

No. SC19-
Lower Tribunal No. 2010-CF-008424

IN THE
Supreme Court of Florida

DAVID KELSEY SPARRE,
Petitioner,

v.

MARK S. INCH
SECRETARY, DEPARTMENT OF CORRECTIONS,
Respondent.

*On Appeal from the Circuit Court, Fourth
Judicial Circuit, in and for Duval County, Florida*

*Honorable Judge Elizabeth Senterfitt
Judge of the Circuit Court*

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.100(a), Article I, Section 13 of the Florida Constitution provides that, “[t]he writ of habeas corpus shall be grantable of right, freely, and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.” Mr. Sparre was sentenced to death, and the instant Petition accompanies Petitioner/Appellant’s Initial Brief from the lower tribunal’s order on Appellant/Petitioner’s denial of his 3.851 Motion for Postconviction Relief. Fla. R. App. P. 9.142(b).

This Court has jurisdiction and the inherent power to do justice. *Brown v. Wainwright*, 392 So. 2d 1327 (Fla. 1981). The ends of justice call on the Court to grant the relief sought in this case. The petition raises claims involving fundamental state and federal constitutional error. This Court’s exercise of its habeas corpus jurisdiction and of its authority to correct constitutional error is warranted in this action. As this petition shows, habeas corpus relief is proper on the basis of Mr. Sparre’s claims.

PRELIMINARY STATEMENT

The first five volumes of the seventeen-volume record on direct appeal, comprising the pleadings, status conferences, motions 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 of Mr. Sparre's trial, will be referenced as "T" followed by the page number. The record on appeal of the postconviction proceeding will be referenced as "PC" followed by the page number.

REQUEST FOR ORAL ARGUMENT

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

GROUND FOR HABEAS CORPUS RELIEF

Mr. Sparre asserts that his conviction was obtained in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because his appellate counsel rendered ineffective assistance of counsel during this direct appeal. Appellate counsel's deficient conduct and the resulting prejudice render Mr. Sparre's conviction unconstitutional.

PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit, Duval County, entered the judgments of conviction and sentence under consideration. (R.689-93).

The Duval County Grand Jury indicted Mr. Sparre on August 26, 2010, for first-degree murder. (R.20-22).

Mr. Sparre's trial began on November 28, 2011, and the jury found Mr. Sparre guilty of premeditated and felony (burglary) murder on December 2, 2011. (R.592-93). The jury also found that Mr. Sparre carried, displayed, used, or attempted to use a weapon. *Id.* The penalty phase was held on December 13, 2011. (T.1231-1420). No live 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 live mitigation testimony was presented. (R.955-87).

At the conclusion of the *Spencer* hearing, the trial court requested sentencing memorandums from both parties. (R.980-81). The State filed its Memorandum in Support of Imposition of the Death Penalty on February 16, 2012. (R.673-87). Mr. Sparre's defense counsel also prepared a sentencing memorandum and provided it to the trial court. (PC.3313; 3317; 3594). Defense counsel did not file Mr. Sparre's sentencing memorandum with the Clerk's office, and it was not part of the record on appeal before this Court. (PC.3327).

The trial court sentenced Mr. Sparre to death on March 30, 2012. (R.694-713). The court found the following aggravating factors and assigned great weight to each: (1) the murder was especially heinous, atrocious, or cruel (HAC); and (2) the capital

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

felony was committed while the defendant was engaged in the commission of a burglary. (R.700-03). The court found one statutory mitigating circumstance and assigned it moderate weight: the age of the defendant (19) at the time of the crime. (R.705-06).

The trial court also found thirteen non-statutory mitigating circumstances: (1) accepts responsibility (little weight); (2) neglect (some weight); (3) emotional deprivation and emotional 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 trial court specifically rejected the following mitigating circumstances: (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).

This Court affirmed Mr. Sparre's conviction and sentences. *Sparre v. State*, 164 So. 3d 1183 (Fla. 2013). The following issues were raised in Mr. Sparre's 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 health

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) the trial court erred in sentencing appellant to death because Florida's capital sentencing proceedings are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*. All three claims were denied.

The United States Supreme Court denied certiorari review on November 2, 2015. *Sparre v. Florida*, 136 S.Ct. 411 (2015).

On June 19, 2017, Mr. Sparre filed an amended 3.851 motion with 36 claims² for relief. (PC.967-1059). Mr. Sparre withdrew Claim 22 of his motion, and an

² 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

evidentiary hearing was held on Claims 1-21 and Claims 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). Mr. Sparre has timely appealed the denial of his amended 3.851 motion and his Initial Brief was filed in Case No. SC18-1192 simultaneously with this petition for writ of habeas corpus.

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) 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*.

ISSUE 1:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO SUPPLEMENT THE RECORD ON DIRECT APPEAL WITH THE SENTENCING MEMORANDUM PREPARED BY MR. SPARRE'S TRIAL COUNSEL

I. Applicable law

In order to establish a claim of ineffective assistance of appellate counsel, the defendant must show: (1) specific errors or omissions which show that appellate counsel's performance departed from the norm or fell outside the range of acceptable professional performance; and (2) the defective performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985).

II. Appellate counsel's deficient performance

A. The sentencing memorandum prepared by trial counsel and considered by the court in sentencing Mr. Sparre to death was not included in the record on appeal and appellate counsel did not file a motion to supplement the record

Appellate counsel knew or should have known that the trial court requested both parties submit sentencing memoranda by February 10, 2012. (R.980-81). Mr. Sparre's defense counsel informed the court that the defense team was already putting the document together. (R.981). The record is clear that the trial court received the memorandum and considered it in rendering his death sentence:

In imposing the sentence this Court has taken into account all of the evidence presented during the trial penalty phase including the guilt and penalty phase, the *Spencer* hearing, the sentencing memorandum submitted by the parties as well as the presentence investigation report.

(R.992-93).

The State's Sentencing Memorandum in Support of Imposition of the Death Penalty was included in the record on direct appeal to this Court. (R.673-87). The sentencing memorandum submitted by trial counsel on behalf of Mr. Sparre was not included in the record on appeal and was therefore not before this Court for consideration when it reviewed Mr. Sparre's case on direct appeal.

Appellate counsel did not file a motion to supplement the record on appeal or take any other action to bring to this Court's attention that the record was incomplete and lacked portions that were necessary for a complete review. *See Delap v. State*, 350 So. 2d 462, 463 (Fla. 1977).

B. The sentencing memorandum prepared by Mr. Sparre's trial counsel was critical to Mr. Sparre's direct appeal

Appellate counsel's first issue on direct appeal was based on this Court's holding in *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), that if the defendant waives the presentation of mitigation and the trial court is alerted to the probability of significant mitigation,

[Th]e trial court has the discretion to call persons with mitigating evidence as its own witnesses. . . . If the trial court prefers counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as

was done in *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991) or to utilize standby counsel for this limited purpose.

782 So. 2d at 363-64.

Appellate counsel knew or should have known that it was critical to Mr. Sparre's *Muhammad* claim that any evidence of the possibility of significant mitigation, including mental health mitigation, that was available for the trial court's review prior to sentencing Mr. Sparre be included in the record on direct appeal.

C. The sentencing memorandum prepared by Mr. Sparre's trial counsel alerted the trial court to the probability of significant mitigation

Trial counsel did not suggest any amendments to the PSI report because Mr. Sparre allowed his attorneys to submit a comprehensive sentencing memorandum to the trial court. (PC.1400-21). The "Attachment 1" of the sentencing memorandum detailed the significant mitigation, including mental health mitigation, that would have been elicited from eleven witnesses on Mr. Sparre's behalf. (PC.1414-21). As a result of trial counsel's sentencing memorandum, the trial court was made aware of significantly more mitigation information than was presented in the abbreviated penalty phase proffer. The trial court was aware that Mr. Sparre was a horribly neglected, physically and emotionally abused child that never experienced a stable home life. His mother used illicit drugs during her pregnancy with Mr. Sparre (PC.1418) and was married at least eight times while Mr. Sparre was a child. (PC.1415). She routinely chose her various husbands over her son, even though

many of those men abused Mr. Sparre and his sister. (PC.1417). He was the pawn in a vicious tug-of-war between his grandmother and his mother, with his mother abandoning him at his grandmother's house for stretches of time and then removing him from his grandmother's custody over and over again. (PC.1418). In 2003, Mr. Sparre's mother essentially abandoned him at a boys' home in Georgetown, South Carolina. (PC.1416). Although the goal of Tara Hall Home for Boys was family unification and connection, Mr. Sparre's mother never participated in counseling, failed to show up for scheduled visits, and ignored Mr. Sparre on holidays. *Id.* The facility required weekly phone calls and one pick-up a month by parents, but Mr. Sparre's mother was never home to receive her child's call and rarely would she would she visit or pick him up for the weekend. *Id.* Mr. Sparre was often the only child left at Tara Hall when the other children spent weekends with family. *Id.* His mother claimed that her then-husband did not get along with her son, and therefore her son was forbidden to come home. (PC.1417). Mr. Sparre spent his holidays with a counselor's family because his mother did not want him at home. *Id.* The *only* way the facility could get his mother's attention was to threaten to report her to the South Carolina Department of Social Services on charges of abuse, neglect and abandonment. (PC.1416, 1417). In the end, due to the constant threats of state action Mr. Sparre's mother removed him from Tara Hall and sent him to live with his grandmother. (PC.1417).

D. The sentencing memorandum prepared by Mr. Sparre’s trial counsel alerted the court to the probability of significant mental health mitigation

As a result of defense counsel’s sentencing memorandum, the trial court was also aware of potentially significant mental health mitigation, including several head injuries and a history of substance abuse. (PC.1420). As a result of Mr. Sparre’s unstable home life as a child and his fear of being removed from his grandmother’s custody, Mr. Sparre suffered from extensive nightmares and night terrors. (PC.1418). As a young child, he was diagnosed with an anxiety disorder, separation anxiety, post-traumatic stress disorder and depression. (PC.1419-20). Although Mr. Sparre’s treating physicians recommended a combination of counseling and medication to treat his disorders, his family did not follow-up with treatment recommendations. According to Dr. Doris Greenberg, M.D., Mr. Sparre “suffered terrible catastrophes” as a child and “people snap if they are not treated after suffering a terrible catastrophe.” (PC.1419). Surely, the sentencing court was on notice of the probability of significant mitigation, including mental health mitigation, and appellate counsel was ineffective for failing to ensure that Mr. Sparre’s sentencing memorandum was in the record on appeal.

E. Appellate counsel missed a second opportunity to supplement the record with Mr. Sparre’s sentencing memorandum when appellate counsel filed a motion for rehearing

When this Court issued its opinion denying Mr. Sparre’s direct appeal, appellate counsel had a second opportunity to file a motion to supplement the record and alert this Court to the probability of significant mitigation in Mr. Sparre’s case. In the recitation of facts regarding the penalty phase, this Court noted that “[t]he trial court also requested sentencing memoranda from the parties.” 164 So. 3d at 1189. In fact, appellate counsel filed a motion for rehearing, yet still did not alert this Court to the omission of Mr. Sparre’s sentencing memorandum and the fact that the trial court was alerted to the probability of significant mitigation beyond the abbreviated penalty phase proffer. (T.1236-46).

III. Prejudice

The omission of Mr. Sparre’s sentencing memorandum from the record on appeal prejudiced Mr. Sparre’s direct appeal because it prohibited this Court from making a reasoned judgment as to whether the trial judge abused her discretion in not calling as its own witnesses four mental health experts and other witnesses who were available to testify to extensive mental mitigation. *Manuel v. State*, 737 So. 2d 580, 582 (Fla. 1st DCA 1999). A complete review of the issues in Mr. Sparre’s direct appeal was not possible without a complete record on appeal that included the

defense sentencing memorandum. *Lipman v. State*, 428 So. 2d 733 (Fla. 1st DCA 1983).

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.

The prejudice to Mr. Sparre is substantial. Due to appellate counsel's failure to supplement the record with the defense sentencing memorandum, this Court was left with trial counsel's abbreviated proffer of mitigation at the beginning of the penalty phase and found there was "insufficient evidence in the record showing a probability of substantial mitigation" that should have triggered the trial court to call its own mitigation witnesses as required by *Muhammad v. State*. The substantial omission by appellate counsel and resulting prejudice to the appellate process is

sufficient to undermine confidence in the outcome of Mr. Sparre's direct appeal. *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Mr. Sparre was denied a full and meaningful direct appeal, and habeas relief is proper to grant Mr. Sparre a new direct appeal.

ISSUE 2:

MR. SPARRE'S APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL CLAIMS OF FUNDAMENTAL ERROR BASED ON NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT, IN VIOLATION OF MR. SPARRE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The prosecutor in Mr. Sparre's case committed multiple acts of prosecutorial misconduct that were un-objected to by defense counsel at trial. Appellate counsel was ineffective for failing to raise these issues on direct appeal. Mr. Sparre was prejudiced by appellate counsel's failure because this Court would have reversed had the issues been raised.

I. Applicable law

A. Ineffective assistance of appellate counsel for failure to raise instances of fundamental error

An appellant may raise a claim of ineffective assistance of appellate counsel in a petition for writ of habeas corpus. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000). A court must grant habeas relief based on appellate counsel's ineffectiveness

if (1) counsel's omission or overt act fell measurably below the standard of competent counsel and (2) counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Freeman*, 761 So. 2d at 1069; *see also Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986).

Appellate counsel may be ineffective in failing to raise instances of fundamental error. *Smith v. Wainwright*, 484 So. 2d 31, 31 (Fla. 4th DCA 1986) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

B. Prosecutorial misconduct may rise to the level of fundamental error

The United States Supreme Court recognizes that prosecutorial misconduct can rise to a level of invasiveness that warrants new proceedings. In *Greer v. Miller*, 483 U.S. 756, 765 (1987), the Supreme Court stated:

This Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.

Id., citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *United States v. Bagley*, 473 U.S. 667, 676 (1985).

In *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), the Supreme Court set for the standard of review to use in assessing the impact of prosecutorial misconduct:

It is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Id., citing *Darden v. Wainwright*, 699 F. 2d 1031, 1036 (11th Cir. 1983); *Donnelly*, 416 U.S. 637 (1974) (internal citations omitted).

In this case, the prosecutor's gross misconduct throughout Mr. Sparre's trial, at both the guilt and penalty phases, made the proceedings unreliable and unfair. Given the prosecutor's numerous improper and egregious remarks to the jury in closing argument and his failure to provide all known mitigation to the trial court, appellate counsel's failure to allege these claims is outside the range of professionally acceptable performance. Appellate counsel's omission compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Therefore, a new direct appeal should be granted by this Court.

Each example of prosecutorial misconduct will be discussed individually, with the appropriate record citations where applicable.

II. The State committed prosecutorial misconduct when the prosecutor failed to correct the PSI report and disclose to the trial court significant mitigation in the State's possession

There was significant mitigation in possession of the prosecutor that went undisclosed to the trial court. The prosecutor's failure to disclose this record evidence to the trial court violated Mr. Sparre's right to a reliable, proportionate, and constitutional sentence. Although appellate counsel did argue in "Issue 1" that the

PSI was inadequate, appellate counsel was deficient for failing to include the prosecutor's misconduct regarding the PSI in the argument on direct appeal.

Florida prosecutors have a standing obligation to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.” R. Regulating Fla. Bar 4-3.8(c). The prosecutor in this case was in possession of significant unprivileged mitigation evidence including: mental health records, military records, records from Tara Hall School for Boys, and three depositions to perpetuate trial testimony that went undisclosed to the trial court.

Mr. Sparre's *Spencer* hearing was held on January 27, 2012. At this hearing, the trial court specifically asked both the State and the defense whether they had a copy of the pre-sentence investigation report (PSI) and whether either side had any exceptions to it. (R.962). The State was in possession of mental health records from Dr. Doris Greenberg and Dr. Tanis Alligood, as well as their perpetuated testimony. These records and their testimony revealed that Mr. Sparre suffered from severe nightmares since before the age of thirteen. Further, by the time Mr. Sparre turned thirteen, he was diagnosed with severe anxiety, separation anxiety, and post-traumatic stress disorder (PTSD). All of this substantial mental health mitigation was

undisclosed by the prosecution despite their duty under *Muhammad v. State*, 782 So. 2d 343, 363-64 (Fla. 2001). Despite his clear knowledge of Mr. Sparre's mental health issues, the prosecutor seized on defense counsel's failure to submit any of this mitigation evidence to the trial court by arguing that Mr. Sparre offered no experts to establish mental health issues. (R.682).

The State's egregious misconduct in this case prejudiced Mr. Sparre because it prevented serious mitigation evidence from being considered by the trial court, thereby prohibiting the trial court from determining whether this case constitutes one of the most aggravated and least mitigated of all murders. The trial court, at the time of Mr. Sparre's sentencing, had the obligation to consider and weigh all possible mitigation. Because of the prosecutor's delinquency in failing to turn over to the trial court this weighty mitigating evidence, the court was improperly limited in its consideration to only what was contained in the PSI. Florida's capital sentencing statute requires that a defendant only be sentenced to death when he is truly deserving of the death penalty, which is not solely dependent on a defendant's own wishes to waive the presentation of mitigation evidence.

III. The prosecutor in Mr. Sparre's trial committed prosecutorial misconduct in his guilt phase closing argument by making multiple improper statements that resulted in fundamental error

The State's use of inappropriate and inflammatory arguments was pervasive throughout its closing argument in Mr. Sparre's trial. The prosecutor's misconduct

constitutes fundamental error because it was so prejudicial that it tainted the jury's verdict. *Mendoza v. State*, 964 So. 2d 121, 133 (Fla. 2007) (citing *Fennie v. State*, 855 So. 2d 597, 609 (Fla. 2003)). The prosecutor misstated the law, argued aggravation in the guilt phase, and made arguments designed to invoke an emotional response in the jurors. Cross examination should "not 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 in light of the applicable law. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

A. The State committed prosecutorial misconduct when the prosecutor misstated the law in his guilt phase closing argument

During his closing argument the prosecutor argued, "[a]t this stage, 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 trial strategy was based on the theory that Mr. Sparre "snapped" and committed the crime in a frenzied state. (T.431). Defense counsel conceded to second-degree murder in opening statement and asked the jury find Mr. Sparre guilty of second-degree murder, not first-degree murder. (T.434-35). Defense counsel never claimed that Mr. Sparre was an innocent man.

The prosecutor's argument that if the jury did not return a verdict of first-degree murder, Mr. Sparre would be "an innocent man" is false and misleading. A verdict finding Mr. Sparre guilty of second-degree murder carries a possible life

sentence and does not equate to a status of innocence. *See* §782.04, Fla. Stat. (2012). Nor is a 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 the law by the State.

Finally, the State misrepresented the legal difference and definitions of second versus first-degree murder. After insinuating that the defense intentionally misrepresented the jury instructions for second-degree murder during his closing argument, the prosecutor distorted what is required to prove second-degree murder. The prosecutor asserted:

See, the Judge is going to instruct you that in order to convict for second-degree murder it is not necessary for the state to prove that the defendant had the intent to cause death. That’s because second-degree murder is an unintentional killing. It’s when you kill somebody without meaning to. . . First-degree murder, premeditated first-degree murder is the intentional killing, intentional.

(T.1154-55).

Although the State does not have to prove intent to kill for the second-degree murder, it does have to prove that a defendant acted with intent. And, first-degree

murder requires more than an intentional killing, it requires a *premeditated* killing. This key difference is exactly what the defense was arguing, and what the State misrepresented to the jury. The defense theory was that Mr. Sparre “snapped” and killed the victim in a frenzy or heat of passion. So, although Mr. Sparre’s actions were intentional, he did not have the requisite *mens rea* for first degree murder, a crime which requires an intentional killing *after consciously deciding to do so*. The State conveniently left this element out.

These comments, un-objected to at trial, constitute prosecutorial misconduct resulting in fundamental error. Appellate counsel was ineffective for failing to raise these improper comments on direct appeal. Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error. *Robinson v. State*, 520 So. 2d 1, 7 (Fla. 1988) (“Our cases have also recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge.”).

B. The State committed prosecutorial misconduct in the guilt phase when the prosecutor made improper and inflammatory comments intended to inflame the passions and prejudices of the jury in an attempt to convince the jury to convict Mr. Sparre for reasons other than alleged guilt

During his guilt phase closing argument, the prosecutor repeatedly made comments 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.1108).

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 much. (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).

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). The prosecutor’s remarks were egregious, inflammatory, and unfairly prejudicial to Mr. Sparre. They were simply meant to inject elements of emotion and hatred toward Mr. Sparre into the jury’s deliberations.

C. The State committed prosecutorial misconduct when the prosecutor argued aggravation during the guilt phase an attempt to inflame the minds and passions of the jury

The prosecutor improperly argued aggravation during the guilt phase of Mr. Sparre’s trial. Specifically, the prosecutor stated:

The last witness your 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 against Mr. Sparre. Aggravating factors are reserved for the penalty phase; otherwise, a defendant will be confronted with a jury likely to decide the defendant's punishment 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.

IV. Prejudice

Appellate counsel was deficient in his performance by failing to raise the above claims of fundamentally erroneous prosecutorial misconduct on direct appeal. *Pittman v. State*, 90 So. 3d 794, 819 (Fla. 2011), reh'g denied (June 7, 2012) (Appellate counsel fails to provide proper representation by not raising issues of prosecutorial misconduct on appeal where a prosecutor's statements were not objected to by trial counsel and the prosecutor's statements constitute fundamental error); *Smith v. Wainwright*, 484 So. 2d 31 (Fla. 4th DCA 1986) (Appellate counsel is deficient where counsel fails to raise a meritorious issue.) 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 failed to provide significant evidence of mitigation that was in his possession, including mental health mitigation, to the trial court. 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).

These omissions and deficiencies by appellate counsel compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Therefore, a new direct appeal should be granted. The effect of the errors at his trial individually and cumulatively created an unreliable guilt phase verdict and death sentence, in violation of Mr. Sparre's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. For all the reasons discussed herein, Mr. Sparre respectfully urges this Court to grant habeas relief.

ISSUE 3:

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF GRUESOME PHOTOGRAPHS IN VIOLATION OF MR. SPARRE’S RIGHTS UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

I. Applicable law

A. Ineffective assistance of appellate counsel

Appellate counsel has the “duty to bring such skill and knowledge as will render [the appeal] a reliable adversarial testing process.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate: (1) specific errors or omissions which show that appellate counsel’s performance deviated from the norm or fell outside the range of professional acceptable performance; and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 476 So. 2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel this Court must determine “whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency

in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.” *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986).

Appellate counsel’s failure to raise the meritorious issues addressed in this petition proves his advocacy involved “serious substantial deficiencies” which establishes that “confidence in the outcome is undermined.” *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986); *Barclay v. Wainwright*, 444 So. 2d 856, 959 (Fla. 1984); *Wilson v. Wainwright*, 474 So. 2d 1162 (Fla. 1985).

B. Admissibility of photographs

Photographs should be excluded when the risk of prejudice outweighs relevancy. *Alford v. State*, 307 So. 2d 433, 441-42 (Fla. 1975), cert denied, 428 U.S. 912 (1976). Although relevancy is key to the admissibility of such photographs under *Adams v. State*, 412 So. 2d 850 (Fla. 1982), limits must be placed on “admission of photographs which prove, or show, nothing more, than a gory scene.” *Thomas v. State*, 59 So. 2d 517 (Fla. 1952).

Furthermore, a photograph’s admissibility is based on relevancy, not necessity. *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996). Generally, if photographic evidence is relevant, it is generally held admissible regardless of its character as gruesome or gory. *Allen v. State*, 340 So. 2d 536 (Fla. 3d DCA 1976). However, if such photographs primary effect is to inflame the passions of the jury, their

introduction will result in a reversal of the conviction. *Jackson v. State*, 359 So. 2d 1190 (Fla. 1978). This Court has indicated that courts must consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990).

II. Appellate counsel was ineffective for failing to raise on direct appeal the admission of gruesome autopsy photographs that had the primary effect of inflaming the passions of Mr. Sparre's jury

During Mr. Sparre's trial, the State introduced gruesome autopsy photographs during the medical examiner's testimony that were highly prejudicial and cumulative in nature, over defense counsel's objection. *See* State's exhibits 134-135, 139-148, 150-159 and 161-166. (T.666-93).

Defense counsel argued that the photographs were prejudicial, gruesome and cumulative. The State conceded on that the photos depicted the same injury, but from a different view. (T.666-93). The trial court allowed the State to publish most of the autopsy photographs to the jury.

Defense counsel renewed his objection and argued that the victim's injuries could be described by the medical examiner and many of the photos were cumulative. (T.1015).

III. Prejudice

The State elicited testimony from witnesses regarding the crime scene and injuries to the victim. The medical examiner testified at great length to the victim's

injuries. (T.1016-20). The photographs in this case had no, or at best, little, relevance and its primary effect would be to inflame the jury. In fact, the prosecutor used the horrific nature of those photographs to improperly argue aggravation during his guilt phase closing argument:

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). The prejudice of the autopsy photographs substantially outweighed any probative value, and Mr. Sparre was denied a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Sparre respectfully urges this Court to grant habeas relief, set aside his conviction and sentence, and grant him a new direct appeal.

Respectfully submitted,

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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.

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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.

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