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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Joel Diaz submits this Reply Brief of Appellant in response to the State's Answer Brief in SC11-949. Mr. Diaz will not reply to every factual assertion, issue or argument raised by the State and does not abandon nor concede any issues and/or claims not specifically addressed in the Reply Brief. Mr. Diaz expressly relies on the arguments made in the Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply. Further, Mr. Diaz expressly relies on the arguments made in his Petition for Writ of Habeas Corpus in SC12-229, for which he will not be submitting a reply brief.

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

The post-hearing memorandum filed in the circuit court following the 2010 hearing provided an overview as to why Mr. Diaz is entitled to relief:

> Unfortunately for Joel Diaz, his new lawyers failed to pick up where [Assistant Public Defender Ken] Garber had left off; they never bothered to look at Garber's file let alone conduct their own investigation into the circumstances of the crime or prepare a case for mitigation.

> 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).
>
> In this case, defense counsel failed to ask relevant questions on voir dire, failed to present a reasonable theory of defense that could be carried through to the penalty phase, and failed to present a meaningful case in mitigation before the jury. The jury never heard that Joel Diaz was seriously ill as a baby, exposed to toxic pesticides as a toddler, worked in the harsh conditions of farm work before reaching adolescence, and grew up surrounded by violence and abject poverty.
>
> 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.

(PCR. 13183-84). The post-hearing memorandum outlined Mr. Diaz's legal claim, that he was deprived of the Sixth Amendment right to the effective assistance of counsel throughout the entire trial. Mr. Diaz also "identify[ed] particular acts [and] omissions of the lawyer[s] that [were] outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). (PCR. 13181-216). Given the foregoing, the criticism that Mr. Diaz presented a "jumbled list of reasons that trial counsel was ineffective" and "numerous sub-claims" in the motion for postconviction relief is unwarranted. (Answer Br. at 9, 11, 34).

In 1984, the *Strickland* Court wrote that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). The State's Answer Brief fails to acknowledge the trifecta of cases that clarified what constitute a **reasonable** investigation. A reasonable investigation is one that includes a full exploration of the client's life history by conducting extensive interviews and gathering records for the purpose of developing mitigation along with a complete evaluation of any prior crimes in order to attack the aggravators. The case law further establishes that the lack of cooperation of the client and his family does not obviate the requirement to conduct a thorough investigation. *See Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla* v. *Beard*, 545 U.S. 374 (2005). Also ignored was the "evolutionary refinement" of the required prejudice analysis set forth in *Porter v. McCollum*, 130 S. Ct. 447 (2009). *See Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011), reh'g denied (Dec. 30, 2011).

The State further fails to distinguish the circumstances in Mr. Diaz's trial from the cases arising out of the Eleventh Circuit Court of Appeal upon which Mr. Diaz relied on in his Initial Brief. *See, e.g., Francis v. Spraggins*, 720 F. 2d 1190 (11th Cir. 1983) (it is deficient performance to concede to an aggravating factor); *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) ("[t]he

description, details, and depth of abuse in [Mr. Diaz's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told."); *Hardwick v. Crosby*, 320 F.3d 1127, 1182-86 (11th Cir. 2003) ("We caution that attorney strategy is not a shield or panacea for failure to investigate all mitigating evidence in a capital case."); *Lawhorn v. Allen*, 519 F.3d 1272, 1295-96 (11th Cir. 2008) (It would be impossible to make a strategic decision regarding mitigation without knowing the applicable law.). The State disregarded a number of cases emanating from this Court as well. *See e.g. Ault v. State*, 53 So. 3d 175, 191-92 (Fla. 2010) ("[L]ow intelligence has been recognized as valid mitigation."); *Parker v. State*, 3 So. 3d 974, 983-85 (Fla. 2009) (granting relief after finding that additional testimony offered during collateral proceedings "fleshed out the 'bare bones'" presented at the penalty phase proceeding and provided a stark picture of the defendant's chaotic childhood). It is impossible to evaluate Mr. Diaz's Sixth Amendment claim by ignoring the cases upon which he relied in his Initial Brief.

In the Statement of Facts at page 14 of the Answer Brief the State asserted that the September 2010 evidentiary hearing was primarily devoted to the claim of mental retardation. This view disregards that virtually all of the expert and lay witness testimony presented by Mr. Diaz could have been presented in mitigation at the penalty phase. The distinction is important because of the different burdens

and standards of proof placed on the defendant. Before the court may find that a defendant is ineligible for execution under pursuant to Florida Rule of Criminal Procedure 3.203, the **court** must find that the defendant proved that he is mentally retarded by clear and convincing evidence. However, in assessing the prejudice prong for the ineffective assistance of counsel claim, the focus shifts to the jury as the fact-finder and the court must speculate at the how the unpresented evidence might have affected the outcome of the proceedings, with the caveat that the jurors must only be "reasonably convinced" that a particular mitigator exists. The mitigation that was presented at the September 2010 hearing cannot be "discount[ed] to irrelevance" in analyzing the ineffective assistance of counsel claim. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

A. Deficient Performance

1. Trial counsels' failure to investigate and prepare for the guilt phase impacted the penalty phase.

Concomitant with the duty to investigate and prepare mitigation is the duty to investigate and attack the aggravators. *Rompilla v. Beard*, 545 U.S. 374 (2005). However, the State treated the guilt phase deficiencies in a vacuum. Answer Br. at 36-47. Assistant Public Defender Ken Garber was concerned about the cold, calculated, and premeditated ("CCP") aggravator so he looked for explanations for his client's actions that the jury might accept. This was not a "whodunit" so it was imperative to defend the case based on Joel Diaz's state of mind. As Garber explained:

> 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.

(PCR. 24). In other words, Ken Garber was looking for a theory of defense that would carry through to the penalty phase.

The record reflects that Frank Porter did not review Garber's file, nor did he have copies of crime scene photographs, Ft. Myers Police Department reports 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 file. (PCR. 3464-3615, D.E. 28, 29, 30, 31, 34, 35, 47 (from Garber's file); PCR. 5816-8047, D.E. 80 (Porter's file without the pertinent documents)). The attorney never went to the crime scene or the evidence room; he failed to conduct independent interviews with respect to the guilt phase. There was no preparation for the guilt phase.

Despite the State's arguments that an attack on CCP was not relevant to the defense in the Answer Brief at pages 39-40, Porter did admit that he presented a quasi-insanity/self-defense case and he agreed that the insanity defense deals with a lack of premeditation. (PCR. 346-50). 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 lack of preparation and deficient performance resulted not only in the guilty verdict but it impacted the outcome of the penalty phase as well because the CCP aggravator was upheld on direct appeal.

The State's argument that defense counsel's failure to question Melissa McKemy was not deficient conflates the prejudice prong with the deficient performance prong. (Answer Br. at 41-42). After the break-up, Joel Diaz uncharacteristically quit his job and became increasingly depressed. McKemy feared he might commit suicide. She also believed that Joel Diaz did not seem to have a realistic perception of the grave nature of his legal situation. (Vol. 97, 189-96). The record shows that Mr. Diaz wrote a handwritten letter to Porter with Melissa McKemy's name and address, stating, "Hopefully she would be able to help you." (PCR. 5607; D.E. 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).

There is no excuse for Frank Porter's failure to contact Melissa McKemy. Her testimony went directly to his 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). Even if some of her testimony would have had a negative impact, the information she had could have been used in the penalty phase, after Mr. Diaz had already been convicted. *Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010) ("[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive . . . .").

With respect to Dr. Keown's testimony, the State's allegation that Mr. Diaz failed to provide a legal or factual basis for his argument that the admission of the "Anger Styles Quiz" in the Answer Brief at 45 demonstrates that either the State did not read the Initial Brief, or the State does not understand the *Frye*[1] test, or both. Dr. Keown told the jury that he gave Joel Diaz something the quiz which consisted of thirty true/false questions such as "do you stay angry a long time?" (R. 644-48). Trial counsel should have known that a *Frye* hearing is required before scientific evidence can be admitted. *See Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995) ("The principal inquiry under the *Frye* test is whether the scientific theory or discovery from which an expert derives an opinion is reliable.").

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. Dr. Keown admitted that his "quiz" was not a standardized test. Dr. Keown explained that validity means that the tests actually measure and reliability

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

mean that the results are repeatable. There is no evidence that the quiz measures what it purports to measure or that there have been any studies showing that the test is valid or that the quiz has been peer-reviewed in any professional journal. (Vol. 96, 744-50; D.E.132.). Furthermore, trial counsel admitted that he did no research regarding the reliability or validity of the "test." (PCR. 384-88). Pop-psychology has no place in a trial that may result in the death of the defendant.

Instead of recognizing the necessity of presenting a cohesive theory between the guilt phase and the penalty phase, the State chastised Mr. Diaz for combining his entire ineffective assistance of counsel claim in Argument II. According to the American Bar Association guidelines for counsel in death penalty cases,

> [d]uring 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). In this case, Ken Garber presented Frank Porter with a theme that could be used in both phases of the trial but it was never even considered. Trial counsel's failure to even attempt a cogent theory throughout the trial was deficient performance.

2. The alleged lack of cooperation does not relieve counsel of the duty to investigate and prepare a case in mitigation.

The State's prevarications regarding the cooperation, or lack of, by the client and his family are not supported by the record. Answer Br. at 52. In his Initial Brief, Mr. Diaz addressed the circuit court's mistake concerning this issue. Potter's view that "[Joel Diaz] did not want any evidence presented that would reflect on his negatively" is irrelevant because Mr. Diaz's disapproval of Minerva's testimony came **after** the penalty phase had already occurred and therefore, had no bearing on the failure to investigate. (PCR. Vol. 95, 522). The pages cited by the State (PCR. 520-26) do not establish that trial counsels' pre-trial preparation was hampered at all by their client:

> Q. Mr. Potter, what is a social history in the context of a capital case?
>
> A. In reference to the defendant?
>
> Q. Yes.
>
> A. His background.
>
> Q. Okay. **And did you complete a social history in this case?**
>
> A. **Other than talking to Joel and his sister—I can't remember if I—there was anybody else I was able to get ahold of that probably would have been—boy, I had to have gotten something**. Because I remember stuff about his dad being kind of not a very nice guy, a lot of drinking and a lot of abuse in the family, I mean just in general. . . .

A. I know Minerva—**I went to the jail and talked to Minerva a couple of times about it. That was probably the major source of it.** I know I remember that Joel wasn't—he didn't like – he didn't like that. You know, he didn't think that that was – it was like I was insulting him or I was making a look. He just didn't like it. . . .

Q. Okay. What was it that Mr. Diaz did not like?

A. There was just—it was like we were trying to like slander him, you know, make him look bad, make his family look bad, and he was just kind of resentful; of that. I remember very, very well, some of this I remember –

Q. Right.

A. --this going over, **after we put his sister on, and I went over to the jail to talk to him about something and he was very—and underline "very" – unhappy with me, because I put her up there and elicited that information.**

Q. Okay. Now in terms of eliciting information, it wasn't that he and his sister or mother were abused. The information he was upset about was the jury heard that he had battered his prior girlfriends; is that correct?

A. No.

Q. No?

A. No. No. He was—I got the drift that he just didn't like—you know, it was like –

Q. **This was after the penalty phase, though, right? This was after the penalty phase.**

A. **It was after Minerva testified, because – and I don't know what the reason was for me being at the jail, but I went over there to talk to him about something and they put him in the holding cell area.** And he just really had some not so nice things to say to me. And, you know, I'm like, "What's the problem?" And he—you know, he just—you know, "I didn't want you bringing that information out. It made me look bad, it made my—you know, my sister cry. You know, you made us look like a bunch of losers." And they he just—Joel had a little bit of a temper and he got irate. Very irate.

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 not. It hadn't occurred.**

Q. Okay. **Did you attempt to get any police reports or criminal history that would have corroborated what Minerva Diaz was telling you concerning the violence in the home?**

A. **No. There's none here, so I would have to say no.**

Q. Okay. Excuse me. If you had police reports or documents that would corroborate the violence in the home, is that something you might have wanted to have used in considering presenting mitigation to the jury prior to the trial?

A. That's—to me, that's kind of six of one, half dozen of the other. I thought one of the few things that went the way that was a positive for the defense was Minerva's testimony. I thought she did—you know, given—I thought she did a pretty good job at testifying. You know, I meant that was one of the—there wasn't a whole lot from the defense to reach out to the jury with in the

case, and the little but that there was came through her. So, I used Minerva. I didn't have the reports, no.

Q. **Did you consider using a mental health expert in the penalty phase?**

A. **No.** And the—boy, I'm not a hundred percent here, but my recollection is, is that the previous attorneys had had him examined. . . .

A. And, you know, **I had to—had to have looked at those reports. And there really wasn't anything there that stood out.** And the other thing is, is, you know, once again, I don't think Joel was real happy about that.

Q. About the fact that there weren't mental health experts there or—

A. No, no, no. **About the—you know, you're giving him way too much credit here. He looked at this as said just like, "you know you want me to—your're saying I'm crazy."**

Q. Right.

A. You know? It's like he got real defensive. You know? You're trying to put on something to show that he had a bad childhood. And it's not like he couldn't—couldn't see that as being helpful. It was like, you know, you're my attorney and you're like talking bad about me type of thing.

Q. Right. I mean is that your—you've represented a number of people in capital cases, right?

A. Handful.

Q. Okay. Has it been your experience sometimes they that don't want you or anybody else to hear that they were abused?

A. It depends upon—it depends up the particular defendant or the particular client. Some people—Clyde Miller. I had a case with Lisa [Plattner]. I could go over and talk to him and, you know, **we had conversations and he would listen to me. And, you know, if [Clyde Miller] didn't like what I was doing, he would, you know, there would be a back and forth.**

Q. Right.

A. You know, so I could explain it to him.

Q. You couldn't have that with Joel?

A. Well, it was—it was hard. He's a pretty hardheaded guy and he's got—like I said, he's got a temper.

Q. But aside from the temper, did he seem to understand your point when you were saying, "I want to put this history on in order to try to save your life," did he get that?

A. Joel, you could talk to Joel and he would listen to you and I think he understood, but Joel was one of these guys—I mean it's not unique. Certain people over in the jail, you go over and when you talk to them and you're telling them something positive for their case that they want to hear—

Q. Right.

A. – boy, they're all ears and they understand every word you're saying. When you're going over and you tell them that, you know, I'm not going to file this motion or I'm not going to do this, and they don't like it, you know, it's kind of like they—they understand, but they refuse to understand.

Q. Are you saying, though, that Joel didn't want anything

that might reflect on him negatively to be presented.

A. If you want a general statement, I would say that would be—that would be fair. And I thing it was just that, you know, he just—he had this, it was like, you know, I'm his attorney I'm supposed to be helping him and doing good things. Good things. You know, "I want to hear good things from you, Mr. Potter. I don't want to hear that my family was a wreck."

Q. Or that he grew up poor. Or that he grew up poor?

A. Well, I don't know of that's got anything to do with anything, but—I grew up poor.

Q. But he didn't that want to be presented? . . .

A. **I know for a fact this thing about the abuse, he was very upset about that. The stuff about the mental health thing, he was not—he didn't get, you know, as vehement and as upset on that as he did on the other things.**

Q. He didn't want to look stupid?

A. Well, I don't know. You'd have to probably ask Joel.

Q. Okay. He had pride?

A. Pride?

Q. Did Joel have pride?

A. Just in general?

Q. Uh-huh.

A. **He always came across to me, back in the day there, he was a pretty muscular, good looking Hispanic guy. He had that kind of macho air about**

him.

(PCR. 519-27). Frank Porter admitted that Joel Diaz was mostly cooperative and that nothing about the family's behavior kept him from investigating. (PCR. 475-80). Given the foregoing, there is no support for limiting the pre-trial investigation based on Mr. Diaz's after-the-fact reaction to the presentation of his sister's testimony.

The State blames trial counsel's lack of pre-trial investigation on the fact Joel Diaz's emotionally and cognitively impaired mother did not show up for an appointment one day. Answer Br. at 52. The record reflects fact that both Esperanza Reyes and Minerva Diaz went to Dr. Kling's office when Mr. Garber was still working on the case. (PCR. 3415-22; DE 6). The record also reflects that Garber had detailed notes from his interview of Minerva Diaz. (Ex. 31). As Anna Garcia demonstrated, simply hiring an interpreter may not be sufficient when gathering information in a capital case; the circumstances here necessitated a skilled professional who could effectively communicate with Esperanza Diaz. The public defender's officer obtained the appointment of psychologist Ricardo Rivas and Lucy Ortiz for this reason but trial counsel never attempted to utilize their skills.[2] Despite Potter's ranting about Minerva Diaz being a "loser" in jail, she did meet with Mr. Garber in his office and Frank Porter sent pleadings to her to help

[2] It is irrelevant that Lucy Ortiz ultimately chose not to work on the case because trial counsel did not know that because they did not know who she was.

her stay abreast of the legal developments on the case. Porter also testified that nothing about Mr. Diaz's behavior impeded the gathering of records. (PCR. 475-80). As for the assertion that Mr. Diaz did not wish to have his mother testify at the *Spencer* hearing (Answer Br. at 52), again, that decision came **after** the trial and had no bearing on the limitations on the pre-trial investigation. Furthermore, any reluctance to have his mother testify at the trial could have been alleviated by having a skilled, bilingual mental health professional gather information from her for use at the penalty phase.[3]

Even if it were true that either Minerva or Esperanza or Joel Diaz were uncooperative, the State never addressed the U.S. Supreme Court's admonishment that even when the defendant and his family members are not cooperative, counsel must investigate. *Rompilla v. Beard*, 545 U.S. 374 (2005). Additionally, the evidence presented established that Joel Diaz was cooperative during the pre-trial mental health evaluations conducted by both defense and State experts, further undermining the story that he did not want mitigation to be presented. *See Robinson v. State*, SC09-1860, 2012 WL 2848697 (Fla. July 12, 2012) ("record does not indicate that Robinson prevented counsel from pursuing other mitigation."). Finally, if trial counsel had difficulty communicating with the immediate family members, they could have reached out to other people such as

[3] Esperanza also showed up to watch the trial so she obviously showed some interest in the case.

Marisol Brenes who spoke to Dr. Griffith, Aunt Luz Diaz who was available and would have testified about the hostile family home, Melissa McKemy, whose name was provided to Frank Porter by the supposedly uncooperative client, or the elementary school teachers who provided information to Dr. Antonio Puente.

3. Trial counsel's performance with respect to the mental health experts was deficient.

The State's theory that trial counsel was not ineffective in relying on their retained expert, Dr. Paul Kling, completely misses the point. (Answer Br. 52-53). Ken Garber had initially retained Dr. Kling and they were in the midst of pre-trial preparation when the case was handed over to Frank Porter. Dr. Kling testified at the evidentiary hearing that he did not review any jail records and that during the collateral proceedings he became aware of the following information: that Joel Diaz was born at home, Joel Diaz had been employed as a farmworker at a young age, Joel Diaz received mostly failing grades in school, and that based upon that information, he would have recommended a neuropsychological evaluation. (PCR. 641-43). This case is not about postconviction counsel hiring more or different or better experts; this case is about trial counsel failing to use the experts and information that was in front of their faces because neither one of them were

competent to see what they had.[4]

In the Initial Brief at page 72, Mr. Diaz argued that Potter's representation at the penalty phase was deficient because he was not aware of any sexual abuse and he did not have Dr. Crowell's report in his file was evidence of his deficient performance in failing to prepare for the penalty phase. In response, the State pointed out that the only mention of sexual abuse was in Dr. Kling's report and that the report was placed into evidence at the guilt phase. (Answer Br. 55). The point that Mr. Diaz made was that Potter failed to conduct his **own** independent investigation of his client's life, and he never bothered to read the reports that were readily available. "And, you know, **I had to—had to have looked at those reports. And there really wasn't anything there that stood out.**" (PCR. Vol. 5). Potter's file has been placed in evidence: a review of the record will confirm that Dr. Crowell's report was not in his possession whether he assumed he had it or not. If Potter failed to obtain Dr. Crowell's psychological report from his co-counsel's file then his performance was *per se* deficient; if Potter did have the report, then no **reasoned** professional judgment supports his failure to follow up on the information that Joel Diaz worked in farm labor when he was a little boy, or the evidence that he had a low average IQ.

[4] The cases cited by the State at page 54 do not defeat Mr. Diaz's allegation that trial counsel failed to properly prepare Dr. Kling by providing his with background materials.

Neil Potter apparently did have Dr. Kling's report with the brief mention of sexual abuse but he never read it: he admitted that the first he ever heard about the allegations of sexual abuse was during the evidentiary hearing. (PCR. Vol. 95, 576-80). Frank Porter did not know about the sexual abuse either. (PCR. 382-86). If either one of the lawyers had read the report pre-trial, there would be no justification for not conducting further investigation to obtain the specific details. The State glossed over the prurient details regarding the sexual abuse that were revealed during the hearing and noted that Minerva Diaz was not aware if her brother had suffered any "physical sexual abuse" himself. (Answer Br. 56). The constant exposure to pornography was abuse in and of itself and a mitigating factor. The State further ignored Dr. Puente's testimony that Joel Diaz was molested by an aunt when he was a little boy (PCR. 299-304); information that may have been uncovered if trial counsel had simply asked Dr. Kling to conduct a follow-up interview after reading the reports. If Potter knew what was in Dr. Kling's report, there would be no excuse for his failure to argue the sexual abuse as a mitigating factor in his closing argument to the jury. The failure to present evidence of sexual abuse was not strategic because counsel did not know about the abuse when they tried the case.

The State also argued that the circuit court properly found that Porter's failure to object to Dr. Keown's report being entered into evidence was strategy

because it contained beneficial information. (Answer Br. at 45-46). The reality is that trial counsel did not have any good reason for allowing the hearsay into evidence but he later agreed with the prosecutor's leading suggestion that he must have allowed the report to come into evidence because it contained useful information. (PCR. 388-90, 469-71). It makes no sense that defense lawyers would forgo presenting their own theory in mitigation in the hopes that the jury might glean whatever humanizing information there might be in the report of the State expert that was introduced during the guilt phase. If it really was their strategy to rely on Keown's report, then there is no plausible justification for not bringing out the "beneficial" information on cross-examination, or, at the very least, reminding the jury about the report during closing argument at the penalty phase.

Neil Potter failed to argue any of the non-statutory mitigators that were mentioned in the reports of Drs. Kling and Keown during closing argument at the penalty phase. (R. 868-69). Potter started out by explaining the "scheme" of aggravators and mitigators and the fact that not every murder case warrants the death penalty even though there are "no good murder cases." (R. 869-70). Potter then argued against the application of the prior violent felony aggravator. (R. 871). He then argued that the crime was not heinous, atrocious, and cruel and pointed out that Joel Diaz was the person who called 911. (R. 873-75). With respect to CCP, Potter conceded that there was "some planning" but that the aggravator did not

apply because he was thinking about Lissa Shaw. In support of his argument against CCP, Potter pointed out that the booking photo showed a "big bruise on [Joel Diaz's] cheekbone where he was struck." (R. 875–77).

When it came time to discuss the mitigators, the State had to object because Potter overstated the standard of proof as to the mitigators; Potter told the court during the sidebar that he would "rephrase" but he never actually corrected himself before the jury. (R. 877-78). Instead, Potter argued that Joel Diaz had no significant prior record. He then discussed the mental health mitigators:

> When this happened, he was under the influence of extreme mental or emotional disturbance. Once again, I think that is quite obvious. I mean when you look at what he was going through, he had some really strong feelings for this girl, had a relationship that went up and down and it just got to the point where she cut him off, and it was just bothering him to the point where he did what he had to do.
>
> Another thing that you need to think about, when you're addressing this particular mitigator, is some of the things that were going on after these shots were fired. He said that he was going around the house looking in drawers and looking on top of dressers, looking for signs that there may have still been some feeling or that she was seeing some other guy. That just shows you how preoccupied he was with this whole involvement with Lissa Shaw.
>
> The defendant's capacity to appreciate the criminality of his conduct was substantially impaired. Now the reason the defense brought Minerva Diaz over here was not to lay the blame for this murder on her father. That's not what was attempted to – to be accomplished. What the

defense was trying to show you folks is that you have someone who was brought up in a very very destructive – emotionally destructive environment. When you stop and think about someone growing up as a child and watching their dad, almost on a daily basis, get all intoxicated, start pushing mom around, slapping her around, calling her every name in the book, just degrading her, treating her like dirt and it keeps going, month after month, year after year, it starts to effect someone. And the defense would submit to you that even Minerva said that she thought that Joel had some problems because of that, some problems up here (indicating).

Now there was some testimony from some psychiatrists, and the state's psychiatrist said one thing but we also had Dr. Kling come in and testify. And his professional opinion was at the time this occurred, that Mr. Diaz was suffering from a mental infirmity. So, once again, you've got two versions of this. I'd ask you to consider what Dr. Kling had to say.

Also, Mr. Diaz testified and he told you that he was quite jealous about this, and he spent the whole night before sitting up drinking, thinking about this. And this is somebody that normally didn't drink. So was his capacity at the time to appreciate the criminality of his conduct substantially impaired? The defense would submit to you that it was.

Now Joel did take the stand today, and he did – it wasn't very long, I think you all remember it. He's had almost three years to think about this and, as he said, if he could somehow go back and do this over, he wished it wouldn't have happened because it's destroyed the Shaw family, and it's also had a tremendously bad effect on his family as well.

And he got up there, and he told you that he does have some remorse for this. Also, if you remember the testimony from the trial, after this happened there were

> some statements that he made to Mrs. Shaw. So is this something that he just cooked up here at the last moment to try to come in here and sidestep the death penalty? No, it's not. The young man is remorseful for what he did, and I think the twelve of you need to take that into account.

(R. 877-81).

The story that trial counsel did not object when the State introduced Keown's damaging report into evidence because they had some intentional strategy to secretly present mitigating evidence is preposterous. Answer Br. 46. Furthermore, Porter's haphazard admission of Kling's report does not mean that trial counsel actually presented evidence of sexual abuse to the jury. Answer Br. at 55-56. Minerva testified at the postconviction that she was sexually abused herself and that their father had a "sex room" room where he and his buddies would watch X-rated movies, look at pornography, and use drugs in plain view of her brothers. (PCR. 138-40, 299-301). What Minerva did not know was that their Aunt Alicia's boyfriends had forced Joel to perform fellatio on them on more than one occasion when Joel was just a little boy. (PCR. 303-04). The failure to present testimony regarding the sexual abuse and to argue it as non-statutory mitigation cannot be rationalized as a reasonable strategic decision simply because the State now needs to justify trial counsels' incompetence.

4. Neil Potter's after-the-fact reliance on "Judge Nelson's" distaste for "kitchen sink" mitigation does not constitute a reasoned trial strategy.

The trial attorneys' failure to conduct a complete investigation prior to trial cannot be blamed on Joel Diaz or his family. Because trial counsel failed to conduct an adequate investigation or complete a social history, attorney Neil Potter's excuse that there was not much "legitimate mitigation" cannot be relied upon as strategy. *Hardwick v. Crosby*, 320 F. 3d 1127, 1182-86 (11th Cir. 2003) ("[T]he mere incantation of 'strategy' does not insulate attorney behavior from review."). Potter did not know what was in the "kitchen sink" so he could not and did not make a reasoned decision not to present certain evidence. *Ferrell v. Hall*, 640 F.3d 1199, 1226-27 (11th Cir. 2011) ("It is almost axiomatic that strategic choices made after 'less than complete investigation' are reasonable *only* to the extent that reasonable professional judgment supports the limitations on investigation," *citing Strickland*, 466 U.S. at 690–91).

The State's reliance on Potter's testimony "he did not consider [evidence of Joel Diaz's work in agriculture and exposure to pesticides] to be compelling" only demonstrates that the State fails to recognize that it is impossible to make a strategic decision to reject mitigating evidence if the lawyer did not know that existed. (Answer Br. at 56). As the U.S. Supreme Court noted in *Sears*:

> [T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure

> to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [Joel Diaz]. The "reasonableness" of counsel's theory was, [Joel Diaz] might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

Sears v. Upton, 130 S. Ct. 3259, 3265 (2010); *see also Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003). The State also ignored that Frank Porter admitted that his former client's work in the fields could have been mitigating but that he did not know about it. (PCR. 419-20, 486-87).

The State's conclusion that trial counsel was not deficient for not investigating because Neil Potter did not find that the exposure to pesticides as a toddler or the fact that Joel Diaz worked in agriculture when he was a little boy was compelling is based on circular reasoning. The State is conflating the question of prejudice with strategy and reasonably competent performance. Neil Potter's lack of interest in presenting evidence of Joel Diaz's farm work was not the product of reasoned professional judgment because he did not know anything about it.

Had trial counsel performed a rudimentary investigation 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 such as brain damage and other

cognitive deficits, malnutrition, abuse, and health risks. If counsel had been curious at all, they could have simply 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 farmworker advocate in nearby Immokalee, FL to learn more about agricultural labor. (PCR. 92-94). Any one of a number of avenues would have led to a wealth of mitigating evidence. (PCR. 89-91).

B. Prejudice

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 v. Smith*, 539 U.S. 510, 534 (2003). In *Porter v. McCollum*, the U.S. Supreme Court rejected this Court's application of *Strickland* where this Court had struck the HAC aggravator on direct appeal and found no prejudice with respect to the penalty phase ineffectiveness claim in postconviction. 130 S.Ct. at 447. The U.S. Supreme Court reasoned that "On the other side of the ledger, the weight of evidence in aggravation is not as substantial as the sentencing judge thought" and that "[h]ad the judge and jury been able to place [the defendant'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." *Id*. (internal quotations omitted). Likewise, when Joel Diaz's life history—including the totality of evidence adduced both at trial and in postconviction—is weighed against the reduced ballast of aggravation, there is clearly a reasonable probability that he would have received a life sentence.

This Court upheld the sentence of death in a sharply divided 4-3 decision. Justice Pariente succinctly summarized the evidence adduced at trial in the dissenting opinion:

> 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).

The State briefly addressed the prejudice prong without reference to the deficiencies in representation that were present during the guilt phase. Answer Br. 59-62. Dr. Kling's testimony was disastrous for the defense; during cross-examination, the State exposed the fact that Dr. Kling did not have sufficient information to support his opinions. The State was able to gain the advantage and lead Dr. Kling into telling the jury that Joel Diaz suffered from an "ungovernable

temper." (R. 572). Despite the State's suggestion in the Answer Brief at page 60 that the "jury was aware of mental mitigation and other mitigating evidence from Dr. Kling's guilt phase testimony" the truth is that by the time he took the stand, Dr. Kling's credibility was destroyed.

The uncontroverted evidence at the hearing was that Esperanza Reyes was a child of Mexican migrant workers who, although born in Texas, never learned English or assimilated into American culture. Esperanza married Jose Diaz Senior when she was still a teenager and the family lived in the "colonias" in an agricultural area near Brownsville, Texas, not far from the Rio Grande. She worked in the fields during her pregnancy with Joel Diaz. (PCR. 29-37).

The eventual move to southwest Florida was typical for Mexican-Americans during the 1970's who were looking for new opportunities in the construction business. Jose Diaz had legal troubles so he accepted his brother Flavio's invitation to move to Florida. (PCR. 38-40, 98-102). After Joel Diaz's father stopped bringing money home because of his crack addiction, Esperanza went back to farm labor, mostly around the Ft. Myers area. She would often bring her sons, Joel and Joes to work with her even though they weren't technically old enough to earn a paycheck. The Diaz children were exposed to older men who were fighting, going to prostitutes, and drinking. Social security records corroborate the testimony that Esperanza took her children up the East Coast Stream to Quincy in the Florida

panhandle where Joel Diaz worked in a packing house when he was just a boy. (PCR. 41-83). It was not uncommon for children to be exposed to the kind of side effects from pesticides that Minerva and Joel described such as the nausea, itchy eyes, and rashes. (PCR. 50-52).

At the evidentiary hearing, the State engaged in a ludicrous attempt to neutralize that evidence by "proving" that Joel Diaz lived within the city limits of Ft. Myers for most of his childhood. The State continued the farce in its Answer Brief with the statement that Joel Diaz "consistently lived in city residential housing and was not living in an 'agricultural home.'" (Answer Br. at 57). The State also asserted that "income records showed minimal agricultural work" even though there was uncontroverted testimony that children were often allowed to work in agriculture and there were not always records of that work. (PCR. Vol. 97, 81-83). The State's attempt to downplay the known and/or potential harmful effects of pesticides is contrary to the expert testimony and common sense and knowledge. The only medical doctor who testified at the hearing, Richard Dudley, M.D., told the lower court that "a pregnant woman's exposure to pesticides historically and/or during the time of the pregnancy, both, can affect the fetus." (PCR. 548-50). The Diaz children ate unwashed vegetables from the fields and that pesticides are well known to be neurotoxic. Dr. Dudley explained that children are at greater risk from exposure to pesticides because their brains are still developing.

Joel Diaz's lifelong history of headaches and nausea are typical symptoms of toxic exposure. (PCR. 447-550).

In the end, whether the circuit court judge was impressed with the State's map of the city of Ft. Myers or the comparison of children in agricultural labor to a stint a summer golf caddy is not the issue. The circuit court obviously accepted the testimony of Anna Garcia, Prof. Griffith, and Dr. Dudley as true because there is no finding to the contrary. The State did not address the case cited by Mr. Diaz in his initial brief, *Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002), in which the appellate court relied on the documented connection between pesticide exposure and brain damage in finding deficient performance. The law requires consideration of the mitigating evidence and the impact that it might have had on the jury—had it been presented at trial. The evidence of Joel Diaz's work in agriculture, and the impact it may have had on his developing brain may not be discounted to irrelevance.

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. This Court must consider the evidence that was presented at trial and conduct a cumulative analysis, taking into consideration the error found on direct appeal and

then assessing the impact that the evidence presented at the hearing could have had on the jurors. In the Answer Brief, the State set forth the mitigating factors that were found by the trial court at page 59. However, the inquiry should concern the impact of the new information on the jurors, three of whom recommended a life sentence.

According to the State, the only new evidence presented was the evidence of Mr. Diaz's farm work and "low average intelligence." Answer Br. at 61. This disregards the vivid description of the porn room that was provided at the evidentiary hearing and the fact that Joel Diaz and his siblings were victims of sexual abuse and incest. It also ignores the impact of the work in agriculture on the developing brain and the testimony that Joel Diaz's has an IQ in the range of mild mental retardation. The State also disregarded the testimony of Drs. Puente and Dudley who gathered information from multiple sources and explained how the life-long deprivation, trauma, and cognitive deficits impacted Joel Diaz as a human being. "The description, details, and depth of abuse in [Mr. Diaz's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1354 (11th Cir. 2011).

In searching for a reasonable probability courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 447 ., as part of their "'[] duty to

search for constitutional error with painstaking care," *Kyles v. Whitley*, 514 U.S. 419, 422 (1995), which requires courts to "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). That is the paradigm. Courts must engage with mitigating evidence by speculating how it might have mattered. Courts have to painstakingly search for constitutional violations, not painstakingly explain them away. But for counsel's inadequate performance, during both the guilt phase and the penalty phase, there is a reasonable probability that there would have been a different outcome.

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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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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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 August, 2012.

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