

CAPITAL CASE

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In the  
**Supreme Court of Florida**

DAVID KELSEY SPARRE,

*Appellant,*

v.

CASE No.: 2024-1512

STATE OF FLORIDA,

*Appellee.*

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY  
L.T. No. 2010-CF-8424

ANSWER BRIEF ON THE MERITS

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## STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in the appeals of successive postconviction motions and there is no reason to do so in this particular case.

## STATEMENT OF THE FACTS AND PROCEDURAL HISTORY<sup>1</sup>

This is the appeal of a postconviction court's denial of a second successive postconviction motion in a capital case.

### Facts of the crime

Sometime between July 8 and July 12, 2010, Sparre stabbed to death Tiara Pool, a woman he had met through a personal ad on Craigslist. He stabbed her over 80 times. Sparre confessed to the murder to two JSO detectives in a videotaped interview. Sparre murdered the victim for the "rush" of killing someone. *See Sparre v.*

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<sup>1</sup> The record on appeal will be referred to as "2nd Succ. PC" followed by the appropriate page number. Appellant, David K. Sparre, will be referred to as appellant, defendant, petitioner, movant, or by proper name. The initial brief will be referred to as "IB" followed by the appropriate page number. All double underlining is supplied as emphasis.

*State*, 164 So.3d 1183, 1187 (Fla. 2015); *Sparre v. State*, 289 So.3d 839, 844-45 (Fla. 2019).

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. Sparre waived the presentation of mitigation. *Id.* at 1189. 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). *See Sparre*, 164 So.3d at 1190. Sparre also waived the presentation of mitigation at the *Spencer* hearing.<sup>2</sup> *Sparre*, 164 So.3d at 1191.

On March 30, 2012, the trial court sentenced Sparre. The trial court found two aggravating circumstances to which both 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 of 19 years-old and gave it moderate weight. *Id.* at 1192. The trial court also found thirteen nonstatutory mitigating

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<sup>2</sup> *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

factors, including prior abuse and military service. *Id.* at 1192-93. The trial court then sentenced Sparre to death. *Id.* at 1193.

### Factual background of the current postconviction claims

In November of 2020, Brian W. Stull of the American Civil Liberties Union commissioned Professor Jacinta M. Gau of the University of Central Florida to conduct an informal study of jury selections in capital cases in Duval County, Florida, which included Sparre's case. (2nd Succ. PC at 39).

The Gau study was entitled *Racialized Impacts of Death Disqualification in Duval County, Florida*. (2nd Succ. PC at 40-50). The 12 capital cases studied were from the time span of 2010 until 2018 and involved 1,042 prospective jurors.<sup>3</sup> The study concluded that death disqualification keeps a "sizable proportion of citizens of color

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<sup>3</sup> The 12 Duval capital jury selections analyzed in the study were: 1) Rasheem Dubose in 2010; 2) Justin McMillian in 2010; 3) Thomas Brown in 2011; 4) David Sparre in 2011; 5) Terrance Philips in 2012; 6) Billy Sheppard in 2012; 7) Dennis Glover in 2013; 8) Kim Jackson in 2013; 9) Rodney Newberry in 2014; 10) Raymond Bright in 2017; 11) Keith Collins in 2018; and 12) James Jackson in 2018. (2nd Succ. PC at 40).

off capital juries.” *Racialized Impacts* at 8. The study also concluded that “people of color are systematically removed” from the venire due to the “cumulative effects” of death disqualification, for-cause challenges, and peremptory challenges. The study also considered disqualification of capital prospective jurors based on gender. The study stated that two-thirds of black women were excluded due to the combination of death disqualification and peremptory challenges. The Gau study does not give a publication date but the study was available on the internet by September of 2021.<sup>4</sup>

Retired Professor Michael Radelet of the University of Colorado at Boulder reviewed the Professor Gau’s study in a letter dated January 22, 2023, at the request of the federal Capital Habeas Unit. (2nd Succ. PC at 52-54). Professor Radelet compared the 12 jury selections in the study to Sparre’s particular jury selection. He noted that, according to the study, whites were 65.3% of the jury pool but 45.5% of death disqualifications in the 12 capital jury selections and

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[https://www.aclu.org/wp-content/uploads/legal-documents/2021.09.07\\_Gau\\_Report.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/2021.09.07_Gau_Report.pdf)

blacks were 25.8% of the jury pool but 39.3% of death disqualifications in the jury selections. So, 33.8% of black prospective jurors were death disqualified but only 15.5% of white prospective jurors were death disqualified. (2nd Succ. PC at 53). In Sparre's jury selection, 26.7% of black prospective jurors were death disqualified but only 17.7% of white prospective jurors were death disqualified. In Sparre's case, 28.6% of black prospective jurors were peremptorily challenged by the prosecution but only 11.8% of white prospective jurors were peremptorily challenged by the prosecution. Professor Radelet concluded that racial difference in the prosecution's use of peremptory challenges was "much stronger" in Sparre's jury selection than in the Gau study. (2nd Succ. PC at 53). Of the ten qualified black women prospective jurors in Sparre's case, four were death disqualified and three were peremptorily challenged by the prosecution. So, 70% of black women prospective jurors were ultimately removed from Sparre's petit jury. Professor Radelet concluded that Sparre's jury selection was "consistent" with the Gau study. (2nd Succ. PC at 54).

## **Current second successive postconviction proceedings**

The Honorable Jonathan Sacks ultimately presided over the second successive postconviction proceedings. On February 16, 2023, Sparre, represented by Capital Collateral Regional Counsel-North (CCRC-N), filed a second successive postconviction motion in the state trial court. (2nd Succ. PC at 17-80). The postconviction motion raised three issues relating to jury selection, based on the study and letter: (1) newly discovered evidence of a violation of the Sixth Amendment fair cross-section requirement; (2) newly discovered evidence of a violation of the Eighth Amendment cruel and unusual punishment provision; and (3) newly discovered evidence of a violation of the state constitutional provision, Article I, § 16(a), of the Florida Constitution guaranteeing an impartial jury.

On March 10, 2023, the State filed an answer to the second successive postconviction motion asserting that the three claims were as not cognizable as newly discovered evidence, untimely, procedurally barred, and meritless as a matter of law. (2nd Succ. PC at 105-128).

The second successive postconviction motion raising the Gau jury study was stayed by the lower court awaiting the return of jurisdiction from the Florida Supreme Court which was deciding the appeal of the first successive postconviction motion regarding claims related to the PSI. *Sparre v. State*, SC2023-0163; *Sparre v. State*, 391 So.3d 404 (Fla. 2024). (2nd Succ. PC at 167-168).

On August 9, 2024, after this Court denied rehearing and issued the mandate in the appeal of the first successive postconviction motion, the State filed a notice of return of jurisdiction to the lower court. (2nd Succ. PC at 182-188).

The postconviction court lifted the stay and then summarily denied the second successive postconviction motion. (2nd Succ. PC at 189-191).<sup>5</sup>

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<sup>5</sup> Sparre currently has a federal habeas petition pending in federal district court. *Sparre v. Sec’y, Fla. Dep’t of Corr.*, 3:20-cv-00216 (M.D. Fla.). The amended habeas petition was filed in June of 2021. (Doc. #26). And, while the district court denied both motions to stay the federal litigation pending resolution of the first and second successive postconviction motions in state court, the petition remains pending in the federal district court as of December of 2024. (Docs. #57;#74).

## SUMMARY OF THE ARGUMENT

### ISSUE I

Sparre asserts the postconviction court improperly summarily denied the second successive postconviction motion without conducting a case management conference, commonly referred to as a *Huff*<sup>6</sup> hearing, as required by Florida Rule of Criminal Procedure 3.851(f)(5)(B). But, as this Court has repeatedly held, *Huff* hearings are not mandatory in successive postconviction litigation. Contrary to opposing counsel's assertion, due process is not violated by a court permitting written pleadings without allowing an additional oral presentation. Thus, the postconviction court properly summarily denied the second successive postconviction motion without holding a *Huff* hearing.

### ISSUE II

Sparre asserts the postconviction court improperly summarily denied the claim of newly discovered evidence of a violation of

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<sup>6</sup> *Huff v. State*, 622 So.2d 982 (Fla. 1993).

Florida's constitutional provision guaranteeing an "impartial" jury. Art. I, § 16(a), Fla. Const. Sparre relies on a study of 12 capital jury selections written by Professor Gau that included Sparre's jury selection and a letter written about the study as the basis for newly discovered evidence. But the state constitutional impartial jury claim is both untimely and procedurally barred. Additionally, the claim is meritless as a matter of law under this Court's precedent. This Court has repeatedly rejected impartial jury challenges to the practice of death-qualifying capital juries. *See e.g., Kennedy v. Wainwright*, 483 So.2d 424, 425-27 (Fla. 1986). Moreover, the United States Supreme Court rejected a Sixth Amendment impartial jury challenge to death-qualifying juries in *Lockhart v. McCree*, 476 U.S. 162 (1986). And there is no reason to distinguish the definition of an "impartial jury" for purposes of the similar state constitutional provision than the High Court did under the Sixth Amendment. Furthermore, a jury study and a letter written about the study are not newly discovered evidence. The postconviction court properly summarily denied the second postconviction motion raising the claim of newly discovered

evidence of a violation of the state constitutional impartial jury provision.

### ISSUE III

Sparre asserts that the postconviction court improperly summarily denied his successive postconviction claim of newly discovered evidence of a violation of the Eighth Amendment. IB at 20. The claim is both untimely and procedurally barred. Additionally, the claim is meritless. The Eighth Amendment does not mandate jury sentencing in capital cases, much less mandate that jurors, who are unalterably opposed to the death penalty, be allowed to serve as jurors. Again, the jury study and letter are not newly discovered evidence. The postconviction court properly summarily denied the claim of newly discovered evidence of a violation of the Eighth Amendment.

### ISSUE IV

Sparre asserts that the postconviction court improperly

summarily denied his successive postconviction claim of newly discovered evidence of a violation to the Sixth Amendment's right to a jury comprised of a fair cross-section of the community. IB at 27. But the fair cross-section postconviction claim is both untimely and procedurally barred. Sparre's jury selection occurred in 2011 but the fair cross-section claim was not raised until 2023, and any such fair cross-section claim could have been raised in the direct appeal but was not. And the claim is meritless as a matter of law for two reasons. First, contrary to the core of opposing counsel's argument, *Duren v. Missouri*, 439 U.S. 357 (1979), does not apply to the petit jury. Nor does the Gau jury study contain the type of information regarding the venire required to establish such a claim. Second, as the postconviction court ruled, death qualifying a jury does not violate the Sixth Amendment's right to an impartial jury under *Lockhart v. McCree*, 476 U.S. 162 (1986). And again, a jury study is not newly discovered evidence. Alternatively, even if the concept of newly discovered evidence applied, Sparre fails both prongs of the test for newly discovered evidence claims. He may not rely on the jury pardon

doctrine to establish the second prong of *Jones v. State*, 709 So.2d 512 (Fla. 1998). The postconviction court properly summarily denied the untimely, procedurally barred, and meritless fair cross-section claim.

## ARGUMENT

### ISSUE I

Whether the Posconviction Court Properly Summarily Denied the Successive Postconviction Motion without Conducting a Case Management Conference?

Sparre asserts the postconviction court improperly summarily denied the second successive postconviction motion without conducting a case management conference, commonly referred to as a *Huff* hearing, as required by Florida Rule of Criminal Procedure 3.851(f)(5)(B). IB at 6. But, as this Court has repeatedly held, *Huff* hearings are not mandatory in successive postconviction litigation. Contrary to opposing counsel's assertion, due process is not violated by a court permitting written pleadings without allowing an additional oral presentation. Thus, the postconviction court properly summarily

denied the second successive postconviction motion without holding a *Huff* hearing.

### **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). But it is also proper for a postconviction court to summarily deny postconviction claims that are untimely, procedurally barred, or legally insufficient because it is meritless as a matter of law. *Zack v. State*, 371 So.3d 335, 338 (Fla. 2023) (agreeing with the postconviction court summarily denying the claims as “untimely, procedurally barred, and meritless”), *cert. denied*, *Zack v. Florida*, 144 S.Ct. 274 (2023). The reason summary denials of claims that are meritless as a matter of law is proper is because, regardless of what facts the defendant established at any evidentiary hearing, the claim would remain meritless under the law. Contrary to opposing counsel’s assertion, no evidentiary hearing was necessary to deny these three untimely, procedurally barred, and meritless postconviction claims of

newly discovered evidence related to jury selection.

### The postconviction court's ruling

On August 12, 2024, CCRC–N filed a motion for a case management conference. (2nd Succ. PC at 192-203). On the same day, August 12, 2024, the State filed a response to the motion for a *Huff* hearing asserting that *Huff* hearings are not mandatory in successive postconviction litigation. (2nd Succ. PC at 204-212). The State explained that, contrary to opposing counsel's assertion, not conducting a *Huff* hearing does not amount to a due process violation, even in initial postconviction proceedings because state postconviction counsel was given an opportunity to be heard in writing. *Huff* hearings are the equivalent of an oral argument which are not required under the due process clause. (2nd Succ. PC at 206-208 citing *Fed. Communications Comm'n v. WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949) (“Constitution does not require oral argument in all cases.”)).

Then, on August 27, 2024, CCRC–N filed a motion for rehearing

raising the failure of the postconviction court to conduct a *Huff* hearing before summarily denying the successive postconviction motion. (2nd Succ. PC at 213-217). On September 20, 2024, the postconviction court denied the rehearing. (2nd Succ. PC at 220).

### Preservation

To preserve an issue for appellate review, “the *specific* legal argument or ground upon which it is based must be presented to the trial court.” *Cole v. State*, 392 So.3d 1054, 1063 (Fla. 2024) (emphasis in original), *cert. denied*, *Cole v. Florida*, 2024 WL 3973814 (U.S. Aug. 29, 2024); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982) (holding the issue was not preserved because the same argument was not made below as that being made on appeal); § 924.051(1)(b), Fla. Stat. (2024) (providing that “‘preserved’ means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.”). Furthermore,

a party must obtain a ruling from the lower court to preserve an issue for appeal. *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008) (stating that to be preserved, “the issue or legal argument must be raised and ruled on by the trial court”); *Ritchie v. State*, 344 So.3d 369, 378 (Fla. 2022) (noting this Court’s precedent requires trial counsel obtain a ruling on any objection or motion to preserve the issue for appeal citing *Rhodes*, 986 So.2d at 513), *cert. denied*, *Ritchie v. Florida*, 143 S.Ct. 1005 (2023).

Opposing counsel filed a separate motion urging the postconviction court to conduct a *Huff* hearing and then raised the issue again in a motion for rehearing. Opposing counsel also properly obtained a ruling denying the rehearing. This issue was preserved.

### Standard of review

While it is not established whether this Court reviews a postconviction court’s failure to conduct a *Huff* hearing under the de novo standard of review or under the abuse-of-discretion standard of review, the abuse-of-discretion standard seems more apt. *Smith v.*

*State*, 333 So.3d 255, 262 (Fla. 1st DCA 2022) (reviewing the trial court’s failure to conduct a pretrial hearing on as motion for a statement of particulars for abuse of discretion citing *Saldana v. State*, 980 So.2d 1220, 1222 (Fla. 2d DCA 2008)). The postconviction court did not abuse its discretion by not permitting an oral presentation in addition to the written submissions.

### Merits

*Huff* hearings are not mandatory in successive postconviction litigation, as this Court has repeatedly held. And not permitting oral presentations in addition to written submissions does not violate due process.

### ***Huff* hearings in successive postconviction litigation**

The rule of court governing postconviction motions in capital cases requires a case management conference to allow counsel to present oral argument regarding which claims, if any, should be explored at an evidentiary hearing. Fla. R. Crim. P. 3.851(f)(5)(B) (stating: within “30 days after the state files its answer to a successive

motion for postconviction relief, the trial court shall hold a case management conference.”). But the failure to hold a *Huff* hearing in connection with a successive postconviction motion is either not error at all or is harmless error.

As this Court has noted, this Court’s original holding in *Huff* itself was limited to “initial death penalty postconviction motions.” *Groover v. State*, 703 So.2d 1035, 1038 (Fla. 1997) (citing *Huff*, 622 So.2d at 983) (emphasis in original). While it may be the “better practice” to conduct a *Huff* hearing in successive postconviction litigation, a *Huff* hearing is “not required” in the successive context. *Groover*, 703 So.2d at 1038; see also *Taylor v. State*, 260 So.3d 151, 157 (Fla. 2018) (discussing *Groover*); *Boyd v. State*, 324 So.3d 908, 913 (Fla. 2021) (stating the requirement of a *Huff* hearing ““applies only to initial, not successive postconviction motions” citing *Taylor*). No *Huff* hearing was required before summarily denying this successive postconviction motion.

### **Due process & additional oral presentations**

Due process does not mandate oral presentations in addition to

written submissions. While the “essence of due process” is “fair notice and a reasonable opportunity to be heard,” being heard in writing fully comports with due process. *Huff*, 622 So.2d at 983 (quoting *Scull v. State*, 569 So.2d 1251, 1252 (Fla.1990)). The United States Supreme Court stated long-ago that the “Constitution does not require oral argument in all cases.” *Fed. Communications Comm'n v. WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949); see also *Poole v. USCIS Pittsburgh Field Office*, 2024 WL 3439777, at \*1 (3d Cir. July 17, 2024) (explaining that because Plaintiff had the opportunity to present his claims in his complaint in the lower court, the lack of oral argument did not deny him due process quoting *Goodwill Station*, 337 U.S. at 276), *cert. denied*, 2024 WL 4874709 (U.S. Nov. 25, 2024); *Berger v. Hahnemann Univ. Hosp.*, 765 Fed.Appx. 699, 703 (3d Cir. 2019) (rejecting a claim that the lower court violated due process by dismissing his complaint without oral argument because oral argument “is not required” citing *Goodwill Station*, 337 U.S. at 276). Most appellate courts, both state and federal, decide the majority of direct criminal appeals without conducting oral argument. Pierre H.

Bergeron, *Covid-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 J. App. Prac. & Process 193, 196, n.8 (2021) (noting that oral arguments are conducted in only 20% of the cases in the federal appellate courts). The vast majority of appeals are decided based on the written briefs alone.

Sparre was permitted to submit his claims in writing which is sufficient to satisfy due process. Opposing counsel had numerous opportunities to be heard in writing in the lower court regarding the three claims raised in the second successive postconviction motion, including in the motion for a case management conference and the motion for rehearing. Sparre was not denied due process.

Opposing counsel cites and quotes from this Court's decision in *Huff* that the defendant "was denied due process of law because the court did not give him a reasonable opportunity to be heard." *Huff*, 622 So.2d at 983. But the actual due process violation identified by the *Huff* Court was that the State submitted a proposed order that was signed by the judge the next working day, before the defense had an opportunity to respond to the proposed order. *Id.* at 983. In other

words, Huff was denied the opportunity to be heard. But Sparre was not denied the opportunity to be heard. The statement in *Huff* quoted by opposing counsel does not support a claim that oral presentations in addition to the written submissions are required by due process.

The trial court's ruling on the second successive postconviction motion without permitting an oral presentation at a *Huff* hearing was not a denial of due process.

### Harmless error

Alternatively, even if viewed as error, this Court has repeatedly held the failure to hold a *Huff* hearing in successive postconviction litigation is harmless error.<sup>7</sup> In *Boyd v. State*, 324 So.3d 908, 913

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<sup>7</sup> *Marek v. State*, 14 So.3d 985, 999 (Fla. 2009) (concluding the failure to hold a *Huff* hearing on a successive postconviction motion that was “legally insufficient” and “without merit” was harmless); *Archer v. State*, 151 So.3d 1223 (Fla. 2014) (concluding the failure to conduct a *Huff* hearing on a successive postconviction motion that was “insufficiently pleaded, facially insufficient, and untimely” was harmless); *Taylor v. State*, 260 So.3d 151, 157-58 (Fla. 2018) (observing that “we have repeatedly emphasized that the failure to hold a *Huff* hearing on legally insufficient or meritless successive postconviction motions is harmless error” and concluding the failure to hold a *Huff* hearing on a second successive postconviction motion was harmless); *Rivera v. State*, 260 So.3d 920, 926 (Fla. 2018) (same

(Fla. 2021), this Court noted it had previously held “that any error in failing to hold a *Huff* hearing on a successive postconviction motion is harmless if the motion is legally insufficient to warrant either relief or an evidentiary hearing.” *Id.* at 913 (citing *Taylor*, 260 So.3d at 157-58). This Court then explained this means a postconviction court’s failure to hold a *Huff* hearing on a successive postconviction motion “is not reversible error in itself.” *Boyd*, 324 So.3d at 913. And whether a capital defendant is entitled to relief depends on whether his successive postconviction motion was sufficient to require either an evidentiary hearing or a new trial. Because *Boyd*’s successive postconviction motion did not require an evidentiary hearing or a new trial, the trial court summarily denying the successive claims without a *Huff* hearing was not reversible error. *Id.* at 913.

No *Huff* hearing was required before summarily denying the second successive postconviction motion and alternatively, because no evidentiary hearing was required for either of the three issues, any error in failing to conduct such a hearing was harmless. The

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in a second successive postconviction motion case).

postconviction court properly summarily denied the successive postconviction motion without conducting a *Huff* hearing.

## ISSUE II

Whether the Posconviction Court Properly Summarily Denied the Successive Postconviction Claim of Newly Discovered Evidence of a Violation of the Impartial Jury Guarantee of the State Constitution?

Sparre asserts the postconviction court improperly summarily denied the claim of newly discovered evidence of a violation of Florida's constitutional provision guaranteeing an "impartial" jury. Art. I, § 16(a), Fla. Const.; IB at 13. Sparre relies on a study of 12 capital jury selections written by Professor Gau that included Sparre's jury selection and a letter written about the study as the basis for newly discovered evidence. But the state constitutional impartial jury claim is both untimely and procedurally barred. Additionally, the claim is meritless as a matter of law under this Court's precedent. This Court has repeatedly rejected impartial jury challenges to the practice of death-qualifying capital juries. *See e.g., Kennedy v.*

*Wainwright*, 483 So.2d 424, 425-27 (Fla. 1986). Moreover, the United States Supreme Court rejected a Sixth Amendment impartial jury challenge to death-qualifying juries in *Lockhart v. McCree*, 476 U.S. 162 (1986). And there is no reason to distinguish the definition of an “impartial jury” for purposes of the similar state constitutional provision than the High Court did under the Sixth Amendment. Furthermore, a jury study and a letter written about the study are not newly discovered evidence. The postconviction court properly summarily denied the second postconviction motion raising the claim of newly discovered evidence of a violation of the state constitutional impartial jury provision.

#### The postconviction court’s ruling

The postconviction court summarily denied the claim. (2nd Succ. PC at 189-190). While the postconviction court did not specifically address the matter under the state’s constitution impartial jury provision, the lower court noted that “the Constitution does not prohibit the State from death-qualifying a jury.” (2nd Succ. PC at

189). “Put plainly, a juror who cannot impose the death penalty cannot serve on a capital jury.” (2nd Succ. PC at 190 citing *Franqui v. State*, 804 So.2d 1185, 1192 (Fla. 2001)).<sup>8</sup>

### Standard of review

The standard of review for the summary denial of successive postconviction claim is de novo. *Randolph v. State*, 2024 WL 4982924, \*2 (Fla Dec. 5, 2024); *Cole v. State*, 392 So.3d 1054, 1061 (Fla. 2024) (citing *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009)), *cert. denied*, *Cole v. Florida*, 2024 WL 3973814 (U.S. Aug. 29, 2024). This is the standard of review because a “postconviction court’s decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court,” so “its ruling is

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<sup>8</sup> This Court should address this issue regardless of the lack of a specific ruling from the lower court. The standard of review is de novo which means that this Court does not defer in any manner to the lower court’s ruling anyway. The interpretation of the state constitution provision is a pure legal matter which may be addressed by this Court in the first instance. Furthermore, remanding the case for a ruling from the lower court would simply cause unwarranted delay in violation of this Court’s goals regarding the time-frame for postconviction litigation in capital cases and the state constitutional provision regarding victim’s rights. Art. I, § 16(10)(b), Fla. Const.

tantamount to a pure question of law, subject to de novo review.”  
*Marek*, 8 So.3d at 1127.

But the defendant bears the burden of establishing that the claim is both timely and legally valid. *Craft v. State*, 2024 WL 5162232, \*4 (Fla. Dec. 19, 2024) (citing *Hojan v. State*, 212 So.3d 982, 989 (Fla. 2017)).

### Untimely

It is Sparre’s burden to establish the timeliness of each of the three successive postconviction claims. *Dillbeck v. State*, 357 So.3d 94, 101 (Fla. 2023) (“It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim” quoting *Mungin v. State*, 320 So.3d 624, 626 (Fla. 2020)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). As this Court has explained, “when a newly discovered evidence claim is brought as a successive claim, the defendant must demonstrate an exception to the rule’s time limitations.” *Sparre*, 391 So.3d at 405-06 & n.3 (citing the three exceptions in Florida Rule of Criminal Procedure 3.851(d) in a footnote

and finding the claims of newly discovered evidence claims in the first successive postconviction motion to be untimely).

Any postconviction claims brought beyond the one-year time limit, regardless of the nature of the claim, are untimely unless “the facts on which the claim is predicated were unknown to the movant or the movant’s attorney.” Fla. R. Crim. P. 3.851(d)(2)(A) (providing: “No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges: (A) 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”); *Stein v. State*, 2024 WL 4231183, \*2 (Fla. Sept. 19, 2024) (concluding a successive postconviction claim was untimely because the witness, who was the basis of the claim, was known the defendant before the trial citing Rule 3.851(d)(2)(A)).

Sparre’s jury selection occurred in 2011. All of the facts regarding his jury selection, including the race and gender of the prospective jurors who were removed for being unalterably opposed

to the death penalty were known to both Sparre and his trial defense attorney because they were present for, and participated in, that jury selection. The facts of the jury selection in this case were known to all, including appellate counsel from the transcripts of his jury selection. Sparre's jury selection occurred in 2011 but this state constitutional impartial jury claim was not raised until 2023 – over a decade later and in a second successive postconviction motion. The state constitutional impartial jury claim is untimely under Rule 3.851(d)(2). *See Owen v. State*, 364 So.3d 1017, 1025-26 (Fla. 2023) (concluding a claim of newly discovered evidence of brain damage was untimely because none of the three exceptions in Rule 3.851(d)(2) applied).

Alternatively, even timing the date the successive claim was due from the date of the last of the jury selections include in the Gau study, the state constitutional impartial jury claim remains untimely. “To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable

through due diligence.” *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020) (quoting *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)). The Gau study relies on the jury selections of 12 Duval capital cases but the last two jury selections considered by the study, are from 2018 or 2019. *Collins v. State*, 290 So.3d 896 (Fla. 1st DCA 2020) (No. 1D18-5037); *Jackson v. State*, 293 So.3d 1127, 1128 (Fla. 1st DCA 2020) (No. 1D19-0154) (Thomas, B.L., J., concurring). So, all of the jury selections considered in the study had been available for over three years before this second successive postconviction motion was filed in 2023. The claim is untimely, even timing the claims from the date of the other jury selections in the study instead of properly from the date of Sparre’s own jury selection.

Sparre has failed to account for the delay in conducting the jury study or the delay in filing the second successive postconviction motion once the study was available in 2021. *Sparre*, 391 So.3d at 406 (noting Sparre had “offered no coherent explanation” either in the lower court or the appellate court for why he did not raise the alleged flaws in the PSI earlier). That observation regarding the claims raised

in Sparre's first successive postconviction motion is equally applicable to all of the claims raised in Sparre's second successive postconviction motion.

Sparre has failed to even attempt to establish the timeliness of any of the three successive postconviction jury selection claims, despite having the burden to do so. All three of the claims of newly discovered evidence regarding the 2011 jury selection raised in the second successive motion are untimely.

#### Procedural bar

Any state constitutional challenge to Sparre's 2011 jury selection for excluding prospective jurors who were opposed to the death penalty should have been raised on direct appeal. *Truehill v. State*, 358 So.3d 1167, 1186 (Fla. 2022) (concluding a fair cross-section claim was procedurally barred because it should have been raised in the direct appeal citing *Reaves v. State*, 826 So.2d 932, 936 n.3 (Fla. 2002)). Sparre's jury selection was conducted in 2011. All of the facts regarding his jury selection, including the race and gender of the

prospective jurors, who were removed for being unable to impose a death sentence, were known to both Sparre and his trial defense attorney. The facts were also known to Sparre's direct appeal counsel from the transcript of the jury selection. As in *Truehill*, this state constitutional impartial jury claim could have been raised in the direct appeal but was not. Therefore, this claim is procedurally barred. Indeed, all three of these successive postconviction claims regarding Sparre's jury selection are procedurally barred.

### Merits

A jury that excludes prospective jurors who cannot follow the law does not violate the state constitutional right to an impartial jury.

### **Impartial juries under the Sixth Amendment and death-qualification**

The United States Supreme Court in *Lockhart v. McCree*, 476 U.S. 162 (1986), held that death qualifying a jury does not violate the impartial jury provision of the Sixth Amendment. McCree argued that a death qualified jury was not impartial. He claimed that excluding jurors, as permitted by *Witherspoon v. Illinois*, 391 U.S. 510 (1968),

and *Wainwright v. Witt*, 469 U.S. 412 (1985), “slanted” the jury in favor of conviction and the death penalty. *McCree*, 476 U.S. at 177. He asserted that the State “tips the scales” by excluding prospective jurors based on *Witherspoon*. *Id.* at 177. The Court rejected that argument, responding that an “impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts.” *Id.* at 178. The Court rejected the view of an impartial jury as including those jurors who could not follow the law as being “illogical.” *Id.* at 178. Indeed, the Court characterized such a view of jury impartiality as “both illogical and hopelessly impractical.” *Id.*

That same definition and analysis of an impartial jury applies to the Florida constitution’s impartial jury provision. Opposing counsel supplies no reason to define an impartial juror any differently under the state constitution than the United States Supreme Court did under the Sixth Amendment in *McCree*. Sparre’s view of jury impartiality under the state constitutional provision is just as illogical, as *McCree*’s view of jury impartiality was.

Sparre does not seek an impartial jury; rather, he seeks a jury

that is partial to him on the issue of the appropriate punishment. But “the state also enjoys the right to an impartial jury, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution.” *Downs v. State*, 386 So.2d 788, 791 (Fla. 1980) (quoting *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978); *Toole v. State*, 479 So.2d 731, 735 (Fla. 1985) (Ehrlich, J., concurring); *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) (characterizing an impartial jury as one “not only freedom from any bias against the accused, but also from any prejudice against his prosecution.”). Sparre wants a jury that is biased in his favor regarding sentencing. He seeks to allow jurors who openly admit to being unable to follow Florida’s death penalty statute and the penalty phase jury instructions be allowed to serve as jurors, regardless of their inability to follow the law.

### **State constitutional right to an impartial jury**

The “rights of accused and of victims” provision of the state constitution, Article 1, section 16, provides: “In all criminal

prosecutions the accused” . . . “shall have the right to have a speedy and public trial by impartial jury.” While the Florida Constitution guarantees an impartial jury, an impartial jury does not mean a jury containing jurors unable to follow the law. Such jurors are properly removed for cause under the state constitutional provision just as they are under the federal constitution.

This Court has consistently rejected impartial jury claims based on allowing *Witherspoon* challenges. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Indeed, this Court rejected impartial jury challenges in numerous cases in the years before *Lockhart v. McCree*, 476 U.S. 162 (1986), was decided.<sup>9</sup>

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<sup>9</sup> *Perkins v. State*, 228 So.2d 382, 392-93 (Fla. 1969) (holding excluding a prospective juror, who stated he was “against capital punishment” and there was “no case at all” that he could vote for death and was “just unalterably opposed to the idea,” did not violate the right to an impartial jury); *Hawkins v. Wainwright*, 245 So.2d 865, 866-67 (Fla. 1971) (holding excluding a prospective juror, who “never” believed in the death penalty, did not violate the right to an impartial jury); *Witt v. State*, 342 So.2d 497, 499 (Fla. 1977) (holding excluding six prospective jurors who stated they could not return an advisory sentence of death did not violate the right to an impartial jury citing *Portee v. State*, 253 So.2d 866 (Fla. 1971)); *Brown v. State*, 381 So.2d 690, 693-94 (Fla. 1980) (holding excluding a prospective juror, who did not think she could “recommend for anyone to be put to death, regardless of the circumstances, and stated life imprisonment yes, but

In *Kennedy v. Wainwright*, 483 So.2d 424, 425-27 (Fla. 1986), this Court rejected a constitutional challenge to the “Grounds for challenge to individual jurors for cause” statute, section 913.03(3), Florida Statutes, which allows a challenge for cause to be made based on a juror having “conscientious beliefs that would preclude him or her from finding the defendant guilty.” This Court held that the practice of excluding prospective jurors from capital trial juries whose beliefs would preclude them from recommending a death sentence “is constitutional.” *Kennedy*, 483 So.2d at 426. This Court characterized prospective jurors who were excused pursuant to *Witherspoon* as being “unalterably biased against the state and for the defendant on

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not the death penalty,” did not violate the right to an impartial jury citing *Jackson v. State*, 366 So.2d 752, 755 (Fla. 1978), and *Williams v. State*, 228 So.2d 377, 381 (Fla.1969)); *Downs v. State*, 386 So.2d 788, 790-91 (Fla. 1980) (holding excluding five prospective jurors who indicated an inability to vote for the death penalty did not violate the right to an impartial jury); *Engle v. State*, 438 So.2d 803, 807-08 (Fla. 1983) (holding excluding two prospective jurors, one of whom stated: “I would not vote to send a man to the electric chair” under any circumstances and the other of whom stated: “I would not vote for the death penalty” no matter what the circumstances were, did not violate the right to an impartial jury, explaining a prospective juror who would vote against a death sentence regardless of the facts presented or the instructions given may properly be excused from service on a jury quoting *Jackson v. State*, 366 So.2d 752, 755 (Fla.1978)).

the question of the sentencing recommendation.” *Id.* at 426. This Court in *Kennedy* noted that it had upheld the statute against constitutional challenge on numerous occasions and observed that its prior decisions had made it “clear that a capital defendant has no right to prevent the excusal of persons committed to voting against a sentence of death, either on the ground of denial of cross-sectional community representation or on the ground that the practice produces juries that are partial in favor of the prosecution.” *Id.* at 426 (citing *Copeland v. State*, 457 So.2d 1012 (Fla. 1984); *Sims v. State*, 444 So.2d 922 (Fla. 1983); *Maggard v. State*, 399 So.2d 973 (Fla. 1981); and *Riley v. State*, 366 So.2d 19 (Fla. 1978)). This Court in *Kennedy* rejected the invitation to recede from its precedent based on several studies regarding jury selection. This Court also rejected the argument that juries, where prospective jurors are excluded based on *Witherspoon*, are not “fair and impartial.” *Id.* This Court additionally rejected the claims that such prospective jurors represent a “distinct segment of the public.” *Id.*

While many of this Court’s cases seem to have been decided

based on the Sixth Amendment right to an impartial jury rather than on the state constitutional impartial jury provision, the phrase used in both provisions is the same. Both refer to an “impartial” jury. And opposing counsel advances no argument that the phrase an “impartial jury” should have a different meaning as used in the state constitution from that in the federal constitution. Despite this Court “typically” looking “to dictionaries for the best evidence” of the ordinary meaning of words, as noting in *Conage v. United States*, 346 So.3d 594, 599 (Fla. 2022), opposing counsel certainly advances no argument that the definition of “impartial” as “not favoring one side more than another; unbiased and disinterested” or the definition of “partial” as being “predisposed to one side of an issue” could possibly include jurors who refuse to follow the law. Nor does opposing counsel account for the definition of “biased” as having a “settled and often prejudiced outlook” could possibly include jurors who are unalterably opposed to the death penalty. *Doe v. Princeton Univ.*, 30 F.4th 335, 347 (3d Cir. 2022) (citing Black’s Law Dictionary (11th ed. 2019), and Merriam-Webster's Collegiate Dictionary (11th ed. 2014), and gleaning

from these definitions that an “impartial” decision-maker “is one who does not favor one side or the other” and an “unbiased” decision maker “is one without a prejudice or inclination in favor of one party.”). Obviously, a juror who is unalterably opposed to the death penalty regardless of the facts favors a capital defendant and is biased against the prosecution.

While the commentators relied on by opposing counsel are certainly free to disagree with the reasoning of the United States Supreme Court in *Lockhart v. McCree*, this Court would have overrule numerous of its prior cases dating back to 1960's to do so.

### **Newly discovered evidence<sup>10</sup>**

There can be no newly discovered evidence of a non-existent violation of the state constitutional provision regarding an impartial jury. And the state constitutional impartial jury provision, itself, adopted in 1885, certainly is not newly discovered evidence. *Deeb v. State*, 179 So. 894, 898 (Fla. 1937) (noting that section 11,

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<sup>10</sup> In the interest in brevity, the State will address the newly discovered evidence aspect of the three claims once in greater detail in ISSUE IV.

Declaration of Rights of the Florida Constitution provided: “In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both.”); *Turner v. State*, 99 So. 334, 336 (Fla. 1924) (“Section 11 of the Declaration of Rights, Constitution of Florida, in part provides that ‘in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed.’”).

Nor does the Gau jury study or the Radelet letter constitute newly discovered evidence. The capital defense bar may not commission a study of jury selections in capital cases in an attempt to create “new” evidence to challenge a jury selection that occurred in 2011.

The postconviction court properly summarily denied the untimely, procedurally barred, and meritless claim of newly discovered evidence of a violation of the state constitutional impartial jury provision.

### ISSUE III

Whether the Postconviction Court Properly Summarily Denied the Successive Postconviction Claim of Newly Discovered Evidence of a Violation of the Right to a Jury Based on the Eighth Amendment?

Sparre asserts that the postconviction court improperly summarily denied his successive postconviction claim of newly discovered evidence of a violation of the Eighth Amendment. IB at 20. The claim is both untimely and procedurally barred. Additionally, the claim is meritless. The Eighth Amendment does not mandate jury sentencing in capital cases, much less mandate that jurors, who are unalterably opposed to the death penalty, be allowed to serve as jurors. Again, the jury study and letter are not newly discovered evidence. The postconviction court properly summarily denied the claim of newly discovered evidence of a violation of the Eighth Amendment.

#### The postconviction court's ruling

The postconviction court summarily denied the claim. (2nd Succ.

PC at 189-190). While the postconviction court did not specifically address the issue under the Eighth Amendment, the lower court noted that “the Constitution does not prohibit the State from death-qualifying a jury.” (2nd Succ. PC at 189). “Put plainly, a juror who cannot impose the death penalty cannot serve on a capital jury.” (2nd Succ. PC at 190 citing *Franqui v. State*, 804 So.2d 1185, 1192 (Fla. 2001)).<sup>11</sup>

### Standard of review

The standard of review for the summary denial of successive postconviction claim is de novo. *Randolph*, 2024 WL 4982924, at \*2; *Cole*, 392 So.3d at 1061 (citing *Marek*, 8 So.3d at 1127). But the defendant bears the burden of establishing that the claim is a timely and legally valid claim. *Craft*, 2024 WL 5162232, at \*4 (citing *Hojan*, 212 So.3d at 989).

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<sup>11</sup> As in ISSUE II, this Court should address the Eighth Amendment issue regardless of the lack of a specific ruling from the lower court for the same reasons previously given in footnote 8.

## Untimely

It is Sparre’s burden to establish the timeliness of each of the three successive postconviction claims. *Dillbeck*, 357 So.3d at 101 (quoting *Mungin*, 320 So.3d at 626). As this Court has explained, “when a newly discovered evidence claim is brought as a successive claim, the defendant must demonstrate an exception to the rule’s time limitations.” *Sparre*, 391 So.3d at 405-06 & n.3 (citing the three exceptions in Florida Rule of Criminal Procedure 3.851(d) in a footnote and finding the claims of newly discovered evidence claims to be untimely). All postconviction claims of newly discovered evidence brought beyond the one-year time limit are untimely unless “the facts on which the claim is predicated were unknown to the movant or the movant’s attorney.” Fla. R. Crim. P. 3.851(d)(2)(A)); *Stein*, 2024 WL 4231183 at \*2 (concluding a successive postconviction claim was untimely because the witness, that was the basis of the claim, was known the defendant before the trial citing Rule 3.851(d)(2)(A)). The Eighth Amendment claim is untimely under Rule 3.851(d)(2). *Owen v. State*, 364 So.3d 1017, 1025-26 (Fla. 2023) (concluding a claim of

newly discovered evidence was untimely because none of the three exceptions in Rule 3.851(d)(2) applied).

Sparre's jury selection occurred in 2011. All of the facts regarding his jury selection, including the race and gender of the prospective jurors who were removed for being unable to recommend a death sentence, were known to both Sparre and his trial defense attorney because they were present for, and participated in, that jury selection. The facts of the jury selection in this case were known to all, including appellate counsel from the transcripts of his jury selection. Sparre's jury selection occurred in 2011 but the Eighth Amendment challenge that jury selection was not raised until 2023—over a decade later and in a second successive postconviction motion.

Alternatively, even timing the date the successive claim had to be filed from the date of the last of the jury selections include in the Gau study, the Eighth Amendment claim remains untimely. “To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due

diligence.” *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020) (quoting *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)). The Gau study relies on the jury selections of 12 Duval capital cases but the last two jury selections considered by the study, are from 2018 or 2019. *Collins v. State*, 290 So.3d 896 (Fla. 1st DCA 2020) (No. 1D18-5037); *Jackson v. State*, 293 So.3d 1127, 1128 (Fla. 1st DCA 2020) (No. 1D19-0154) (Thomas, B.L., J., concurring). So, all of the jury selections considered in the study had been available for over three years before the second successive postconviction motion was filed in 2023. The claim is untimely, even improperly timing the claims from the date of the last jury selections in the study instead of properly from the date of Sparre’s own jury selection.

Sparre has failed to account for the delay in conducting the jury study or the delay in filing the second successive postconviction motion once the study was available in September of 2021. *Sparre*, 391 So.3d at 406 (noting Sparre had “offered no coherent explanation” either in the lower court or the appellate court for why he did not raise the alleged flaws in the PSI earlier). That observation regarding

the claims raised in Sparre's first successive motion is equally applicable to all of the jury selection claims raised in Sparre's second successive motion.

Sparre has failed to even attempt to establish the timeliness of any of the three successive postconviction jury selection claims. All three of the claims of newly discovered evidence regarding the 2011 jury selection raised in the second successive motion are untimely.

#### Procedural bar

Any Eighth Amendment challenge to Sparre's 2011 jury selection for excluding prospective jurors who were opposed to the death penalty should have been raised on direct appeal. *Cf. Truehill v. State*, 358 So.3d 1167, 1186 (Fla. 2022) (concluding a fair cross-section claim was procedurally barred because it should have been raised in the direct appeal citing *Reaves v. State*, 826 So.2d 932, 936 n.3 (Fla. 2002)).

Sparre's jury selection was conducted in 2011. All of the facts regarding his jury selection, including the race and gender of the

prospective jurors who were excused, were known to both Sparre and his trial defense attorney. The facts were also known to Sparre's direct appeal counsel as well from the transcript of the jury selection. As in *Truehill*, this Eighth Amendment claim should have been raised in the direct appeal. Indeed, all three of these successive postconviction claims regarding Sparre's jury selection are procedurally barred.

### Merits

The Eighth Amendment does not does not mandate jury sentencing in capital cases, much less mandate that jurors, who are unalterably opposed to the death penalty, be allowed to serve as jurors.

### **Florida's constitutional conformity clause**

Florida's constitutional excessive punishments provision, Article I, section 17, provides, in part: the "prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against

cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.” *See Lawrence v. State*, 308 So.3d 544, 548 (Fla. 2020) (discussing the state’s conformity clause regarding the Eighth Amendment). When the United States Supreme Court establishes a categorical rule, expanding the category violates that rule. *Kearse v. Sec’y, Fla. Dep’t of Corr.*, 2022 WL 3661526, \*26 (11th Cir. Aug. 25, 2022) (citing *Barwick v. Sec’y, Fla. Dep’t of Corr.*, 794 F.3d 1239, 1257-59 (11th Cir. 2015)). In this Court’s words, the Conformity Clause is both “both the floor and the ceiling for protection from cruel and unusual punishment in Florida.” *Zack v. State*, 371 So.3d 335, 348 (Fla. 2023), *cert. denied*, *Zack v. Florida*, 144 S.Ct. 274 (2023).

This Court has repeatedly rejected arguments, such as this one, that are contrary to the United States Supreme Court’s Eighth Amendment jurisprudence, based on the conformity provision of the state constitution. *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023) (noting, regarding all cruel and unusual punishment claims, this Court is “bound by Supreme Court precedents”), *cert. denied*, *Dillbeck*

*v. Florida*, 143 S.Ct. 856 (2023).<sup>12</sup>

### **The Eighth Amendment and capital juries**

The Eighth Amendment prohibits “cruel and unusual” punishment. U.S. Const. amend. VIII. But the Eighth Amendment does not require jury sentencing in capital cases. The United States Supreme Court has rejected the argument that the constitution requires a jury’s involvement in capital sentencing beyond the finding of one aggravating factor. *McKinney v. Arizona*, 589 U.S. 139, 145 (2020) (“States that leave the ultimate life-or-death decision to the judge may continue to do so” quoting *Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring)).

Opposing counsel is essentially arguing that the Eighth Amendment requires jury sentencing in capital cases because juries reflect the community’s views in a way that judges do not. But that was only one Justice’s view in *Ring v. Arizona*, 536 U.S. 584 (2002), not the majority’s view. *Ring*, 536 U.S. at 614 (Breyer, J., concurring)

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<sup>12</sup> *Barwick v. State*, 361 So.3d 785, 794 (Fla. 2023) (noting “this Court lacks the authority to extend *Roper*”), *cert. denied*, *Barwick v. Florida*, 143 S.Ct. 2452 (2023); *Zack*, 371 So.3d at 348 (noting “Florida Courts lack the authority to extend *Atkins*”).

(stating: “I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.”). The other concurring opinion in *Ring*, which was later adopted by the Supreme Court in *McKinney*, stated “today’s judgment has nothing to do with jury sentencing” in capital cases. *Ring*, 536 U.S. at 612 (Scalia, J., concurring).

Furthermore, this Court has rejected this Eighth Amendment argument in a recent warrant case, relying on *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). See *Dillbeck*, 357 So.3d at 104 (rejecting an argument that the Eighth Amendment requires unanimous jury sentencing in capital cases citing *Spaziano* and *State v. Poole*, 297 So.3d 487, 504 (Fla. 2020). As this Court observed, “*Spaziano* is still good law,” and requires the Eighth Amendment challenge be denied. *Dillbeck*, 357 So.3d at 104.

While the law professors quoted by opposing counsel are certainly free to ignore *Spaziano*, this Court is not free to do so under the conformity clause of the state constitution.

### **Newly discovered evidence<sup>13</sup>**

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<sup>13</sup> In the interest in brevity, the State will address the newly discovered evidence aspect of the three claims once in greater detail

There can be no newly discovered evidence of a non-existent Eighth Amendment violation. Nor does the Gau jury study or the Radelet letter constitute newly discovered evidence. The capital defense bar may not commission a study of jury selections of old jury selections in an attempt to create “new” evidence to challenge a jury selection that occurred in 2011.

The postconviction court properly summarily denied the untimely, procedurally barred, and meritless claim of newly discovered evidence of a violation of the Eighth Amendment.

#### ISSUE IV

Whether the Postconviction Court Properly Summarily Denied the Successive Postconviction Claim of Newly Discovered Evidence of a Violation of the Fair Cross-section Requirement of the Sixth Amendment?

Sparre asserts that the postconviction court improperly summarily denied his successive postconviction claim of newly discovered evidence of a violation to the Sixth Amendment’s right to

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in ISSUE IV.

a jury comprised of a fair cross-section of the community. IB at 27. But the fair cross-section postconviction claim is both untimely and procedurally barred. Sparre's jury selection occurred in 2011 but the fair cross-section claim was not raised until 2023, and any such fair cross-section claim could have been raised in the direct appeal but was not. And the claim is meritless as a matter of law for two reasons. First, contrary to the core of opposing counsel's argument, *Duren v. Missouri*, 439 U.S. 357 (1979), does not apply to the petit jury. Nor does the Gau jury study contain the type of information regarding the venire required to establish such a claim. Second, as the postconviction court ruled, death qualifying a jury does not violate the Sixth Amendment's right to an impartial jury under *Lockhart v. McCree*, 476 U.S. 162 (1986). And again, a jury study is not newly discovered evidence. Alternatively, even if the concept of newly discovered evidence applied, Sparre fails both prongs of the test for newly discovered evidence claims. He may not rely on the jury pardon doctrine to establish the second prong of *Jones v. State*, 709 So.2d 512 (Fla. 1998). The postconviction court properly summarily denied

the untimely, procedurally barred, and meritless fair cross-section claim.

#### The postconviction court's ruling

The postconviction court summarily denied the second successive postconviction motion (2nd Succ. PC at 189-191). The lower court relied on *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986). (2nd Succ. PC at 189-90). The postconviction court noted that the United States Supreme Court in *McCree* had rejected the same argument, observing that “groups defined solely in terms of shared attitudes” are “not distinctive groups for fair-cross-section purposes.” (2nd Succ. PC at 190 citing *McCree*, 476 U.S. at 174). The lower court noted that the prosecution may remove prospective jurors for cause if the juror cannot impose a death sentence. (2nd Succ. PC at 190 citing *Franqui v. State*, 804 So.2d 1185, 1192 (Fla. 2001)).

The lower court also ruled that because this is a postconviction case, Sparre may not litigate the jury selection claims as though it was a direct appeal case. (2nd Succ. PC at 190). Rather, he must

establish that death-qualifying his jury resulted in an actually biased juror serving. The lower court relied on the reasoning of *Martin v. State*, 322 So.3d 25, 37-38 (Fla. 2021), for that requirement.

### Preservation

To preserve an issue for appellate review, “the *specific* legal argument or ground upon which it is based must be presented to the trial court.” *Cole*, 392 So.3d at 1063 (emphasis in original); *Steinhorst*, 412 So.2d at 338; § 924.051(1)(b), Fla. Stat. (2024). Furthermore, a party must obtain a ruling from the lower court to preserve an issue for appeal. *Rhodes*, 986 So.2d at 513; *Ritchie*, 344 So.3d at 378 (citing *Rhodes*, 986 So.2d at 513).

Opposing counsel filed a postconviction motion raising the same fair cross-section claim in the lower court based on the same grounds being raised in this appeal and properly obtained a ruling on the claim from the lower court. Thus, the issue of newly discovered evidence of a violation of the fair cross-section requirement was properly preserved.

### Standard of review

Again, the standard of review for the summary denial of successive postconviction claim is de novo. *Randolph*, 2024 WL 4982924 at \*2; *Cole*, 392 So.3d at 1061 (citing *Marek*, 8 So.3d at 1127). But the defendant bears the burden of establishing that the claim is a timely and legally valid claim. *Craft*, 2024 WL 5162232 at \*4 (citing *Hojan*, 212 So.3d at 989).

### Failure of proof/lack of proper presentment

The *Duren* issue was not properly presented in the postconviction motion filed in the lower court nor was it properly presented in the brief filed in this Court. The sole focus in the successive postconviction motion and in the appellate brief was on the petit jury, not the venire. The Gau jury study does not contain any of the required information regarding the race and gender of Duval County and the race and gender of his jury venire that is required to begin to show a violation of *Duren* either.

Without such information, courts refuse to entertain *Duren*

claims. *See e.g., United States v. Fernetus*, 838 Fed. Appx. 426, 435 (11th Cir. 2020) (concluding that there was no prima facie case of a violation of *Duren* because the defendant did not provide information regarding the percentage of African Americans in the relevant community or the percentage of African Americans in the jury venire); *Woodel v. State*, 985 So.2d 524, 529 (Fla. 2008) (rejecting a *Duren* claim because no statistical evidence to support the claim was presented relying on *Gordon v. State*, 863 So.2d 1215, 1218 (Fla. 2003), and citing *Robinson v. State*, 707 So.2d 688, 699 (Fla. 1998)); *United States v. Savage*, 970 F.3d 217, 260 (3d Cir. 2020) (concluding that there was no prima facie case of a violation of *Duren* because there was attempt to show that blacks were underrepresented on an ongoing basis prevents him from establishing “systematic” exclusion). There is both a total failure of proof and a lack of proper presentment.

### Untimely

It is Sparre’s burden to establish the timeliness of each of the three successive postconviction claims. *Dillbeck*, 357 So.3d at 101

(quoting *Mungin*, 320 So.3d at 626). As this Court has explained, “when a newly discovered evidence claim is brought as a successive claim, the defendant must demonstrate an exception to the rule’s time limitations.” *Sparre*, 391 So.3d at 405-06 & n.3 (citing the three exceptions in Florida Rule of Criminal Procedure 3.851(d) in a footnote and finding the claims of newly discovered evidence claims in the first successive postconviction motion to be untimely).

All postconviction claims brought beyond the one-year time limit, regardless of the nature of the claim, are untimely unless “the facts on which the claim is predicated were unknown to the movant or the movant’s attorney.” Fla. R. Crim. P. 3.851(d)(2)(A) (providing: “No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges: (A) 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”); *Owen*, 364 So.3d at 1025-26 (concluding a claim of newly discovered evidence of brain damage was untimely because none of the three exceptions in Rule 3.851(d)(2)

applied); *Stein*, 2024 WL 4231183, at \*2 (concluding a third successive postconviction claim was untimely because the witness who was the basis of the claim, was known the defendant before the trial citing Rule 3.851(d)(2)(A)).

Sparre’s jury selection occurred in 2011. All of the facts regarding his jury selection, including the race and gender of the prospective jurors who were excused were known to both Sparre and his trial defense attorneys. They were present for, and participated in, that jury selection. The facts of the jury selection in this case were known to all, including appellate counsel from the transcripts of his jury selection.

Sparre’s jury selection occurred in 2011 but the fair cross-section claim was not raised until 2023—over a decade later and in a second successive postconviction motion. The fair cross-section claim is untimely under Rule 3.851(d)(2).

Alternatively, even timing the date the successive claim was due from the date of the last of the jury selections include in the Gau study, the fair cross-section claim remain untimely. “To be considered

timely filed as newly discovered evidence, the successive rule 3.851 motion was 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 (quoting *Jimenez*, 997 So.2d at 1064). The Gau study relies on the jury selections of 12 Duval capital cases but the last two jury selections considered by the study, are from 2018 or 2019. *Collins v. State*, 290 So.3d 896 (Fla. 1st DCA 2020) (No. 1D18-5037); *Jackson v. State*, 293 So.3d 1127, 1128 (Fla. 1st DCA 2020) (No. 1D19-0154) (Thomas, B.L., J., concurring). So, all of the jury selections considered in the study had been available for over three years before this second successive postconviction motion was filed in 2023. The claim is untimely, even timing the claims from the date of the other jury selections in the study instead of properly from the date of Sparre’s own jury selection in 2011.

Sparre has failed to account for the delay in conducting the jury study or the delay in filing the second successive postconviction motion once the study was available in 2021. *Sparre*, 391 So.3d at 406 (noting Sparre had “offered no coherent explanation” either in the

lower court or the appellate court for why he did not raise the claim earlier). That observation regarding the claims raised in Sparre's first successive motion is equally applicable to all of the jury selection claims raised in Sparre's second successive motion. Sparre has failed to even attempt to establish the timeliness of any of the three successive postconviction jury selection claims.

All three of the claims of newly discovered evidence regarding the 2011 jury selection raised in the second successive motion are untimely.

#### Procedural bar

Any fair cross-section challenge to Sparre's 2011 jury selection for excluding prospective jurors who were opposed to the death penalty should have been raised on direct appeal. *Truehill*, 358 So.3d at 1186 (concluding a fair cross-section claim was procedurally barred because it should have been raised in the direct appeal citing *Reaves*, 826 So.2d at 936 n.3).

Sparre's jury selection was conducted in 2011. All of the facts

regarding his jury selection, including the race and gender of the prospective jurors, who were removed for being unable to impose a death sentence, were known to both Sparre and his trial defense attorney. The facts were also known to Sparre's direct appeal counsel as well from the transcript of the jury selection. The claim could have been raised as a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Melbourne v. State*, 679 So.2d 759 (Fla. 1996), or as a claim under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) or even as a claim under *Duren* (albeit a misguided one), in the direct appeal.

As in *Truehill*, this fair cross-section claim should have been raised in the direct appeal. Again, all three of these successive postconviction claims regarding Sparre's jury selection are procedurally barred.

### Merits

A new jury study of old jury selections is not newly discovered evidence. Alternatively, death-qualifying a jury does not violate the Sixth Amendment's fair cross-section requirement, as both the United

States Supreme Court and this Court have held. *Lockhart v. McCree*, 476 U.S. 162 (1986); *Kennedy v. Wainwright*, 483 So.2d 424 (Fla. 1986).

### **Newly discovered evidence claims and *Jones***

The test for newly discovered evidence in Florida was established over two decades ago by this Court and has been consistently applied in both capital and non-capital cases since that time. *Jones v. State*, 709 So.2d 512 (Fla. 1998). “To establish a claim of newly discovered evidence, a defendant must satisfy the two-prong test set forth in *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998).” *Truehill v. State*, 358 So.3d 1167, 1184 (Fla. 2022).

Under *Jones*, first, 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. *Truehill*, 358 So.3d at 1185. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial or result in a lesser sentence. *Id.* The defendant has the burden of establishing both prongs of the

*Jones* test.

When determining whether the newly discovered evidence would probably result in an acquittal or in a lesser sentence, a court considers not only the evidence already presented at trial but also any new evidence developed in postconviction proceedings that could be introduced at a new trial, including new evidence of guilt. *Brown v. State*, 304 So.3d 243, 274 (Fla. 2020), *cert. denied*, *Brown v. Florida*, 141 S.Ct. 2828 (2021); *Green v. State*, 975 So.2d 1090, 1100-01 (Fla. 2008). In other words, a court examines the newly discovered evidence in light of a “total picture” of the case that could be presented at a new trial. *Brown*, 304 So.3d at 274. To constitute newly discovered evidence, “the evidence must be admissible.” *Dailey v. State*, 329 So.3d 1280, 1285 (Fla. 2021) (citing *Williamson v. State*, 961 So.2d 229, 234 (Fla. 2007)). Sparre must establish both prongs of *Jones* but he can establish neither.

### **Studies are not new evidence**

A new jury study of old jury selections is not evidence, much less newly discovered evidence. *Dillbeck v. State*, 357 So.3d 94, 99 (Fla.

2023) (noting that “new opinions or research studies based on a compilation or analysis of previously existing data and scientific information are not generally considered newly discovered evidence” citing *Henry v. State*, 125 So.3d 745, 750 (Fla. 2013)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023); *Truehill v. State*, 358 So.3d 1167, 1185 (Fla. 2022) (observing that a study “based on information that was previously available to counsel at the time of trial,” does “not constitute newly discovered evidence” citing *Schwab v. State*, 969 So.2d 318, 325–26 (Fla. 2007)).

Sparre’s own jury selection in 2011 was known to all at that time and therefore, is not newly discovered. Moreover, a study of old jury selections is not “evidence” at all. A study of other jury selections in other capital cases is not case-specific evidence as to this case. *Wyatt v. State*, 71 So.3d 86, 99 (Fla. 2011) (concluding a “case-specific” letter from the FBI regarding the testimony on comparative bullet lead analysis presented at the defendant’s trial was newly discovered evidence). The Gau jury study does not undermine any of the evidence presented against Sparre during guilt phase or the penalty

phase in any manner.

And the jury study would not be admissible at a new trial or new penalty phase. *Dailey v. State*, 279 So.3d 1208, 1213 (Fla. 2019) (explaining that no relief is warranted on a claim of newly discovered evidence, unless the evidence would be admissible and rejecting a claim of newly discovered evidence because the notes “would not be admissible at a retrial”).

And, even if his jury selection or the Gau study could be considered evidence, it is not “new” evidence. Sparre’s jury selection occurred in 2011. The capital defense bar may not commission a study of jury selections, many of which occurred years earlier, in an attempt to create “new” evidence to challenge a jury selection that occurred in 2011.

### **Known to all and lack of diligence**

The first prong of *Jones* requires that the defendant or his counsel not know of the evidence at the time of trial. But, as repeatedly explained in this brief, the trial court, Sparre himself, and his defense attorneys all knew about his 2011 jury selection. The trial

court, Sparre, and his attorneys were all present for and participated in the jury selection in this case. The trial court, the prosecution, and the defense all participated in the jury selection in the presence of Sparre himself.

Nor was opposing counsel diligent in discovering the jury study. The study was commissioned in November of 2020 but the fair cross-section claim was not filed until February of 2023.<sup>14</sup> Sparre fails the first prong of *Jones*.

### **Not likely to produce a different result**

The second prong of *Jones* requires that the jury study would probably result in a life sentence at a new penalty phase. Sparre is asserting that the four black jurors who were removed for cause due to their death scruples should have been allowed to serve, despite being unable to follow the law and if they had be allowed to serve, it would have resulted in a life sentence because they would not have

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<sup>14</sup> The study seems to have been publicly available on the internet by 2021, but the burden to establish the timeliness of the claim based on the study's availability is Sparre's, not the State's. [https://www.aclu.org/wp-content/uploads/legal-documents/2021.09.07\\_Gau\\_Report.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/2021.09.07_Gau_Report.pdf).

recommended death regardless of the evidence of aggravation presented. He is asserting that he is entitled to retain actually biased jurors that are biased against the death penalty but biased in his favor regarding sentencing.

But that is exactly why those prospective jurors were removed. *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (stating “an impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts”). These jurors were removed because they were unable to follow the law, as required by both *McCree* and the applicable state statute. § 913.03(3), Fla. Stat. (2024) (providing that a juror who “has conscientious beliefs that would preclude him or her from finding the defendant guilty” is subject to a challenge for cause).

Sparre is not permitted to rely on that type of reasoning to establish the second prong of *Jones*. A defendant may not attempt to establish the second prong of a different result based on ignoring controlling precedent and a state statute.

The fundamental basis of opposing counsel’s “different result”

of a life sentence for purposes of *Jones* is bottomed on creating a right to jurors that are not only biased against the death penalty but biased against the State as well. But there is no such right as a right to a biased jury. To the contrary, the State has a right to an impartial jury. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) (characterizing an impartial jury as one “not only freedom from any bias against the accused, but also from any prejudice against his prosecution”); *Downs v. State*, 386 So.2d 788, 791 (Fla. 1980) (“the state also enjoys the right to an impartial jury, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution” quoting *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978); *Livingston v. State*, 441 So.2d 1083, 1086 (Fla. 1983) (“Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge” quoting *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (1930)). Sparre may not rely on such logic to establish the second prong of *Jones*.

Sparre is seeking to create a right to jury nullification in capital

sentencing. But this Court does not recognize jury nullification as a basis for relief because the jury pardon doctrine is “without legal foundation.”<sup>15</sup> A Court that does not permit pardon power to be a basis for relief in a direct appeal should not consider pardon power as to the sentence to be a basis for relief for a postconviction claim either. Sparre fails the second prong of *Jones* as a matter of law.<sup>16</sup>

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<sup>15</sup> *Knight v. State*, 286 So.3d 147 (Fla. 2019) (holding a claim of fundamental error cannot be based on the jury pardon doctrine, reconsidering the doctrine and refusing to recognize a right that would facilitate jury nullification and explaining the jury’s practical pardon power is not a right of the defendant); *Dean v. State*, 230 So.3d 420, 425 (Fla. 2017) (Polston, J. concurring) (explaining that a jury pardon is “essentially a not guilty verdict rendered contrary to the law and evidence and is an aberration” and noting, by definition, jury pardons are a result of jurors violating their oath to well and truly try the issues between the State and the defendant and render a true verdict according to the law and the evidence and to convict of the highest offense proven citing *Sanders v. State*, 946 So.2d 953, 958 (Fla. 2006)); *Haygood v. State*, 109 So.3d 735, 749 (Fla. 2013) (Canady, J., dissenting) (observing that nothing in the Florida Constitution, the Florida Statutes, or the Florida Rules of Criminal Procedure supports a recognition of a right to jury nullification).

<sup>16</sup> The postconviction court relied, in part, on *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007), and *Martin v. State*, 322 So.3d 25, 37-38 (Fla. 2021), to reject the three successive postconviction claims on the merits, noting the postconviction context in which the claims were raised. (2nd Succ. PC at 190). The postconviction court thought that Sparre was required to establish either his conviction or death sentence was the result of actual bias on the part of the jury. The

## **Fair cross-section requirement and petit juries**

The Sixth Amendment right to a jury trial includes the right to a jury pool comprised of a fair cross-section of the community. *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975)). But the fair cross-section requirement does not apply to the petit jury, as Sparre is improperly attempting to do in this issue. *Taylor*, 419 U.S. at 538 (refusing to impose a requirement that petit juries actually mirror the community and reflect various distinctive groups). The fair cross-section requirement does not apply to “anything beyond the inclusion of all cognizable groups in the venire.” *Holland v. Illinois*, 493 U.S. 474, 478 (1990) (citing cases). The fair cross-section requirement of the Sixth Amendment only applies to the jury pool, not to the final or petit jury.

The United States Supreme Court has “never” invoked the fair cross-section requirement “to invalidate the use of either for-cause or peremptory challenges to prospective jurors” or to require petit juries

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State, however, believes that, while actual bias is obviously an appropriate part of the discussion, this Court’s precedent rejecting the pardon power doctrine is more appropriate lens for these types of claims.

reflect the “community at large.” *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986). The *McCree* Court observed that extending the fair cross-section requirement to petit juries would be “unworkable and unsound.” *Id.* at 174. “A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury.” *Holland*, 493 U.S. at 478; *see also United States v. Rodriguez-Cardenas*, 866 F.2d 390, 393 (11th Cir. 1989) (observing that the Supreme Court has consistently refused to extend the fair cross-section requirement to petit juries). While the larger jury pool of prospective jurors must generally reflect the community, the final jury is not required to reflect the community. *Duren v. Missouri*, 439 U.S. 357 (1979), applies only to the jury pool, not the petit or final jury.

The fundamental problem with this claim is that it is actually a mixture of *Duren* and *Batson/Melbourne*, but like the East and the West, the twain does not meet. *Duren* applies to the jury pool but not

the final jury. *Batson* and *Melbourne*, on the other hand, apply to the final jury. There is no such claim as a *Duren* claim regarding the final jury. Sparre may raise either a *Duren* challenge to the jury pool or a *Batson/Melbourne* challenge to the petit jury but not raise a *Duren* challenge to the final jury.

### ***Duren v. Missouri***

Opposing counsel improperly relies on *Duren v. Missouri*, 439 U.S. 357 (1979), as support for this claim. The jury study does not support a constitutional challenge based on *Duren* for other reasons as well as not applying to the final jury. To establish a prima facie case of a violation of *Duren*, the defendant must show: (1) the allegedly excluded group is a “distinctive group” in the community; (2) the representation of this group in the venire was not “fair and reasonable in relation to the number of such persons in the community”; and (3) the under-representation was due to “systematic exclusion of the group” in the jury-selection process. *Duren*, 439 U.S. at 364.

The first reason is that prospective jurors who are opposed to the death penalty are not a “distinctive group” for purposes of *Duren*.

While blacks certainly are “distinctive group” for purposes of *Duren*, prospective jurors who are opposed to the death penalty are not a distinctive group for purposes of *Duren*, regardless of their race. *United States v. Savage*, 970 F.3d 217, 255 (3d Cir. 2020) (recognizing in a capital case that “Blacks qualify as a distinctive group”). While blacks are protected from being removed from a jury due to their race under *Batson* and *Melbourne*, they are not protected from being removed due to their opposition to the death penalty. *Lockhart v. McCree*, 476 U.S. 162, 176-77 (1986) (holding prospective juror may be excluded from jury service based on their opposition to the death penalty without contravening any of the basic objectives of the fair-cross-section requirement); *Wainwright v. Witt*, 469 U.S. 412, 425 (1985) (clarifying that a prospective juror may be excluded for cause because of his or her views on capital punishment). Groups defined “solely in terms of shared attitudes” are “not ‘distinctive groups’ for fair-cross-section purposes. *McCree*, 476 U.S. at 174. It is constitutionally proper to remove black jurors due to their views, regardless of their race. *United States v. Kurland*, 2024 WL 5165547,

at \*3 (2d Cir. Dec. 19, 2024) (holding unvaccinated jurors are not a distinct group because they are a “group defined solely in terms of shared attitudes may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement” quoting *McCree*, 476 U.S. at 176-77).

The second reason is that Sparre failed to even allege the other two requirements of a *Duren* claim. He did not alleged that the representation of blacks in the venire was not “fair and reasonable” in relation to the number of blacks in Duval County or that blacks were subject to “systematic exclusion” from jury pools. *United States v. Fernetus*, 838 Fed.Appx. 426, 434-35 (11th Cir. 2020) (rejecting a *Duren* claim in a federal prosecution because the defendant did not provide information regarding the percentage of blacks in the relevant community and the number of blacks in the venire). This Court has repeatedly rejected *Duren* claims that lack evidentiary support. *Woodel v. State*, 985 So.2d 524, 529 (Fla. 2008) (rejecting a *Duren* claim because no statistical evidence to support the claim was presented); *Gordon v. State*, 863 So.2d 1215, 1218 (Fla. 2003) (rejecting a *Duren*

claim because there was no “prima facie showing” that blacks were systematically excluded and affirming the summary denial of the claim).

The Gau jury study does not address the jury pool or present any statistics regarding the percentage of blacks in Duval County or the percentage in the venire, as it must to raise a proper *Duren* claim. Nor does either opposing counsel or the study provide any information to establish systematic exclusion, such as the percentage of blacks in various venires over a period of time in Duval County.

The claim as a *Duren* claim fails for those three reasons.

**Fair cross-section requirement and death-qualification**

Death qualifying a jury does not violate the fair cross-section requirement of the Sixth Amendment’s right to a jury trial provision. *Lockhart v. McCree*, 476 U.S. 162 (1986). The United States Supreme Court explained that excluding prospective juror based on their opposition to the death penalty or “for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded

from jury service without contravening any of the basic objectives of the fair-cross-section requirement.” *Id.* at 176-77 (citing *Lockett v. Ohio*, 438 U.S. 586, 597 (1978)). The *McCree* Court directly held that “death qualification” of a jury “does not violate the fair-cross-section requirement.” *Id.* at 177; *see also United States v. Stinson*, 647 F.3d 1196, 1206 (9th Cir. 2011) (noting the Supreme Court has made clear that death qualifying a jury in a capital case does not violate the Sixth Amendment’s impartial jury or fair cross section requirements citing *McCree*, 476 U.S. at 174).

The postconviction court properly summarily denied the untimely, procedurally barred, and meritless claim of newly discovered evidence of a violation of the fair cross-section requirement.

Accordingly, the trial court properly summarily denied the second successive postconviction motion.

CONCLUSION

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

Respectfully submitted,

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### CERTIFICATE OF SERVICE

Counsel certifies that a true and correct copy of this ANSWER BRIEF ON THE MERITS has been furnished via the e-portal system to **DAWN B. MACREADY**, Acting Chief of CCRC-N, 1004 DeSoto Park Dr., Tallahassee, FL 32301-4555; Phone: (850) 487-0922; email: Dawn.Macready@ccrc-north.org; **CHELSEA SHIRLEY**, Assistant CCRC-N counsel, 1004 DeSoto Park Dr., Tallahassee, FL 32301-4555; Phone: (850) 487-0922; email: Chelsea.Shirley@ccrc-north.org; and **NIDA IMTIAZ**, Assistant CCRC-N counsel, 1004 DeSoto Park Dr., Tallahassee, FL 32301-4555; Phone: (850) 487-0922; email: Nida.Imtiaz@ccrc-north.org this 24th day of January, 2025.

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