

*In the Supreme Court of Florida*

**DAVID KELSEY SPARRE,**

*Appellant,*

v.

CASE NO.: SC23-163  
CAPITAL CASE

STATE OF FLORIDA,

*Appellee.*

\_\_\_\_\_/

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

ANSWER BRIEF

ASHLEY MOODY  
ATTORNEY GENERAL OF FLORIDA

CHARMAINE M. MILLSAPS  
SENIOR ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL  
THE CAPITOL, PL-01  
TALLAHASSEE, FL 32399-1050  
(850) 414-3300  
primary email:  
capapp@myfloridalegal.com  
secondary email:  
charmaine.millsaps@myfloridalegal.com

*Counsel for the State*

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## STATEMENT REGARDING ORAL ARGUMENT

No oral argument should be conducted in this appeal of a first successive postconviction motion involving a case where the defendant waived the presentation of mitigation and, despite that waiver, is belated pointing to flaws in the pre-sentence investigation (PSI). This Court should *not* hold an oral argument to discuss successive postconviction claims that are waived, procedurally barred, and meritless as a matter of law.

## PRELIMINARY STATEMENT REGARDING THE RECORD

The record on appeal will be referred to by the designation “1st succ. PC” to denote it is a successive postconviction appeal, followed by the page number in the record on appeal. (1st succ. PC at page).

## STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal from a postconviction court's summary denial of a first successive postconviction motion in a capital case raising claims regarding omissions in mitigation in the pre-sentencing investigation (PSI).

### Facts of the murders

Sometime between July 8 and July 12, 2010, Sparre stabbed to death a woman he met through a personal ad on Craigslist. He stabbed her over 80 times and then stole her 2003 Chevrolet Malibu, a PlayStation 3 game console, a DVD, and a wireless modem. Law enforcement officers located the victim's car. Sparre admitted to two Jacksonville Sheriff's Office (JSO) Detectives, Detective Patrick Bodine and Detective James Childers, that he killed Tiara Pool in a videotaped interview. Sparre murdered her for the "rush" of killing someone. *See generally Sparre v. State*, 164 So.3d 1183, 1186-87 (Fla. 2015), *cert. denied*, *Sparre v. Florida*, 577 U.S. 961 (2015).

### Procedural history

The jury convicted Sparre by special verdict for both premeditated murder and felony murder with burglary as the underlying felony. *Sparre*, 164 So.3d at 1189. On December 13, 2011, the trial court conducted the penalty phase. *Id.* at 1189.

Sparre informed the court that he did not want any mitigation case presented. *Sparre*, 164 So.3d at 1190. The trial court conducted an inquiry with Sparre to confirm that his waiver was knowing and voluntary, as required by *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993). Defense counsel assured the trial court that there was substantial mitigation they were prepared to present, developed by two mitigation specialists, David Douglas and Dan Roberts, who had traveled to Georgia to investigate mitigation, as well as mental health mitigation. *Id.* Sparre's defense team proffered that it was prepared to present the following mitigation evidence: (1) Sparre has no significant criminal history as mitigation; (2) four mental health experts that would testify as to mental health mitigation; (3) Dr. Harry Krop was prepared to testify that Sparre had five diagnoses of ADHD,

posttraumatic stress disorder (PTSD), substance abuse, intermittent explosive disorder, and bipolar schizoid-affective disorder; (4) Dr. Buffington was prepared to testify that Sparre's continued use of hydrocodone, possibly powder cocaine, alcohol, and other drugs could cause blackouts, and memory loss; (5) both Dr. Allgood and Dr. Greenberg were prepared to testify regarding Sparre's PTSD dating from the time he was in the Tara Hall School for Boys in South Carolina when he was 11, 12, or 13 years old; (6) Shannon Bullock, a missionary and counselor at Tara Hall would testify as to Sparre's dysfunctional family, his mother's neglect of him, and Sparre's belief in God; (7) several of Sparre's family members were prepared to testify about his dysfunctional family background and personal history; and (8) James Dunn, the director of Tara Hall, would testify as to the little family contact Sparre had while he was at the school. *Id.* at 1189, n.3. Defense counsel informed the trial court that it did not believe Sparre was incompetent. *Id.* at 1190. The trial court found Sparre's waiver of his right to present mitigation to be knowingly and voluntarily entered and that Sparre was "lucid during its inquiry." *Id.* at 1190.

The jury unanimously recommended death. *Id.* at 1191.

Sparre also waived the presentation of mitigation at the *Spencer* hearing. *Sparre*, 164 So.3d at 1191. The trial court ordered a PSI. *Id.* at 1191. At the *Spencer* hearing, the trial court asked whether the parties had any arguments regarding the PSI and defense counsel had not objection. *Id.* at 1191. The trial court also stated that she had no intention of considering the sentencing recommendation made by the parole officer who prepared the PSI in her sentencing decision. *Id.* at 1191.

The trial court found two aggravating circumstances both of which were assigned great weight: 1) heinous, atrocious, and cruel (HAC); and 2) the murder was committed during the course of a burglary. *Sparre*, 164 So.3d at 1192. The trial court found the statutory mitigating circumstance of age and gave it moderate weight. *Id.* at 1192. The trial court also found thirteen nonstatutory mitigating factors. *Id.* at 1192-93. The trial court then sentenced Sparre to death. *Id.* at 1193.

In the direct appeal to the Florida Supreme Court, Sparre raised

three claims: 1) the trial court erred in not calling mitigation witnesses as court witnesses when the defendant waived the presentation of mitigation relying on *Muhammad v. State*, 782 So.2d 343 (Fla. 2001); 2) the Florida Supreme Court should recede from its holding in *Hamblen v. State*, 527 So.2d 800 (Fla. 1988); and 3) his death sentence violated the Sixth Amendment right-to-a-jury trial announced in *Ring v. Arizona*, 536 U.S. 584 (2002). While there was no specific issue regarding the completeness of the PSI raised in the direct appeal, the Florida Supreme Court, as part of its discussion of *Muhammad*, stated that it was “unpersuaded that the PSI report the trial court considered lacked meaningfulness to the point of violating the *Muhammad* standard that it be a comprehensive document.” *Sparre*, 164 So.3d at 1195. The Florida Supreme Court affirmed the conviction for first-degree murder and death sentence, after finding the death sentence to be proportional. *Id.* at 1202.

Sparre filed a petition for writ of certiorari in the United States Supreme Court raising a claim that the Eighth Amendment requires the trial court to call mitigation witnesses as court witnesses,

including mental health experts, in cases where the defendant waives the presentation of mitigation. On November 2, 2015, the United States Supreme Court denied review. *Sparre v. Florida*, 577 U.S. 961 (2015) (No. 15-5858).

On October 26, 2016, Sparre, represented by Capital Collateral Regional Counsel - (CCRC-N), filed an initial postconviction motion raising 30 claims. On March 13, 2017, the State filed an answer. The state postconviction court granted an evidentiary hearing on nearly all the claims. The state postconviction court conducted a three-day evidentiary hearing on March 15, 16, and 19, 2018. The state postconviction court denied postconviction relief. *Sparre v. State*, 289 So.3d 839, 846 (Fla. 2019).

In the postconviction appeal, Sparre raised six claims of ineffectiveness and a claim of cumulative error. *Sparre*, 289 So.3d 846 (listing the six claims of ineffectiveness). Sparre also raised a claim that *Roper v. Simmons*, 543 U.S. 551 (2005), should be expanding to him because he was 19 years old at the time of the murder. *Id.* at 853. He raised a claim based on *Hurst v. State*, 202

So.3d 40 (Fla. 2016). He additionally raised a claim that the postconviction court erred in denying the motion to amend the postconviction motion. The Florida Supreme Court affirmed the denial of postconviction relief. *Id.* at 857.

Sparre also filed a state habeas petition raising three claims of ineffectiveness of appellate counsel. *Sparre*, 289 So.3d at 846, 854-57. The three claim of ineffectiveness of appellate counsel were: (1) failing to supplement the record on appeal with the defense sentencing memorandum; (2) failing to argue fundamental error based on prosecutorial misconduct; and (3) failing to challenge the admission of certain autopsy photographs. The Florida Supreme Court denied the state habeas petition. *Id.* at 857.

### **Pending federal habeas litigation**

On March 4, 2020, Sparre, represented by CCRC-N, filed a federal habeas petition raising nine claims in federal district court. *Sparre v. Sec’y, Fla. Dep’t of Corr.*, 3:20-cv-00216-TJC-JBT (M.D. Fla.). CCRC-N had a potential conflict of interest because they were state postconviction counsel under a combination of *Martinez v. Ryan*, 566

U.S. 1 (2012), and *Christeson v. Roper*, 574 U.S. 373 (2015). On June 15, 2020, the federal district court appointed the Capital Habeas Unit (CHU-N), as federal habeas co-counsel. (Doc. #16). On June 18, 2021, the CHU-N filed an amended habeas petition. (Doc. #26). On March 2, 2022, the Secretary filed an answer to the § 2254 petition. (Doc. #41). On April 15, 2022, instead of filing a reply, CHU-N filed a motion to stay the case based on filing the first successive postconviction motion regarding the PSI in state court. (Doc. #43). Nearly a year later, on April 4, 2023, the district court denied the stay. (Doc. #57). The CHU-N filed a rehearing regarding the denial of a stay. (Doc. #58). The federal habeas proceedings are currently tolled awaiting resolution of rehearing regarding the denial of a stay and the filing of a reply.<sup>1</sup>

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<sup>1</sup> It is becoming a common tactic to file meritless, if not frivolous, successive postconviction motions in the state court during the federal habeas proceedings and seek a stay of the federal habeas proceedings pending resolution of the state court successive litigation merely to obtain a delay of the federal habeas litigation. Unfortunately, that tactic is often successful in federal court.

### **Current first successive postconviction litigation**

On April 14, 2022, Sparre, represented by Capital Collateral Regional Counsel - Northern Region (CCRC-N), filed a first successive rule 3.851 postconviction motion raising three claims regarding the completeness and accuracy of the Presentencing Investigation Report (PSI), in the state trial court. (1st succ. PC at 1-46). On May 2, 2022, the State filed an answer to the first successive postconviction motion asserting that all three claims regarding the PSI were waived by Sparre's waiver of mitigation at the penalty phase and *Spencer* hearing and that therefore, the successive postconviction motion should be summarily denied. (1st succ. PC at 47-72). On June 23, 2022, the postconviction court summarily denied the first successive postconviction motion. (1st succ. PC at 73-90).

On July 1, 2022, opposing counsel filed a motion for rehearing asserting that the trial court violated Florida Rule of Criminal Procedure 3.851(f)(5)(B) by not conducting a case management conference, commonly referred to as a *Huff* hearing,<sup>2</sup> before

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<sup>2</sup> *Huff v. State*, 622 So.2d 982 (Fla. 1993).

summarily denying the first successive postconviction motion. (1st succ. PC at 91-94). The State filed a response to the rehearing noting that it is not reversible error to fail to conduct *Huff* hearing in successive postconviction litigation, under this Court's long-standing precedent. (1st succ. PC at 95-105 citing *Boyd v. State*, 324 So.3d 908, 913 (Fla. 2021), and other cases). The postconviction court granted the rehearing and conducted a *Huff* hearing on July 13, 2022. (1st succ. PC at 110-111). At the *Huff* hearing, opposing counsel clarified that the alleged inaccuracy in the PSI was that former Probation Officer Dale Carney, who prepared the PSI in this case, wrote that Sparre seemed normal during their conversation.

On December 6, 2022, the postconviction court again summarily denied the successive postconviction motion relying on the same ground as the original order. (1st succ. PC at 112-129). CCRC-N filed another motion for rehearing arguing the law-of-the-case doctrine did not apply due to the "material change in the evidence" based on former probation officer Carney's statements about the PSI. (1st succ. PC at 130-135). On January 5, 2023, the postconviction court denied

rehearing. (1st succ. PC at 136-37).

This appeal of the summary denial of the first successive postconviction motion follows.

## SUMMARY OF THE ARGUMENT

### ISSUE I

Sparre asserts a newly discovered evidence claim of a violation of *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), based on omissions in the mitigation in the Presentence Investigation Report (PSI). Any claims regarding any omissions or inaccuracies in the PSI were waived by Sparre's waiver of the presentation of mitigation at the penalty phase and *Spencer* hearing. Furthermore, the claim of newly discovered evidence regarding the completeness of the PSI is untimely. The PSI has been available since 2012. Additionally, as the postconviction court concluded, the claim is procedurally barred by the law-of-the-case doctrine because this Court found the PSI to be sufficient to satisfy *Muhammad* in the direct appeal and in the state habeas petition as well. Alternatively, the newly discovered evidence claim is meritless. Sparre fails both prongs of the test for newly discovered evidence established in *Jones v. State*, 709 So.2d 512 (Fla. 1998). Sparre was not diligent in discovering this claim regarding the PSI. The PSI was prepared in 2012 and opposing counsel did not

speak with the probation officer until 2021. Nor would a more complete PSI have resulted in a life sentence given the facts of, and motive for, this murder. The postconviction properly summarily denied the newly discovered evidence claim.

## ISSUE II

Sparre asserts the omissions in the mitigation in the Presentence Investigation Report (PSI) violate due process relying on *Alcorta v. Texas*, 355 U.S. 28 (1957), and *Giglio v. United States*, 405 U.S. 150 (1972). The due process claim regarding the PSI was waived when Sparre waived the presentation of mitigation at the penalty phase and the *Spencer* hearing. Additionally, the due process claim regarding the PSI is procedurally barred because any such claim should have been raised in the direct appeal. Alternatively, the due process claim is meritless as a matter of law. Neither *Alcorta* nor *Giglio* involved a PSI in a waiver-of-mitigation case. The successive postconviction claim is waived, procedurally barred, and meritless.

### ISSUE III

Sparre asserts the PSI violated his due process right to be sentenced based on accurate information under *Townsend v. Burke*, 334 U.S.736, 740-41 (1948), and *United States v. Tucker*, 404 U.S. 443 (1972). The due process claim was waived when Sparre waived the presentation of mitigation at the penalty phase and the *Spencer* hearing. The claim is also procedurally barred because it was not raised in the direct appeal. Alternatively, the claim is meritless as a matter of law. There are omissions in the PSI, not inaccuracies. Neither *Townsend* nor *Tucker* apply to fully disclosed PSIs, much less to PSIs in waiver-of-mitigation cases. The successive postconviction claim is waived, procedurally barred, and meritless as a matter of law.

The postconviction court properly summarily denied the first successive postconviction motion.

## ARGUMENT

### ISSUE I

DID THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE POSTCONVICTION CLAIM OF NEWLY DISCOVERED EVIDENCE OF A VIOLATION OF *MUHAMMAD V. STATE*, 782 So.2D 343 (FLA. 2001), REGARDING OMISSIONS IN THE PRESENTENCE INVESTIGATION REPORT? (Restated)

Sparre asserts a newly discovered evidence claim of a violation of *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), based on omissions in the mitigation in the Presentence Investigation Report (PSI). IB at 37. Any claims regarding any omissions or inaccuracies in the PSI were waived by Sparre's waiver of the presentation of mitigation at the penalty phase and *Spencer* hearing. Furthermore, the claim of newly discovered evidence regarding the completeness of the PSI is untimely. The PSI has been available since 2012. Additionally, as the postconviction court concluded, the claim is procedurally barred by the law-of-the-case doctrine because this Court found the PSI to be sufficient to satisfy *Muhammad* in the direct appeal and in the state habeas petition as well. Alternatively, the newly discovered evidence claim is meritless. Sparre fails both prongs of the test for newly

discovered evidence established in *Jones v. State*, 709 So.2d 512 (Fla. 1998). Sparre was not diligent in discovering this claim regarding the PSI. The PSI was prepared in 2012 and opposing counsel did not speak with the probation officer until 2021. Nor would a more complete PSI have resulted in a life sentence given the facts of, and motive for, this murder. The postconviction properly summarily denied the newly discovered evidence claim.

#### Factual background of the claims

On June 2, 2021, an investigator with the Capital Habeas Unit of the Public Defender Office of the Northern District of Florida (CHUN), who is Sparre's federal habeas co-counsel, spoke with former Probation Officer Dale Carney. Carney prepared the PSI in this case. Carney stated that the Department of Corrections had no formal guidelines for preparing a PSI in capital cases. Carney also stated that Sparre did not want to talk about his case during the interview for the PSI and was only willing to answer simple background questions. Carney speculated that Sparre's silence and unwillingness to

cooperate may have been a consequence of some “psychiatric disorder.” Carney had written in the PSI that Sparre’s mental health was “satisfactory” and that Sparre showed “no oblivious signs of impairment.” (1st succ. PC at 117-118).

### Summary denials of postconviction motions

A postconviction court may summarily deny a postconviction claim that is conclusively rebutted by the existing record. Fla. R. Crim. P.3.851(f)(5)(B). It is also proper for a postconviction court to summarily deny postconviction claims that are not cognizable, not retroactive, procedurally barred, untimely, or meritless under controlling precedent. *Valentine v. State*, 339 So.3d 311, 313 (Fla. 2022) (stating a postconviction court may summarily deny a claim that is legally insufficient citing *McDonald v. State*, 296 So.3d 382, 383 n.2 (Fla. 2020)), *cert. denied*, *Valentine v. Florida*, 143 S.Ct. 378 (2022); *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); *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (affirming the summarily denial of a successive postconviction claim as untimely), *cert. denied*, *Dailey v. Florida*, 143 S.Ct. 272 (2022); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (noting because the claims were purely legal claims that have been previously rejected by the Florida Supreme Court, the lower court properly summarily denied relief).

Contrary to opposing counsel's assertion, no evidentiary hearing was necessary to deny this waived, untimely, procedurally barred, and meritless successive postconviction claim.

#### The postconviction court's ruling

The postconviction court summarily denied the newly discovered

evidence claim. The postconviction court concluded, “as a matter of law,” the PSI complied with the requirements of *Muhammad*, as this Court had already held in the direct appeal and the state habeas petition. (1st succ. PC at 115-119). The postconviction court quoted this Court’s direct appeal opinion in *Sparre v. State*, 164 So.3d 1183, 1195 (Fla. 2015), concluding the PSI complied with the requirements of *Muhammad*. The postconviction court also quoted this Court’s state habeas opinion rejecting a claim of ineffectiveness of appellate counsel regarding “unpresented mitigation evidence” in the PSI in *Sparre v. State*, 289 So.3d 839, 855 (Fla. 2019), finding the claim to be an “improper attempt to relitigate the merits” of the issue of the PSI’s compliance with *Muhammad* that was “raised and decided against Sparre on direct appeal” and concluding, in the alternative, that “all the relevant mitigation was before the trial court.”

### Standard of review

The standard of review of a trial court’s order summarily denying a postconviction claim is de novo. *Dillbeck v. State*, 357 So.3d 94, 98

(Fla. 2023) (stating that because “the circuit court denied these claims without an evidentiary hearing, our review is de novo” citing *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023); *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (noting the Florida Supreme Court reviews a postconviction court’s decision to summarily deny a successive postconviction motion de novo citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)).

### Waiver

The claim of newly discovered evidence of mitigation was affirmatively waived when Sparre voluntarily waived the presentation of mitigation at the penalty phase. The only reason the omitted mitigation that opposing counsel insists had to be included in the PSI was not presented at the penalty phase was that Sparre insisted on waiving mitigation. Defense counsel had a full mitigation case ready to present including a mental health expert developed by two mitigation specialists but Sparre chose to waive that presentation. The Florida Supreme Court’s direct appeal opinion detailed the

extensive mitigation that defense counsel was ready to present. *Sparre*, 164 So.3d at 1189, n.3. The only reason that the omitted mitigation in the PSI is at issue is because Sparre chose not to present it at the penalty phase.

The *Muhammad* requirement of a comprehensive PSI is for the benefit of the court, not the defendant. A defendant may not affirmatively waive his rights and then complain that those rights were violated. *Grim v. State*, 841 So.2d 455, 462 (Fla. 2003) (concluding that because Grim waived the presentation of mitigation during the penalty phase, “he cannot complain on appeal that the trial court abused its discretion” by not calling the defense mental health experts as a court witness to testify as to mitigation citing *LaMarca v. State*, 785 So.2d 1209 (Fla. 2001)). *Muhammad* and the contents of the PSI only becomes an issue due to his waiver. Sparre affirmatively waived any objection to any mitigation not being considered when he waived all mitigation.

Moreover, Sparre refused to cooperate in the preparation of the PSI. Former probation officer Carney stated that Sparre did not want

to talk about his case during the interview for the PSI and was only willing to answer simple background questions. A capital defendant may not refuse to cooperate in the preparation of the PSI and then claim as error that there are omissions in the PSI. While former probation officer Carney speculated that Sparre's silence and unwillingness to cooperate was a consequence of some "psychiatric disorder," there is an equally plausible explanation for Sparre's refusal to cooperate. His lack of cooperation flowed naturally from his decision to waive mitigation. A defendant who does not want mitigation presented via his trained defense attorney and his two defense mitigation specialists would not want mitigation presented by a probation officer instead. Sparre refused to discuss his case and his background because he did not want to undermine his own prior waiver of mitigation. Sparre's unwillingness to cooperate in the preparation of the PSI was a natural consequence of his decision to waive mitigation, not evidence of a mental disorder. But regardless of his reasons, his lack of cooperation negates this claim.<sup>3</sup>

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<sup>3</sup> There may be an additional waiver at play. As opposing counsel acknowledges, many background records of the defendant

The claim of newly discovered evidence regarding the PSI was waived.

### Untimely

Florida's rule of court governing postconviction motions in capital cases, rule 3.851(d)(1)(B), requires that a postconviction motion be filed within one year of the conviction and death sentence becoming final in the direct appeal. Sparre's convictions and death sentence became final the day after the United States Supreme Court denied review from the direct appeal, which was Tuesday, November 3, 2015. *Sparre v. Florida*, 577 U.S. 961 (2015) (No. 15-5858). Sparre then had one year to timely file any postconviction motion which would be by Wednesday, November 2, 2016. So, the one year for Sparre to timely file a postconviction motion expired in 2016 but the

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can only be obtained by the probation officer preparing the PSI with the defendant's written consent. And capital defendants that waived mitigation are the defendants most likely to refuse to sign any consent forms for their school records, medical records, and mental health records. A defendant who refuses to cooperate by signing the consent forms necessary for the background records cannot complain about the mitigation in those records and background information being omitted from the PSI.

current successive postconviction motion was not filed until April of 2022. The first successive postconviction motion was filed more than five years late.

There is an exception to the one-year time limit for postconviction claims that involve “facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence.” *Dillbeck v. State*, 304 So.3d 286, 287 (Fla. 2020) (citing Fla. R. Crim. P. 3.851(d)(2)(A), and holding a claim of newly discovered evidence of mitigation was untimely because petitioner had not been diligent in discovering the new evidence of mitigation), *cert. denied*, *Dillbeck v. Florida*, 141 S.Ct. 2733 (2021). To be considered timely filed, a claim “is required to have been filed within one year of the date upon which the claim became discoverable through due diligence.” *Dillbeck*, 304 So.3d at 288; *see also Mungin*, 320 So.3d at 626 (concluding a successive motion raising a claim of newly discovered evidence was untimely because the new evidence was “discoverable through due diligence more than a year before the motion was filed”). Any

postconviction claim must be filed within one year of the evidence becoming “discoverable,” not when it is actually discovered. *Dillbeck*, 304 So.3d at 288 (using the word “discoverable”); *Mungin*, 320 So.3d at 626 (using the word “discoverable”); *Dailey v. State*, 283 So.3d 782,788 (Fla. 2019) (using the word “discoverable”).

Here, as in *Dillbeck* and *Mungin*, the claim of newly discovered evidence was discoverable by due diligence years ago. The PSI was prepared in 2012 and Carney’s name was listed as the probation officer who prepared the PSI. But Sparre’s lawyers did not speak with Carney until 2021. Sparre was not diligent.

It is the defendant’s burden to establish that a successive postconviction claim is timely. *Dillbeck v. State*, 357 So.3d 94, 101 (Fla. 2023) (stating it “is incumbent upon the defendant to establish the timeliness of a successive postconviction claim” citing *Mungin v. State*, 320 So.3d 624, 626 (Fla. 2020)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023); *see also Rivera v. State*, 187 So.3d 822, 832 (Fla. 2015)). Sparre failed to meet that burden. He does not even attempt to explain why he did not speak with former probation officer Carney

at an earlier date.

Diligence is required under the rule. Sparre does not meet the diligence requirements of the exception regarding timeliness in the rule, so the successive postconviction motion remains untimely. Fla. R. Crim. P. 3.851(e)(2) (“A claim raised in a successive motion shall be dismissed . . . if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).”). The claim of newly discovered evidence regarding the PSI is untimely.

### Procedural bar

As the postconviction court properly concluded, the claim of newly discovered evidence is procedurally barred by the law-of-the-case doctrine. The law-of-the-case doctrine precludes reraising the same claim. The “law-of-the-case doctrine is the long-established principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.” *State v.*

*Okafor*, 306 So.3d 930, 934 (Fla. 2020) (citing *Delta Prop. Mgmt. v. Profile Invs., Inc.*, 87 So.3d 765, 770 (Fla. 2012)).

The claim regarding the adequacy of the PSI under *Muhammad* is barred by the law-of-the-case doctrine twice over, as the postconviction court properly concluded. While Sparre did not raise any issue regarding the PSI in the direct appeal, he did raise a *Muhammad* issue regarding the failure of the trial court to call mitigation witnesses as court witnesses. Even though not raised in the direct appeal by Sparre's counsel, the Florida Supreme Court, on its own, addressed the issue of the PSI's compliance with *Muhammad*. The Florida Supreme Court observed in the direct appeal that "neither party raised any objection on the record or otherwise informed the trial court that the PSI was inadequate under *Muhammad* or any other legal standard" but the Florida Supreme Court itself was "unpersuaded that the PSI report the trial court considered lacked meaningfulness to the point of violating the *Muhammad* standard that it be a comprehensive document." *Sparre*, 164 So.3d at 1195.

This Court also rejected a claim of ineffectiveness of appellate

counsel regarding “unpresented mitigation evidence” in the PSI in its state habeas opinion. *Sparre v. State*, 289 So.3d 839, 855 (Fla. 2019). This Court found the claim to be an “improper attempt to relitigate the merits” of the issue of the PSI’s compliance with *Muhammad* that was “raised and decided against Sparre on direct appeal.” *Sparre*, 289 So.3d at 855. This Court also concluded, in the alternative, that “all the relevant mitigation was before the trial court.” *Id.* at 855.

This Court has addressed the issue of the PSI’s compliance with *Muhammad* twice already and now Sparre seeks to have it address the same basic claim a third time. The law-of-the-case doctrine precludes this type of repeated litigation.

Opposing counsel attempts to distinguish this Court’s prior decisions because those claims were different claims. But the law-of-the-case doctrine applies regardless of whether the claim is a variation of a prior claim or whether a party employs different arguments when reraising the same claim. *Sireci v. State*, 773 So.2d 34, 40-41 (Fla. 2000) (finding claims to be procedurally barred and observing that even if a defendant uses a different argument to

relitigate the same issue, the claim remains procedurally barred); *Mills v. State*, 684 So.2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely a variation of another prior postconviction claim). The doctrine applies to this latest version of the claim.

Opposing counsel insists that the doctrine does not apply when there have been “material changes in the evidence.” IB at 19. Opposing counsel relies on former probation officer Carney’s statements regarding the PSI as being the material changes. IB at 21. But the law-of-the-case doctrine is not so easily evaded. Carney’s statements are not material enough to invoke this exception to the doctrine.

Furthermore, usually there must be a subsequent trial or subsequent hearing to invoke this exception. *Van Poyck v. Singletary*, 715 So.2d 930, 940 (Fla. 1998) (explaining a prior decision “may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence” citing *Henry v. State*, 649 So.2d 1361, 1364 (Fla.1994)). There has been no new trial or penalty phase or *Spencer* hearing, only a new statement from the person who

prepared the PSI. The doctrine applies regardless of the new statement.

The postconviction court properly concluded the issue of the PSI's compliance with *Muhammad* was procedurally barred by the law-of-the-case doctrine and may not be raised yet again in a successive postconviction motion.

### Merits

The claim of newly discovered evidence is meritless. Sparre fails both prongs of the test for newly discovered evidence.

### **The *Jones* test for newly discovered evidence**

The test for newly discovered evidence, established by this Court in *Jones v. State*, 709 So.2d 512 (Fla. 1998), requires that: (1) the evidence be unknown at the time of the trial and not discoverable with diligence; and (2) the evidence would be likely to result in an acquittal at a retrial. *Hutchinson v. State*, 343 So.3d 50, 53 (Fla. 2022) (affirming the summary denial of a claim of newly discovered evidence), *cert. denied*, *Hutchinson v. Florida*, 143 S.Ct. 601 (2023).

Sparre asserts that his death sentence would be reduced to a life sentence based on the new evidence of WHAT HERE \* if it had been included in the PSI. The *Jones* test for newly discovered evidence also applies to the penalty phase and when the sentence is at issue, the second prong requires a determination of whether the newly discovered evidence would probably yield a less severe sentence at any resentencing, which, in a capital case, means a life sentence. *Brown v. State*, 304 So.3d 243, 273 (Fla. 2020) (citing *Swafford v. State*, 125 So.3d 760, 767 (Fla. 2013)). A postconviction court is required to consider “all” newly discovered evidence which would be admissible and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Brown*, 304 So.3d at 273 (quoting *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994)). The defendant must meet both prongs of the *Jones* test for claims of newly discovered evidence. *Matthews v. State*, 288 So.3d 1050, 1058 (Fla. 2019). Sparre, however, fails both prongs. He was not diligent and the new evidence of WHAT would not result in a life sentence.

## **Not diligent**

The first prong of the *Jones* test for newly discovered evidence requires that “the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence.” *Matthews*, 288 So.3d at 1058.

Sparre fails the first prong of the *Jones* test for newly discovered evidence. The PSI was not unknown at the time of the sentencing. The PSI, which was written in 2012, was known by the trial court and both parties at the time of the *Spencer* hearing. Indeed, the Florida Supreme Court’s direct appeal opinion noted that the trial court inquired whether either of the parties had any arguments or objections to the PSI at the *Spencer* hearing. *Sparre*, 164 So.3d at 1191. The PSI is not new. *Valentine v. State*, 339 So.3d 311, 314 (Fla. 2022) (affirming the summary denial of a successive postconviction motion in a capital case and rejecting a claim of newly discovered evidence as not being “new”). Sparre, like Valentine, fails the first prong of *Jones* because the evidence supporting his “newly” discovered evidence claim is not new.

Nor was Sparre diligent in raising this claim of newly discovered evidence. The PSI was prepared in 2012 and provided to the defense before the *Spencer* hearing but this complaint about its compliance with *Muhammad* was raised over a decade later in 2022. Even if Probation Officer Carney's statement is viewed as a necessary prerequisite to raising such a claim (which it is not), Sparre provides no explanation as to why he did not speak with Carney many years ago. *Rogers v. State*, 327 So.3d 784, 787-88 (Fla. 2021) (affirming a summary denial of a newly discovered evidence claim as untimely due to lack of diligence and noting there was no explanation offered as to why trial counsel or postconviction counsel could not have obtained this information years before). Current postconviction counsel, CCRC-N, was appointed to this case as state postconviction counsel over seven years ago, in June of 2015. Even timing from the date of that appointment, opposing counsel was not diligent in speaking with Carney.

Sparre was not diligent. Sparre fails the first prong.

### **Not result in a life sentence**

Sparre also fails the second prong. The second prong of *Jones* requires that the newly discovered evidence of mitigation would probably result in a life sentence. *Brown v. State*, 304 So.3d 243, 274 (Fla. 2020) (noting the second prong of *Jones* is “whether the newly discovered evidence would probably result in an acquittal or a lesser sentence on retrial” citing *Jones*, 709 So.2d at 521).

But the new mitigation would not result in a different outcome. Sparre killed the mother of two young children solely for the “rush” of killing someone. Sparre stabbed her at least 88 times and she had 39 defensive wounds. *Sparre*, 289 So.3d at 845. Sparre admitted in a January 2, 2012, letter to the mother of his child, Ashley Chewning, that it took him over five minutes to kill her. Sparre also wrote in that letter that he wanted to murder someone merely to see how it felt. DAR Vol. II 287-88; PCR 2865. The trial court found the heinous, atrocious, and cruel aggravating circumstance (HAC) based on those facts and gave it great weight. *Sparre*, 164 So.3d at 1192. Nothing about the omitted mitigation would have changed the weight given to the HAC aggravator.

Furthermore, the trial court concluded that Sparre's letter "negated any claim of extreme emotional disturbance." Sparre, 164 So.3d at 1192. The omitted mitigation would not change the trial court's view that Sparre's motive for killing the victim undermined the mental mitigation. The trial court was aware of the diagnosis of PTSD from the trauma of his childhood from defense counsel's proffer during the *Koon* colloquy.

The State was prepared to rebut any mitigation presentation by cross-examining Dr. Krop about Sparre's admission to deliberately killing animals, including shooting dogs with firearms and running over a cat with a lawnmower. Sparre, 164 So.3d at 1190, n.3; cf. *Wilcox v. Warden New Jersey State Prison*, 720 Fed. Appx. 669, 675–76 (3d Cir. 2018) (explaining in determining prejudice from the omitted mitigation, a court cannot merely consider the new mitigation but "must also take account of the anti-mitigation evidence that the prosecution would have presented to rebut" the mitigation citing *Wong v. Belmontes*, 558 U.S. 15, 26 (2009)). Including the omitted mitigation in the PSI, such as an ACE score of 9, would not have resulted in a life

sentence. IB at 49 & n.12

There were four defense mental health experts that the defense would have presented, Dr. Krop, Dr. Buffington, Dr. Alligood, and Dr. Greenberg, if Sparre had allowed him to do so. Dr. Krop diagnosed him as having ADHA; PTSD; substance abuse; bipolar schizoaffective disorder; and intermittent explosive disorder. *Sparre*, 164 So.3d at 1203 & n.3. But all that mental health information was known to, and discussed by, this Court in the direct appeal opinion.

Carney wrote in the PSI that Sparre's mental health was "satisfactory" and that Sparre showed "no oblivious signs of impairment." Surely, opposing counsel is not really arguing that an untrained probation officer's vague view of the defendant's mental state would have changed the jury's view, the trial court's view, or this Court's view of mitigation to the point it would result in a life sentence instead of a death sentence. It would not.

Sparre also fails the second prong of the *Jones* test.

Sparre fails both prongs of *Jones* and therefore, the claim of newly discovered evidence of mitigation is meritless.

### ***Muhammad and PSIs***

While framed as a claim of newly discovered evidence, the actual complaint is the Probation Officer Carney was not a mitigation specialist. IB at 32. For example, opposing counsel criticizes the probation officer for not obtaining the Duval County jail records documenting Sparre's mental health. IB at 52, n.13. But Sparre had two mitigation specialists, David Douglas and Dan Roberts, who had traveled to Georgia and developed an extensive mitigation presentation that Sparre refused to present. A practical concern with the *Muhammad* requirement of a detailed PSIs in waiver cases is that it forces the probation officer to become a mitigation specialist for the defense. Fla. R. Crim. Pro. 3.170(b) (requiring the PSI in waiver case to be "comprehensive" and include information "such as previous mental health problems (including hospitalizations), school records, and relevant family background."). But as this Court has noted, PSIs are "prepared by non-lawyers." *Sparre*, 164 So.3d at 1194.

Opposing counsel argues the harm from the omitted mitigation in the PSI is that the trial court would have appointed special mitigation counsel if the PSI had alerted the trial court to the

possibility of significant mitigation. IB at 38. But the trial court already knew there was extensive mitigation from the proffer during the *Koon* colloquy and still did not appoint special mitigation counsel. Furthermore, while it is an open question how *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), applies to a penalty phase, the appointment of special counsel to evade the defendant's waiver of mitigation may violate *McCoy*.

Most importantly, the purpose of creating the *Muhammad* requirement of a detailed PSI in waiver-of-mitigation cases was to further this Court's proportionality review. *Muhammad*, 782 So.2d at 365 (stating it is "difficult, if not impossible," for this Court to perform its proportionality review in waiver-of-mitigation cases); *Marquardt v. State*, 156 So.3d 464, 490 (Fla. 2015) (advocating the appointment of special mitigation counsel in waiver cases to "bringing forth all available mitigation" for the benefit of the trial court and this Court "to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases."). But this Court abolished its traditional proportionality review in *Lawrence v. State*, 308 So.3d 544

(Fla. 2020). *Muhammad* and *Marquardt* are the handmaidens of proportionality review when there is no longer any lady to serve. Once proportionality review ended, the completeness of the PSI regarding mitigation is of little importance. In the wake of *Lawrence*, this Court should not even recognize a postconviction claim of newly discovered evidence of a violation of *Muhammad*.

The postconviction court properly summarily denied the claim of newly discovered evidence of a violation of *Muhammad*.

## ISSUE II

DID THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE POSTCONVICTION CLAIM OF A DUE PROCESS VIOLATION DUE TO THE OMISSIONS IN THE PRESENTENCE INVESTIGATION REPORT BASED ON *ALCORTA V. TEXAS*, 355 U.S. 28 (1957), AND *GIGLIO V. UNITED STATES*, 405 U.S. 150 (1972)? (RESTATED)

Sparre asserts the omissions in the mitigation in the Presentence Investigation Report (PSI) violate due process relying on *Alcorta v. Texas*, 355 U.S. 28 (1957), and *Giglio v. United States*, 405 U.S. 150 (1972). IB at 39. The due process claim regarding the PSI was waived when Sparre waived the presentation of mitigation at the penalty phase and the *Spencer* hearing. Additionally, the due process claim regarding the PSI is procedurally barred because any such claim should have been raised in the direct appeal. Alternatively, the due process claim is meritless as a matter of law. Neither *Alcorta* nor *Giglio* involved a PSI in a waiver-of-mitigation case. The successive postconviction claim is waived, procedurally barred, and meritless.

### The postconviction court's ruling

The postconviction court did not specifically address the due

process claim regarding the PSI but summarily denied the motion. (1st succ. PC at 112-129).

### Standard of review

The standard of review of a trial court's order summarily denying a postconviction claim is de novo. *Dillbeck v. State*, 357 So.3d 94, 98 (Fla. 2023) (stating that because "the circuit court denied these claims without an evidentiary hearing, our review is de novo" citing *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023); *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (noting the Florida Supreme Court reviews a postconviction court's decision to summarily deny a successive postconviction motion de novo citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)).

### Waiver

The due process claim of omitted mitigation in the PSI was affirmatively waived when Sparre voluntarily waived the presentation of mitigation at the penalty phase and *Spencer* hearing. The only

reason the omitted mitigation was not presented at the penalty phase was that Sparre insisted on waiving mitigation. Defense counsel had a full mitigation case ready to present developed by two mitigation specialists which included expert mental health mitigation but Sparre chose to waive that presentation. This Court's direct appeal opinion detailed the extensive mitigation that defense counsel was ready to present. *Sparre*, 164 So.3d at 1189, n.3. The only reason that the omitted mitigation in the PSI is at issue is because Sparre chose not to present it at the penalty phase and *Spencer* hearing.

A defendant may not affirmatively waive his rights and then complain that those rights were violated, much less a decade later in a successive postconviction motion. *Grim v. State*, 841 So.2d 455, 462 (Fla. 2003) (concluding that because Grim waived the presentation of mitigation during the penalty phase, "he cannot complain on appeal that the trial court abused its discretion" by not calling the defense mental health experts as a court witness to testify as to mitigation citing *LaMarca v. State*, 785 So.2d 1209 (Fla. 2001)). *Muhammad* and the contents of the PSI only become an issue due to the waiver.

Sparre affirmatively waived any due process objection to any mitigation not being included in the PSI when he waived all mitigation. The due process claim regarding the PSI was waived.

### Procedural bar

Additionally, the claim is procedurally barred because any due process attack on the PSI should have been raised in the direct appeal. *Covington v. State*, 348 So.3d 456, 471 (Fla. 2022) (concluding a due process claim was procedurally barred in postconviction because the claim should have been raised on direct appeal citing *Dailey v. State*, 283 So.3d 782, 793 (Fla. 2019)); *Smith v. State*, 310 So.3d 366, 373-74 (Fla. 2020) (concluding a Fourth Amendment claim was procedurally barred in postconviction because he failed to raise the issue on direct appeal citing *Johnson v. State*, 104 So.3d 1010, 1027 (Fla. 2012)).

The PSI, which was written in 2012 before sentencing was available at the time of the direct appeal in 2012. *Sparre v. State*, 164 So.3d 1183 (Fla. 2015) (No. SC12-891). While the statement from the

probation officer who wrote the PSI was not available at the time, the information that there was significant mitigation evidence was known and was in the appellate record from the extensive *Koon* colloquy, as noted by this Court in the direct appeal opinion. *Sparre*, 164 So.3d at 1190. A comparison between the extensive mitigation listed in the *Koon* colloquy and the mitigation listed in the PSI would have established that there were omissions in the mitigation in the PSI. This claim could have been raised in the direct appeal but was not. The claim is procedurally barred.

### Merits

Alternatively, the due process claim is meritless. Neither *Alcorta* nor *Giglio* apply.

### **Omissions, not false testimony**

None of the United States Supreme Court cases relied by opposing counsel involved a PSI in a waiver of mitigation case. *Alcorta* and *Giglio* were both false testimony cases. *Geralds v. Att’y Gen. of Fla.*, 855 Fed. Appx. 576, 590 (11th Cir. 2021) (noting that, while

*Alcorta* discussed testimony that gave the jury a “false impression,” the opinion also explained that the witness had “been allowed to testify falsely”), *cert. denied, Gerald v. Dixon*, 142 S.Ct. 1422 (2022). *Giglio* also involved the false testimony of the co-perpetrator, who was the Government’s key witness, that he did not have a deal with the prosecution when he did have a deal.

This is not a claim of false testimony in the PSI. Rather, it is a claim that the PSI omitted important mitigation and that the probation officer’s lay observation regarding his impression of Sparre’s mental condition on the day of his interview with Sparre. It is a claim mainly of omission, not falsity.

There is also a magnitude aspect to *Alcorta* because it was the only eyewitness to the murder who gave perjured testimony that he was not having an affair with the victim which was “seriously prejudicial” to the defense that he had killed his wife in a “sudden passion” upon discovering the affair. And the prosecutor in *Alcorta* had told the eyewitness not to be forthcoming about the affair. *Alcorta* and *Giglio* are far afield from a claim of omissions in a PSI. Indeed,

this Court already observed that the prosecutor did not possess any mitigation other than that already contained in the detailed *Koon* proffers. *Sparre*, 289 So.3d at 855.

Just as a prosecutor has no duty under *Brady* to discover or investigate for the defense, a probation officer has no federal due process duty to collect all mitigation, much less to collect it against the defendant's wishes. *Hall v. Mays*, 7 F.4th 433, 440 (6th Cir. 2021) (rejecting a claim that a prosecutor had a duty to investigate, discover, and obtain, under due process and *Brady*, the mental health records of the State's key witness who was an inmate), *cert. denied*, 142 S.Ct. 2655 (2022).<sup>4</sup> The federal due process clause does not require

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<sup>4</sup> *Moreno-Morales v. United States*, 334 F.3d 140, 146-47 (1st Cir. 2003) (stating that the government has no duty to produce evidence outside of its control citing *United States v. Hughes*, 211 F.3d 676, 688 (1st Cir. 2000); *United States v. Faller*, 675 Fed. Appx. 557, 560 (6th Cir. 2017) (holding the Government had no due process duty to discover the whereabouts of a computer with exculpatory evidence because it never possession the computer citing *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007)); *United States v. Robinson*, 272 Fed. Appx. 421, 434 (6th Cir. 2007) (explaining that *Brady* does not impose a duty upon the government to discover information which it does not possess citing *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007)); *United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994) (noting the Government has no affirmative duty to discover information which it does not possess citing *United States v. Tierney*,

probation officers preparing PSIs to become defense mitigation specialists and especially not in a case where the defendant did not even want the mitigation from his own two mitigation specialists to be presented.

### **Full disclosure**

The only federal due process concern regarding a PSI is the full disclosure requirement. In *Gardner v. Florida*, 430 U.S. 349 (1977), the United States Supreme Court found, in a capital case, a violation of due process when the confidential portions of the PSI were not disclosed to the defendant or his counsel. It was the ex parte nature of the PSI that amounted to the due process violation, not the contents or any omissions in the PSI itself. *Delap v. Dugger*, 513 So.2d 659, 661,n.3 (Fla. 1987) (noting the Florida Supreme Court had concluded in the direct appeal that the sentencing judge's solo trip to Florida State Prison without notice to the parties violated the due

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947 F.2d 854, 864 (8th Cir. 1991), and *United States v. Dunn*, 851 F.2d 1099, 1101 (8th Cir. 1988)); *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) (holding that federal prosecutors had no duty to discover and disclose evidence obtained in an unrelated state investigation).

process principles of *Gardner* but finding no prejudice because the trial court found mitigation, not aggravation, based on the trip citing *Delap v. State*, 440 So.2d 1242, 1257 (Fla. 1983)); *Mann v. Moore*, 2010 WL9452231, at \*22 (M.D. Fla. Nov. 10, 2010) (explaining that considering evidence not disclosed to the defendant as a basis for imposing a death sentence is improper under *Gardner*); *see also McClendon v. State*, 589 So.2d 352, 354 (Fla. 1st DCA 1991) (noting there may be a due process concern under *Gardner* if the PSI contains confidential portions which are not revealed to defense counsel).

But, here there is no allegation that Sparre's trial counsel and appellate counsel did not receive a copy of the PSI or that the trial court considered any undisclosed information in the PSI, unavailable to counsel, in sentencing Sparre. Indeed, the trial court asked both the defense counsel and the prosecutor if they had any objections to the PSI at the *Spencer* hearing. *Sparre*, 164 So.3d at 1191 (noting defense counsel had no objections to the PSI). Because the claim is not a claim of non-disclosure of the PSI, there is no due process violation.

This is not actually a valid federal due process claim. It is really just a *Muhammad* claim wrapped in due process cloth. *Muhammad* is a matter of state law and there is no federal constitutional equivalent. A petitioner cannot transform a state law claim into a federal one merely by attaching a due process label. *Gryger v. Burke*, 334 U.S. 728, 731 (1948) (refusing to treat an error of state law as a denial of due process; otherwise, “every erroneous decision by a state court on state law would come here as a federal constitutional question”). State law issues, even when “couched in terms of equal protection and due process,” still remain state law issues. *Deveaux v. Warden*, 2017 WL 11621333, at \*2 (11th Cir. Apr. 26, 2017) (concluding the claim was not a valid claim of the denial of a federal constitutional right; rather, it was a matter of state law citing *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1998)). *Muhammad* is not a matter of federal due process constitutional law and merely quoting random dicta in United States Supreme Court due process cases does not turn it into one.

The successive claim is waived, procedurally barred, and meritless as a matter of law.

### ISSUE III

DID THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE POSTCONVICTION CLAIM OF THE DUE PROCESS RIGHT TO BE SENTENCED BASED ON ACCURATE INFORMATION RELYING ON *TOWNSEND V. BURKE*, 334 U.S. 736 (1948), AND *UNITED STATES V. TUCKER*, 404 U.S. 443 (1972), DUE TO THE OMISSIONS IN THE PRESENTENCE INVESTIGATION REPORT? (RESTATED)

Sparre asserts the PSI violated his due process right to be sentenced based on accurate information under *Townsend v. Burke*, 334 U.S.736, 740-41 (1948), and *United States v. Tucker*, 404 U.S. 443 (1972). IB at 45. The due process claim was waived when Sparre waived the presentation of mitigation at the penalty phase and the *Spencer* hearing. The claim is also procedurally barred because it was not raised in the direct appeal. Alternatively, the claim is meritless as a matter of law. There are omissions in the PSI, not inaccuracies. Neither *Townsend* nor *Tucker* apply to PSIs, much less to PSIs in waiver-of-mitigation cases. The successive postconviction claim is waived, procedurally barred, and meritless as a matter of law.

### The postconviction court's ruling

The postconviction court summarily denied the successive postconviction motion. (1st succ. PC at 112-129).

### Standard of review

The standard of review of a trial court's order summarily denying a postconviction claim is de novo. *Dillbeck v. State*, 357 So.3d 94, 98 (Fla. 2023) (stating that because "the circuit court denied these claims without an evidentiary hearing, our review is de novo" citing *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023); *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (noting the Florida Supreme Court reviews a postconviction court's decision to summarily deny a successive postconviction motion de novo citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)).

### Waiver

The due process claim of inaccurate information in the PSI was affirmatively waived when Sparre voluntarily waived the presentation

of mitigation at the penalty phase and *Spencer* hearing. Again, the only reason the omitted mitigation that opposing counsel insists had to be included in the PSI was not presented at the penalty phase was that Sparre waived mitigation. Defense counsel had a full mitigation case, developed with the help of two mitigation specialists, that included mental health experts, ready to present to the jury but Sparre chose to waive that presentation. The Florida Supreme Court's direct appeal opinion detailed the extensive mitigation that defense counsel was ready to present. *Sparre*, 164 So.3d at 1189, n.3. The only reason the contents of PSI are at issue is because Sparre chose not to present mitigation to the jury at the penalty phase or to the judge at the *Spencer* hearing.

A defendant may not affirmatively waive his rights and then complain that those rights were violated. *Grim v. State*, 841 So.2d 455, 462 (Fla. 2003) (concluding that because Grim waived the presentation of mitigation during the penalty phase, "he cannot complain on appeal that the trial court abused its discretion" by not calling the defense mental health experts as a court witness to testify

as to mitigation citing *LaMarca v. State*, 785 So.2d 1209 (Fla. 2001)). The contents of the PSI only becomes an issue due to his waiver. The due process claim regarding the right to a sentence based on accurate information was waived.

### Procedural bar

Additionally, the claim is procedurally barred because any due process attack on the PSI regarding any inaccuracies should have been raised in the direct appeal. *Covington v. State*, 348 So.3d 456, 471 (Fla. 2022) (concluding a due process claim was procedurally barred in postconviction because the claim should have been raised on direct appeal citing *Dailey v. State*, 283 So.3d 782, 793 (Fla. 2019)); *Smith v. State*, 310 So.3d 366, 373-74 (Fla. 2020) (concluding a Fourth Amendment claim was procedurally barred in postconviction because he failed to raise the issue on direct appeal citing *Johnson v. State*, 104 So.3d 1010, 1027 (Fla. 2012)).

The PSI, which was written in 2012 was available at the time of the direct appeal. *Sparre v. State*, 164 So.3d 1183 (Fla. 2015) (No.

SC12–891). Any claims of inaccuracies based on *Townsend* and *Tucker* should have been raised in the direct appeal. The claim is also procedurally barred.

### Merits

None of the United States Supreme Court cases relied by opposing counsel involved a PSI in a waiver of mitigation case. *Townsend v. Burke* was a case where an unrepresented defendant was sentenced on additional charges that he had actually been acquitted of. While *Townsend* Court spoke of the “foundation” of the sentence being “extensively and materially false” because the sentence was based on assumptions concerning his criminal record which were “materially untrue,” the actual violation of due process found by the Court was that the defendant was not represented by counsel. *Townsend* was a due process forerunner to *Gideon v. Wainwright*, 372 U.S. 335 (1963). It was not the sentence itself that was the due process violation. The High Court explicitly made that observation, when it stated that “counsel might not have changed the sentence,

but he could have taken steps to see that the conviction and sentence were not predicated on misinformation.” *Townsend*, 334 U.S. at 741.

Here, unlike *Townsend*, Sparre had counsel. And the PSI in this case did not misrepresent Sparre’s criminal history either. Furthermore, *Townsend* was not a waiver-of-mitigation case.

*Tucker* also involved a violation of the right to counsel under *Gideon*. *Tucker*, who had been unrepresented by counsel, was sentenced based on prior convictions. Again, Sparre was represented by counsel. *Tucker* did not involve a waiver of mitigation either. *Watts v. United States*, 386 Fed. Appx. 245, 250, n.5 (3d Cir. 2010) (rejecting a general due process challenge to a sentence based on a mistake of fact where the defendant, who was represented by counsel, did not object and distinguishing *Townsend* and *Tucker*).

### **Omissions, not misrepresentations**

Additionally, while opposing counsel characterizes the omissions in the PSI as “inaccuracies,” there were no misrepresentation in the PSI, only omissions. The PSI did not contain all the possible mitigation but it did not misrepresent the mitigation. The PSI did not contradict

the mitigation proffered to the trial court during the *Koon* colloquy.

Opposing counsel extensively lists the mitigation that was omitted from the PSI for pages but does not point to any actual inaccuracies. IB at 49-54. Opposing counsel characterizes the PSI description of Sparre's upbringing as "less than ideal" as a "preposterous understatement." IB at 49. But understatements are not inaccuracies.

And while counsel points to Carney's written statements in the PSI that Sparre's mental health was satisfactory and he "no obvious signs of impairment," when later, in 2021, Carney stated that Sparre's unwillingness to cooperate in the preparation of the PSI have been a consequence of some psychiatric disorder as being an inaccuracy. Carney admitted that Sparre did not want to talk to him and would answer only certain questions. But again Sparre's unwillingness to cooperate may have been due to that fact that he wanted to waive mitigation rather than any mental illness. Carney's statement about a possible mental disorder is pure speculation by a lay person based on his limited interaction with Sparre. And postconviction relief

cannot be based on speculation. *Dillbeck v. State*, 357 So.3d 94, 103 (Fla. 2023) (quoting *Jones v. State*, 845 So. 2d 55, 64 (Fla. 2003)); *Brown v. State*, 304 So.3d 243, 260 & 261 (Fla. 2020) (quoting *Calhoun v. State*, 312 So.3d 826, 844 (Fla. 2019)). Moreover, the PSI contained Sparre’s grandmother’s statement that he suffered with “mental problems.” *Sparre*, 164 So.3d at 1194.

This is really a claim that due process requires full information regarding all possible mitigation in a waiver-of-mitigation case. But there is no federal due process right to a PSI, much less to a comprehensive PSI, and certainly not in a waiver case.

The successive due process claim is waived, procedurally barred, and meritless as a matter of law.

Accordingly, the postconviction court properly summarily denied the first successive postconviction motion.

CONCLUSION

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

Respectfully submitted,

ASHLEY MOODY  
ATTORNEY GENERAL OF FLORIDA

*/s/ Charmaine Millsaps*

CHARMAINE M. MILLSAPS  
SENIOR ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 0989134  
OFFICE OF THE ATTORNEY GENERAL  
THE CAPITOL, PL-01  
TALLAHASSEE, FL 32399-1050  
(850) 414-3300  
COUNSEL FOR THE STATE  
primary email:  
capapp@myfloridalegal.com  
secondary email:  
charmaine.millsaps@myfloridalegal.com  
  
COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to CHELSEA SHIRLEY, Assistant CCRC-N, 1004DeSoto Park Drive, Tallahassee FL 32301; phone: (850) 487-0922; email: chelsea.shirley@ccrc-north.org; DAWN A. MACREADY, Assistant CCRC-N, 1004DeSoto Park Drive, Tallahassee FL 32301; phone: (850) 487-0922 ext. 111; email:Dawn.Macready@ccrc-north.org; and NIDA IMTIAZ, Assistant CCRC-N, 1004DeSoto Park Drive, Tallahassee, FL 32301; phone: (850) 487-0922; email: Nida.Imtiaz@ccrc-north.org this \_\_\_\_ day of June, 2023.

/s/ Charmaine Millsaps  
Charmaine M. Millsaps  
Attorney for the State of Florida

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/s/ Charmaine Millsaps  
Charmaine M. Millsaps  
Attorney for the State of Florida