IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-949

JOEL DIAZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This capital case involves the appeal of the circuit court's denial of Joel Diaz's motions for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851and 3.203. The following abbreviations will be utilized to cite to the record in this matter, with appropriate page number(s) following the abbreviation:

"R." - record on direct appeal to this Court;

"T." - transcripts on direct appeal to this Court;

"PCR." - record on appeal following the postconviction denial;

"Vol. #" - transcripts of the 2010 evidentiary hearing in postconviction;

"DE or SE" - exhibits entered into evidence at the evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Diaz has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Diaz, through counsel, urges that the Court permit oral argument.

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INTRODUCTION

> In this case, there was a nine-to-three vote on the advisory sentence and substantial mitigation, including the finding that the murder was committed while the defendant was under the influence of extreme emotional disturbance, the age of the defendant at the time of the offense, and the defendant's lack of a significant history of prior criminal activity. . . Consequently, I believe that striking the HAC aggravator alone requires that we reverse Diaz's sentence and remand for a new penalty phase.

Diaz v. State, 860 So. 2d 960, 972 (Fla. 2003) (Pariente, J., dissenting).

Joel Diaz is mentally retarded; central to his defense at trial was that he could not form the heightened premeditation necessary to commit first-degree murder because he was insane at the time of the crime. Trial counsel never bothered to look at the prior attorney's file let alone conduct their own investigation into the circumstances of the crime or prepare a case for mitigation. As a result, trial counsel failed to present a cohesive defense that carried through to the penalty phase. From the very beginning, trial counsel missed opportunities to persuade the jury into accepting a mental health defense in mitigation of the death sentence. The failure to put together a defense theory supported by evidence was obvious as the trial progressed. The presentation of the insanity defense was a disaster.

The trial lawyers did no mitigation investigation—they did not gather records and they did not prepare a social history. *Wiggins v. Smith*, 539 U.S. 510,

524-25 (2003). Consequently, they could only offer the testimony of Joel's younger sister, who told the jury the family grew up in low-income housing and that their father was a violent and abusive alcoholic and drug addict. From this, the trial court gleaned that while Mr. Diaz's "upbringing was less than idyllic," he knew the difference between right and wrong. (PCR. 13443). After finding both statutory and non-statutory mitigation, the trial court imposed the death penalty based on three aggravating factors, one of which was struck on direct appeal.

The result of Joel Diaz's penalty phase was not reliable because trial counsel failed to present information that was available at the time of trial including evidence of sexual abuse and evidence that Mr. Diaz had cognitive deficits that colored both how he perceived the world and the decisions that he made. "During the penalty phase, the jury heard very little that would humanize Mr. Diaz" and "the mitigation evidence presented in postconviction proceedings 'paints a vastly different picture of his background' than the picture painted at trial." *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1355 (11th Cir. 2011). "While the jury heard a small sliver of his volatile upbringing," id., the jury never heard that he was seriously ill as a baby, that he was exposed to toxic pesticides as a toddler, or that he worked in the harsh conditions of farm work before reaching adolescence or that he was and is mentally retarded. But for counsel's inadequate performance, there is a reasonable probability that there would have been a different outcome.

STATEMENT OF THE CASE

Joel Diaz was indicted on November 18, 1997 in Lee County, Florida for attempted first-degree murder of his ex-girlfriend, Lissa Shaw, capital first-degree murder of her father, Charles Shaw, and aggravated assault on a neighbor. (R. 7-8).

On November 21, 1997, Dr. Paul Kling, psychologist, was appointed to evaluate Mr. Diaz for competency and sanity at the request of the Office of the Public Defender. (R. 11-12).

Subsequently, Mr. Diaz filed a *pro se* motion requesting a new lawyer and private attorney J. Franklin Porter[1] was appointed on January 29, 1999. (R. 23-24).

Porter filed a notice of intent to rely on the insanity defense. (R. 33). Thereafter, Drs. Bruce Crowell and Richard Keown were appointed to conduct mental health evaluations. (R. 45-47).

On May 16, 2000, private attorney Neil Potter was appointed by the trial court to assist Porter in the penalty phase. (R. 50).

The trial commenced on July 25, 2000 before the Honorable Thomas S. Reese during which Dr. Kling testified for the defense and Dr. Keown testified for the State. (R. 56). On July 28, 2000, the jury returned a verdict of guilty as charged on all counts. (R. 55). Two and a half months later, the one-day penalty phase took

[1] The Hon. J. Franklin Porter was appointed as a county court judge in 2002 and in, January 2004, he was elevated to the circuit court bench. (Vol. 95, 323-26).

place on October 10, 2000 (R. 137), and the jury recommended the death penalty by a vote of nine-three. (R. 138). Following a Spencer[2] hearing held on November 3, 2000, the trial court followed the jury's recommendation in sentencing Mr. Diaz to death on January 29, 2001. (R. 166-67).

On direct appeal, Mr. Diaz challenged the trial court's findings on the statutory aggravators of cold, calculated, and premeditated (CCP) and heinous, atrocious, and cruel (HAC). A majority of this Court agreed that the trial court erred in finding that the HAC aggravator applied in this case; however, there was sharp disagreement regarding both the analysis of the harmless error standard with respect to the death sentence as well as the application of CCP based on "transferred intent." *Diaz v. State*, 860 So. 2d 960 (Fla. 2003). Justice Pariente concurred in affirming the convictions but dissented in a written opinion, joined by former Justices Anstead and Shaw, as to the death sentence. Justice Pariente wrote

> I do not agree that after striking the HAC aggravator, on which the jury was instructed and which the trial court found, this Court can state beyond a reasonable doubt that the error did not contribute to the imposition of the death penalty.

Id. at 972 (Pariente, J., dissenting). Justice Pariente also noted that under *Hess v. State*, 794 So. 2d 1249, 1266 (Fla. 2001), the prior violent felony aggravator in this case carries less weight. *Id*. at 1266, n. 10. After the completion of briefing on

[2] *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

direct appeal before this Court, but before Mr. Diaz's death sentence became final, the United States Supreme Court decided the seminal case of *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Diaz filed a petition for writ of certiorari in the United States Supreme Court challenging the convictions and death sentence. The petition was denied on April 26, 2004. *Diaz v. Florida*, 541 U.S. 1011 (2004).

Mr. Diaz timely filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure Rule 3.851 along with a motion to interview jurors on April 15, 2005 (PCR. 354-457). Mr. Diaz alleged in Claim III that during the course of collateral litigation, he discovered that the foreperson of his jury, Sherri Smith Williams, Ph.D., a criminal law professor, failed to disclose critical background information during voir dire and that as a result, he was deprived of his Sixth Amendment right to a fair and impartial jury under state and federal law. (PCR. 365-71). Professor Williams failed to disclose that she was arrested as the perpetrator of a domestic violence battery and that she completed her pre-trial diversion program just two months before being chosen to sit on Mr. Diaz's jury where she became the foreperson. (PCR. 367). Following a period of extensive litigation regarding public records, Mr. Diaz filed an amendment to the pending Rule 3.851 motion on July 20, 2009 in which he alleged that Professor Williams also failed to disclose that she was a certified domestic violence counselor. (PCR. 2778-2971). Mr. Diaz was never given an evidentiary hearing on this claim.

A case management conference was held and shortly thereafter, the circuit court entered an order granting an evidentiary hearing on the following claims: Amended Claim VI (trial counsel failed to ensure a fair and impartial jury); Claim VII (the guilty verdicts are unreliable due to ineffective assistance of counsel and state misconduct); Amended Claim X (ineffective assistance of counsel in the penalty phase); and Claim XII (non-statutory aggravators). (PCR. 3037-40). The juror misconduct claim was summarily denied. *Id.*

Mr. Diaz filed motions to disqualify Judge Reese and the Twentieth Judicial Circuit because both the lead defense counsel at trial as well as the lead prosecutor had been appointed to the bench. (PCR. 3041). This Court appointed the Honorable Judge Charles Roberts from Sarasota, Florida to preside over the litigation on December 4, 2009. (PCR. 3103).

During the time that Judge Roberts was reviewing the case history, postconviction counsel had Joel Diaz re-evaluated with the most recently published psychometric test for measuring IQ in preparation for the upcoming hearing. Based upon the low score obtained on the WAIS-IV (full scale IQ of 57), Mr. Diaz filed a motion for determination of mental retardation pursuant to Florida Rule of Criminal Procedure 3.203 on May 12, 2010. (PCR. 3114-30). The court granted a hearing. (PCR. 3185).

Evidentiary proceedings were held on June 21-24, 2010 and September 20-24, 2010. In June, the circuit court heard testimony and evidence regarding the pre-trial investigation and the trial itself.[3] In September, Mr. Diaz presented mental health professionals and lay witnesses to prove that Joel Diaz is mentally retarded and that there was substantial mitigation that was available at the time of trial that was never presented to the jury.[4] The State presented witnesses to rebut the diagnosis of mental retardation.[5] The parties were permitted to submit written closing arguments following the hearing; Mr. Diaz filed a Memorandum in Support of Rule 3.851 Motion (PCR. 13145-80) and Memorandum in Support of *Atkins* Claim (PCR. 13181-13216). On April 8, 2011, the circuit court entered two separate orders: (1) an Order Denying Motion for Postconviction Relief (PCR.

[3] The following witnesses were called by Mr. Diaz in June 2010: Kenneth Garber (former attorney); Robert Walker (crime scene technician); Richard Joslin (crime scene technician); Darren Esposito (FDLE serologist); Dr. Gary Litman (molecular geneticist); Jesus Cases (trial prosecutor); Hon. Maria Gonzalez (trial prosecutor); Hon. Frank Porter (defense counsel); Neil Potter (defense counsel); Dr. Paul Kling (trial psychologist); and Lucy Ortiz (L.C.S.W.). The State called: Donald Hutta (DOC); Dr. Bruce Crowell (court-appointed psychologist); and Dr. Richard Keown (State psychiatrist). (Vol. 93, 16; Vol. 96, 754).

[4] The following witnesses were called by Mr. Diaz in September 2010: Anna Garcia (field worker, ethnographer); Dr. David Griffith (anthropologist); Minerva Diaz (sister); Melissa McKemy (Plourde)(friend); Luz Diaz (aunt); Dr. Antonio Puente (expert in mental retardation); Dr. Philip Harvey (neuropsychologist); Dr. Richard Dudley (psychiatrist). (Vol. 97, 9; Vol. 99, 587).

[5] The State called: Brant Gederian (SAO investigator); Lissa Shaw (victim and ex-girlfriend); John Jones (DOC); Nicole Parra (DOC); Lisa Wiley (DOC); Jennifer Sagle (DOC); and Dr. Michael Gamache (neuropsychologist).

13384-13427) and (2) an Order finding Mr. Diaz is not Mentally Retarded. (PCR. 13715-34).

A timely notice of appeal was filed on May 3, 2011. (PCR. 13946).

STATEMENT OF THE FACTS

A. Transition from the Public Defender to Private Counsel.

When Assistant Public Defender Ken Garber was appointed to the case, he was faced with the fact that his client brought a gun to the Shaw residence and shot Charles Shaw in plain view of his disabled wife in the privacy of their bedroom. At the 2010 evidentiary hearing, Garber explained his thinking as to the investigation and theory of the case:

> Theory of defense was basically the issue of Mr. Diaz's state of mind at the time of the incidence. **The theory basically being that he—this wasn't a premeditated murder**, that it was—that it was a second degree murder, and that his intent in—that the reason he went to the Shaw house that morning was to try to talk to his girlfriend, Lissa, to find out why she had broken up with him recently, and that things went bad while he was there.

(Vol. 93, 24)(emphasis added). To that end, Garber began a thorough investigation of the State's case and the crime scene: he personally reviewed the evidence (PCR. 3674; DE 47); went to the Shaw home where the shooting took place; obtained color copies of Lee County Sheriff's Office (LCSO) photographs (PCR. 3410; DE 3); and conducted numerous depositions. (Vol. 93, 21-24, 147).

Garber testified that he was particularly interested in the Florida Department

of Law Enforcement (FDLE) reports establishing that his client's DNA was found in blood droplets throughout the home and under Charles Shaw's fingernails. (Vol. 93, 50-51; PCR. 3436-56; DE 13, 17, 18). Garber thought the FDLE reports were important because they corroborated Joel Diaz's theory of defense that (1) he was retreating when Shaw hit him in the face and, (2) he went to the home to try to understand why Lissa Shaw broke up with him. The photographs showed blood droplets on papers and on the desk in Lissa Shaw's bedroom. (Vol. 93, 43-51). The DNA found in the deceased's fingernail scrapings could corroborate that Charles Shaw hit Joel Diaz in the face. (PCR. 3426-28; DE 9). Garber intended to call the analyst, Darren Esposito, as a witness. (Vol. 93, 52-58).

Garber testified that his client was quiet and he was not sure "whether [Joel Diaz] was just an introvert or whether he really understood what was going on." (Vol. 93, 31). Garber had some concerns about his client's intelligence and state of mind at the time of the crime so he had Dr. Paul Kling appointed to evaluate him. (Vol. 93, 31-33, 37). Dr. Kling issued his first report on May 28, 1998 after interviewing the client several times, administering some psychological testing, reviewing records, and meeting with Esperanza Reyes Diaz (mother) and Minerva Diaz (sister). (PCR. 3415-20; DE 6). Dr. Kling reported that Joel Diaz had a "serious illness as an infant," that he was depressed and had a bad temper, and that according to the sister, there was a "significant family history for sexual abuse,

physical abuse, violence, anger, legal problems, and alcoholism." (PCR. 3418). Dr. Kling opined that Joel Diaz suffered from anxiety and depression but that he was "competent at the time of the alleged offenses." (PCR. 3419). Dr. Kling wrote in his report that he did not have sufficient information at that time to find that Joel Diaz was "under the influence of extreme mental or emotional disturbance. (PCR. 3419-20).

Garber attempted to negotiate a plea but his client was never "on board." (Vol. 93, 66). Garber was concerned that sympathy for Barbara Shaw could operate as a "non-statutory aggravator" and result in a death sentence. (Vol. 93, 66-67). Garber has been a trial lawyer for 32 years and has tried six to eight capital cases through the penalty phase (Vol. 93, 17); he knew it was important to prepare a social history in anticipation of a penalty phase. Any mitigation that might humanize his client is a factor. Garber has had clients who did not want mitigation presented but he gathered records anyway. (Vol. 93, 68-70).

Garber obtained police reports from the Ft. Myers Police Department (FMPD) that documented the history of domestic violence in the Diaz home. (Vol. 93, 70-77; DE 34).[6] Garber also interviewed family members, (Vol. 93, 80-82;

[6] Mr. Diaz's father is Jose DeJesus Diaz aka Estanislado Reynoso aka Jesus Ramez Diaz aka Chewy. (PCR. 3475; DE 32). On November 14, 1992, the police arrested Jose Diaz for battery after a domestic dispute with his brother, Joel Diaz. (PCR. 3481). On June 4, 1994, the police arrested Estanislado Reynoso for aggravated assault with a knife after an argument about him being intoxicated. Joel Diaz's

PCR. 3472-73; DE 31), and obtained his client's school records[7] and birth certificate.[8] (Vol. 93, 78-80; PCR. 3500-3615; DE 35). Garber always gets school records in capital cases. (Vol. 93, 78-80). Former Assistant Public Defender Melodee Smith was assisting Garber in exploring mitigation for their client. (Vol. 93, 59-60, 83-84). To that end, Smith sought and obtained the appointment of two additional mental health professionals: Lucy Ortiz, L.C.S.W, a bilingual advocate for victims of domestic violence based in the agricultural town of Immokalee, Florida, and Dr. Ricardo Rivas, a psychiatrist who specialized in domestic violence. (PCR. 3642-43; DE 41, 42).

During the course of his pre-trial preparation, Garber sent Dr. Kling additional documents in an effort to gather support for mitigation. (Vol. 93, 31-42; PCR. 3425-

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mother, Esperanza, and brother, Jose Jr., are listed as the victims. (PCR. 3484-85). On May 20, 1998, the police took a report from a man who accused Reynoso of hitting him on the head with a baseball bat and threatening him with a knife. (PCR. 3466-67). On October 4, 1996, Reynoso was arrested for disorderly intoxication and possession of marijuana. (PCR. 3495-96).

[7] The school records show that Joel Diaz failed kindergarten (PCR. 3523), and second grade. (PCR. 3520). The records also show that the school district identified Mr. Diaz as a migrant student. (PCR. 3608-09). The school records indicate that Mr. Diaz was seen at the Lee County Health Department. Those records were destroyed in 2001 but they would have been available to trial counsel had he sought to obtain them. (PCR. 9128; DE 134).

[8] The birth certificate shows that Mr. Diaz was born at his mother's residence in McAllen, Texas on June 13, 1973. There is a box to check who attended the birth: an MD, a DO, a midwife, or other. The box checked is other and the attendant is listed as Dominga Hernandez Reyes (maternal grandmother). (PCR. 3509).

28; DE 8, 9). With the benefit of more information surrounding the events leading up to the crime, Dr. Kling changed his mind and determined that Joel Diaz was "probably not competent at the time of the alleged offense." (PCR. 3429; DE 10). Dr. Kling further found that the crime was not premeditated, and that the he met the criterion to support a finding that the "capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (PCR. 3430; DE 10). But, by the time Dr. Kling issued his second report on March 30, 1999, Ken Garber was no longer on the case.

Mr. Diaz had difficulty trusting his lawyer; Garber told the circuit court that his client's perception of the facts struck him as odd. Garber thought that getting the FDLE report that showed that the blood droplets belonged to Mr. Diaz was a positive development in the case. But, Mr. Diaz saw it differently; he was upset because he thought that Garber needed outside evidence before he believed Mr. Diaz's version as to how the crime occurred. (Vol. 93, 60). The relationship took turn for the worse and Mr. Diaz had another jail inmate draft a motion to have the Public Defender removed from his case. (Vol. 93, 60-63).

On February 1, 1999, Ken Garber sent a letter to Frank Porter letting him know that he could pick up copies of discovery and deposition transcripts and inviting him to review his personal file in case Porter wanted copies. (Vol. 93, 61-63; PCR. 335-37; DE 21). The letter noted that he had to keep the color

photographs of the crime scene. Garber testified that he kept his personal notes and work product in his file but made them available to trial counsel. (Vol. 93, 61-63). Porter never took him up on the offer (Vol. 93, 65); he did not review Garber's personal work file, nor did he have copies of the LCSO crime scene photographs, the police reports documenting a history of domestic violence in the Diaz home, school records of his client, or hand-written notes summarizing interviews with family members—all of which remained in Garber's original trial file until the postconviction evidentiary hearing. (Vol. 95, 397-99). Porter never saw any of the records. (Vol. 95, 403-06). Porter never went to the crime scene or the evidence room nor did he conduct independent interviews with respect to the guilt phase. (Vol. 95, 399-401). Porter's entire original trial file was placed into evidence; a review of that filed reveals that the copies of police reports, discovery, and depositions are mostly intact, with few notes indicating that they had even been reviewed. (PCR. 5617-8047; DE 80).

Three weeks later, Garber sent another letter to Porter informing him that he had previously subpoenaed analyst Darren Esposito for trial because the FDLE reports showed that Joel Diaz had been in many areas of the Shaw home. (PCR. 3461; DE 22). The letter also noted that the LCSO photos also supported Garber's original defense theory. Garber testified that he sent the letter because trial counsel had not made contact with him about the case. (Vol. 93, 63-64).

B. The Guilt Phase

Trial counsel presented a quasi-insanity/self-defense theory and knew he had to show the crime was not premeditated. (Vol. 95, 348-49). Porter filed a notice of intent to rely on the insanity defense on July 19, 1999, (R. 32-33), because it was his "best and probably only chance of success." (Vol. 95, 349). He decided on the insanity defense because Dr. Kling found that Mr. Diaz was insane at the time of the offense, and that was the "only thing we had to hang our hat on." (Vol. 95, 349).

At the time of Mr. Diaz's arrest, Lee County was known as one of the most segregated areas in the nation. The "apartheid-like" discrimination against the Mexican and Mexican-American population took a turn for the worse during the mid-nineties. (Vol. 97, 104, 125-27). The racial tension between the white, middle-to-upper class residents and the poor Hispanic population is evident from the news articles and letters to the editor published in protest of a low-income housing development around the time that Mr. Diaz was arrested.[9] The Shaw family lived in Cross Creek Estates, an upscale, gated-community. The crime occurred in the

[9] A fair housing complaint was filed with the U.S. Department of Housing and Urban Development (HUD) by Florida Legal Services, Inc. over a zoning dispute regarding a proposed farm worker housing project known as "Pueblo Bonita." The complaint resulted in an investigation by the U.S. Department of Justice. *See Farmworkers Association of Florida v. Lee County, et al.* and five other complaints. (PCR. 10684-10719).

early morning hours, and the police canvassed the area speaking with possible witnesses, all of whom were white.

Mr. Diaz's trial began in July of 2000—not long after the community furor over Mexican farm workers moving next to the gated subdivisions boiled over. Trial counsel spent just two hours questioning the venire panel. (T. 128-95). He failed to question jurors on their potential racial attitudes toward minorities, particularly those of Mexican heritage. There were no questions about the jurors' opinions regarding immigrants or migrant workers. At the evidentiary hearing, Porter agreed that there are racial disparities in the imposition of the death penalty but he did not have any reason to believe that any of the jurors were biased. (Vol. 95, 422).

Trial counsel did not question the potential jurors about their views on insanity defense or psychiatric testimony. There were no questions about their personal experience or knowledge about mental illness, alcoholism, or mental health professionals.

Porter testified at the 2010 hearing that as part of the self-defense theory, he wanted to establish a break between Joel Diaz's shooting at Lissa Shaw and his confrontation with the father, Charles Shaw; this is why he presented the booking photo showing the mark on his client's face. (Vol. 95, 348-49). When it came time to show that it was Mr. Diaz's blood throughout the home and his DNA under the

fingernails of the victim (Vol. 95, 355-57), he apparently forgot to subpoena and make arrangements for the FDLE analyst Darren Esposito to travel from Tampa to Ft. Myers to testify. Instead, trial counsel tried to get the results of the lab report into evidence through crime scene technician Robert Walker, who had not authored the report. (PCR. 8055-57; DE 82). However, the State objected based on hearsay and "Frye."[10] (PCR. 8056).

It was proven at the 2010 evidentiary hearing that Darren Esposito is an analyst with an impeccable record and that there is no doubt regarding the accuracy of his findings. (Vol. 93, 155-95). As Dr. Gary Litman, molecular geneticist, explained, if the State had succeeded in its Frye challenge to the blood typing in this case, it would have opened the floodgates on appeals. By the time the case was tried, method DQ-Alpha polymarker was being used by five FDLE laboratories and by laboratories all over the United States. (Vol. 93, 227-28). Mr. Diaz proved that the lead prosecutor had no basis to believe that there was any problem with the results and no legal basis to raise the Frye objection. (Vol. 93, 203-28, 238, 266-67). But, trial counsel was unsuccessful in getting the information contained in the FDLE reports before the jury. (T. 437-40).

Dr. Paul Kling testified at trial for the defense in guilt phase. Dr. Kling was questioned about his evaluations and his trial testimony at the 2010 evidentiary

[10] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

hearing. Porter did not spend any time preparing Dr. Kling for his deposition or trial testimony. (Vol. 96, 625-26; PCR. 5587; DE 66). Dr. Kling recalled that at the trial, the prosecutor exposed the fact he did not have sufficient information to support his opinions. At the trial, the prosecutor was able to gain the advantage and lead Dr. Kling into telling the jury that Joel Diaz suffered from an "ungovernable temper."[11] (R. 572). At the evidentiary hearing, Dr. Kling admitted that he was uncomfortable during his trial testimony because he knew he did not have sufficient information. (Vol. 96, 628-33). He was relying on the attorney to provide him with the necessary legal information and he explained that knowledge of the jury instructions would have helped him to be more effective in his trial testimony. (Vol. 96, 633-35).

During the course of the postconviction investigation, Dr. Kling was provided with additional documents by collateral counsel including school records, social security records, birth certificate, and Dr. Bruce Crowell's report.[12] If Dr. Kling had that information prior to the trial, he would have recommended a neuropsychological evaluation. (Vol. 96, 641-43).

Dr. Richard Keown, psychiatrist, was appointed by the Court to evaluate

[11] The trial judge read the standard jury instructions to the jury before deliberation that "unrestrained passion or ungovernable temper is not insanity even though the normal judgment of the person be overcome by passion or temper." (R. 774).

[12] Dr. Crowell's report reflects based on an abbreviated IQ test Mr. Diaz's full scale IQ was approximately 86, "placing him within the low average range of intellectual functioning." (PCR. 5604-06; DE 68).

Joel Diaz; the evaluation took place at Dr. Keown's office in the presence of two law enforcement officers. Trial counsel did not attend the evaluation, even though the order stated that he had the right to be present. (PCR. 9066-67; DE 129). Before trial, Porter obtained a copy of Dr. Keown's report which included the following:

> The **results [of the Anger Styles Quiz]** showed a strong tendency to mask his anger, . . . These individuals often have low self-esteem, are oversensitive to criticism, and frequently get angry at those closest to them. Finally, Mr. Diaz showed a pattern of harboring a great deal of hatred. . . . They frequently cannot let go of their hate in order to go on with their lives. . .
>
> [Mr. Diaz] could be very controlling. According to Lissa Shaw he could be threatening and physically abusive as well as unpredictable in terms of when he might get angry. The pattern of the relationship is an all too common one in abusive relationships where the issue is mainly one of making up and good behavior.

(Trial Ex. 88) (Dr. Keown's report, p. 4-5)(emphasis added).

Just after Dr. Keown took the stand during the guilt phase, Porter approached the bench and asked for assurance that the Lissa Shaw's attempt to obtain a restraining order would not be mentioned during his testimony. (R. 643-44; PCR. 9095-96). Dr. Keown proceeded to testify about his evaluation of Mr. Diaz and administration of the "Anger Styles Quiz." (PCR. 9085; DE 131). Trial counsel made no effort to prevent the jury from hearing the results of the "quiz" during the guilt phase. Without objection, Dr. Keown told the jury that the results

of the quiz indicated:

> that he generally tends to have a lot of deep anger or hate and this is anger where people tend to hand onto their anger for a long time and have trouble letting go of it. It's where they spend time thinking about vengeful things or taking actions. They really dwell on it and fester with it. So, in a sense, that's what the test was telling me . . .

(R. 648; PCR. 9100). At the close of Dr. Keown's testimony, the State moved to put Dr. Keown's report into evidence, apparently under the theory that it was a business record. It was admitted in the guilt phase without objection. (R. 656-57; PCR. 9108-09; Trial Ex. 88).

At the evidentiary hearing, Dr. Keown admitted the Anger Styles Quiz is not a standardized test and that it was developed by social workers. (Vol. 96, 737-40). He is unaware of any studies supporting the efficacy of the quiz. (Vol. 96, 746-50; DE 132). The book containing the quiz—complete with a helpful illustration of a thermometer for gauging anger—is available at any Barnes and Noble. (Vol. 96, 748-750; PCR. 9088-91; DE 132). Porter admitted that he did not do any research regarding the reliability or validity of the Anger Styles Quiz even though it was his job to challenge the State's evidence. (Vol. 96, 384-88).

C. The Penalty Phase

Frank Porter testified that he started preparing for mitigation when he began reviewing the documents but he could not remember his theory of defense in mitigation. Porter is aware of the American Bar Association Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases and agreed that there is no reason not to follow them in a capital case. (Vol. 95, 409-12). He did not obtain releases to get school records even though he agreed that there is no reason in a capital case not to get all records concerning his client. "If I didn't seek them, I must not have felt like I needed them." (Vol. 95, 401-02). Porter could not recall obtaining any records that would corroborate his client's social history or family background.

Porter never followed up with Dr. Ricardo Rivas or Lucy Ortiz. (Vol. 95, 414-16). He never considered hiring a mental health expert to assist in mitigation and he could not offer an explanation or strategic reason for that decision. (Vol. 412-13). Porter admitted that preparation of mitigation should not be dependent on the client's self-report. Porter had no idea how far Esperanza Reyes Diaz got in school and it never crossed his mind to get a bilingual mental health professional to interview her. (Vol. 95, 475-80). On cross-examination at the hearing, Porter agreed with the prosecutor that he did not recall any illness, but when shown Kling's report, he admitted that he never followed up on that information. (Vol. 95, 480-83).

The record reflects that Porter never saw Garber's notes about Mr. Diaz's friend, Melissa McKemy (now Plourde) who may have had valuable information. (Vol. 95, 397-99). Nevertheless, Mr. Diaz wrote a handwritten letter to his lawyer

with Melissa McKemy's name and address, stating, "Hopefully she would be able to help you." (PCR. 5607; DE 69). Porter had no recollection of ever contacting her despite his admission that she could have been helpful if she had information regarding Joel Diaz's state of mind. (Vol. 95, 408).[13]

Dr. Bruce Crowell, psychologist, was also appointed pre-trial by the court to evaluate Joel Diaz but he did not testify at trial. Dr. Crowell obtained a social history based on the Mr. Diaz's self-report: the information he obtained included that Mr. Diaz was born in Texas and moved to Florida at the age of six, that he left school in the ninth grade, and he had been employed as a field worker, janitor, and dishwasher. Mr. Diaz denied having a history of medical or psychological problems but he did report a history of drug and alcohol use. Dr. Crowell administered the Wechsler Abbreviate Scale of Intelligence (WASI) and reported that Mr. Diaz had a "Verbal IQ of 94, Performance IQ of 81, and a resultant Full Scale IQ of 86, placing him within the low average range of intellectual

[13] Melissa McKemy was a friend of Joel Diaz and she was a witness to the domestic violence incident at Western Auto that led to Lissa Shaw seeking a restraining order. After the break-up, Joel Diaz uncharacteristically quit his job and became more and more depressed. McKemy feared he might commit suicide. She talked to him the night before the crime; he sounded depressed and not like himself. She also believed that Joel Diaz did not seem to have a realistic perception of the grave nature of his legal situation. McKemy testified at the 2010 evidentiary hearing that she was living in Ft. Myers during the time of the trial and would have been available to testify if asked. No one from Mr. Diaz's legal team ever contacted her. (Vol. 97, 189-96).

functioning." (PCR. 5604-06; DE 68). He saw no evidence of brain damage.

On November 23, 1999, Dr. Crowell wrote a letter to Porter requesting to meet with friends or family—there is no evidence that Porter ever contacted him again after that. (PCR. 9084; Vol. 96, 704-07; DE 130).[14] When Porter was questioned about Dr. Crowell's report, he conceded that information that a child working in the fields would be mitigating. (Vol. 95, 488).

Neil Potter had been appointed by the trial court to assist in the penalty phase; he claimed that two months was sufficient time to prepare a case in mitigation "in this case." He expressed that his client "wouldn't listen to his attorneys" and that there "wasn't a whole lot of mitigation that was—I mean legitimate mitigation. I mean some attorneys think you throw in everything, including the kitchen sink, but that kind of just—my experience was that kind of tends to make judges not real happy." (Vol. 95, 509-10). Potter also complained that that the family was not cooperative:

> Well, I mean, first of all, you would have thought being mom, that she would have had some interest in this. . . . I remember one day we went and both of us set aside – both Frank and I set aside an afternoon to get her downtown here, and we went out and got an interpreter

[14] At the 2010 evidentiary hearing, Dr. Crowell testified that he had no independent recollection of the case. However, he agreed that he would not use the results of the WASI in the context of an *Atkins* case. (Vol. 96, 702-03). The WASI is not recognized by the State of Florida as an acceptable measure to determine mental retardation. § 921.137(1), Fla. Stat. (2002); see also, Fla. R. Crim. P. 3.203(b).

> and, you know, it was supposed to be like 2:00. . . . And we just sat around and finally about – I mean after an extended period of time, we called whatever number we had and just rang and rang and rang. And we never heard – you know, she never showed up and never even bothered to call. . . Frank told me that she had some excuse that she couldn't get a ride or something. . .
>
> I mean the only one we had to work with was his sister, and that's because she was sitting next door in the Lee County Jail with a whole slew of felony cases.

(Vol. 95, 510-11). Trial counsel never went to the mother's residence himself. (Vol. 95, 512).

Potter went through Porter's files and made copies of the documents he felt he needed. (Vol. 95, 416-19). Potter's entire trial file is no bigger than a stuffed manila envelope. (PCR. 8609-8985; DE 121). Other than talking to the sister, he did not prepare a social history. (Vol. 95, 519-36). With respect to the psychological evaluations, he said, "I had to—had to have looked at those reports. And there wasn't really anything that stood out." (Vol. 95, 523). When asked whether it is important to gather records in a capital case, Potter opined: "To an—to an extent. Going out and just, you know, getting wheelbarrows full of stuff, no. But if it something that is going to prove a point, obviously, yes." (Vol. 95, 529-32). Potter agreed that an attorney cannot make reasonable strategic decisions about his case "blindly" and when asked about the ABA Guidelines, he responded, "Who am I to argue with the ABA?" (Vol. 95, 578-80).

At trial, Potter began his opening by asking the jury to find three statutory mitigators: that the defendant had no significant prior history; that the defendant was suffering from extreme mental or emotional disturbance at the time of the crime; and that his capacity to appreciate the criminality of his conduct at the time was diminished. (R. 820). Counsel also asked the jury to consider "his background, his family life, and the fact that he is remorseful for what happened here." Id.

When Minerva Diaz testified on her brother's behalf, she was in custody on a drug charge that was pending before Judge Reese, the same judge trying Mr. Diaz's case. She testified that she and her siblings grew up in low-income housing. (R. 829). Their father was an alcoholic and drug addict who was physically abusive to their mother and her brothers. (R. 824). When Joel Diaz was young, their father told him that it was time for the children to support him. She told the jury that Joel Diaz eventually quit school completely in the ninth grade to work to support the family. (R. 825-26). After years of abuse, the family kicked the father out of the home but he would come back and hound the family. At times he was so violent that he broke out their car windows. (R. 830).

Minerva testified that Joel Diaz learned by example and he also hit his girlfriends. She described one incident where he came home so angry that he banged his head against the wall and destroyed his room. (R. 827). She knew that there was something wrong with him. The prosecutor was able to elicit that Mr.

Diaz "beat" his other girlfriends and that she had previously seen Lissa Shaw with a black eye and bruises. (R. 835). The prosecutor questioned Minerva about whether she or her other brothers ever killed anyone. Minerva told the jury that her older brother had been arrested for aggravated battery. (R. 839).

Joel Diaz took the stand on his own behalf to say that he was sorry. The testimony ended with him agreeing that Lissa Shaw would "take his beatings." (R. 846). In closing argument, Potter conceded that the murders involved planning and that there was a "heightened level of premeditation" with respect to Lissa Shaw. (R. 873-77).

D. Information the Jury Never Heard

In September 2010, Mr. Diaz presented the testimony of witnesses in order to demonstrate the kind of testimony that could have been presented to the jury in mitigation of the penalty phase. The expert witnesses included Dr. David Griffith, anthropologist, and Anna Garcia, field worker and ethnographer, who presented testimony regarding the Diaz family's experience in farm labor. Dr. Philip Harvey, neuropsychologist, administered a battery of neuropsychological tests and found Mr. Diaz's IQ to within the range of mild mental retardation. Dr. Antonio Puente, also a neuropsychologist, diagnosed Mr. Diaz with mental retardation and constructed a social history. Dr. Richard Dudley, psychiatrist, testified regarding Mr. Diaz's impoverished childhood and his state of mind at the time of the offense.

Dr. David Griffith co-authored *Working Poor: Farm Workers in the United States*, a book that detailed case studies of different farm labor communities around the United States including the Rio Grande in Texas as well as Immokalee, Florida.[15] Anna Garcia is an expert in Mexican culture and she has been interviewing Mexicans and Mexican-American farmworkers all over the country—many of them women with children—for thirty years. (Vol. 97, 13). Garcia's extensive work includes contributions to the *Working Poor* and well as a project called Case Study Conditions of Children Engaged in Agricultural Labor. (Vol. 97, 18). Both Dr. Griffith and Garcia met with various members of the Diaz family and, based upon the information they gathered, they put together a social history much like the much like the case studies in the *Working Poor*. (Vol. 97, 25, 96-97; PCR. 9418-45; DE 137B).

Everyone who came into contact with Esperanza Reyes Diaz on this case,

[15] There were "quite a few" people who have studied migrant farm work from an anthropological perspective and that it would not have been difficult to learn about migrant work at the time the trial took place. (Vol. 97, 120). The Working Poor was dedicated to attorney Rob Williams, a well-known Florida advocate for farm workers rights who was employed at the time in southwest Florida at Florida Rural Legal Services. (Vol. 97, 89-91). It was through Williams that Dr. Griffith was contacted in this case. (Vol. 97, 95). If either Frank Porter or Neil Potter wanted to know more about farm work, he could contact the Association of Farm Worker Opportunity Programs or Redlands Christian Migrant Organization, legal aid, or an advocacy group in Immokalee. (Vol. 97, 92-94). They could also have asked Lucy Ortiz, a bilingual advocate for victims of domestic violence based in Immokalee, for more information. (Vol. 96, 712).

whether pretrial or during the postconviction investigation, had difficulty communicating with her whether they had an interpreter or spoke Spanish themselves. It was not until Minerva pressed that Esperanza that she agreed to be open and honest with Dr. Kling. Even then, Esperanza characterized her son as a "good student" when he failed two grades and dropped out of school completely in junior high with all failing grades. (PCR. 3417; DE 6). Potter was frustrated because he thought that since Esperanza was the mother, "she would have had some interest in this." (Vol. 95, 510-11). Even at the trial, Minerva commented that her mother was caring but that she did not teach the children right from wrong. (R. 34). In postconviction, Dr. Antonio Puente traveled to Esperanza's home in Ft. Myers to interview her; she knew that he was coming from out of town but was late because she went out grocery shopping. She then took her time putting everything away and started "meandering around the house." Dr. Puente had such a difficult time getting through to her that he finally decided to give her a "simple fast IQ test." (Vol. 98, 281-83). Her full scale IQ is estimated at 48.

Anna Garcia met Mr. Diaz's mother, Esperanza, at her own home so that she would be more "open and receptive." (Vol. 97, 26). Garcia also had difficulty communicating with her even in her native language and thought Esperanza may have had some type of mental deficiency. (Vol. 97, 32-33). Esperanza did not have "confidence in western medicine" and instead, she "relied a lot on folk remedies and folk beliefs, traditional Mexican healing practices" for treating her children. (Vol. 97,

33). During the interview, Garcia asked about the reports that Mr. Diaz suffered from untreated meningitis as a baby, but Esperanza "minimize[d] those kinds of events." (Vol. 97, 34).

Esperanza has little education, married young, never learned English, and worked in agriculture for most of her life. (Vol. 97, 32-34). Even though she was born in the United States, she went back and forth to Mexico with her parents and never assimilated into American culture. (Vol. 97, 30). Esperanza worked in the fields in McAllen, Texas, where she was exposed to toxic pesticides, and suffered more than one miscarriage. (Vol. 97, 30). Esperanza continued to pick vegetables such as tomatoes and eggplant during her pregnancy with Joel Diaz, "bending over, harvesting, putting into boxes or crates or buckets, . . . then lugging that over to a truck. . ." (Vol. 97, 31-32). The family lived in the "colonias" in an agricultural area outside of Brownsville, Texas and not far from the Rio Grande; to this day, the streets are not paved, there is substandard housing, a lack of street lighting, and chemical companies dumping pollution into the river. (Vol. 97, 35-37).

Minerva reported that the family had to leave Texas because their father, Jose DeJesus Diaz, was wanted for an assault. Typical of the migration pattern at the time,[16]

[16] Dr. Griffith explained that during the 1970s, many farm workers moved from Texas to Florida due to social and technological changes in agriculture. Farm labor contractors, or "troqueros" assisted many workers in moving from Texas to Florida; many of those lived in "anchor households" where other relatives were already

Joel Diaz's Uncle Flavio served as an "anchor" and the family moved in with him in Ft. Myers. Uncle Flavio was able to get work for Mr. Diaz's father in the lumber business. (Vol. 97. 98-99). The Diaz family suffered discrimination for their Mexican heritage in their new community (Vol. 97, 40); Dr. Griffith commented that "animosity among different ethnic groups" was common during that time period because of the competition for jobs and housing. (Vol. 97, 101). The children were "subjected to daily fights or confrontations" and violence in their neighborhood; in fact, Joel Diaz witnessed someone being shot during a robbery when he was just a boy. (Vol. 97, 101).

All of the siblings told Garcia about the abuse in the home at the hands of their father but again, Esperanza "tried to minimize that. She would not go into detail about what had happened to her" and would only say that her husband was jealous. (Vol. 97, 41). Garcia did learn that the Mr. Diaz's father and Uncle Flavio were raised by a "very mean" and abusive mother. After working for a while at the truss company, Joel Diaz's father made more money and that was when he began to abuse drugs which resulted in him losing his job. It was Uncle Flavio who first introduced Jose DeJesus Diaz to crack cocaine—he was not a good role model for the young children. (Vol. 97, 43).[17] The

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established in the new town. (Vol. 97. 98-99). There is considerable movement from farm labor to construction labor among Latino workers. (Vol. 97, 100).

[17] Luz Diaz is Joel Diaz's "step-aunt." She testified that Uncle Flavio's children were taken away due to his drug use so she had custody of the children. Flavio eventually went to prison. Luz was never contacted by Mr. Diaz's legal team. (Vol. 97, 196-99).

men created a room in the home to watch pornographic films; all of the children knew "what was going on and they knew about the content." (Vol. 97, 45).

Esperanza was forced to go back to work in the fields in areas around Ft. Myers and Immokalee and she often took her boys with her. (Vol. 97, 44-46, 142-44). Social security records from 1986 show that Joel Diaz was doing farm work at the age of 13 but the boys helped their mother in the fields at a younger age. Garcia explained:

> [Esperanza] had a tie-in to agricultural labor, so anywhere that person was, she would be allowed to be part of the crew. It also would allow her to take the children, because this person knowing full well that it was not legal, would kind of wink at the fact that she had her children with her.

(Vol. 97, 48). The Diaz children were exposed to older men who were fighting, going to prostitutes, and drinking. (Vol. 97, 49-50). Some of the crew leaders would recruit people with crack cocaine. (Vol. 97, 111-13). Because farm labor market depends on violence and fear to control the workforce, idleness is always a concern. (Vol. 97, 117-19). The children who worked in fields were more prone to muscular-skeletal injuries, because they were less skilled, not good judges of potential risks, and more likely to work beyond their physical capacity due to heaving lifting and constant stooping. (Vol. 97, 111-16, 50). The reports of the Diaz siblings were consistent with what other children in agriculture have experienced. (Vol. 97, 51, 112).

Esperanza took her boys on the "East Coast Stream" and travelled over 500 miles from southwest Florida to Quincy which is located in the Florida panhandle. (Vol. 97, 111). Mr. Diaz was in the fifth grade when he was working in the packing house and harvesting squash in Quincy, Florida. (Vol. 97, 76; PCR. 9018-21; DE 124).[18] All of the farms where Mr. Diaz worked used pesticides, probably organophosphates. (Vol. 97, 124). Garcia testified that Joel Diaz told him about one specific time when he was waiting for a bus and a plane flew over, spraying pesticide. (Vol. 97, 76). It is not uncommon for children in agriculture to be exposed to the kind of side effects from pesticides that Minerva and Joel described such as the nausea, itchy eyes, and rashes. (Vol. 97, 50-52).

Richard G. Dudley, Jr., M.D., met with Mr. Diaz and reviewed documents from the crime and other records in order to put together a social history. (Vol. 97, 541-44). The Diaz children ate unwashed vegetables from the fields, ingesting some of the pesticides. (Vol. 95, 548).

> **These pesticides are known to be neurotoxic and cause toxic deaths as well so that would be a . . . possible etiology for [cognitive] deficits, particularly in a brain that is still growing.** . . we're talking about when he's like ten, eleven, twelve. . . . Children are at greater risk because there brains are still growing. You don't have a mature brain at that point.

[18] The social security records, obtained during collateral investigation, show that Mr. Diaz worked for the Thomas B. Smith Farm in Quincy, Florida in 1986. (PCR. 9018).

(Vol. 97, 548)(emphasis added). Mr. Diaz had a history of chronic headaches and nausea—this is consistent with toxic exposure. (Vol. 95, 549). With regard to Esperanza: a "woman's exposure to pesticides historically and/or during the time of the pregnancy, both can affect the fetus." (Vol. 97, 550). Dr. Dudley also noted a history of "significant insults to the brain, times when he was knocked unconscious, multiple times during early developmental years, which can result in cognitive difficulties." (Vol. 97, 547).

There is no evidence that Joel Diaz was ever subject to formal psychometric testing prior to the crime. As previously noted, Dr. Bruce Crowell administered the Wechsler Abbreviated Scale of Intelligence (WASI) prior to trial and obtained an estimated IQ score of 86—placing him in the lower 15% of the population. In 2005, Dr. Philip Harvey was retained by postconviction counsel to conduct a neuropsychological assessment of Mr. Diaz. (Vol. 99, 442-43). Dr. Harvey also administered the WASI; Mr. Diaz obtained a verbal IQ score of 77, a performance IQ score of 79, and a full scale estimated IQ of 76. (Vol. 99, 456-57). The WASI is not considered an accurate test for determining mental retardation because research reflects that the WASI tends to inflate IQ scores. (Vol. 99, 455-56; Vol. 98 293).

At that time, Dr. Harvey also administered the Repeatable Battery for the Assessment of Neuropsychological Status (r-BANS), a performance-based test with subtests divided into five domains: immediate memory; visual and

constructional; language; attention; and delayed memory. (Vol. 99, 446). Dr. Harvey was able to draw two conclusions from Mr. Diaz's performance on the r-BANS: first, that his performance was "quite impaired" across the five ability domains; and second, that since he had perfect performance on a line orientation test and clearly superior to random performance on a recognition test, he was not malingering. Dr. Harvey also administered the Trail Making Test, which tests processing speed. (Vol. 99, 453). Joel Diaz's scores placed him at the first percentile, consistent with some aspects of his performance on the r-BANS. (Vol. 99, 454).

Dr. Harvey evaluated Mr. Diaz again prior to the 2010 evidentiary hearing. On the WAIS-IV, a test recognized by the State of Florida as accurate to determine mental retardation, Mr. Diaz achieved a verbal comprehension score of 63, a perceptual reasoning score of 73, a working memory score of 63, and a processing speed score of 50. (Vol. 99, 483). His full scale IQ was scored at 57. Id. Taking into account the standard error of measurement, his IQ would fall in the range of 52 to 62. (Vol. 99, 484). Because both processing speed and working memory can be affected by depression, by about a half a standard deviation—about 7.5 points

of the composite score—which would bring Joel's score up to 64 without considering the standard error of measurement. (Vol. 99, 479-81).[19]

Mr. Diaz filed a motion for determination of mental retardation pursuant to Florida Rule of Criminal Procedure 3.203 on May 12, 2010. (PCR. 3110). The State the asked the circuit court to appoint Dr. Michael Gamache. (PCR. 3270).

Dr. Gamache, however, did not administer an IQ test to Mr. Diaz, nor observe him taking such a test. He disputed Dr. Harvey's scores on the prior IQ tests and opined that Mr. Diaz's low scores were due to malingering, based on never having tested or observed Mr. Diaz's efforts in taking those tests. (Vol. 101, 930). Dr. Gamache re-scored the 2005 WASI that he did not administer and found that Mr. Diaz's estimated full scale IQ was 81.

In the order finding that Mr. Diaz is not mentally retarded, the circuit court adopted Dr. Gamache's testimony wholesale, though Gamache had never tested nor observed Mr. Diaz taking an IQ test. (PCR. 13720). The circuit court discounted entirely Dr. Harvey's testimony and testing.

Dr. Antonio Puente is a board-certified neuropsychologist who has testified

[19] Dr. Harvey issued a report finding that "Mr. Diaz has psychometric evidence of performance consistent with mental retardation." (PCR. 3130). Dr. Harvey found other evidence that was consistent with mental retardation including: (1) his performance on the r-BANS administered in 2005; (2) "gross impairments in processing speed which also point to a fronto-striatal syndrome that could be associated with early toxic exposure"; and (3) memory impairment consistent to fronto-striatal syndrome. Based on that evidence, Dr. Harvey recommended an evaluation of Mr. Diaz's adaptive functioning.

for both the State and the defense as an expert in psychology, neuropsychology, and mental retardation. (Vol. 98, 241). Dr. Puente conducted a clinical interview of Mr. Diaz, speaking in both English and Spanish. (Vol. 98, 292). Dr. Puente also spent approximately 10 hours interviewing numerous individuals who knew Joel Diaz prior to age 18: Esperanza Diaz, Minerva Diaz, Roel Diaz, Jose Diaz, and Luz Diaz (family members); Susan Garrison and Leslie Amos (grade school teachers); and Melissa McKemy (friend). (Vol. 98, 327-29). He attempted to interview Lissa Shaw, but she declined to speak with him. (Vol. 98, 346) Dr. Puente administered the ABAS-II[20] to Minerva and Jose Diaz. (Vol. 98, 331, PCR. 10251-74; DE 147, 148). As a result of his assessment of Joel Diaz's adaptive behavior, Dr. Puente was able to piece together a comprehensive picture of his level of functioning as well as mitigation of the death sentence that was not presented to the jury in Mr. Diaz's trial.

Dr. Puente found that Mr. Diaz meets the criteria for mild mental retardation (Vol. 98, 314-316) based on the fact that his IQ is below 70 and that he exhibited adaptive deficits prior to age 18. Mr. Diaz had significant deficits in the areas of functional academics, self-direction, work, and to some extent, health and safety. (Vol. 98, 334-36). The information that Dr. Puente obtained from various people, including Minerva Diaz, who knew Joel Diaz growing up reveals that he had

[20] Adaptive Behavior Assessment System–II (Harrison & Oakland, 2003).

lifelong deficits and that others were able to take advantage of him.

Esperanza Diaz told Dr. Puente that during her pregnancy with Joel, she felt weak and did not have enough food to eat. (Vol. 98, 329). Joel was late in achieving developmental milestones and started speaking late. As a child, Esperanza described Joel as "pretty much like a mute." (Vol. 98, 330). The Diaz family also lived in abject poverty, where the availability of food was determined on a day-to-day basis and they often had to choose between water and electricity. (Vol. 98, 284). Dr. Puente agreed that numerous risk factors for mental retardation and cognitive deficits were present: history of meningitis, malnutrition, physical abuse, and exposure to pesticides. (Vol. 98. 285; 299-300). The mother's extremely low intelligence indicates the presence of additional risk factors including the lack of stimulation and genetics. (Vol. 98, 284-85).

Mr. Diaz's academic performance was consistently poor throughout his school years. (PCR. 9923-57; DE 142). Even though he had to repeat two grades, he obtained low grades and performed in the lower percentile on standardized tests. (Vol. 98, 272-275). Miss Garrison, Mr. Diaz's second grade teacher, remembered that he could not read well and was struggling. (Vol. 98, 329). Miss Garrison thought of Joel as borderline retarded and opined that in today's terms she would call him learning disabled. Id. Miss Amos, another teacher, explained why he was never tested: "In those days… [t]he focus was not on labeling" and there were no

clear guidelines or methods for assessment. (Vol. 98, 328). Minerva testified that simple games such as marbles would pose problems for her brother when they were children; he could not follow rules. (Vol. 97, 145).

Mr. Diaz's work history consists of menial and unskilled labor; he never earned very much money in any given year. (Vol. 98, 277). The best job Joel had was building trusses; Mr. Diaz cut mostly two-by-fours and cut the same trusses everyday. He had to make some measurements, but not very many. Joel's brother, Jose, told Dr. Puente that they had given Joel the job that he could do, which was cutting the wood in the same way each time. (Vol. 98, 278-79).

Mr. Diaz never lived independently; he went from living with his family to moving in with Lissa. (Vol. 98, 309). He was unable to maintain a driver's license, he never went to the dentist or doctor on his own, and he had no checking account. (Vol. 98, 308, 312, 335). He bought several cars: one stopped working a month after he bought it; another turned out to have been stolen; and according to Dr. Puente, "the best one that really just describes it all is the purchase of his first vehicle for $500 from a family friend, that happened to be a Pinto." (Vol. 98, 310).

Dr. Puente said Mr. Diaz had been described as "skittish and paranoid" so he had to slowly gain his trust. (Vol. 98, 301). While Mr. Diaz had alluded to sexual abuse with Dr. Dudley, he was more forthcoming with Dr. Puente: when he was around ten years old, his Aunt Alicia's boyfriend engaged in oral sex with him. Dr.

Puente learned that Mr. Diaz was sexually abused by men more than once when he was a little boy. (Vol. 98, 302-03). Dr. Puente explained that he did not believe that Mr. Diaz is comfortable with his sexuality so it is not surprising that he would not reveal this intimate information in front of jail guards. (Vol. 98, 304).

Joel Diaz's father and uncle turned one of the rooms in the house into a movie theater for pornography where they would party with other men, getting drunk and using marijuana and cocaine. (Vol. 97, 135-37). Dr. Puente explained that "In the back of the house . . . certain women were allowed and they showed films and possibly had sex." (Vol. 98, 301-02). Joel Diaz was only eight years old when he was exposed to X-rated movies and magazines. Minerva testified that her brother knew that she had been sexually abused when she was little. In response to questions by the prosecutor during the evidentiary hearing, Minerva said simply that she did not know whether Joel Diaz was physically sexually abused but that in her opinion, it was abusive to expose young children to pornography. (Vol. 97, 152).

Dr. Dudley described Mr. Diaz's "traumatic" childhood: [I][t was clearly that this was not simply excessive punish[ment], because the violence was much more unpredictable than that and not particularly tied to anything that they had done." (Vol. 97, 550). Mr. Diaz was also "repeatedly exposed to violence outside of the home" when "he and his brother were repeatedly beaten by older kids who

were living in the area" and when he saw "dead bodies on the street being collected by police." (Vol. 97, 551). The father was addicted to drugs so the "drug dealers would come to the house, bust the windows, threaten the family." (Vol. 97, 551). The severe and constant violence was being inflicted on a mentally retarded child and "there was no adult who was offering any sort of comfort or soothing or calming effect, or any sort of possibility of a safe space . . . the mother was really unable to do that." (Vol. 97, 552). The chronic violence coupled the lack of support and the inability to reason and comprehend what was going on led to hyper-nervousness, worry, sleep deprivation, and depression. (Vol. 97, 553-54).

Dr. Dudley reported Lissa Shaw was a few years older than Mr. Diaz and he was intimidated because she had more life experience. She had difficulty with her own family as they were prejudiced against him because he was Hispanic. Mr. Diaz had difficulty with intimate communication. (Vol. 97, 557-59). After Lissa moved back with her family, Joel Diaz thought he saw Ms. Shaw's mother's van in his neighborhood and his trailer was burglarized. (Vol. 97, 560-61). During the weeks leading up to the crime, Mr. Diaz was distraught and depressed according to his friend, Melissa McKemy. (Vol. 97, 189-92). The night before the crime, Joel Diaz could not sleep and he stayed up drinking whiskey and smoking marijuana, further exacerbating his already limited ability to reason. (Vol. 97, 561-64). In Dr. Dudley's opinion, Joel Diaz did not have the capacity for premeditated murder and he met the

criteria for both statutory mental health mitigators. (Vol. 97, 564-65).

STANDARD OF REVIEW

Mr. Diaz has presented several issues which involve mixed questions of law and fact. Thus, a *de novo* standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

ARGUMENT I

JOEL DIAZ WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY DUE TO JUROR MISCONDUCT AND THE STATE'S FAILURE TO DISCLOSE MATERIAL INFORMATION

Joel Diaz alleged in his Rule 3.851 motion that during the course of collateral litigation, he discovered that the foreperson of his jury, Sherri Smith Williams, a criminal law professor, purposefully failed to disclose critical background information that she was the perpetrator of a domestic battery during voir dire. As a result, Joel Diaz was deprived of his Sixth Amendment right to a fair and impartial jury under state and federal law. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984) (quoting *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980) ("[W]hen possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire, the result is deprivation of the defendant's right to a fair trial."); *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006); see also

Chester v. State, 737 So. 2d 557 (Fla. 3d DCA 1999). (PCR. 2786-95). Mr. Diaz also filed a motion to interview jurors simultaneously with the rule 3.851 motion. (PCR. 458-63).

Mr. Diaz argued at the case management conference that he was deprived of his Sixth Amendment right to a trial by an impartial jury due to the jury foreperson, Professor Smith's failure to disclose information that was relevant and material to her jury service in this case, and that as a matter of law, he was entitled to a new trial. Mr. Diaz also argued that the State Attorney's Office prosecuting Mr. Diaz had constructive knowledge of the jury foreperson's arrest and the failure to disclose this material information was a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Mr. Diaz sought an evidentiary hearing on his claims but was denied. (PCR. 2996-3036). The circuit court erred in denying the motion to interview jurors and in summarily denying the juror misconduct claim without a hearing. This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" *Lemon v. State*, 498 So. 2d 923 (Fla. 1986). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v.*

State, 684 So. 2d 726, 728 (Fla. 1996). Mr. Diaz is entitled to an evidentiary hearing and thereafter relief on his claim.

At trial, Judge Reese conducted extensive voir dire of the jurors before turning the panel over to the attorneys for questioning. The court informed the jurors that:

> A Voir Dire examination is for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or by some personal experience or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain a jury of 12 persons who will impartially try the issues in this case on the evidence presented in the courtroom, without being influenced by any other outside factors.

(T. 10). During that questioning, the trial court made certain that all of the jurors understood the importance of candor and truthfulness during the voir dire process:

> Let me assure everyone that there are no wrong or right answers to the questions. You'll not be asked questions about the law. . . But we do want you to answer candidly and tell us what your feeling are, nobody is going to criticize you for what your opinions may be or what your feelings or experiences may be. But we do want to know what they are. So its essential that you be candid.
>
> If one juror raises their hand or answers a question, and you know that same sort of question would apply to you, please don't hesitate to volunteer the information. It will help us in getting through the jury selection process.

> As I said earlier in the selection, the object is to select a jury of 12 persons who will fairly and impartially consider the testimony and evidence in this case an the law that I instruct them on and reach a verdict without being influenced by outside factors. We want to know what those outside factors may be. . .
>
> . . . If there is a question that you feel would be embarrassing for you to speak up about and this comes occasionally, more frequently than you might think, especially if somebody has ever been charged with a case and your reluctant to say anything, please don't be embarrassed. You can always ask to come up to the bench and we will discuss it up here out of the hearing of the others. Okay?

(T. 26-27)(emphasis added).

In light of the trial court's strict admonition, at least thirteen lay jurors revealed how either they or their relatives had been charged with criminal offenses. (T. 58-68). Juror Shelton revealed that he had a prior felony and that he had numerous prior DUI's. (T. 65, 191). Juror Seaborn admitted a minor juvenile record. (T. 66). Juror Pittenger disclosed that he had killed people in the line of duty when serving in the United States military. (T. 195). But prospective juror, Criminal Law Professor Sherri Williams only stated:

> Sherry Smith Williams. I'm a college professor. I teach at Florida Gulf Coast, Criminal and Criminal Justice. I've been in Lee County for five years. Prior to that, I was a student at Florida State. I'm divorced. I have not served on a jury, but obviously I have been a witness to various legal proceedings.

(T. 32).

The jurors also were questioned about whether they had ever been a victim of a crime (T. 54) or whether they had any close relationships with police officers. (T. 68). Professor Williams announced that she was a professor of criminal justice at the local college. (T. 32). She professed an understanding of the criminal justice system (T. 70, 141, 149, 175) and opined that she understood the "pros and cons" of the death penalty while expressing her feeling that she could remain neutral and objective in Mr. Diaz's case. (T. 175). She also admitted that she had been a victim of a home invasion robbery (T. 103), and that she had sought an injunction in the past (T. 136). She admitted that she knew a number of law enforcement officers from all around the state, including Lee County Sheriff McDougal. (T. 70). Professor Williams was allowed to remain and ultimately served on the jury as the foreperson.

Although Professor Williams told the trial court and the lawyers that she could remain neutral, her actual undisclosed experiences and choices demonstrate otherwise. Public records obtained during the course of postconviction litigation reveal that while employed at the local university, she actually taught a course in domestic violence in 1998; before she served as a juror. Professor Williams failed to disclose that she had been a domestic violence counselor and she had participated in events on behalf of battered women. Professor Williams neglected to tell the trial court that she has been a "Certified Domestic Violence Trainer for

Health Care Professionals" as of 1998. Further, while she claimed that she could be neutral, she failed to disclose that she previously interned for the department of corrections in another state.

These facts regarding her professional experiences and interest in domestic violence that were not disclosed evidence a potential bias toward the State and should have been disclosed to the defense. The central issue in Mr. Diaz's case was his mental state after the break-up with his girlfriend. The State used evidence that Mr. Diaz was violent toward past girlfriends as an aggravator in the penalty phase. The jurors' attitudes and biases about divorce, domestic violence, and relationships were topics that were explored on voir dire.

Despite her extensive knowledge of criminal law, Professor Williams failed to disclose her own arrest for domestic battery in December 1999. Even though she disclosed to defense counsel that she had obtained an injunction in the past, she omitted that she also had been arrested as the perpetrator of a domestic battery and had been the subject of a "no contact order" in connection with her own criminal charges. Presumably, if Professor Williams knew from her extensive knowledge of criminal law that she had to disclose that she had obtained an injunction and that she had been the victim of a home invasion in the past, then she also knew she had to disclose that she was the perpetrator of a domestic battery. Mr. Diaz presented the facts of Professor Williams's arrest in his rule 3.851 motion:

On 12-26-99 I, Deputy R. Hodges, was dispatched to a physical dispute located at 17290 Knight Drive in South Lee County. Upon arrival, Deputy M. Sheffield and I made contact with the victim W/F Benscoter, Andrea DOB 12-24-64.

I observed a red bloody cut approx one inch in length located on the right side of Andrea's nose. I asked Andrea to explain what had happened. She told me that her roommate W/F Sherri Williams, who she has lived with for the past nine years engaged in a verbal argument.

Andrea said she walked into the kitchen to pick up her camera and keys so she could leave. **Sherri walked in behind her and shoved her and then started to choke her. Andrea said they both fell to the kitchen floor where Sherri sat on top of her and continued to choke her.** Andrea stated that she thought she may have blacked out for a few minutes. Andrea explained when she woke up, **Sherri started choking her again. While Sherri was still choking Andrea,** Andrea was able to place Sherri in a leg lock position and crawl to the phone. **Sherri was able to drag the phone away and rip it out of the wall.**

Andrea got up and ran toward the door, opened it and Sherri tackled her and started to punch her in the back of the head with a closed fist. Andrea was able to get away from Sherri and ran outside to call 911 from her cell phone.

Deputy Sheffield and I made contact with Sherri inside the house. I observed the phone on the floor which had been ripped out from the wall, a pair of glasses broken which belonged to Andrea on the floor of the kitchen, and the kitchen table shoved into a corner.

I asked Sherri what had happened, Sherri stated that she had gotten into an argument with her roommate Andrea.

> Sherri said that Andrea became upset and started to hit her. Sherri said she struck Andrea in self-defense because Andrea had punched her. I did not observe any physical signs of injury on Sherri's person.
>
> I placed Sherri under arrest for battery, dom. viol. [domestic violence] and transported her to the Lee County Jail.

(PCR. 2789-90) (Lee County Sheriff's Office report 99-268862)(emphasis added).

The same office that prosecuted Mr. Diaz required Professor Williams to complete the Domestic Violence Diversion Program to avoid serving jail time. Juror Williams completed her Domestic Violence program on May 19, 2000, just two months before she became the jury foreperson in Mr. Diaz's case. This timeframe is significant. See *Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002) ("Remoteness in time is one aspect to consider in determining the impact, if any, of a juror's prior exposure to the legal system on his present ability to serve in a particular case."). Despite questioning from the circuit court on the subject of prior arrests and her disclosure of being a victim of a home invasion, Professor Williams purposefully failed to disclose her recent arrest for domestic battery and domestic violence. These were material facts that Professor Williams knew full well could be cause for dismissal or the basis for a peremptory challenge by the defense. The fact that she purposefully withheld the information rendered Mr. Diaz's trial structurally flawed.

Mr. Diaz had a right to know about Professor Williams's arrest for domestic battery and should have been entitled to question her on this material fact:

> The examination of a juror on voir dire has a dual purpose, namely, to ascertain whether a legal cause for challenge exist and also to determine whether prudence and good judgment suggest the exercise of a peremptory challenge. The right of peremptory challenge implies the right to make an intelligent judgment as to whether a juror should be excused. Counsel have the right to truthful information in making that judgment.

Mitchell v. State, 458 So. 2d 819 (Fla. 3rd DCA 1984) (emphasis added). The omission of the information prevented counsel from making an informed judgment, which would have resulted in a valid cause challenge. Had trial counsel known a juror had a criminal arrest for such an offense, he would or should have moved to strike her for cause, and if not successful, used one of his peremptory challenges to excuse her from the jury.

A juror's false response during voir dire which results in the non-disclosure of material information relevant to jury service justifies a new trial as a matter of law. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Chester v. State*, 737 So. 2d 557 (Fla. 3d DCA 1999). This Court has set out a three-part test for determining whether the nondisclosure of information warrants a new trial: (1) the information must be relevant and material to jury service in the case; (2) the juror concealed information; and (3) the failure to disclose was not attributable to lack of due diligence. *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995).

Applying the De La Rosa test to Mr. Diaz's case, it is clear that a new trial is warranted. First, Professor Williams's prior arrest for domestic battery and her professional involvement with domestic violent issues are relevant and material to the facts of Mr. Diaz's case where the central issue was his mental state after the break-up with his girlfriend. Professor Williams's account to the police of the events that led to her arrest makes clear that she perceived herself as the "victim" in the dispute. To that extent, there was a danger that, unknown to Mr. Diaz, Professor Williams may have identified with the victims in his case as well. Indeed, the information regarding her professional interest in working with battered women was relevant to jury service in this case. *De La Rosa*, 627 So. 2d at 533-34 ("A person involved in prior litigation may sympathize with similarly situated litigants or develop a bias against legal proceedings in general."); *see also Barnarl v. Lipp*, 580 So. 2d 315 (Fla. 3d DCA 1991).

Mr. Diaz meets the second prong of the test; neither the information regarding the work as a domestic violence advocate nor the fact of the arrest was disclosed to the circuit court or the defense, despite the circuit court's clear questioning and the fact that other prospective jurors disclosed analogous information in response to the same questioning. Furthermore,

> It is clear that nondisclosure along with partial or inaccurate disclosure is concealment in the voir dire process. Again, as with the concept of materiality, **analysis of a single question or series of questions**

> **may or may not provide an answer. The information disclosed by other prospective jurors may be as important in any particular inquiry by counsel, because the dynamics and context of the entire process may define the parameters of that which should be disclosed.** It is the trial judge who must stay involved in and be attentive to the process to make this factual determination.

Roberts v. Tejada, 814 So. 2d 334, 345-46 (Fla. 2002)(emphasis added).

Finally, the third prong of the De La Rosa test has been met: it is "abundantly clear from the transcript of the voir dire proceedings that no person sufficiently perceptive and alert to act as a juror could have sat through voir dire without realizing that it was . . . her duty to make known to the parties and the court" that she had been recently arrested and prosecuted for domestic violence battery. *Young v. State*, 720 So. 2d 1101, 1103 (Fla. 3d DCA 1998) (quoting *Mobil Chemical Co. v. Hawkins*, 440 So. 2d 378, 381 (Fla. 1st DCA 1983), review denied, 449 So. 2d 264 (Fla. 1984)). The diligence prong has been met:

> 'The 'due diligence' test requires that counsel provide a sufficient explanation of the type of information that potential jurors are being asked to disclose, particularly if it pertains to an area about which an average lay juror might not otherwise have a working understanding.' *Roberts*, 814 So. 2d at 343. 'Resolution of the 'diligence' issue requires a factual determination regarding whether the explanations provided by the judge and counsel regarding the kinds of responses which were sought would reasonably have been understood by the subject jurors to encompass the undisclosed information.' **The record evidence demonstrates that other prospective jurors, none of**

> **whom were lawyers, clearly understood what type of information Parajon's counsel was asking them to disclose. It is hard to imagine that Berg, a lawyer and partner of a large law firm who admitted that her practice involves litigation, did not understand the questions being posed to her and the venire by Parajon's counsel.** Consequently, we find that Parajon's counsel made a diligent inquiry of each of the prospective jurors regarding any involvement in personal injury litigation, whether as a party or otherwise.

Pereda v. Parajon, 957 So. 2d 1194, 1198 (Fla. 3d DCA 2007) (internal citations omitted)(emphasis added). Similarly, the other prospective jurors in this case—none of whom had a Ph.D. in criminal justice—understood what type of information the circuit court was asking them to disclose. It is hard to imagine that Professor Williams did not, when the other lay jurors understood and disclosed the crimes they had perpetrated.

Finally, had the defense been given the benefit of Professor Williams's arrest history, there would have been reason to question her mental status. In fact, there is additional evidence that Professor Williams failed to disclose that would have caused the lawyers to question her ability to sit as a juror in this case. Although she presented herself as a "professional," the fact is that she was asked to resign from her position at the university due to numerous problems, including, but not limited to, issues concerning inappropriate comments regarding her own personal firearm. The victim in the domestic violence incident was also employed

at the university. Instead, Professor Williams played a pivotal role in the decision to sentence Mr. Diaz to death. As a criminal justice professor, she became a de facto "expert" by the other jurors because of her occupation. This is obvious by the fact that she was chosen by the other jurors to be the foreperson. When a criminal justice professor, presumably familiar with the legal process, lies to remain in the jury pool, that is a fundamental structural error in the trial. No fair trial can occur in those circumstances and prejudice is presumed. Mr. Diaz seeks an evidentiary hearing and thereafter, a new trial. Based on the jury foreperson having failed to disclose material information in voir dire, Mr. Diaz is entitled to a new trial. *Young v. State*, 720 So. 2d 1101, 1103 (Fla. 3d DCA 1998); *see also Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998).

The circuit court summarily denied this claim on the grounds that Professor Williams did not conceal any information because Mr. Diaz "has failed to point to any specific question(s) that Williams failed to answer fully or truthfully." (PCR. 13390). It is arguable whether her disclosure of being a victim of a home invasion but not the perpetrator of a domestic battery is "answering fully." The circuit court ignored entirely that at least thirteen lay jurors, who were not criminal law professors, understood the judge's questioning and revealed how either they or their relatives had been charged with criminal offenses. The court also ignored the fact that a criminal law professor should have known the implications of leaving

out critical information in a death penalty case as she said she was familiar with the intricacies of death penalty cases.

The circuit court further found that the domestic violence related information discovered in postconviction was not "material" to Professor Williams's jury service because **"[w]hile the issue of domestic violence between [Mr. Diaz] and his girlfriends was raised at trial**, any such episodes were tangential to the jury's determination of whether Defendant murdered Mr. Shaw." (PCR. 13390)(emphasis added). This finding demonstrates a fundamental misunderstanding of materiality and prejudice. This was a capital death penalty case, not a "whodunit" murder mystery. There was an eyewitness to the shooting and Mr. Diaz remained in the home until the police arrived. The entire case was about Mr. Diaz's mental state surrounding his domestic relationship with his girlfriend. The State argued that he went to the Shaw residence because of the parents' interference in the relationship between him and his girlfriend. The State portrayed Mr. Diaz to the jury as a perpetual girlfriend-beater. There can be no doubt that the concept of domestic violence played a major role in this case. It was not tangential to the prosecution during closing argument. (T. 748).

Finally, as to the *Brady* claim, Mr. Diaz argued in his Rule 3.851 motion that the Lee County State Attorney's Office had constructive knowledge of Professor Williams's arrest because it was the office that prosecuted her case in December

1999, at the same time it was prosecuting Mr. Diaz's domestic murder case. In Professor Williams's case, the State agree to a pre-trial domestic violence diversion program for her in order to withhold adjudication of guilt while she completed the program. Professor Williams finished the domestic violence counseling program only sixty days before Mr. Diaz's trial began. The failure to disclose this material information was a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). The circuit court summarily denied this claim on testimony from prosecutor Maria Gonzalez at the evidentiary hearing that "she had no knowledge at the time" of Williams's arrest or prosecution. (PCR. 13391) (citing Vol. 24, 279).

The circuit court concluded that "The State could not disclose information it did not possess." Id. However, the circuit court's order ignores that this Court has long held that "the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers." *Gorham v. State*, 597 So. 2d 782 (Fla. 1992) (citing *State v. Coney*, 294 So. 2d 82 (Fla.1973)); see also *Smith v. Cain*, 132 S. Ct. 627, 629 (2012).

Furthermore, the circuit court's erroneous conclusion that the withheld information "does not undermine confidence in the outcome of the trial" is equally unreasonable. "[E]vidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the

proceeding would have been different." *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (citing *Cone v. Bell*, 556 U.S. 449, 469-70 (2009)). Professor Williams was the foreperson on the jury and was the spokesperson for all questions or comments from the jury to the judge.

A recent United States Supreme Court opinion in *Smith v. Cain* suggests that the State bears the burden of showing that confidence is not undermined in the outcome. Id. Had the evidence of Professor Williams's domestic battery arrest been disclosed to defense counsel, trial counsel would have moved to strike her for cause, and if not successful, used one of his peremptory challenges to excuse her from the jury. There is a reasonable probability that without Professor Williams on the jury, the outcome of both phases of the trial would have been different. The foreperson on a jury has a position of authority as spokesman for the panel. Mr. Diaz's jury foreman having been arrested for domestic violence and battery had an influence on the decisions of the other eleven jurors. She knowingly hid her background from the court and Mr. Diaz's counsel so that she could be considered for the jury. The fact that this "criminal law expert" became the jury's foreperson only proves the panel's deference to her expertise. Her bias is revealed in her own case.

Mr. Diaz is entitled to a new trial.

ARGUMENT II

JOEL DIAZ IS ENTITLED TO A NEW TRIAL AND/OR A NEW PENALTY PHASE DUE TO TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PREPARE AND TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL RENDERING BOTH THE CONVICTIONS AND DEATH SENTENCE UNRELIABLE

As an experienced capital defense attorney, Assistant Public Defender Ken Garber set the stage by beginning an extensive investigation of both the crime and his client's life history. Garber was concerned about the CCP aggravator so he looked for explanations for his client's actions that the jury might understand. He had additional concerns about his client's intelligence and competency so he had a psychologist appointed to evaluate Joel Diaz. In addition, the court was asked to appoint mental health experts who could help the legal team—and eventually, the jury—understand the Mexican-American subculture in Southwest Florida. But, whether due to his cognitive deficits[21] or the trauma and violence he experienced as a child, Joel Diaz was not able to trust his lawyers. Joel Diaz, acting in fear, asked to have the Office of the Public Defender removed from his case. All of the necessary ingredients for a successful defense strategy, i.e., a strategy that focused "on the particular characteristics of the

[21] The U.S. Supreme Court has recognized that mentally retarded defendants have difficulty assisting their lawyers. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

individual," *Thomas v. Kemp*, 796 F.2d 1322, 1325 (11th Cir. 1986), were available in Ken Garber's file. Unfortunately, the new lawyers never bothered to look.

Central to the defense was that Joel Diaz could not form the heightened premeditation to commit first-degree murder because he was insane at the time of the crime, but trial counsel failed to present that defense in a manner that might carry through to the penalty phase. From the very beginning, Porter missed opportunities to condition the jury into accepting a mental health defense in mitigation and failed to inquire about the panel's attitude toward an insanity defense. The failure to put together a cohesive defense theory was evident as the trial progressed. Trial counsel failed to subpoena witnesses, failed to keep out inadmissible and damaging evidence, and failed to present a meaningful case in mitigation before the jury. Trial counsel failed to present information that was available at the time of trial including evidence of sexual abuse and evidence that Joel Diaz had cognitive deficits that colored both how he saw the world and the decisions that he made.

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. In order to obtain a new trial, Joel Diaz must show that his attorneys rendered deficient performance and that he was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668 (1984). But for counsel's inadequate performance, there is a reasonable probability that there

would have been a different outcome; as it was, three jurors recommended a life sentence. On direct appeal, this Court struck the HAC aggravator and three members of the Court would have reversed the sentence of death based on the application of the CCP aggravator. In its prejudice analysis, this Court must evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the collateral proceeding—and weigh it against the aggravation, less the invalid HAC aggravator. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009); *Williams v. Taylor*, 529 U.S. 362, 397 (2000); *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Mr. Diaz is entitled to a new trial or at the very least, a new sentencing proceeding.

In its order denying Mr. Diaz's ineffective assistance of counsel claims, the circuit court separated Mr. Diaz's claims into numerous subclaims and addressed them individually in a superficial and piecemeal fashion without considering the entire picture. The court overlooked the interplay between trial counsel's performance at the different stages of Mr. Diaz's trial—pretrial, the guilt phase, and the penalty phase—and thus, like trial counsel, ignored the importance in a capital case of having a cohesive theme carry through from the guilt phase to the penalty phase.

A. Deficient Performance

1. Guilt Phase

a. Premeditation and CCP

This was not a "whodunit" so it was imperative to defend the case based on Joel Diaz's state of mind. Ken Garber explained that his theory of defense was that his client did not commit premeditated murder—that he went to the Shaw home to try to get answers. (Vol. 93, 24). This was particularly important given Neil Potter's concerns about the CCP aggravator. (Vol. 95, 514-16).

Frank Porter testified that he wanted to establish a break between Mr. Diaz's shooting at Lissa Shaw and his confrontation with her father. (Vol. 95, 348-49). Potter confirmed that this was why they intended to call the FDLE analyst. (Vol. 95, 514-16). Porter knew about the importance of these findings yet he unreasonably failed to ensure that Esposito was subpoenaed for trial. Porter was caught flat-footed at trial when the State raised not only a hearsay objection but a bogus *Frye*[22] challenge to his attempt to get the FDLE report in through the crime scene technician. Neither attorney could offer any good explanation for not being prepared. Potter offered that "[Esposito] was listed as a State's witness and, for whatever reason, the State didn't call him. And so he wasn't there for - - I guess

[22] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). It was established at the evidentiary hearing that the prosecutor had no legal or factual basis for the Frye objection.

[Porter] may have assumed that they were going to call him and could cross-examine him." (Vol. 95, 514-16).

It was an oversight for which there is no excuse given that the DNA evidence was a key part of the defense strategy to show that there was an intervening act after Lissa Shaw sped away and when Charles Shaw came out of the home. The circuit court's finding that Esposito was not called was "strategic" is not supported by competent, substantial evidence. The carelessness in not ensuring Esposito's appearance is just one example of trial counsels' failure to effectively represent their client.

Competent counsel would have first argued that a report prepared by the FDLE is an admission by a party opponent. *Lee v. Dep't. of Health & Rehabilitative Servs.*, 698 So. 2d 1194 (Fla. 1997); *Garland v. State*, 834 So. 2d 265 (4th DCA 2002). Next, competent counsel would have pointed out that a Frye hearing would only be necessary if there was a question as to the scientific acceptability of the procedures used in obtaining the results or if there was a problem with the actual testing in this case. But, trial counsel was in a quandary: he failed to ensure the appearance of Esposito so he could not adequately respond to the State's baseless objection. Inexplicably, trial counsel did not even proffer exactly what the FDLE lab report's DNA findings were if it had been admitted.

The circuit court finding of no prejudice is based upon a number of reasons that the quasi-insanity/self-defense strategy would not have worked. (PCR. 13409). While Mr. Diaz's testimony may not have provided a legal basis for self-defense, the fact of the confrontation supported his testimony and the defense strategy. The jury never had an opportunity to hear the evidence. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

The circuit court also erred in finding that Mr. Diaz did not meet his burden under *Strickland* with regard to the failure to interview Melissa McKemy. (PCR. 13407). First, instead of addressing the failure to investigate, the lower court conflated the two prongs and accepted the prosecutor's after-the-fact rationalization as to why McKemy's testimony may have been negative. Second, the statement that McKemy was not questioned regarding Joel Diaz's state of mind prior to the offense is contrary to the record. McKemy testified that after the break-up, Joel Diaz uncharacteristically quit his job and became more and more depressed. McKemy feared he might commit suicide. She talked to him the night before the crime; he sounded depressed and not like himself. (Vol. 97, 191). In fact, her testimony went directly to a state-of-mind defense and would have been relevant in either the guilt or the penalty phase of the trial; she was able to corroborate the information that Dr. Dudley testified to regarding Joel Diaz's depression and intoxication prior to the crime. (Vol. 99, 560-65). *State v. Bias*, 653

So. 2d 380 (Fla. 1995)(When a defendant who has a mental disease or defect raises an intoxication defense, expert testimony is admissible about the combined effect of a mental disease or defect and intoxicants on the defendant's ability to form specific intent.).

b. Insanity defense

Frank Porter was ill-prepared for the complexities of an insanity defense; to this day, he does not know the difference between a psychologist and a neuropsychologist. (Vol. 94, 378-79). Dr. Kling's testimony turned out to be a disaster beginning with a surprise fire alarm, (R. 536), and ending with Dr. Kling agreeing with the prosecutor that Joel Diaz's mental state did not meet Florida's definition of insanity. (R. 572). The circuit court's findings with respect to trial counsel's failure to properly investigate and prepare Dr. Kling for his testimony are not based on competent, substantial evidence. (PCR. 13410).

If Porter had prepared Dr. Kling, the State would not have been able to score points with the fact that he was either never aware or he had forgotten key details: that Joel Diaz had purchased a gun before the shooting; that he was calling the pawn shop everyday; that on the morning of the crime, he had asked his brother for a ride to the entrance of the gated-community and then walked to the Shaw residence; or that he had left a suicide note for his brother the night before. (R. 552-56). The State used Dr. Kling's lack of preparation to gain the advantage and

lead Dr. Kling into telling the jury that Joel Diaz suffered from an "ungovernable temper." (R. 572). By the time the prosecutor was done, Dr. Kling's credibility was destroyed and defense counsel did nothing to rehabilitate him. In sentencing Mr. Diaz to death, the trial court noted that his behavior was "consistent with someone who simply has an ungovernable temper." (R. 215).

As if there were not enough blows to the defense, the State presented the psychiatrist Richard Keown, M.D. in rebuttal at trial. As part of Dr. Keown's testimony, the State admitted the results of a quiz that has never been shown to be reliable or valid. Based upon the quiz, the jury was told, during the guilt phase, that "Joel Diaz has a lot of very deep anger" and "this is anger where people tend to hang onto their anger for a long time thinking about vengeful things or taking actions." (R. 644-48). Dr. Keown's report containing inflammatory and prejudicial testimony was admitted into evidence. Raising insanity as a defense does not give the State's expert a free license to pontificate endlessly about the bad character of the accused. Trial counsel's failure to object was deficient.

The circuit court order states that the Mr. Diaz "failed to allege a basis for objecting to the results or the report, and has failed to allege prejudice." (PCR. 13404). To the contrary, the record reflects that Mr. Diaz argued:

> This highly prejudicial testimony was based on a pop-psychology quiz designed by social workers that never would have survived a Frye challenge. Dr. Keown is not trained in psychometric testing and he conceded at the

> postconviction hearing that he was unaware of any studies supporting the efficacy of the test. (citation omitted). Yet, there was no objection to the testimony during trial; that testimony ultimately operated as a non-statutory aggravator pushing the jury toward a death recommendation.

(PCR. 13201). Had counsel objected, the State would never have been able to show that the quiz was generally accepted in the scientific community. The report itself was not admissible simply because Dr. Keown testified: an "out of court statement offered to prove the truth of the matter asserted" is still hearsay, even if the witness is offering his own prior statements. Fla. Stat. § 90.801; *Davis v. State*, 694 So. 2d 113, 114 (Fla. 4th DCA 1997); see also *Rodriguez v. State*, 609 So. 2d 493, 500 (Fla. 1992). Nor is it admissible as a business record exception as it was prepared for the purposed of litigation. Fla. Stat. §90.803(6); *Rae v. State*, 638 So. 2d 597, 598 (Fla. 4th DCA 1994).

Mr. Diaz also alleged in the circuit court that:

> When a lawyer does not know the law, his decisions cannot be defended on the basis of "strategy." *Lawhorn v. Allen*, 519 F.3d 1272, 1295-96 (11th Cir. 2008). In this case, trial counsel misunderstood the prohibition against hearsay in that he apparently thought a report is rendered admissible just because the person who prepared that report testified in the proceeding.

(PCR. 13201-02). Even if the results of the quiz were reliable, and even if the report did not constitute hearsay, trial counsel was deficient because he failed to keep out

damaging evidence of prior bad acts.[23] The report contained irrelevant and damaging information: "[Joel Diaz] could be threatening and physically abusive as well as unpredictable in terms of when he might get angry." Trial Exh. 88, p. 7. The report also contained information that was factually inaccurate: with an IQ no higher than 86, or in the bottom 15% of the population, it could hardly be said that Joel Diaz is of "average intelligence." Id. at p. 4.

The circuit court unreasonably found Porter's excuses about why he did not object to Dr. Keown's testimony to be strategic. (PCR. 13404). The record reflects that when pressed, Porter conceded that he had the report before trial and that he did not research regarding the validity of the quiz. (Vol. 94, 384-88.

Finally, the fact that Porter allowed his depressed and suicidal[24] mentally retarded client to be questioned by the State's expert, in the presence of law enforcement, without counsel, is facially deficient no matter what excuse may have been offered. Dr. Puente, who testified as an expert in cross-cultural evaluation, explained that it did not surprise him at all that Mr. Diaz was not forthcoming

[23] Fla. Stat. § 404(2)(evidence of other crimes, wrongs or acts inadmissible when admitted solely to proof bad character or propensity to commit the crime).

[24] Porter never obtained his client's jail medical records. The records show that Mr. Diaz made numerous requests for help and there was documentation of depression, anxiety, headaches, and a suicide threat/attempt when Mr. Diaz was placed on confinement after trying to put a rope around his own neck. (PCR. 9026-83; DE 129).

about the intimate details of sexual abuse that he endured as a child. In effect, Porter abandoned his client to fend for himself.

2. Penalty Phase

The circuit court's order gave short shrift to the claims of ineffective assistance of counsel in the penalty phase: the discussion regarding deficient performance and prejudice is just barely two pages of the 44 page order. After dedicating some space to the attorneys' litany of justifications for why they did not do their job, the circuit court found:

> What mitigation evidence existed was presented, and was considered by the jury and the trial court. That current defense counsel can now provide reams of school, medical, and other documents of ambiguous value, to corroborate the evidence already presented, or the testimony of experts who disagree with the findings of previous experts, does not render trial counsel's performance at the time, based on the information they had, ineffective. (citation omitted). Further, Defendant has failed to establish prejudice, in that he has failed to show that any additional mitigation would have outweighed the aggravating factors.

(PCR. 13419-20). The circuit court's order regarding deficient performance is based upon fact-finding that is not supported by the record as well as a misunderstanding of the controlling case law.

Neil Potter agreed that an attorney cannot make reasonable strategic decisions about his case "blindly" and when asked about the ABA Guidelines, he responded, "Who am I to argue with the ABA?" (Vol. 95, 578-80). Frank Porter

also agreed that the ABA Guidelines set the standard for representation in capital cases. (Vol. 95, 412). The U.S. Supreme Court has long referred to the ABA Guidelines as "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003). As the *Wiggins* Court further explained, the applicable ABA standards state that "counsel should consider presenting . . . medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id*. (emphasis in original).

The statement that "current defense counsel can now provide reams of . . . documents of ambiguous value" (PCR. 13419) misconstrues the record. Many, if not most, of the records that were presented in postconviction were easily available to trial counsel—all they had to do was stop by the public defender's office one afternoon and ask to see Ken Garber. They would have found school records, the birth certificate, color photographs of the crime scene, Esposito's FDLE reports, handwritten notes of family interviews, police reports, orders appointing Lucy Ortiz[25] and Dr. Ricardo Rivas, Dr. Crowell's report, and handwritten notes with his own theory of defense. The fact that all of this material was in Garber's file right

[25] The fact that she ultimately decided not to take the case is irrelevant; the point is that trial counsel did not follow up on who she was even though her name was in the court file. There are many other experts who had similar skills as Ortiz, such as Anna Garcia, who would have been available to assist in mitigation.

under their noses only highlights the deficient performance. Other records, such as the jail medical records and the social security earnings statements, could have been obtained with a signed release and stamped, self-addressed envelope. Further, the point of putting "reams" of documents into evidence was to show that those documents had clues as to what additional mitigation, and thus what additional investigation, should be conducted.

The statement that "what mitigation evidence existed was presented, and was considered by the jury and the trial court" (PCR. 13419-20) is not supported by the record. Evidence of low intellectual functioning and childhood farm labor "existed" at the time of the trial but it was not presented. Any suggestion that the other evidence presented in postconviction serves only to "corroborate the evidence already presented" is not consistent with case law or the record in this case. In *Parker v. State*, 3 So. 3d 974, 983-85 (Fla. 2009), trial counsel presented five mitigation witnesses and one mental health expert on the defendant's behalf. In fact, there was testimony about Parker's childhood deprivation, much like Potter presented testimony through Minerva Diaz in this case. Like Porter and Potter, the lawyers in *Parker* inherited the case from another lawyer but failed to gather records or conduct interviews of anyone other than family. This Court granted a new penalty phase, finding that the additional testimony offered during collateral proceedings "fleshed out the 'bare bones'" presented at the penalty phase

proceeding and provided a stark picture of Parker's chaotic childhood. *Parker*, 3 So. 3d at 983-85.

The circuit court accepted Frank Porter's response that he saw no need to obtain corroboration of the family violence. (PCR. 13419). It was impossible to know whether the jury believed Minerva's testimony, especially considering that she testified in shackles. Interestingly, during the evidentiary hearing, counsel agreed with the prosecutor that the police reports would not have been admissible or relevant at the penalty phase of the hearing. (Vol. 95, 489). Apparently, neither Porter nor the State were aware that hearsay may be presented in a capital sentencing hearing under Florida law.[26] It would be impossible to make a strategic decision regarding mitigation without knowing the applicable law. *Lawhorn v. Allen*, 519 F.3d 1272, 1295-96 (11th Cir. 2008).

The circuit court also excused Porter's failure to hire mental health experts for the penalty phase because "the main resource for information was his client, and neither Defendant, nor his interactions with Defendant, suggested Defendant had any mental health issues." (PCR. 13417). This was the same excuse that was offered by Porter in the case of *Florida v. David Lee Thomas* (Circuit Court Case

[26] Fla. Stat. § 921.141(1)("Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, . ."); see also *Blackwood v. State*, 777 So. 2d 399, 411-12 (Fla. 2000)(evidentiary rules are relaxed during the penalty phase); *Sears v. Upton*, 130 S. Ct. 3259 (2010).

No. 90-1058) and yet, the trial court in that case entered an order finding that Frank Porter's representation was deficient. Despite Porter's testimony in that case that "Mr. Thomas acted appropriately" and that "they communicated appropriately," the court found that "with due diligence, defense counsel could and should have discovered this mitigating evidence [of a mental deficiency] or a significant portion of it." (PCR. 10756).

Instead of answering questions about his preparation for the case at the evidentiary hearing, Neil Potter wanted to blame his client and the client's family for his own failure to investigate. He groused about how the mother did not even show up for an appointment when he and Porter waited for her in his office one afternoon. The idea to visit her at her home, let alone hire a trained, bilingual mental health expert or mitigation specialist to gather information never occurred to the lawyer. (Vol. 95, 511-14). Potter lamented: "[T]he only one that was there for me to work with was his sister, and that's because she was sitting next door in the Lee County Jail with a whole slew of felony cases." (Vol. 95, 511-14). Potter's expectations of the client and family were patently unrealistic; people who commit capital murder usually do not come from nice, middle-class families who always send their Christmas cards out on the first of December.

When asked about preparing a social history, Potter wanted to talk about how his client was unhappy and "irate" with him "after Minerva testified" at the penalty phase. (PCR. 519-21). Potter was then asked:

> Q. Did any of that incident that occurred after you put Minerva Diaz on the stand have anything to do with the investigation that you conducted prior to the time that the trial began?
>
> A. Obviously no. It hadn't occurred.

(Vol. 95, 522). Given the foregoing exchange, the circuit court's reliance on Potter's testimony that the "Defendant was not cooperative" and "did not want any evidence presented that would reflect on him negatively" (PCR. 13419) is unreasonable and not supported by the record. In fact, Frank Porter admitted that nothing about Mr. Diaz's behavior impeded the gathering of records. (Vol. 95, 419-20, 475-80). It is the lawyer's job to gather any mitigating evidence available and present it to the jury and the circuit court's reliance on trial counsel's view that the family was "not cooperative," (PCR. 13419), is contrary to the law. *Rompilla v. Beard*, 545 U.S. 374 (2005)(even where the defendant and his family members do not provide mitigating evidence, counsel must investigate).

When asked whether it is important to gather records in a capital case, Potter opined: "To an—to an extent. Going out and just, you know, getting wheelbarrows full of stuff, no. But if it is something that is going to prove a point, obviously,

yes." (PCR. 95, 529-32). Potter was not aware of sexual abuse[27] and he did not have Dr. Bruce Crowell's report in his file. (Vol. 95, 529-36, 576-78). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 690-91).

In an outrageous attempt to minimize the harsh reality of farm work in America, Potter compared the experience of young Diaz picking fruit before reaching puberty to his own stint as a country-club golf caddy. (Vol. 95, 532-36). Then, without any sense of irony—or recognition that his former client was born in Texas—Potter went on to opine about farm labor: "Americans don't do it. . . . You're not going to find too many Americans that will go out and fill up big bushel baskets and get paid 75 cents a basket." (Vol. 95, 536-37). Regardless of his own possible bias,[28] it is incumbent upon the lawyer in a capital case to recognize "anything in the life of a defendant which might militate against the

[27] Potter admitted that the first he ever heard about allegations of sexual abuse was during the evidentiary hearing. (Vol. 95, 576-78).

[28] Potter's comments suggested that he maintained some stereotypes regarding Hispanics: he described Joel Diaz as having a "macho air about him" and being a "pretty muscular, good looking Hispanic guy" (Vol. 95, 527), who went to trial because he was obsessed with a "white chick." (Vol. 95, 540, 566-67).

appropriateness of the death penalty for that defendant." *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987)). In the commentary to the 2003 ABA Guidelines, the scenario of a client working in agriculture and potential for pesticide exposure is cited as an example where a lawyer might have to conduct special research or consult with an expert. 2003 ABA Guidelines (citing *Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002)). In fact, the appellate court in Caro relied on the documented connection between pesticide exposure and brain damage in finding deficient performance.

The circuit court's determination that "the decision not to perform 'kitchen sink' mitigation was trial strategy" was wrong as a matter of fact and law. (PCR. 13419).

> We caution that attorney strategy is not a shield or panacea for failure to investigate all mitigating evidence in a capital case. "[T]he mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." (citations omitted).

Hardwick v. Crosby, 320 F.3d 1127, 1182-86 (11th Cir. 2003). None of the old stories about "Judge Nelson's" theory that it only hurts the case to bring in "wheelbarrows of stuff" in mitigation are relevant in this proceeding because it was impossible to make a strategic decision not to present evidence that the lawyers did not know existed. (Vol. 95, 532-36, 563-64). Illustrating the point is

the fact that lead counsel recognized that his client's work in agriculture could have been mitigation but he did not remember having that information. (Vol. 95. 419-20, 486-87). The circuit court quoted Potter's testimony that "there was not much legitimate mitigation evidence in this case." Order at 36 (citing June 509-10). Potter's opinion of the legitimacy of the mitigation evidence available is due absolutely no deference where it is undisputed that Potter conducted no mitigation investigation prior to forming his opinion. Likewise, the anti-kitchen sink "strategy" falls flat because the trial lawyers never bothered to look in the "sink" to find out what was there. The circuit court's finding that this was a reasonable strategic decision simply flies in the face of the facts and clearly established federal law.

"Judge Nelson's" view notwithstanding, the U.S. Supreme Court has made clear that mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586 (1978). Thus, the circumstances of the defendant's background and family history are directly relevant and must be considered for mitigation. See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). Similarly, Potter's expressed fear of making the trial judge angry is hardly a "strategic" reason not to zealously represent a client facing the death penalty. (Vol. 95, 563-65). Trial counsel had the responsibility to file the appropriate

motions that would ensure his client an individualized sentencing. *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000) (remanding for re-sentencing "provided that [the State] does so through a new sentence hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.").

Frank Porter completely abdicated his role as lead counsel and instead, allowed Neil Potter to take responsibility for the entire penalty phase. There was little cohesion between the evidence presented in the guilt phase and what was presented at the sentencing hearing.

> During the investigation of the case, **counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.** (citation omitted). . . . First phase defenses that seek to reduce the client's culpability for the crime (e.g. by negating intent) rather than to deny involvement altogether are more likely to be consistent with mitigating evidence of mental illness, retardation, domination by a co-defendant, substance abuse, or trauma.

2003 ABA Guidelines, Guideline 10.11 (emphasis added). Sadly, Potter conceded at the 2010 hearing that he had no theory at all because he did not think there was a "whole heck of a lot of defense in this case." (Vol. 95, 509-10).

Potter began his opening by asking the jury to find three statutory mitigators: that the defendant had no significant prior criminal history; that the defendant was suffering from extreme mental or emotional disturbance at the time of the crime;

and that his capacity to appreciate the criminality of his conduct at the time was diminished. (R. 820). Inexplicably, he never related Dr. Kling's testimony or his report to the statutory mitigators. In any case, by the time the case reached the penalty phase, Dr. Kling's credibility had been destroyed, and along with it, any good chance for a life recommendation based on his opinion.

Potter failed to prepare Minerva Diaz for her testimony. At the time, Minerva was awaiting trial on drug charges that were pending in front of her brother's trial judge and she was shackled in front of the jury. (Vol. 97, 131). On the one hand, Potter painted Minerva as a loser because she was in jail, but on the other, he failed to acknowledge the need to bolster her credibility. (Vol. 511-14). Trial counsel's failure to move to disqualify the judge in light of the risk that his personal knowledge of the facts of Minerva's pending criminal case would affect his credibility findings in sentencing Joel Diaz to death was deficient performance. No one explained to her what the penalty phase was or why she was testifying. (Vol. 97, 131-32). She was left to beg for her brother's life on her own.

Potter then had his client get on the stand and offer a trite apology. The testimony concluded with the admission that Lissa Shaw used to "take his beatings." He obviously failed to anticipate and prepare for the consequences of asking the jury to consider the lack of significant criminal history. See *Walton v. State*, 547 So. 2d 622 (Fla. 1989) (state may rebut evidence of a lack of significant

prior criminal history with direct evidence of criminal activity). The State made a mockery of Mr. Diaz's testimony and falsely argued that Mr. Diaz had never expressed remorse even though she knew that was not true. Lack of remorse has no place in consideration of aggravating factors. *Robinson v. State*, 520 So. 2d 1, 6 (Fla. 1988); *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983).

During closing argument, Potter misspoke regarding the standard of proof regarding the mitigators. (R. 877-78). The error was so glaring that the State asked to approach the bench and objected, concerned about "later on." Potter went back to his argument, but never corrected the error. As the final straw, Porter inexplicably conceded that the murders involved planning in closing argument and that there was a "heighted level of premeditation" with respect to Lissa Shaw. (R. 873-77). This was per se deficient performance. See *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983).

B. Prejudice

The trial court misstated the prejudice standard in holding that Mr. Diaz failed to show that any "additional mitigation evidence would have outweighed the aggravating factors." (PCR. 13420). Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impaired confidence in the outcome of the proceedings.

Wiggins, 539 U.S. at 534.

As the Eleventh Circuit Court of Appeals recently explained in *Cooper v. Sec'y, Dept. of Corr.*,

> In the penalty phase of a trial, '[t]he major requirement ... is that the sentence be individualized by focusing on the particularized characteristics of the individual.'" *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987)). Therefore, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 455 (2009). Background and character evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse." *Johnson*, 2011 WL 2419885, at *27 (collecting cases).

Cooper v. Sec'y, Dept. of Corr., 646 F.3d 1328, 1354 (11th Cir. 2011). The court found that Cooper's case was "strikingly similar" to its recent decision in *Johnson v. Sec'y, Dept. of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011). Like *Johnson*, "[t]he description, details, and depth of abuse in [Cooper's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Cooper*, 646 F.3d at 1353. What Cooper and Johnson highlight is that even in cases where some mitigation is presented at trial, when the description, detail, and depth of mitigation presented in postconviction far exceeds what the jury heard, prejudice exists.

As the Eleventh Circuit explained in Johnson:

> The picture Jones painted for the jury was of Johnson having cold and uncaring parents, something in the nature of the 'American Gothic' couple. With a reasonable investigation, though, he could have painted for the jury the picture of a young man who resembled the tormented soul in 'The Scream.' There is nothing wrong with a Grant Wood approach, if that is all one has to use, but an Edvard Munch approach would have been far more likely to sway the jury to sympathy for Johnson.

Johnson v. Sec'y, Dept. of Corr., 643 F.3d 907, 936 (11th Cir. 2011). Furthermore, as in *Cooper*, "Given that some jurors nonetheless 'were inclined to mercy even with[ ] having been presented with [so little] mitigating evidence and that a great deal of mitigating evidence was available to [Joel Diaz's] attorneys had they more thoroughly investigated,' it is possible that, if additional mitigating evidence had been presented, more jurors would have voted for life." *Cooper*, 646 F.3d at 1356; (quoting *Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991)).

Had trial counsel investigated by looking at Ken Garber's file, or by reviewing Dr. Crowell's report detailing their client's work history, or by obtaining school or social security records, or by hiring a competent mitigation specialist to interview Esperanza Diaz, they would have discovered that their client was subjected to many risk factors for brain damage and other cognitive deficits, such as malnutrition, abuse, and health risks. If counsel had been curious at all, they could have picked up the phone and contacted, for example, the Association of Farm Worker Opportunity Programs, Redlands Christian Migrant Organization,

South Florida Rural Legal Services in Ft. Myers, or a farm worker advocate in nearby Immokalee, FL to learn more about agricultural labor. Any one of a number of avenues would have led to a wealth of mitigating evidence.

At the evidentiary hearing, Joel Diaz presented testimony of witnesses in order to show the kind of information that should have been presented to the jury concerning the formative years of his life. The testimony of Luz Diaz and Melissa McKemy corroborated much of the information that was obtained from the immediate family and both women would have been available to testify at the time of trial. (Vol. 189-99). Anna Garcia was able to communicate with Esperanza Reyes Diaz and thus, could piece together key aspects of Joel Diaz's infancy. (Vol. 9-24, 32-34). Because of her background, Garcia knew what questions to ask about working in the fields. (Vol. 75-77). Dr. Griffith was able to provide academic information concerning the typical migration from Texas to the Ft. Myers area in the 1970s, the "apartheid-like" discrimination and segregation in southwest Florida, as well as explain the concept of structural violence. (Vol. 97, 85-88, 98-99, 118). Dr. Dudley and Dr. Antonio Puente, neuropsychologist, gathered information from multiple sources and explained how the life-long deprivation, trauma, and cognitive deficits impacted Joel Diaz as a human being.

The circuit court ignored that Dr. Kling was provided with information that he did not have at the time of trial: Dr. Bruce Crowell's report, social security records,

school records, and the birth certificate. Dr. Kling did not know that Joel Diaz had been exposed to high levels of toxic pollution from the Rio Grande River Valley in Texas and later, in Florida where he worked in the fields sprayed with hazardous chemicals. Based on the new information, Dr. Kling would have recommended a neuropsychological evaluation.

In *Sears v. Upton*, the U.S. Supreme Court noted that Sears "performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning." 130 S. Ct. 3259, 3261 (2010). Neuropsychological testing demonstrated that Mr. Diaz was "quite impaired." (Vol. 99, 454). On the Trail Making Test, his scores placed him at the first percentile, consistent with some aspects of his performance on the r-BANS. (Vol. 99, 454). Based upon prior administrations of the WASI, according to the circuit court, Mr. Diaz's estimated IQ is 81 to 86, placing him in the bottom 15% of the population. (PCR. 13719). According to Dr. Dudley, it is not surprising that Mr. Diaz suffered from cognitive deficits given the history of insults to the brain and exposure to toxins. T2. 547-50, 595-97. "Low intelligence has been recognized as valid mitigation in capital sentencing." The failure to present Joel Diaz's low IQ and cognitive deficits in the context of his decision-making resulted in an unreliable sentencing proceeding. *Ault v. State*, 53 So. 3d 175, 191-92 (Fla. 2010)("[L]ow intelligence has been recognized as valid mitigation."); see also *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

At trial, the fact that Mr. Diaz had a temper was presented as a non-statutory aggravator to rebut any mitigation: between Dr. Keown's bogus Anger Styles Quiz and the concessions that Joel Diaz beat all his girlfriends, it cannot be said that this did not contribute to the death recommendation. In *Sears v. Upton*, the U.S. Supreme Court noted that "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency theory." 130 S. Ct. 3259, 3264 (2010) . But, even in response to the prosecutor's leading questions at the evidentiary hearing, Neil Potter failed to understand that growing up in a cycle of domestic violence could be mitigating. (Vol. 95, 581-82).

The failure to have Dr. Kling—or any other competent mental health professional—help the jury understand Joel Diaz undermines confidence in the outcome. A mental health professional could have explained that the violence was severe and constant and was inflicted on and around a child with cognitive deficits, and that there was no adult in Joel's life who could offer a safe space. (Vol. 99, 550-54). The chronic violence coupled with an inability to reason and comprehend what was going on led to hyper-nervousness, worry, sleep deprivation, and depression. Id. Both statutory mental health mitigators were present.

Finally, the circuit court also ignored that a majority of this Court agreed that the trial court erred in finding that the HAC aggravator applied in this case.

Diaz v. State, 860 So. 2d 960 (Fla. 2003). The remaining aggravators were CCP and that Joel Diaz has a prior violent felony and because the prior violent felony occurred during the capital crime, it carries less weight. *Hess v. State*, 794 So. 2d 1249, 1266 (Fla. 2001). Justice Pariente wrote separately to express disagreement with the death sentence:

> In this case, **there was a nine-to-three vote on the advisory sentence and substantial mitigation,** including the finding that the murder was committed while the defendant was under the influence of extreme emotional disturbance, the age of the defendant at the time of the offense, and the defendant's lack of a significant history of prior criminal activity. **Thus, the erroneous submission of the weighty aggravator of HAC to the jury and the trial court's reliance on HAC in the sentencing order cannot be harmless beyond a reasonable doubt in their effect on the jury recommendation and imposition of the death penalty.** Consequently, I believe that striking the HAC aggravator alone requires that we reverse Diaz's sentence and remand for a new penalty phase.

Diaz, 860 So. 2d at 972 (Pariente, J., dissenting)(emphasis added). These circumstances are similar to those present in *Porter v. McCollum*:

> On the other side of the ledger, the weight of evidence in aggravation is not as substantial as the sentencing judge thought. . . .[T]he Florida Supreme Court rejected one of [the] aggravating circumstances, i.e., that [Mr. Diaz's] murder was especially heinous, atrocious.
>
> Had the judge and jury been able to place [Mr. Diaz's] life history 'on the mitigating side of the scale,' and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that

> the advisory jury-and the sentencing judge-'would have struck a different balance,' Wiggins, 539 U.S., at 537, 123 S.Ct. 2527, and it is unreasonable to conclude otherwise.

Porter v. McCollum, 130 S. Ct. 447, 454 (2009). The mitigation presented in postconviction must be weighed against the reduced aggravation as determined on direct appeal. When weighed properly, it is clear that the circuit court erred in finding that there was not a reasonable probability of a different result.

ARGUMENT III

JOEL DIAZ IS MENTALLY RETARDED AND INELIGABLE FOR EXECUTION UNDER THE EIGHTH AMENDMENT; HE WAS DEPRIVED OF A FULL AND FAIR HEARING ON HIS *ATKINS* CLAIM

Joel Diaz is mentally retarded and thus ineligible for execution under the Eighth Amendment to the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304 (2002). There are a number of definitions of mental retardation which are broadly similar but not identical.[29] All the definitions, however, include three basic elements: low intelligence, typically measured by an intelligent quotient (IQ) score two standard deviations below the mean; impaired adaptive functioning; and onset before age 18. Florida's statutory definition is not inconsistent with the clinical

[29] The *Atkins* Court cited to the then-current definitions of mental retardation set forth by the organization known at the time as the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA) in its publication, The Diagnostic and Statistical Manual of Mental Disorders (4th ed. Text Rev. 2000) (DSM-IV-TR).

definitions: mental retardation is defined as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifesting during the period from conception to age 18." Fla. Stat. § 916.106(15); Fla. R. Crim. P. 3.203(a).

In 2005, Dr. Philip Harvey administered the Wechsler Abbreviated Scale of Intelligence (WASI) to Mr. Diaz; he obtained a verbal IQ score of 77, a performance IQ score of 79, and a full scale estimated IQ of 76. (Vol. 99, 456-57). Dr. Harvey evaluated Mr. Diaz again prior to the 2010 evidentiary hearing. On the WAIS-IV, Mr. Diaz achieved a verbal comprehension score of 63, a perceptual reasoning score of 73, a working memory score of 63, and a processing speed score of 50. (Vol. 99, 483). His full scale IQ was scored at 57. Id. Based upon the low IQ score, Dr. Harvey recommended an evaluation for mental retardation.

Dr. Puente conducted a clinical interview of Mr. Diaz, interviewed numerous individuals who knew Mr. Diaz prior to age 18, and reviewed documents including school, work, and prison records. Additionally, Dr. Puente administered the ABAS-II to Minerva and Jose Diaz. (Vol. 98, 331) Dr. Puente found that Mr. Diaz meets the criteria for mild mental retardation based on the fact that his IQ is below 70 and that he exhibited adaptive deficits prior to age 18. (Vol. 98, 314-316) Mr. Diaz had significant deficits in the areas of functional academics, self-direction, work, and to some extent, health and safety. (Vol. 98, 334-36).

The circuit court held a hearing on Mr. Diaz's *Atkins* motion in June and September 2010 and entered an order finding that Mr. Diaz is not mental retarded on April 6, 2011. (PCR. 13715-13734). The circuit court determination that Joel Diaz is not mentally retarded is based on a misunderstanding of accepted norms within the relative scientific community concerning the diagnosis of mental retardation as well as errors of fact concerning the record evidence. The circuit court made a number of legal errors during the evidentiary hearing. The circuit court accepted Dr. Gamache as an expert witness, over defense objection. Under the circumstances, the refusal to grant a continuance to hear from nationally recognized experts in the field of mental retardation was an abuse of discretion and resulted in the deprivation of a full and fair hearing. The circuit court also erred in considering the pre-trial WASI to rebut evidence of mental retardation. Compounding the legal errors was the reliance on Dr. Gamache's opinion and testimony when the video evidence was directly contrary.

A. Denial of a Full and Fair Hearing

During the hearing, Mr. Diaz was confronted with the State's neuropsychologist who made numerous assertions that are at odds with the relevant scientific community. However, when Mr. Diaz requested a continuance so that he could call experts to rebut the testimony of the State's witness, it was denied. Mr. Diaz has been deprived of a full and fair hearing on his Eighth Amendment claim.

Postconviction litigation is governed by principles of due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Mordenti v. State*, 711 So. 2d 30 (Fla. 1998); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Due process requires a reasonable opportunity to be heard in a full and fair adversarial proceeding. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("essential principle of due process is that a deprivation of life...be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

Mr. Diaz objected to allowing Dr. Gamache to render his opinion in this case because Dr. Gamache is not qualified to render an opinion regarding mental retardation, he did not conduct a proper evaluation of mental retardation, and his conclusions are not supported by the evidence. (Vol. 101, 882-93). "The demands of expert testimony in *Atkins* [cases] involve an unusual mix of background in the field of developmental disabilities with a background in forensic psychology." Olley, J. Gregory, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 Applied Neuropsychology 135, 135 (2009). Experts in *Atkins* cases must be familiar with the prevalent definitions of mental retardation and recommendations made by recognized authorities in the field of mental retardation. The circuit court erred in accepting Dr. Gamache as an expert witness in the context of an *Atkins* hearing.

Dr. Gamache either could not or refused to give a clinical definition of mental retardation, (Vol. 101, 872-77), and he was not familiar with the AAIDD during his deposition and does not rely on the AAIDD User's Guide or Manual in his practice. (Vol. 101, 856, 860). Dr. Gamache simply refuses to play with the same rulebook as the rest of his colleagues. In fact, his unconventional theories of psychometric testing were recently rejected by this Court in another capital case involving mental retardation. *Kilgore v. State*, 55 So. 3d 487, 509 (Fla. 2010) (rejecting the credibility of Dr. Gamache's scores).

Dr. Gamache does not have the requisite background and experience in mental retardation to render an expert opinion in a matter of life or death. His only relevant experience with mentally retarded individuals occurred more than 25 years ago when he was in graduate school. (Vol. 101, 863). He neither follows the Journal of Applied Neuropsychology nor does he conduct research in the area of mental retardation. (Vol. 101, 848-51). Dr. Gamache is not board certified and he is not a member of the APA division on Development Disabilities. He does not specialize in mental retardation in his current practice and does not see any more mentally retarded patients in his practice than are in the general population—less than 2 percent. (Vol. 101, 865). Dr. Gamache does not even own the most recently normed version of the WAIS, the gold standard of IQ tests. (Vol. 101, 852-57). He has never been qualified as an expert in the field of mental retardation.

Dr. Gamache was unable to explain the rationale behind *Atkins*[30] and did not give consideration to the deficits that were present prior to the age of 18 and at the time of the crime. Dr. Gamache's methods of evaluation are at odds with the rest of the relevant scientific community. Dr. Gamache made gross generalizations about the ability of persons with mild mental retardation to function: he described the "classic case" of the mentally retarded individual working at McDonald's with a job coach looking over his shoulder and someone taking him to work every day, and still having problems with wandering off and not doing what he's supposed to do. (Vol. 101, 1033). The truth is that one cannot tell whether a person is mildly mentally retarded simply by looking at them.

Qualification of a witness as an expert, as well as the range of subjects about which the witness will be allowed to testify, are within the trial judge's broad discretion. *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 335 (Fla. 4th DCA 1991). The circuit court abused its discretion in accepting Dr. Gamache as an expert witness. Any member of the Florida Bar may represent any client in most criminal matters, even if he or she has little to no experience. However, an attorney with general experience in the criminal law may not represent criminal defendants in capital cases whether at trial, or in postconviction. See Fla. Stat. § 27.704; Fla.

[30] In *Gregg v. Georgia*, the Court identified retribution and deterrence as the social purposes served by the death penalty. 428 U.S. 152, 183 (1976). The *Atkins* Court recognized that these goals are not served by the execution of the mentally retarded.

R. Crim. P. 3.112. The reason for the special requirements for lawyers is clear: the quality of counsel can mean the difference between life and death. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). It is equally important, in the context of an *Atkins* hearing, to ensure that the experts are qualified to render an opinion regarding mental retardation.

Mr. Diaz knew that Dr. Gamache was not an expert in mental retardation prior to the hearing. Dr. Gamache was deposed after his "evaluation" of Mr. Diaz but shortly before the second half of the evidentiary hearing on September 14, 2010. Dr. Gamache did not know what the "AAIDD" was nor was he familiar with the User's Guide. (PCR. 11059-60). He admitted that he did not own the WAIS-IV. (PCR. 11086). Based upon Dr. Gamache's answers during the deposition, it was obvious that he was not qualified to render an expert opinion in an *Atkins* case. In anticipation of having to rebut some of Dr. Gamache's claims, Mr. Diaz amended his witness list on September 20, 2010 to include three nationally recognized experts in the field of mental retardation. (PCR. 11159-62).

Mr. Diaz wanted to call Marc J. Tassé, Ph.D., co-author of the User's Guide[31] and current Chairperson of the American Association on Intellectual and

[31] The AAIDD sets forth a comprehensive framework for the diagnosis of mental

Developmental Disabilities (AAIDD) workgroup developing the Diagnostic Adaptive Behavior Scale. The AAIDD is considered the world leader with respect to the criteria for diagnosing mental retardation. The User's Guide and the AAIDD Manual are the leading treatises with respect to mental retardation in the United States and in countries worldwide. (PCR. 140370-14038; DE 154).

Mr. Diaz also wanted to call Thomas Oakland, Ph.D., the author of the Adaptive Behavior Assessment System–II (Harrison & Oakland, 2003) and an international expert on adaptive functioning. Dr. Oakland would have been able to rebut some of the claims that Dr. Gamache made with respect to the proper assessment of prisoners and the definition of a community. The circuit court erred in accepting Dr. Gamache's testimony with regard to adaptive functioning because it is at odds with the relevant scientific community. Finally, Mr. Diaz wanted to call Dr. Gordon Taub, an expert in psychometric measurement to rebut Dr. Gamache's claims regarding reliability and validity of the WAIS-IV.

At the close of the hearing, Mr. Diaz requested a continuance because it was clear that the disputed issues went beyond the individual facts in this case; rather,

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retardation in the AAIDD Definition Manual: Intellectual Disability, Definition, Classification, and Systems of Supports (11th ed. 2010) (hereinafter "Manual"). The Manual is accompanied by the User's Guide: Mental Retardation, Definition, Classification and Systems of Supports (10th ed. 2007) (hereinafter "User's Guide"). The AAIDD published its latest manual in 2010 which is entitled Intellectual Disability; Definition, Classification, and Systems of Supports (11th ed.).

there was a dispute as to the standards in the relevant scientific community. It became clear that all of the witnesses were not using the same rulebooks, so Mr. Diaz wanted to call the experts who actually wrote the books. (Vol. 101, 1208-09). The circuit court found that because Mr. Diaz knew about the hearing for months, then he could have reasonably anticipated the issues and the need for additional witnesses. (Vol. 101, 1211). This was an abuse of discretion under the circumstances: Mr. Diaz had no idea that the State would call a charlatan in a case that would literally decide whether he would live or die.

B. Mr. Diaz is Mentally Retarded

When reviewing determinations of mental retardation, this Court examines the record for whether competent, substantial evidence supports the determination of the trial court. *Dufour v. State*, 69 So. 3d 235, 246 (Fla. 2011). This Court does not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Id*. (citing *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)). However, to the extent that the circuit court decision concerns any questions of law, this Court applies a de novo standard of review. *Id*. The circuit court's determination that Joel Diaz is not mentally retarded (PCR. 13715) is not supported by competent, substantial evidence.

Prior to the trial in this case, Dr. Bruce Crowell conducted an evaluation regarding sanity at the time of the offense. Based on the administration of the

Wechsler Abbreviated Scale of Intelligence (WASI), Mr. Diaz's Full Scale IQ was 86 indicating that he is in the low average range of intellectual functioning. Prior to the hearing, Mr. Diaz filed a motion to limit the use of this test to the question of ineffective assistance of counsel. He argued that while the evidence of his cognitive deficits relative to the general population would have been admissible at the penalty phase in mitigation, the WASI cannot, consistent with the Eighth and Fourteenth Amendments of the United State Constitution, be used to rebut evidence of mental retardation. (PCR. 3362-64).

Mr. Diaz had to establish that he has "significantly subaverage general intellectual functioning," defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the department of Children and Family Services in rule 65B-4.302 of the Florida Administrative Code."§ 921.137(1), Florida Statutes (2002); see also, Fla. R. Crim. P. 3.203(b). The only authorized tests are the Stanford-Binet Intelligence Scale and the Wechsler Intelligence Scale. The WASI is not an appropriate test for the purposes of diagnosing mental retardation. (Vol. 96, 702-04). Even if the WASI could be used for these purposes, the raw data no longer available and therefore, Mr. Diaz cannot test those results through cross-examination. (Vol. 96, 701). It was error to consider the results of the WASI to rebut evidence of mental retardation.

The State did not present any evidence admissible under Florida law to

counter the evidence presented by Joel Diaz that he indeed has significantly sub-average intellectual functioning that is more than two standard deviations below the mean. The circuit court found that Mr. Diaz had not met his burden of proving by clear and convincing evidence that he suffers from significantly sub-average intellectual functioning. (PCR. 13717-21). The circuit court's finding was based on its wholesale acceptance of Dr. Gamache's testimony and wholesale rejection of Dr. Harvey's based on concerns that Dr. Gamache raised regarding the test scoring.

The circuit court's conclusion that Dr. Harvey did not perform a complete evaluation of Mr. Diaz because he did not test for malingering (PCR. 13719) is not supported by competent substantial evidence. Significantly, Dr. Harvey administered the r-BANS, a neuropsychological screening instrument that measures multiple cognitive ability areas. (Vol. 99. 446-52). Dr. Harvey testified that the high delayed recognition score was important because it was a direct test of malingering and ruled out the possibility that he was intentionally producing poor performance. (Vol. 99, 452). Despite his good performance on the delayed recognition and the language domain, Mr. Diaz received a total score of 52, which places him in the 0.1 percentile. *Id*. Dr. Harvey was able to draw two conclusions from Mr. Diaz's performance on the r-BANS: first, that Mr. Diaz's performance was "quite impaired" across the five ability domains; and second, that since Mr. Diaz had perfect performance on a line orientation test and clearly superior to

random performance on a recognition test, he was not malingering.

The circuit court ignored entirely that the only malingering testing that Dr. Gamache performed was invalid. Dr. Gamache administered the Test of Memory Malingering (TOMM) and part of the Validity Indicator Profile (VIP). Dr. Gamache testified that the TOMM is a forced choice test that was designed to detect whether the test-taker is feigning impairment. (Vol. 101, 957). Dr. Gamache claimed Mr. Diaz's scores on the TOMM indicated that he was malingering or feigning impairment. *Id*. But, Dr. Harvey explained that several published studies have suggested that the TOMM is **invalid for use with mentally retarded populations** and "was designed to detect malingered memory complaints in individuals with a high school education or higher." (Vol. 99, 497). "The conclusion of the researchers has been that this test should not be used [on mentally retarded individuals]; and if it is used at all, the only value index from the TOMM is the delayed recall condition." (Vol. 99, 498). Thus, on the one trial of this test that empirical research has shown is valid for use on mentally retarded individuals, Joel Diaz's performance was incompatible with malingering. (Vol. 99, 498-99).

The circuit court's reliance on Dr. Gamache's interpretation of Mr. Diaz's childhood California Achievement Tests scores to determine the age of onset was error. Dr. Gamache made up some IQ scores based on his interpretation of Joel Diaz's CAT scores in grade school to support the State's argument that Joel Diaz is

not mentally retarded. According to Dr. Gamache, he could extrapolate the scores that Joel Diaz received when he was the 5th grade and determine that his IQ was 115. Of course, Dr. Gamache was comparing Joel Diaz to a national sample of children who were at least two years younger. Even then, the score that he obtained in 5th grade was an outlier and the original raw data is no longer available; it certainly does not provide a sufficient basis to allow the execution of Joel Diaz. As Dr. Harvey pointed out, there is simply no scientific basis for extrapolating IQ scores from CAT scores. (Vol. 99, 464). Dr. Harvey also looked at Joel Diaz's achievement test scores and opined that scores suggest that Joel Diaz was performing a little bit more than 1.8 standard deviations below the adjusted local mean, which would translate to an IQ score equivalent of 72 or so. (Vol. 99, 46-64). Dr. Harvey warned, however, that

> It's a mistake to infer intellectual functioning from an achievement test. But to put it in reference with the other scores we've been talking about, the r-BANS, the WASI, et cetera, I just mention that as a reference range. **It is not clear in any way how that translates into the results of an individually obtained IQ test.**

Id. (emphasis added).

The circuit court also erred in rejecting Dr. Puente's clinical findings on adaptive functioning. The statement that Dr. Puente "did not test the Defendant directly" (PCR. 13721) demonstrates the failure to understand that the ABAS is merely a clinical tool to aid clinical judgment; as Dr. Puente explained, "An x-ray

doesn't speak, the physician does." (Vol. 98, 267-68, 416-18). Further, the finding that Dr. Puente "disregarded any adaptive functioning after age 18," (PCR. 13723), is not only not supported by any competent evidence but it is directly contrary to the testimony in the record. When asked whether, as a clinician, he generally looks at a prison setting to determine whether someone has adaptive deficits, Dr. Puente explained that it is not appropriate based upon national standards because "If you're in a prison setting you don't have many choices. Your choices are narrowed down intensely." (Vol. 98, 314-17). However, Dr. Puente did review prison records, (Vol. 98, 320-323), and he was "happy to talk about it from the standpoint as a psychologist." (Vol. 98, 316). The records revealed that Mr. Diaz makes poor food choices, cannot add correctly, does not use the library and he does not read to pass the time. (Vol. 98, 320-24). The fact that a family member can put money into an account for Mr. Diaz did not impress Dr. Puente in terms of whether Mr. Diaz could manage his finances. (Vol. 98, 321).

Dr. Gamache's assessment of Joel Diaz's adaptive functioning was based almost exclusively on his functioning after age 18 and was focused largely on how he functions in prison, in direct contravention of all the leading authorities on mental retardation. His interview with Joel Diaz is more aptly described as an interrogation and the only other person he interviewed was Lissa Shaw, who admitted that she does not want to see Joel Diaz removed from death row. Given

his methodology, Dr. Gamache's assessment most certainly was not aimed at discovering whether Joel Diaz is mentally retarded.

Not surprisingly, Dr. Gamache concluded that Joel Diaz has strengths rather than deficits in almost all domains of adaptive behavior. The discrepancies between his ultimate conclusions and the evidence presented at this hearing demonstrate why the circuit erred in the wholesale acceptance of his testimony. The circuit court relied on the fact that Mr. Diaz can read and write in finding that he is not mentally retarded but the ability to read and write is not inconsistent with retardation at all.[32] Further, the circuit court erred in relying on Dr. Gamache's testimony to find that "he sometimes reads magazines, newspapers, or books" (PCR. 13725). The truth is that Mr. Diaz could not remember the name of the last book he supposedly read, he said that he starts reading books and does not finish, and said that he only "looks" at magazines and newspapers when he is bored. (Vol. 100, 640-42). Joel Diaz is no reader, even on death row where there is literally nothing else to do. The circuit court also found the argument that Mr. Diaz did not write many of the motions to be based upon pure speculation. In fact, the trial record indicates that Joel Diaz told the trial judge that another inmate had written the letter for him. (Supp. R. 5).

[32] The circuit court erroneously substituted his own judgment based on a lay person's view rather than listen to the expert's opinion. *See, e.g., State v. White*, 885 N.E.2d 905, 915-16 (Ohio 2007).

The goals of retribution and deterrence are not served by the execution of the mentally retarded. *Gregg v. Georgia,* 428 U.S. 152, 183 (1976). As to the first justification, retribution, the *Atkins* Court noted that "our society views mentally retarded offenders as categorically less culpable than the average criminal." *Atkins v. Virginia,* 536 U.S. 304, 316 (2002). "[T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id*. at 318. As to the deterrence justification for capital punishment, the *Atkins* Court also found that as a result of the limitations on the ability of a person with mental retardation to reason and control himself, the death penalty would have no deterrent effect on his actions. *Id*. In this case, Joel Diaz's inability to process the break-up of his relationship and his ill-fated decision to confront Lissa Shaw in the early dawn at her home is consistent with the type of impulsive actions that are not deterred by the threat of punishment.

Additionally, the *Atkins* Court reasoned that mentally retarded defendants are less able to meaningfully assist counsel before and during trial. *Id*. at 320. Joel Diaz's inability to trust Assistant Public Defender Ken Garber provides the perfect example of the inability to assist counsel. Neil Potter summed it up most succinctly when trying to explain why Joel Diaz rejected the State's plea offer: "This case went to trial because Joel Diaz wouldn't listen to his attorneys. … I wasn't advising him to go to trial, not when there was an offer of life on the table. I mean it was just begging for

it." (Vol. 99, 509). The circuit court's finding that Dr. Gamache was more credible is not based upon competent, substantial evidence. Mr. Diaz seeks a remand to the circuit court for a full and fair hearing on his *Atkins* claim.

CONCLUSION

Based on the foregoing, Mr. Diaz respectfully requests relief in the form of a new trial based upon juror misconduct and/or a new resentencing proceeding based upon the ineffective assistance of counsel and/or a life sentence due to his mental retardation. In the alternative, Mr. Diaz requests a remand for a hearing on the juror misconduct claim and further evidentiary proceedings on his *Atkins* claim.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Stephen D. Ake, Assistant Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, this _____ day of February, 2012. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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