

No. SC18-1192
Lower Case No. 16-2010-CF-008424

IN THE
Supreme Court of Florida

DAVID KELSEY SPARRE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel – North
1004 Desoto Park Drive
Tallahassee, Florida 32301

STACY R. BIGGART
Assistant CCRC – North
Fla. Bar No. 0089388
Stacy.Biggart@ccrc-north.org
(850) 487-0922 ext. 114

Counsel for Appellant

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	vii
PRELIMINARY STATEMENT.....	1
REQUEST FOR ORAL ARGUMENT.....	1
STANDARDS OF REVIEW.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	5
I. The guilt phase of trial.....	5
A. The State’s opening statement.....	5
B. Defense counsel’s opening statement.....	6
C. The State’s case.....	7
D. The State’s closing argument.....	15
E. Defense counsel’s closing argument.....	15
F. The State’s rebuttal argument.....	15
G. Verdict.....	16
II. The penalty phase of trial.....	16
III. The <i>Spencer</i> hearing.....	20
IV. The sentencing order.....	21
V. Postconviction – the evidentiary hearing.....	24

A.	Trial counsel.....	24
B.	Dr. John Marraccini.....	27
C.	Dr. Harry Krop.....	28
D.	Dr. James Garbarino.....	33
E.	Mr. Sparre’s outburst at the end of the hearing.....	40
F.	Post-hearing motions.....	41
SUMMARY OF THE ARGUMENT.....		42
ISSUE 1.....		44
<p>TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO REQUEST A CONTINUANCE AND INVESTIGATE MR. SPARRE’S COMPETENCY AFTER RED FLAGS WERE RAISED WHEN MR. SPARRE TOLD THE COURT THAT HE WAS NOT TAKING THORAZINE, THE ANTIPSYCHOTIC MEDICATION HE WAS PRESCRIBED, FOR FAILING TO ALERT THE COURT TO THE RED FLAGS, AND FOR FAILING TO ENSURE MR. SPARRE WAS COMPETENT WHEN MAKING DECISIONS CRITICAL TO HIS PENALTY PHASE.</p>		
I.	Applicable law.....	44
II.	Trial counsel was deficient for failing to investigate Mr. Sparre’s competency when he told the court he was not taking his medications.....	45
III.	Mr. Sparre was prejudiced by trial counsel’s deficient conduct.....	54
ISSUE 2:.....		55
<p>TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO FILE THE DEFENSE SENTENCING MEMORANDUM WITH THE CLERK OF COURT TO PRESERVE RECORD EVIDENCE OF SUBSTANTIAL MITIGATION FOR MR. SPARRE’S DIRECT APPEAL.</p>		
I.	Trial counsel was deficient for failing to file the defense sentencing memorandum in the Clerk’s office.....	56

II.	Mr. Sparre was prejudiced by trial counsel’s deficient conduct.....	60
ISSUE 3.....	TRIAL COUNSEL’S FAILURE TO IMPEACH DR. GILES WITH HIS DEPOSITION TESTIMONY WAS DEFICIENT PERFORMANCE THAT FELL BELOW PREVAILING NORMS.	63
I.	Applicable law.....	63
II.	Trial counsel was deficient for failing to impeach Dr. Giles.....	64
III.	Mr. Sparre was prejudiced by trial counsel’s deficient conduct.....	65
ISSUE 4.....	TRIAL COUNSEL’S FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND CONSULT WITH EXPERTS, INCLUDING A FORENSIC PATHOLOGIST, WAS DEFICIENT PERFORMANCE WHICH FELL BELOW THE PREVAILING NORMS.	66
I.	Applicable law.....	66
II.	Trial counsel was deficient for failing to investigate and consult with a forensic pathologist to support the defense of second-degree murder.....	67
III.	Mr. Sparre was prejudiced by trial counsel’s deficient conduct.....	69
ISSUE 5.....	TRIAL COUNSEL’S FAILURE TO UTILIZE AND ARGUE EVIDENCE TO THE JURY THAT SUPPORTED THE DEFENSE OF SECOND-DEGREE MURDER WAS DEFICIENT PERFORMANCE THAT FELL BELOW PREVAILING NORMS.	70
I.	Trial counsel was ineffective for failing to utilize and argue evidence to the jury that supported the defense of second-degree murder.....	70
II.	Mr. Sparre was prejudiced by counsel’s guilt phase closing argument.....	73
ISSUE 6.....	TRIAL COUNSEL WAS DEFICIENT IN FAILING TO OBJECT TO	78

NUMEROUS IMPROPER STATEMENTS BY THE PROSECUTOR IN GUILT AND PENALTY PHASE CLOSING ARGUMENTS.

I. Applicable law.....78

II. Trial counsel was ineffective during the guilt phase for allowing the State to misrepresent the law in closing argument.....78

III. Trial counsel was ineffective during the guilt phase for failing to object to numerous improper statements by the prosecutor during his closing argument.....80

IV. Trial counsel was ineffective for failing to object when the state argued aggravation in the guilt phase.....82

V. Trial counsel was ineffective for failing to object to the State’s improper penalty phase closing argument.....83

VI. Mr. Sparre was prejudiced by trial counsel’s deficient conduct.....84

ISSUE 7.....85
THE CUMULATIVE EFFECT OF THE ERRORS TAINTED MR. SPARRE’S TRIAL

ISSUE 8.....88
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. SPARRE’S CLAIM THAT *ROPER V. SIMMONS* SHOULD BE EXTENDED TO PRECLUDE MR. SPARRE’S EXECUTION. HE WAS 19 YEARS OLD WHEN HE COMMITTED THE CRIME AND HIS EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT’S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

ISSUE 9.....92
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. SPARRE’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *HURST V. FLORIDA* AND *HURST V. STATE*.

ISSUE 10.....99
THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT

ALLOWING MR. SPARRE TO AMEND HIS MOTION FOR
POSTCONVICTION RELIEF.

CONCLUSION.....100

CERTIFICATE OF SERVICE.....102

CERTIFICATE OF FONT.....102

TABLE OF AUTHORITIES

Cases

<i>Anderson v. State</i> , 276 So. 2d 17 (Fla. 1973).....	80
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	94
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	92
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983).....	60
<i>Bell v. State</i> , 768 So. 2d 22 (Fla. 1st DCA 2000).....	80
<i>Bertolotti v. State</i> , 476 So. 2d 130 (Fla. 1985).....	78
<i>Blake v. State</i> , 180 So. 3d 89 (Fla. 2014).....	64
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993).....	94
<i>Burch v. State</i> , 977 So. 2d 778 (Fla. 5th DCA 2008).....	63
<i>Butler v. State</i> , 100 So. 2d 638 (Fla. 2012).....	64
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985).....	4, 96, 97, 98, 99
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	87, 96
<i>Clemons v. Mississippi</i> , 494 U.S. 738 (1990).....	60
<i>Connor v. State</i> , 979 So. 2d 852 (Fla. 2008).....	64
<i>Grim v. State</i> , 971 So. 2d 85 (Fla. 2007).....	64
<i>Davis v. State</i> , 136 So. 3d 1169 (Fla. 2014).....	64
<i>Davis v. State</i> , 207 So. 3d 142 (Fla. 2016).....	95
<i>Graham v. Florida</i> , 543 U.S. 48 (2011).....	90
<i>Guardado v. Jones</i> , 138 S. Ct. 1131 (2017).....	97

<i>Hall v. Florida</i> , 134 S. Ct. 1986 (2014).....	89
<i>Hamblen v. State</i> , 527 So. 2d 800 (Fla. 1988).....	4
<i>Head v. State</i> , 35 So. 3d 1008 (Fla. 5th DCA 2010).....	63
<i>Henry v. State</i> , 862 So. 2d 679 (Fla. 2003).....	45, 67
<i>Howell v. State</i> , 109 So. 3d 763 (Fla. 2013).....	2
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016).....	<i>passim</i>
<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016).....	<i>passim</i>
<i>Jackson v. State</i> , 575 So. 2d 181, 189 (Fla. 1991).....	87
<i>Jones v. State</i> , 569 So. 2d 1234 (Fla. 1990).....	86
<i>Kegler v. State</i> , 712 So. 2d 1167 (Fla. 2d DCA 1998).....	63
<i>Kelly v. State</i> , 198 So. 3d 1077 (Fla. 5th DCA 2016).....	63
<i>Kilgore v. State</i> , 55 So. 3d 487 (Fla. 2010).....	64
<i>Koon v. Dugger</i> , 619 So. 2d 246 (Fla. 2007).....	19
<i>Kormondy v. State</i> , 983 So. 2d 418 (Fla. 2007).....	64
<i>Magill v. Dugger</i> , 824 F. 2d 879 (5th Cir. 2012).....	45, 66
<i>McDuffie v. State</i> , 970 So. 2d 312 (Fla. 2007).....	2
<i>Middleton v. Florida</i> , 138 S. Ct. 829 (2018).....	97
<i>Mills v. Singletary</i> , 161 F.3d 1273 (11th Cir. 1998).....	57, 98
<i>Moore v. State</i> , 820 So. 2d 199 (Fla. 2002).....	2
<i>Muhammad v. State</i> , 782 So. 2d 343, 364 (Fla. 2001).....	59, 61

<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	94
<i>Parker v. Dugger</i> , 498 U.S. 308 (1991).....	41, 61, 99
<i>Parker v. State</i> , 89 So. 3d 844 (Fla. 2011).....	87
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966).....	54
<i>Ray v. State</i> , 403 So. 2d 956 (Fla. 1981).....	86
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	4
<i>Roper v. Simmons</i> , 543 U.S. 554 (2005).....	<i>passim</i>
<i>Rose v. Clark</i> , 478 U.S. 570, 583 (1986).....	60, 96
<i>Ruiz v. State</i> , 734 So. 2d 1 (Fla. 1999).....	78
<i>Shellito v. State</i> , 121 So. 3d 445 (Fla. 2013).....	25
<i>Sochor v. State</i> , 883 So. 2d 776 (Fla. 2004).....	1
<i>Spann v. State</i> , 985 So. 2d 1059 (Fla. 2008).....	64
<i>Sparre v. Florida</i> , 136 S. Ct. 411 (2015).....	4
<i>Sparre v. State</i> , 164 So. 3d 1183 (Fla. 2015).....	4, 59, 162
<i>Spencer v. State</i> , 615 So. 2d 688 (Fla. 1993).....	<i>passim</i>
<i>State v. DeGuilio</i> , 491 So. 2d 1129 (Fla. 1986).....	87
<i>State v. Gunsby</i> , 670 So. 2d 920 (Fla. 1996).....	87
<i>State v. Morrison</i> , 236 So. 3d 204 (Fla. 2017).....	25
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	<i>passim</i>
<i>Tanzi v. State</i> , 94 So. 3d 482 (Fla. 2012).....	100

<i>Truehill v. Florida</i> , 138 S. Ct. 3 (2017).....	98
<i>Urbin v. State</i> , 714 So. 2d 411 (Fla. 1998).....	78
<i>Wiggins v. Smith</i> , 539 U.S. 510, 527 (2003).....	45, 67
<i>Williams v. Thaler</i> , 684 F. 3d 597 (5th Cir. 2012).....	45, 67

Statutes

Fla. Stat. 27.7045 (2018).....	25
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Rules

Fla. R. Crim. P. 3.851.....	<i>passim</i>
Fla. R. Crim. P. 3.852.....	55

Other Authorities

2 Kaplan & Sadock’s Comprehensive Textbook of Psychiatry 3060 (B. Sadock, V. Sadock, & P. Ruiz eds., 10th ed. 2017) (hereinafter Kaplan & Sadock’s).....	48
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PRELIMINARY STATEMENT

This is Mr. Sparre’s appeal of the circuit court’s order denying his motion for postconviction relief under Fla. R. Crim. P 3.851. The first five volumes of the seventeen-volume record on direct appeal, comprising the pleadings, status conferences, motion hearings, and *Spencer* hearing will be referenced as “R” followed by the page number. The next eight volumes, comprising the transcripts of the guilt and penalty phases will be referenced as “T” followed by the page number. The trial exhibits are designated by the letter “E” followed by the page number. The postconviction record will be referenced as “PC” followed by the page number.

REQUEST FOR ORAL ARGUMENT

Mr. Sparre has been sentenced to death. The resolution of this appeal will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims and the stakes involved. Mr. Sparre respectfully requests this Court grant oral argument.

STANDARDS OF REVIEW

Strickland claims present mixed questions of law and fact, so this Court defers to the circuit court’s factual findings that are supported by competent substantial evidence but reviews the circuit court’s legal conclusions de novo. *Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Where the circuit court denies 3.851 claims without an evidentiary hearing, this Court reviews the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *Howell v. State*, 109 So. 3d 763, 777 (Fla. 2013).

Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." *McDuffie v. State*, 970 So. 2d 312, 328 (Fla. 2007).

"The trial court's denial of a motion to amend is subject to an abuse of discretion standard." *Moore v. State*, 820 So. 2d 199, 206 (Fla. 2002).

STATEMENT OF THE CASE

Mr. Sparre was indicted for first-degree murder by the Duval County Grand Jury on March 25, 2010. (R.20-22). His trial began on November 28, 2011, and the jury found Mr. Sparre guilty of premeditated and felony (burglary) murder on December 2, 2011. The jury also found that Mr. Sparre carried, displayed, used, or attempted to use a weapon. (R.592-93). The penalty phase was held on December

13, 2011. (T.1231). No mitigation testimony was presented. The jury recommended death by a vote of 12 to 0. (R.628; T.1410).

A *Spencer*¹ hearing was held on January 27, 2012, and again, no mitigation testimony was presented. (R.955-87). The court sentenced Mr. Sparre to death on March 30, 2012. The court found the following aggravating factors and assigned each great weight: (1) the murder was especially heinous, atrocious, or cruel (HAC); and (2) was committed during a burglary. (R.700-03). The court found one statutory mitigator and assigned it moderate weight: the defendant's age at the time of the crime. (R.705-06).

The court found 13 non-statutory mitigators: (1) accepts responsibility (little weight); (2) neglect (some weight); (3) emotional deprivation and abuse (some weight); (4) physical abuse (some weight); (5) lacked a good support system (little weight); (6) absent father (some weight); (7) good at fixing things (slight weight); (8) dropped out of high school but obtained a GED (little weight); (9) participated in ROTC in high school and served in the United States military (slight weight); (10) devoted to his grandmother (little weight); (11) has a child (some weight); (12) loves his family (some weight); and (13) his family loves him (some weight). (R.706-711). The court rejected the following mitigators: (1) the defendant's judgment was impaired; (2) the defendant was under the influence of drugs; and (3) the incident

¹ See *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

was situational. (R.707, 709).

This Court affirmed Mr. Sparre's conviction and sentences. *Sparre v. State*, 164 So. 3d 1183 (Fla. 2015).² The United States Supreme Court denied certiorari review on November 2, 2015. *Sparre v. Florida*, 136 S. Ct. 411 (2015).

Mr. Sparre filed an amended 3.851 motion with 36 claims³ for relief. (PC.967-

² The following issues were raised on direct appeal: (1) the trial court erred in not calling as its own witnesses four mental health experts and other witnesses who were available to testify to extensive mental mitigation, in violation of the Eighth and Fourteenth Amendments; (2) this Court should recede from *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988) and require the appointment of independent public counsel to present whatever mitigation reasonably can be discovered in all cases where the defendant seeks the death penalty or waives the presentation of mitigating evidence; and (3) Florida's capital sentencing proceedings are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*.

³ Mr. Sparre raised the following claims in his 3.851 motion: (1) counsel failed to raise a cause challenge on Juror Davis; (2) counsel failed to raise a cause challenge on Juror Wideman; (3) counsel failed to move to strike the jury pool based on Juror Wideman's prejudicial comments and her fixed opinion of the defendant's guilt; (4) counsel allowed a biased juror to be empaneled; (5) counsel failed to challenge the entire jury pool after it was discovered they discussed the case during a break; (6) counsel failed to educate the jury on the penalty phase process; (7) counsel failed to inquire about racial bias with the venire; (8) counsel failed to raise a *Neil* challenge; (9) counsel failed to correct *Caldwell* errors; (10) counsel failed to utilize and argue evidence before the jury that supported second degree murder; (11) counsel failed to investigate and retain a forensic pathologist to support the defense theory of second degree murder; (12) counsel failed to object to improper statements by the prosecutor about the law concerning second degree murder; (13) counsel failed to object to numerous improper prosecutorial statements during closing arguments; (14) prosecutorial misconduct for misrepresenting the law; (15) prosecutorial misconduct for inflammatory statements; (16) prosecutorial misconduct for improperly vouching for the victim; (17) prosecutorial misconduct for arguing facts not in evidence; (18) prosecutorial misconduct for denigrating the defense; (19) prosecutorial misconduct for arguing aggravation during the guilt phase; (20)

1059). Mr. Sparre withdrew Claim 22, and an evidentiary hearing was held on Claims 1-21 and 23-31 on March 15, 16 and 19, 2018. (PC.3254-3841). The circuit court issued a final order denying all claims (PC.2845-2911). This appeal follows.

STATEMENT OF THE FACTS

I. The guilt phase of trial

A. The State's opening statement

The victim, Tiara Pool, attended school in Jacksonville. In July 2010⁴ her husband was deployed and their children were with his family in Bonifay, Florida. (T.404-05). Her husband's deployment caused a strain on their marriage and she

prosecutorial misconduct for invoking government authority; (21) counsel failed to investigate the defendant's background and retain a childhood trauma expert; (22) counsel failed to investigate and present behavioral genetics evidence; (23) counsel failed to fully investigate the defendant's background rendering his waiver invalid; (24) counsel failed to advise the court it had the alternative means to present the mitigation evidence; (25) counsel failed to request the appointment of a special counsel to represent the public interest in bringing forth all available mitigation; (26) counsel failed to request the court to call available mitigation witnesses; (27) counsel failed to argue any specific evidence in mitigation that had already been presented during the guilt phase; (28) counsel failed to object to the State's improper penalty phase closing argument; (29) counsel failed to provide all mitigation evidence to the court during the penalty phase; (30) prosecutorial misconduct for failing to ensure all mitigation evidence was provided to the court during the *Spencer* hearing; (31) cumulative error; (32) the trial court erred by allowing the defendant to waive the presentation of mitigating evidence; (33) the trial court violated *U.S. v. Cronin*; (34) the death penalty as a punishment of an offender under the age of 21 at the time of the offense is cruel and unusual punishment; (35) Florida's three drug protocol is unconstitutional and Florida is unable to maintain sufficient supply of each drug; and (36) the defendant's sentence is illegal pursuant to *Hurst v. Florida*.

⁴ All subsequent dates refer to 2010 unless otherwise noted.

sought out relationships with other men on Craigslist. *Id.* Mr. Sparre responded to her Craigslist ad, and they met on July 8 when he traveled to Jacksonville to take his grandmother to the hospital. (T.406). On July 12, the victim's body was discovered in her bedroom by a friend. (T.408). She had been stabbed to death. (T.409).

Law enforcement found Mr. Sparre through the victim's cell phone records. (T.411). On July 14, investigators traveled to Waynesville, Georgia, to interview him. (T.412). He told investigators that he met the victim on Craigslist. She picked him up from St. Vincent's Hospital on July 8 and took him home. They had sex, and then she took him back to the hospital. (T.412-13). Mr. Sparre said he had not heard from her since she dropped him. (T.413).

After the interview with Mr. Sparre, law enforcement found the victim's car a few blocks from St. Vincent's Hospital (T.414), and obtained the hospital's video surveillance from July 8. (T.415). Mr. Sparre was developed as a suspect and arrested on July 24, and he told several different stories about what happened when he was with the victim. (T.418-19). Mr. Sparre eventually admitted that he killed her and took her wireless router and PlayStation. (T.419).

B. Defense counsel's opening statement

The defense theory at trial was that Mr. Sparre killed the victim, but he was guilty of the lesser charge of second-degree murder. In opening statements, trial counsel told the jury:

They're on the bed. They're talking and then something occurs, ladies and gentlemen. The fact that Sparre liked her, didn't like her, that's not the point. What matters is at that moment in time when they were on the bed after the shower Tiara Pool told Sparre who she really was, husband in the military, not separated. Married, not divorced. Kids at grandparent's house. The scene was set up nicely for her. This was not the person Sparre contacted through Craigslist. This is not the person that was spoke to or texted on the phone. This is not the person that he met at the hospital. This is not the person that he drove back to her apartment with. This isn't the person that he just had an intimate relationship with. This is a person that deceived David Sparre as to who she was or what she really wanted. **When he heard this, he snapped. Something in his mind snapped.** He couldn't believe what he just heard. He had been through so much turmoil and so much pain being lied to, being neglected, things of that nature, it all came together right then and there.

(T.430-31). (emphasis added). Trial counsel asked the jury to find Mr. Sparre guilty of second-degree murder, not first-degree murder. (T.435).

C. The State's case

Nichelle Edwards was the victim's nanny and classmate. She went by the victim's apartment on July 12 to check on her when she did not attend classes that week. (T.442). When there was no answer, she let herself in with her key. *Id.* When she opened the bedroom door, she saw a hand on the floor. She ran back outside and called 911. (T.443-44). Officer Brown responded to the 911 call and found the victim's body on the floor of her bedroom, nude and covered in blood. (T.462; 468).

The victim's apartment was processed for evidence. (T.476). There was no evidence of forced entry. (T.479). Her purse was located on a table in the living room, with the wallet open and items hanging out of the purse. (T.485) Her cell

phone was on the back of the couch. (T.486). In the master bedroom, there was blood around the body, on the carpet, baseboards, door, and wall. (T.496). A blue towel was under the body and a pair of black capris with underwear on the floor nearby. (T.599, 502). There was blood on the bed, along with assorted clothing and a bottle of OxiClean. The comforter was ripped with blood in the rip. (T.505-07). There was blood on the bathroom door and blood drops at the entrance to the bathroom. There was a large knife, which matched a knife block in the kitchen, propped up against the tub in the master bathroom. (T.511-12). The blade was bent and the tip was missing. (T.513-14). There was blood in the grout around the tub and toilet that suggested the area had been cleaned. (T.514).

Michael Pool, the victim's husband, was deployed when his wife was killed. They grew up together in Bonifay, Florida. (T.546). Their two children were living with his mother in Bonifay in July 2010. (T.551). The couple had marital problems while he was out at sea, and they even had discussions about divorce. (T.549). He suspected his wife had relationships with other men while he was deployed. (T.550). After his wife's death, he determined that several items were missing from his home, including a PlayStation, a wireless router, and a Blu-ray movie. (T.552-53).

Detective Bodine discovered calls and texts to a number of men on the victim's phone, including flirtatious and sexually explicit texts messages to and from Mr. Sparre between July 6, and July 8. (T.563). In the July 8 texts, the victim and

Mr. Sparre made plans to meet at St. Vincent's Hospital. (T.572-76). The last texts from Mr. Sparre to the victim were on July 8 at 5:21 p.m., saying, "don't bother coming," and 6:14 p.m., saying, "guess you're mad at me." (T.577).

Investigators downloaded information from the victim's computer and subpoenaed records from Craigslist. (T.578). The victim posted on Craigslist on July 1 and Mr. Sparre responded to the posting on July 5. (T.579). Detectives Bodine and Childers traveled to Mr. Sparre's home in Waynesville, Georgia on July 14 to interview him. (T.579). They made contact with Mr. Sparre and Detective Childers noticed a PlayStation 3 on his living room floor. (T.721). He agreed to accompany them to the Brantley County Sheriff's Office for an interview. (T.582). Mr. Sparre was not under arrest and investigators did not read him his Miranda Rights. (T.583). The interview was recorded and played for the jury. (T.586).

Mr. Sparre recognized a picture of the victim. (T.594). He met her on Craigslist. (T.596). She had posted an ad three weeks earlier, saying she wanted to chill. (T.595). Mr. Sparre and the victim met up at St. Vincent's hospital on July 8 when his grandmother was having a procedure. They went to the victim's home and had sex. She dropped him off at the hospital (T.598-99), and he had not heard from her since that day. (T.608). He denied that he had been drinking or had taken any drugs on July 8. (T.599-600). After the interview, investigators took him home and he gave them the clothes he said he was wearing on July 8. (T.644).

Detective Childers recovered video surveillance from St. Vincent's Hospital that showed Mr. Sparre and the victim together in the admissions lobby around 2:30 p.m. The video also showed Mr. Sparre after he returned to the hospital at 5:58 p.m. carrying a large dark-colored shopping bag. (T.726-27). Mr. Sparre was wearing different clothing from the clothing he gave investigators. (T.722).

Trial counsel focused his cross-examination of Detective Childers on the victim's Craigslist postings and her inaccurate descriptions of herself online. (T.740). The victim described herself as 25 years old instead of her actual age of 21 years old, single instead of married, and that she was plus-size when in fact she was not. (T.740-41). Trial counsel asked Detective Childers about other men associated with the victim, namely Joshua Cody Reid and his friend, Joshua Cody Wood. (T.742). Mr. Wood's truck had a "redneck" sticker and "piss on Ford" sticker. *Id.* The men would visit the victim, and Mr. Reid lived with her at one time. (T.743).

Based on inconsistencies between Mr. Sparre's statement to investigators on July 14 and evidence collected from his phone records and St. Vincent's Hospital, Mr. Sparre was arrested on July 24. (T.816). He was interviewed again and the redacted video of the interview was played for the jury. (T.824-982).

Mr. Sparre told several different stories about what happened on July 8 and eventually admitted he killed the victim. He initially told investigators the same thing he had told them in the July 14 interview, that the victim picked him up from

the hospital, they went to her home, had sex, and she took him back to the hospital. (T.843-848). He went to his car in the hospital garage before returning to his grandmother's hospital room to deposit a bag with a gift from the victim. (T.858). He sent the victim texts when he returned to the hospital but she did not answer so he figured she was mad at him. (T.879).

After investigators told Mr. Sparre the phone records, video, and lab records were going to "hang [him] out to dry," Mr. Sparre said he went to get cigarettes and when he returned, there was blood everywhere, and he freaked out and left. (T.913). When investigators did not believe him, Mr. Sparre said he was in the shower and the victim tried to stab him. He freaked out, blacked out, and before he knew what would happen, it was already done. He thought no one would believe it was self-defense, so he wiped everything down. (T. 918). He took the PlayStation to a pawn shop in Waynesville. (T.923). Mr. Sparre told investigators that his stepdad "beat the fuck out of me every day for a year-and-a-half" and that his mom "beat the fuck out of me" but his grandma "doesn't touch me." (T.933-35).

When investigators told Mr. Sparre the victim was attacked on the bed, not in the bathroom (T.941), and that it was not self-defense (T.945), Mr. Sparre said he did not know why he did it, that he got a really bad headache and did not remember anything from the time he got out of the shower until he got to the car. He then said he got out of the shower and grabbed a blue towel out of the closet. He went to get

something to drink, and she ran at him, angry. (T.945-47).

When the investigators told him that it did not start in the kitchen, Mr. Sparre said he did not know how he got the knife, but he remembered opening the bedroom door. She was lying on the bed, and he was giving her a massage. He did not remember if he had the knife then and did not remember the actual stabbing. He knew he stabbed her because when he was done, he freaked out and dropped the knife, and he was “flipping,” was “tripping, balling.” He denied being high on drugs, “I was real calm when I walked in there because she had Hydrocodone in her purse. I remember that. That’s why I was so calm.” He took all eight pills. When he was asked if he took the pills afterwards, he said, yes, he was tripping out. He did not know why he went through her purse or why he took the PlayStation. He grabbed all the Hydrocodone in the purse and wiped everything off, including the car. (T. 950-52). Asked about the OxiClean on the bed, he said he did not clean anything, “why would I clean anything?” (T.953, 958). He burned his clothes in a burn pile in the yard. (T.955). He said he learned how to clean up crime scenes from watching C.S.I. When investigators asked him again why, he said he did not remember stabbing her. Doing it did not make him feel good, and he was “freaked out like shit” afterwards. (T.962-63). Asked if he blacked out before, he said he blacked out once when he was driving, and when he came to, a lady hit him, but it was her fault. (T.964). He had blacked out at other times, too, but did not pass out. “I’ll be one

place whenever – whenever I just like – and then I’ll be another.” (T.965). He did not know why he did it. Everything was going good. Asked if he did it for a thrill, he said, no. When the investigators told him some people do it for a rush, he said he would jump off a building if he wanted a rush. It was bothering him, and he knew they would be coming eventually. If he had wanted to run, he would have run when he was in Brantley County where he could have gotten away with it. (T.970-72).

He didn’t know why he told them he was in a boys’ home when he was young. He’d kept that inside for a long time. Asked if he thought going to the home was bad, he said, “It is bad. I mean who wants to-who wants to tell somebody that they-(unintelligible)-oh, my mom didn’t give a fuck about me and she let her husband-she chose her husband over me, over her own flesh and blood.” (T.973).

Investigator Simpson of the Brantley County Sheriff’s Office went to Mr. Sparre’s grandmother’s home on July 24, and recovered denim material from the burn barrel and green and white striped cloth from the burn pile. (T.800, 805). He also obtained pawn tickets from Mill’s Pawn Shop in Waynesville, Georgia, where Mr. Sparre pawned a PlayStation 3 and some games. (T.807-08).

Ashley Chewning, Mr. Sparre’s former girlfriend and the mother of his young daughter, testified that approximately one week after Mr. Sparre’s grandmother had surgery in Jacksonville, Mr. Sparre told her “human blood stinks.” (T.995-96). He told her he had killed a black woman at her apartment in Jacksonville. (T.996). She

did not believe him. (T.996-97). She saw Mr. Sparre with a PlayStation, and he told her he stole it from the woman he killed. (T.997). Mr. Sparre wrote her letters from jail. *Id.* Ms. Chewning turned over a letter he sent on September 26, 2011, to law enforcement. *Id.* He wrote Ms. Chewning that he “slumped that bitch.” (T.998).

Dr. Jesse Giles performed the autopsy on the victim. (T.1012). The cause of death was multiple sharp force injuries. (T.1012). There were approximately 88 sharp force injuries. (T.1014). There was a fatal slashing wound to the neck (T.1022), and two potentially fatal stab wounds to the back that punctured the lungs. (T.1024). Dr. Giles testified at trial that the victim’s wounds were inconsistent with a frenzy based on the pattern of the blade and the number of wounds. (T.1034-35). According to Dr. Giles, many of the wounds have the same pattern, but in other wounds the pattern goes the other direction, which indicated to Dr. Giles that the knife direction changed, the victim moved, or the attacker moved. (T.1034-35). To Dr. Giles, this implied a passage of time between the wounds. (T.1055).

Trial counsel moved for a Judgment of Acquittal and argued that the State had not proven premeditation for first-degree murder or burglary under the theory of felony murder. (T.1059). The State argued that the number of stab wounds was evidence of premeditation. (T.1066). The State argued that the burglary began when the victim withdrew consent for Mr. Sparre to be in her apartment because “[s]he had given consent to him to have sex with him, not to go over there and kill her or

to beat her or to hurt her.” (T.1067). The court denied the motion. (T.1070).

The defense did not call any witnesses. Mr. Sparre did not testify. (T.1071).

D. The State’s closing argument.

The prosecutor told the jury that the victim “fought for her life.” (T.1085). The prosecutor argued that the number of wounds was proof of premeditation. (T.1112, 1115). Mr. Sparre’s “handiwork” was proof of premeditation. (T.1114). The murder took a long time and was not a frenzy. *Id.* The prosecutor also argued the jury should find Mr. Sparre guilty of felony murder because Mr. Sparre committed burglary by unlawfully remaining in the victim’s home after she withdrew consent. (T.1116). According to the prosecutor, the victim withdrew permission for Mr. Sparre to remain in her home once he started stabbing her. *Id.*

E. Defense counsel’s closing argument

Trial counsel focused on the victim’s lifestyle. He insinuated that she was bipolar or had some other mental illness. (T.1130-31;1136;1137). He criticized her for inviting strange men to her home (T.1133), and cheating on her husband with a guy “that has zero going for him.” (T.1137). Trial counsel argued that she was a liar because she misrepresented her weight and age in her Craigslist ads (T.1142-43), and he called her a racist because she preferred white men. (T.1143;1147).

F. The State’s rebuttal argument

In rebuttal, the prosecutor accused trial counseling of “trashing” the victim.

(T.1153). He argued that “she was allowed to hold herself out to whatever she wanted to be.” (T.1152). Regarding the defense of second-degree murder, the prosecutor told the jury that “second-degree murder is an unintentional killing. It’s when you kill somebody without meaning to.” (T.1154-55). He also argued that Mr. Sparre’s actions *after* the murder – i.e., wiping away his prints, burning his clothes, and sending fake alibi texts while he was still at her home – were evidence that he planned the murder. (T.1158). The prosecutor also told the jury Mr. Sparre had premeditation the moment he stabbed the victim. (T.1160).

G. Verdict

The jury found Mr. Sparre guilty of first-degree, premeditated murder. The jury found that the killing was done in the commission of a burglary, and Mr. Sparre carried, displayed, used, threatened to use or attempted to use a weapon. (T.1204).

II. The penalty phase of trial

Trial counsel informed the court that Mr. Sparre wished to waive the presentation of mitigation testimony. (T.1236). Trial counsel presented an abbreviated proffer of the mitigation witnesses that were prepared to testify at the penalty phase. (T.1236-46). Dr. Krop would testify to both statutory and mental mitigators, that Mr. Sparre was under the influence of extreme emotional disturbance and his capacity to conform his conduct to the law was substantially impaired at the time of the crime. Dr. Krop would also testify to five separate psychiatric diagnoses,

stemming from early childhood and a dysfunctional family: ADHD, posttraumatic stress disorder, a neurological assessment of substance abuse, intermittent explosive disorder, and bipolar schizoaffective disorder. (T.1235-34, 1239). Dr. Buffington, a nationally-renowned pharmacologist, would testify about the effects of hydrocodone, powder cocaine, alcohol and other drugs Mr. Sparre used, including blackouts and memory loss, the interaction of those drugs, and the effects of continued drug use from age thirteen to the present on frontal lobe growth. (T.1238). Drs. Alligood and Greenberg would testify (by video) about Mr. Sparre's history of mental issues, which began as early as age eleven, twelve, thirteen, when he was in the boys' home, Tara Hall, including lack of treatment for PTSD. Alligood and Greenburg would testify based on Mr. Sparre's history, medical records, school records, and consultation with the family. (T.1238-40).

Shannon Bullock, Mr. Sparre's counselor at Tara Hall, would testify about Mr. Sparre's dysfunctional family, the lack of interest by his mother, who dropped him off at Tara Hall to move on with her life and her many husbands, his belief in God, and that he got along well among the diverse staff and residents. (T.1239-40).

James Dumm, the director of Tara Hall Boy's Home, would testify that while Mr. Sparre was there, there was little or no contact with his family, and that he called the South Carolina Department of Social Services to report abuse because there was no communication at all with the mother. (T.1245-46).

A number of family members were also prepared to testify. Nissa Sparre, Mr. Sparre's sister, would describe their horrific upbringing, including the physical and emotional abuse she witnessed and the impact it had on her and her brother. Mary Kay Tyson, Mr. Sparre's maternal aunt (his mother's sister-in-law) also witnessed much of the abuse and would testify about, in her words, the "awful, awful life" these kids had. Gladys and Fred Sparre, who raised Mr. Sparre during certain time periods, would testify to the dysfunction on both his mother and his father's side. They would provide the link to Mr. Sparre's father, Erik, and would testify to his absence in Mr. Sparre's life, that he would not testify because he has a misdemeanor warrant in Florida, and that both parents put their own wants ahead of their children. Rhonda Hickox, Mr. Sparre's mother, would show the dysfunction of Mr. Sparre's upbringing and would testify that she has been married seven times, moved numerous times, that several of her husbands were physically, emotionally, and mentally abusive to Mr. Sparre, and that each marriage came first, not her son, ultimately culminating in her placing him in a home, where he was left for two years. Although the program allowed families extensive access to the children, she visited her son one time in the two years he was there. Mary Varnadore, Mr. Sparre's maternal grandmother would testify that the two most significant relationships Mr. Sparre had were with her and her late husband and that these relationships were routinely hindered by Mr. Sparre's mother, who denied them access at times and

only allowed for a meaningful relationship when Mr. Sparre came to live with her after he was released from the boy's home. Mrs. Varnadore would testify to the lack of relationship Mr. Sparre had with his mother and how it affected him, that he could not sleep at night and would try to crawl in Mrs. Varnadore's bed and would wake up in the middle of the night screaming and trying to climb the walls. (T.1241-48).

The judge conducted a colloquy under *Koon v. Dugger*, 619 So. 2d 246 (Fla. 2007). The judge asked Mr. Sparre if he had discussed the mitigation with his lawyers. Mr. Sparre said he had and did not want them to present the evidence. Mr. Sparre told the judge he had been prescribed Thorazine and Celexa but he throws them in the toilet because the medication gives him the shakes. He told the court that those medications were sleep aids. (T.1257). The court found Mr. Sparre's waiver was knowingly, freely and voluntarily done. (T.1259). The court also commented, "I don't know what else can be done." *Id.*

The State and the defense waived opening statements. (T.1260). The State introduced eight photographs and the victim impact statements of Michael Pool, Thelma Summers and Valerie Speed. (T.1275-87). At the close of the penalty phase, Mr. Sparre confirmed that he did not want his attorneys to put on any live mitigation testimony, and he declined to testify. (T.1290-91, 1338). However, Mr. Sparre did allow counsel to deliver a closing argument that argued mitigation in the guilt phase record and asked the jury to spare Mr. Sparre's life. (T.1373). The advisory jury

recommended death by a vote of 12 to 0. (T.1410).

III. The *Spencer* hearing

The *Spencer* hearing was held on January 27, 2012. (R.955-87). Mr. Sparre waived the presentation of mitigation testimony. (R.958-62). The court discussed the PSI report with the parties, and trial counsel reported that Mr. Sparre did not suggest any objections or corrections. (R.962). Notably, trial counsel did not make any objections or corrections of their own based on their extensive knowledge of Mr. Sparre's substantial mitigation. The prosecutor objected to the characterization of Mr. Sparre's discharge from the military, but did not make any objections or corrections of his own based on his extensive knowledge of Mr. Sparre's background and mitigation from the various depositions he attended. (R.963). The State called Ashley Chewning and Sergeant Daisy Peoples of the Duval County Jail to testify about a letter Mr. Sparre tried to send to Ms. Chewning after the penalty phase. (R.965). Sergeant Peoples intercepted the letter before it was mailed. (R.970). Ms. Chewning identified Mr. Sparre's handwriting from past letters. (R.972). The court ordered the letter to be sealed until the attorneys could provide case law on the issue (R.966), but later admitted the letter into evidence as additional proof of the aggravators already argued (HAC and committed during a burglary). (R.671-72). In the letter, Mr. Sparre said he wanted "to tell the truth about why I killed that girl." He wrote that he knew he was going to Jacksonville a week before he started looking

for a potential victim and he wanted to try something to see how it felt. He knew the police would come talk to him so “I had the perfect alibi . . . taking my grandma to the doctor.” He said he took over five minutes to kill her, that she was on the bed when he began, then “we moved on by the bedroom after she quit fighting I tilted her head and sliced her throat.” He said he planned it for a week and a half and did it for the rush and enjoyed it. “I never stabbed somebody and so I just thought it would be a good rush so I did it. Anyway the point I’m getting at is that I did what I did because I could and I almost got away with it.” (E.286-88).

The court requested sentencing memorandums from the parties. (R.981).

IV. The sentencing order

The court sentenced Mr. Sparre to death on March 30, 2012. (R.1006). In the order, the judge stated that she had “taken into account all of the evidence presented during the trial, including the guilt and penalty phases, the *Spencer* hearing, the sentencing memoranda submitted by the parties, as well as the PSI.” (R.695). The judge noted she could call witnesses to testify to mitigation evidence if the PSI revealed evidence of significant mitigation. (R.704).

The court found two aggravators and assigned great weight to each: (1) the murder was committed during a burglary; and (2) was especially heinous, atrocious, or cruel. The court found one statutory mitigator and assigned it moderate weight: the defendant’s age at the time of the crime. (R.705-706).

The court also found 13 non-statutory mitigating circumstances: (1) accepts responsibility (little weight); (2) neglect (some weight); (3) emotional deprivation and abuse (some weight); (4) physical abuse (some weight); (5) lacked a good support system (little weight); (6) father was absent from his life (some weight); (7) good at fixing things (slight weight); (8) dropped out of high school but obtained a GED (little weight); (9) participated in ROTC in high school and served in the United States military (slight weight); (10) devoted to his grandmother (little weight); (11) has a child (some weight); (12) loves his family (some weight); and (13) family loves him (some weight). (R.706-11). The court rejected the following mitigators: (1) the defendant's judgment was impaired; (2) the defendant was under the influence of drugs; and (3) the incident was situational. (R.707, 709).

The judge concluded that the statutory mitigator of extreme emotional disturbance was negated by the letter Mr. Sparre wrote after the penalty phase. The judge noted that although Drs. Greenberg, Alligood and Krop would have testified that Mr. Sparre suffered from PTSD, she was "not required to accept this mitigating circumstance based on this proffer." (R.705).

The judge rejected the mitigator of impaired judgment, noting that although Dr. Krop would have testified that Mr. Sparre's "decision-making processes were based on immaturity and impulsiveness," she was "not required to accept this mitigating circumstance as proven based on this proffer." (R.707).

The judge found the mitigating factor of neglect “based on the limited evidence” before it, i.e., information in the PSI that Mr. Sparre was raised intermittently by his mother, grandmother, and sister; his mother was married seven times and would move when entering into a new relationship; and Mr. Sparre was placed in Tara Hall at age thirteen. The judge noted that the defense was prepared to present the testimony of Mr. Sparre’s mother, grandmother, and two counselors from Tara Hall with regarding to Mr. Sparre’s neglect and abandonment but state that she was “not required to accept this mitigating circumstance.” (R.708).

In addressing the mitigating factor of emotional deprivation and abuse, the judge stated,

The Defendant argues that his dysfunctional family life and lack of parental support caused him to suffer from emotional deprivation. The Defendant also argues he was emotionally abused by his mother and step-fathers. There is limited information before this Court, however, based on the Defendant’s unstable home life, one would logically conclude that such an upbringing would lead to emotional issues.

(R.708). The judge noted that while Drs. Krop and Greenberg were prepared to testify to Mr. Sparre’s emotional deprivation, she was “not required to accept this mitigating evidence as proven based on this proffer.” *Id.*

Regarding physical abuse, the trial court wrote, “In the PSI, the Defendant reported he was beaten by one of his step-fathers. Additionally, during the Defendant’s July 24, 2010, interrogation, he stated both his mother and step-father beat him.” (R.709). Noting that Mr. Sparre’s sister, grandmother, and aunt were

prepared to testify to this mitigating circumstance, the court found it proven. *Id.*

V. Postconviction – the evidentiary hearing

The evidentiary hearing on Claims 1-21 and 23-31 of Mr. Sparre’s 3.851 motion was held on March 15, 16, and 19, 2018. The court heard testimony from Refik Eler, Michael Bateh, Al Perkins, Shawn Arnold, John Leombruno, David Douglas, Dr. John Marraccini, Dr. Harry Krop, and Dr. James Garbarino.

A. Trial counsel

Mr. Sparre was represented by Refik Eler, Michael Bateh and Al Perkins of the Public Defender’s Office. They were joined by private practice attorneys Shawn Arnold and John Leombruno. Only Mr. Eler was qualified to handle capital cases. Mr. Sparre’s trial was the first death penalty trial for Mr. Bateh, Mr. Arnold and Mr. Leombruno. It was Mr. Perkins’s second capital trial. Mr. Sparre’s attorneys had limited memory of the case during direct examination by postconviction counsel. However, their memories of the events of 2010-2011 improved when the prosecutor cross-examined them with leading questions. The trial court sustained the State’s objections to Mr. Sparre’s counsel asking leading questions on direct examination at the evidentiary hearing. (PC.3299-3300). Postconviction counsel argued that Mr. Sparre’s trial attorneys are adverse parties in the 3.851 proceeding because Mr. Sparre has raised claims of ineffective assistance of counsel against all five attorneys, claims which carry serious potential consequences for attorneys who

handle capital cases. If attorneys are found ineffective twice in capital cases, they will be unable to receive new appointments for five years. *See Fla. Stat. §27.7045 (2018)*. Mr. Eler has already been found ineffective twice: *State v. Morrison*, 236 So. 3d 204 (Fla. 2017), and *Shellito v. State*, 121 So. 3d 445 (Fla. 2013). (PC.3534).

At first, Mr. Eler did not remember if he or Mr. Bateh was lead counsel on this case. (PC.3508). He later testified that he was lead (PC.3510) and that Mr. Bateh or Mr. Perkins handled the guilt phase and Mr. Arnold and Mr. Leombruno helped Mr. Eler with the penalty phase. (PC.3511).

Mr. Bateh recalled the Mr. Eler was first chair and denied that he got involved in the case until six months to one year after Mr. Sparre was arrested. (PC.3264). Mr. Bateh claimed he and Al Perkins “kind of flip-flopped. I mean it was not designed as he’s second chair and me third chair, vice versa.” (PC.3268). Mr. Perkins, however, testified that he was “like fourth chair at best.” (PC.3418). He “did small stuff in the case” to get death qualified (PC. 3417).

Mr. Arnold was in private practice after working as a state attorney for four and a half years. (PC.3382). Former State Attorney Angela Corey asked him to get death qualified, so he approached Mr. Eler and joined Mr. Sparre’s defense team so he could do the penalty phase portion of a capital trial. (PC.3384). Mr. Arnold does not know who was lead counsel on Mr. Sparre’s case. “I want to say it was Mr. Eler but I could be wrong about that” (PC.3385).

Mr. Arnold's law partner, Mr. Leombruno, also got involved in Mr. Sparre's case "to get death penalty certified." (PC.3403). He also had trouble recalling who was lead counsel and testified that it was either "Mr. Bateh or Mr. Eler." *Id.* Mr. Leombruno was going to assist in the penalty phase and only watched a day or two of the guilt phase from the gallery. (PC.3407).

Mr. Douglas was the lead investigator/mitigation specialist. (PC.3368). Mr. Douglas testified Mr. Bateh was lead counsel. (PC.3453). Mr. Douglas agreed that meeting with clients regularly is important for establishing a rapport. (PC.3457). Mr. Douglas said the attorneys have their own standards for seeing clients and "count court appearances." *Id.* Although some clients will not sign releases allowing trial counsel to gather mitigation records, Mr. Sparre was cooperative and willing to sign releases so Mr. Douglas could gather his records and construct a mitigation timeline. (PC.3469) According to Mr. Douglas, "[A]t that point in time his life was only 20 years in the making. It was not that difficult to construct a timeline so to speak." *Id.* When Mr. Douglas first met Mr. Sparre, "he was barely 18." (PC.3470). It was very clear to Mr. Douglas that "he had a somewhat disjointed, dysfunctional and in many instances tragic childhood from the standpoint of his upbringing." (PC.3473).

In Mr. Douglas's opinion, Mr. Sparre had "genuine mitigation." (PC.3475). He "genuinely had diagnoses at a young age of posttraumatic stress disorder" and had "absolutely no memory of the first six years of his life." *Id.*

The attorneys delegated the critical duty of counseling Mr. Sparre about a life sentence to Mr. Douglas. (PC.3460-61). Mr. Sparre was concerned about the effect that the penalty phase testimony would have on his family, particularly his grandmother Mary Varnadore. In Mr. Douglas's opinion, "Ms. Varnadore didn't do much . . . to alleviate that worry on the part of Mr. Sparre." (PC.3488).

B. Dr. John Marraccini, M.D.

Dr. Marraccini is a forensic pathology consultant and family practice physician in Miami, Florida. (PC.3619). He is board-certified in pathology, clinical pathology and forensic pathology and served as a chief medical examiner in Palm Beach County. (PC.3620).

Postconviction counsel asked Dr. Marraccini to review Dr. Giles's opinions. (PC.3622-23). He reviewed photographs, police reports, Mr. Sparre's statements, and Dr. Giles's trial testimony. (PC.3623). Dr. Marraccini disagreed with Dr. Giles's opinion that the victim's injury pattern was inconsistent with a frenzy. *Id.* In Dr. Marraccini's opinion, the assault "could very well be a continuous assault with no significant interruption." *Id.* Dr. Marraccini disagreed with Dr. Giles's assessment that the changing orientation of the knife wound pattern make it "less likely to be a frenzied event." (PC.3624). According to Dr. Marraccini, "just moving the arm up or down or bending the elbow can change the orientation of the sharp and blunt corners of the skin wound." *Id.*

Dr. Marraccini also disagreed with Dr. Giles's opinion that the number of sharp force injuries "would tire a person out" and the attack could not be a frenzy because "the assailant would stop to rest between the volleys of strikes." (PC.3624). According to Dr. Marraccini, "all the injuries could have been inflicted within two minutes without stopping by an assailant who's in an agitated state." *Id.* Given Mr. Sparre's young age and health, "[t]here's no reason why he could not have completed the assault in a very rapid period of time." (PC.3624-25). Dr. Marraccini supported his opinion with the crime scene photographs. (PC.3625). The scene was contained to the bedroom and "this assault did not carry through the entire dwelling." *Id.* Dr. Marraccini also testified that "defensive wounds don't speak to the length of the event" and he took those wounds into account in his assessment that the attack could have taken less than two minutes. (PC.3630).

C. Dr. Harry Krop, Ph.D.

Dr. Harry Krop is a neuropsychologist retained by trial counsel in 2011 to evaluate Mr. Sparre before trial. (PC.3656-57). Postconviction counsel called him to testify at the evidentiary hearing. The State stipulated to Dr. Krop's expertise in the field of forensic psychology stating: "I am imminently aware of [Dr. Krop's] qualifications and I don't dispute them at all." (PC.3656).

Dr. Krop first met with Mr. Sparre at the Duval County Jail on September 13, 2011 to discuss his upcoming trip to Dr. Krop's office for a neuropsychological

evaluation. (PC.3657). Dr. Krop also gathered information about Mr. Sparre's relevant history, such as head injuries, substance abuse, and education. *Id.* Mr. Sparre was evaluated at Dr. Krop's office on September 14, 2011. (PC.1422).

On October 24, 2011, Dr. Krop sent trial counsel a report of his opinions regarding the results of the neuropsychological testing. (PC.1422-23). Mr. Sparre's I.Q. of 81 was in the "lowest part of the low average range of intelligence. (PC.3661). Dr. Krop found no evidence of malingering and "concluded that there was no evidence from the testing of any type of neurocognitive impairment. (PC.3662). At the time of Dr. Krop's evaluation in September 2011, Mr. Sparre was on Thorazine. *Id.* Although Dr. Krop does not prescribe medications in his practice as a psychologist, it is necessary for him to be familiar with medications used to treat psychological conditions and disorders. (PC.3663). Thorazine is an antipsychotic medication with a sedative effect. According Dr. Krop, Mr. Sparre had been on Thorazine for a while at the time of the September 2011 evaluation and "he was showing no particular side effects including sedation." *Id.*

Dr. Krop reviewed Mr. Sparre's jail medical records that he received from trial counsel and determined that the jail psychiatrist prescribed Thorazine because he diagnosed Mr. Sparre with a psychotic disorder. (PC.3664). Mr. Sparre also reported hearing the voice of his stepfather and an individual he called "Tommy" that Mr. Sparre referred to as his friend." *Id.*

On November 27, 2011, the day before jury selection, Dr. Krop evaluated Mr. Sparre again at trial counsel's request to "do a more comprehensive mitigation workup." *Id.* He reviewed Mr. Sparre's jail records and other medical records related to previous head injuries. (PC.3659; 1529). He was asked to consider the application of statutory mitigators such as extreme emotional distress and capacity to appreciate his conduct. (PC.3668-69). Trial counsel also asked Dr. Krop's assistance in exploring a theory that a 19-year-old brain is not fully developed and able to control impulses. (PC.3668). According to Dr. Krop, the frontal lobe of the brain is not fully developed until approximately age 25. (PC.3669). The frontal lobe is responsible for executive functions, including judgment, problem solving, impulse control, and inhibition. (PC. 3670). The science of juvenile brain development is important in Mr. Sparre's case because he was 19 years old and the nature of the crime is relevant to difficulties with impulse control. *Id.* Also, the number of stab wounds to the victim "suggests problems with inhibition which is one of the most important aspects of the frontal lobe. Once a person starts something he has difficulty stopping." (PC.3671).

Dr. Krop planned to testify at Mr. Sparre's trial, and his testimony would have been consistent with the postconviction report prepared by Dr. James Garbarino. (PC.3673). Dr. Krop would have testified about the adverse childhood experiences Mr. Sparre's suffered. (PC.3674). Dr. Krop said the stress of a capital trial can have an effect on a young person with no prior arrests or incarcerations. *Id.*

Dr. Krop was also prepared to testify that given Mr. Sparre's age, his adverse childhood experiences, and the substances he was using at the time of the crime, Mr. Sparre "was in a lot of emotional distress at the time this incident happened." (PC.3676). Mr. Sparre told Dr. Krop he had been using cocaine and marijuana since he was 14. (PC.3694). He began drinking when he was 15. (PC.3709). He started using his grandmother's Xanax when he moved in with her. (PC.3710). He also told Dr. Krop he had used one to two grams of cocaine when he was in the car with the victim, as well as eight or twelve Hydrocodone pills he got from the victim. (PC.3703). Mr. Sparre reported several suicide attempts. (PC.3717). He lashed his wrists with a razor blade the night he learned of his grandfather's death. *Id.* He tried to drink himself to death on his 18th birthday when he was with his mother. *Id.* He has heard the voice of "Tommy" since he was at Tara Hall, and they have conversations. (PC. 3718). Once, before he was prescribed Thorazine, Tommy told Mr. Sparre that killing himself would be better than going to prison. (PC.3719).

Dr. Krop did not testify at Mr. Sparre's trial. *Id.* He was on the way to the courthouse when someone called and told him that he did not need to come to the courthouse because Mr. Sparre had waived the presentation of mitigation testimony. (PC.3676-77). Although Dr. Krop felt Mr. Sparre was "psychologically stable" and competent when he evaluated him, Mr. Sparre also reported that he had heard the voice of someone named Tommy since he was at Tara Hall. *Id.* During the

evaluations, Dr. Krop did not diagnose Mr. Sparre as being psychotic because Mr. Sparre did not appear to be hearing voices or responding to internal stimuli, but the jail records show that he was taking his Thorazine and Celexa around the time Dr. Krop interviewed him. (PC.3677-78; 3720). If the caller had also told him that Mr. Sparre was not taking his Thorazine and Celexa as prescribed when he made the waiver decision, Dr. Krop would have been concerned. (PC.3677).

Notably, Dr. Krop testified that it would probably be difficult for a layperson to recognize the effects suffered by a person who had abruptly stopped taking Thorazine. (PC.3678). According to Dr. Krop, “he, of course, could start exhibiting the psychotic symptoms, but in his case since they were internal it would be up to him to report these symptoms or hallucinations for someone else to recognize, for a layperson to recognize that he’s going through that.” (PC.3679).

On the day Mr. Sparre waived the presentation of live mitigation witnesses, Dr. Krop was not asked to assess his competency. *Id.* If trial counsel had asked Dr. Krop about competency, he would have recommended Mr. Sparre be evaluated to make sure he was competent to make that decision. *Id.* Dr. Krop would have turned around and headed back to the courthouse to evaluate Mr. Sparre if he had been asked. (PC.3680). Dr. Krop has doubts as to Mr. Sparre’s competency at the time he waived the presentation of live mitigation testimony “in part because he was diagnosed with psychosis and also that he was not taking his medication for

psychosis.” (PC.3685). Dr. Krop reviewed Mr. Sparre’s statements when he waived the presentation of live mitigation testimony, and Dr. Krop was concerned with his statement that he had discussions with himself prior to making his decision:

Now he wasn’t questioned as to what that meant with myself, but given the fact that he had the history talking to, quote, Tommy and the fact that he had admitted that he had stopped taking his medication, at least I would have questioned what he - - I would have tried to get him to clarify - - if I or any other mental health professional were asked to evaluate him for competency I certainly would have tried to clarify what he meant by that.

(PC.3682). Dr. Krop was never told by trial counsel that Mr. Sparre was considering waiving the presentation of live mitigation testimony. *Id.* Dr. Krop has been involved in other cases where the defendant waived mitigation, but usually in those cases Dr. Krop or another mental health professional has been asked to assess the defendant’s competency before the waiver is accepted. (PC.3686).

D. Dr. James Garbarino, Ph.D.

Dr. Garbarino is a professor of psychology at Loyola University in Chicago. (PC.3724). He is also a senior faculty fellow at the Center for the Human Rights of Children. *Id.* His specialty is child and adolescent development, particularly violence, trauma, abuse, and neglect. *Id.* He has written 26 books and more than a hundred professional peer-reviewed articles and chapters, and received numerous awards. (PC.3726). Dr. Garbarino was retained by postconviction counsel and testified at the evidentiary hearing as an expert on the effects of trauma and violence

in youth and adolescents. (PC.3727, 3728).

Postconviction counsel attempted to move all the records reviewed by Dr. Garbarino to formulate his opinions into evidence. The State objected, and the circuit sustained the objection stating, “I’m not really here to look at mitigation.” (PC.3780). The records included medical records, education records, family court and police reports from Georgia, and deposition taken in anticipation of Mr. Sparre’s trial. The court stated, “I don’t see how these individual items now are relevant to your motion to our hearing now.” (PC.3780).

According to Dr. Garbarino, children “require relationships to develop their brains, to develop the content of their brains, to learn emotional regulation, so it’s generally accepted that a secure early attachment to at least one parent figure is one of the basic building blocks of normal personality development.” (PC.3735). If a child lives in a home with “physical, psychological or sexual maltreatment whatever vulnerabilities they may have typically are made worse.” *Id.* Dr. Garbarino defines trauma as “experiencing things that are simultaneously overwhelming arousal, that is the feelings that they engender are fear, terror is overwhelming and at the same time the idea of what’s happening is overwhelming.” (PC.3737). While most children recover from a single incident of trauma, the process of recovery looks quite different for children who experience repeated incidents of trauma “because you can’t simply reassure children that things are back to normal because normal

becomes the problem.” (PC.3737-38). Children who experience chronic severe trauma and abuse in the first few years of life when the brain and personality are developing have “their brains incubated in terror.” (PC.3738). Dr. Garbarino describes child abuse and living in an abusive family as “an attack on the basic process of becoming a human being.” (PC.3740).

Severe early trauma “seems to deteriorate the quality of early memories generally, so [people who suffer severe repetitive childhood trauma] often cannot report on what they experienced and [. . .] it’s harder often for them to be seen as victims because they don’t have anything to tell about that happened in that early period.” (PC.3739). Since victims of such trauma cannot self-report, it is necessary to consult with people around the victim to piece together what happened. *Id.*

People experience the effects of trauma differently and “some children are more vulnerable.” (PC.3742). Dissociation is a “basic evolutionary response to trauma” exhibited by children who cannot flee or fight back. (PC.3743). Dissociation “allows you to survive horrible experiences” by emotionally disconnecting from the experiences. *Id.* The danger with dissociation, though, is that the individual can “become chronically, emotionally disconnected and particularly when there are stressful events you will retreat to this dissociative state.” *Id.* Often, children will play pretend: “I pretended I wasn’t there. It was as if I was somewhere else.” (PC.3744). According to Dr. Garbarino, such coping behavior can lead to what was

once referred to as multiple personality disorders when the children believe the fantasy that somebody else was there. “Joey was there and I’m somebody else.” *Id.* People who have suffered such repetitive severe trauma also sometimes to minimize what they experienced. *Id.* “[T]he more they’re emotionally disconnected from the experience the easier it is to minimize the significance of that experience because they have dissociated from it in the first place.” (PC.3744-45).

The adverse child experience (“ACE”) scale is a set of ten questions to evaluate how certain risk factors might affect a child’s development. (PC.3745). In national studies, approximately 2/3 of the population have one or zero risk factors. Only one-tenth of one percent (1/1000) have all ten risk factors. Dr. Garbarino reviewed Mr. Sparre’s records and social history and determined that Mr. Sparre’s ACE factor score is 9/10. (PC.3748-49).

- Verbal Abuse or Threats of Violence: Throughout his childhood, Mr. Sparre was the victim of verbal assaults and threats of physical violence. (PC.3750).
- Physical Abuse: Mr. Sparre was physically abused by at least one of his stepfathers. *Id.*
- Abandonment or Lack of Protection: Mr. Sparre felt rejected and abandoned by his family. The professionals at Tara Hall Home for Boys noted the “extraordinary” level of abandonment by his mother and her parental rights be terminated because of the “massive psychological neglect.” (PC. 3752). Dr. Garbarino cited to studies that show that “children who experienced parental rejection will very likely turn out badly.” (PC. 3754). “Without taking anything else into account, parental rejection accounts for about 25 percent of bad outcomes in children.” (PC. 3754-55). Maternal rejection is the worst kind of parental rejection and results in a doubting of your essential worth. (PC.3755).

- Neglect: Mr. Sparre’s mother often disappeared and left Mr. Sparre’s twelve-year-old sister to take care of her little brother. There was often not enough food in the house. There were also issues of substance abuse in the family. (PC.3752).
- Parental Divorce or Separation: Mr. Sparre’s parents were divorced and his mother remarried and divorced several times. “There’s a long, long pattern of separation and divorce and replacements.” (PC.3753). Although most children can deal with divorce or separation, a vulnerable child like Mr. Sparre would be overwhelmed by the repeated separations and disruptions and cast of characters shifting in and out of his life. (PC.3754).
- Physical Abuse of Maternal Figure: There were severe issues of domestic violence in Mr. Sparre’s home. (PC.3775, 1755).
- Use of Street Drugs or Excessive Use of Alcohol in Home: Mr. Sparre lived in homes with substance abuse on and off throughout his childhood and adolescence. (PC.3756).
- Mental Illness or Suicidality of Household Member: Mr. Sparre’s mother “demonstrated a pathological level of narcissism, and both his mother and grandmother demonstrated behaviors that “indicated some underlying great difficulty in adhering to normal rules of conduct within families.” (PC.3756-57).
- Prison Sentence of Household Member: Mr. Sparre’s biological father and at least one of his stepfathers went to prison. (PC.3757).

Dr. Garbarino also testified about the debilitating effects of psychological maltreatment on a developing child. Psychological maltreatment consists of five subcategories: terrorizing, rejecting, ignoring, corrupting, and isolating. (PC.3759). This concept is widely accepted by professionals who focus on child abuse and child protection, and the psychological maltreatment is more disruptive than physical or sexual abuse by itself. (PC.3760). Dr. Garbarino found that Mr. Sparre suffered from

several forms of psychological maltreatment during his childhood and adolescence.

Mr. Sparre experienced “profound parental rejection” from his mother and his father throughout his short life. (PC.3761-62). He never received love, and his sister described how their mother would “discard” children when she had the next baby. (PC.3762). The subcategory of “ignoring” is more profound “where children can’t seem to get their parents to acknowledge and respond to them.” (PC.3763). Mr. Sparre experienced pervasive and profound ignoring “given his mother’s extreme narcissism and self-involvement, self-preoccupation that it’s hard to imagine how she could have been available to him even when she was physically there [and] she often just simply walked off for days and weeks at a time.” *Id.*

Mr. Sparre suffered corrupting psychological maltreatment because he was exposed to rampant substance abuse in his various homes from a very young age. (PC.3765). This type of exposure “normalizes” the corrupting behavior. Mr. Sparre experienced isolation in the disruption of his day-to-day life because he was moved around so often. He was always the new kid. (PC.3767).

Dr. Garbarino did not interview Mr. Sparre because Mr. Sparre refused to meet with him. (PC.3749). It is very unusual for someone to refuse to meet with Dr. Garbarino, and it has only happened twice in twenty years with

people who are just very, very disturbed and volatile and either are afraid to deal with what being interviewed might bring up or they’ve had bad experiences being evaluated before - - or sort of related to the first part, that what they’ve experienced is so humiliating that they don’t

want to face up to that again and they're afraid that sitting down will lead to that reopening of those wounds.

Id. On cross-examination, the prosecutor asked Dr. Garbarino about Mr. Sparre's statements about cruelty to animals. (PC.3788). Dr. Garbarino testified that "there was a belief that cruelty to animals in childhood was predictive of very severe personality disorders later" but "more recent research has found that that connection is not nearly so strong as it was thought." *Id.* Dr. Garbarino testified that he does not "think [Mr. Sparre] has had a good insight into his own motivations." (PC.3790).

The prosecutor confronted Dr. Garbarino with Mr. Sparre's letter he wrote to Ashley Chewing after the penalty phase. (PC.3792). Dr. Garbarino reviewed the letter, and testified that:

I'm dubious about the authenticity of this story from him, that it really, I suspect – I can't prove it by I suspect this is his – his attempt to rationalize it. I mean we wouldn't find it rational, but to rationalize what he did after the fact because whenever he did it he was in this state of arousal that has a lot to do with his background, but again, we can't – we have his words but again the words are a year after the event and my hypothesis would be that he's formulated a way to make himself look – look good in this rather than look pathetic as he probably was.

(PC.3794-95). When confronted by the prosecutor with Mr. Sparre's letter to his mother and grandmother dated January 13, 2012, Dr. Garbarino testified that he does not think Mr. Sparre's letter "has the transparent meaning that we might think it has." (PC.3813). Dr. Garbarino further explained:

It's possible, but I think for a such a disturbed person it's hard to know whether you should take that at face value as it was with that terrible

letter before because – and I think – in my mind it’s related to why he didn’t want to talk with me because he – below the surface is all this crazy stuff that comes out in a variety of ways, and again that’s why I started the report by saying he’s a profoundly damaged person in many, many ways.

Id. Dr. Garbarino also testified that he referred to Mr. Sparre in his report “as an untreated traumatized child inhabiting a young adult’s body and mind.” (PC.3814).

E. Mr. Sparre’s outburst at the end of the hearing

Entirely consistent with Dr. Garbarino’s testimony about people who have experienced trauma so humiliating they do not want to face it, Mr. Sparre became very angry during Dr. Garbarino’s testimony and addressed the court over postconviction counsel’s objections. (PC.3829). The court noted that Mr. Sparre was not under oath. (PC.3830). The court also stated, “I’m not saying I’m necessarily going to consider anything he says.” *Id.* As will be discussed in Issue 1, *infra*, the court was less than candid in her statement.

Mr. Sparre was upset about Dr. Garbarino’s insinuations about sexual abuse because he slept with his grandmother until he was 15. He said he quit sleeping with his grandmother when he was 13 years old, and he shared a room with her because space was limited and five people shared a two-bedroom home. (PC.3830-31).

Mr. Sparre was also upset about testimony from Dr. Krop about his I.Q. score. (PC.3831). Mr. Sparre claimed that he was “trying to play crazy” and that postconviction counsel refused to ask questions of the doctors about “how a person’s

brain develops differently based on life experiences.” (PC.3831-33). He said he did not see Dr. Garbarino because everything he needed to know could be found in the records in Mr. Sparre’s file. (PC.3834). Mr. Sparre said that based on the records provided to Dr. Garbarino, there is nothing he could have said that would have changed Dr. Garabrino’s opinion that he met 9/10 ACE factors. (PC.3834).

F. Post-hearing motions

At the end of the evidentiary hearing, postconviction counsel filed a motion to amend Mr. Sparre’s 3.851 motion to include a claim based on *Parker v. Dugger*, 498 U.S. 308 (1991), holding that a reviewing court’s analysis is flawed when it ignores the evidence of mitigation in the record. (PC.1769-74). The basis for the claim was trial counsel’s failure to file the sentencing memorandum with the clerk’s office so documentation of Mr. Sparre’ significant mitigation could be included on the record on direct appeal. The court denied the motion to amend. (PC.2673-76).

Postconviction counsel also filed a motion for the court to reconsider its prior ruling denying admission of Mr. Sparre’s background records Dr. Garbarino relied on in formulating his opinions. (PC.2198-2634). The circuit court denied the motion. (PC.2692-94).

Finally, postconviction counsel filed a public records demand to review the file the court maintained in chambers. (PC.1493-97). When it became clear during the evidentiary hearing that trial counsel failed to file the sentencing memorandum

in the Clerk's office, the court revealed the file maintained in chambers had an unsigned copy of the defense sentencing memorandum was in the file. Postconviction counsel requested access to the court's file out of a concern that there could be other documents prepared by trial counsel but not filed in the clerk's office or provided to postconviction counsel. The court denied the demand. (PC.2671-72).

SUMMARY OF ARGUMENT

Trial counsel was ineffective because they failed to request a continuance and investigate Mr. Sparre's competency when he told the court that he was not taking the Thorazine that he was prescribed to treat his diagnosed mental illness of psychosis. Had trial counsel investigated his competency, there is a reasonable probability that the outcome of his penalty phase would have been different.

Trial counsel was also ineffective for failing to file the sentencing memorandum with the Clerk's office so it would be included in the record on appeal. Had trial counsel filed the memorandum, it would have been properly before this Court on direct appeal and the result of his direct appeal would have been different.

Trial counsel failed to impeach key witnesses, failed to hire experts to assist in the review of evidence and to support the defense of second-degree murder, and failed to object to numerous improper statements by the prosecutor. But for trial counsel's deficient performance, there is a reasonable probability that the outcome of Mr. Sparre's trial would have been different.

The trial court erred in denying Mr. Sparre's motion to amend his 3.851 motion to reflect testimony and evidence at the evidentiary hearing that Mr. Sparre's trial counsel was ineffective for failing to file the defense sentencing memorandum.

Roper v. Simmons should be extended to prohibit Mr. Sparre's death sentence because he was only 19 on the date of the crime and his immaturity and impulsiveness are more akin to a juvenile offender than a mature adult "whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 554, 568 (2005). While the current cut-off for a statutory bar to execution established by *Roper* is 18, this Court should recede from *Roper* and bar Mr. Sparre's execution. This Court should also recede from its holding in *Branch v. State*, 236 So. 3d 981 (Fla. 2018), that it will adhere to *Roper* unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended. *Id.* at 987. While *Roper* sets the minimum standards, or constitutional "floor," this Court has long recognized its authority to provide defendants greater-than-minimum protections in conformity with Eighth Amendment precedent.

Mr. Sparre's death sentence violates the Sixth and Eighth Amendments under *Hurst v. Florida*, and *Hurst v. State* because his advisory jury did not make the factfindings necessary to sentence Mr. Sparre to death under Florida law.

ISSUE 1:

TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO REQUEST A CONTINUANCE AND INVESTIGATE MR. SPARRE'S COMPETENCY AFTER RED FLAGS WERE RAISED WHEN HE TOLD THE COURT THAT HE WAS NOT TAKING THORAZINE, THE ANTIPSYCHOTIC MEDICATION HE WAS PRESCRIBED, FOR FAILING TO ALERT THE COURT TO THE RED FLAGS, AND FOR FAILING TO ENSURE MR. SPARRE WAS COMPETENT WHEN MAKING DECISIONS CRITICAL TO HIS PENALTY PHASE

I. Applicable law

Trial counsel has a “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Specifically, counsel has a duty to investigate in order to make the adversarial testing process meaningful. *Id.* at 690. “An ineffective assistance of counsel claim has two components: A petitioner must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel’s representation ‘fell below an objective standard of reasonableness.’” *Id.* at 687-88 (internal citations omitted). Prejudice is defined as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.” *Id.* at 694.

One of the primary duties trial counsel owes his client is the duty to prepare himself adequately prior to trial. Pretrial preparation, principally because it provides

a basis upon which most of the defense case must rest, is perhaps the most critical of stage of the lawyer's preparation. *See Magill v. Dugger*, 824 F. 2d 879, 886 (5th Cir. 2012). Also critical is the duty to consult and present expert testimony in cases where the jury's interpretation of it is imperative. *See Williams v. Thaler*, 684 F. 3d 597, 604 (5th Cir. 2012)(trial counsel's performance fell below an objective standard of reasonableness when counsel failed to obtain independent ballistics or forensics experts and was therefore unable to offer any meaningful challenge to the findings and conclusions of the state's experts, many of which proved to be incorrect.).

Trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. *Wiggins v. Smith*, 539 U. S. 510, 527 (a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategic decision is based on informed judgment.).

II. Trial counsel was deficient for failing to investigate Mr. Sparre's competency when he told the court he was not taking his medications

At the penalty phase, trial counsel notified the court that Mr. Sparre did not want them to present any live mitigation testimony. (T.1235). The Court conducted a colloquy with him that included questions about his medication regimen at the jail:

The Court: Let's talk about medications. Let me ask you, Mr. Sparre, are you taking medications, prescriptions?

Sparre: They have me prescribed medication but I don't take it because it gives me the shakes and uncontrollable shakes so I quit taking it. It's still prescribed but I just toss it in the toilet.

The Court: What are you prescribed?

Sparre: Thorazine.

The Court: Is that it?

Sparre: Thorazine and Celexa.

The Court: And –

Sparre: Celexa.

The Court: Okay. And what are those supposed to do for you?

Sparre: I – I had talked to the mental health counselor in the jail and I told him that I was having some trouble sleeping and they prescribed Celexa.

The Court: That was just to help you sleep?

Sparre: Yes, ma'am.

The Court: Okay. And what about the Thorazine?

Sparre: To help me sleep.

The Court: Okay. So you're actually not taking any medication right now?

Sparre: No. No, Your Honor.

(T.1256-67).

The court accepted Mr. Sparre's desire for his attorneys to not present live

penalty phase witnesses. A similar colloquy occurred at the *Spencer* hearing on January 27, 2012. Trial counsel told the court that Mr. Sparre did not want any mitigation presented. (T.958). The Court conducted a colloquy with Mr. Sparre but did not ask him about any medications. (T.960-62). At the end of the *Spencer* Hearing, the court conducted another colloquy with Mr. Sparre regarding his decision not to testify on his own behalf. Mr. Sparre again stated that he was not taking the Thorazine or Celexa that had been prescribed to him. (T.985-86).

His attorneys did not challenge Mr. Sparre's decision on the record, and they did not express any concerns about his competence. They did not request a competency hearing. Neither the Court nor counsel expressed any concerns about Mr. Sparre making critical life-or-death decisions during a period when he was not taking the psychotropic medication for which he was prescribed and, according to the jail medical staff, needed.

Beyond belief, Mr. Sparre's "capital attorneys" who testified to having significant criminal defense experience were not familiar with those medications, specifically Thorazine. (PC.3304-05; 3394). They had a duty to intervene and advocate for their client. With this information, they had an affirmative duty to investigate what their client had been prescribed and what he was not taking. They had a duty to learn what Thorazine was, why he was prescribed it, and what it meant for him to not be taking it. Had they investigated (which they could have done in

any number of ways, including talking to Dr. Krop), they would have learned that Mr. Sparre not taking it raised substantial red flags.

Thorazine is not a sleep aid. Thorazine is the brand name for Chlorpromazine, a first-generation antipsychotic medication commonly used to treat such mental illnesses as schizophrenia, schizoaffective disorder, and psychosis. *See* 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 3060 (B. Sadock, V. Sadock, & P. Ruiz eds., 10th ed. 2017) (hereinafter Kaplan & Sadock's). An antipsychotic medication is a psychotherapeutic drug used to treat psychosis, particularly schizophrenia. *Id.* at 4562. Mr. Sparre was prescribed Thorazine by the psychiatrist at the jail to treat a psychotic disorder. (PC. 3664). Psychosis is a "mental disorder in which a person's thoughts, affective response, ability to recognize reality, and ability to communicate and relate to others are sufficiently impaired to grossly interfere with his or her capacity to deal with reality. Kaplan & Sadock's at 4607. "[T]he classical characteristics of psychosis are impaired reality testing, hallucinations, delusions and illusions." *Id.* Mr. Sparre reported hearing the voices, including the of an individual he referred to as "Tommy" and other voices that said "degrading" things to him. (PC.3664, 3667, 1540, 1554, 1555, 1556, 1580).

Dr. Krop had been hired by trial counsel in September 2011 to conduct neuropsychological testing on Mr. Sparre. (PC.3657-58). At that meeting, Mr. Sparre was on Thorazine. (PC.3662). Months later trial counsel asked Dr. Krop to

“do a more comprehensive mitigation workup.” *Id.*; (PC.3668).

Dr. Krop was prepared to testify for the defense at Mr. Sparre’s trial. He was on the way to the courthouse when he was contacted by someone working with the defense team and told he did not need to come to court because Mr. Sparre instructed his attorneys not to present live mitigation witnesses. (PC.3676-77). Had trial counsel told Dr. Krop that Mr. Sparre was not taking his Thorazine as prescribed, Dr. Krop would have expressed grave concerns about Mr. Sparre’s competency and his desire for no live penalty phase witnesses to testify. (PC.3677). Dr. Krop would have advised trial counsel that Mr. Sparre needed to be evaluated again and that Mr. Sparre may be incompetent to proceed. Dr. Krop, already on his way to the courthouse, was available and willing to meet with Mr. Sparre. (PC.3680).

Dr. Krop knew that Mr. Sparre had suffered auditory hallucinations since adolescence, including hearing the voice of Tommy since he was 14. Dr. Krop also knew that the jail medical staff had documented Mr. Sparre’s psychosis throughout Mr. Sparre’s pretrial detention. (PC.3685, 1530-1697). Trial counsel had Mr. Sparre’s jail records, and they provided those records to Dr. Krop. (PC.3665). The records are replete with references to Mr. Sparre’s history of psychosis. (PC.3667, 1530-1697). The records also show that, when properly medicated—such as during Dr. Krop’s interviews, Mr. Sparre’s symptoms were managed. *Id.*

Had counsel consulted with Dr. Krop about Mr. Sparre being off his

medications while making critical decisions, Dr. Krop would have explained that treatment with psychotropic regime was medically necessary for Mr. Sparre. (PC.3665). During Dr. Krop's interviews, Mr. Sparre "didn't appear to be hearing voices or responding to internal stimuli," because at those times, as the jail medical records indicate, Mr. Sparre "was taking his Thorazine and Celexa." (PC.3677-78).

The jail records corroborate that Mr. Sparre needed medication. The records show that the medications were not supplied to assist him with sleep but rather to treat serious psychosis. The records highlight even more that trial counsel had a duty to investigate Mr. Sparre's competency and request a competency hearing. Counsel had the records. Presumably, they read the records. They must have been aware of Mr. Sparre's documented history of psychosis and his need for psychotropic medication. If trial counsel did not read the jail records, that was unreasonable and deficient. The prejudice is the same.

The circuit court's order does not address Dr. Krop's concerns about a specific portion of the colloquy transcript:

The Court: Mr. Sparre, you've been standing right beside your attorneys this entire time. Have you listened closely to all of this information that the attorneys have put on the record about evidence that they are ready to present on your behalf in mitigation?

Sparre: Yes, Your Honor.

The Court: And prior to this morning, have you had lengthy discussions with them and the investigators about

all of this?

Sparre: Yes, Your Honor, **not only with them but with myself.**

(T.1248-49; PC. 3681-82). Dr. Krop was troubled, because nobody asked Mr. Sparre what he meant by discussing his case with himself despite that Mr. Sparre has a history of talking to Tommy. (PC.3682). Had Dr. Krop known about this colloquy at the time of trial, he would have wanted to talk to Mr. Sparre about his conversations with himself if he had been consulted by trial counsel about Mr. Sparre's instruction not to present live testimony on December 13, 2011.

In Dr. Krop's opinion within a reasonable degree of psychological certainty, he has doubts as to Mr. Sparre's competency at the time he instructed his attorneys not to present live penalty phase testimony:

I do have doubts in part because he was diagnosed with psychosis and also that he was not taking his medical for psychosis. The reference that I just saw in this – in the questioning by the Court and I guess I would also add given the seriousness of his – not only the seriousness of the decision but the seriousness of the potential consequences, particularly in that Mr. Eler had indicated that there – in his opinion there would be considerable mitigation in the case.

(PC.3685). Although Dr. Krop was on his way to the courthouse and was available for a consultation that day, trial counsel did not request a brief continuance to consult with their mental health expert because they thought Mr. Sparre was articulate and rational. (PC.3580). The continuance could have been a day or half a day. It did not have to be long or disrupt the court's trial schedule. But counsel needed an

opportunity to consider Mr. Sparre's statements, consult with Dr. Krop, and have Dr. Krop assess Mr. Sparre.

The circuit court denied this claim, noting that neither Mr. Eler, nor Mr. Arnold had any concerns about Mr. Sparre's competency. (PC.2895). The court's order ignores Dr. Krop's testimony that Mr. Sparre may very well have been experiencing psychotic symptoms, but "in his case since they were internal it would be up to him to report those symptoms or these hallucinations for someone else to recognize, for a layperson to recognize that he's going through that." (PC.3679). Psychologists usually wean patients off psychotropic drugs. (PC.3678). Mr. Sparre was not weaned off his medication; he started throwing it in the toilet. A person who stops taking Thorazine "cold turkey" would experience loss of appetite, sleep problems and "neurovegetative indicants of depression and anxiety." (PC.3679). That Mr. Sparre appeared articulate does not erase the red flag that he had not been taking the medically-necessary Thorazine. Trial counsel, at no point, attempted to learn what it meant for Mr. Sparre to have quit taking Thorazine and, at no point, attempted to learn what Thorazine was or why it was prescribed to Mr. Sparre.

The circuit court reliance's on Mr. Arnold's testimony is also misplaced. The court's order states that Mr. Arnold "testified nothing from his observations of Defendant would have led him to believe he did not understand the proceedings." (PC.2895). Mr. Arnold had *minimal* contact with Mr. Sparre. He testified that "[t]he

couple meetings I had with him were very brief and he – when I spoke with him he seemed just quiet. It was a lot of me explaining what I was going to do and him just listening.” (PC.3388). Mr. Arnold also commented that “a conversation with Mr. Sparre was very difficult. He just wasn’t engaging much.” (PC.3393). Mr. Arnold jumped on Mr. Sparre’s team to get death qualified and had minimal contact with his client. This Court should not defer to the circuit court’s credibility findings regarding Mr. Arnold.

The circuit court also supported the denial of this claim with Mr. Sparre’s outburst at the end of the evidentiary hearing. Postconviction counsel objected to the court allowing Mr. Sparre to speak, and the court did not swear Mr. Sparre in. The judge assured postconviction counsel that she probably would not consider anything Mr. Sparre said, and this Court should not consider his statements either. Mr. Sparre was emotional and agitated, and he was clearly upset about Dr. Garbarino’s testimony that insinuated he might have been sexually abused by his grandmother and Dr. Krop’s testimony about his borderline low I.Q. (PC.3830-31).

Although the circuit court finds that “these statements support trial counsels’ testimony concerning Defendant’s desire to not present mitigation” (PC.2897), his outburst was also entirely consistent with Dr. Garbarino’s testimony that people who have been traumatized and abused are “very disturbed and volatile” and “what they’ve experienced is so humiliating that they don’t want to face up to that again...”

(PC.3749). The circuit court's findings also ignore that Mr. Sparre allowed postconviction counsel to present mitigation throughout the three-day evidentiary hearing through the testimony of trial counsel, Dr. Krop and Dr. Garbarino, and only objected at the end of the hearing to testimony about sexual abuse, his I.Q., and maturity.

III. Mr. Sparre was prejudiced by trial counsel's deficient conduct

Mr. Sparre's team of five criminal defense lawyers, including Mr. Eler and Mr. Anold, are not mental health experts, nor are they trained to assess their client's mental capacity to make a life and death decision. They hired Dr. Krop and trusted his opinions and recommendations because they considered him to be a "preeminently qualified expert" (PC.3542) who could assist them with "a lot more than just competency." (PC.3543). The jail records are critical. Counsel had them. Mr. Sparre's statements about being off his psychotropic medications, in light of the jail records, obligated trial counsel to request a continuance in order to investigate Mr. Sparre's competency and request a competency hearing to protect Mr. Sparre's procedural right under the due process clause not to be tried while incompetent. *Pate v. Robinson*, 383 U.S. 375, 378; 86 S. Ct. 836, 838 (1966). Based on his statements at the time of the colloquy and his jail records, there is a substantial doubt as to his competency when he waived mitigation. The prejudice to Mr. Sparre is substantial. There was substantial and compelling mitigation that was not presented to the jury

as a result of Mr. Sparre's waiver. There was no reason for counsel to not alert the trial court or to request a competency hearing. There is no excuse, knowing what trial counsel knew from the jail records and Mr. Sparre's colloquy, for counsel not to investigate their client's competency when he was making the biggest decision of his life.

**ISSUE 2:
TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO FILE THE
DEFENSE SENTENCING MEMORANDUM WITH THE CLERK OF
COURT TO PRESERVE RECORD EVIDENCE OF SUBSTANTIAL
MITIGATION FOR MR. SPARRE'S DIRECT APPEAL**

Mr. Sparre's postconviction motion included a claim for ineffective assistance of counsel at the *Spencer* hearing for failure to ensure either comprehensive PSI report or providing all mitigation evidence in counsel's possession to the court directly. (PC.1040). Trial counsel testified at the evidentiary hearing that he did not challenge the adequacy of the PSI report because counsel prepared a comprehensive sentencing memorandum. (PC.3317). Mr. Bateh brought an unsigned copy of the sentencing memorandum to the evidentiary hearing that he had just printed out that morning. (PC.3374). A copy of the defense sentencing memorandum was not included in the records provided to undersigned counsel by the Fourth Circuit Public Defender's Office pursuant to Rule 3.852. Contrary to the State's baseless accusation in its post-hearing brief, postconviction counsel did not "rifle through trial counsel's personal files and documents." (PC.2704, fn.3). The condition of trial

counsel's file is entirely the responsibility of the Public Defender's Office and their internal file maintenance protocols. This court should not consider the State's baseless and generalized accusation about this alleged "reoccurring problem in postconviction cases." *Id.*

I. Trial counsel was deficient for failing to file the defense sentencing memorandum in the Clerk's office

The memorandum was not a part of the case docket or file in the Clerk's Office. Trial counsel apparently provided the sentencing memorandum to the Court (PC.3594) but did not file it with the Clerk's Office. The unsigned copy of the defense sentencing memorandum that Mr. Bateh brought to evidentiary hearing was filed by the Clerk on March 15, 2018 at the hearing. (PC.3380, 1368-88).

Assistant Attorney General Charmaine Millsaps attended the evidentiary hearing. Ms. Millsaps prepared the State's answer in Mr. Sparre's direct appeal. She was unable to locate the defense sentencing memorandum on CORE and it was not part of the appellate record to the Florida Supreme Court. (PC.3327).

During the State's cross-examination of trial counsel, the testimony about the adequacy of the PSI report devolved into testimony supporting the comprehensiveness of the mitigation presented in the sentencing memorandum.

The sentencing memorandum included details of testimony that would have been elicited from 11 mitigation witnesses. This memorandum was not made available to this Court on direct review, and thus the Court failed to conduct an

independent review of nonstatutory mitigating factors presented by Mr. Sparre's counsel at sentencing. *See Mills v. Singletary*, 161 F.3d 1273, 1283 (11th Cir. 1998).

The sentencing memorandum that was not part of the record on direct appeal put the trial court on notice that Mr. Sparre had an "awful and disjointed upbringing" and a childhood "full of rejection and broken promises." (PC.1414, 1417). His mother used illicit drugs during her pregnancy with Mr. Sparre. (PC.1418). His mother and father were estranged and he did not have any relationship with his father until he was 12 years old. His mother was married eight times during his brief life and Mr. Sparre never experienced a stable homelife. He was physically and emotionally abused and neglected by his mother and his numerous stepfathers. (PC.1414). He suffered from nightmares and night terrors, both products of his fear of being snatched from his grandmother's custody by his mother. *Id.*

Mr. Sparre's mother always chose herself or the relationship of her significant other over her child. (PC.1417). When one of Mr. Sparre's stepfathers no longer wanted him in the picture, his mother essentially abandoned him at a boys' home in Georgetown, South Carolina. (PC.1415, 1417). Although Tara Hall Home for Boys is a "reintegration facility with family reunification and connection as a goal," Mr. Sparre's mother "never participated in the counseling programs, failed to show for scheduled visits and ignored her son during holidays." (PC.1416). Mr. Sparre was often the only child left at Tara Hall when other children spent weekends with their

families. *Id.* Mr. Sparre spent holidays with staff counselor Shannon Bullock and his family. *Id.* Mr. Sparre’s mother was never home to accept calls from her young son, and it took threats to report her to the South Carolina Department of Social Services to get her to acknowledge her child. *Id.*

Mr. Sparre had no relationship with his biological father until he was twelve years old. His father, Erik Sparre, could not be bothered to support his son, and refused to attend Mr. Sparre’s *capital murder* trial because Erik was wanted on a minor traffic warrant in Florida.

As a young adolescent, Mr. Sparre suffered night terrors/nightmares and severe stomach aches. (PC.1419). He was diagnosed with an anxiety disorder, separation anxiety, depression and post-traumatic stress disorder. (PC.1419-20). Although he was prescribed medication and counseling to treat his conditions, Mr. Sparre’s family failed to follow-up with treatment for their young son. *Id.*

The court was on notice that Dr. Harry Krop was prepared to testify that “Mr. Sparre suffered from defects and mental issues and Post Traumatic Stress Disorder” as well as provide his opinion that Mr. Sparre “was under the influence of extreme emotional distress at the time of the incident.” (PC.1420).

Trial counsel’s failure to file the sentencing memorandum had enormous implications for Mr. Sparre on direct appeal.⁵ In *Muhammad v. State*, 782 So. 2d

⁵ See “Issue 1” of Mr. Sparre’s Petition for Writ of Habeas Corpus, filed

343, 364 (Fla. 2001), this Court held that when a capital murder defendant waives mitigation, “if the trial court is alerted to the probability of significant mitigation, the court has discretion to call its own witnesses or to appoint special counsel for purposes of introducing such evidence.” On direct appeal, Mr. Sparre argued that the trial court abused its discretion and violated the *Muhammad* standard because the circuit court was alerted to the probability of significant mitigation and failed to appoint special counsel to present mitigation or call the proffered witnesses. As a result, the guilt phase evidence and the PSI provided the only basis for finding the mitigating circumstances against imposing the death penalty. *Sparre*, 164 So. 3d at 1195. Mr. Sparre challenged the adequacy of the PSI report and argued that it “lacked meaningfulness to the point of violating the *Muhammad* standard that it be a comprehensive document.” *Id.* This Court rejected Mr. Sparre’s claims and found “there is insufficient evidence in the record showing a probability of substantial mitigation that the trial court should have further considered calling its own witnesses with the governing standard.” *Id.* at 1196. In her dissent, Justice Pariente noted that “aside from what can be gleaned from the PSI, the record is devoid of any evidence in mitigation for this young offender since none of the mitigation that clearly exists was ever presented.” *Id.* at 1203.

Trial counsel’s egregious error denied Mr. Sparre meaningful appellate

simultaneously with this Initial Brief.

review. Mr. Sparre requested that his attorneys not present live mitigation witnesses, but he did not preclude counsel from preparing a comprehensive sentencing memorandum that detailed substantial mitigation, including compelling mental health mitigation. The circuit court does not address Mr. Sparre's arguments in his post-hearing brief that trial counsel was deficient for failing to file the sentencing memorandum. (PC.2823-28;2905-06). In fact, despite numerous references to the defense sentencing memorandum and the myriad of ways the court and the State use the memorandum to support the denial of Mr. Sparre's claims, neither the State nor the court *ever* address trial counsel's egregious error in failing to take the simple step of actually filing this critical document in the Clerk's office.

II. Mr. Sparre was prejudiced by trial counsel's deficient conduct

This Court's premature harmless error analysis on direct appeal cannot be the basis for a *Strickland* prejudice analysis in Mr. Sparre's postconviction appeal because the direct appeal harmless error analysis was premature and improper. A state court's harmless-error review, particularly in a capital case, must not be "automatic and mechanical," *Barclay v. Florida*, 463 U.S. 939 (1983), must include consideration of the whole record, *see Rose v. Clark*, 478 U.S. 570, 583 (1986), and must be accompanied by "a detailed explanation based on the record," *Clemons v. Mississippi*, 494 U.S. 738, 740 (1990). This Court's premature harmless-error ruling in Mr. Sparre's direct appeal is speculation and satisfies none of those constitutional

requirements. In Mr. Sparre's case, this Court did not consider the entire record in the harmless error analysis on direct appeal because the record was missing critical documents that were not filed in the Clerk's office by trial counsel. See Claim 10, *infra*. This Court cannot make a cursory harmless error analysis that ignores evidence of mitigating circumstances in the record. See *Parker v. Dugger*, 498 U.S. at 320. This Court made the improper and premature harmless error analysis before these issues could be flushed out in postconviction.

Trial counsel had a duty to file the sentencing memorandum and make it part of Mr. Sparre's appellate record. Shockingly, this was not done and the prejudice to Mr. Sparre is overwhelming. The trial court had for its consideration a crucial document that was not available for this Court's review, because his own trial attorneys did not take the most basic step of filing it in the Clerk's office. If the failure to make the defense sentencing memorandum a part of the record was a failure of courtroom/judicial/courthouse staff, Mr. Sparre was still prejudiced because he was deprived of his right to due process and a meaningful appeal.

In rejecting Mr. Sparre's *Muhammad* claim, this Court concluded:

[T]here is no showing that the trial court failed to follow established procedure or engaged in actions that were arbitrary, fanciful, or unreasonable with regard to its judgment that it was unnecessary to call any of the mitigation witnesses proffered by Sparre's defense team.

. . . Furthermore, **there is insufficient evidence in the record** showing a probability of substantial mitigation the court should have

further considered by calling its own witnesses in accordance with the governing standard.

The trial court's order reflects that under the totality of the circumstances surrounding Sparre's case, it judged that the trial evidence and the PSI report provided sufficient grounds for the mitigation found and the weights it assigned to each factor. We agree and conclude that Sparre simply fails to establish by competent, substantial evidence in the record how the trial court abused its discretion in declining to call its own mitigation witnesses.

Sparre, 164 So. 3d at 1196. This Court found insufficient evidence of substantial mitigation, because it did not have the benefit of Mr. Sparre's sentencing memorandum that was considered by the trial court in sentencing Mr. Sparre to death. If the trial court had called its own witnesses or appointed special counsel, there is a reasonable probability that the outcome of his penalty phase would have been different. At the very least, one juror could have voted for life, and Mr. Sparre would be entitled to a new penalty phase under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Florida Supreme Court has found the *Hurst* error not harmless in every post-*Ring* death sentence that was not unanimous; had trial counsel performed adequately, there is a reasonable probability that one juror would have shown mercy and that Mr. Sparre would receive *Hurst* relief. Mr. Sparre is wrongfully incarcerated under a sentence of death that was never meaningfully reviewed on direct appeal; he is entitled to a new direct appeal.

ISSUE 3:
**TRIAL COUNSEL’S FAILURE TO IMPEACH DR. GILES WITH HIS
DEPOSITION TESTIMONY WAS DEFICIENT PERFORMANCE THAT
FELL BELOW PREVAILING NORMS**

I. Applicable law

Florida courts have held that failure to impeach a key witness may amount to ineffective assistance of counsel. In *Kelly v. State*, 198 So. 3d 1077, 1078 (Fla. 5th DCA 2016), the district court reversed the postconviction court’s denial of an evidentiary hearing on Kelly’s claim of ineffective assistance of counsel for trial counsel’s failure to impeach a key state witness with the number and nature of his prior felony convictions after the witness only admitted half of them. *Id.* at 1077-78. *See also Burch v. State*, 977 So. 2d 778, 780 (Fla. 5th DCA 2008) (reversing the summary denial of an ineffective assistance of counsel claim where trial counsel failed to impeach a witness with a single conviction for a misdemeanor involving dishonesty); *Head v. State*, 35 So. 3d 1008 (Fla. 5th DCA 2010) (explaining that the *Strickland* prejudice prong was satisfied where trial counsel failed to impeach a witness in a credibility contest); *Kegler v. State*, 712 So. 2d 1167, 1168-69 (Fla. 2d DCA 1998) (holding that the failure of trial counsel to impeach a witness with inconsistent statement was ineffective).

Since Dr. Giles’s deposition transcript was admitted into evidence at the evidentiary hearing, there is no need to speculate as to what he would have said if impeached. (PC.1453-92). This Court has routinely evaluated ineffective assistance

of counsel claims premised upon a failure to impeach based on record evidence. *See Butler v. State*, 100 So. 2d 638, 654 (Fla. 2012); *Connor v. State*, 979 So. 2d 852, 862 (Fla. 2008); *Grim v. State*, 971 So. 2d 85, 94 (Fla. 2007); *Blake v. State*, 180 So. 3d 89, 104 (Fla. 2014); *Spann v. State*, 985 So. 2d 1059 (Fla. 2008); *Kilgore v. State*, 55 So. 3d 487 (Fla. 2010); *Kormondy v. State*, 983 So. 2d 418 (Fla. 2007); *Davis v. State*, 136 So. 3d 1169 (Fla. 2014).

II. Trial counsel was deficient for failing to impeach Dr. Giles

Trial counsel had an opportunity to develop the defense theory of second-degree murder through the testimony of the medical examiner, Dr. Giles. Trial counsel deposed Dr. Giles prior to trial. At his deposition, Dr. Giles did not contradict the defense theory of second-degree murder. He testified that “[t]he time, you asked about the time, there’s no way to know, whether there’s some fighting and hurting and chasing, and there’s stalking and threatening and then some more of this this to go on before the final wounds, there’s no way to know, or whether this is all within a very short time of frenzy, I don’t know.” (PC.1478-79).

Dr. Giles changed his opinion at trial:

The State: Now some could argue or ask you if these were just all of a sudden just in a frenzy. Can you state whether that was consistent or inconsistent with that?

Dr. Giles: It’s inconsistent.

The State: Why is that?

Dr. Giles: Looking at these wounds they have a pattern which shows a single edge blade. It's a sharp or acute end at one and a blunt or rounded end at the other end of the opening where the sharp part of the knife is going through the dull part. Many of these side by side have the same pattern but then right next to it are others which go the other direction, so the knife has at least been changed in between or the body has moved or the attacker has moved. In addition, it's way too many to be done in a frenzy. It would just tire a person out just trying to do these until they are all done.

(T.1034-35). Trial counsel "had an opportunity prior to cross examining [Dr. Giles] at trial to obviously develop and read the report and prepare for [his] cross examination." (PC.3566). Either trial counsel did not prepare to cross-examine Dr. Giles, or trial counsel failed to pay attention to Dr. Giles's testimony during trial, because Dr. Giles's trial testimony was directly inconsistent with his deposition testimony, which supported the defense theory of second-degree murder. Trial counsel did not attempt to impeach Dr. Giles with his deposition testimony.

III. Mr. Sparre was prejudiced by trial counsel's deficient conduct

The defense at trial was that Mr. Sparre was guilty of second-degree murder, not first-degree murder. Trial counsel never alerted the jury to the fact that Dr. Giles testified under oath during his deposition that the physical evidence showed the events could have all occurred "within a very short time of frenzy." (PC.3592; Defense Exh. 8, p. 32). In closing argument, trial counsel had nothing to work with in terms of the medical examiner's testimony:

I'm not going to go into anything Dr. Giles really, really said. I mean basically he did the examination. He said not torture, indicated how many cuts and which ones were fatal. You heard that. That was just this morning.”

(T.1130). Had trial counsel impeached Dr. Giles with his prior inconsistent statement, counsel could have attacked the medical examiner's credibility in his closing argument and directed the jury's attention to Dr. Giles's deposition testimony that the evidence was consistent with a frenzy. Mr. Sparre's jury never heard that the physical evidence was consistent with the defense theory of second-degree murder. Had counsel impeached Dr. Giles and discredited the State's forensic evidence, the outcome of Mr. Sparre's trial probably would have been different.

ISSUE 4:

TRIAL COUNSEL'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND CONSULT WITH EXPERTS, INCLUDING A FORENSIC PATHOLOGIST WAS DEFICIENT PERFORMANCE WHICH FELL BELOW THE PREVAILING NORMS

I. Applicable law

One of the primary duties trial counsel owes his client is the duty to adequately prepare himself prior to trial. Pretrial preparation provides a basis for the defense's case at trial. *See Magill v. Dugger*, 824 F. 2d 879, 886 (5th Cir. 2012). Also critical is the duty to consult and present expert testimony in cases where the jury's interpretation of the evidence is imperative. *See Williams v. Thaler*, 684 F. 3d 597, 604 (5th Cir. 2012) (holding that trial counsel's performance fell below an objective standard of reasonableness when counsel failed to retain independent forensics

experts and was unable to offer any meaningful challenge to the findings of the State's experts, many of which proved to be incorrect).

Trial counsel cannot be found to have made a strategic decision when they failed to fully investigate. *Strickland* at 690-691; *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (explaining that a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the unknown evidence would lead a reasonable attorney to investigate further); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) (“A reasonable strategy decision is based on informed judgment.”).

II. Trial counsel was deficient for failing to investigate and consult with a forensic pathologist to support the defense of second-degree murder

Trial counsel did not consider hiring a forensic pathologist to assist him in Mr. Sparre's defense. Counsel attempted to justify his lack of consideration by “concession of guilt, 89 stab wounds, like I just read wasn't a whodunit. I think the only thing to explore was time of death, but I didn't really see that as significant for the guilt or penalty phase really.” (PC.3564). Unfortunately, there actually were elements of the defense of second-degree murder that counsel could have explored with an expert in forensic pathology.

At the evidentiary hearing, Mr. Sparre presented the testimony of Dr. John Marraccini, a board-certified clinical and forensic pathologist. (PC.3620). Dr. Marraccini testified that physical evidence in this case shows the offense “could very

well be a continuous assault with no significant interruption.” (PC.3623). Dr. Marraccini disagreed with Dr. Giles’ trial testimony that the changes in the orientation of the knife make the attack inconsistent with a frenzy “because just moving the arm up or down or bending the elbow can change the orientation of the sharp and blunt corners of the skin wound, so if the knife is arcing—held underhand and arcing or even if it’s held underhand and arcing then the hole in the skin will change its orientation.” (PC.3624).

Dr. Marraccini also testified that the attack was consistent with a frenzy because “all these injuries could have been inflicted within two minutes without stopping by an assailant who’s in an agitated state, especially an individual such—this individual he’s young. He’s healthy. There’s no reason why he could not have completed the assault in a very rapid period of time.” (PC.3624-25). Dr. Marraccini also testified that “this assault did not carry through the entire dwelling but was more or less contained in the general area of the bedroom, the bed and the immediate area next to the bed.” (PC.3625).

Trial counsel cited the number of stab wounds and the fact Mr. Sparre inflicted the wounds as the basis for his decision to not retain a pathologist. That is nonsensical. The number of stab wounds and the defense theory of second-degree murder are the very reasons why counsel had a duty to use an independent forensic pathologist. Trial counsel owed a duty to Mr. Sparre to utilize the evidence in the

case to support its theory that Mr. Sparre “snapped” or that the murder was committed in a frenzied state. Trial counsel also said calling his own witness would “belabor the cause and manner of death.” (PC.3566). The circuit court found trial counsel credible and used his testimony to support the denial of this claim. (PC.2871).

Trial counsel’s strategic reason for not consulting with or hiring a forensic pathologist is really just lazy lawyering. There is no dispute that trial counsel had a difficult case with difficult facts. However, trial counsel’s defense strategy of second-degree murder required trial counsel to tackle those bad facts head-on with the jury, and trial counsel could have used jury selection to prepare jurors for that disturbing testimony.

III. Mr. Sparre was prejudiced by trial counsel’s deficient conduct

Counsel’s failure to investigate the forensics and hire appropriate experts was objectively unreasonable. Counsel knew the testimony that the physical evidence was consistent with a frenzy—and consistent with the defense of second-degree murder—was critical. That is why he asked Dr. Giles about a frenzy during the deposition. If counsel had not recognized the utility of retaining an independent pathologist prior to Dr. Giles’s deposition, it became apparent during his deposition. Counsel missed the opportunity to discredit Dr. Giles when he failed to impeach him at trial with his inconsistent deposition testimony. Having neglected to retain an

independent pathologist, Mr. Eler did not have a way to attack Dr. Giles' opinions.

Counsel's failures resulted in the defense forfeiting the opportunity to challenge the State's case and support Mr. Sparre's defense of second-degree murder. Had trial counsel challenged Dr. Giles' testimony, he would have delivered a blow to the State's case and given the jury a scientific basis to find that Mr. Sparre was guilty of second-degree murder; there is a reasonable probability the outcome would have been different.

ISSUE 5:

TRIAL COUNSEL'S FAILURE TO UTILIZE AND ARGUE EVIDENCE TO THE JURY THAT SUPPORTED THE DEFENSE OF SECOND-DEGREE MURDER WAS DEFICIENT PERFORMANCE THAT FELL BELOW PREVAILING NORMS. TRIAL COUNSEL PREJUDICED MR. SPARRE BY ATTACKING THE VICTIM AND ALIENATING THE JURY.

I. Trial counsel was ineffective for failing to utilize and argue evidence to the jury that supported the defense of second-degree murder

Trial counsel has a continuing duty throughout the course of trial to provide effective representation. *See Strickland*, 466 U.S. at 688. Mr. Sparre's counsel's utter failure to develop and argue any evidence in support of the defense theory falls below any standard of reasonableness. The defense theory at trial was second-degree murder—that Mr. Sparre killed the victim, that there was no burglary, and that the killing was not pre-meditated. (T.426; 1123; 1125; 1135; 1148). Had trial counsel utilized the facts in evidence from the State's witnesses, and consulted with and presented expert testimony explaining how the facts of the case were consistent with

second-degree murder, counsel would have been able to rebut the State's evidence of premeditation.

Trial counsel explained Mr. Sparre's defense of second-degree murder in his opening statement to the jury:

They're on the bed. They're talking and then something occurs, ladies and gentlemen. The fact that Sparre liked her, didn't like her, that's not the point. What matters is at that moment in time when they were on the bed after the shower Tiara Pool told Sparre who she really was, husband in the military, not separated. Married, not divorced. Kids at grandparent's house. The scene was set up nicely for her. This was not the person Sparre contacted through Craigslist. This is not the person that was spoke to or texted on the phone. This is not the person that he met at the hospital. This is not the person that he drove back to her apartment with. This isn't the person that he just had an intimate relationship with. This is a person that deceived David Sparre as to who she was or what she really wanted. **When he heard this, he snapped. Something in his mind snapped.** He couldn't believe what he just heard. He had been through so much turmoil and so much pain being lied to, being neglected, things of that nature, it all came together right then and there.

(T.430-31) (emphasis added). As trial counsel's opening statement was not evidence, it was crucial for trial counsel to provide evidentiary support for the claim that Mr. Sparre's past experiences caused him to snap. The defense did not call any witnesses, so it was important for trial counsel to use the State's witness to develop the defense theory of second-degree murder. Mr. Sparre's interrogation video was played for the jury during Detective Childer's testimony. In the interrogation, Mr. Sparre spoke about his upbringing, which was chaotic, abusive, and painful to him.

- The victim's kids were living with their grandmother. (T.844)

- A year before his arrest, Mr. Sparre lived with his mother and her boyfriend (his mother no longer lived with his stepfather). (T.884). He left his mother and went to live with his father. (T.884).
- At the time of his arrest, he was no longer speaking with his father because they got into an argument. (T.938).
- At the time of his arrest, he was living with his grandmother. His grandmother was very nice to him “occasionally” and conniving. (T.911).
- Detective leading the interrogation acknowledges Mr. Sparre apparently had a bad family life. (T.915).
- Mr. Sparre says his grandmother’s son only lives two doors down but will not speak to her because Mr. Sparre is with her. With him out of the way, her son will be back in her life like she has always wanted. (T.929).
- Mr. Sparre says he was raised on and off by his grandmother. (T.933). When he was “off” with grandma, he was living with his mother and stepfather who beat the “fuck out” of him for 1 and ½ years. (T.934).
- Mr. Sparre says he has not real relationship with any of his siblings. He says he has tried to get a hold of them to see if they could be somewhat of a family but they want nothing to do with him. (T.934).
- Mr. Sparre says the grandparents of his child will use his child as a weapon against her mother and tell her if she lets him see the child, she has to leave. (T.935). His mother did the same thing to his grandmother with him.
- Mr. Sparre denies any sexual abuse was done to him but says there was a lot of physical abuse. Says his mother and stepfather both beat “the fuck” out him. (T.935).
- Mr. Sparre says he does not really have any friends. (T.967).
- Mr. Sparre says he is from a family of “fuckups.” (T.967).
- Mr. Sparre says he has always had sleep deprivation because he has PTSD. (T.971).

- Mr. Sparre says he was sent to a boys' home by his mother. Says he barely tells people about it and it is something he's kept inside for a very long time. (T.973).
- When asked if he thinks it is something bad that he went to a boys' home, Mr. Sparre says he does not want to tell people that his mom "did not give a fuck" about him and chose her husband over her son, her own flesh and blood. (T.973).
- When asked why he would open up to the officers about the boys' home, Mr. Sparre said "y'all are nice." (T.974).

During cross-examination, trial counsel did not ask Detective Childers any questions about Mr. Sparre's statements. (T.982-93), and trial counsel did not bring these statements to the jury's attention at any point. In fact, trial counsel never explained to the jury—through witnesses, exhibits, or argument—how these statements were relevant, how Mr. Sparre's background impacted him at the time of the offense, and how Mr. Sparre's upbringing was directly linked to the defense's theory that he was guilty of second-degree murder.

III. Mr. Sparre was prejudiced by counsel's guilt phase closing argument

Trial counsel failed to argue any evidence in closing argument that could give the jury some basis for why Mr. Sparre "snapped" and killed the victim. Instead, he maligned, attacked and blamed the victim:

Now the prosecutor just asked a few minutes ago why I am asking these questions about the victim, what I am trying to imply. Well, I'll tell you point-bank what I'm trying to imply. I'm trying to imply maybe this woman was bipolar. We know that there's bipolar in her family. Mom is bipolar and there was a suggestion that maybe she was, also. It helps you to get a better idea as to what kind of person—yes, she's dead and we're not challenging that and it's a horrible death. Not anything you

would want to wish on anybody or anything, but that comment that the state made, what they want to know and I want you to know is maybe she was bipolar. She had some issues herself. Not saying Sparre doesn't himself, but let's look at what this case is about. (T.1130-31).

So you're going to meet a total stranger on Craigslist and you're going to invite them over to our house. Is that normal? (T.1133).

[Y]ou will see that this lady was posting all the time, texting, day in, day out. You name the hour of the morning she—and these are just the communications she's having with him, not anyone else. These are just the ones between him and her. (T.1134).

It says I'm in love with white men. Don't talk to anything outside of them. Big dicks, and this is what I'm reading, are just a bonus. That's what she said. (T.1134).

[Nichelle Edwards] made it very clear that Ms. Pool preferred white men. She preferred not to date African Americans, that she never would and never did, and that she told us that Ms. Pool's mom was bipolar. I am not saying Ms. Pool is bipolar herself. Things can be hereditary, ladies and gentlemen. (T.1136).

Now is she bipolar? It ain't for me to say, ladies and gentlemen. (T.1137).

No one else was supposed to be living in the house – [Mr. Pool's] house while he was gone unless maybe his wife's friend who had come in for a few days. He had no idea that his wife had one man living there for several weeks while he was out in the Persian Gulf and after that man moved out another guy moved in. That guy has no job, no car, no place to live and he has a dog. Does this woman have problems? You going to move a guy in that has zero going for him and then come to find out, I don't want to call him trash, but he comes over, he gets a ride with his buddy who's got a little red pick-up truck with piss on Ford sticker and redneck sticker? Something ain't right with this woman." (T.1137).

Her other ads talked about her being a single black female, talked about her being someone who wanted a long-term relationship because she's a black—single black female and it says I love black men. However, I

am open to any good man between the age of 32 and 42. Now that is totally inconsistent with her real life because Nichelle Edwards says no, she didn't deal with black men. She preferred white men only. Her husband's white.

....

The other Craigslist ad she talks about a long-term relationship she wants and she had—she tells people I have kids. Yes, I have kids. You have to be cute and she says I'm not racist but please no black men. I'm a white guy type of woman. Now that—that's the real her. That the real her because she's looking for a long-term relationship and she tells them I've got kids.

....

But then other Craigslist ad. Hey, I'm new in town. Looking to have some fun. I'm a plus size girl. Now, ladies and gentlemen, you know that is not true. She is 5-foot-3, 111 pounds. She ain't no plus size. She ain't even close. She's misrepresenting in these ads as to who she is and in another one she says I'm short and spunky and 25 years old. She is not 25. She's 21. Again looking for long-term relationship. Is that her? No, it's not her. (T.1142-43).

In fact, if anyone was a racist it was Ms. Pool herself because of her associations, but that's just my thoughts. (T.1147).

The defense theory was not self-defense. The defense theory was not that another person killed the victim. Trial counsel conceded in his opening statement that Mr. Sparre killed the victim without any premeditation and was guilty of second-degree murder. Rather than argue the facts in evidence to support the defense theory—including facts about Mr. Sparre's background and upbringing—trial counsel attacked the victim's lifestyle, made unsubstantiated claims about her mental health, ridiculed her Craigslist posts and descriptions of herself and her body size, and accused her of being a racist. None of these inflammatory arguments advanced the defense theory of the case and certainly the gratuitous attacks on a

murder victim angered and alienated Mr. Sparre's jury.

Trial counsel did not prepare for his closing argument. At the evidentiary hearing, trial counsel could not recall how he prepared in this particular case, but he did describe his general practice for preparing for closing arguments.

Well, I can't do it until I've heard all the evidence and generally—hopefully there's a major break or break between the—the trial and having time to go through all the notes and sum up everything and do bullet points if I've got the time. Sometimes depends on the case. Certainly a murder case I'm sure there was time to get everything done, possibly go home overnight and come back in the morning. I'm not sure what the circumstances were in this case, but I don't type out a closing argument. I just do bullet points because I know what the facts are, especially if you've been in trial for about a week and I sum it up there. You know what your elements are. You know what you want to talk about. You want to hit some of the high points of the case.

(PC.3425-26).

Despite his denigration of the victim at trial, trial counsel agreed that it is generally a good idea to discuss a victim of homicide respectfully in front of a jury.

(PC.3429). Inexplicably, trial counsel continued to attack and blame the victim at the evidentiary hearing:

I'm not sure if we blamed the victim. I mean I don't know you would blame the victim, no, but I'm not sure if we blamed the victim in the crime. We talked about the victim being places—the victim lied about a lot of things because she introduced herself over the internet, whether its Craigslist or some other things. I remember specifically one of the things she stated that she was a plus-sized person when she wasn't. She said she was a single black female and she wasn't single because she had two children and her husband's in the Navy if I remember correctly. I want to say if it was three, four, five different social media type ads, whatever she had placed out there were not true representations of what

she was, and we did talk about that in trial. But its kind of like she put herself in a bad spot, not saying its her—necessarily her fault that she's dead, but something she said or something she did set him off and because of her lifestyle and her activities, you know, and his upbringing and what happened between the two of them, something bad happened...

(PC.3428).

In its order denying relief, the circuit court did not make any findings about trial counsel's improper and inflammatory comments about the victim in closing argument. These comments were raised in Mr. Sparre's post-hearing brief. (PC.2793-94). The prejudice to Mr. Sparre is substantial. None of these inflammatory arguments advanced the defense they or the case and certainly the gratuitous attacks on a murder victim angered and alienated Mr. Sparre's jury. While trial tactics and strategy are generally left to the sound discretion of trial counsel, there is no strategic reason to simply ignore evidence before the jury that clearly supports the defense theory of the case. There is also no strategic reason to attack and malign the victim's character by attacking her lifestyle, making unsubstantiated claims about her mental health, ridiculing her Craigslist posts and descriptions of herself and her body size, and accusing her of being a racist. Had trial counsel actually articulated an evidentiary basis for its theory of defense, the jury could very well have found that Mr. Sparre lacked the necessary intent for first-degree premediated and felony murder.

ISSUE 6:
**TRIAL COUNSEL WAS DEFICIENT IN FAILING TO OBJECT TO
NUMEROUS IMPROPER STATEMENTS BY THE PROSECUTOR IN
GUILT AND PENALTY PHASE CLOSING ARGUMENTS**

I. Applicable law

“[T]he role of counsel in closing argument is to assist the jury in analyzing evidence, not to obscure the jury’s view with personal opinion, emotion, nonrecord evidence.” *Ruiz v. State*, 734 So. 2d 1, 4 (Fla. 1999). A criminal trial is meant to be a neutral arena where the jury alone weights the evidence and credibility of each witness. “Although this legal precept – and indeed the rule of objective, dispassionate law in general – may sometimes be hard to abide, the alternative – a court ruled by emotion – is far worse.” *Urbini v. State*, 714 So. 2d 411, 419 (Fla. 1998). Closing argument is not to be used “to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than a logical analysis of the evidence.” *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985).

II. Ineffective assistance of counsel during the guilt phase for allowing the State to misrepresent the law in closing argument

During postconviction, trial counsel agreed that it is generally important to object during closing arguments when the State misstates the law (PC.3430). This makes inexplicable his failure to object during the guilt phase of Mr. Sparre’s trial to the State’s numerous misrepresentations of the law.

During closing argument, the State claimed that, “[a]t this state you’re determining whether you have an innocent man before you or whether this man is guilty of first-degree murder.” (T.1091). This was a misstatement of the law. The defense had requested, and the judge had granted, a jury instruction for second-degree murder. The entire defense theory was based around the theory that Mr. Sparre “snapped” and committed this crime in a frenzied state. Trial counsel conceded to a second-degree murder in opening statement and thus, never claimed that Mr. Sparre was an innocent man.

By arguing that if the jury did not return a verdict of first-degree murder, Mr. Sparre would be “an innocent man” is misleading and patently untrue. A verdict finding Mr. Sparre guilty of second-degree murder carries a possible life sentence and does not equate a status of innocence. Nor is a jury verdict of “not guilty” the same as “innocent”—it simply means that the State did not prove its case beyond a reasonable doubt.

Additionally, as to premeditation, the State argued, “[p]remeditation, there was no reason to kill her. It wasn’t like she had a dispute with him or he had a dispute with her.” (T.1114). Under Florida law, premeditation does not require a motive or reason. All that premeditation requires is a killing after consciously deciding to do so. Thus, implying that the murder was premeditated simply because there was no reason to kill the victim is a misstatement of law by the State.

While it is true that the State does not have to prove that a person had the intent to cause a death for second-degree murder, the State made a patently false argument that second-degree murder is defined as an unintentional killing. (T.1154-55). Premeditation—not intent—is the essential element which distinguishes first-degree murder from second-degree murder. *Bell v. State*, 768 So. 2d 22, 25 (Fla. 1st DCA 2000) (citing *Anderson v. State*, 276 So. 2d 17 (Fla. 1973)).

By continuously conflating intent with premeditation and arguing that first-degree murder is “intentional murder,” the State lessened its burden and entirely negated Mr. Sparre’s defense with erroneous statements of the law. Had trial counsel objected, the trial court would have been forced to give a curative instruction and advised the jury of the proper standards for second-degree murder.

III. Ineffective assistance of counsel during the guilt phase for failure to object to numerous improper statements by the prosecutor in his closing argument

Trial counsel also failed to object to numerous improper statements by the State in the guilt phase closing arguments that were simply meant to inflame the passions and prejudices of the jury, which were not based in evidence or law. These statements include:

And it would be great if, you know, while a person is killing somebody, while a person is brutally killing a person as he did in this manner they would stop and say, okay, hold on. Write down here why you’re doing this. Is this injury enough, ma’am? Are you suffering enough? Are you in pain enough? Are you screaming enough? Okay. I’m going to stop. Okay. Let me write down. I want her to suffer. Okay. Let me go back

to stabbing. (T.1088).

Is there any dispute that she wanted to live? That or she gave up and she just said please stab me over and over and over. I'm not enjoying this enough. (T.1102).

Was he just kind of having fun with her? Is he just enjoying – was it just a thrill kill and then he just kind of got a little carried away? (T.1092).

Well, God help the bipolar people because apparently that must be some type of mitigation to be allowed to have your head cut off. (T.1150).

I would submit to you because they're hoping if you think about the fact that Tiara Pool had committed an affair, if you focus on that then maybe you might not focus on the choices he made when he butchered her that day. (T.1151).

Any concern with alienating the jury by making objections during the State's arguments could have been ameliorated in jury selection, but trial counsel did not educate the jury about the purpose and necessity of making objections during trial. (T.247-327). Trial counsel cannot "check out," fail to object, and fail to hold the State accountable for false and misleading statements of law, and trial counsel cannot hide behind a strategy defense when the State was allowed to commit so many instances of prosecutorial misconduct with not one single objection. In Mr. Sparre's case, there is no justification for trial counsel's failure to protect Mr. Sparre's interests in a fair trial and to ensure that the State did not mislead the jury as to critical legal issues.

IV. Ineffective assistance of counsel during the guilt phase for failure to object when the state argued aggravation during the guilt phase

The State improperly argued aggravation during the guilt phase of Mr. Sparre's trial which influenced the jury to reach a more severe verdict and deprived Mr. Sparre of a fair and impartial trial. Specifically, the prosecutor said:

The last witness you heard from, Dr. Giles, unfortunately, had to describe to you in great detail and you had to unfortunately look at this man's handiwork because that's what it was. As the victim attempted to fight for her life he went after her. He went after her not just once but numerous times because she was alive throughout this whole ordeal. (T.1085).

I can't tell you what she was feeling other than pain and that is because he silenced her. But by the evidence it is indisputable that she suffered and that it took a while and that the fatal stab wounds were at the end. (T.1113-14).

They should be fresh in your mind, those M.E. photographs. They're horrific. They speak volumes of what this man did and how this young lady suffered. (T.1117).

These statements are not relevant to the issue of guilt, but simply meant to inflame the passions and prejudices of the jury. Aggravating factors are reserved for the penalty phase; otherwise, a defendant will be confronted with a jury likely to decide the punishment issue during the guilt phase. The State's repeated references to the victim's suffering was improper and irrelevant to the guilt phase determination to be made by the jury, and resulted in prejudice towards Mr. Sparre.

V. Ineffective assistance of counsel during the penalty phase for failure to object to the State's improper closing argument

The State made numerous improper statements in penalty phase closing arguments. The State repeatedly argued that Mr. Sparre enjoyed killing the victim and specifically sought her out as "easy prey." (T.1343; 1344; 1345; 1347; 1349; 1359; 1365). There was absolutely no evidentiary basis for the State to make this argument in attempt to negate that Mr. Sparre's youthful age should be considered as a mitigating factor.

The State also denigrated the defense. The State seized on Mr. Sparre's waiver to make an argument that it knew was entirely contrary to what the defense intended to argue:

Now the defense is going to argue that the capital felony, that is the murder, was committed while the defendant was under the influence of extreme mental or emotional disturbance. Ladies and gentlemen, you determine whether that's a mitgator, number one, whether that's been proven. I guess they're going to argue to you that he was very emotional because his grandmother was having surgery at the hospital.

Think of that. Let me restate that again. That he was very emotional, disturbed, distraught because his grandmother was having surgery at the hospital. So I guess he had no choice but to lash out at this 21-year-old girl that he went to have sex with and then he decided just to kill her for the heck of it, for his enjoyment.

What other evidence could be argued? What could you – what evidence is there of extreme mental or emotional disturbance? What have you heard of that? (T. 1364).

He was so impaired that I guess he only stabbed her 89 times? Is that what their argument is going to be, that if he hadn't been impaired he

might have stabbed her 150 times? He might have enjoyed the murder more? He might have made her suffer more? (T.1368).

Although trial counsel agreed that it is generally a good idea to object when the State misstate the law in closing arguments (PC.3526), he did not do that in Mr. Sparre's trial. He also stated that sometimes you should object when the State argues facts not in evidence in closing arguments, but "sometimes you can turn those facts around then and use it against them." *Id.* In Mr. Sparre's trial, trial counsel neither objected to the prosecutorial misconduct nor turned those facts around and used them against the State. Trial counsel testified that if he felt something was improperly argued he would have objected. (PC.3586). He also agreed with the prosecutor that sometimes making objections backfires on you, because it highlights the objectionable conduct in the jury's mind. *Id.* Bottomline, he did not feel the need to object. *Id.* This Court should take trial counsel at his word that he would have objected if he thought something was improperly argued. Trial counsel was ineffective in Mr. Sparre's penalty phase closing argument because he did not even recognize the State's misconduct. Ignorance is not a strategy.

VI. Mr. Sparre was prejudiced by trial counsel's deficient conduct

Mr. Sparre suffered from a complete and utter lack of advocacy from his trial counsel. The number and egregiousness of each of the prosecutor's improper statements separately and cumulatively severely prejudiced Mr. Sparre. In addressing the multitude of improper comments, this Court should consider the

cumulative effect of the comments to determine whether Mr. Sparre received a fair trial. The comments should not be looked at in isolation, but rather in the context of the whole closing argument. *Merck v. State*, 975 So. 2d 1054, 1062 (Fla. 2007).

The prosecutor also made numerous improper remarks throughout his closing argument and these statements resulted in fundamental error. The errors cannot be harmless. The cumulative effect of these errors denied Mr. Sparre his fundamental rights under the United States Constitution and the Florida Constitution. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000) (finding cumulative effect of prosecutor's improper remarks in closing argument were fundamental in nature). Trial counsel did not object to any of those improper arguments and his failure to object was unreasonable and prejudiced Mr. Sparre. Had trial counsel objected to the prosecutorial misconduct, the trial court would have been allowed to give a curative instruction. That did not occur. As a result, there is a reasonable probability that the Mr. Sparre would have received a life sentence.

**ISSUE 7:
THE CUMULATIVE EFFECT OF THE ERRORS TAINTED
MR. SPARRE'S TRIAL**

Mr. Sparre did not receive the fundamentally fair trial to which he was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F. 2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Sparre's guilt and penalty phases, when

considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the state or federal constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Sparre's guilt and penalty phases. The errors as claimed in this brief are hereby specifically incorporated into this claim and include: ineffective assistance of counsel at the guilt and penalty phases; failure to file the defense sentencing memorandum in the Duval County Clerk's Office; and all others listed and presented at the evidentiary hearing.

Under Florida case law, the cumulative effect of these errors denied Mr. Sparre his fundamental rights under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981). In *Jones v. State*, 569 So. 2d 1234 (Fla. 1990), the Florida Supreme Court vacated a capital sentence and remanded the case for a new sentencing proceeding before a jury because of the "cumulative errors affecting the penalty phase." *Id.* at 1235. When cumulative errors exist the proper concern is whether:

Even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991) (internal citations omitted).

A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967); *State v. DeGuilio*, 491 So. 2d 1129 (Fla. 1986). The errors that occurred in Mr. Sparre's case were caused by counsel's incompetent, disorganized defense team and their failure to present a cohesive defense, file critical documents, hire appropriate experts, and take the necessary steps to develop trust with their young client. These errors prejudiced Mr. Sparre. This Court is required to analyze the prejudice not only individual, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867-8 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996). Mr. Sparre was on trial for his life, and his attorneys were so inexperienced in capital defense and so disorganized as a team that nobody had a clearly defined role. The *quantity* of Mr. Sparre's attorneys is not the issue. The *quality* of Mr. Sparre's defense team reflects an unorganized group of attorneys, too busy to be bothered with team meetings and collaboration, who got involved in his defense simply to become death qualified and advance their own careers.

ISSUE 8:
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. SPARRE’S CLAIM THAT *ROPER V. SIMMONS* SHOULD BE EXTENDED TO PRECLUDE MR. SPARRE’S EXECUTION. HE WAS 19 YEARS OLD WHEN HE COMMITTED THE CRIME AND HIS EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT’S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Mr. Sparre turned 19 the day before the crime was committed, but his immaturity and impulsiveness are more akin to a juvenile offender than a mature adult “whose extreme culpability makes them the most deserving of execution.” *Roper v. Simmons*, 543 U.S. 554, 568 (2005). Fourteen years ago, in *Roper*, the United States Supreme Court stated: “The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” *Id.* at 472. Based upon findings from the medical and scientific community, the Supreme Court held in *Roper* that it is cruel and unusual punishment to impose death sentences on juveniles under eighteen. Given the knowledge about the human brain maturation process then available, the Court’s cutoff at age eighteen made sense at that time.

While the current cut-off for a statutory bar to execution established by *Roper* is eighteen, this Court should recede from *Roper* and bar Mr. Sparre’s execution. This Court should also recede from its holding in *Branch v. State*, 236 So. 3d 981 (Fla. 2018), that it will adhere to *Roper* unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended. *Id.*

at 987. While *Roper* sets the minimum standards, or constitutional “floor,” this Court has long recognized its authority to provide defendants greater-than-minimum protections in conformity with Eighth Amendment precedent.

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court was concerned with the “unacceptable risk” that a defendant lacking the requisite culpability might receive a death sentence. *Id.* at 1990. To avoid such a risk, the Court determined that it is impermissible to disregard the teachings of the scientific community. *Id.* at 1995. Instead, where a scientific consensus supports a defendant’s lesser culpability, “[p]ersons facing that most severe sanction [the death penalty] must have a fair opportunity to show that the Constitution prohibits their execution.” *Id.* at 2001. The Supreme Court held that arbitrary numerical cut-offs for application of a categorical ban against capital punishment can themselves be unconstitutional if they fail to include all persons who can fairly demonstrate, with reliable scientific evidence, that they share the condition that is addressed with the categorical ban. Similarly here, just as states could not preclude the finding of intellectual disability because of an arbitrary IQ score cut-off, states cannot arbitrarily foreclose a finding of youth, and the inherent characteristics which accompany it—including the background, and mental and emotional development of the defendant—once a defendant turns 18.

The United States Supreme Court has recognized that neuroscience justifies treating youthful offenders differently than their adult counterparts. “Because

juveniles have diminished culpability and greater prospects for reform they are less deserving of the most severe punishments.” *Graham v. Florida*, 543 U.S. 48, 68 (2011). “These differences render suspect any conclusion that a juvenile fall among the worst offenders.” *Roper*, 543 U.S. at 570.

In finding juvenile offenders inherently different than adult offenders, the Court relied on three key differences between juveniles and adults which demonstrate that “juvenile offenders cannot reliably be classified among the worst offenders.” *Simmons*, 543 U.S. at 569. These include: (1) a lack of maturity and an underdeveloped sense of responsibility; (2) they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) their characters are not well formed. *Graham*, 543 U.S. at 68. It is these differences which separate youthful offenders from the worst offenders.

These characteristics that distinguish juvenile offenders from their adult counterparts do not just evaporate when a person turns 18 years old. On the day after his 19th birthday, Mr. Sparre did not exhibit factors that the United States Supreme Court has found to indicate maturity. Dr. Krop and Dr. Garbarino testified about the immature brain at the evidentiary hearing. The scientific community recognizes that human brains are not mature until age 25 or 26. (PC.3669, 3769). The frontal lobe, which controls executive functioning and emotional regulation, is the last area to develop in young adults. (PC. 3669). Executive functioning is decision-making and

problem solving, impulse control, inhibition, and weighing consequences and risks. (PC.3668, 3769). Emotional regulation is managing feelings. (PC.3769).

Children and young adults with immature brains have a disability in understanding consequences, giving equal value to negative and positive outcomes, to long-term effects versus short-term effects. (PC.3770). While normal 18, 19, 20-year-olds make bad decisions, kids like Mr. Sparre “have sort of double whammy of being young and then being doubly young because of their traumatic experiences.” *Id.* Dr. Krop testified that the number of stab wounds to the victim in this case suggest Mr. Sparre’s immature frontal lobe and problems with the inhibition. (PC.3671). “Once a person [with an immature frontal lobe] starts something he has difficulty stopping.” *Id.*

Normal 19-year-olds that have not experienced the severe trauma experienced by Mr. Sparre still have a relative immaturity of managing intense emotions. (PC.3772). Dr. Garbarino testified that Mr. Sparre’s immature brain makes the crime make “developmental sense.” *Id.* Mr. Sparre was a very vulnerable child and his behavior was always erratic. *Id.* He had frequent outbursts at home and at Tara Hall. *Id.* Mr. Sparre was “a kid on the edge” and was still on the edge at age 19 and “not playing with a full deck.” *Id.* Dr. Garbarino testified that “there’s no evidence that the severity of the teenager’s crime predicts well to their possibilities for rehabilitation or transformation later in life, and so horrible as the crime is it may

not have as much developmental significance as it might in a 30-year-old who had a mature brain.” (PC.3773).

While the consequence of the decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper* was to establish a categorical ban on executing a certain class of individuals, the rationale driving the decision was to bring the imposition of capital punishment in line with a properly individualized assessment of moral culpability. To execute an individual whose chronological age is just above the 18-year cutoff but whose mental development is the same as that described in *Roper*, is exactly the unscientific arbitrary line-drawing that *Hall* forbids. Mr. Sparre is so similarly situated to the class of defendants protected by *Roper* that the Court should conclude that his death sentence violates the Eighth Amendment prohibition against cruel or unusual punishment.

ISSUE 9:
THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. SPARRE’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *HURST V. FLORIDA* AND *HURST V. STATE*

There is no dispute that Mr. Sparre’s death sentence was obtained in violation of the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst*, the United States Supreme Court held that Florida’s capital sentencing scheme—the scheme pursuant to which Mr. Sparre was sentenced to death—violated the Sixth Amendment because it required the judge, not the jury,

to make the findings of fact required to impose the death penalty under Florida law. *Id.* at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were “sufficient” to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Because Mr. Sparre was sentenced to death pursuant to that scheme, his sentence is unconstitutional under *Hurst*.

Mr. Sparre’s death sentence also violates the Florida Constitution. On remand in *Hurst*, this Court held that the Eighth Amendment requires unanimous jury fact-finding as to *each* of the required elements above, and also a unanimous death recommendation by the jury. *Hurst v. State*, 202 So. 3d at 53-59. Even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Mr. Sparre’s advisory jury unanimously recommended death to the judge, but made none of the findings of fact required for a death sentence under Florida law. Mr. Sparre’s trial judge alone made the required state-law findings: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) whether those aggravators were “sufficient” to justify death; and (3) whether the aggravators were outweighed by the mitigation. *See Fla. Stat.* 921.141(3) (2017); *see also Hurst*, 136 S. Ct. at 623; *Hurst v. State*, 202 So. 3d 40, 51-54 (Fla. 2016)

(discussing required elements).

There is also no dispute that the *Hurst* decisions apply retroactively to Mr. Sparre. See *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); see also *Danforth v. Minnesota*, 552 U.S. 264 (2008). The only issue here is whether the *Hurst* error was “harmless.”

The “harmless error” doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury’s unanimous recommendation to sentence Mr. Sparre to death.⁶ Under the per se *Hurst* harmless-error rule, this Court has held that *Hurst* errors are harmless in every case in which the pre-*Hurst* advisory jury recommended death by a vote of 12 to 0, rather than a majority vote of 11 to 1; 10 to 2; 8 to 4; or 7 to 5. Although in some cases this Court mentions additional factors in the course of a *Hurst* harmless-error decision, this Court has *never* held a *Hurst* violation harmful in a case with a unanimous advisory jury recommendation. And the court has *never* held a *Hurst* violation harmless in a split-vote advisory jury case.

⁶ *Hurst* errors should be deemed “structural” and not subject to harmless review. See *Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. *Hurst* errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and “deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination” of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

This Court’s per se rule that *Hurst* errors are harmless in every case where the pre-*Hurst* jury unanimously recommended death, *see, e.g., Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution.

This Court’s rule relies entirely on the vote of a defendant’s “advisory” jury—a jury that did not conduct the fact-finding required by the Sixth Amendment but made only a generalized recommendation to the judge. The rule has been mechanically applied in every Florida *Hurst* case. If a defendant’s advisory jury voted to recommend death by a majority vote—i.e., a margin between 7-to-5 and 11-to-1—the *Hurst* error is deemed not harmless and this Court vacates the defendant’s sentence. But if the defendant’s advisory jury recommended death by a vote of 12-to-0, the *Hurst* error is automatically deemed harmless and this Court upholds the defendant’s death sentence. No other factors make a difference. There is no individualized review of the *Hurst* error’s impact in light of the specific aggravation and mitigation presented or any factor other than the raw advisory vote.⁷ Because this Court’s rule violates the United States Constitution, it should not be

⁷ Although in some cases this Court, having applied the per se rule, goes on to describe other factors that favor a harmless-error ruling, this does not negate the per se nature of this Court’s unanimous-jury-recommendation rule. It is the unanimous jury recommendation that is the common determinative factor in this Court’s harmless-error analysis in every *Hurst* case. This Court has never denied *Hurst* relief on harmless-error grounds without relying on the unanimous jury recommendation, even if other factors are discussed. In many cases, the unanimous recommendation is the only factor discussed.

applied to Mr. Sparre.

The United States Supreme Court has explained that constitutional errors may only be deemed harmless where there is no reasonable possibility that they contributed to the result. *See Chapman v. California*, 386 U.S. 18, 21 (1967). Harmless error review must also include consideration of the entire record. *See, e.g., Rose v. Clark*, 478 U.S. 570, 583 (1986). Here, the whole record reveals a possibility that the *Hurst* error at Mr. Sparre's sentencing contributed to his death sentence. An average rational jury instructed in compliance with *Hurst* and the Sixth Amendment could have voted for a life sentence in Mr. Sparre's case.

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact take on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence is rested elsewhere). Mr. Sparre's jury was led to believe that its role was diminished when the court instructed it that the jury's role was advisory and that the judge would ultimately determine the sentence. In addition to the court informing the jury that its sentence will be a "recommendation," the prosecutor repeatedly emphasized to the jury that the judge "is the one that actually imposes the sentence." (T.192, 193, 217, 218, 219, 222-23, 233).

Trial counsel also consistently diminished the jury's role in sentencing.

Counsel repeatedly minimized “the jury’s sense of responsibility for determining the appropriateness of death” in violation of the Eighth Amendment. *Caldwell*, 472 U.S. at 341. During voir dire, trial counsel stated, “the Judge sentences defendants in penalty phases.” (T.297). Trial counsel continued to refer to the jury’s verdict during the penalty phase as simply a “recommendation” on approximately twenty other occasions. (T.297, 298, 300-01, 304, 305, 306, 307, 311-12, 314, 319, 323). This point was not lost on the jury. During voir dire, one juror stated, “I thought the state representative had said that no matter what we say in the second section that, of course, the Judge makes the ultimate decision on that.” (T.302).

Trial counsel’s failure to object to improper comments by the court and the state, and his own improper comments, prejudiced Mr. Sparre’s jury by diminishing its role at sentencing. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. At least three Justice of the United States Supreme Court have urged this Court to revisit the state’s decisional law on *Caldwell*, particularly in light of *Hurst*. See, e.g., *Guardado v. Jones*, 138 S. Ct. 1131 (2017) (Sotomayor, J., dissenting from the denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829 (2018) (Ginsburg, Sotomayor, JJ., dissenting from the denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3 (2017) (Ginsburg, Breyer, Sotomayor,

JJ., dissenting from the denial of certiorari).

This Court's total reliance on the advisory jury's recommendation, without considering the jury's diminished sense of responsibility for the death sentence violated *Caldwell*. Mr. Sparre's advisory jurors were led to believe their role in sentencing was diminished when jurors were repeatedly instructed that their recommendation was advisory and the final sentencing decision rested solely with the judge. Given that the jury was led to believe it was not ultimately responsible for imposing Mr. Sparre's death sentence, this Court's per se rule cannot be squared with the Eighth Amendment. Under *Caldwell*, no court can be certain beyond a reasonable doubt that a jury would have made the same unanimous *recommendation* absent the *Hurst* error, let alone that a jury that properly grasped its critical role in determining a death sentence would have unanimously found all of the elements for the death penalty satisfied.

This Court's rule does not allow for meaningful consideration of the actual record. The per se rule cannot permissibly predict that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously found or rejected any specific mitigators in a proceeding comporting with constitutional requirements. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444

(1990) (same). This Court's failure to consider Mr. Sparre's mitigation in its harmless-error analysis is also inconsistent with *Parker v. Dugger*, where the United States Supreme Court rejected the state supreme court's cursory harmless-error analysis in jury-override cases. 498 U.S. 308, 320 (1991). ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.").

In light of *Caldwell* and *Hurst*, Mr. Sparre's death sentence is unconstitutional and should be vacated.

**ISSUE 10:
THE CIRCUIT COURT ABUSED ITS DISCRETION BY NOT ALLOWING
MR. SPARRE TO AMEND HIS MOTION FOR POSTCONVICTION
RELIEF**

The circuit court abused its discretion by not permitting Mr. Sparre to amend his 3.851 motion with a claim based on *Parker v. Dugger*, 498 U.S. 308 (1991), regarding trial counsel's failure to file the sentencing memorandum.

The question of whether Mr. Sparre should have been granted leave to amend and the question of the merits of the amendment are two separate inquiries. Mr. Sparre did not request a continuance of the evidentiary hearing, nor would there have been any prejudice to the State had Mr. Sparre's amendment been granted. It has been shown without a doubt that the facts Mr. Sparre sought to amend his postconviction with were not readily available to postconviction counsel at the time

he filed his initial 3.851 motion. *See Tanzi v. State*, 94 So. 3d 482 (Fla. 2012). Trial counsel did not file the sentencing memorandum with the Clerk's office, and the sentencing memorandum was not included in the record on appeal to this Court on Mr. Sparre's direct appeal. The existence of the sentencing memorandum was an issue that arose during the State's cross-examination of trial counsel at the evidentiary hearing. Mr. Sparre's motion to amend his 3.851 was an effort to make the pleadings conform to the testimony and evidence presented at the hearing.

The facts asserted in the motion were not vague and nonspecific, nor were they available to counsel at the time Mr. Sparre's 3.851 motion was filed. The circuit court's denial of Mr. Sparre's motion to amend was an abuse of discretion because it prohibits Mr. Sparre from raising a claim that arose from the testimony and evidence presented at the evidentiary hearing. This Court should remand this issue back to the circuit court for a full and fair evidentiary hearing on trial counsel's failure to file the sentencing memorandum in the Clerk's office.

CONCLUSION AND RELIEF SOUGHT

Mr. Sparre respectfully requests this Honorable Court reverse and remand the trial court's denial of his 3.851 Motion for Postconviction Relief and grant a new guilt phase, a new penalty phase, and a new direct appeal.

Respectfully submitted,

ROBERT S. FRIEDMAN
Capital Collateral Regional Counsel-North

/s/ Stacy R. Biggart
STACY R. BIGGART
Assistant CCRC-North
Florida Bar No. 0089388
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922 ext. 114
Stacy.Biggart@ccrc-north.org

COUNSEL FOR THE PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing petition have been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon Janine Robinson, Assistant Attorney General (Janine.Robinson@myfloridalegal.com and capapp@myfloridalegal.com) on March 11, 2019.

/s/ Stacy R. Biggart
STACY R. BIGGART
Assistant CCRC-North
Florida Bar No. 0089388
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922 ext. 114
Stacy.Biggart@ccrc-north.org

COUNSEL FOR THE PETITIONER

CERTIFICATE OF FONT

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210.

/s/ Stacy R. Biggart
STACY R. BIGGART
Assistant CCRC-North
Florida Bar No. 0089388