

In the Supreme Court of Florida

HECTOR SANCHEZ-TORRES,

Appellee,

v.

CASE NO.: SC22-322
CAPITAL CASE

STATE OF FLORIDA,

Appellant.

_____/

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

ANSWER BRIEF

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PRELIMINARY STATEMENT

The record on appeal will be referred to as “Succ. PCR” followed by the appropriate page number. Appellant, HECTOR SANCHEZ-TORRES, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. The initials “IB” refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in successive postconviction appeals and certainly should not do so in a case raising an issue that is untimely, barred by the law of the case doctrine, not cognizable under this Court’s current precedent, and prohibited by the state constitution.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal of a summary denial of a successive postconviction motion in a capital case. The facts of the case and the

evidence presented at the penalty phase are recounted in this Court's direct appeal opinion. *Sanchez-Torres v. State*, 130 So.3d 661, 664-68 (Fla. 2013), *cert. denied*, *Sanchez-Torres v. Florida*, 571 U.S. 1210 (2014). Sanchez-Torres entered a guilty plea and waived a penalty phase jury. *Id.* at 664. Judge Skinner presided at the bench penalty phase and at the co-perpetrator's trial and resentencings.

This Court affirmed the denial of the initial 3.851 postconviction motion and denied the state habeas petition. *Sanchez-Torres v. State*, 322 So.3d 15 (Fla. 2020), *cert. denied*, *Sanchez-Torres v. Florida*, 142 S.Ct. 1145 (Feb. 22, 2022).

Background facts of the co-perpetrator's sentences

The co-perpetrator, Markeil D. Thomas, was 17 years old when the murder occurred on September 10, 2008. Because Thomas was a minor at the time of the murder, the Eighth Amendment precluded a death sentence for him. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the "death penalty is disproportionate punishment for offenders under 18...").

Thomas was charged by indictment with two counts: 1) first-degree murder by shooting; and 2) armed robbery. Thomas' jury convicted him as charged but made a special finding that Thomas "did not actually possess or discharge a firearm." Thomas was originally sentenced to life in prison without parole for the first-degree murder count and 30 years imprisonment for the armed robbery count.

Thomas appealed his convictions and sentences to the First District Court of Appeals. *Thomas v. State*, 110 So.3d 541 (Fla. 1st DCA 2013). The First District affirmed the convictions but reversed and remanded for a resentencing based on *Miller v. Alabama*, 567 U.S. 460 (2012). *See Thomas*, 110 So.3d at 541 (citing *Washington v. State*, 103 So.3d 917 (Fla. 1st DCA 2012)).

On May 30, 2014, the trial court conducted a *Miller* resentencing. The trial court sentenced Thomas to 40 years for the first-degree murder and 30 years for the armed robbery. On appeal, the First District affirmed the new sentences. *Thomas v. State*, 135 So.3d 590 (Fla. 1st DCA 2014). The First District, however, cited *Horsley v. State*, 121 So.3d 1130, 1131 (Fla. 5th DCA 2013), *rev. granted*, 2013 WL

6224657 (Fla. 2013), in its written opinion, which was then pending in this Court.

Thomas then filed a notice of appeal in the Florida Supreme Court asserting jurisdiction based on *Jollie v. State*, 405 So.2d 418 (Fla. 1981). *See Thomas v. State*, SC14-961 (Fla). On September 15, 2015, this Court quashed the First District’s opinion and remanded Thomas’ case for resentencing citing its prior decision in *Horsley v. State*, 160 So.3d 393, 395 (Fla. 2015) (applying the new statute governing sentencing hearings for juveniles being considered for life sentences, § 921.1401(2), Florida Statutes, to all cases involving juvenile *Miller* resentencing issues). *See Thomas v. State*, 177 So.3d 1275 (Fla. 2015).

On remand to the trial court at the second resentencing, the State filed a memorandum of law addressing the statutory factors of § 921.1401(2), Florida Statutes (2016). (1685-1695).¹ The State noted

¹ The record cites in this section are to the record on appeal of the second resentencing in the First District. *Thomas v. State*, 1D16-4774. A Florida court may take judicial notice of the record on appeal of a Florida District Court of Appeal and should do so when the claim is one of relative culpability. § 90.202(4), Fla. Stat. (2021) (providing: “A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201” . . . “Records of any court of this state or of any court of record of the

that Thomas admitted to committing perjury by signing a sworn statement claiming to be the actual triggerman which Thomas had recanted. (1686).

The defense also filed a memorandum of law addressing the juvenile sentencing statutory factors. (1696-1703). The defense memorandum quoted the judge as saying that if Thomas had gone to the police the next day, right after the murder, the chances are Thomas would have been more of a witness than a defendant. (1696-97).

On September 9 and 26, 2016, the trial court conducted the second *Miller* resentencing. On September 26, 2016, the trial court entered a written sentencing order noting the jury determined that Thomas “was not the shooter.” (1704-1712, 1708). The sentencing order also noted that Thomas had made a statement that he was the shooter, thinking it would help his friend Sanchez-Torres, but had since recanted that statement. (1710). The trial court concluded that a life sentence “would not be an appropriate sentence” because

United States or of any state, territory, or jurisdiction of the United States”).

Thomas “did not actually kill Colon” and was not “a major participant” in the murder. (1711). The trial court noted, that pursuant to § 921.1402(2)(c), Florida Statutes, Thomas was “entitled to review of his sentence after fifteen years of incarceration.” (1712). The trial court sentenced Thomas to 40 years incarceration on Count 1 with review after 15 years and to 30 years incarceration on Count 2. (2038-2049).

On February 5, 2018, the First District affirmed Thomas’ sentences from the second resentencing. *Thomas v. State*, 239 So.3d 1193 (Fla. 1st DCA 2018) (1D16-4774). The First District issued the mandate on February 26, 2018.

Earlier, on March 26, 2015, Thomas had confessed to being the shooter to his attorney. Thomas’s sworn statement, along with the forensic psychological report and facts regarding Thomas’ prior bad acts, were known before his 2016 resentencing. Thomas, however, recanted his statement regarding being the actual shooter before the second resentencing.

Procedural history of the current successive postconviction motion

On November 24, 2020, Sanchez-Torres, represented by Capital Collateral Regional Counsel – Northern Region (CCRC-N), filed a successive rule 3.851 postconviction motion in the state trial court. (2022 Succ. PCA 7-154). The successive postconviction motion raised two claims: 1) a claim of newly discovered evidence of relative culpability based on the juvenile co-perpetrator's resentencing due to *Miller v. Alabama*, 567 U.S. 460 (2012), and on the co-perpetrator's recanted confession to being the actual shooter; and 2) a claim that the Eighth Amendment requires relative culpability analysis among co-perpetrators.

On December 14, 2020, the State filed an answer to the successive postconviction motion asserting the motion was untimely and should be summarily denied. (2022 Succ. PCA 171-196). The State also argued that relative culpability analysis was precluded by the current law of *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021), and that the co-perpetrator's sentence was not admissible or relevant to the defendant's sentence.

The State additionally argued that the co-perpetrator's recanted confession to being the triggerman was inadmissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), due to its unreliability. Alternatively, even if the recanted confession was admissible, it would not be likely to result in a lesser sentence, as required by *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998), to be granted a new penalty phase, in light of his criminal history. Sanchez-Torres had a prior conviction for murder that he committed a couple of months before this murder which was used to establish the prior violent felony aggravator.

On January 13, 2021, the trial court summarily denied the successive postconviction motion. (2022 Succ. PCA 203-279).

On January 26, 2021, CCRC-N filed an unopposed motion for rehearing pointing that the trial court had denied the postconviction motion without conducting a case management conference, as required by Rule 3.851(f)(5)(B), commonly referred to as a *Huff* hearing.² Nearly a year later, on January 5, 2022, the trial court

² *Huff v. State*, 622 So.2d 982 (Fla. 1993).

conducted a case management conference, as required by rule 3.851(f)(5)(b).

On February 13, 2022, the trial court summarily denied the successive postconviction motion. (2022 Succ. PCA 456-535).

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Sanchez–Torres asserts the postconviction court erred in concluding that the successive postconviction motion was untimely and that the exception to the time limitation for attorney neglect, in rule 3.851(d)(2)(C), did not apply. Rule 3.851(d)(2)(C) should be limited to initial postconviction motions and should not be applied to successive postconviction motions. Alternatively, there was no attorney neglect. Both substantive claims are meritless. The trial court properly refused to apply the exception and properly concluded the successive motion remained untimely.

ISSUE II

Sanchez–Torres asserts a claim of newly discovered evidence of relative culpability based on his juvenile co-perpetrator’s resentencing. Years after the direct appeal of this case, the juvenile co-perpetrator’s sentence was reduced from a life sentence due to *Miller v. Alabama*, 567 U.S. 460 (2012). Sanchez–Torres argues that his

death sentence is disproportionate to the co-perpetrator's reduced sentence. Additionally, he raises a claim of newly discovered evidence of mitigation based on his co-perpetrator's recanted confession to being the actual shooter.

But the claim of relative culpability is barred by the law-of-the-case doctrine. This Court already rejected a relative culpability claim in the direct appeal because the co-perpetrator was ineligible for the death penalty as a matter of law. That reasoning remains valid to this day regardless of the co-perpetrator's resentencing and therefore, the claim remains barred by the law-of-the-case doctrine.

Moreover, the claim of relative culpability is not cognizable under current law. Relative culpability analysis is merely a subset of proportionality review, and under this Court's current precedent, proportionality review is precluded. *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021). The conformity clause of the state constitution also precludes relative culpability analysis.

Alternatively, the claim is meritless under traditional relative culpability analysis. The juvenile co-perpetrator was not eligible for the death penalty, as a matter of law, due to his being a minor at the time of the murder. When a co-perpetrator is not eligible for the death penalty as a matter of law, this Court traditionally did not conduct any relative culpability analysis. Under a traditional analysis, the claim of newly discovered evidence of relative culpability is meritless both legally and factually. The trial court properly summarily denied the relative culpability claim.

ISSUE III

Sanchez-Torres asserts that the federal constitution requires relative culpability analysis among co-perpetrators in capital cases. This claim is barred by the law-of-the-case doctrine and is untimely. On the merits, Sanchez-Torres' position that the Eighth Amendment requires relative culpability analysis is extraordinary in light of *McCleskey v. Kemp*, 481 U.S. 279 (1987), and *Pulley v. Harris*, 465 U.S. 37 (1984). And this Court recently held that proportionality review

was prohibited by the state constitution in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021). Because relative culpability analysis is merely a species of proportionality review, the state constitution also prohibits relative culpability analysis. The Eighth Amendment does not require relative culpability analysis among co-perpetrators any more than it requires proportionality review.

Furthermore, Thomas' lesser sentence, recanted confession, forensic psychological report diagnosing him with anti-social personality disorder, and prior criminal history is not mitigation at all as to Sanchez-Torres. None of that evidence meets the constitutional definition of mitigation. Another person's sentence is not an aspect of the defendant's character, record, background, or circumstances of the offense. The United States Supreme Court recently held similar propensity evidence was not admissible as mitigation in *United States v. Tsarnaev*, 142 S.Ct. 1024 (2022). The trial court properly summarily denied this Eighth Amendment claim.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT PROPERLY DETERMINED THE SUCCESSIVE POSTCONVICTION MOTION WAS UNTIMELY AND THAT THE EXCEPTION TO THE TIME LIMITATION FOR ATTORNEY NEGLIGENCE IN RULE 3.851(d)(2)(C) DID NOT APPLY? (Restated)

Sanchez-Torres asserts the postconviction court erred in concluding that the successive postconviction motion was untimely and that the exception to the time limitation for attorney neglect, in rule 3.851(d)(2)(C), did not apply. Rule 3.851(d)(2)(C) should be limited to initial postconviction motions and should not be applied to successive postconviction motions. Alternatively, there was no attorney neglect. Both substantive claims are meritless. The trial court properly refused to apply the exception and properly concluded the successive motion remained untimely.

The postconviction court's ruling

The trial court summarily denied the successive postconviction motion. (2022 Succ. PCA 456-535). The trial court concluded that the

newly discovered evidence claims were untimely. (2022 Succ. PCA 458-461). The trial court discussed the exceptions to the one-year time limitation in rule 3.851(d)(2). The trial court then explained that under rule 3.851(d)(2)(A), and *Jimenez v. State*, 997 So.2d 1056 (Fla. 2008), any claim of newly discovered evidence must be brought within one year of the date it become discoverable with diligence. The trial court reasoned that Thomas' new sentence was discoverable on February 26, 2018, when it became final on appeal and any claim based on the new sentence had to be filed by February of 2019, but the successive motion was not filed by that deadline.

Regarding Thomas' recanted sworn statement to being the actual shooter, that statement was made to his counsel on March 26, 2015, and was revealed, along with the forensic report and facts regarding Thomas' prior bad acts, at the September 9, 2016, resentencing. (2022 Succ. PCA 463-466). So, any claim of newly discovered evidence based on any of that information had to be brought by September 9, 2017, in this case, but was not. Because the newly

discovered evidence claims were not filed within one year, the claims did not meet the exception and were untimely.

The trial court then discussed the exception to the one-year time limitation in rule 3.851(d)(2)(C) for attorney neglect. The trial court rejected the argument that prior postconviction counsel should have raised both the newly discovered evidence claims and the Eighth Amendment claim in a timely manner to meet the exception in rule 3.851(d)(2)(A). The trial court concluded that both claims could have been raised in the initial 3.851 motion by amendment, noting that the initial postconviction motion had been amended twice.

Untimely

The postconviction court properly determined the successive postconviction motion was untimely and that the exception for attorney neglect did not apply.

Any claim of newly discovered evidence must be filed within one year of the date the claim became discoverable through due diligence. *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (quoting *Rodgers v.*

State, 288 So.3d 1038, 1039 (Fla. 2019), and *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008); *Mungin v. State*, 320 So.3d 624, 625-26 (Fla. 2020) (citing *Reed v. State*, 116 So.3d 260, 264 (Fla. 2013)), *cert. denied*, *Mungin v. Florida*, 142 S.Ct. 908 (2022). And it is the defendant's burden to establish the timeliness of a successive postconviction claim. *Mungin*, 320 So.3d at 626 (citing *Rivera v. State*, 187 So.3d 822, 832 (Fla. 2015)).

Co-perpetrator Thomas's new sentence became final when it was affirmed on direct appeal by the First District. *Thomas v. State*, 239 So.3d 1193 (Fla. 1st DCA 2018) (No. 1D16-4774) (unpublished). The First District issued the mandate from Thomas' *Miller* resentencing on February 28, 2018. So, the co-perpetrator's new sentence was discoverable early in 2018, and, under *Jimenez*, any successive postconviction claim based on the co-perpetrator's new sentence should have been filed by the end of February of 2019. But this successive claim was not filed until November 24, 2020. The claim of newly discovered evidence is one year, eight months, and three weeks late.

Any claim of newly discovered evidence based on Thomas' recanted confession to being the actual triggerman is even more untimely. Thomas confessed to being the shooter in March of 2015 (and then recanted before his 2016 resentencing). The confession was available in 2015. So, any successive claim based on Thomas's confession to being the triggerman should have been filed by March of 2016 but, in fact, was not filed until November of 2020. The claim of newly discovered evidence based on the recanted confession is over four years late.

Both of these claims of newly discovered evidence are untimely.

Exception for postconviction counsel's neglect

To evade the time bar, opposing counsel seeks to rely on the exception for postconviction counsel's neglect. Fla. R. Crim. P. 3.851(d)(2)(C). Current postconviction counsel, CCRC-N, is arguing that both prior postconviction counsel, registry counsel Francis Shea

and Robert Berry of CCRC-N, were negligent in failing to raise this claim in a timely manner.³

The rule of criminal procedure governing postconviction litigation in capital cases, rule 3.851(d)(2)(C), provides: “No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges” . . . “postconviction counsel, through neglect, failed to file the motion.” There is an equivalent provision in the rules for non-capital cases. Fla. R. Crim. P. 3.850(b)(3) (providing: “the defendant retained counsel to timely file

³ Current CCRC-N counsel ignores that prior CCRC-N counsel Berry was counsel for a short part of the critical time period. Co-perpetrator Thomas’ sentence from the second *Miller* resentencing became final on February 26, 2018, when the First District issued its mandate. So, any timely successive postconviction motion raising these claims of newly discovered evidence were due by the end of February of 2019. CCRC-N was appointed counsel of record on February 12, 2019. Berry could have filed a timely successive postconviction motion raising these two substantive claims in the trial court while the appeal of the initial postconviction motion was pending in this Court, as is permitted by *Tompkins v. State*, 894 So.2d 857, 859-60 (Fla. 2005). Indeed, current CCRC-N counsel did just that by filing a third successive postconviction motion raising a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), in the trial court while this appeal was pending. Prior CCRC-N counsel, no doubt, did not do so because he recognized that both claims were both barred by the law-of-the-case doctrine and totally meritless, as will be explained in ISSUE II and ISSUE III.

a 3.850 motion and counsel, through neglect, failed to file the motion. A claim based on this exception shall not be filed more than 2 years after the expiration of the time for filing a motion for postconviction relief” in non-capital cases). The exception in both capital cases and non-capital cases was originally limited to retained counsel. *Amendments to Florida Rules Criminal Procedure 3.851, 3.852, & 3.993*, 772 So.2d 488, 495 (Fla. 2000) (providing in rule 3.851(d)(1)(A)(iii), “the defendant retained counsel to timely file a 3.851 motion and counsel, through neglect, failed to file the motion”). But the rules were later amended to cover all types of state postconviction counsel. *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Florida Rule of Judicial Admin. 2.050*, 797 So.2d 1213, 1227 (Fla. 2001) (deleting any reference to retained counsel).

The exception, however, should only be applied to initial postconviction motions, not to successive postconviction motions. It is understandable to excuse a late filing of an initial postconviction motion, as it is the defendant’s first and main opportunity to raise critical claims such as ineffectiveness of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Brady* claims. Additionally,

initial postconviction motions are the context in which a capital defendant is most likely to be granted an evidentiary hearing on his claims. But it is quite another thing to excuse a late filing in the context of successive postconviction motions that can be filed decades after the conviction, such as the eighth successive motion filed 25 years after the direct appeal in the recent case of *Sweet v. State*, 293 So.3d 448 (Fla. 2020), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020). Allowing the exception for attorney neglect to be invoked without any limitation would undermine the one-year time limitation in the rule to an extent that allowing the exception in the initial postconviction context typically would not. As this Court has previously observed regarding this exception, the exception would swallow the rule altogether if it is read in an expansive manner. In *Howell v. State*, 145 So.3d 774, 775 (Fla. 2013), this Court affirmed a summary denial of a successive postconviction motion and rejected a limitless interpretation of the exception for attorney neglect in rule 3.851(d)(2)(C), in part, because a defendant would “never face any time limitation” because the inmate could always assert that

postconviction counsel neglected to raise a claim. Opposing counsel's interpretation of rule 3.851(d)(2)(C) as being properly applied to successive postconviction motions would similarly tend to negate the time limit in postconviction litigation. The exception should be limited to initial postconviction motions.

It is perfectly proper to limit exceptions to initial postconviction motions and refuse to allow the same exception in the context of successive postconviction motions. For example, in federal habeas litigation, the Supreme Court has created an exception to a procedural bar for certain ineffective assistance of counsel claims but that exception only applies to initial habeas petitions, not to successive habeas petitions.⁴ This Court should likewise limit the exception to

⁴ *Martinez v. Ryan*, 566 U.S. 1, 8-9 (2012) (explicitly limiting the new “narrow” equitable exception to “initial-review collateral proceedings”); *id.* at 16 (explaining that the new exception “does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance of trial counsel”); *See also Lambrix v. Sec’y, Fla. Dep’t of Corr.*, 756 F.3d 1246, 1260 (11th Cir. 2014) (explaining that *Martinez* is “expressly limited to attorney errors in initial-review collateral proceedings” and “does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review” quoting *Martinez*, 566 U.S. at 16); *Luciano v. Sec’y, Dep’t of Corr.*,

the time limitation for attorney neglect in rule 3.851(d)(2)(C) to initial postconviction motions.

Opposing counsel's reliance on the federal habeas statute, 28 U.S.C. § 2255, as well as *Holland v. Florida*, 560 U.S. 631 (2010), and *Maples v. Thomas*, 565 U.S. 266 (2012), is seriously misplaced. IB at 22-28. *Holland* and *Maples* may not be used to reopen a closed initial habeas petition or to file a successive habeas petition. *Howell v. Sec'y, Fla. Dep't Corr.*, 730 F.3d 1257, 1261 (11th Cir. 2013) (holding *Holland* does not warrant reopening a closed initial habeas petition); 28 U.S.C. § 2244(b)(2)(A) (limiting successive habeas petitions to new constitutional rights that the Supreme Court itself has made retroactive). *Maples* does not apply in successive federal habeas litigation. Federal habeas litigation supports the State's position that rule 3.851(d)(2)(C) should not apply to successive postconviction motions in state court.

701 Fed. Appx. 792, 793 (11th Cir. 2017) (explaining that *Martinez* did not concern attorney errors in proceedings other than initial postconviction proceedings and it does not extend to other proceedings, including appeals from initial-review collateral proceedings or successive collateral proceedings).

Limiting the exception in capital cases to initial postconviction motions would also bring the capital exception in rule 3.851(d)(2)(C), more in line with the similar non-capital exception in rule 3.850(b)(3). Rule 3.850 has a time limit of two years for invoking the exception for attorney neglect that rule 3.851 does not. *Seme v. State*, 327 So.3d 383 (Fla. 3d DCA 2021) (dismissing a petition as time-barred under rule 3.850(b)(3), because it was filed beyond the two-year limit), *review dismissed*, SC21-1584, 2021 WL 5317230 (Fla. Nov. 16, 2021). At very least, this Court should adopt a one-year time limit for invoking rule 3.851(d)(2)(C).

Opposing counsel attempts to create a right to effective state postconviction counsel based on due process, but both the United States Supreme Court and this Court have repeatedly held there is no right to effective assistance of postconviction counsel.⁵ IB at 35.

⁵ *Asay v. State*, 210 So.3d 1, 28 (Fla. 2016) (noting that this Court “has repeatedly held that defendants are not entitled to effective assistance of collateral counsel” citing *Gore v. State*, 91 So.3d 769, 778 (Fla. 2012), and *Zack v. State*, 911 So.2d 1190, 1203 (Fla. 2005)); *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002); *Lambrix v. State*, 698 So.2d 247, 248 (Fla.1996); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding generally there is “no constitutional right to effective assistance of counsel in state collateral proceedings”); *Murray v.*

There is no due process right to effective postconviction counsel either. It is the Sixth Amendment that is the source of the constitutional right to counsel, not the due process clause. A specific constitutional provision, such as the Sixth Amendment right to counsel, controls over the general due process clause.⁶

Contrary to opposing counsel's argument, being unqualified under rule 3.112(k) does not automatically amount to ineffectiveness *per se*, as opposing counsel implicitly asserts. *cf. Young v. Runnels*, 435 F.3d 1038 (9th Cir. 2006) (holding the state bar court's subsequent finding of unfitness did not amount to *per se* ineffectiveness). Courts do not assume ineffectiveness or attorney neglect merely from the failure to meet minimum qualifications.

Giarratano, 492 U.S. 1, 10 (1989) (same in capital cases).

⁶ *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under that specific provision, not under the more general due process clause); *Graham v. Connor*, 490 U.S. 386, 394 (1989); *United States v. Hano*, 922 F.3d 1272, 1288 (11th Cir. 2019) (rejecting an argument that the Due Process Clause provides defendants with a right to confront witnesses more expansive than the Confrontation Clause itself and analyzing the claim under the specific constitutional provision, not under procedural due process citing *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019)).

Cronic itself involved a young real estate attorney, who had never tried a case, being assigned to handle a complex federal criminal case in a mail fraud prosecution, with over 12 counts, involving a nearly 10 million dollar “check kiting” scheme, within 25 days. *United States v. Cronic*, 466 U.S. 648 (1984). Yet, the High Court refused to just assume his inability to handle a federal criminal trial, observing that every experienced criminal defense attorney once tried his first criminal case. *Id.* at 665. And regardless of Shea’s qualifications, CCRC-N counsel Berry was qualified but did not file a successive postconviction motion raising these same claims either.

No attorney neglect

Alternatively, the exception in rule 3.851(d)(2)(C) does not apply. There was no attorney neglect from not filing the successive postconviction motion earlier. There was no deficient performance by either postconviction counsel Shea or Berry because all the claims raised in the successive motion were losers. Both issues are barred by the law of the case doctrine, as will be explained in greater detail, and neither of the two prior postconviction counsel were ineffective or

neglectful for recognizing this. The claim of relative culpability is also meritless both legally and factually under traditional relative culpability principles, which would have applied in 2019, which is when the motion based on Thomas' final sentence would have been due, as well as in 2016, which is approximately when the motion based on Thomas' confession to being the triggerman would have been due. As will be explained in detail in ISSUE II, the claim is meritless under traditional relative culpability analysis. The Eighth Amendment claim is equally meritless. And neither of the two prior postconviction counsel were ineffective or neglectful for recognizing this.

There was no neglect by prior postconviction counsel from not raising these meritless claims. *Hilton v. State*, 326 So.3d 640, 651 (Fla. 2021) (explaining that "counsel cannot be considered ineffective for failing to raise a meritless argument" citing *Matthews v. State*, 288 So.3d 1050, 1065 (Fla. 2019), and *Raleigh v. State*, 932 So.2d 1054, 1064 (Fla. 2006)); *Sheppard v. State*, 338 So.3d 803, 831 (Fla. 2022) (appellate counsel cannot be ineffective for failing to bring a meritless claim citing *Breedlove v. Singletary*, 595 So.2d 8, 11 (Fla. 1992)). This

really amounts to a dispute between former CCRC-N lead counsel and current CCRC-N lead counsel about the viability of these particular postconviction claims.

There was no neglect, even if the exception in rule 3.851(d)(2)(C) is applied in the successive postconviction context, which it should not be.

The successive postconviction motion remains untimely regardless of the exception for attorney neglect in 3.851(d)(2)(C).

ISSUE II

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE POSTCONVICTION CLAIM OF NEWLY DISCOVERED EVIDENCE OF RELATIVE CULPABILITY BASED ON THE JUVENILE CO-PERPETRATOR'S RESENTENCING (Restated)

Sanchez-Torres asserts a claim of newly discovered evidence of disproportionality based on his juvenile co-perpetrator's second resentencing. Years after the direct appeal of this case, the juvenile co-perpetrator's sentence was reduced from a life sentence to 40-years incarceration with review after 15 years. Sanchez-Torres argues that

his death sentence is disproportionate to the co-perpetrator's reduced sentence.

But the successive postconviction claim is barred by the law-of-the-case doctrine. Moreover, the underlying claim of relative culpability is not cognizable under this Court's current caselaw. Relative culpability analysis is merely a subset of proportionality review, and under the current law, proportionality review is precluded by the state constitution's conformity clause. *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021). The conformity clause of the state constitution also precludes relative culpability analysis.

Alternatively, the claim would be meritless under traditional relative culpability analysis. The juvenile co-perpetrator was not eligible for the death penalty, as a matter of law, due to his being a minor at the time of the murder. When a co-perpetrator is not eligible for the death penalty, as a matter of law, this Court traditionally did not conduct any relative culpability analysis. Furthermore, Sanchez-Torres was the actual triggerman, so he and Thomas are not equally

culpable. Under a traditional analysis, the claim of newly discovered evidence of relative culpability is meritless both legally and factually. The trial court properly summarily denied the successive postconviction motion.

The postconviction court's ruling

The trial court summarily denied the successive postconviction motion. (2022 Succ. PCA 456-535). Alternatively, the postconviction court found the claims to be “without merit.” (2022 Succ. PCA 461). The trial court assumed that the defendant met the first prong of the test for newly discovered evidence claim established in *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). *Id.* at 462. The trial court assumed that Thomas’ new sentence, Thomas’ recanted statement to being the shooter, the forensic psychological report, and Thomas’ prior bad acts were all not known at the time of the trial.

The trial court noted the Florida Supreme Court’s decision in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), holding that proportionality review was precluded by the state constitution’s

conformity clause relating to the Eighth Amendment. (2022 Succ. PCA 463). The trial court then explained that, because relative culpability analysis was an “aspect” of proportionality review, the constitutional claim was “without merit.” *Id.* at 463.

The trial court also performed a traditional relative culpability analysis noting that, when the co-perpetrator’s sentence is reduced to life because the co-perpetrator is not eligible for a death sentence “as a matter of law,” then a claim of newly discovered evidence fails the second prong of *Jones*. (2022 Succ. PCA 463-464 citing *Farina v. State*, 937 So.2d 612, 619 (Fla. 2006)). The trial court rejected any exception to the traditional analysis based on mandatory versus discretionary sentencing. The trial court explained that when the co-perpetrator’s sentence is “purely a matter of law,” whether discretionary or not, the rule of *Farina* applies. (2022 Succ. PCA 464 citing *Farina*, 937 So.2d at 618-20). The trial court noted that Thomas’ life sentence was reduced based on the purely legal reason of complying with *Miller v. Alabama*, 567 U.S. 460 (2012). The trial

court also stated that Thomas' reduced sentence was "irrelevant to the mitigating circumstances" in this case. *Id.* at 464.

The trial court also noted that the sentencing judge had noted that Thomas' jury had determined that he was not the shooter, and therefore, Thomas was not equally or more culpable than Sanchez-Torres. (2022 Succ. PCA 464-465).⁷ And therefore, Thomas' new sentence would not produce a less severe sentence, as required by *Jones*. *Id.* at 465.

Regarding Thomas' recanted sworn statement to being the shooter, the trial court found the claim to be barred by issue preclusion.⁸ The trial court noted that Thomas' sworn statement was raised as a claim in the initial postconviction motion and that the trial court was aware

⁷ Judge Skinner presided over Thomas' trial and the resentencings; Judge Skinner also presided at Sanchez-Torres' plea and bench penalty phase, as well as the initial postconviction litigation. Judge Don Lester, however, presided over this successive postconviction litigation. (2022 Succ. PCA at 463).

⁸ Issue preclusion bars the relitigation of matters that were actually litigated and decided in a prior suit. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Grusky*, 763 So.2d 1206, 1207 (Fla. 3d DCA 2000); *Islam v. Sec'y, Dep't of Homeland Sec.*, 997 F.3d 1333, 1341 (11th Cir. 2021) (explaining that "issue preclusion forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit").

that Thomas had recanted that statement at the time.⁹ The trial court noted that it had rejected the claim concluding that Thomas' sworn statement to being the actual shooter would not have resulted in a lesser sentence because triggerman status was not the basis for Sanchez-Torres' death sentence. (2022 Succ. PCA 466).

The trial court concluded that Thomas' forensic psychological report diagnosing him with antisocial personality disorder and his prior bad acts were not relevant to Sanchez-Torres' sentence because neither was relevant to Sanchez-Torres' character or the circumstances of the crime. (2022 Succ. PCA 466). The trial court again noted that Sanchez-Torres' triggerman status was not the basis for his death sentence, and therefore, any evidence tending to prove that Thomas was more likely to be the actual triggerman based on his history of violence, was "irrelevant." The trial court then summarily denied the successive motion.

⁹ The claim regarding Thomas' sworn statement to being the triggerman was Claim 8 in the Sanchez-Torres' initial postconviction proceedings in the trial court. Sanchez-Torres did not raise that issue in the initial postconviction appeal, however. *Sanchez-Torres*, 322 So.3d at 19 (listing the issue raised in the postconviction appeal as being three claims of ineffective assistance of trial counsel).

Standard of review

The standard of review of a summary denial of a successive postconviction motion is *de novo*. *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (stating this Court reviews the postconviction court's decision to summarily deny a successive postconviction motion *de novo* citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)); *Sweet v. State*, 293 So.3d 448, 451 (Fla. 2020) (citing *Long v. State*, 183 So.3d 342, 344 (Fla. 2016)), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020).

Summary denials of successive postconviction claims

It is proper for a postconviction court to summarily deny postconviction claims that are not retroactive, procedurally barred, untimely, not truly new evidence, refuted by the existing record, or meritless under controlling precedent. *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds), *cert. denied*, *Bogle v. Florida*, 141 S.Ct. 389 (2020); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (stating a court may summarily deny a postconviction

claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)); *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, *Rodgers v. Florida*, 141 S.Ct. 398 (2020); *Asay v. State*, 210 So.3d 1, 22–23 (Fla. 2016) (affirming the summary denial of a newly discovered evidence claim and observing that “merely obtaining a new expert to review the same records does not create newly discovered evidence” and noting that new opinions or new research studies have routinely been rejected as newly discovered evidence citing *Henry v. State*, 125 So.3d 745, 750–51 (Fla. 2013)); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (noting because the claims were purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief).

The two substantive claims raised on appeal are barred, untimely, and meritless. Therefore, the postconviction court properly summarily denied the successive postconviction motion.

Barred by the law-of-the-case doctrine

This claim is barred by the law-of-the-case doctrine because it was addressed by this Court in the direct appeal. *Sanchez-Torres v. State*, 130 So.3d 661, 674-76 (Fla. 2013). Under the law-of-the-case doctrine, any questions of law actually decided in a prior appeal governs the case through all subsequent stages of the proceedings in both the trial court and the appellate court. *Delta Prop. Mgmt. v. Profile Investments, Inc.*, 87 So.3d 765, 770 (Fla. 2012) (concluding that the law-of-the-case doctrine is not applicable to a legal question that was not decided on appeal, distinguishing the law-of-the-case doctrine from the doctrine of res judicata, and reaffirming *Fla. Dep't of Trans. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001)). The law-of-the-case doctrine is designed to prevent “the same parties from relitigating issues that have already been fully litigated and determined.” *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003)). The doctrine applies to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047 (Fla. 1st DCA 2015) (citing *McBride*, 848 So.2d at 290-91).

In the direct appeal, this Court conducted a proportionality review of Sanchez-Torres' death sentence. *Sanchez-Torres*, 130 So.3d at 674-76. This Court noted that the trial court found two aggravating circumstances: 1) the prior violent felony which was based on a prior murder and which was given great weight by the trial court; and 2) commission of the murder during the course of a robbery, which was merged with pecuniary gain and also given great weight. *Id.* at 675. This Court noted that Sanchez-Torres had confessed to the prior murder which had taken "place less than two months before the murder in this case." *Id.* This Court observed that "no mental health mitigation was presented or found." *Id.* This Court concluded that Sanchez-Torres' death sentence was proportional. *Id.* at 676.

This Court also rejected a "relative culpability proportionality analysis" claim between Sanchez-Torres' death sentence and his juvenile co-defendant's then life sentence "because codefendant Thomas was seventeen at the time of the crime and therefore ineligible for the death penalty." *Sanchez-Torres*, 130 So.3d at 675, n.5.

That co-perpetrator Thomas was later resentenced to a term of years does not change this Court's analysis regarding relative culpability one iota. Opposing counsel argues that, while both perpetrators initially respectively received the maximum sentence under the law, somehow Thomas' resentencing changes that calculus. But this Court has never considered maximum sentencing as part of its traditional relative culpability analysis. Opposing counsel's maximum sentencing argument is a non-sequitur in any traditional analysis.

Moreover, Thomas' prior sentence of life without parole being the maximum possible sentence for him was not the basis of this Court's decision in the direct appeal rejecting the relative culpability claim either. The basis for Court's decision in the direct appeal was the prohibition on sentencing minors to death established in *Roper v. Simmons*. It was Thomas' age at the time of murders which rendered him ineligible for the death penalty which was critical to this Court's decision, not the length of his sentence. And Thomas's age at the time of the murder and his ineligibility for the death penalty remains the

same regardless of any resentencing. So, the resentencing does not change the applicability of the law-of-the-case doctrine.

Furthermore, the two later resentencings were a consequence of a subsequent Eighth Amendment case from the United States Supreme Court decided after the direct appeal which rendered Thomas ineligible for a life without parole sentence. Thomas received his two resentencings based on *Miller v. Alabama* and *Horsley v. State*, 160 So.3d 393, 395 (Fla. 2015). So, it was the Eighth Amendment that limited Thomas' sentence and prohibited him from being sentenced to life due to his being a juvenile. But being ineligible first for a death sentence and then ineligible for a life without parole sentence due to age does not change this Court's legal analysis in the direct appeal opinion regarding relative culpability at all. The claim remains barred by the law-of-the-case doctrine, despite the resentencings.

Merits

The claim is meritless under the current law of *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021), as well as under a traditional relative culpability analysis.

Not cognizable under current law

Relative culpability claims are not cognizable in the wake of this Court's decision in *Lawrence*. In *Lawrence*, this Court held that the conformity clause of the state constitution precludes proportionality review. Art. I, § 17, Fla. Const. The *Lawrence* Court then noted that the United States Supreme Court has held that comparative proportionality review of death sentences is not required by the Eighth Amendment. *Lawrence*, 308 So.3d at 548 (citing *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984)). This Court has consistently refused to conduct proportionality review in the direct appeals of capital cases after deciding *Lawrence*. See, e.g., *Craft v. State*, 312 So.3d 45, 52, n.3 (Fla. 2020) (refusing to review the proportionality of the death sentence citing *Lawrence*), *cert. denied*, *Craft v. Florida*, 142 S.Ct. 490 (2021); *Hojan v. State*, 307 So.3d 618, 625 (Fla. 2020) (same citing

Lawrence); *Joseph v. State*, 336 So.3d 218, 227 n.5 (Fla. 2022) (same citing *Lawrence*). *Lawrence* is now the well-established law of Florida.

Relative culpability analysis is merely a subset of proportionality review. *McCloud v. State*, 208 So.3d 668, 693 (Fla. 2016) (Canady, J., dissenting in part) (explaining that because relative culpability is an aspect of comparative proportionality review, it is precluded by the conformity clause). Just as the conformity clause of the state constitution precludes proportionality review, the conformity clause of the state constitution also precludes relative culpability analysis. Art. I, § 17, Fla. Const.

Opposing counsel may not rely on the concept of newly discovered evidence under *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). *Jones* does not apply at all to non-cognizable claims. One cannot have newly discovered evidence of a non-cognizable claim.

Additionally, Thomas was resentenced due to *Miller v. Alabama* and *Horsley v. State*, 160 So.3d 393 (Fla. 2015). *Miller* and *Horsley*, however, are not new “evidence;” rather, they are new cases. This claim is being raised as a claim of newly discovered evidence to avoid

retroactivity. Successive claims premised on new caselaw should not be entertained unless the new case is determined to be retroactive, as required by the rule. Fla. R. Crim. P 3.851(d)(2)(B) (providing: “No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges” . . . “the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively”). *Jones* and the concept of newly discovered evidence do not apply to changes in the law.

Furthermore, this Court’s relative culpability analysis never made much sense anyway. Traditionally, relative culpability analysis seems to have been improperly limited to the defendant’s and the co-perpetrator’s respective roles in the crime when their respective sentences may well have been the result of other considerations. Even if their roles were exactly the same, a co-perpetrator’s lesser sentences may have been a result of his lesser aggravation or his greater mitigation. *Jeffries v. State*, 222 So.3d 538, 547 (Fla. 2017) (observing, that even assuming that the same aggravating

circumstances would apply to both a defendant and codefendant, the codefendant might present very different mitigation than the defendant). For example, a co-perpetrator may have significant mental mitigation that the defendant does not. *Sanchez-Torres*, 130 So.3d at 675 (noting, as part of proportionality review, that no mental mitigation was presented or found). Alternatively, a co-perpetrator may have had no prior criminal history when the defendant may have a violent criminal history. *Sanchez-Torres*, 130 So.3d at 675 (noting, as part of proportionality review, that the defendant had confessed to a prior murder used to support the prior violent felony aggravator which had taken “place less than two months before the murder in this case”). And this case is an example of just that. *Sanchez-Torres* had committed another murder just months before this murder but Thomas had no significant prior criminal history. Even if their roles in the murder had been similar (which they were not), *Sanchez-Torres* had killed before; whereas, Thomas had not. It is perfectly reasonable to sentence a recidivist murderer to death while sentencing an equally culpable co-perpetrator, in terms of their respective roles in the

murder, but who is not a recidivist killer, to a life sentence. Relative culpability analysis always was a flawed concept.

But regardless of its intellectual validity, relative culpability claims, like disproportionality claims, are not cognizable under current law of *Lawrence* and the state constitution conformity clause.

Traditional relative culpability analysis

Alternatively, even if the claim was timely and was not barred by the law of the case, it would be meritless under this Court's traditional relative culpability principles. *Bargo v. State*, 331 So.3d 653, 665 (Fla. 2021) (declining to address whether relative culpability analysis survived *Lawrence*, because the claim would fail even under this Court's pre-*Lawrence* caselaw). The reasoning of *Bargo* applies equally to this claim. This claim is meritless both legally and factually under this Court's traditional relative culpability principles.

Under the prior law, when this Court performed proportionality review and relative culpability analysis, this Court would not perform any relative culpability analysis, if the co-perpetrator was ineligible for the death penalty as a matter of law, such as due to age or intellectual

disability. *Walton v. State*, 246 So.3d 246, 252 (Fla. 2018) (refusing to perform a relative culpability analysis when the co-perpetrator receives lesser sentences “due to purely legal reasons” which have “no connection to the nature or circumstances of the crime or to the defendant’s character or record citing *Farina v. State*, 937 So.2d 612, 619 (Fla. 2006).¹⁴ Indeed, this Court recently rejected a claim of relative culpability because the two co-perpetrators were juveniles relying on the direct appeal opinion in this case as support. *Bargo v. State*, 331 So.3d 653, 665 & n.6 (Fla. 2021) (explaining that relative culpability review is “inapplicable” with respect to the two juvenile co-perpetrators given their ineligibility for the death penalty” citing *Sanchez-Torres v. State*, 130 So.3d 661, 675 n.5 (Fla. 2013)); *see also Archer v. State*, 293 So.3d 455, 457 (Fla. 2020) (rejecting a claim of newly discovered evidence of relative culpability based on a juvenile

¹⁴ *See also McCloud v. State*, 208 So.3d 668, 689, n.5 (Fla. 2016) (noting that the co-perpetrator was found to be intellectually disabled, rendering him ineligible for the death penalty and therefore, the co-perpetrator’s sentence was not a basis for concluding that McCloud’s death sentences were disparate); *Jeffries v. State*, 222 So.3d 538, 547 (Fla. 2017) (noting a co-perpetrator could be rendered ineligible for the death penalty by age or intellectual disability, and, if so, a relative culpability analysis would not be performed by the Court).

co-perpetrator's resentencing due to *Miller v. Alabama* agreeing with the trial court's reasoning that the *Miller* resentencing was done "for purely legal reasons" and therefore, had "no bearing on Archer's culpability" citing *Farina v. State*, 937 So.2d 612, 620 (Fla. 2006)), *cert. denied*, *Archer v. Florida*, 141 S.Ct. 1397 (2021). It was this logic that this Court followed in the direct appeal to reject the claim of relative culpability, and this Court would reach the same result today, applying those traditional principles, ignoring the current law of *Lawrence*.

Thomas was not eligible for the death penalty due to his age, under *Roper v. Simmons*, because he was 17 years old on the date of the murder. Therefore, traditional relative culpability analysis is "inapplicable" in this case. And being wrapped in a cloak of newly discovered evidence based on a later resentencing or a recanted confession does not change that legal conclusion in any manner.

Furthermore, even if Thomas had been an adult at the time of the murder, this claim of relative culpability would fail based on the facts. Sanchez-Torres and Thomas are not equally culpable. Sanchez-Torres

was the actual triggerman.¹⁵ Thomas’ jury made a specific finding by special verdict that he did not possession the firearm and therefore, was not the triggerman. And then the judge at Thomas’ second resentencing, who was also the judge who sentenced Sanchez-Torres to death, found that Thomas “was not the shooter.” (1704-1712, 1708). Judge Skinner found that Thomas “did not actually kill Colon” and was not “a major participant” in the murder.

Furthermore, Sanchez-Torres originally confessed in writing to being the actual shooter shortly after the murder but then recanted. *Sanchez-Torres*, 130 So.3d at 664-65 (Fla. 2013).

Sanchez-Torres and Thomas are not equally culpable and therefore, any claim of relative culpability would fail factually, even if Thomas had been an adult.

¹⁵ *Bargo v. State*, 331 So.3d 653, 665 (Fla. 2021) (noting this Court’s pre-*Lawrence* caselaw, generally rejected claims of relative culpability raised by the “triggerman” citing *Blake v. State*, 972 So.2d 839, 849 (Fla. 2007)); *Melton v. Jones*, 2018 WL 566451 (Fla. Jan. 26, 2018) (denying a relative culpability claim because Melton was the admitted triggerman); *Hannon v. State*, 228 So.3d 505, 510 (Fla. 2017) (denying a relative culpability claim because the defendant was more culpable than his codefendants because he was both the “triggerman” and the “knifeman”).

This particular claim of relative culpability would still be without merit even using this Court's traditional relative culpability principles, both legally and factually.

The claim of relative culpability is meritless under traditional relative culpability analysis and not even cognizable under the current law of *Lawrence*.

ISSUE III

WHETHER THE EIGHTH AMENDMENT REQUIRES RELATIVE CULPABILITY ANALYSIS AMONG CO-PERPETRATORS (Restated)

Sanchez-Torres asserts that the federal constitution requires relative culpability analysis among co-perpetrators in capital cases. This claim is barred by the law-of-the-case doctrine and is untimely. On the merits, Sanchez-Torres' position that the Eighth Amendment requires relative culpability analysis is extraordinary in light of *McCleskey v. Kemp*, 481 U.S. 279 (1987), and *Pulley v. Harris*, 465 U.S. 37 (1984). And this Court recently held that proportionality review was prohibited by the state constitution in *Lawrence v. State*, 308 So.3d

544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021). Because relative culpability analysis is merely a species of proportionality review, the state constitution also prohibits relative culpability analysis. The Eighth Amendment does not require relative culpability analysis among co-perpetrators any more than it requires proportionality review. Furthermore, Thomas' lesser sentence, recanted confession, forensic psychological report, and prior criminal history is not mitigation at all as to Sanchez-Torres. None of that evidence meets the constitutional definition of mitigation. Another person's sentence is not an aspect of the defendant's character, record, background, or circumstances of the offense. The United States Supreme Court recently held similar propensity evidence was not admissible as mitigation in *United States v. Tsarnaev*, 142 S.Ct. 1024 (2022). The trial court properly summarily denied this Eighth Amendment claim.

The postconviction court's ruling

The trial court summarily denied the successive postconviction motion. (2022 Succ. PCA 456-535). The trial court noted the Florida Supreme Court's decision in *Lawrence v. State*, 308 So.3d 544 (Fla. 2020), holding that proportionality review was precluded by the conformity clause. (2022 Succ. PCA 463 citing *Hojan v. State*, 307 So.3d 618, 625 (Fla. 2020)). The trial court then explained that because relative culpability analysis was an "aspect" of proportionality review, the constitutional claim was "without merit." *Id.* at 463.

The trial court also concluded that the forensic psychological report and Thomas' prior bad acts were not relevant to Sanchez-Torres' sentence because neither was relevant to Sanchez-Torres' character or the circumstances of the crime. (2022 Succ. PCA 466). The trial court again noted that Sanchez-Torres' triggerman status was not the basis for his death sentence, and therefore, any evidence tending to prove that Thomas was more likely to be the actual triggerman based on his history of violence, was "irrelevant." *Id.* at 466.

Standard of review

The standard of review of a summary denial of a successive postconviction motion is *de novo*. *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (stating this Court reviews the postconviction court's decision to summarily deny a successive postconviction motion *de novo* citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)); *Sweet v. State*, 293 So.3d 448, 451 (Fla. 2020) (citing *Long v. State*, 183 So.3d 342, 344 (Fla. 2016)), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020).

And an Eighth Amendment claim is a pure issue of law which is also reviewed *de novo*. *Taylor v. State*, 246 So.3d 204, 206 (Fla. 2018) (stating that issues of the requirements of the Sixth Amendment and Eighth Amendment are issues that “present purely legal questions, which we review *de novo*”).

Barred by the law-of-the-case doctrine

This claim is also barred by the law-of-the-case doctrine because it was addressed by this Court in the direct appeal. In the direct appeal, this Court conducted a relative culpability analysis under

state law. *Sanchez-Torres v. State*, 130 So.3d 661, 675. n.5 (Fla. 2013). This Court rejected a “relative culpability proportionality analysis” claim between Sanchez-Torres’ death sentence and his juvenile co-defendant’s then life sentence “because codefendant Thomas was seventeen at the time of the crime and therefore ineligible for the death penalty.” *Id.* at 675, n.5.

While this Court performed the analysis under state law principles, opposing counsel fails to explain why an Eighth Amendment analysis would yield any different result. Even if there were some differences between state relative culpability analysis and whatever an Eighth Amendment analysis would look like, the actual shooter, no doubt, would be considered more culpable under either standard.

And it is too late for opposing counsel to explain what the differences would be in the reply brief when the State will not have an opportunity to respond. *Sparre v. State*, 289 So.3d 839, 849 (Fla. 2019) (holding an issue was not preserved for appeal when postconviction counsel did not formally raise the subclaim until the post-evidentiary hearing written closing arguments, but “by then, it was too late for the

State to respond” because the written closing arguments were filed simultaneously). The claim is barred by the law-of-the-case doctrine.

Untimely

The Eighth Amendment claim is untimely. A postconviction motion must be filed within one year of the conviction and sentence becoming final. Fla. R. Crim. P. 3.851(d)(1) (providing: “Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final.”). Sanchez-Torres’ convictions and sentences become final on February 25, 2014, the day after the United States Supreme Court denied the petition for writ of certiorari in the direct appeal. *Sanchez-Torres v. Florida*, 571 U.S. 1210 (2014) (No. 13-7735). Any timely postconviction claim was due on February 25, 2015, but this claim was not filed until November of 2020. The claim is over five years late.

And none of the exceptions in the rule applies. Rule 3.851(d)(2)(A) does not apply to this purely legal claim. Nor does Rule 3.851(d)(2)(B)

apply. Rule 3.851(d)(2)(B), provides: “No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges” . . . “the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively.” But there is no United States Supreme Court case holding that the Eighth Amendment requires relative culpability analysis among co-perpetrators. Indeed, the last time the Supreme Court directly addressed this issue was in 1984 in *Pulley v. Harris*, 465 U.S. 37 (1984). Unless and until the United States Supreme Court holds that the Eighth Amendment requires relative culpability analysis among co-perpetrators, Sanchez-Torres cannot raise this claim in a successive postconviction motion, under 3.851(d)(2)(B). Nor does the exception in 3.851(d)(2)(C) for attorney neglect apply. As previously explained, the exception in (C) should be limited to a total failure to file an initial postconviction motion.

The Eighth Amendment claim is untimely.

Merits

As this Court has stated, there is no basis in Supreme Court caselaw for holding that comparative proportionality review by an appellate court is required in capital cases. *Lawrence*, 308 So.3d at 548 (quoting *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984)); *see also Murray v. Giaratano*, 492 U.S. 1, 9 (1989) (declining to hold that the Eighth Amendment required appellate courts to perform proportionality review of death sentences); *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990) (noting that “proportionality review is not constitutionally required”). And there is, likewise, no basis in Supreme Court case law for the view that the Eighth Amendment requires relative culpability analysis among co-perpetrators in capital cases. Relative culpability analysis is merely a species of proportionality review that, instead of comparing the defendant’s sentences to all other death sentences in a state, compares that sentence to the co-perpetrator’s sentence.

In *McCleskey v. Kemp*, 481 U.S. 279, 306-07, (1987), the Supreme Court directly stated that a capital defendant cannot “prove a constitutional violation by demonstrating that other defendants who

may be similarly situated did not receive the death penalty.” *See also United States v. Johnson*, 495 F.3d 951, 960-61 (8th Cir. 2007) (rejecting, in a Federal Death Penalty Act (FDPA) prosecution, a claim that the Eighth Amendment requires relative culpability analysis between co-perpetrators citing *McCleskey* and observing one “cannot expect that two different juries” to “necessarily reach the same verdict” regarding sentencing¹⁶ but also noting that, while the evidence regarding the crime and aggravators was the same in both co-perpetrators’ trials, the mitigation of the two co-perpetrators may have been different); *Hatch v. Oklahoma*, 58 F.3d 1447, 1466-67 (10th Cir. 1995) (holding that the Eighth Amendment does not require co-perpetrators’ sentences to be proportional to one another citing *Pulley v. Harris* and *McCleskey*); *United States v. Higgs*, 353 F.3d 281, 327 (4th Cir. 2003) (rejecting, in an FDPA prosecution, a relative culpability as mitigation claim where the co-perpetrator, who was the actual triggerman, received a life sentence).

¹⁶ Thomas was tried by a jury who determined by special verdict he did not possess the gun and therefore, was not the triggerman but Sanchez-Torres entered a guilty plea and had a bench penalty phase before Judge Skinner.

The only Eighth Amendment requirement regarding co-perpetrators is that of *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). But both of those decisions looked at the defendant's own role and his personal intentions, not at a co-perpetrator's role or to a co-perpetrator's lesser sentence. The *Enmund* Court stated that the "question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct." *Enmund*, 458 U.S. at 798 (emphasis added). The High Court wrote that "focus must be on *his* culpability," not on that of the co-perpetrators. *Id.* at 798 (emphasis in original). Enmund was the get-away driver, not the triggerman. *Id.* at 784. It was the two other co-perpetrators who robbed and shot the elderly victims in their home. "We must focus on 'relevant facets of the character and record of the individual offender.'" *Id.* at 798. Executions very much depend on the degree of the defendant's culpability—what the defendant's "intentions, expectations, and actions were," and "the degree of his criminal culpability." *Id.* at 800. The *Enmund* Court stated that the defendant's "culpability must be

limited to his participation” and “his punishment must be tailored to his personal responsibility and moral guilt.” *Id.* at 801 (emphasis added). None of that logic depends in any manner on the co-perpetrators, much less on a co-perpetrator’s lesser sentence.

In *Tison*, the brothers, along with their uncle, all armed with guns, helped their father and another inmate escape from an Arizona prison. *Tison*, 481 U.S. at 139-140. Their father and the other inmate murdered a family of four to further their escape. The brothers were not the triggermen but both were sentenced to death. *Id.* at 140-41, 143. The issue, according to the High Court, was “whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life” but who was not the triggerman. *Id.* at 152. The *Tison* Court spoke of a “critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime.” *Id.* at 156 (emphasis added). The Court looked at the brothers’ “own personal involvement in the crimes” which was “not

minor” but “substantial” and focused their “degree of participation” in the underlying felony. *Id.* at 158 (emphasis added). Both brothers were “actively involved” in every part of the underlying kidnappings and robbery of the family. The *Tison* Court then held that “major participation” in the felony committed, “combined with reckless indifference to human life,” is sufficient culpability to be sentenced to death.” *Id.* at 158. The Court affirmed the death sentences for both non-triggerman.

Enmund and *Tison* look at the defendant’s own conduct and his intentions against an objective standard of major participation in the crime combined with reckless indifference to human life, not against that of the co-perpetrators, much less against the co-perpetrator’s sentence.

Neither *Enmund* or *Tison* lend any support to a relative culpability requirement. The Eighth Amendment does not require relative culpability analysis. The trial court properly denied this federal constitutional claim.

Proposed evidence is not mitigation

Far from requiring relative culpability analysis based on a co-perpetrator's lesser sentence, or a co-perpetrator's forensic psychological report or a co-perpetrator's criminal history, it is unlikely that the Eighth Amendment even requires the admission of such evidence as mitigation in the penalty phase.

This Court has recognized that not all evidence proposed by a defendant as mitigation is actually mitigating. This Court has stated that proposed mitigation may be rejected as a matter of law, if it is not “truly of a mitigating nature.” *Kaczmar v. State*, 228 So.3d 1, 13–14 (Fla. 2017) (stating that a trial court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant and “whether, in the case of nonstatutory factors, it is truly of a mitigating nature” quoting *Harris v. State*, 843 So.2d 856, 869 (Fla. 2003)); *Fletcher v. State*, 168 So.3d 186, 219 (Fla. 2015) (explaining a trial court does not abuse its discretion if it rejects proposed mitigation, if it explains why a proposed nonstatutory mitigating factor is not truly mitigating). Residual doubt, for example, is not mitigation in the United States Supreme Court's view. *Oregon v. Guzek*, 546 U.S.

517, 523-24 (2006); *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988). This Court agrees that lingering doubt is not proper mitigation. *Lukehart v. State*, 70 So.3d 503, 513 (Fla. 2011) (“Florida does not recognize residual doubt, much less residual doubt as to the aggravators citing *Williamson v. State*, 961 So.2d 229, 237 (Fla. 2007); *Darling v. State*, 808 So.2d 145, 162 (Fla. 2002) (stating that “residual doubt is not an appropriate mitigating circumstance” citing cases). Not everything and anything is mitigation.

A co-perpetrator’s sentence is not mitigation. Another person’s sentence certainly does meet the constitutional definition of mitigation which is “any aspect of the defendant’s character, record, background, or circumstances of the offense” that would mitigate against the imposition of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 601 (1978) (plurality) (stating “the sentencing process must permit consideration of the ‘character and record of the individual offender and the circumstances of the particular offense’”); *id.* at 604 (stating that the sentencer not be precluded from considering, as a mitigating factor, “any aspect of a defendant’s character or record and any of the

circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”)¹⁷ But the *Lockett* Court also stated in a footnote to its definition of mitigation, that “nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.” *Lockett*, 438 U.S. at 604 n.12 (emphasis added). *Lockett* “does not mean that the defense has carte blanche to introduce any and all evidence that it wishes.” *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir. 2005); *Owens v. Guida*, 549 F.3d 399, 419 (6th Cir. 2008) (quoting *Purkey*).

¹⁷ See also *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (adopting the *Lockett* definition of mitigation as “any aspect of the defendant’s character or record or any circumstances of the offense”); *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (defining mitigation as “evidence relevant to the defendant’s background or character or to the circumstances of the offense that mitigate against imposing the death penalty”); *id.* at 327-28 (stating that the “jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s character or record or the circumstances of the offense”); *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O’Connor, J., concurring) (“We have defined mitigating circumstances as facts about the defendant’s character or background, or the circumstances of the particular offense, that may call for a penalty less than death”).

A co-perpetrator's sentence is not an aspect of defendant's character, record, or background. Nor is it a circumstance of the offense. *cf. Hitchcock v. Sec'y, Fla. Dep't. of Corr.*, 745 F.3d 476, 483 (11th Cir. 2014) (holding evidence of a rejected plea offer for a lesser sentence is not a mitigating circumstance "because it sheds no light on a defendant's character, background, or the circumstances of his crime"); *see also Owens v. Guida*, 549 F.3d 399, 419-20 (6th Cir. 2008) (holding a rejected plea offer is not mitigation because it is not related to the defendant's "record" or to the "circumstances of the offense" because "the plea offer says nothing about how the murder was committed"). Mitigation looks at the defendant himself and the crime, not at the sentence of a co-perpetrator.

A lesser sentence for a co-perpetrator simply is not mitigation. As the postconviction court properly concluded in this case, Thomas' reduced sentence was "irrelevant to the mitigating circumstances" in this case.

Opposing counsel's reliance on *State v. Purdy*, 252 So.3d 723 (Fla. 2018), and *Sumner v. Shuman*, 483 U.S. 66 (1987), is misplaced. IB at

69-71. In *State v. Purdy*, this Court noted that counsel for the defendant had pointed to “several gaps and anomalies in the statutory scheme enacted to address the Eighth Amendment issues associated with juvenile sentencing.” *State v. Purdy*, 252 So.3d at 728. This Court noted that Amicus pointed out that the defendant was sentenced for multiple offenses arising from a single criminal episode, but as part of the juvenile review there had been a judicial determination that he was rehabilitated but he was still serving a sentence for the other offenses, despite that finding, which “may” raise Eighth Amendment concerns. *Id.* at 729. While two Justices concluded in a dissent that the “anomaly” was a violation of the Eighth Amendment, the majority did not address that issue. *Id.* at 729 (Pariente, J. dissenting, joined by Justice Larbarga); *id.* at 729, n.2. *Purdy* did not address the Eighth Amendment issue and it certainly did not overrule this Court’s later decision in *Lawrence*.

Nor does *Shuman* advance an argument that the Eighth Amendment requires relative culpability analysis in any manner. The High Court wrote that the Court “has recognized time and again that

the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime.” *Shuman*, 483 U.S. at 79. The Court stated whether the defendant was the primary force in that incident or a nontriggerman would be relevant to his sentence. *Id.* at 87. At no point did the Court compare his role to any other persons. Indeed, there were no other co-perpetrators in the murder. *Id.* at 79, n.7 *Shuman* alone burned the victim to death. *Id.* at 79, n.7 (citing *Shuman v. State*, 578 P.2d 1183, 1184 (Nev. 1978)). *Shuman* has nothing at all to say regarding whether the Eighth Amendment requires relative culpability.

Opposing counsel argues that the sentences imposed on Sanchez-Torres and Thomas are “arbitrary and irrational” because they depended on one being a juvenile and the other being an adult. IB at 73. But Sanchez-Torres’ sentence depended more than on the fact he was a recidivist murderer than on the fact he was an adult at the time of this murder. And regardless, the United States Supreme Court had repeatedly relied on a bright-line rules regarding age and sentences in Eighth Amendment cases, including in capital cases. *Roper v.*

Simmons, 543 U.S. 551, 574 (2005) (stating that the “age of 18 is the point where society draws the line for many purposes between childhood and adulthood” and “we conclude, the age at which the line for death eligibility ought to rest”); *Cruz v. United States*, 826 Fed. Appx. 49, 51 (2d Cir. 2020) (noting “the Supreme Court has repeatedly drawn a bright line at age eighteen for Eighth Amendment limitations on sentencing” citing *Miller v. Alabama*). So, while that is opposing counsel’s view of irrational sentencing, it is not the Supreme Court’s view.

There is nothing arbitrary or irrational about sentencing a recidivist murderer to death. Nor is there anything arbitrary or irrational about taken into account in sentencing, a co-perpetrator being a minor, much less a minor who is not a recidivist murderer.

Recent United States Supreme Court precedent on mitigation

In *United States v. Tsarnaev*, 142 S.Ct. 1024 (2022), the United States Supreme Court, in the Federal Death Penalty Act (FDPA) prosecution of the Boston Marathon bomber, held that the federal district court did not abuse its discretion by excluding evidence

sought to be introduced as mitigation by the defense at the capital sentencing. Tsarnaev and his older brother detonated two homemade pressure-cooker bombs near the finish line of the Boston Marathon killing three people including a young girl and wounding hundreds of others. *Id.* at 1030. Three days later, while fleeing in a stolen SUV, Tsarnaev inadvertently killed his brother by running him over. The jury convicted him of thirty federal crimes and he was sentenced to death for six of those convictions. *Id.* At the sentencing phase, Tsarnaev sought to introduce evidence that the co-perpetrator, his elder brother, masterminded the bombing and had pressured him into participating. *Tsarnaev*, 142 S.Ct. at 1032. He wanted to introduce evidence of an unsolved triple homicide, that had occurred years earlier, in which his brother was a suspect. During the investigation of the bombing, the FBI interviewed a friend of the older brother, who confessed to being involved in the triple homicide but who pointed to his brother as the mastermind and actual killer of all three victims. *Id.* at 1032-33. The friend, however, attacked the FBI agents during the interview and was killed by the agents before he provided a written

confession. *Id.* at 1033. The prosecution filed a motion to exclude all of the evidence regarding the triple homicide from the sentencing phase, arguing it was irrelevant, and alternatively, that it lacked probative value and was likely to confuse the issues. The federal district court granted the motion and excluded the evidence of the triple homicide noting that everyone involved, including the friend who confessed, was dead. Tsarnaev then argued that his older brother was more culpable at the sentencing phase.

The First Circuit reversed the death sentences on two grounds including a finding that the district court abused its discretion when it excluded the evidence regarding the triple homicide from the sentencing phase. *Tsarnaev*, 142 S.Ct. at 1033. The First Circuit concluded the evidence was sufficiently probative of the older brother's ability to influence Tsarnaev. The United States Supreme Court reversed the First Circuit on both grounds. *Id.* at 1033-34. The Supreme Court affirmed the convictions and six death sentences.

Justice Thomas, writing for a seven to three majority on this issue, rejected Tsarnaev's argument that the triple homicide was evidence of

his brother's domineering nature that supported his mitigation defense that his elder brother was the "ringleader." *Tsarnaev*, 142 S.Ct. at 1032, 1037. The Supreme Court found the district court's conclusion that the triple homicide, committed years ago, was "without any probative value" and would be nothing more than "a waste of time" was "reasonable" and not an abuse of discretion. *Id.* at 1033, 1037. The majority noted that the defendant himself had no role in the triple homicide. *Id.* at 1041. And that there was no way to verify any of the relevant facts because all of the parties involved were dead. *Id.* at 1037. The Court rejected the argument that the unsolved triple homicide was highly probative, characterizing it instead as "unreliable." *Id.* at 1039. The Court reasoned that the evidence regarding the triple homicide certainly did not show that, almost two years later, the older brother dominated Tsarnaev in a manner that would mitigate his culpability. *Id.*

Tsarnaev asserted that Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591(c), violates the Eighth Amendment if it excluded any even "marginally" relevant mitigating evidence, relying on both *Lockett*

v. Ohio, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Tsarnaev*, 142 S.Ct. at 1037-38. But the *Tsarnaev* Court found this reading of *Lockett* to be “extreme,” noting that both the Federal Government and the States have the authority to set reasonable limits on the admission of mitigating evidence. *Id.* at 1038. The majority noted that § 3591(c) limits evidence at the sentencing phase to “any matter relevant to the sentence, including any mitigating or aggravating factor.” *Id.* at 1037. But that does not make capital sentencing proceedings “evidentiary free-for-alls.” *Id.* at 1037. The Court explained that § 3593(c) was a “highly permissive regime that allows criminal defendants to introduce a wide range of normally inadmissible evidence” that does not exclude “any category of mitigating evidence.” *Id.* at 1038. Rather, it simply preserves the traditional gatekeeping function of judges to assess relevancy and probative value. The Court rejected the Eighth Amendment challenge to § 3593(c). *Id.* at 1039.

The majority also rejected the dissent’s view that the balancing analysis under 28 U.S.C. § 403 of the risk of confusing the jury

outweighing the probative value of the evidence should be different in a capital case because capital cases are “special.” *Tsarnaev*, 142 S.Ct. at 1040. The majority reasoned that there was no support in either FDPA or the evidence statute for that view.

In this case, much the same could be said of Thomas’ psychological report containing a diagnosis of anti-social personality disorder with anger issues, and his prior insignificant criminal history, as the *Tsarnaev* Court said about the earlier triple homicide his brother was connected to. And Thomas’ psychological report and his prior bad acts are not mitigating evidence under the *Lockett* definition of mitigation, as explained above. Thomas’ lesser sentence, psychological report, and criminal history certainly do not show that Thomas was the actual shooter.

And Thomas’ recanted confession to being the triggerman is even more unreliable than the brother’s friend’s confession at issue in *Tsarnaev*. The friend’s confession in *Tsarnaev* was, at least, to some extent, a statement against penal interest, unlike Thomas’s recanted confession. The recantation of the confession was in Thomas’ interest

penal interest at his second resentencing rather than against his penal interest. Thomas seems to have thought that there would be no downside to helping his old friend Sanchez-Torres by confessing to being the actual shooter. He, no doubt, thought that his 40-year sentence from the first *Miller* resentencing was the best reduction from his original life sentence that he could hope for but once he realized that his statement about being the actual shooter could hurt him at his second *Miller* resentencing, he recanted.

And that recantation was a recantation of a recantation. Thomas' original statement was that he remained in the car, while Sanchez-Torres robbed and then shot the victim. Years later, Thomas recanted that original statement by making a new statement that he was the actual triggerman. And then he recanted that statement and denied being the triggerman. This Court has observed that recantations are "notoriously unreliable." *Mansfield v. State*, 204 So. 3d 14, 16 (Fla. 2016) (concluding that a letter which was not given under oath was "even less reliable than an actual, sworn recantation, which are themselves notoriously unreliable"); *Smith v. State*, 330 So.3d 867, 888

(Fla. 2021) (stating that recanted testimony “is exceedingly unreliable” quoting *Sweet v. State*, 248 So.3d 1060, 1066 (Fla. 2018), and *Consalvo v. State*, 937 So.2d 555, 561 (Fla. 2006)). But recantations of recantations are even less reliable.

Opposing counsel’s arguments about Thomas’ prior insignificant criminal history establishing Thomas’ propensity for violence and making it more likely that Thomas was the actual triggerman is nonsensical in this case. Thomas basically had a school fight with brass knuckles before this murder but Sanchez-Torres had just murdered another person a couple of months before this murder. In terms of sheer propensity, Sanchez-Torres is more likely to have been the triggerman than Thomas. This claim of propensity between co-perpetrators makes even less sense than the claim of propensity between the brothers that the Supreme Court rejected in *Tsarnaev*. See *Fauber v. Davis*, __ F.4th __, __, 2022 WL 3132427, at *14 (9th Cir. Aug. 5, 2022) (affirming the exclusion of evidence regarding the prosecution making a plea offer of a life sentence in a capital case and explaining that state courts in penalty phase proceedings retain their

traditional authority to decide that certain types of evidence may have insufficient probative value to justify their admission as mitigation, citing *Tsarnaev*, 142 S.Ct. at 1038).

Florida's death penalty statute

Florida's death penalty statute, like the FDPA, has limitations on what is admissible in the penalty phase of a capital case. Florida's death penalty statute permits a trial court to consider any evidence in the penalty phase it "deems relevant" and "deems to have probative value." § 921.141(1), Fla. Stat. (2022). So, a trial court may exclude evidence that is irrelevant or that lacks probative value in a penalty phase. Florida penalty phases are not "evidentiary free-for-alls," any more than federal penalty phases are. *Tsarnaev*, 142 S.Ct. at 1037.

It is hard to see how Thomas' psychological report diagnosing him with anti-social personality disorder and anger issues could be considered relevant to, or probative of, Sanchez-Torres' sentence under the statute. A diagnosis of anti-social personality disorder of a co-perpetrator has no relevance whatsoever to the sentence of a different person.

The Eighth Amendment claim is barred, untimely, and meritless. The postconviction court properly summarily denied it.

Accordingly, this Court should affirm the trial court's order summarily denying the successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the postconviction court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via e-portal to KARIN L. MOORE Assistant Capital Collateral Regional Counsel – North, 1004 DeSoto Park Drive, Tallahassee, FL 32301; phone: (850) 487-0922; email: Karin.Moore@ccrc-north.org this 25th day of August, 2022.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was generated using Bookman Old Style 14-point font and is less than 75 pages, as ordered by this Court in this successive capital postconviction appeal.

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