IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-163
L.T. No. 162010CF008424AXXXMA

DAVID KELSEY SPARRE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this matter.

STATEMENT OF THE CASE

Appellant David Kelsey Sparre was indicted for the first-degree murder of Tiara Poole on August 26, 2010. (R. 20-22).[1] He was tried in the Duval County Circuit Court in front of Judge Elizabeth Senterfitt. On December 2, 2011, a jury found Appellant guilty of first-degree murder on theories of premeditation and felony murder in the course of a burglary. (R. 592-93). After Appellant waived the presentation of mitigation evidence, (T. 1248-59), the trial court ordered that a presentence investigation report (PSI) be compiled but declined to order mitigation evidence be presented, (R. 704). The jury unanimously recommended a sentence of death. (R. 628; T. 1410). A *Spencer* hearing was held on January 27, 2012, during which no

[1] References to the record on direct appeal, which includes the first five volumes of the state court record, are "(R. [page])." Citations to the trial transcript, which includes volumes six through fifteen of the state court record, are "(T. [page])." Citations to the two volumes of exhibits compiled for the direct appeal record are "(E. [page])." References to the Record on Appeal for the initial postconviction proceeding are designated "(PCR. [page])." References to the Record on Appeal of the proceeding below are designated "(PCR-2. [page])."

mitigation testimony was presented. (R. 955-87).[2] Appellant was sentenced to death on March 30, 2012. (R. 694-713, 988-1008). On direct appeal, this Court affirmed Appellant's conviction and death sentence. *Sparre v. State* (*Sparre I*), 164 So. 3d 1183 (Fla. 2015).

Appellant filed an initial motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 on October 26, 2016. The circuit court denied relief. Appellant timely appealed and sought habeas corpus relief in this Court. This Court affirmed the circuit court's order and denied habeas corpus relief. *Sparre v. State* (*Sparre II*), 289 So. 3d 839 (Fla. 2019).

On April 14, 2022, Appellant filed a Successive Motion to Vacate Judgement and Sentence with Special Request for Leave to Amend Pursuant to Rule 3.851. (PCR-2. 1-46). Without holding a *Huff* hearing, the circuit court summarily denied the motion.[3] (PCR-2. 73-81). In light of the *Huff* error, Appellant filed a motion for rehearing. (PCR-2. 91-94). The circuit court held a hearing on July 14, 2022, granting the motion for rehearing and holding the *Huff* hearing that day. (PCR-2. 110-11). Following that hearing, the circuit court re-

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

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

issued the same order summarily denying the successive 3.851 motion. (PCR-2. 112-20). This appeal follows.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

A. Appellant waived the presentation of mitigation.

On the morning that the penalty phase was set to begin, trial counsel informed the Court that they just learned that Appellant did not wish to present mitigating evidence. (T. 1236). The trial judge asked if Appellant had discussed the mitigation with his lawyers. (T. 1248-59). He said he had. Appellant also stated he had been prescribed Thorazine and Celexa but he throws them in the toilet. (T. 1256). He falsely said those medications were sleep aids. (T. 1256-57). The court found Appellant's waiver of mitigation was knowingly, freely, and voluntarily made. (T. 1248-59). Trial counsel presented an abbreviated proffer of the mitigation witnesses that were prepared to testify that morning. (T. 1236-46).[4]

Up until the morning of the penalty phase, trial counsel had never indicated to the court that Appellant considered waiving

[4] Appellant allowed trial counsel to argue mitigation from the guilt phase record, and trial counsel asked the jury to spare Appellant's life. (T. 1373).

mitigation. The week prior to his waiver, trial counsel stated that everything was on schedule—that there were "no kinks in the wheels" for the mitigation case. (R. 1218). He advised the Court, with Appellant present and not objecting, that the defense would call four experts in addition to lay witnesses, and that the penalty phase case could last an extra day because the defense would be presenting more witnesses than expected. (R. 1219-20).

Appellant had fully participated in the development of mitigation. During the guilt phase, Appellant confirmed to the trial court on the record that he "would . . . like to have [his grandmother] testify live during the penalty phase." (T. 355). Additionally, Appellant cooperated with mental health development requiring his participation. He met with Dr. Krop and his assistant on September 13-14 and on November 27, 2011, without incident, to "explore possible mitigation factors." (PCR. 3668-69). Dr. Krop was still receiving records from trial counsel's investigator through the first week of December. (PCR. 3660).

On the eve of the penalty phase, counsel again represented the defense would be presenting mitigation:

ELER: Judge, other than scheduling, I was going to ask, and of course we'll be prepared to complete the case tomorrow, but with the lengthy witnesses, we have two or three mental health experts, would the Court consider if we run into a problem, concluding on Wednesday morning with closing and instructions?

THE COURT: Yes.

ELER: And getting through the actual physical testimony tomorrow.

(R. 952). Despite facing no obstruction to the preparation of mitigation until this point, Appellant would waive mitigation on the next day. On December 14, 2011, trial counsel announced he was "informed actually yesterday morning" that "Mr. Sparre does not wish us to present any witnesses." (R. 1235). Dr. Krop was driving to testify when he was called and told to turn around because he would not be needed. (PCR. 3676-77). Mitigation witnesses who had otherwise been ready to testify that day, including Appellant's family members, were all gathered in a room in the courthouse and informed, for the first time, that Appellant asked to have no testimony presented.

Notably, jail records reflect several red flags during this time. Shortly after his arrest, Appellant was put into the mental health lock-down unit for "mental health reasons" including suicidal

ideation. (PCR. 1530). Jail records reflect that he remained there, or another lockdown unit, for most of the time through his trial and sentencing. Appellant reported numerous night terrors, depression and anxiety. He reported that he would alternate between sleeping for days and being awake for days at a time. He threatened to commit suicide and had reported hearing voices on many occasions. (PCR. 1540, 1542, 1545, 1549-51, 1554, 1574, 1592). He indicated that at least one voice—his alter ego or imaginary voice "Tommy"—had told him to kill himself while in jail, before being prescribed medication. (*See id.*; *see also* PCR. 3664, 3677, 1432-33).

During the first week of January 2011, records show that Appellant went through a major psychotic episode. On January 1, 2011, he was "aggressive and belligerent," threatened suicide, and banging on the cell walls and door with his head, even when nobody was around to see it. (PCR. 1589). "He cut himself and streaked blood across his face, arms, torso." *Id.* He was taken to the clinic and with additional abrasions on his neck and shoulders. (PCR. 1588). He was seen again later in the day because his symptoms worsened. He kept banging his head on the glass window of his cell and "speaking nonsensicalities." (PCR. 1590). He had to be restrained and injected

with the antipsychotic Zyprexa (olanzapine) and the sedative Ativan (lorazepam) for "agitation and psychosis." (PCR. 1588-91).

In response to this episode, Appellant was prescribed Thorazine (chlorpromazine), (PCR. 1592, 3664), a first-generation antipsychotic medication commonly used to treat such psychotic disorders like schizophrenia, schizoaffective disorder, and psychosis. *See* 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 3060 (B. Sadock, V. Sadock, & P. Ruiz eds., 10th ed. 2017). Psychosis is a "mental disorder in which a person's thoughts, affective response, ability to recognize reality, and inability to communicate and relate to others are sufficiently impaired to grossly interfere with his or her capacity to deal with reality." *Id.* at 4607. "[T]he classical characteristics of psychosis are impaired reality testing, hallucinations, delusions and illusions." *Id.* He was also prescribed a regimen of Prozac (fluoxetine), a selective serotonin reuptake inhibitor. (PCR. 1592). While Appellant was taking his medications as prescribed, until the day after his penalty phase waiver, the jail medical records appear unremarkable and do not note any psychotic outbursts.

Additionally, during the waiver, the court asked Appellant if he had consulted with counsel before making the decision to waive mitigation:

> THE COURT: And prior to this morning, have you had lengthy discussions with them and the investigators about all of this?
>
> SPARRE: Yes, Your Honor, not only with them but with myself.

(T. 1248-49). Counsel for neither side inquired about Appellant's having "lengthy discussions . . . with myself," despite having reviewed jail records and expert notes documenting his "Tommy" alter ego, his history of auditory hallucinations and voices, and his present antipsychotic regimen.

At the State's request, the court inquired of Appellant regarding his medication prescriptions. Appellant admitted that he had been prescribed Thorazine and Celexa by jail staff but lied that they were merely to help him sleep. Additionally, he notified the Court that he had quit taking his prescribed antipsychotic medications. The trial judge had counsel confirm that Appellant was seen by doctors and

that no competency issues were noted in the past. (T. 1257).[5] The court also noted that Appellant did not appear to be visibly under the influence and seemed lucid and answered questions appropriately. (T. 1257). The court found that Appellant knowingly and voluntarily waived the presentation of mitigation evidence.

The next day, Appellant reported to the jail personnel he was "seeing things," had lost his appetite, and had not been sleeping for three consecutive nights—which would include two nights prior to his penalty phase waiver. (PCR. 1675). He denied suicidality, but only after hesitating to answer. *Id*. He asked to be put on Risperdal, an antipsychotic drug previously prescribed to him as a child. *Id*. During the postconviction proceedings, Dr. Krop noted that his symptoms were expected for a person who abruptly quits antipsychotics. He explained that quitting medications "most likely" would cause sleep problems, loss of appetite, and "neurovegetative indicants of depression and anxiety." (PCR. 3679). He added that doing so could

[5] Dr. Krop referenced for counsel Appellant's prior auditory hallucinations and psychotic episodes before Appellant was prescribed Thorazine at the jail. Also, as noted earlier, jail medical staff have extensively documented Appellant's psychosis and hallucinations.

result in "exhibiting the psychotic symptoms, but in his case since they were internal it would be up to him to report these symptoms or these hallucinations for someone else to recognize, for a layperson to recognize that he's going through that." (PCR. 3679).

B. The circuit court follows the *Muhammad* procedure, but by relying on the PSI, declines to order mitigation evidence be presented

After Appellant waived the presentation of mitigation evidence, the trial court, following the *Muhammad* procedure, ordered the Florida Department of Corrections to generate a PSI.[6] Probation officer Dale Carney was assigned to generate the PSI in this case.

The PSI was cursory and, as the sentencing judge found, did not reveal a possibility of significant mitigation. The PSI was submitted within one month of Appellant's mitigation waiver and noted the following potentially mitigating facts:

- Personal Background: Mr. Sparre's family was "dysfunctional" and he was raised by his grandmother, mother and sister. His mother moved frequently and was married seven times. He was beaten by a stepfather and later placed in the Tara Hall boys home. He dropped out in 10th grade, had C and D grades, but obtained a GED in 2008. He joined the military but was discharged within seven months because he was not a "good fit." He worked as a busboy for two months. (PCR. 1395-97).

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6 *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001).

- Alcohol or Drugs: The PSI noted that Mr. Sparre self-reported using Xanax, Ecstacy, Hydrocodone and Percoset since age 14. He also drank and blacked out on average two times per month from alcohol. (PCR. 1397).
- Mental Health: Mr. Sparre showed no obvious signs of impairment and denied being suicidal or depressed. His grandmother said he was "mentally challenged and had mental problems" as well as "ADHD." (PCR. 1397).

Officer Carney summed up the PSI as revealing that although Appellant's upbringing was "less than an ideal," it was "not remarkably different from most young men I have interviewed and supervised." (PCR. 1399).

At the January 2012 *Spencer* hearing, the sentencing judge inquired of the parties as to any exception they may have to what was in the PSI. (R. 962). The defense did not voice any objections. *Id.* The State had one objection, which concerned the PSI's omission of a bad fact. The PSI noted that Appellant was discharged from the military, but the State corrected it to ensure that the court knew that the reason for discharge was that he got into "a fight" and "had problems" with others. (R. 963). The State explained that "by law the Court has to consider anything in the P.S.I. that is of a mitigati[ng] nature," so "the record needs to be clear" and "complete" about the military facts.

(R. 963-64). The State represented that the PSI was otherwise correct. (R. 965).

After the jury recommended a sentence of death by a 12-0 vote, the court sentenced Appellant to death on March 30, 2012. (R. 1006). The judge noted she could, in her discretion, have called witnesses to testify if the PSI revealed the probability of significant mitigation, but she declined to do so. (R. 704). In doing so, the circuit court rejected any mitigation unless it was noted in the PSI. The court noted that although three doctors would have testified that Appellant suffered from PTSD, it was "not required to accept this mitigating circumstance based on this proffer." (R. 705). Similarly, the court rejected the mitigator of impaired judgment, noting that although Dr. Krop would have testified in support of it, she was not required to accept it based on a proffer. (R. 707).

C. The author of the PSI admits that the PSI contained false information and that it is a pattern and practice to prepare deficient PSI's in capital cases in Florida

On June 2, 2021, Officer Carney spoke to an investigator from the Federal Public Defender's office working on behalf of Appellant's federal habeas legal team. Carney revealed information about the PSI report he authored in this case—namely that it contained false

information and omitted other material information. He also revealed that Florida Department of Corrections investigators, including himself, are derelict in their duty to prepare PSI reports in capital cases based on a general misunderstanding of the law under *Muhammad* that capital PSI's are irrelevant.

i. DOC pattern and practice—inadequate capital PSI's

According to Officer Carney, the Department of Corrections did not give officers specific guidelines for their PSI reports, other than to investigate based on the criteria laid out in the standard categories within the PSI report form. (PCR-2. 6). Typically, there was only a few weeks to months to finish a report for a judge. *Id.* The standard practice was to obtain relevant records from the court file and law enforcement databases, or make specific requests for medical, employment and school records. *Id.* Sometimes records would be difficult to obtain without release authorizations signed by the defendant. *Id.* Officer Carney also would interview the particular defendant and his family members if their information was provided by the record or by the defendant. *Id.* He would also request comments from the prosecutor, defense attorney, lead detective, and the victim or victim's advocate. *Id.* However, over 90 percent of the

time, law enforcement and lawyers did not make comments, and almost never in capital cases. *Id.*

Carney also explained that generally, in non-capital cases, probation officers understand PSI reports to carry more weight with a judge for deciding a defendant's sentence. (PCR-2. 7). But in capital cases, such reports are regarded as having no import because under either sentencing option (death or life without parole) there is no community release and no need to prepare information that is useful for further supervision or a release plan. *Id.* Mr. Carney also operated under the belief that, in capital cases, the jury or judge already heard all relevant evidence directly through the court proceedings. *Id.* So, there is essentially no motivation to conduct an extensive investigation into a defendant's background for a PSI in a capital case based on this misunderstanding. *Id.* There are also no official guidelines for investigating PSI's in a capital case. *Id.*

ii. The false and materially inaccurate PSI in this case

Officer Carney explained that he was assigned the PSI in this case in December 2011 and finished it the next month. (PCR-2. 6). He followed DOC's normal practice. *Id.* He met Appellant once, at the pretrial detention facility. *Id.* He also reached out to one family

member (Appellant's grandmother) and interviewed her over the phone. *Id.* He could not visit her in person because she lived in Brunswick, Georgia. *Id.* Officer Carney took notes when speaking to each of them and wrote relevant information in the PSI. *Id.* The lawyers and the detectives declined to make a comment for the PSI. *Id.*

In this case, Carney noted in his PSI report that Appellant's "mental health" was "satisfactory." (PCR-2. 7). In fact, Officer Carney believed that Appellant had a psychiatric disorder. *Id.* As Carney reflected in June 2021, in his entire career only two or three defendants impressed upon him as David Sparre did. *Id.* The reason was that Appellant was silent and had a blank expression on his face, and Officer Carney was disturbed by Appellant to the point that he vividly remembered him almost a decade after their only encounter. *Id.* But when drafting the PSI, Officer Carney wrote, falsely, Appellant was "not remarkably different from most young men I have interviewed and supervised." *Id.*

Additionally, Officer Carney noted that unlike most defendants, Appellant did not want to speak about his case, other than answering simple questions about his history. *Id.* His answers were brief and

short. *Id*. Although Officer Carney suspected that Appellant had a psychiatric disorder, he did not pursue the issue because he was not familiar with the *Muhammad* requirement, and actually held a contrary assumption—that a PSI would carry little to no weight in a capital case where a defendant would not have any potential for release. *Id*. Besides the records he was initially given, Officer Carney made no additional requests for records, and he was not privy of records documenting Appellant's psychotic and PTSD symptoms in jail, or during his childhood or adolescence. (PCR-2. 7-8).

SUMMARY OF THE ARGUMENT

First, the circuit court denied relief below based on an erroneous application of the law-of-the-case doctrine. Appellant raised three claims below based on the newly discovered evidence regarding a 2021 statement made by PSI author Dale Carney admitting the DOC's pattern and practice of generating inadequate PSI's in capital cases and that the PSI in this case contained false information. As such, these claims are not barred by the law of the case. And, even if they were, the application of the law-of-the-case doctrine would be manifestly unjust and/or clearly erroneous in light of Carney's 2021 statement.

Second, the circuit court denied all three claims raised below in a terse paragraph because "none of the…newly discovered evidence shows that the State failed to prepare a thorough PSI," the PSI was "sufficient," and that "a PSI is not a substitute for a mitigation trial." (PCR-2. 119). This was error. Carney's 2021 statement, in which he admitted to the DOC's pattern and practice of generating inadequate PSI's in capital cases and that the PSI in this case contained false information, demonstrates that the *Muhammad* "comprehensive" requirement was not met in this case and that the PSI contained materially false information. This Court should vacate the circuit court's order and remand for an evidentiary hearing on Appellant's claims.

ARGUMENT

This Court should reverse the circuit court's summary denial of Appellant's successive 3.851 motion and remand for an evidentiary hearing. This Court's review of the circuit court's order is de novo and the factual allegations presented in Appellant's motion and in this appeal must be taken as true unless conclusively refuted by the record. *See Kocaker v. State*, 311 So. 3d 814, 821 (Fla. 2020).

I. THE CIRCUIT COURT ERRED IN DENYING THE SUCCESSIVE RULE 3.851 MOTION AS BARRED BY THE LAW-OF-THE-CASE DOCTRINE

In the successive 3.851 motion, Appellant raised three claims based on newly discovered evidence relating to the PSI in this case. All three claims were factually based on officer Carney's 2021 statement. These claims argued that: (1) in light of the newly discovered information, the PSI violated *Muhammad*'s comprehensiveness requirement; (2) his due process rights were violated by the false presentation of information in the PSI; and (3) his due process right not to be sentenced based on materially inaccurate information was violated.

In summarily denying relief, the circuit court found that all three claims were procedurally barred under the law-of-the-case doctrine because they were not "materially different" than claims previously denied by this Court in this case and that "as a matter of law, his PSI complied with the requirements of *Muhammad*." (PCR-2. 118-19). The circuit court also concluded that "none of [the] newly discovered evidence shows that the State failed to prepare a thorough PSI" and that "a PSI is not a substitute for a mitigation trial." (PCR-2. 119).

The circuit court erred in applying the law-of-the-case doctrine. Under the law-of-the-case doctrine, a trial court must follow the prior ruling of the appellate court only "as long as the facts on which such decision are based continue to be the facts of the case." *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001). If a litigant "develops different facts and different issues, the 'law of the case' doctrine will not preclude a conclusion at variance with the initially adjudicated result." *Steele v. Pendarvis Chevrolet, Inc.*, 220 So. 2d 372, 376 (Fla. 1969).

Even if the legal issues are the same, the doctrine still allows "reconsider[ation] where there have developed material changes in the evidence." *State v. Sigler,* 967 So. 2d 835, 840 (Fla. 2007). Thus, the doctrine does not separately bar consideration of newly discovered evidence claims. *See* Fla. R. Crim. P. 3.851(d)(2)(A) (directing merits review if "the 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"); *cf*. *Dorian v. Davis*, 874 So. 2d 661, 664 (Fla. 5th DCA 2004) (new evidentiary basis of an argument in a later proceeding meant that the law-of-the-

case doctrine does not apply); *State v. Parker*, 275 So. 3d 189, 192 (Fla. 4th DCA 2019) (same).

It is axiomatic that distinct legal claims related to the same aspect of a trial can be raised on both direct appeal and during postconviction. This is particularly so when, like here, the claim raised on direct appeal or in a previous appeal is entirely record based and the later-raised claim (or claims) is based on facts outside the trial record.

For example, in *Sanchez-Torres v. State*, 130 So. 3d 661, 672 (Fla. 2013), this Court analyzed on direct appeal a claim that the guilty plea was involuntary based on the trial-court record but declined to address the portion of the defendant's argument that was related to ineffective assistance of counsel because, as the Court noted, that argument was better addressed in postconviction. Then, during the postconviction appeal in the same case, this Court addressed the "claim that trial counsel misadvised Sanchez-Torres" regarding the guilty plea after noting that "in the direct appeal opinion, we refused to address Sanchez-Torres's assertions that he was misinformed about the consequences of a guilty plea, holding that such claims should be addressed in postconviction proceedings,

where an evidentiary hearing could be held on the allegations." *Sanchez-Torres v. State*, 322 So. 3d 15, 20 (Fla. 2020). There, like Appellant's case, the later-raised claim was not procedurally barred by the fact that the defendant had already challenged the same operative event at his trial through a previously raised but distinct legal claim.

Similarly, in this case, each of the claims raised in Appellant's successive 3.851 Motion are based on the same operative newly discovered evidence: the DOC Officer's candid admissions that his PSI was cursory pursuant to a pattern and practice of DOC in capital cases, that he did not follow the comprehensiveness requirement (or even know about it) in crafting the PSI and believed that the judge and jury had already considered all relevant information, and that he did not actually believe that Appellant's mental health to be "satisfactory" or that Appellant was "not remarkably different from most young men I have interviewed and supervised." The circuit court assumed the truth of all of the factual allegations—both as to the substance of the claims as well as to the timeliness of their discovery. (PCR-2. 118). The law-of-the-case doctrine has no application in denying these claims and the circuit court erred in

deferring to this Court's prior statements about the thoroughness of the PSI, which were made based on the then-existing record without the benefit of Carney's 2021 statements.

On direct appeal, Appellant "argue[d] that the trial court abused its discretion by not calling the proffered witnesses as its own after the defense team informed the trial court that Sparre forbade it from putting on a mitigation case." *Sparre I*, 164 So. 3d at 1193. This Court held that, based on the face of the trial transcript, the circuit court did not abuse its discretion in declining to call witnesses under *Muhammad*. This Court based its holding on the fact that "neither party raised any objection on the record or otherwise informed the trial court that the PSI report filed is inadequate under *Muhammad*." *Id.* at 1195. Thus, taking the PSI at face value and relying on the State's failure to object to the PSI, this Court determined that nothing indicated on the face of the record that the "PSI report the trial court considered lacked meaningfulness to the point of violating the *Muhammad* standard that it be a comprehensive document." *Id.*

In Appellant's state habeas petition, Appellant "contend[ed] that appellate counsel should have argued on direct appeal that the prosecutor committed misconduct amounting to fundamental error

by failing to alert the trial court to unpresented mitigation evidence during the *Spencer* hearing and further arguing that Sparre offered no expert testimony to establish mental health mitigation despite knowing such evidence existed." *Sparre II*, 289 So. 3d at 855. Similar to the direct appeal *Muhammad* claim, because it was raised in a state habeas petition, it was limited to the face of the trial court record. And, as this Court noted, in bringing this claim, Appellant did not point to or allege any new evidence that was not contained in the trial record. *Id*. This Court therefore denied relief because, based on the face of the trial record, "if appellate counsel had raised this argument on direct appeal, counsel would not have been able to establish that the alleged error was fundamental." *Id*.

Therefore, the factual basis underlying the claims raised in the successive 3.851 is distinct from the factual basis underlying claims that this Court has previously decided. While the current and former claims generally address the same subject matter—the PSI in this case—that is where the similarities end. This Court has never decided, nor was asked to decide: (1) the impact of the fact that, unknown to defense counsel and to the trial court, the PSI author was ignorant of *Muhammad*'s comprehensiveness requirement

(Claim One); (2) whether the State violated due process by knowingly presenting false evidence through the PSI (Claim Two); or (3) whether PSI information was materially inaccurate in light of Carney's 2021 admissions that the PSI contained false information (Claim Three).

Moreover, the factual record now is starkly different. As noted above, in previously labeling the PSI as "comprehensive," this Court specifically relied upon the representation of the prosecution that it was accurate. *Sparre I*, at 1195 ("We observe that neither party raised any objection on the record or otherwise informed the trial court that the PSI report filed is inadequate under *Muhammad* or any other legal standard.").[7] But now that Carney has come forward, his knowledge is imputed to the State and the State had a duty to object. Likewise, this Court found the PSI to be comprehensive based on the representation in the PSI that the "defendant showed no obvious signs of impairment to [Officer Carney]." *Id.* at 1194. Carney has now admitted that that was false.

[7] It goes without saying that because the Carney information was suppressed, defense counsel could not object to the PSI based on the content of his 2021 admissions.

Further, the circuit court's reliance on the finding in *Sparre II* that the PSI complied with *Muhammad* is misplaced given that it was premised on the fact that, at the time, Appellant had not "alleged" any information calling the preparation of the PSI into question. *Sparre II*, 289 So. 3d at 855. For that sole reason, the circuit court found that Appellant was trying to "relitigate" the issue already decided on the same factual record on direct appeal. (PCR-2. 118-19). So, for example, the previous decision in this case that the PSI was adequate as a matter of law rested on the premise that the author of the PSI did not include any red flags calling Appellant's mental health into question. But now Appellant has alleged new information, including the PSI author's admission that the document was materially inaccurate, that Carney himself was aware of mental health red flags, and that it was a pattern and practice of DOC not to conduct adequate capital PSI investigations.

Therefore, neither the factual nor legal bases of the current claims were "actually presented" or "actually decided" in any former appeal. *Juliano,* 801 So. 2d at 105-06. In fact, they could not have been because they were suppressed. Appellant is thus entitled to merits review without having to show that any prior ruling, even if it

covered the same or a similar issue, was "clearly erroneous" or resulted in "manifest injustice." (PCR-2. 116-17) (citing *In re Lambrix*, 776 F.3d 789, 793-94 (11th Cir. 2015)).

But even if this Court finds that the law-of-the-case doctrine does apply, it would be manifestly unjust and/or clearly erroneous to bar Appellant's claims from being heard. Otherwise, Appellant would face execution despite being sentenced to death—without a sentencer having reviewed the substantial mitigation in this case—on the basis of a materially inaccurate sentencing procedure that was tainted by the suppression of evidence, including Florida DOC's pattern and practice of generating inadequate PSI's and the PSI author misrepresenting Appellant's mental health as "satisfactory." Additionally, this Court's prior findings regarding the sufficiency and thoroughness of the PSI in this case are now clearly erroneous in light of Carney's admissions.

The failure to address these claims under the law-of-the-case doctrine would violate Appellant's federal constitutional rights. Because state-mandated review of criminal capital convictions creates life and liberty interests that cannot be deprived without due process, states have a "duty" to provide "an adequate opportunity to

present . . . claims fairly in the context of the State's appellate process." *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). "[T]he question is whether consideration of [the] claim within the framework of the State's procedures for post-conviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Dist. Atty's Off. for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (citing *Medina v. California*, 505 U.S. 437 (1992)).

To bar the consideration of Appellant's federal constitutional claims based on the fact that Appellant previously raised different claims related to the same operative event at his trial would violate his federal rights. *Cf. Cruz v. Arizona*, 143 S. Ct. 650 (2023). To hold that a defendant cannot raise a federal claim such as a *Giglio*[8] claim for that reason violates his rights to meaningfully access the courts, *Bounds v. Smith*, 430 U.S. 817, 823 (1977), and to state-mandated review of his criminal conviction under the Due Process Clause of the Fourteenth Amendment. *Cf. Davis v. United States*, 417 U.S. 333, 342

[8] *Giglio v. United States*, 405 U.S. 150 (1972).

(1974) (finding error where lower court felt bound by law of the case despite change in circumstances).

Therefore, this Court should find that the circuit court erred in finding the claims raised in Appellant's successive 3.851 motion to be barred under the law-of-the-case doctrine.

II. THIS COURT SHOULD REMAND THE CASE FOR AN EVIDENTIARY HEARING ON APPELLANT'S CLAIMS

In the alternative to the circuit court's law-of-the-case denial, the circuit court denied all of the claims raised in Appellant's successive 3.851 in a single terse paragraph that was nonresponsive to Appellant's arguments and dismissive of the important issues at stake. Without individually analyzing any of Appellant's claims, the circuit court found that "none of the…newly discovered evidence shows that the State failed to prepare a thorough PSI," the PSI was "sufficient," and that "a PSI is not a substitute for a mitigation trial." (PCR-2. 119). This Court should vacate the circuit court's order and remand for an evidentiary hearing.

As an initial matter, this Court should vacate the circuit court's order because the cursory disposal of three claims without making specific findings of fact and law with respect to each claim deprived

this Court of the ability to conduct "meaningful appellate review." *Mendoza v. State*, 964 So. 2d 121, 129 (Fla. 2007). As this Court has repeatedly noted, in a capital postconviction case the circuit court is required to "render its order, ruling on each claim . . . raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review." *Tanzi v. State*, 94 So. 3d 482, 489 (Fla. 2012) (quoting Fla. R. Crim. P. 3851(f)(5)(D)). The order here is similar to the one this Court vacated in *Mendoza* which "simply set out the standards from case law . . . and held: 'This Court finds that the Defendant's petition did not meet nor did it overcome the requirements of the above-mentioned case law'" in a two-page order. *Mendoza*, 964 So. 2d at 129. In this case, the circuit court below neither set out the relevant standards of review for claims two and three, nor did it address the claims and the facts that Appellant alleged. Therefore, the order below did not "provide sufficient findings of facts and conclusions of law to provide meaningful appellate review." *Tanzi*, 94 So. 3d at 489.

To obtain relief based on new evidence, Appellant must show that, "the evidence must not have been known by the trial court, the

party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence." *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018). Appellant must also show the evidence to be material, which generally "requires that the newly discovered evidence would probably yield a less severe sentence." *Id.* In *Martin v. State*, 322 So. 3d 25, 37–38 (Fla. 2021) this Court announced an exception to the general rule for prejudice regarding newly discovered evidence. There the Court distinguished between "*Jones* claims,"[9] which are premised purely on the "allegation that the jury did not hear previously unavailable evidence material to guilt or innocence," and legal claims, which are governed by the relevant previously legal standard. Under either test, Appellant is entitled to a new trial.

a. Appellant's claims were timely raised

As the circuit court correctly assumed, Appellant's claims are timely and were pursued with due diligence. (PCR-2. 118). The newly discovered evidence—including the fact that the PSI contained false information, the probation officer failed to conduct a comprehensive

[9] *Jones v. State*, 709 So. 2d 512 (Fla. 1998); *Jones v. State*, 591 So. 2d 911 (Fla. 1991).

investigation into Appellant's personal and mental health history, and the pattern and practice of DOC—was not known at the time of trial. The defendant or defense counsel would not have known this information even with due diligence because there was no reason to suspect that the probation officer did not follow the law. Nor would initial collateral counsel had any reason to suspect that.

This Court has held that both trial counsel and collateral counsel can presume the accuracy of state-generated investigative reports until a witness comes forward calling the veracity of the report into question. *See Waterhouse v. State*, 82 So. 3d 84, 103 (Fla. 2012) (finding new evidence claim based on false police reports became timely only when the witness disputed the veracity of the report). Officer Carney made these statements for the first time in June 2021 when he informed an investigator working on Appellant's federal habeas case of the information that formed the basis of the three claims. Within one year, Appellant filed the successive 3.851 motion below. Therefore, these claims were brought within one year of the date from which they became discoverable.[10]

[10] To the extent that there is any question regarding whether the claims are timely, this Court must assume the allegations in

b. Appellant has raised claims that are not, on their face, unmeritorious.

i. The role of the PSI in this case under *Muhammad*.

Florida law requires a trial court to order DOC to prepare a PSI "to determine the existence of mitigating circumstances" whenever a defendant decides to waive mitigation. *Muhammad*, 782 So. 2d at 363-64 (setting forth this rule); *see* Fla. Stat. § 921.231(1) (requiring Department of Corrections to investigate and draft a report upon trial court's referral); (PCR. 1399) (citing § 921.231). This PSI must be "comprehensive" and "meaningful" to cover, in relevant part, a defendant's personal and mental health history. *Muhammad*, 782 So. 2d at 363-64. The State must also tender any relevant records in its possession to the trial court. *Id.* 364 & n. 11 (citing Fla. R. Prof. Conduct 4-3.8(c)); *see also id.* at 367 (Harding, J., concurring) ("comprehensive PSIs . . . ensure that the defendant's relevant background information regarding mental health and family history

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Appellant's 3.851 are true for purposes of this appeal and that question would be more appropriately addressed at an evidentiary hearing. *See Davis v. State*, 26 So. 3d 519, 528-29 (Fla. 2009) (noting that whether a motion for postconviction relief has met the relevant requirements under the rules of criminal procedure is subject to factual testing at an evidentiary hearing).

will be considered"); *Sparre I*, 164 So. 3d at 1194 (acknowledging state law "requires that comprehensive PSI reports be prepared and filed with the trial court whenever a capital defendant facing the death penalty waives . . . mitigation.").

The sentencing judge reviews the content of the PSI to decide on further proceedings. In doing so, "if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses." *Muhammad*, 782 So. 2d at 364; *see also Barnes v. State*, 29 So. 3d 1010, 1023 (Fla. 2010) (endorsing trial court's decision to call witnesses and appointing special mitigation counsel in light of the PSI); *Russ v. State*, 73 So. 3d 178, 189 (Fla. 2011) (same); *cf. Sparre I*, 164 So. 3d at 1203-04 (Pariente, J., dissenting) (arguing that this Court should have called witnesses despite the PSI not revealing, of itself, significant possibility of mitigation).

The PSI in this case was cursory and, as the sentencing judge found, did not reveal a possibility of significant mitigation. The PSI noted Appellant's childhood drug use and "dysfunctional" family, as self-reported. (PCR. 1395-97). But, according to the PSI, Appellant

"showed no obvious signs of impairment and denied being suicidal or depressed," apart from Appellant's grandmother noting that Appellant was "mentally challenged and had mental problems." (PCR. 1397). Carney, summed up the PSI as revealing that although Appellant's upbringing was "less than an ideal," it was "not remarkably different from most young men I have interviewed and supervised." (PCR. 1399).

When the trial court inquired of the parties as to any exception they may have to what was in the PSI, the defense did not voice any objections and the State objected solely because of the omission of a bad fact regarding Appellant's discharge from the military. (R. 963). The State explained that "by law the Court has to consider anything in the P.S.I. that is of a mitigati[ng] nature," so "the record needs to be clear" and "complete" about the military facts. (R. 964). The State represented that the PSI was otherwise correct. (R. 965).

After reviewing the content of the PSI, the trial court declined to call mitigation witnesses. However, the trial court noted that it was aware that doing so would have been appropriate "if the PSI reveal[ed] evidence of significant mitigation." (R. 704).

The trial court's sentencing order, consistent with *Muhammad*, reflected that the PSI was the only authoritative source (in addition to the guilt phase record) for determining potential mitigating factors. Any mention of a fact of mitigating nature—even if wholly unexplained or based on double-hearsay—was automatically deemed as true, so long as there was a mention of it in the PSI. (R. 708-10) (neglect, physical abuse, lack of good support system, absent father, GED, military service, deemed "proven" based cursory mention in the PSI). The trial court never discredited, or failed to find, any mitigator that was averred to in the PSI. (R. 704-11).

On the other hand, the trial court refused to credit sworn perpetuated and deposition testimony, as well as detailed proffers from the defense, because they were not part of the record. (R. 707-08 & nn. 6-8) (mitigator based solely on a defense proffer not proven, but mitigators where defense proffer was corroborated by the PSI were proven). For example, the trial court refused to credit three defense experts that discussed Appellant's childhood PTSD diagnosis—even though two of them gave sworn and perpetuated videotaped testimony to which Appellant expressly consented before

trial[11]—on the ground that a court need not consider a "proffer." (R. 705 n. 5). The PSI was the only authoritative, make-or-break source for the trial court's consideration of possibly available mitigation.

As noted above, twice this Court has denied claims related to the PSI. *Sparre II*, 289 So. 3d at 855; *Sparre I*, 164 So. 3d at 1195. But both times this Court centrally relied on the implicit assumption that the PSI was materially accurate and thoroughly prepared. Additionally, this Court relied upon the State's decision not to object to the PSI. *Sparre I*, 164 So. 3d at 1195. In light of the newly discovered evidence, both assumptions were wrong.

ii. This Court should enable Appellant to proceed forward on the claims raised below.

As noted above, on appeal from the summary denial of Appellant's successive 3.851 motion, this Court is required to take Appellant's allegations as true, unless conclusively refuted by the record. *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012). This Court should remand the case because Appellant's claims raise significant

[11] (*See* R. 648-650) (Appellant giving counsel express permission to present videotaped perpetuated testimony regarding "mitigation evidence as to statutory and non-statutory factors regarding abuse and neglect and psychological conditions and trauma which I suffered as an adolescent.").

constitutional and state law concerns in this case in light of the DOC's pattern and practice of failing to generate "comprehensive" PSI's and because the PSI contained false information.

1. The newly discovered evidence establishes that the PSI in this case contravened this Court's "comprehensiveness" requirement (Claim 1).

Officer Carney's June 2021 statement—which revealed that Appellant's PSI was grossly inaccurate, materially false, and developed in contravention of the *Muhammad* thoroughness requirement—constitutes newly discovered evidence. Appellant was prejudiced by the error. Under *Martin*, 322 So. 3d at 37-38, this Court applies the prejudice standard for inaccurate-PSI claims. That standard is "whether there is a reasonable possibility that any error in consideration of the PSI contributed to the trial court's decision to impose death." *Barnes v. State*, 29 So. 3d 1010, 1027–28 (Fla. 2010). Here, the new evidence easily establishes a "reasonable possibility" that the defective PSI "contributed" to the trial court's decision to impose death.

But even under the traditional prejudice test, Appellant is still entitled to relief because the new evidence would probably yield a less severe sentence at a new trial. The trial court declined to appoint

special counsel based entirely on the improper PSI that did not reveal a probability of significant mitigation. The PSI could have easily revealed such mitigation, had officer Carney even attempted to comply with the relevant legal requirements. Indeed, despite believing (correctly) that Appellant had a psychiatric disorder, Carney indicated that Appellant's mental health was "satisfactory." This denied Appellant the right to a comprehensive PSI he was due under state law. As noted above, the circuit court, in turn, relied exclusively upon the defective PSI as the sole authoritative source of mitigation in this case.

Therefore, under the *Barnes* standard, there is a reasonable possibility that the errors in the PSI process contributed to this Court's ultimate death sentence. Under the *Jones* standard, given the substantial mitigating evidence, which is more thoroughly laid out below, the new evidence would probably yield a less severe sentence at a new trial. *Cf. Porter v. McCollum*, 558 U.S. 30, 42 (2009) ("Had the judge and jury been able to place Porter's life history on the mitigating side of the scale, and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable

probability that the jury—and sentencing judge—would have struck a different balance[.]") (internal quotation omitted).

2. The State violated due process by presenting a PSI that the State knew, or should have known, was materially false (Claim 2).

The State violates the Due Process Clause of the Fourteenth Amendment when it presents "false or misleading evidence" to a trial court. *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 846 (11th Cir. 2011); *United States v. Horner*, 853 F.3d 1201, 1208 (11th Cir. 2017). Implied misrepresentations, even if "technically correct," create the same due process violation. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (creating a "false impression" violates due process); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977). In other words, "deliberate deception of a court . . . is incompatible with rudimentary demands of justice." *Giglio v. United States,* 405 U.S. 150, 153 (1972); *see also Berger v. United States,* 295 U.S. 78, 85 (1935) (condemning "improper insinuations and assertions calculated to mislead"). A violation occurs even if the false evidence comes from an agency that is not formally part of the prosecution. *See McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996).

Here, the prosecution knew the requirement of a comprehensive capital PSI, and thus was aware of the importance of this document to this Court. Further, the prosecution knew of the substantial mental health mitigation in this case, much of it never disputed. Yet the prosecution endorsed the PSI as accurate, minus one exception for omitting a *bad fact* about Appellant's military service. The State knew that the PSI painted a grossly false picture about Appellant's mental health and personal background. The PSI portrayed Appellant as having frequently changing homes, but either having no mental health problems, or at worst, having "ADHD" or other unspecified problems, but being "satisfactory" overall. But the prosecution fully knew that Appellant had suffered significant depravity documented well before the crime, which the PSI omitted. It does not matter that the prosecution did not actively solicit Officer Carney to paint the false picture with the defective PSI because it is still a violation of due process when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears." *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Additionally, Dale Carney, being an officer with the Florida Department of Corrections—an agency within the Florida executive

branch—was himself a state actor. Although not a formal member of the prosecution, he functioned as an investigative officer in accordance with his duty under state law. As a state investigator, any information which he held or was aware of is imputed to the State. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Gorham v. State,* 597 So. 2d 782, 784 (Fla. 1992). Thus, since Officer Carney knew (and acted upon) DOC's illegal practice of putting minimal effort into capital case PSI investigations, under the erroneous belief that any information was effectively unnecessary in capital cases, even if he did not share the existence of this practice with the prosecution, such a practice is a core impeachment fact that is imputed to the State. Additionally, like the prosecution, Officer Carney was also aware of great concerns regarding Appellant's mental health and possible mitigating evidence but omitted this from the final report. Thus, even if he did not explicitly inform the prosecution of the falsity of the information contained in the PSI, it is still imputed to the State.

Napue holds that reversal is required where the prosecution fails to correct false evidence, *regardless* of any defense efforts—successful or not—to combat it. Under *Napue*, the obligation is on the prosecution to correct—not the defense. *See also, Commw. of N.*

Mariana Islands v. Bowie, 243 F.3d 1109, 1118 (9th Cir. 2001) (Embodied in *Napue* and the Supreme Court's other precedent is "the freestanding ethical and constitutional obligation" of the State and its representatives to protect the integrity of the court against false testimony); *Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009) ("The prosecutor is an officer of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost."); *Delhall v. State*, 95 So. 3d 134, 170 (Fla. 2012) ("We are compelled once again to emphasize that the prosecutor has a "duty to seek justice, not merely 'win' a death recommendation.").

Even if defense counsel can somehow be faulted for failing to object to the inaccurate PSI – *see Routly v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994) (holding that because defense counsel was aware that a false statement was subject to impeachment and yet failed to object to the statement, there was no due process violation under *Giglio*) – the due process violation here still stands because the State capitalized on the false report. *United States v. Stein*, 846 F.3d 1135, 1147–48 (11th Cir. 2017) ("[W]here the government not only fails to correct materially false testimony but also affirmatively capitalizes on it, the defendant's due process rights are violated

despite the government's timely disclosure of evidence showing the falsity."); *see also DeMarco v. United States*, 928 F.2d 1074, 1076–77 (11th Cir. 1991) (finding prosecutorial misconduct warranted a new trial despite no suppression of evidence when the prosecutor not only failed to correct false testimony but also capitalized on the false testimony in closing argument); *United States v. Sanfilippo*, 564 F.2d 176, 178–79 (5th Cir. 1977) (same). Here, the State capitalized and affirmed the contents of the false report after express questioning by the trial court as to its accuracy. (R. 963). This Court relied too on the implicit assumption that the PSI was materially accurate and thoroughly prepared in denying Appellant's previous appeals. *Sparre II*, 289 So. 3d at 855; *Sparre I*, 164 So. 3d at 1195.

The State's presentation of false evidence prejudiced Appellant. As noted above, the sentencing judge declined to appoint special counsel to present mitigation witnesses solely because Officer Carney falsely found Appellant to be "not remarkably different from most of the other young men" who are supervised on probation, and as having no mental health problems other than perhaps "ADHD." (R. 704; PCR. 1397-99). The sentencing judge did not credit counsel's oral mitigation proffers or even deposition testimony of expert

witnesses in support of mitigation, and instead only considered the cursory mitigating facts that made it into the PSI.

Had the State corrected the PSI to accurately reflect the extent of its knowledge of Appellant's family history and mental health, the trial court would have found the correct PSI to reflect a probability of significant mitigation and, consistent with its duty under state law, would have appointed special counsel to present mitigation witnesses. *See Sparre I*, 164 So. 3d at 1193-95 (discussing the *Muhammad* requirement and concluding that the PSI did not reveal a probability of significant mitigation). Additionally, if the trial court was aware of the fact that the agency in charge of the PSI put in minimum effort and that the author did not believe the PSI mattered in capital cases, the trial court surely would not have relied upon it in declining to call witnesses. *Cf*. *Kyles*, 514 U.S. at 445 (holding that evidence is material if it impeaches the "thoroughness and . . . good faith" of an investigation conducted by the state). Finally, this Court would not have relied on the State's failure to object to the PSI in denying Appellant's *Muhammad* claim on direct appeal. *Sparre I*, 164 So. 3d at 1195.

As laid out more thoroughly below, there was substantial mitigating evidence in this case that could have been presented showing a picture of childhood deprivation, historical mental illness, lifelong suicidality, physical abuse, head injuries, and substance abuse. Had this evidence been presented, it is reasonably likely that Appellant would have received a sentence that is less than death had the court appointed special counsel.

3. Appellant was sentenced based on materially inaccurate information (Claim 3).

The false and misleading PSI also violated Appellant's due process right to be sentenced based on accurate information. *See Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Tucker*, 404 U.S. 443 (1972). This violation does not require bad faith by any state actor. *Townsend*, 334 U.S. at 740–41 (sentencing based on "untrue" information violates due process of law, regardless of whether the presentation was "caused by carelessness or design"). Rather, *Townsend* and *Tucker* simply "stand for the general proposition that a criminal defendant has the due process right to be sentenced on the basis of accurate information." *Ben-Yisrayl v. Buss*, 540 F.3d 542, 554 (7th Cir. 2008); *see also U.S. ex rel. Welch v. Lane*, 738 F.2d 863,

864–65 (7th Cir. 1984) ("A convicted offender does not have a constitutional right to a particular sentence available within a range of alternatives, but the offender does have a right to a fair sentencing process—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.").

In this case, the newly discovered evidence shows that Appellant's due process right to be sentenced based on accurate information was violated. His PSI was incorrectly deemed and assumed to be a "comprehensive" auditing of potentially available mitigation, as required by State law. But the PSI author, unaware of such a requirement, never tried to comprehensively account for Appellant's personal and mental health history and, in fact, materially misstated it. He believed, inaccurately, that because this was a capital case the PSI essentially did not matter. Despite trial counsel's mitigation proffer, the trial court relied exclusively on the PSI to supply potentially mitigating factors. (R. 704-11). Had the trial court been aware of Officer Carney's mistaken understanding of the importance of his role in this capital sentencing and the weight his findings would be given, the court would not have so relied on the

PSI report he generated. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985) ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."). Nor would the court have relied upon it if it was aware that it contained false information.

A sentencing procedure in which "significant mitigating information" is not put into evidence—or where it is falsely implied that such mitigation does not exist—results in "a sentence based on incomplete—thereby inaccurate—information." *United States v. Hamid*, 531 A.2d 628, 644 (D.C. 1987) (finding that *Townsend* and lower court cases support that the omission of material information from the sentencing hearing is regarded no less significantly). "[T]he sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts." *United States v. Malcolm*, 432 F.2d 809, 817-19 (2d Cir. 1970) (finding due process was violated where court refused to hear evidence in mitigation, namely evidence that defendant had cooperated with the authorities, based on court's "blind faith" in the presentence report

which did not mention the cooperation). Appellant was thus sentenced based on "misinformation of constitutional magnitude." *Tucker*, 404 U.S. at 447.

iii. Underlying mitigation prejudice.

In considering whether to grant an evidentiary hearing, this Court must also look to the "total picture" of the case. *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla. 2014). Had DOC followed the *Muhammad* requirement and had the PSI not contained false information, a PSI could have been compiled revealing significant and overwhelming mitigation, which would have resulted in an appointment of a special counsel and mitigation witnesses. If mitigation had been presented, Appellant would not be on death row today. A survey of the "total picture" of the available mitigation in this case establishes that this Court should remand for an evidentiary hearing.

The potential psychiatric mitigation alone would have necessarily been significant and probable. *See Baxter v. Thomas*, 45 F.3d 1501, 1515 (11th Cir. 1995) ("Psychiatric mitigating evidence has the potential to totally change the evidentiary picture."). A PSI based on available court, jail, and medical records, coupled with

guidance from trial counsel's on-the-record proffer from December 13, 2011, would have comprehensively revealed a picture of significant mitigation. It would have stood in stark contrast with the inaccurate characterization in the actual PSI that described Appellant having a "less than ideal" upbringing, but basically no different than that of most probationers, (PCR. 1399)—a "preposterous understatement" in light of the reality of Appellant's life. (PCR. 1747) (testimony of Dr. James Garbarino).

The readily obtainable evidence would have shown a picture of depravity paling in comparison to even most capital cases. When young David Sparre was a one-year-old, he was listed as a crime victim due to beatings his mother sustained at the hands of his biological father. (PCR. 2376). His childhood doctor's pretrial deposition revealed that David "fell" into a campfire as a baby, leaving a permanent scar on his right wrist. By age five, he was reported as having been "abused all his life." (PCR. 2408). He faced continuous trauma and abuse for his entire childhood, resulting in ACE score of 9, placing him in the 99.9th percentile of traumatized children.[12]

[12] ACE stands for Adverse Childhood Experiences. *See* Ctr. For Disease Control, Preventing Adverse Childhood Experiences (ACEs),

(PCR. 1746). By age five, young David had begun to experience horrifying night terrors, which included "ear piercing screams" three out of every five times when David napped. (PCR. 648). By age eleven, he was being medicated with Adderall, Prozac and Remeron, after previously having been on Ritalin and Concerta at age eight or nine. (PCR. 2484-85). During those years, his sister gave him her stimulants—which were "strong" and "addictive" and turned him into a "zombie" and made him drool out both sides of his mouth. (PCR. 2103). After he was sent to Tara Hall boys home, also at age eleven, he was struck with a hammer causing profuse bleeding from his head and requiring stiches. That injury caused enduring headaches, sensitivity, and tingles down his back, reported to persist as late as 2010. He was attacked and beaten by other kids in the boys' home, and family members have suspected that he also endured physical and sexual abuse. (PCR. 1925-26). While at Tara Hall, young David began having a "voice" in his head, which he called "Tommy." (PCR. 3677, 3718-19). This early childhood depravity is well-documented

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2019. Most people have either no ACE factors (36% of people) or 1 to 2 ACE factors (42% of people). (PCR. 1746-47). Less than 1 percent of the population has a score of 7 or 8 and approximately *0.1%* of the population has 9 out of 10 ACE factors, like Appellant. *Id.*

through contemporaneous sources.

At age thirteen, upon leaving the Tara Hall boys' home, he was diagnosed with PTSD and prescribed antipsychotic medications, which did not stop his declining mental health. (PCR. 1414). He attempted to commit suicide multiple times. (PCR. 3717; 1432). He could not sleep alone in his grandmother's guest bedroom and would wake up and sleep with her instead. He was seen by his grandmother and mother climbing walls, as if trying to get away from something or someone. (T. 1244-45). He was "shell shocked" like soldiers coming from battle. (PCR. 1032). He soon stopped taking the antipsychotic medication and began abusing drugs, including cocaine, prescription opiates, MDMA, alcohol, marijuana and his grandmother's Xanax. (PCR. 607, 1161, 3694, 3709). As a sixteen-year-old, in 2008, David again was taken to a doctor complaining of "night terrors" and "severe anxiety," and he was medicated with Prozac on the first visit. (PCR. 841). Just five weeks later, he turned seventeen and enlisted in the National Guard, without disclosing his lengthy substance abuse and mental health history. (PCR. 792-99). Within a year, he was discharged for being a disciplinary problem and "too immature for the military." (PCR. 1779, 1788).

Appellant has reported having "blocked out" parts of his childhood, (PCR. 1758), and has referenced one incident—jumping out of his grandmother's car—about which he had been told but had no independent memory, (PCR. 3716). In addition to "falling" into a fire as a baby and being struck in the head by a hammer at age eleven or twelve, Appellant also sustained head trauma from falling a "few stories" resulting in a trip to an emergency room, getting stepped on his head by a stepfather, a concussion at age fourteen from a school fight causing dizziness and giddiness, and a car crash at age eighteen when his head hit the steering wheel. (PCR. 1420-22).

At age nineteen, after his arrest for this crime, Appellant's mental health deteriorated even further. He was promptly put into a lock-down unit for "mental health reasons," including suicidal ideation.[13] (PCR. 1530). He again reported numerous night terrors, depression, and anxiety. He would alternate between sleeping for days and being awake for days at a time. He threatened to commit suicide and had reported hearing voices on many occasions. (PCR.

[13] Notably, all evidence presented here regarding Appellant's mental health while in the Duval County jail was documented contemporaneously in records that Officer Carney could have easily accessed but did not.

1540, 1542, 1545, 1549-51, 1554, 1574, 1592). He indicated that at least one voice—his alter ego or imaginary voice "Tommy"—had told him to kill himself while in jail, before being prescribed medication. *See id.*; (*see also* PCR. 3664, 3677, 1432-33). He was noted as "aggressive and belligerent," threatened suicide, and banging on the cell walls and door with his head, even when nobody was around to see it. (PCR. 1589). "He cut himself and streaked blood across his face, arms, torso." *Id.* He was taken to the clinic and with additional abrasions on his neck and shoulders. (PCR. 1588). He was seen again later in the day as he kept banging his head on the glass window of his cell and "speaking nonsensicalities." (PCR. 1590). He had to be restrained and injected with the antipsychotic Zyprexa (olanzapine) and the sedative Ativan (lorazepam) for "agitation and psychosis." (PCR. 1588-91). In response to this episode, he was prescribed Thorazine (chlorpromazine), (PCR. 1592, 3664), an antipsychotic medication commonly used to treat such psychotic disorders like schizophrenia, schizoaffective disorder, and psychosis.

As noted above, Appellant was going through a mental breakdown when he waived mitigation. One day after his waiver, and a few weeks before meeting Officer Carney, Appellant reported to the

jail personnel he was "seeing things," had lost his appetite, and had not been sleeping for three consecutive nights. (PCR. 1675). He denied suicidality, but only after hesitating to answer. *Id*. He asked to be put on Risperdal (the antipsychotic he was prescribed when he was thirteen) because he said he took it before, and it worked "better." *Id*.

On the other side of the scale, the available records and witness accounts would have undercut the case for aggravation. At a *Muhammad*-compliant mitigation hearing, the evidence could help show that Appellant "snapped" and thus committed the murder during a frenzy, which could diminish the notion of premeditation or the cruelty or atrociousness of the killing. A premeditated killing is, by its nature and by common sense, far more blameworthy than an intentional killing committed spontaneously. *Cf*. *Ellerbee v. State*, 87 So. 3d 730, 743 (Fla. 2012) (observing that a "robbery gone bad" felony murder scenario is less blameworthy than premeditated murder); *see* Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 Hofstra L. Rev. 669, 694 (2000) (controlling for all other circumstances, jurors are over 300 percent more likely to impose a death sentence for felony-murder if the actual killer also

premeditates the killing). Therefore, not only would the presentation of witnesses materially increase the mitigation in this case, it would also substantially decrease the aggravated nature of the crime.

CONCLUSION

This Court should reverse the lower court and remand the cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 5th day of June 2023.

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CERTIFICATION OF TYPE SIZE AND STYLE

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