IN THE SUPREME COURT OF FLORIDA

HECTOR SANCHEZ-TORRES,

Appellant,

v.

CASE NO. SC19-211
Lower Tribunal No.
2009-CF-671
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal

The relevant facts concerning this case are recited in this Court's opinion on direct appeal:

> Sanchez-Torres pled guilty to first-degree murder and armed robbery. After he subsequently waived a penalty-phase jury, the State presented the following evidence regarding the crimes in this case during penalty-phase proceedings in front of the trial judge.
>
> . . .
>
> Colon's body was discovered lying on the sidewalk close to his home in the early morning hours of September 10, at 1:30 a.m. The area was very dark. When Colon's body was discovered, his wallet and cell phone were missing.
>
> Colon had been shot once in the head, but had no other injuries. The medical examiner testified that the characteristics of the gunshot wound indicated that the muzzle of the gun was in direct contact with, and pressed hard against, the skin. The entrance wound was just below the left eye, and the exit wound was on the right back side of the head.
>
> On September 30, 2008, Colon's mother testified that she received a phone call from her son's number. When she answered, a young Hispanic woman was on the other end. Colon's mother began crying and told the caller that the cell phone belonged to her murdered son. The caller hung up.
>
> Sanchez-Torres's younger sister, who was fifteen years old at the time of the crime, testified during the penalty phase that she had discovered the cell phone and recognized that it was not one of her brother's cell phones. She found a contact listing for "mom" and called it. A woman answered. She was crying and explained that the cell phone belonged to her murdered son. Sanchez-Torres's sister then hung up and called her mother, who

told her to turn off the phone and wait for her to come home. Sanchez-Torres's sister also called Markeil Thomas, the codefendant in this case and Sanchez-Torres's good friend and roommate, who told her to turn off the phone and pull out the battery, which she did. She gave the phone to Thomas, and her mother got it from him.

. . .

Detective West, also with the Clay County Sheriff's Office, testified that he spoke with Torres on March 5, 2009, when he interviewed her at her home. When he met with her, he informed her that he had drafted an arrest warrant for her for tampering with the cell phone and showed her an unsigned arrest warrant. Torres testified that the next day, she told Sanchez-Torres about what happened, and he told her to contact the detectives and tell them to come see him.

After Detective West received a phone call from Torres, in which she stated that Sanchez-Torres wanted to speak to him, Detective West proceeded to the Duval County Jail to interview Sanchez-Torres. During the initial part of the interview, Sanchez-Torres stated that Thomas had shot the victim and drew a diagram of the scene and the body to describe what happened. Detective West left the room, and Sanchez-Torres wrote out a three-page handwritten statement, in which he stated that he, and not Thomas, had shot the victim. Detective West returned to the room and took Sanchez-Torres to a different location in order to conduct a videotaped interview. Sanchez-Torres then told Detective West again that Thomas was the shooter.

The State also presented evidence regarding Sanchez-Torres's prior violent felony, which was a murder that took place in Duval County on July 20 or 21, 2008, less than two months before the murder in this case. Sanchez-Torres had confessed to shooting the victim in the Duval County murder, stating that he shot the victim because the victim had repeatedly threatened to kill his then-pregnant girlfriend. Sanchez-Torres was tried and found

guilty of first-degree murder in the Duval County case and was sentenced to life in prison in December 2009.

. . .

The penalty-phase proceedings then continued in Sanchez-Torres's case. Sanchez-Torres presented mitigation evidence in the form of testimony from numerous witnesses consisting of his family, friends, friends of the family, former teachers and coaches, and supervisors and fellow employees at the dog track where he worked. They universally described Sanchez-Torres as a respectful, polite, good, kind, loving, caring, and giving person, who was also a "clown" and a "goofball." Specifically, they described him as family-oriented; bright and intelligent; someone who was always quick to help in any way, including helping people financially, assisting others with moving, volunteering, providing transportation to others, and being there if someone needed to talk; someone who got along with others and made friends everywhere he went; and someone who loved animals. Several individuals testified that Sanchez-Torres believes in God and attended church on a regular basis as part of the youth group. Witnesses also testified that Sanchez-Torres was a civic-minded individual who volunteered often at Hispanic heritage events.

. . .

When Sanchez-Torres was fifteen years old, his parents got divorced based on problems caused by his father's gambling and drug and alcohol abuse problems, which his parents had kept from him. His mother testified that Sanchez-Torres was angry about the divorce. After the divorce, Sanchez-Torres's father moved to Connecticut. Sanchez-Torres then moved to Connecticut to be with his father, but only stayed for a short period of time upon discovering his father's gambling and drug abuse problems and after being disappointed that his father did not spend time with him. Sanchez-Torres then moved back to Jacksonville to live with his mother and younger sister.

Shortly thereafter, when Sanchez-Torres was sixteen years old, his father died as a result of problems caused by the alcohol and drug abuse. Sanchez-Torres's mother testified that Sanchez-Torres was "devastated" by his father's death. One of Sanchez-Torres's aunts testified that Sanchez-Torres's father's death was "very hard for him." Sanchez-Torres did not pass the FCAT and therefore was unable to graduate from high school, which was stressful to him.

Sanchez-Torres started working at the dog track when he was in high school and was still employed there the day of the murders. His fellow employees and his supervisors at the dog track universally described him as a good employee who took his work seriously and was quickly promoted because he was respectful, professional, and had no issues with attendance. He came in on his days off if someone called in sick and supervised eight other employees. He was known as a reliable employee and someone people could count on. He also frequently gave other employees rides to work.

Sanchez-Torres's girlfriend became pregnant, and his mother testified that Sanchez-Torres was very happy and excited about being a father. However, Sanchez-Torres's high school teacher testified that he had "mixed feelings" because being a parent was also a lot of responsibility. His girlfriend gave birth shortly before the murder in this case.

Several individuals testified that Sanchez-Torres would give or lend them money. He worked overtime at the dog track because he was trying to help his mother with the rent, as well as make payments on his new car that he had bought. He also felt that because he was going to be a father, he needed to make more money. About a month before the murder in this case, Sanchez-Torres moved out of his mother's apartment into an apartment downstairs with the codefendant, Thomas.

Sanchez-Torres also presented testimony from his former counsel in this case, who had represented him for a short period of time. She testified that Sanchez-Torres was

a "model client" who was always pleasant, personable, and cooperative. She suggested that Sanchez-Torres take a polygraph test, and Sanchez-Torres submitted to a polygraph examination without hesitation.

Sanchez-Torres also presented testimony from the polygrapher who conducted his polygraph examination. The polygrapher asked Sanchez-Torres whether he had shot the victim, to which Sanchez-Torres answered that he did not. Sanchez-Torres passed the polygraph test with a score that was "very, very good."

Finally, Sanchez-Torres read a statement in which he apologized to the victim's family, stating that he could not "apologize enough" and that he was taking responsibility, but denied that he killed the victim, stating that it was not supposed to "go down the way it did."

Following the penalty-phase proceedings, the trial court found the following aggravating circumstances: (1) Sanchez-Torres had been convicted of a prior violent felony; and (2) the murder was committed during the course of a robbery (merged with pecuniary gain). The trial court gave both aggravators great weight. The trial court found that the cold, calculated, and premeditated aggravator was not established beyond a reasonable doubt because "it is not unreasonable to infer that evidence presented during the sentencing proceedings could suggest that the fatal gunshot was the result of an accidental discharge of the gun."

The trial court then addressed the proposed statutory mitigating circumstance of age. However, the trial court stated that it "decline[d] to assign significant weight to this mitigator." The trial court found the statutory mitigator that Sanchez-Torres was an accomplice and that his participation was relatively minor did not apply, because "whether or not [Sanchez-Torres] was the person who fired the fatal shot that killed Eric Joel Colon, his participation was not minor" and, further, the court "was presented with competent evidence that [Sanchez-

Torres] may have in fact been the individual who pulled the trigger."

The trial court found twenty-two nonstatutory mitigators: (1) Sanchez-Torres can have a positive impact on his family and friends, who continue to love and support him (slight weight); (2) Sanchez-Torres was a peaceful child and enjoyed spending time with his family (slight weight); (3) Sanchez-Torres was a good athlete and a baseball player (slight weight); (4) Sanchez-Torres's father had a gambling problem and was addicted to drugs and alcohol (slight weight); (5) Sanchez-Torres's parents were divorced when he was twelve years old (slight weight); (6) Sanchez-Torres moved away from his mother and sister when he was fifteen to live with his father in Connecticut (slight weight); (7) Sanchez-Torres lived in a bad neighborhood while in Connecticut and received little supervision from his father (slight weight); (8) Sanchez-Torres's father died from complications of alcohol and drug abuse and Sanchez-Torres was very emotional at his father's funeral (slight weight); (9) Sanchez-Torres was a good brother to his siblings (little weight); (10) Sanchez-Torres was outgoing and was considered to be the "clown" of his family (some weight); (11) Sanchez-Torres was kind and respectful to his family, friends, and coworkers (some weight); (12) Sanchez-Torres had difficulty in school (slight weight); (13) Sanchez-Torres was a reliable employee, with a consistent work record from a young age (the trial court found this mitigator but failed to specify the weight given); (14) Sanchez-Torres did charitable deeds, volunteered for several organizations, and was helpful to others (slight weight); (15) Sanchez-Torres loves his child and desires to be a supportive father during imprisonment (slight weight); (16) Sanchez-Torres loves animals (slight weight); (17) Sanchez-Torres took responsibility for his crimes by confessing to police (little weight); (18) Sanchez-Torres has expressed remorse for his conduct (slight weight); (19) Sanchez-Torres has been a good inmate while incarcerated and is capable of adapting

> well to long-term incarceration (slight weight); (20) Sanchez–Torres exhibited appropriate conduct throughout the proceedings and was polite, cooperative, and respectful to his attorneys and legal staff during his criminal cases (slight weight); (21) Sanchez–Torres believes in God and joined a church on his own (slight weight); and (22) society can be protected by life sentences without parole (some weight).
>
> After considering and weighing the aggravating and mitigating circumstances, the trial court determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced Sanchez–Torres to death.

Sanchez-Torres v. State, 130 So. 3d 661, 664-68 (Fla. 2013).

On direct appeal, Appellant, represented by Rick Sichta, Esq., raised three claims: (1) that his guilty plea was not knowing, intelligent, and voluntary; (2) the trial court erred in not considering polygraph results as mitigating evidence; and (3) the trial court should have given great weight to Defendant's age. *Sanchez-Torres*, 130 So. 3d at 668. This Court found all three claims to be without merit and denied them. *Id.* at 673-74. Though not specifically raised by Appellant, this Court also reviewed the death sentence and found it to be a proportionate sentence based on the circumstances of this case. *Id.* at 675. This Court affirmed the convictions and sentence of death. *Id.* at 676.

After the denial of his direct appeal, Appellant filed a petition for writ of certiorari, which was denied. *Sanchez-Torres v. Florida*, 134 S. Ct. 1296 (2014). The judgment and sentence became final upon denial of certiorari on February 24, 2014.

Post-conviction Proceedings

Following the direct appeal, on February 13, 2015, Sanchez-Torres, represented by registry counsel, Gonzalo Andux, Esq., filed a "Motion to Vacate Judgments of Conviction and Sentence." On March 6, 2015, the State filed a motion to strike the original motion for post-conviction relief because it contained sub-claims in violation of rule 3.851(e)(1). On April 1, 2015, the post-conviction court struck Appellant's Motion and granted leave to amend.

On April 30, 2015, Appellant filed an "Amended Motion to Vacate Judgments of Conviction and Sentence." (PCR 17-91). The amended post-conviction motion raised 10 claims. On May 29, 2015, the State filed an "Answer to Rule 3.851 Motion for Post-Conviction Relief," which responded to Appellant's 10 claims. (PCR 92-137).

On May 3, 2016, Appellant filed a "Motion for Leave to Amend Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence" and "Second Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule 3.851 With Special Request for Leave to Amend." (PCR 393-462). The Second Amended Motion contained 11 claims. Claims 1-6 were the same as in the Amended Motion. Appellant added one *Hurst* related claim and numbered it claim 7. Claims 8-11 were the same as claims 7-10 in the Amended Motion.

On January 27, 2017, Appellant filed a "Third Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule 3.851 with Special Request for Leave to Amend" (PCR 486-576). The Third Amended Motion contained 12 claims. Claims 1-8 were the same as in the Second Amended Motion. Appellant added another *Hurst* claim as claim 9. Claims 10-12 were the same as claims 9-11 in the Second Amended Motion. The claims are as follows: (1) Defendant's trial counsel were ineffective at the penalty phase for failing to investigate, develop, and prepare witnesses to expand and establish non-statutory mitigating circumstances (PCR 495-506); (2) trial counsel were ineffective at the penalty phase for failing to investigate, develop, and solicit testimony from mental health experts to prove statutory and non-statutory mitigating circumstances (PCR 506-19); (3) trial counsel were ineffective for failing to request a separate hearing, or "cooling off" period between the penalty phase and *Spencer* hearing (PCR 519-22); (4) trial counsel were ineffective at the guilt phase for failing to request a continuance of the trial (PCR 522-26); (5) trial counsel were ineffective at the guilt phase for failing to file a motion to suppress the Defendant's statements (PCR 526-31); (6) Defendant's plea was not knowing, intelligent, and voluntary because trial counsel did not properly advise him of the consequences of his plea (PCR 531-43); (7) *Hurst* as newly discovered evidence claim (PCR 543-44); (8) newly discovered

evidence of co-defendant Markeil Thomas' statement that he was the "trigger-man" (PCR 544-47); (9) Sixth and Eighth Amendments *Hurst* claim (PCR 547-69); (10) cumulative error (PCR 569-70); (11) incompetence at execution claim (PCR 571-73); and (12) a lethal injection protocol challenge (PCR 573-75).

Additionally, on January 27, 2017, registry counsel, Andux, filed a motion to withdraw as counsel due to a conflict of interest. (PCR 678-79). The post-conviction court appointed W. Charles Fletcher, Esq., who was not on the registry[1] list, and was soon replaced. (PCR 676-77). On February 1, 2017, Francis Shea, Esq., who was on the registry[2] list, was appointed as counsel for the Appellant. (PCR 687-88). Mr. Shea adopted the Third Amended Motion.

On August 7, 2017, Appellant filed "Defendant's Supplement to His Rule 3.851 Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*," which asserts one *Hurst* related claim. (PCR 716-38). This supplement subsumes claims 7 and 9 from the Third Amended Motion as it contains the most relevant response in light of recent updates to the case law regarding

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[1] The Capital Collateral Attorney Registry maintained by the Justice Administrative Commission (JAC) can be found here: https://www.justiceadmin.org/registry/mregistry.aspx?show_div=2

[2] Mr. Shea remains on the most current registry, which is dated February 12, 2019, and can be found here: https://www.justiceadmin.org/registry/Attorneys.xls

Hurst. On August 10, 2017, the State filed "Answer to Supplemental Rule 3.851 Postconviction Motion." (PCR 739-55).

An evidentiary hearing was held on September 20 and November 8, 2018, where Appellant presented testimony and exhibits in support of his Motion. On September 20, 2018, Dr. Julie Kessel and Dr. Stephen Bloomfield testified for the defense. (PCR 2542-93; 2593-2637).

Dr. Kessel is a forensic psychiatrist. (PCR 2543). Of the 35-50 times Dr. Kessel has testified, 90-95% of the time has been for the defense. (PCR 2576-77). She examined the Appellant January 31, 2018. (PCR 2571; 2752-60). Dr. Kessel diagnosed Appellant with major depressive disorder and attention deficit and hyperactivity disorder (ADHD). (PCR 2569). Dr. Kessel testified that despite Appellant's intelligence falling in a normal range, her diagnosis of ADHD nine years after Appellant's plea demonstrates that his plea was involuntary. (PCR 2569-70). Though the research is still pending, Dr. Kessel believes that brain development is not complete until after age 21, and the Appellant's age should have been taken into consideration. (PCR 2553). Additionally, Dr. Kessel believes Appellant did not know that the death penalty would still be a possible sentence if he pled. (PCR 2558). Though the issue was clearly discussed during the plea colloquy, Dr. Kessel believes that Appellant did not internalize it. (PCR 2562).

Dr. Bloomfield is a licensed psychologist. (PCR 2594). Before trial in 2011, Dr. Bloomfield examined the Appellant for competency purposes but did not write a report. (PCR 2598). He determined that there were no competency issues and was told that he would not testify at trial as the defense and State had stipulated that no expert witnesses would be called. (PCR 2598, 2602). Dr. Bloomfield was again consulted during post-conviction and provided a report dated July 11, 2016. (PCR 2603). After being provided additional information, Dr. Bloomfield provided an updated assessment dated August 20, 2018. (PCR 2596; 2769-72). In reviewing the Appellant's mental health history, Dr. Bloomfield noticed that it mentioned that Appellant met the criteria for antisocial personality disorder, though Dr. Bloomfield disagrees with that diagnosis. (PCR 2610). Retrospectively, Dr. Bloomfield believes that Appellant was inadequately able to enter into a plea, though he admits nothing appears wrong with the plea colloquy. (PCR 2613-14). Dr. Bloomfield believes that Appellant's underdeveloped brain due to his age, his major depressive disorder, and his ADHD caused Appellant to be experiencing extreme emotional distress at the time of the crime in 2008 and continuing through the time of his plea in 2011. (PCR 2610). Dr. Bloomfield opined that looking at the plea retrospectively, Appellant's poor judgment and heightened inability to understand the consequences of his behavior caused the plea to be involuntary. (PCR 2613).

Additionally, Dr. Bloomfield did mention that there was a shame about homosexual actions that were involved in the Duval murder, and that had he testified at sentencing, he would have testified about that. (PCR 2630-31). Although Dr. Bloomfield thought that Appellant's marijuana use would have affected his brain development, he conceded that any ill effects would have gone away during the two-year period of incarceration from Appellant's arrest in 2009 to his plea in 2011. (PCR 2626-27).

On November 8, 2018, Appellant's trial defense counsel, public defenders Kate Bedell, Esq., and Quintin Till, Esq., testified for the defense. (PCR 2650-2702; 2704-45). The State called no witnesses.

Ms. Bedell testified that at the time of her representation of Appellant, she was working at the public defender's office and had approximately nine years of criminal law experience, including 8-10 murder cases. (PCR 2651). Ms. Bedell believes her involvement in this case began sometime between the end of 2010 and beginning of 2011. (PCR 2651). Ms. Bedell had a case load of 20-40 cases at the time, including other homicide cases. (PCR 2653). Prior to her involvement in this case, there were multiple defense attorneys and mitigation specialists involved. (PCR 2653). Mr. Till represented Appellant in his Duval County trial for first-degree murder and had Dr. Harry Krop evaluate him in 2009. (PCR 2657). One of Appellant's former defense attorneys on

the Clay County case, Ms. Taylor, had Dr. Bloomfield examine him. (PCR 2657). Appellant told Ms. Taylor he was not the shooter in this case and Taylor had him take a polygraph, which he passed. (PCR 2659-60). Appellant discussed with Mr. Till that the police threatened to arrest his mother and sister. (PCR 2660). Ms. Bedell remembers meeting with Angela Corey, Esq., the elected State Attorney for the Fourth Judicial Circuit at the time, to discuss a potential plea deal. (PCR 2662-63). At that time, the State Attorney's office had a policy that if the defense filed a motion to suppress, any deals were off the table. (PCR 2733). Ms. Bedell remembers the case being ready for trial prior to the plea and does not recall ever saying that she was not ready to proceed. (PCR 2664). Ms. Bedell discussed with the Appellant the possibility of a plea many times. (PCR 2664-65; 2691). She explained that based on her experience with Clay County juries and based on the specific facts of this case, Appellant would more than likely be convicted and sentenced to death. (PCR 2665). Ms. Bedell believed that a plea and using the polygraph and Appellant's remorse at a judge only sentencing proceeding would be the best chance for obtaining a life sentence. (PCR 2669). On February 17, 2011, Appellant's trial judge had overridden a jury's death sentence in *State v. McBride*. (PCR 2670; 3136-50). Though much of the mitigation was not developed prior to Ms. Bedell's involvement, she believed she had enough time to adequately

prepare. (PCR 2691; 2694). Ms. Bedell declined to call any experts during sentencing because Appellant told Dr. Reibsame, a State expert, that he had no remorse for the Duval killing. (PCR 2684). Ms. Bedell believed that would undermine their defense strategy of focusing on Appellant not being the shooter and his remorse. (PCR 2684). Ms. Bedell testified that on the day of the plea, they arrived in court with a signed plea, had a thorough colloquy, and the Appellant knew death was still on the table. (PCR 2691-94). The Appellant thought the plea was in his best interest and appeared to understand the consequences. (PCR 2695).

Mr. Till testified that the Appellant understood the criminal justice system and had no concerns about the Appellant's plea being knowing, intelligent, and voluntary. (PCR 2731-32). Mr. Till opined this was a horrible case for the defense, and that one would not want to have a jury trial in Clay County on these facts. (PCR 2731). Mr. Till stated that the defense team wanted to have the polygraph considered at sentencing, and that certainly would not have gone before a jury. (PCR 2732).

At the post-conviction evidentiary hearing, Appellant presented three composite exhibits as documentary evidence. Defense Composite 1 consists of: (1) Report of Dr. Julie Kessel, 5/23/18; (2) CV of Dr. Julie Kessel; (3) Declaration of Dr. Stephen Bloomfield, 7/11/16; (4) Report of Dr. Stephen Bloomfield, 7/11/16; (5) CV of Dr. Stephen Bloomfield; (6) Affidavit of Hector

Sanchez-Torres, 8/24/18; (7) Declaration of Emma DiAnna, 8/13/18; (8) Transcript of guilty plea, 4/29/11; (9) Transcript of jury waiver, 5/2/11; and (10) Transcript of colloquy of Hector Sanchez-Torres in co-defendant's case, 06/07/2011. (PCR 2749-2850). Defense Composite 2 consists of: (1) Sentencing Order (Hector Sanchez Torres), 9/01/11; (2) Defense witness list; (3) Clay County docket, 6/24/11; (4) Defense investigation spreadsheet, 5/31/11; (5) Defense memo to incur costs, 4/27/11; (6) Arrest warrant for Maria Torres, 10/01/08; (7) Defense attorney note, 12/21/10; (8) Defense attorney notes (composite); (9) Deposition-Kate Bedell, 6/22/17; (10) Motion to Prohibit Testimony of Hector Sanchez-Torres, 06/06/2011; (11) Sentencing Order (Markeil Thomas), 9/26/16; (12) Police reports re: arrest warrant Maria Torres, 3/05/09; and (13) Sentencing Order, State's Notice of Objection, and Newspaper article of judge's override of a jury recommendation of death in the McBride case. (PCR 2851-3150). Defense Composite 3 consists of: (1) Notice of Appeal; filed September 6, 2011; (2) Statement of Judicial Acts to Be Reviewed: filed September 6, 2011; and (3) Motion for New Penalty Phase Hearing Pursuant to Rule 3.590(b) Florida Rules of Criminal Procedure: filed September 9, 2011. (PCR 3152-57).

At the evidentiary hearing, Appellant withdrew his claim that that his death sentence violates the Eighth Amendment because he may be incompetent at the time of execution and a claim that

Florida's lethal injection protocols violate the Eighth Amendment, claims 11 and 12, because they were unripe. (PCR 1075).

On January 16, 2019, the post-conviction court denied claims 1-10, dismissed claims 11 and 12 without prejudice, and denied the supplemental *Hurst* claim. (PCR 1066-1109). The court attached as exhibits to the order all of the documents that were relied upon to make a decision, which are listed as the following Exhibits: (A) September 20, 2018 Evidentiary Hearing Transcript (PCR 1110-2644); (B) November 8, 2018 Evidentiary Hearing Transcript (PCR 2645-2748); (C) Defense Composite 1 (PCR 2749-2850); (D) Defense Composite 2 (PCR 2851-3150); (E) Defense Composite 3 (PCR 3152-57); (F) April 21, 2011 Transcript (PCR 3158-69); (G) April 29, 2011 Plea Transcript (PCR 3170-3203); (H) May 2,3, and 17, 2011 Transcript (PCR 3204-3439); (I) June 7 and 13, 2011 Transcript (PCR 3440-55); (J) June 24, 2011 Transcript (PCR 3610-3800); (K) June 29, 2011 Transcript (PCR 3801-55); (L) July 8, 2011 Transcript (PCR 3836-3916); (M) July 14, 2011 Transcript (PCR 3917-24); (N) August 5, 2011 Transcript (PCR 3925-4039); (O) August 29 and September 1, 2011 Transcript (PCR 4040-74); and (P) June 13, 14, and 15 2011 Transcript (PCR 3456-3609).

Appellant filed a notice of appeal on January 30, 2019. (PCR 4085-86). On February 13, 2019, the circuit court allowed Mr. Shea to withdraw as counsel for Appellant and appointed Capital Collateral Regional Counsel-North (CCRC-N) to represent Appellant.

On February 15, 2019, Mr. Robert Berry, Esq., an attorney with CCRC-N, filed his Notice of Appearance.[3] On May 20, 2019, Appellant filed his initial brief. This is the State's response.

SUMMARY OF THE ARGUMENT

The post-conviction court properly held that trial counsel were not ineffective and Appellant's guilty plea was voluntary, knowing, and intelligent. Trial counsel had a reasonable strategic reason for advising Appellant that it was in his best interest to plead guilty. Since Appellant failed to demonstrate that their advice was deficient, that the advice prejudiced him, or that his plea was not knowing, voluntary, and intelligent, the post-conviction court properly denied this claim. This Court should affirm.

[3] Though Mr. Berry states that "Mr. Nolas, the State Attorney's Office, the Attorney General's Office and Judge Skinner knew or should have known Mr. Shea lacked the qualifications to handle post-conviction capital litigation," these individuals all rely on the JAC's registry list to be accurate. If a person is listed on the registry, there should be no independent duty for the parties or the judge to investigate post-conviction counsel's qualifications, even when counsel fails to file a notice of appearance stating their qualifications. Further, it should be noted that even Mr. Berry, who is board-certified in criminal trial and appellate law, failed to comply with Fla. R. Crim. P. 3.112(i) which requires not only private attorneys to certify their qualifications, but also requires Public Defenders and Regional Counsel to "certify that the individuals or assistants assigned as lead and co-counsel meet the requirements of this rule." Under Mr. Berry's logic, the State should move to strike him as counsel for failing to state his qualifications under the rule to represent Appellant in his notice of appearance.

The post-conviction court properly held that trial counsel were not ineffective and Appellant's waiver of his penalty phase jury was voluntary, knowing, and intelligent. Trial counsel had a reasonable strategic reason for advising Appellant that it was in his best interest to waive his penalty phase jury. Since Appellant failed to demonstrate that their advice was deficient, that the advice prejudiced him, or that his waiver of the penalty phase jury was not voluntary, knowing, and intelligent, the post-conviction court properly denied this claim. This Court should affirm.

The post-conviction court properly held that trial counsel were not ineffective for failing to file a motion to suppress because it was meritless. Trial counsel were not ineffective for failing to file a motion to suppress Appellant's statement to police because they had a strategic reason for not filing a meritless motion to suppress. Appellant's confession was not coerced by police, as any "threat" of arrest to Appellant's family members for tampering with evidence was premised on the fact that they did, in fact, tamper with evidence. Since Appellant failed to demonstrate that counsel were deficient in not filing a meritless motion to suppress or that he was prejudiced, the post-conviction court properly denied this claim. This Court should affirm.

ARGUMENT

ISSUE I: APPELLANT'S PLEA WAS VOLUNTARY, KNOWING, AND INTELLIGENT, AND TRIAL COUNSEL WERE NOT INEFFECTIVE REGARDING PLEA ADVICE

Appellant alleges that his trial attorneys, Assistant Public Defenders Quintin Till and Kate Bedell, convinced Appellant to plead guilty against his best interest because they were ineffective in their trial preparation, and this caused Appellant to enter into a plea that was not knowing and intelligent. (Initial Brief (IB) at 34-47). However, trial counsel assessed Appellant's odds, with a confession and testimony from the co-defendant that Appellant was the shooter, in front of a Clay County jury and presented Appellant with well-reasoned advice that indicated that a plea of guilty and waiver of penalty phase jury would be in Appellant's best interest. Based on this well-reasoned advice, the post-conviction court correctly found that "Defendant has failed to demonstrate that Defendant's plea was not voluntary, knowing, or intelligent based on lack of advice or misadvice of counsel." (PCR 1101). The post-conviction court correctly held that counsel were not deficient, and Appellant was not prejudiced regarding the plea advice. This Court should affirm the post-conviction court's denial of this claim.

Because this Court determined on direct appeal that Sanchez-Torres' guilty plea was voluntary, knowing, and intelligent, to the extent that this claim mirrors the direct appeal claim, it is

barred by law of the case doctrine and/or collateral estoppel. Claims that have been previously raised and decided are procedurally barred under the law of the case doctrine and/or collateral estoppel.

> The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, throughout all subsequent stages of the proceedings. *See Greene v. Massey*, 384 So. 2d 24, 28 (Fla. 1980) ("All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case.").

Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 105-06 (Fla. 2001). "In Florida, collateral estoppel prevents the same parties from relitigating issues that have already been fully litigated and determined." *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013) (citing *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)).

Here, Appellant raised a claim that his plea was involuntary on direct appeal. *Sanchez-Torres*, 130 So. 3d at 668-73. Appellant argued he was unaware of the nature and elements of the charges to which he was pleading guilty. This Court concluded that "at a minimum," it was "clear from the plea colloquy that Sanchez-Torres understood that by planning and participating in the armed robbery, he was guilty of first-degree felony murder." *Id.* at 670. This Court noted that at the beginning of the plea colloquy, the defense lawyer began by explaining that Sanchez-Torres intended to plead

guilty because it was in his best interest and in order to take responsibility for his actions:

> Your Honor, [Sanchez-Torres] is before the Court. I have met with [Sanchez-Torres] numerous times and discussed all of his options with him numerous times, and this morning we are going to enter a plea of guilty with the understanding that there's no agreement with the State to waive death. We have reached that decision. We've discussed various options. We've discussed the fact that he was not the shooter, and—and we believe that we could present evidence of that.
>
> Despite the fact that he was not the shooter, ... [Sanchez-Torres] understands that he is just as responsible for Mr. Colon's death, and he believes that this is in his best interest and he is ready and willing to take responsibility for his—for his actions. And, you know, he—he tried to resolve both of his cases by entering pleas with the State's agreement to waive death, and that was refused. Anyway, this is his decision and mine, and he's had time to discuss it with me, with his mother, and this is what he wants to do.

Id. at 671 (emphasis omitted).

To establish ineffective assistance of counsel, an appellant must demonstrate both that his counsel was deficient and that he was prejudiced by this deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

> "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Peterson v. State*, 154 So. 3d 275, 280 (Fla. 2014) (quoting *Burns v. State*, 944 So. 2d 234, 239 (Fla. 2006)). Even if "arguably trial counsel's strategy may have ultimately been unsuccessful, [the defendant] cannot now properly challenge an informed, strategic

> decision of counsel in the hindsight of postconviction." *Dufour v. State*, 905 So. 2d 42, 62 (Fla. 2005). "The defendant bears the burden to 'overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.' " *McCoy v. State*, 113 So. 3d 701, 707 (Fla. 2013) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

Mosley v. State, 209 So. 3d 1248, 1268 (Fla. 2016).

Ms. Bedell testified that at the time of the plea, the defense team was prepared to go to trial. (PCR 1235). The purpose of the plea was that the defense team and Appellant believed that it was in the Appellant's best interest. Based on their experience in Clay County, the defense team knew that Appellant would very likely receive a guilty verdict and a death sentence from a jury. However, only a few weeks prior to the plea, a defendant received a death recommendation from a jury, but the judge overrode the recommendation and sentenced the defendant to life instead. The defense team's strategy to plea directly to the judge was a valid and reasonable one. As the post-conviction court correctly recounted,

> [t]he defense strategy was to plead guilty, try to use the polygraph and other pieces of evidence to convince the Court that Defendant was not the shooter, rely on Defendant's asking for mercy, taking of responsibility, and remorse, and demonstrate that he was young, immature, a young father, loved by a lot of people, a great client, and respectful to convince the Court that a death sentence was not appropriate.

(PCR 1101). Counsel had a reasonable and strategic reason for recommending that Appellant plead guilty, even without the benefit

of a plea deal with the State. Thus, counsel was not deficient in advising Appellant to plead guilty.

Regarding whether Appellant knew that the death penalty was still on the table, on direct appeal, this Court stated that "on this record, there is absolutely no indication that there was any misadvice of counsel with respect to the possible penalties or that the potential of the death penalty was not thoroughly explained." *Sanchez-Torres*, 130 So. 3d at 672-73. Ms. Bedell's testimony at the evidentiary hearing confirms this assertion. Ms. Bedell testified that discussions regarding a plea occurred multiple times and that she told Appellant that the judge could sentence him to death, that there was no guarantee, but that compared to a Clay County jury on the facts of this case, she believed a plea was his best shot at life. (PCR 1236; 1272).

Nor was the Appellant prejudiced by this advice. Appellant claims that he was pressured into a guilty plea by trial counsel because they were not ready for trial. Yet, Appellant fails to point specifically to any evidence which had not been discovered by the time of the plea on April 29, 2011, which could have negated his guilt. Instead, Appellant vaguely states that a "qualified attorney would have put the Defendant on the stand. . . ." However, Appellant's testimony at the trial of his co-defendant, Markeil Thomas, that Thomas was the shooter, was not believed by Thomas' jury as they specifically found that Thomas "did not actually

possess or discharge a firearm during the commission of the offense." *Sanchez-Torres*, 130 So. 3d at 665 n.1; (PCR 927). Appellant raises nothing that would suggest that his own jury would have found otherwise. Thus, Appellant has failed to demonstrate he was prejudiced by trial counsel's advice regarding the plea.

Additionally, after refusing to testify in Thomas' case, the judge explained to Appellant that:

> if you will not cooperate at this time as a subpoenaed witness having waived your right to remain silent then I have no choice but to take you back to square one, seat a jury, a death qualified jury and let the jury determine your guilt and then make a recommendation to me with regard to the penalty phase.
>
> If you want me to do that I can do that or we can leave it like it is now and you can start to cooperate.

(TR at 313). Appellant then testified at Thomas' trial that he would rather testify against Thomas than go to trial himself. (PCR 2509-12). Thus, even if Appellant was originally coerced into a plea because of trial counsel's lack of preparation, Appellant had the explicit chance to withdraw the plea and very clearly, on the record, indicated that he did not wish to withdraw. There can be no prejudice under *Strickland* if the Appellant would have made the same choice either way.

Because Appellant has failed to demonstrate that his trial counsel were deficient in their advice regarding the plea and that any such deficiency prejudiced him, counsel was not ineffective

under *Strickland*. Thus, this Court should affirm the post-conviction court's denial of this claim.

ISSUE II: APPELLANT'S WAIVER OF THE PENALTY PHASE JURY WAS VOLUNTARY, KNOWING, AND INTELLIGENT, AND TRIAL COUNSEL WERE NOT INEFFECTIVE REGARDING WAIVER ADVICE

Appellant alleges that his trial attorneys were ineffective regarding their advice on waiver of the penalty phase jury, which caused Appellant to enter a penalty phase jury waiver which was not knowing and intelligent. (IB at 48-51). However, just as in Issue I above, trial counsel assessed Appellant's odds of a death sentence in front of a Clay County jury and presented Appellant with well-reasoned advice that indicated that a plea of guilty and waiver of penalty phase jury would be in Appellant's best interest. Based on this well-reasoned advice, the post-conviction court correctly found that "Defendant has failed to demonstrate that Defendant's plea [and waiver][4] was not voluntary, knowing, or intelligent based on lack of advice or misadvice of counsel." (PCR 1101). This Court should affirm the post-conviction court's denial of this claim.

[4] Though Appellant breaks this claim into two parts on appeal, issue 1 related to the plea and issue 2 related to the jury waiver, in post-conviction, these two issues were raised in the same claim, claim 6, and additionally raised in an untimely motion to withdraw guilty plea and jury waiver, so the post-conviction court's order addressed them simultaneously. (PCR 1092-1102). The same rationale applies to both issues as the defense strategy incorporated both the plea and the waiver.

Just as discussed above regarding the strategy in pleading guilty, the post-conviction court correctly recounted,

> [t]he defense strategy was to plead guilty, try to use the polygraph and other pieces of evidence to convince the Court that Defendant was not the shooter, rely on Defendant's asking for mercy, taking of responsibility, and remorse, and demonstrate that he was young, immature, a young father, loved by a lot of people, a great client, and respectful to convince the Court that a death sentence was not appropriate.

(PCR 1101). Counsel had a reasonable and strategic reason for recommending that Appellant plead guilty and waive the penalty phase jury, even without the benefit of a plea deal with the State. Thus, counsel was not deficient in advising Appellant to waive the penalty phase jury.

As discussed above, Appellant points to no evidence that had not yet been discovered at the time of his guilty plea that would have demonstrated his innocence as proof of prejudice under *Strickland*. Nor does Appellant point to any specific, compelling mitigation evidence which had not been discovered by trial counsel prior to the plea or prior to the judge alone sentencing as proof of prejudice.

Dr. Krop evaluated Appellant in 2009 for the Duval County murder case. Dr. Bloomfield evaluated Appellant in 2011. Though Dr. Bloomfield does not specifically state when in 2011 he evaluated Appellant, Appellant has not alleged or proven that it was after the plea. The majority of the witnesses who had not yet

been contacted at the time of the plea were lay witness family members who lived in Puerto Rico and primarily spoke Spanish. These witnesses testified about Appellant's demeanor and personality as a child while he lived in Puerto Rico. (PCR 1237). Had Appellant's sentencing proceeding been sooner, counsel would have interviewed these individuals sooner. Additionally, the penalty phase was postponed due to the co-defendant's trial. (PCR 2509).

Appellant points to nothing, other than his death sentence, to demonstrate that he was prejudiced by counsel's advice to forgo a penalty phase jury. Instead, Appellant vaguely states that "there is no down side to first submitting the case to a jury for a recommendation. . . ." (IB at 48). However, just as a guilty plea can mitigate a sentence, so too can waiver of a penalty phase jury. *See Green v. State*, 84 So. 3d 1169, 1171 (Fla. 3d DCA 2012) ("a defendant's expression of remorse and acceptance of responsibility are appropriate factors for the court to consider in mitigation of a sentence"); *McKune v. Lile*, 536 U.S. 24, 47 (2002) (noting the federal sentencing guideline's "downward adjustment for acceptance of criminal responsibility"). Certainly not having to spend time and resources on a penalty phase jury would mitigate the sentence.[5]

[5] Though certainly, a defendant's exercise of constitutional rights would not prejudice him. *Green*, 84 So. 3d at 1171 ("lack of

Based on the evidence that Appellant's trial judge had just overridden a Clay County jury's death recommendation, combined with the weighty aggravation in this case, which included a prior murder committed just two months before this one, Appellant's chances of receiving a death recommendation from a jury were the same, if not higher than with a judge. Appellant cannot demonstrate that he was prejudiced by counsel's advice to forgo a penalty phase jury. Additionally, by forgoing the jury, Appellant was able to present evidence that he passed a polygraph examination where he was asked if he was the shooter. *Sanchez-Torres*, 130 So. 3d at 667. Appellant would not have been able to present this information to a jury. Such information would not have been helpful after a jury had already recommended death, perhaps with a special jury finding that Appellant was the shooter.

Because Appellant has failed to demonstrate that his trial counsel were deficient in their advice regarding waiver of the penalty phase jury, and that any such deficiency prejudiced him, counsel was not ineffective under *Strickland*. Thus, this Court should affirm the post-conviction court's denial of this claim.

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remorse, the failure to accept responsibility, or the exercise of one's right to remain silent at sentencing may not be considered by the trial court in fashioning the appropriate sentence").

ISSUE III: TRIAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS

Appellant alleges that his trial attorneys were ineffective for not moving to suppress his confession to law enforcement regarding the murder of the victim on the basis that law enforcement threatened his mother with being arrested. (IB 52-54). The post-conviction court denied the claim. "Because a motion to suppress on the basis alleged would have been unsuccessful, the Court finds no reasonable probability that defendant would have forgone entry of the plea." (PCR 1088-92). Since the suppression motion would not have been granted even if filed, counsel were not deficient and Appellant was not prejudiced by the failure to file a suppression motion. This Court should affirm the post-conviction court's denial of this claim.

Counsel cannot be ineffective for failing to file a meritless motion to suppress. *Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011). "To establish prejudice as a result of trial counsel's failure to file a motion to suppress, a defendant must demonstrate that the motion would have been successful, and the evidence in question would have been excluded." *Lebron v. State*, 135 So. 3d 1040, 1053 (Fla. 2014).

There was no deficient performance in not filing a motion to suppress Appellant's confession because the motion was meritless. Coercive police activity is a necessary predicate to the finding

that a confession was involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). To exclude a confession as involuntary, the circumstances must "be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind." *Baker v. State*, 71 So. 3d 802, 814 (Fla. 2011) (quoting *Simon v. State*, 5 Fla. 285, 296 (Fla. 1853)). In other words, promises or threats by law enforcement must be made to induce, or be a "quid pro quo for the confession." *Id.* at 815 (citing *Blake v. State*, 972 So. 2d 839, 844 (Fla. 2007)).

Here, Detective West spoke with Appellant's mother, Maria Torres regarding the victim's cell phone. (TR at 286). Appellant's sister, Joanne, found a cell phone, and called the contact titled "mom." (TR at 247). The person called was the victim, Eric Colon's, mother. (TR at 249). After Joanne hung up the phone, she gave it to her mother, Ms. Torres, who gave it to someone to get rid of it. (TR at 288). Before talking to Ms. Torres, Detective West had drafted an arrest warrant for Ms. Torres for tampering with evidence. (TR at 288). When confronted with the warrant, Ms. Torres became very upset and started crying. (TR at 289). Detective West showed her the arrest warrant to get her to tell the truth about the cell phone. (TR at 290-91). Detective West did not threaten to arrest Sanchez-Torres' sister, Joanne. (TR at 289). While law enforcement officers may not threaten a

family member with arrest without any basis and solely to obtain a confession from a suspect, law enforcement officers may threaten a family member with arrest if there is a legal basis to do so. Detective West did not threaten Appellant's mother with arrest in order to coerce a confession from Appellant. Detective West knew Ms. Torres had information regarding a cell phone that belonged to a murder victim and had attempted to have that evidence destroyed. That constitutes probable cause to believe Ms. Torres tampered with evidence of a murder.

This case is similar to *Thompson*, where the Eleventh Circuit held that there was no police coercion when a police officer told the accused that his girlfriend would be charged for murder unless he confessed, because the officer, in fact, had probable cause to arrest the girlfriend for murder. *Thompson v. Haley*, 255 F.3d 1292, 1296-97 (11th Cir. 2001), *cert. denied*, 536 U.S. 942 (2002). Thompson robbed a convenience store, kidnapped the clerk, and pushed her down a well. *Id.* at 1294. He returned with his girlfriend, who held a torch, while Thompson shot the clerk in the well. *Id.* The police found the body at the well and obtained an admission from the girlfriend before arresting Thompson. *Id.* at 1294-95. Thompson claimed that the detectives told him his girlfriend "would be tried and sentenced to the electric chair along with him, but that he would let her go if Thompson made a statement." *Id.* at 1296. The Court concluded that because "the

police had probable cause to arrest her at the time [the detective] allegedly told Thompson that she could have faced responsibility for the crime," the detective's alleged statement did not constitute coercion. *Id.* at 1297; *see also United States v. Johnson*, 379 F. App'x 964, 968 (11th Cir. 2010)("Agent Armour's comment in the police car that Johnson's sister-in-law might be arrested for the cocaine found in her trailer was not deceptive or threatening, but merely a statement of a realistic possibility."); *United States v. Hufstetler*, 782 F.3d 19, 24 (1st Cir. 2015) (explaining that an officer's truthful description of the family member's predicament is permissible since it merely constitutes an attempt to both accurately depict the situation to the suspect and to elicit more information about the family member's culpability); *Allen v. McCotter*, 804 F.2d 1362, 1363 (5th Cir. 1986) (denying an involuntariness claim where officers told the suspect that "because his wife was directly involved in the robbery, charges could be filed against her"); *United States v. Johnson*, 351 F.3d 254, 257, 260-63 (6th Cir. 2003) (holding there was no police coercion when police threatened to arrest the defendant's half-sister if he did not confess, because police had valid probable cause to arrest the her and explaining the rule is that "promises of leniency may be coercive if they are broken or illusory" but finding that the promise was kept because the half-sister was not prosecuted).

The same logic applies here. An officer's truthful description of the family member's predicament is permissible and is not properly classified as a "threat," or "extortion" as Appellant alleges, since it merely constitutes an accurate depiction of the situation. (IB at 52). If the officer could legally arrest Appellant's mother, threatening to arrest her does not render Appellant's confession involuntary under the law. Therefore, there was no basis to file a motion to suppress Appellant's confession. Here, the officer did not threaten Appellant's mother in order to make Appellant confess. Rather, the officer threatened his mother with arrest hoping that she would tell the truth regarding the cell phone. In the end, Appellant's mother was not arrested and not prosecuted.

Additionally, Mr. Till testified that the State Attorney's office policy was to not offer any plea deals to defendants who had filed motions to suppress. (PCR at 1304-05). Prior to the plea, the defense team sought a deal with the State Attorney's office and received a "we'll see" answer. (PCR at 1233-34). Thus, not filing a meritless suppression motion that would have precluded any further plea negotiations with the State Attorney was a valid strategy in this case and counsel were not deficient.

Since a suppression motion would not have been granted in this case, there can be no prejudice in it not being filed. Any motion to suppress the confession based on the arrest warrant for

Appellant's mother would have been denied. Sanchez-Torres' confession would have still been admitted regardless of whether counsel had filed a motion to suppress or not and therefore, there is no prejudice.

Because Appellant has failed to demonstrate that his trial counsel were deficient in not filing a meritless suppression motion and that any such deficiency prejudiced him, counsel were not ineffective under *Strickland*. Thus, this Court should affirm the post-conviction court's denial of this claim.

CONCLUSION

WHEREFORE, this Court should affirm the post-conviction court's denial of all claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 24th day of June, 2019, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to Robert Berry, Esq., Counsel for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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