might have lost, or what impairments, if any, he might now suffer as a result. He acknowledged that Damren's brain damage is probably minimal and that he may not be measurably impaired. He acknowledged that a person can lose many brain cells without being impaired at all. And, when he reviewed for the first time at the hearing the neurological testing conducted before Damren's trial, Dr. Miller conceded that Damren appeared not to suffer any measurable impairments. Damren simply has not demonstrated that presentation of Dr. Miller's testimony would in reasonable probability have resulted in a life sentence.

Damren barely mentions Arlene DeLong in his brief. It does not appear that she was available at the time of the trial. Further, her testimony would not have been especially favorable to Damren, since (a) it merely emphasized Damren's long criminal history (she had met him while he was in prison) and (b) her testimony that he had

abandoned her after she got pregnant by him is not consistent with the defense theory that Damren was a nice person who was helpful to his friends.

3. The trial court's alleged failure to review state attorney exempt files for exculpatory material is not preserved for appeal by timely presentation to the circuit court. Furthermore, the record belies Damren's contention that the circuit court failed to review the state attorney's exempt files for exculpatory evidence.

ARGUMENT

ISSUES I AND II

TRIAL COUNSEL WAS NOT INEFFECTIVE AT EITHER PHASE OF THE TRIAL FOR FAILING TO INVESTIGATE AND PRESENT ALLEGED EVIDENCE OF BRAIN DAMAGE

The State will address Damren's first two issues together because the same deficiency is alleged in both issues: Damren's trial counsel failed to obtain and present evidence that Damren is brain damaged.[5]

Initially, the State would note that it has no burden to prove that Damren's trial counsel was effective; instead, there is "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and the defendant bears the burden of proving that the representation was unreasonable under the

[5] From Damren's captions to his first two issues, it appears he is raising ineffective assistance as to both guilt and penalty phases. However, except for one brief reference to counsel's failure to request individual sequestered voir dire (Initial Brief of Appellant at 16), his argument in both issues appears entirely addressed to the penalty phase. The State is unable to discern any suggestion in Damren's brief that evidence of brain damage could or should have been admitted at the guilt phase. As for any suggestion that trial counsel was ineffective for failing to insist on sequestered voir dire, the State's response is that this claim (if it is such) was not raised anywhere in his 3.850 motion, and may not be raised for the first time on this appeal. It is also meritless, as Damren has utterly failed to prove that trial counsel rendered constitutionally ineffective assistance for failing to seek sequestered jury voir dire.

prevailing professional norms and that the challenged action was not strong strategy." Johnson v. State, 769 So.2d 990 (Fla. 2000). To prove that counsel rendered ineffective assistance, Damren must demonstrate both: (1) that counsel's performance was deficient, i.e., that counsel made such serious errors that he did not function as the counsel guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced him, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Damren must make both showings, i.e., both deficient performance and prejudice. Ibid., Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995)("The standard is not how present counsel would have proceeded, but rather whether there was both a deficient performance and a reasonable probability of a different result."); Williamson v. Dugger, 651 So.2d 84, 87-88 (Fla. 1994)(court need not consider whether trial counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial); Wike v. State, 27 Fla. L. Weekly S95 at S98, fn. 7 (Fla. January 24, 2002) (once it is determined that the defendant has failed to establish one of the prongs, "it is not necessary to delve into whether the defendant has made a showing as to the other prong"). Thus, if Damren has failed to establish *either* prong of the test for attorney ineffectiveness, he cannot

prevail. Proving one prong is insufficient to establish ineffectiveness of counsel; conversely, the failure to prove one prong moots any further inquiry.

Although acknowledging these standards, Damren contends that trial counsel's failure to present Damren's hospital records to Dr. Miller, or to present Dr. Miller's testimony regarding Damren's alleged brain damage to the jury at the guilt and/or penalty phases of the trial was prejudicially deficient attorney performance meeting both prongs of the Strickland standard. The circuit court correctly found otherwise.[6]

Although Damren states in his brief that it is "clear" that his trial counsel "failed to make an investigation altogether into brain damage," in fact it is undisputed that his trial counsel was aware of Damren's 1989 hospitalization for cocaine overdose, and had consulted two qualified experts about the possibility that Damren had brain damage. Trial counsel merely failed to consult Dr. Miller on this issue.

---

[6] This Court has held that, while "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo standard," a trial court's "factual findings are to be given deference." Porter v. State, 788 So.2d 917 (Fla. 2001). In this case, the circuit court did not make explicit factual findings. However, there was no conflict in the evidence; only Damren called witnesses at the evidentiary hearing, and he does not contend that any of their testimony should be rejected. Nor does the State's argument in this case depend upon the rejection of any testimony presented below. Instead, it is the State's position that, accepting the testimony at face value, Damren has failed to establish deficient attorney performance or prejudice. Thus, the absence of explicit factual findings in the circuit court's order does not preclude proper evaluation by this Court on appeal, and Damren does not contend otherwise.

Trial counsel was and is an experienced capital litigator who prepared thoroughly for Damren's trial and penalty phase, decided on strategy of portraying Damren as basically a good person who had a serious alcohol problem, and then pursued that strategy by presenting ***fourteen*** witnesses at the penalty phase, including Damren's girlfriend, his mother, his brother, his sister, two aunts, five friends, two former employers, and a jailer.

Trial counsel's problem with presenting any kind of brain-damage mitigation was that neither of the experts he consulted found any indication of brain damage. Damren has presented no evidence that either of these experts was unqualified. Neither has he demonstrated that every reasonable attorney would have shown Damren's 1989 hospital records to Dr. Miller after two experts had explicitly evaluated Damren for possible brain damage and found no indication of such. Haliburton v. State, 691 So.2d. 466, 470-71 (Fla. 1997) (no deficient performance where counsel's decision not to call witness was not "so patently unreasonable that no competent attorney" would have declined to do so). Trial counsel "conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable

mental health expert." Asay v. State, 769 So.2d 974, 986 (Fla. 2000).[7] The burden was on Damren to prove "that the approach taken by defense counsel would not have been used by professionally competent counsel." Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1989. He has failed to do so. Instead, he has established, at most, only "that his present counsel would not have pursued the same strategy, a showing which misses the target by a wide mark." Spaziano v. Singletary, 36 F.3d 1028, 1041 (11th Cir. 1994). Accord, Occhicone v. State, 768 So.2d 1037, 1048, 1049 (Fla. 2000) ("Counsel cannot be deemed ineffective merely because current counsel disagrees with trail counsel's strategic decisions. . . . The issue is not what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense.").

Furthermore, Damren has not demonstrated prejudice. In the first place, even with persuasive evidence of significant brain damage, trial counsel would have had difficulty overcoming the substantial aggravation presented by the State. As this Court has noted, "The possibility of organic brain damage . . . does not necessarily mean that one is incompetent or that one may engage in violent, dangerous behavior and not

[7] The State would question whether Dr. Miller can even be regarded as a more favorable mental health expert, for reasons set out in the State's discussion of prejudice, below.

be held accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in today's society." James v. State, 489 So.2d 737, 739 (Fla. 1986). But Damren has not shown us significant brain damage. On the contrary, what Damren presented below fails to establish that he has any measurable brain damage.

It should be noted that Dr. Miller still has not examined Damren personally, or administered any kind of neuropsychological testing. See Walls v. State, 641 So.2d 381, 390-91 (Fla. 1994) (expert opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminished to the degree such support is lacking"). Instead, Dr. Miller has testified only to probabilities (however high he thinks they might be) based on the bare occurrence of a seizure. Dr. Miller cannot say with certainty that Damren has brain damage at all, much less brain damage of such character that it would have had a significant impact on Damren's behavior at the time of this crime. As Dr. Miller acknowledged, the brain has many more cells than it needs. Because the loss of even a large number of brain cells can constitute a very small percent of the total number of cells in the brain, such loss can have *minimal* to *no* affect on the brain's overall performance. Dr. Miller cannot calculate how many brain cells (if any) Damren might have lost during his 1989 seizure, and Dr. Miller conceded that any brain-cell loss Damren might have suffered during

this seizure could have been so minimal that it would not show up even with neurological testing.

Indeed, that appears to be the case, as the evidence is undisputed that the only two experts who have actually examined Damren found no evidence of brain damage. After reviewing Dr. Risch's 1995 report (Defendant's Exhibit #1), Dr. Miller acknowledged that Damren is highly intelligent, that the absence of a significant disparity between Damren's verbal and performance IQ is in indicator that he is not brain damaged, that other tests administered by Dr. Risch showed that Damren suffers no deficits in his problem solving skills or cognitive flexibility, and that the test results overall are void of organic implications.

In short, no evidence has been presented even now of any measurable mental dysfunction, much less of any dysfunction related somehow to the murder Damren committed. Moreover, introduction of evidence about Damren's seizure would have alerted the jury to Damren's abuse of cocaine, contrary to counsel's desire to portray Damren as a drunk, not an abuser of illegal drugs.

In view of the strong aggravation presented in this case (CCP, HAC, prior violent felony and murder committed during a burglary) and the jury's unanimous sentencing recommendation, it is clear that Damren simply has shown no reasonable probability of a different sentence if he had presented Dr. Miller's testimony about the

unconfirmed possibility of brain damage based solely on the fact that Damren once had a seizure after overdosing on cocaine. Asay, supra; Rutherford v. State, 727 So.2d 216, 225-26 (Fla. 1998) ("not reasonably probable, given the nature of the mitigation offered," that defendant's new mitigation "would have led to the imposition of a life sentence, outweighing the multiple substantial aggravators" of CCP, HAC and robbery/pecuniary gain); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987) (unpersuasive medical evidence can do more harm than good by opening door to harmful cross-examination or rebuttal).[8]

---

[8] Damren makes brief reference to Arlene DeLong, who, Damren contends, could have given "compelling evidence" in mitigation that Damren was a good friend and had helped her. Initial brief of Appellant at 8. DeLong admitted, however, that she was not in contact with Damren at the time of his trial; she had moved, was not in contact with her former friends, and did not have a telephone. This is hardly a demonstration that she was an available witness at the time of trial. Moreover, trial counsel's opinion that he probably would not have called her even if she had been available seems reasonable, given her testimony that (1) she had met Damren while he was in prison, (2) he got her pregnant and then insisted she have an abortion because he was using cocaine heavily and could not handle the responsibility of a child, (3) he thereafter disappeared from her life, and (4) she had not seen him for five years at the time of the trial. This testimony does not show that Damren was a good friend or that he had helped her. Nor is it consistent with trial counsel's strategy of not apprising the jury of Damren's extensive criminal past or his abuse of illegal drugs, but instead portraying Damren as basically a good person, albeit one with an alcohol problem, who treated people well.

The circuit court correctly found that Damren had failed to establish either deficient attorney performance or prejudice. Damren has failed to prove that his trial counsel was constitutionally ineffective, and the circuit court's judgment should be affirmed.

ISSUE III

THE CIRCUIT COURT'S IN CAMERA REVIEW OF STATE ATTORNEY EXEMPT DOCUMENTS WAS NOT INADEQUATE FOR ANY REASON URGED

Damren contends in his third and final issue that, although the circuit court reviewed documents in camera for which the state attorney had claimed exemption from disclosure under Chapter 119, "there is no indication in the court's order that the work product documents were reviewed for exculpatory information under Brady v. Maryland, 373 U.S. 83 (1963)." Initial Brief of Appellant at 38. Damren fails to cite to any portion of the record in support of this claim, or to show how it is preserved for appeal. However, the record does show that postconviction counsel moved for in camera review by the circuit court of two sealed envelopes retained by the Repository, for determination by the circuit court of "what materials would be public

record and should be disclosed to the Defendant's attorney that would be relevant in any manner to assist in the preparation of the Defendant's 3.851 motion" (1R 90-91). The circuit court granted the motion for in camera review and directed the Repository to deliver the two sealed envelopes to the circuit court (1R 96-97). The court thereafter reviewed these two envelopes, with the parties and a court reporter present (Supp R 40-52).

At the in camera review, the circuit court described envelope 1 as containing "Parole Commission Records, Victim Statement records, FCIC/NCIC, and Mental Health Records, and I think the P.S.I." (Supp R 41). Envelope two was described as "Loose pages of handwritten attorney notes and summaries of information for trial preparation, rough drafts, notes intended by secretaries for dictation for preparation, victim and/or next of kin information and NCIC/FCIC teletypes and/or intelligence information, annotated Jury selection list and attorney notes and strategies pertaining to Jury selection" (Supp R 41).

Ultimately, the circuit court ordered the disclosure of all the contents of envelope number 1, but nothing from envelope number 2 except for one folder containing "Victim Impacts" (2R 230). Although the circuit court did not explicitly state in its written order that it had reviewed for exculpatory information, the court did

state orally at the hearing that the attorney work product it had reviewed "**contains no exculpatory information that I can glean**" (Supp R 47).

Thus, it is clear from the record that the Court did review for exculpatory information even though Damren never formally moved for such review.[9] Moreover, Damren never complained to the circuit court about the parameters of its review. In particular, he never explicitly sought a Brady-type in-camera review, or complained to the circuit court, either orally or in writing, that it had failed to conduct such a review. Thus, Damren's present complaints about the in-camera review have not been preserved for appeal. Furthermore, because it is clear from the record that that the circuit court did in fact conduct a review for exculpatory material, Damren's present claim is also meritless.

Damren does not appear to making any further claim on this appeal. In particular, Damren makes no claim or showing that the State withheld any admissible exculpatory evidence or anything that would have led to the discovery of admissible exculpatory evidence. See Williamson v. Moore, 221 F.3d 1177, 1182-83 (11th Cir. 2000)(no Brady violation where defendant fails to show either that material and

---

[9] Postconviction counsel did make a kind of off-hand reference to "exculpatory-type evidence" at the hearing (2R 46), but he did not, insofar as the State can tell, make any formal written request for a Brady-type in-camera review of exempt records for materially exculpatory material.

admissible exculpatory evidence was withheld, or at least that information was withheld which, although not admissible itself, *would have led* to admissible and material exculpatory evidence).

Damren is entitled to no relief on this issue.

CONCLUSION

The circuit court correctly found that Damren had failed to prove either deficient attorney performance or prejudice. Damren having failed to demonstrate any other error, the judgment of the circuit court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

____
CURTIS M. FRENCH
Senior Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext 4583
(850) 487-0997 - Fax

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jefferson W. Morrow, P.A., 1301 Riverplace Boulevard, Suite 2600, Jacksonville, Florida 32207, this 19th day of March, 2002.

____
CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND FONT

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

____
CURTIS M. FRENCH
Senior Assistant Attorney General