IN THE SUPREME COURT OF FLORIDA

GEORGE PORTER, JR.,

Appellant,

v. CASE NO. 88,562

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State does not accept the argumentative, incomplete, and inaccurate "Statement of the Case" found at pages 1-4 of Porter's brief. The State relies on the following Statement of the Case.

On or about February 27, 1995, Porter filed an "Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend." (R1-182). The State answered that motion on May 18, 1995. (R274-307). Leave was granted to engage in discovery, and, on May 22, 1995, a *Huff* hearing was conducted. (SR94). On July 12, 1995, the trial court entered its order denying relief on all but two of Porter's claims for relief. (R323 *et seq*). A two-day evidentiary hearing was conducted, beginning on January 4, 1996.

Following the conclusion of that hearing, the trial court considered various legal memoranda (R1137-91), and, on May 15, 1998, issued its order denying relief. (R1203 *et seq*). Porter filed a motion for reconsideration (R1407), which was denied on June 10, 1996. (R1412). Notice of appeal was given on July 15, 1996. (R1422). The record on appeal was supplemented, and, on August 28, 1998, Porter filed his *Initial Brief*.

STATEMENT OF THE FACTS

Porter's brief does not include a "Statement of the Facts" as required by the *Florida Rules of Appellate Procedure*. The State relies on the following Statement of the Facts.

On direct appeal from his convictions and sentences of death, this Court summarized the facts of Porter's case as follows:

> Porter elected to represent himself, with the assistance of standby counsel, when he went on trial in November 1987 on two counts of first-degree murder and one count each of armed burglary and aggravated assault. The facts adduced at trial are as follows.
>
> In 1985 in Melbourne, Florida, Porter became the live-in lover of the first victim, Evelyn Williams ("Williams"). Their relationship was stormy almost from the beginning, aggravated by hostility between Porter and Williams' children, especially Williams' daughter, Amber. Several violent incidents occurred during the course of Porter's relationship with Williams. In July 1986, Porter damaged Williams' car while she was at work, and later he telephoned and threatened to kill Williams and Amber. Porter left town shortly thereafter and was not seen again in town until early October 1986. Before Porter returned to Melbourne, Williams had entered a relationship with the second victim, Walter Burrows.
>
> When Porter returned to town, he contacted Williams' mother, Lora Mae Meyer. He told her that he wanted to see Williams, and that he had a gift for her. Meyer told Porter that her daughter did not wish to see him anymore, and that Williams wanted nothing from him. Nevertheless, Porter persisted. During each of the two days immediately preceding the murder, Porter was seen driving past Williams' house.
>
> A few days before the murder, Porter had a conversation with a friend, Nancy Sherwood, who testified that Porter told her, "you'll read it in the paper." She offered no explanation for Porter's remark. Porter went to the home of another friend, Dennis Gardner, and asked to borrow a gun. Gardner declined, but the gun subsequently vanished from Gardner's home.
>
> On October 8, 1996, Porter visited Williams, who then called the police because she was afraid of him. That evening, Porter went to two cocktail lounges. He spent the night with a friend, Lawrence Jury, who said that Porter was quite drunk by 11 p.m.
>
> At 5:30 a.m. the next morning, Amber awoke to the sound

of gunshots. She ran down the hallway and saw Porter standing over her mother's body. Amber testified that Porter came toward her, pointed a gun at her head and said, "boom, boom, you're going to die." Burrows then came into the room, struggled with Porter, and forced him outside. Amber telephoned for emergency assistance.

Williams' son, John, who lived next door, testified that he heard gunshot blasts at about 5:30 a.m. He ran outside and saw Burrows lying facedown in the front lawn. Both Williams and Burrows were dead by the time police arrived at the scene.

On December 5, 1987, as the prosecution was nearly finished presenting its case-in-chief, Porter told the judge that he wanted to plead guilty to the murder charges and no contest to the other charges. When the judge sought the factual basis of the pleas from Porter, Porter denied killing Williams, although said he may have killed Burrows. The judge refused to accept the pleas on that basis. Porter consulted with his standby counsel and then said he would plead guilty to all four charges, but that he did not want to provide a factual basis for the pleas. The trial court conducted an extensive inquiry into the voluntariness of the pleas, and the prosecutor presented the factual basis in support of guilt. Porter admitted his guilt and said he changed his pleas "[b]ecause I want to get it over with." The trial court accepted the guilty pleas to all four counts.

That night, when Porter returned to his jail cell, he attempted to commit suicide by twice hurling himself to the concrete floor from a fourteen-foot catwalk. Porter broke his leg but suffered no other serious injuries. The physicians who examined Porter concluded there was no reason to believe that Porter was mentally incompetent.

On January 4, 1988, Porter filed a motion to withdraw his pleas of guilty. In a hearing on the motion, Porter testified that the night before he pleaded guilty, he learned through an inmate and a guard that two other guards had said that something bad would happen to Porter's eleven-year-old son if Porter continued to stand trial. Porter contended that this motivated his suicide attempt. However, Porter refused to reveal the names of those who informed him of the threat. The trial court denied Porter's motion to withdraw his pleas.

On January 21, 1988, the trial jury returned to hear evidence in the penalty phase, during which Porter was represented by counsel. The jury recommended death on both murder counts. The trial court imposed a death sentence for the murder of Williams, but imposed a sentence of life imprisonment for the murder of Burrows, finding that the aggravating factors in the latter instance were merely "technical." (FN2) The trial court also sentenced Porter to life for armed burglary and five years for aggravated assault.

Porter raises six issues on appeal. (FN3)

> FN2. As to both counts of murder, the trial court found aggravating circumstances that: (1) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to that person (these two murders and the accompanying aggravated assault), Sec. 921.141(5)(b), *Fla. Stat.* (1985); and (2) the capital felonies were committed while the defendant was engaged in the commission of a burglary, *id.* Sec. 921.141(5)(d).
>
> The trial court found two additional aggravating circumstances as to the murder of Williams: (1) the murder was especially heinous, atrocious, or cruel, *id*. Sec. 921.141(5)(h); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, *id*. Sec. 921.141(5)(i).
>
> The trial court found no mitigating circumstances.
>
> FN3. Porter includes a claim that the trial court's instructions violated *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This issue already has been decided adversely to Porter. *Combs v. State*, 525 So.2d 853 (Fla. 1988); *Grossman v. State*, 525 So.2d 833 (Fla. 1988), *cert. denied*, --- U.S. ---, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). His argument that the Florida death penalty statute is

> unconstitutional also is without merit.
>
> *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. Dixon,* 283 So.2d 1 (Fla. 1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Porter v. State, 564 So.2d 1060-62 (Fla. 1990).

In addition to the issues identified above, Porter raised the following issues, as framed by this Court: "that the trial court improperly accepted his guilty pleas and then improperly denied his motion to withdraw those pleas," *Porter v. State*, 564 So.2d at 1063; that the murder was not "especially heinous, atrocious, or cruel," *id.*; "that the murder was not cold, calculated, and premeditated," *id.*; and, "that the death penalty is not proportional in this instance," *id.*, at 1064. This Court agreed with Porter that the heinous, atrocious, or cruel aggravator did not apply, but decided the remainder of the claims adversely to Porter, and affirmed the death sentence. *Porter v. State*, 564 So.2d at 1065.[1]

THE RULE 3.850 EVIDENCE

Sam Bardwell was appointed to represent Porter after the Brevard County Public Defender declared a conflict of interest. (TR42-43). Mr. Bardwell has handled a substantial number of criminal cases both as a "conflict" Public Defender, and as an

[1]This Court also found the evidence sufficient to support the convictions. *Porter v. State*, 564 So.2d at 1063.

Assistant State Attorney. (TR44). He had handled five (5) potential death penalty cases -- this is the first case that went into the penalty phase proceeding. (TR44). Mr. Bardwell testified that certain decisions belong wholly to the client, and that the client can waive representation altogether if he chooses to do so. (TR45). Tactical decisions are the province of the lawyer -- however, some clients prevent counsel from pursuing certain aspects of their case. (TR46-7). A competent client can make that decision, and counsel must respect that decision if the client cannot be dissuaded from it. (TR48-9).

Mr. Bardwell testified that he had a difference of opinion with Porter over the best way to defend this case at a fairly early point in the representation. (TR53). He believed that the physical evidence could be exploited to Porter's advantage, but in order to do so, it would have been necessary to admit that Porter was present at the crime scene. (TR54). Mr. Bardwell also believed that Porter's alcohol consumption could be used to his advantage. (TR54). However, Porter rejected the use of such a theory. (TR55). Further, Porter refused to talk to a mental health professional engaged by Mr. Bardwell. (TR55). Ultimately, Porter entered a plea of guilty and Mr. Bardwell was re-appointed to represent Porter at the penalty phase proceeding. (TR61-63).

Ultimately, Porter was evaluated by Dr. Kay in connection with the motion to withdraw his guilty plea. (TR68). However, Porter

refused to see Dr. Macaloosa, an "addictionologist" retained by Mr. Bardwell. (TR70-73). The addictionologist could not reach an opinion based solely upon Porter's records, and, because Porter refused to see the doctor, no "addictionology" testimony was available. (TR72-3).[2] Insofar as the penalty phase was concerned, Porter as "very fatalistic," and wanted no mitigation evidence presented. (TR76-7). The witnesses that did testify at the penalty phase were witnesses that Porter wanted to testify. (TR78). Porter was insistent that he did not want his family involved. (TR78; 91). Further, Porter did not want evidence of his military service presented. (TR91). Mr. Bardwell was unaware of Porter's background because he would not reveal it. (TR86). Porter did not cooperate, and foreclosed the presentation of military and family mitigation testimony. (TR91).[3] Porter's decision to plead guilty did not help his cause because there were no eyewitnesses -- Porter needed to fill in the facts of the crime for the jury, and, in Mr. Bardwell's opinion, the best hope for a sentence less than death lay in a proportionality challenge. (TR89; 94-5).

Sherman Pratt was an infantry Captain during the Korean Conflict, and was the commander of the rifle company in which Porter served in that conflict. (TR123-127). Mr. Pratt testified

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[2]Mr. Bardwell was well aware of the all-encompassing nature of mitigation testimony. (TR75).

[3]As Mr. Bardwell put it, after talking with Porter, he had no expectation of producing penalty phase evidence. (TR121).

about the combat operations in which his rifle company participated, and testified in great detail about the life of a combat infantryman during the first few months of the Korean Conflict. (TR128-159). However, Mr. Pratt has no personal knowledge of anything that Porter did while in the combat theater. (TR166).

Henry Dee is a psychologist who was engaged by Porter's present attorneys to evaluate his mental status. (TR205-208). Dee administered various psychometric tests to Porter and reviewed various records. (TR209-212).[4] Dee testified that his testing "strongly indicates" that Porter has some sort of cerebral damage in the frontal area of his brain. (TR214; 223). Dee alternatively stated that Porter **may** have some brain damage, and that he suffers from "frontal lobe syndrome" (or **has** damage to the frontal area of his brain). (TR214; 219-23).[5] Dee later concluded that Porter may suffer from Post-traumatic Stress Disorder (PTSD) (TR232); that Porter was suffering from an extreme mental or emotional disturbance at the time of the murders and that he has "organic brain syndrome with mixed features" (TR232); that his capacity to

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[4]Dee administered **part** of the WAIS intelligence test. ((TR213). He did not use the newer (and current) WAIS-R version. (TR212). Porter scored 92 on the verbal portion and 100 on the performance portion. (TR274). According to Dee, that 8-point spread in scores indicates brain damage. (TR274).

[5]Dee testified that psychometric testing (such as he administers) may reveal brain damage that medical tests such as the MRI fail to detect. (TR225).

appreciate the criminality of his conduct and conform that conduct to the law was substantially impaired by this cerebral damage and intoxication (TR234); and that the conclusions reached by the other mental state professionals involved in this case are wrong. (TR239).[6] Significantly, Dee relied on the dissenting opinion contained in this Court's direct appeal affirmance of Porter's convictions and death sentence for his version of the facts, and testified that this Court found, as a fact, that Porter was "substantially intoxicated." (TR260; 262; 266). However, Dee did admit that Porter can conform his behavior to the requirements of law when it is in his best interest to do so, and that Porter knows that it is wrong to murder two people. (TR261; 264). Despite the evidence of advance planning by Porter, Dee is of the opinion that this crime was impulsive. (TR273). Dee testified that Porter probably does not meet the criteria for a diagnosis of Anti-social Personality Disorder, and, because of the "frontal lobe damage," such a diagnosis is precluded. (TR279).

The State called Robert Carrasquillo, who was the case agent in this investigation, and who subsequently became employed as an investigator with the State Attorney's Office for the 18th Judicial Circuit. (TR290). In the course of his employment as a State Attorney investigator, he attempted to interview various persons in

[6]Dee stated that Porter was not literate enough to administer the MMPI instrument. (TR235-6). He did, however, state that he asked Porter's attorneys to give that test to Porter. (TR242).

Ohio regarding Porter, including Porter's ex-wife. (TR291). None of those persons would cooperate with such interviews, and Porter's ex-wife specifically stated that she would not cooperate because she feared that Porter might be released from prison. (TR291-2).

Dr. William Riebsame is a licensed psychologist who was engaged by the State to review the records in this case. (TR310-314). Dr. Riebsame testified that Dee's administration of the out-dated version of the WAIS test was not in conformity with standard psychological practice, and that the subtests of that instrument that **would** be of assistance in determining neurological damage were **not** given. (TR316-18). Dr. Riebsame also testified that the difference observed between the verbal and performance scores was not at all unusual. (TR318). As he put it, Porter's scores may indicate a learning problem; may indicate a lack of motivation; or may indicate that Porter has stronger abilities in one area than in another -- the scores are simply reflective of the strengths and weaknesses of the individual, and do **not** indicate brain abnormality or damage. (TR319). Dr. Riebsame would have administered an MMPI to Porter, and pointed out that there is an audiotape version of that instrument that can be used if the individual's reading level is not adequate. (TR320). Moreover, the MMPI has internal scales that indicate malingering, as well as having an "antisocial" scale, an elevated score on which would suggest that the individual is unlikely to respect the norms of society and has been in frequent

trouble with the law. (TR321). Porter meets most of the criteria for a diagnosis of Anti-social Personality Disorder, but, because of a lack of information, Dr. Riebsame cannot determine whether Porter satisfies the "conduct disorder" component of the diagnostic criteria. (TR322).[7]

Dr. Riebsame testified that the results of the various tests administered to Porter were contradictory, in that Porter would score inconsistently on tests that measured the same aspect of brain function. (TR323). Such inconsistent and contradictory results are suggestive of malingering. (TR323-26). Dr. Dee overstated the potential degree of brain damage that would potentially result from alcohol abuse, and, in any event, either an MRI or an EEG would definitely confirm or deny the existence of brain damage. (TR328).[8]

Based upon Dr. Riebsame's review of the evaluations conducted contemporaneously with Porter's trial, there is no indication of any extreme mental or emotional disturbance, nor is there any indication of brain damage. (TR330). Specifically Porter does not exhibit any seizure activity, which is normally present in the case of frontal lobe damage. (TR330). Moreover, if Porter suffered from enough brain damage to affect his behavior (and thus rise to the

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[7]Conduct disorder refers to behavior prior to the age of 15. *Diagnostic and Statistical Manual of Mental Disorders*–Fourth Edition, 90, 649-50. This information is apparently unavailable.

[8]Dee did not request either test, even though he acknowledged that those tests could conclusively prove his diagnoses. (TR243).

level of a mitigator), the behavioral correlates of such brain damage would be observable whether or not Porter was under the influence of alcohol. (TR331). Dr. Riebsame testified that Porter's behavior was probably the result of "adult antisocial behavior" rather than any brain damage or abnormality. (TR333). Further, the third-party information regarding the crime indicates that it was not an impulsive act, but rather was one that had been planned in advance. (TR334). Porter was subject to numerous stressors during the course of his capital trial, and, had he suffered from brain damage, he would have become disorganized, disoriented, and confused. (TR335). Porter exhibited none of those characteristics. (TR335). Porter was not under the influence of an extreme mental or emotional disturbance at the time of the murders, and all of the data supports that conclusion. (TR337-8). Porter's behavior was organized and goal-directed, and his behavior after the murders was that of a person who knew that he had done something wrong and did not want to be apprehended. (TR338-9). Dr. Riebsame has not offered a final opinion about Porter's mental condition because he has not been afforded the chance to evaluate Porter. (TR383).

Dr. Robert Kirkland is a psychiatrist who was retained by the State to review the mental state aspects of this case. (TR394-8). Dr. Kirkland wanted to evaluate Porter, but was not allowed to do so. (TR398). Dr. Kirkland is unwilling to make a diagnosis of

Porter, but, assuming that Dee is correct in his opinion that there is some brain damage, the cause of that damage cannot be determined. (TR405). There are medical tests that would determine whether or not any brain damage is present, but those tests were not conducted. (TR405-7). Further, it becomes more difficult to assess Porter's condition at the time of the crime as time passes. (TR407). Porter's demeanor before, during, and after the crime is very important to assessing his mental status, as is the way the crime was committed. (TR407). None of the mental state personnel who saw Porter close to the time of the crime were of the opinion that he had any significant mental illness, whether organic or non-organic in origin. (TR408). At the time of the murders, Porter was upset, but was not under the influence of any mental illness, nor were the murders the product of any mental illness. (TR413). Nothing supports the presence of an extreme mental or emotional disturbance, and Porter's behavior during his trial does not suggest the existence of brain damage. (TR415). Porter's ability to appreciate the criminality of his conduct and conform his conduct to the requirements of law was not substantially impaired, nor was Porter acting under extreme duress or the substantial domination of another. (TR416). Dr. Kirkland testified that none of the testing establishes the presence of brain damage, and went on to state that Dee made assumptions that cannot be made even based upon Dee's report. (TR419). It is not possible to determine

Porter's condition at the time of trial without many more facts than are available. (TR420).

SUMMARY OF THE ARGUMENT

This Court should dismiss this appeal for want of jurisdiction because Porter did not give notice of appeal within 30 days, as required by the *Florida Rules of Appellate Procedure.*

The collateral proceeding trial court correctly denied relief on Porter's ineffective assistance of counsel claims, finding that trial counsel's performance was not deficient, and that there was no prejudice. Trial counsel acted in accordance with instructions given him by Porter, and Porter should not be heard to complain because his instructions were followed. Finally, even if the "mitigation" at issue should have been presented, the result would not have changed, as the trial court found. The findings of the collateral proceeding trial court shold be affirmed in all respects.

Porter's claim that he is entitled to another *Huff* hearing on a claim that was filed *pro se* is based upon an inaccurate perception of the record, which indicates that, as Florida law allows, the collateral proceeding trial court exercised its discretion to consider only the pleadings filed by counsel, not Porter's *pro se* filings. Further, there is no factual basis for this claim because every claim contained in the Rule 3.850 motion filed by counsel was addressed at the *Huff* hearing.

Porter's claim that the collateral proceeding trial court should have granted an evidentiary hearing on five additional claims is foreclosed by the facts. Three of those sub-claims are foreclosed by one or more procedural bars. One of the remaining two sub-claims is conclusively rebutted by the files and records, and the final sub-claim (guilt phase ineffective assistance of counsel) has no factual basis because Porter represented himself, and ultimately pleaded guilty.

Porter's claim that he should have been afforded an evidentiary hearing on his claim of an improper use of "non-statutory aggravation" has no legal basis. That claim, as the lower court found, is procedurally barred and, alternatively, without merit. In any event, Porter has not identified what evidence could be produced in connection with this claim.

The claims concerning the penalty phase jury instructions and the "presumption of death in sentencing" are procedurally barred, and, alternatively, without merit.

Porter's claim concerning the aggravating circumstance jury instructions is, as the lower court found, procedurally barred, and, alternatively, without merit.

Porter's claim that his death sentence is based on an "automatic" aggravating circumstance is not only procedurally barred, but also meritless.

Porter's claim that the sentencing court failed to find

certain matters mitigating is procedurally barred.

Porter's claim of "improper prosecutorial argument" is procedurally barred.

ARGUMENT

1. PORTER'S NOTICE OF APPEAL WAS UNTIMELY

Porter gave notice of appeal from the denial of *Florida Rule of Criminal Procedure* 3.850 relief on July 12, 1996. (R1422). However, the orders appealed from, and the last Circuit Court action in this case, date from June 7, 1996, and May 10, 1996.[9] Under any view of the chronology, the notice of appeal was not filed until more than 30 days after the rendition of the order appealed from. Under settled Florida law, the notice of appeal is jurisdictional, and, when the notice is untimely, the appeal must be dismissed on jurisdictional grounds. *Fla. R. App. P.* 9.140(b)(3); *Jordan v. State,* 549 So.2d 805, 806 (Fla. 1st DCA 1989); *Johnson v. State,* 492 So.2d 755 (Fla. 1st DCA 1986); *Benz v. State*, 346 So.2d 1081 (Fla. 1st DCA 1977). Porter's notice of appeal is untimely, and this proceeding should be dismissed on that basis.

To the extent that further discussion of this issue is necessary, no principle of law, constitutional or otherwise, requires this Court to ignore its settled rules merely because

[9]The June order is the order denying Porter's motion for reconsideration. (R1412-1415). The May order is the final order denying post-conviction relief. (R1203-1216).

Porter is under a sentence of death. Timely filing of the notice of appeal is a jurisdictional requirement under long-settled law, and this Court must regularly apply and enforce its own settled procedural rules if those rules are to remain valid and worthy of respect from the federal courts. *See, Harris v. Reed,* 489 U.S. 255 (1989); *Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989); *Lindsey v. Smith*, 820 F.2d 1137 (11th Cir. 1987).

Finally, lest there be any question concerning the validity of a dismissal predicated upon an untimely notice of appeal, the United States Supreme Court has addressed that precise issue, and found that it is an adequate and independent state procedural rule that must be honored by the federal courts. In *Coleman v. Thompson*, the Court upheld a state procedural bar finding that was based upon the notice of appeal having been filed **3 days late**. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).[10] Porter is in the same position as was Coleman -- the result should be the same. This Court should dismiss this appeal for want of jurisdiction.

II. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pages 8-44 of his brief, Porter argues that his penalty phase counsel was ineffective for failing to develop various items of mitigation based upon Porter's military service, his childhood, his alcohol abuse, and his mental state. The collateral proceeding trial court addressed each of these specifications of ineffective

[10]Coleman was executed on May 22, 1992. *Death Row U.S.A.*

assistance of counsel, and denied relief. For the reasons set out below, that decision should be affirmed in all respects.

THE LEGAL STANDARD

Claims of ineffective assistance of counsel are evaluated under the well-known, two-part standard announced in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), where the Court held that:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

See also, Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). That standard is in the conjunctive, and, unless, the defendant can establish both deficient performance **and** prejudice, he is not entitled to relief. *Maxwell, supra*. In order to establish the deficiency prong of *Strickland*, the defendant must establish that counsel's performance fell outside the wide range of professionally competent assistance. *Strickland, supra,* at 688. The prejudice prong of the standard is established by a showing that there is a reasonable probability that "but-for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*., at 694. Moreover, contrary to Porter's suggestion, the *Strickland* standard is not an outcome-determinative one. Instead, that standard evaluates whether or not the proceeding itself was

unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). As the *Fretwell* Court emphasized, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id*., at 843.

Review of trial counsel's performance is highly deferential, especially where matters of trial strategy are concerned. *Strickland, supra,* at 689-90. Extensive scrutiny and second-guessing of attorney performance is not appropriate, and the analysis of any claim of ineffective assistance of counsel must begin with "a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Strickland, supra,* at 689. A defendant is "not entitled to perfect or error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So.2d 341, 343 (Fla. 1988). Even if the defendant establishes that a more thorough investigation might have been conducted, and even if that investigation might have been fruitful, that showing does not establish that counsel's performance fell outside of the wide range of reasonably effective assistance. *Burger v. Kemp,* 483 U.S. 776, 794 (1987); *Sims v. Singletary,* 12 Fla. L. Weekly Fed C113 (11th Cir. 1998).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and

to evaluate the conduct from counsel's perspective at the time." *Francis v. State,* 529 So.2d 670, 672 n. 4 (Fla. 1988). The ultimate question is not what the best lawyer would have done, nor is it what most good lawyers would have done -- the question is only whether a competent attorney reasonably **could** have acted as this one did given the same circumstances. *See, White v. Singletary,* 972 F.2d 1218, 1220-21 (11th Cir. 1992); *see also, Sims v. Singletary, supra*. That standard is a high one, with the result that the "cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 486 (11th Cir. 1994). Porter cannot carry his burden of proof, and the Circuit Court's denial of relief should be affirmed in all respects.

THE CIRCUIT COURT'S FINDINGS SHOULD BE AFFIRMED

As set out above, Porter alleged that penalty phase counsel was ineffective in his presentation of mitigation evidence. The Circuit Court conducted a two-day evidentiary hearing on the ineffective assistance of counsel claims, and, following the conclusion of that hearing (and the submission of post-hearing briefs), the Court denied relief in a written order which made specific findings of fact and conclusions of law. Those findings and conclusions are supported by competent, substantial evidence, and should be affirmed in all respects.

Porter presented the testimony of Dr. Henry Dee to support his

claim that the statutory mental mitigators were present. (TR205-89). In rebuttal of Dr. Dee's testimony, the State presented the testimony of Dr. William Riebsame, who, in the words of the Circuit Court, "specifically disagreed with Dr. Dee." (TR1207). The Circuit Court credited the testimony of Dr. Riebsame, and rejected as incredible the testimony of Dr. Dee. (TR1207). That determination is within the province of the finder of fact, is not clearly erroneous, and should not be disturbed. In rejecting the testimony of Dr. Dee, the Circuit Court relied on this Court's decision in *Bottoson v. State*, 674 So.2d 621 (Fla. 1996), wherein this Court had expressly approved the trial court's rejection of the testimony of the defendant's hand-picked mental state expert.

Moreover, to the extent that further discussion of this issue is necessary, the law is settled that the factfinder's resolution of conflicting facts cannot be clearly erroneous -- for that reason, there can be no basis for reversal because the credibility determinations made by the collateral proceeding trial court are not clearly erroneous, are supported by competent substantial evidence, and should be affirmed in all respects.

In addition to the factual determinations made based upon the testimony, the sentencing court made specific findings that:

> [t]he defendant was sober the night before the murders and he was sober immediately after the murders. He was able to drive and transact business. There is nothing in the record which would support that this mitigating circumstance [substantial impairment of ability to appreciate and conform] exists.

(TR1210). Further, as the collateral proceeding trial court found, Porter had given trial counsel explicit instructions not to speak to members of his family, and, moreover, **Porter had "refused to speak to the doctor who Defense Counsel sent to the jail."** (TR1210 n.4). As the collateral proceeding trial court found, Porter has "failed to show sufficient evidence that any statutory mitigators could have been presented." (TR1210). Porter's claim is nothing more than speculation, and, in any event, he cannot preclude an investigation into potential mitigation (either by express direction or as a result of a failure to cooperate), and then, years later, charge trial counsel with ineffective assistance of counsel for doing exactly what the defendant instructed. That is not the law because it makes no sense. *Sims, supra*. If the law was as Porter suggests, the strategy of choice would be for counsel to produce no mitigation at trial, in favor of presenting all of it during the collateral attack proceeding. Such a strategy is completely at odds with any sense of finality, and moreover, makes collateral attack the main event. That result is absurd.

In addition to the statutory mental mitigator, Porter argued that trial counsel was ineffective with regard to various items of non-statutory mitigation. To the extent that Porter argues that evidence of his "alcohol abuse" should have been presented, the finding of the sentencing court in rejecting the statutory mental mitigator is fatal to the non-statutory mitigator, as well. As the

collateral proceeding trial court found, the testimony of Porter's siblings on the issue of alcohol abuse was conflicting, and, further, there was no indication that Porter was intoxicated at the time of the murders. (TR1211). As the collateral proceeding trial court found, "even if the judge and jury had been presented with evidence of the Defendant's prior problems with alcohol, the effect of any such evidence on the outcome of the sentencing procedure would have been insignificant at best." *Id*. That finding is supported by competent substantial evidence, is not an abuse of discretion, and should not be disturbed.[11]

To the extent that further discussion of this issue is necessary, it requires only a keen sense of the obvious to recognize the absurdity that would be inherent in finding that counsel was ineffective for not advancing a theory that is not supported by the facts of the crime, and as to which the only other evidence is conflicting. Even if counsel should have presented this "evidence", and the State does not concede that that is so, the effect, as the collateral proceeding trial court found, would have been insignificant. (TR1211). *See, e.g., Alvord v. Wainwright,* 725 F.2d 1282, 1290 n. 15 (11th Cir.), *modified,* 731 F.2d 1486,

[11]Under settled Florida law, the court is presumed to have exercised its discretion properly, and "the general rule is that unless it clearly appears that the trial court abused its discretion, the action of the trial court will not be disturbed by the appellate court." *State v. Spaziano*, 692 So.2d 174, 177 (Fla. 1997) *quoting, Henderson v. State*, 135 Fla. 548, 561, 185 So. 625, 630 (1938).

cert. denied, 469 U.S. 956 (1984). Finally, the distaste with which juries regard violent criminals who commit such crimes while under the influence of alcohol and drugs is well known -- the mitigation value of any evidence concerning alcohol usage is, at best, debatable.

The second category of non-statutory mitigation at issue concerns Porter's allegedly "abusive childhood."[12] However, as the collateral proceeding trial court found, Porter was 54 years old at the time of his capital trial, and any evidence of an allegedly "deprived and abusive childhood is entitled to little, if any mitigating weight when compared to the aggravating factors." (TR1211), *quoting Bolender v. Singletary,* 16 F.3d 1547, 1561 (11th Cir. 1994); *see also, Bottoson v. State, supra.* The collateral proceeding trial court's denial of relief is in accord with settled law, is supported by competent substantial evidence, and should be affirmed in all respects. To the extent that further discussion of this issue is necessary, and even assuming, *arguendo*, that this evidence should have been presented, Porter cannot establish the prejudice prong of the two-part *Strickland* standard because, even had the evidence been presented, there is no reasonable probability of a different result. That is what Porter must demonstrate in

[12]Porter alleges in his brief that he enlisted in the Army "at the time of the Korean War" to escape his home situation. *Initial Brief,* at 27. Porter entered the Army on August 30, 1949 -- the Korean Conflict did not start until almost one year later.

order to be entitled to any relief, and he cannot do that because the evidence concerning his childhood is, under the facts of this case, insignificant. Because that is so, there is no basis for relief.

The third category of mitigation evidence that Porter claims support his claim of ineffective assistance of counsel relates to his military service during the Korean Conflict. According to Porter, trial counsel was ineffective for not presenting this evidence because, if he had, Porter would have received a life sentence. *Initial Brief*, at 25. That conclusion requires a leap of logic that the facts and the law do not support.

In deciding this component of this claim adversely to Porter, the collateral proceeding trial court made the following findings of fact and conclusions of law:

> . . . Though this Court does recognize the Defendant's military service, it notes that if the Defendant had presented evidence of his military experience, the judge and jury would have been presented with evidence of the Defendant's recurring periods of being Absent Without Leave (AWOL), as well. In his testimony during the evidentiary hearing, for example, Sherman Pratt testified that the Defendant's military records reflect that the Defendant:
>
> > **did have two or three periods of absence without leave ... [and] that later on when he got back to the States he went AWOL, for ... almost a year. For that he received a special court-martial and was sentenced to I think six months, fifty dollars a month fine.**
>
> See Exhibit "A", transcript at pages 154, 155. These periods of desertion would have significantly impacted upon any mitigating effect that the evidence would have had, and indeed they would have reduced this impact to inconsequential proportions.

(TR1212). Those findings are within the province of the finder of fact, and should not be disturbed.

To the extent that further discussion of this issue is necessary, there can be no dispute that Porter's experiences in Korea preceded the murders at issue in this case by more than 30 years. Porter has made no attempt to connect his military experiences with the murders because no such linkage is possible. While those experiences were no doubt unpleasant, they do not mitigate the facts of these murders, which were planned well in advance of their commission and were carried out in a manner that is shocking in its ruthlessness because, in every sense of the word, the murders were cold, calculated and premeditated. *See, Porter v. State,* 564 So.2d at 1064. Under these facts (which are the only ones that matter), Porter's wartime experiences, no matter how horrible, cannot mitigate the facts of the murder for which he was convicted and sentenced to death. *See, Tafero v. Dugger,* 873 F.2d 249, 252 (11th Cir. 1989); *Elledge v. Dugger,* 823 F.2d 1439, 1447 (11th Cir.), *modified,* 823 F.2d 250 (11th Cir. 1987), *cert. denied,* 108 S.Ct. 1487 (1988).

Finally, as the collateral proceeding trial court found, even if all of the "unpresented" mitigation **had** been presented, the result would not have changed. (TR1212). That finding is supported by competent, substantial evidence, and should not be disturbed. That finding is within the province of the finder of fact, is not

an abuse of discretion, and should be affirmed in all respects.

To the extent that other issues are presented on pages 34-44 of Porter's brief, those issues collapse onto themselves because they ignore the fact that Porter refused to cooperate with the mental health professional obtained by trial counsel, and that he furthermore instructed counsel not to speak to members of his family. (TR1210). Those facts, which Porter has chosen to ignore, are dispositive of the issue -- it is a basic premise that *Strickland* requires the post-conviction courts to view trial counsel's conduct from his perspective as of the time of the challenged actions. It takes little analysis to reach the conclusion that counsel cannot have been ineffective when the defendant is the one who, by his actions, caused the actions that are alleged to constitute ineffectiveness. Porter made his decision at the time of his trial, and he is bound by that decision. He cannot now relitigate his case using a new theory -- to hold otherwise would be to approve of obstructionist tactics by the defendant brought about by the hope that, if the first result was not satisfactory, a second chance would be forthcoming under the guise of an ineffective assistance of counsel allegation. That is not the law, and there is no basis for relief. The collateral proceeding trial court should be affirmed in all respects.

III. THE *HUFF* HEARING CLAIM

On pages 44-46 of his brief, Porter argues that he was not afforded a *Huff* hearing on claim 11 of his Rule 3.850 motion.

Specifically, Porter's claim is that he was not present in Court to present argument on the *pro se* claims that he had submitted, even though he was represented by counsel.[13] This claim is not a basis for relief.

The issue contained in Porter's brief is, as understood by the State, that Porter is entitled to a *Huff* hearing on Claim 11, which was contained within a *pro se* pleading. Porter's position apparently is that he is entitled to the opportunity to **personally** appear before the Circuit Court and **personally** conduct the *Huff* hearing on that claim.[14]

The "issue" contained in Porter's brief has apparently not been directly addressed by this Court. The issue will remain unaddressed because it is not presented in this case, despite Porter's claims to the contrary. The true facts are that Porter's collateral proceeding attorney *did* argue claim 11 during the *Huff* hearing. (R257-260).[15] The only reference to Porter's absence was when counsel asserted that he "would prefer that Mr. Porter were here to argue these particular" matters contained within paragraph 3 of claim 11. (R260). Counsel's

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[13]There is no claim that a *Huff* hearing was not conducted as to the other claims contained in the motion.

[14]On page 45 of his brief, Porter refers to "claims" in the plural, with the implication being that there are claims in addition to claim 11 that are included within this issue. Those claims are unidentified, and the State cannot address them.

[15]On page 46 of his brief, Porter uses the page numbers assigned by the court reporter. On page 45 of his brief, he uses the numbers assigned by the clerk when the record was assembled. The confusion engendered by that practice is obvious.

position was that he could not "efficiently" argue those claims without Porter's presence. (R260). Such a claim is, at most, an admission of lack of preparation on the part of counsel -- it is not a preclusion of argument on the claim, nor is there any due process component implicated in connection with this claim. Counsel **did** argue claim 11, and the State (quite properly) responded thereto. (R164-167). Porter's claim has no basis in fact, and, because that is so, does not provide a basis for reversal. (R160-169).

To the extent that this frivolous claim deserves any further response, Florida law is long-settled that:

> [w]hen the accused is represented by counsel, affording him the privilege of addressing the court or the jury in person is a matter for the sound discretion of the court.

State v. Tait, 387 So.2d 338, 340 (Fla. 1980); *see also, Powell v. State,* 206 So.2d 47, 48 (Fla. 4th DCA 1968); *Thompson v. State,* 194 So.2d 649, 650 (Fla. 2d DCA 1967).[16] It is debatable whether the facts of this case even implicate that rule of law, but, assuming *arguendo* that they do, there was no abuse of discretion in expecting counsel to argue the claims that Porter had wanted raised. There is simply no act upon which to base a claim of error, and the lower court's denial of relief should be affirmed in all respects.

Alternatively and secondarily, without conceding that error of any sort took place, even assuming that Porter *should* have been allowed to handle the *Huff* hearing as to claim 11, any error is

[16]The trial court exercised its discretion to consider only those motions filed by counsel. (R30-31).

harmless beyond a reasonable doubt. None of the issues contained in claim 11 set out grounds for relief because, as the lower court found, the pleading does not properly plead a *Brady* claim (to the extent that such undercurrent is present), and the rest of that claim is a challenge to the sufficiency of the evidence which is improper in a collateral proceeding. (R347-350). *See, Mendyk v. State,* 592 So.2d 1076 (1992); *Routly v. State,* 590 So.2d 297 (Fla. 1991); *Jackson v. State,* 640 So.2d 1173, 1174 (Fla. 1994). Even if the lower court should have secured Porter's presence before conducting a *Huff* hearing on claim 11, that error is harmless beyond a reasonable doubt because an evidentiary hearing was not required on any of the sub-components of claim 11. *See, Groover v. State,* 703 So.2d 1035, 1038 (Fla. 1997). The collateral proceeding trial court should be affirmed in all respects.

IV. THE DENIAL OF AN EVIDENTIARY HEARING CLAIM

On pages 47-75 of his brief, Porter asserts that he should have been afforded an evidentiary hearing on some five discrete claims, which are discussed at length in his brief. The collateral proceeding trial court denied relief on these individual claims, and that decision should be affirmed in all respects for the reasons set out below.

A. THE INCOMPLETE RECORD CLAIM

On pages 47-52 of his brief, Porter argues that the transcript of his capital trial is inaccurate. The lower court found this claim procedurally bared because it could have been but was not raised on

direct appeal. (TR327). That ruling is in accord with settled Florida law, and should be affirmed in all respects. *See, Muhammad v. State,* 603 So.2d 488 (Fla. 1992). Moreover, the lower court made various factual findings regarding this claim. Specifically, that court found that Porter "has failed to provide any support for these allegations". (TR327). The court further found that, **following review of the record that was filed with this Court**, "no omissions, inconsistencies or other errors exist in the transcription of the witnesses' testimony". (TR327). Those findings of fact are supported by competent substantial evidence, and should not be disturbed on appeal. Moreover, to the extent that further discussion is necessary, there is no component of this claim on which an evidentiary hearing would be proper -- this claim could only have been resolved by reviewing the testimony of the witnesses, as the trial court did. Finally, the irony of this claim is that each witness about which Porter complains was a witness at the guilt phase of his capital trial, which, as this Court is well aware, was cut short when Porter decided to plead guilty. *See, Porter, supra,* at 1062. **Porter's brief contains no allegation that the "inaccurate" transcript in some way induced him to plead guilty**. The precise relevance of the transcript claim is, to say the least, unclear. However, regardless of how it is viewed, it is not an available basis for relief of any sort.

B. THE *PATE* COMPONENT

On pages 52-57 of his brief, Porter argues that he was tried

while incompetent in violation of *Pate v. Robinson,* 383 U.S. 375 (1966). The Circuit Court denied relief on this claim on procedural bar grounds, and that ruling should be affirmed in all respects.

Under settled Florida law, a claim that a defendant was not competent to stand trial (or sentencing) is barred from collateral review if the determination of competency was not challenged on direct appeal from the conviction and sentence.[17] *Johnston v. Dugger,* 583 So.2d 657 (Fla. 1991); *see also, Scott v. Dugger,* 604 So.2d 465 (Fla. 1992); *Muhammad v. State,* 603 So.2d 488, 489 (Fla. 1992). Because this claim is procedurally barred, there is no basis for Porter's claim that the Circuit Court's denial of Rule 3.850 relief should be set aside and the case returned to that court with instructions to conduct an evidentiary hearing. The procedural bar holding should not be disturbed.

To the extent that further discussion of this claim is necessary, the collateral proceeding trial court made the following findings of fact regarding this claim:

> Prior to trial, the State filed a motion for appointment of psychiatrist, requesting that the Defendant be evaluated regarding his ability to understand the nature and severity of the charges against him. See Exhibit "x", Motion for Appointment of Psychiatrist(s). The trial court then appointed Dr. Constance Kay, Dr. J. Lloyd Wilder and Dr. David Greenblum, pursuant to Rule 3.210 and 3.211, Florida Rules of Criminal Procedure (1987), to determine the Defendant's competency to stand trial. See exhibit "y", Order Appointing Expert Pursuant to F.R.Cr, .P.3.210(b); Exhibit "Z", Order Appointing expert(s) Pursuant to

[17]Porter's competency to stand trial was evaluated before trial began, and he was found competent to proceed. (TR328-9).

F.R.Cr.P.3.210 and 3.211; and Exhibit "z", Amended Order Appointing expert Pursuant to F.R.Cr.P. 3.210 (b). The Defendant later refused to see Dr. Greenblum. See Exhibit "aa", Letter from Defendant.

At a hearing on November 30, 1987, both parties agreed that the reports submitted by Dr. Wilder and Dr. Kay would be admitted into evidence in lieu of live testimony. See Exhibit "ab", Excerpt of Transcript. Having considered the factors set forth in Rule 3.211 (2) (A) (I-vi), Dr. Wilder recommended that the Defendant be found competent to proceed. See Exhibit "ac", Written Psychological Report by J. Lloyd Wilder, M.D. Dr. Kay expressed reservations only about the Defendant's ability to exhibit appropriate courtroom behavior. Dr. Kay also noted that the Defendant was defensive about his inability to handle the spoken and written word. She indicated that this may be relevant to his handling his own defense. See Exhibit "ad", Written Psychological Report of Constance E. Kay, Ph.D., M.B.A.

The trial court then conducted a thorough inquiry of the Defendant regarding his competency to stand trial. See Exhibit "ab", Excerpt of Transcript. The court inquired whether the Defendant understood the charges against him and the maximum penalties involved. The court even allowed the Defendant to consult with standby counsel to ensure his understanding. The Defendant indicated that he understood the roles of the prosecution, defense, jury and court. He indicated that he was capable of interacting with counsel in the preparation of his defense. Upon request by the State, the court inquired specifically about the Defendant's ability to act appropriately in the courtroom. The court inquired into the Defendant's understanding of the procedure for making objections and the court's ruling on objections with or without argument form the parties. The court noted that having observed the Defendant on numerous occasions, the Defendant had always displayed proper decorum and conducted himself appropriately.

The Defendant suggests that the mental health experts reached their conclusions based on self-report by the Defendant. Collateral counsel indicates that current mental health evaluations indicated that the Defendant was not competent to enter his guilty pleas. Assuming the truth of these allegations, they alone do not demonstrate that the two mental health experts who examined the Defendant contemporaneous with his trial and sentencing conducted unprofessional examinations. "Mental health experts often reach differing conclusions." *Engle v.*

> *Dugger*, 576 So.2d 696, 702 (Fla. 1991). No other allegations are made regarding the inadequacy of the 1987 evaluations.
>
> A review of the psychological reports contained in the court file indicates that the evaluations were complete and addressed each and every concern of the trial court. The Defendant's interactions and communications with the trial court, the state and standby counsel indicate that the Defendant was alert and functioning properly. The Defendant filed pretrial motions and actively cross-examined state witnesses. See Exhibit "ae", Pre-trial Pro Se Motions; and Exhibit "af", Excerpt of Transcript. As noted by the trial court, the State's pretrial request for competency evaluations was done out of an abundance of caution. Se Exhibit "ab", Excerpt of Transcript. There had been no evidence prior to the request which called the Defendant's competency into question. This Court finds that there is competent and substantial evidence in the record that the mental health evaluations were adequate. Therefore, this claim is denied.
>
> The Defendant also argues that counsel was ineffective for failing to object to the Defendant having to read and evaluate the mental health reports himself and then defend against the. The record reflects that the Defendant knowingly waived his right to counsel and was made aware of the perils of self-representation. See Exhibit "ag", Excerpt of Transcript; and Exhibit "ah", Excerpt of Transcript. The trial court appointed Sam Bardwell for the purpose of giving legal advice when needed. At no time did the Defendant object to this arrangement. He may not now complain "that his 'co-counsel', provided for the purpose of giving advice upon request, ineffectively 'co-represented' him...." *Goode v. State*, 403 So.2d 931, 933 (Fla. 1981). Thus, this claim is denied.

(TR328-331). Those findings of fact are supported by competent substantial evidence, are not an abuse of discretion and should be affirmed in all respects.

In connection with this claim, Porter argues at length that he lacked the mental capacity to waive counsel, and suggests that the wrong standard of competency was utilized. This sub-claim fails

because it is based upon a claim that is procedurally barred, as the trial court found. (TR333). Moreover, to the extent that Porter asserts that a higher standard of competency applies in a waiver of counsel situation, that claim fails under binding precedent. In *Godinez v. Moran,* 509 U.S. 389, 113 S. Ct. 2680, 125 L.Ed.2d 321 (1993), the United States Supreme Court clearly held that the standard for determining competency to stand trial and competency to waive counsel are the same insofar as the required level of mental functioning is concerned[18]. This claim is based upon an invalid legal premise, and deserves no further attention.

C. THE *FARETTA* COMPONENT

On pages 57-66 of his brief, Porter argues that an inadequate *Faretta* hearing was conducted, and that he was "incompetent" to waive his right to counsel. According to Porter, the Circuit Court erred by not conducting an evidentiary hearing on this claim. This claim has no legal basis for the reasons set out below.

Under settled Florida law, allegations that the trial court failed to conduct a proper *Faretta* inquiry must be raised, if at all, on direct appeal from the conviction and sentence. *Bundy v. State,* 497 So.2d 1209 (Fla. 1986). The lower court imposed that settled procedural bar, and denied relief on that basis. (TR332). That disposition is in accord with settled law, and should be affirmed in

[18]The United States Supreme Court expressly reversed the Ninth Circuit's *Moran v. Godinez,* 972 F.2d 263 (9th Cir. 1992) decision on which Porter relies. *See, Initial Brief,* at 61.

all respects. There is nothing upon which an evidentiary hearing could have been conducted, and any argument to the contrary has no legal basis.

To the extent that further discussion is necessary, the Circuit Court made the following, alternative findings:

> Furthermore, this claim lacks merit. The record is replete with inquiries by the trial court concerning the Defendant's waiver of counsel. See Exhibit "ag", Excerpt of Transcript; and Exhibit "ah", Excerpt of Transcript. Each time the court asked a plethora of questions regarding the Defendant's background, education, and mental health; his experiences with the criminal justice system; his understanding of a defendant's right to counsel; the penalty sought by the State; the role of an attorney at trial; the dangers of self-representation; the mechanism for issuing subpoenas and filing motions; and the procedures for making opening and closing statements and examining witnesses. The record reflects that the exchange between the trial court and the Defendant did not consist of pro forma questions and pro forma answers. Based on these repeated inquiries, the trial court found the Defendant was freely, voluntarily and intelligently exercising his right of self-representation. See Exhibit "ag", Excerpt of Transcript; and Exhibit "ah", Excerpt of Transcript.

(TR332-333). Those findings are supported by competent substantial evidence, are not an abuse of discretion, and are an additional basis for the denial of relief on this claim.

D & E. THE *AKE*/INEFFECTIVENESS CLAIMS

On pages 66-75 of his brief, Porter claims that he is entitled to a hearing on his claims that the mental health experts who evaluated him did not conduct adequate evaluations, and that trial counsel was ineffective in connection with the mental state issues. These claims fail for the reasons set out below.

The lower court found that the pre-trial mental state evaluations were adequate based upon the files and records of the case. (TR334-36). This issue has been briefed in connection with sub-claim B, above, and is unworthy of repetition here. This claim was properly resolved without a hearing.

To the extent that Porter's claim is one of ineffective assistance of counsel, that claim collapses because Porter represented himself and ultimately pleaded guilty. As the lower court found, Porter knowingly and voluntarily waived his right to counsel, and "was the architect of his defense at trial." *Goode v. State,* 403 So.2d 931, 903 (Fla. 1981). In a very real sense, Porter's argument proves too much -- he sought and received the right to represent himself at trial. He cannot seek to exercise his right to self representation, and, upon conviction, allege that "counsel" was ineffective. Such an argument makes no sense[19]. Porter was competent to waive counsel, and that is the end of the inquiry. There is nothing contained within this "claim" upon which an evidentiary hearing could be conducted -- the lower court should be affirmed in all respects.

V. THE NON-STATUTORY AGGRAVATION CLAIM[20]

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[19]The adage to "be careful what you wish for because you might get it" comes to mind. Porter got what he wanted, and he cannot now attempt to transform those express requests into a basis for relief of some sort.

[20]This claim is numbered "VI" in Porter's brief. That is apparently a typographical error. The State has re-numbered this issue as "V", which is the next consecutive heading.

On Pages 75-76 of his brief, Porter argues that he is entitled to an evidentiary hearing on his claim that the sentencing judge erroneously relied on "non-statutory aggravation" in imposing a sentence of death. This claim was properly decided by the trial court, and the denial of relief should not be disturbed.

In ruling on this claim, the trial court stated:

> [t]he Defendant contends that the State relied on nonstatutory aggravating factors in arguing for the death penalty. Specifically, the Defendant contends that the trial court in its sentencing order relied on the time the murders occurred, the path of the bullet through the body of Evelyn Williams and the number of shots fired in imposing the death penalty.
>
> A claim that nonstatutory aggravating circumstances were improperly introduced is an issued which could or should have been raised on direct appeal. *Roberts v. State,* 568 So.2d at 1257-1258; *Brown v. State,* 596 So.2d 1026 (Fla. 1992); *Scott v. Dugger,* 604 So.2d 465 (Fla. 1992); *Remeta v. Dugger,* 622 So.2d 452 (Fla. 1993).
>
> Furthermore, the Defendant's contention is without merit. The nonstatutory aggravating factor claimed by the Defendant are merely the facts surrounding the murders and those facts relied upon by the trial court in finding that the murder of Evelyn Williams was especially wicked, evil, atrocious or cruel. (TR 342).

As the Circuit Court found, this claim is procedurally barred because it could have been but was not raised on direct appeal. That is a procedural bar under settled Florida law. *See e.g., Remeta v. State,* 622 So.2d 452 (Fla. 1992). Moreover, as the alternative finding of the trial court makes clear, what Porter attempts to make into a "non-statutory aggravator" is, in reality, merely the true facts surrounding murders and the facts upon which the sentencing court relied in finding the heinous, atrocious, or cruel aggravator.

(TR342). Porter should not be heard to complain because the true facts of his handiwork were contained within the sentencing order. Of course, "[m]urder is a grisly affair" *Jeffers v. Rickets,* 832 F.2d 476, 484 (9th Cir. 1987), *rev'd sub nom, Lewis v. Jeffers,* 497 U.S. 764 (1990) -- there is no legal or factual basis supporting this claim, and the circuit court should be affirmed in all respects.

VI. THE PENALTY PHASE JURY INSTRUCTION CLAIM

On pages 76-77 of his brief, Porter argues that the penalty phase jury instructions "shifted the burden" to Porter to prove that death was not the proper sentence, and that the trial court "employed a presumption of death" when it imposed sentence. This claim is procedurally barred and, alternatively, meritless.

In deciding this claim against Porter, the trial court stated:

> ...The trial court instructed the jury as follows:
>
> > However, it is your duty to follow the law that will be now given to you by the Court and render to the Court an advisory sentence, or sentences in this case, based on your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> See Exhibit "am", Excerpt of Transcript. The Defendant claims that the trial court employed a presumption of death.
>
> This is the standard jury instruction which has been approved by both the state and federal courts. *See Stewart v. State,* 549 So.2d 171 (Fla. 1989), *cert. denied,* 497 U.S. 1031, 110 S. Ct. 3294, 112 L.Ed.2d 1599 (1990); *Bertolotti v. Dugger,* 883 F.2d 1503 (11th Cir. 1989), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990). Moreover, this issue could or should have been raised on

> direct appeal. *Engle v. Dugger*, 576 So.2d 696 (Fla. 1991); *Byrd v. State*, 597 So.2d 252 (Fla. 1992); *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993); *Garcia v. State*, 622 So.2d 1325 (Fla. 1993). Therefore, this claim is procedurally barred.

(TR343)

The trial court's disposition of this claim on alternative procedural bar and no merit grounds is in accord with settled Florida law, and should be affirmed in all respects. To the extent that Porter includes an ineffective assistance of counsel component to this claim, the law is settled that a merits claim cannot be recast as one of ineffective assistance of counsel, *Medina v. State*, 573 So.2d 293 (Fla. 1990), and, further, counsel is not ineffective for not objecting to a standard jury instruction, which is the case here. *Harvey v. Dugger*, 656 So.2d 1253, 1258 (Fla. 1995). There is no basis for relief, nor is there any basis for an evidentiary hearing.

VII. THE OVERBROAD AGGRAVATORS CLAIM

On pages 78-84 of his brief, Porter argues that the jury instructions on every aggravator submitted to the jury were "overbroadly and vaguely argued and applied". This claim is not a basis for relief (in the form of an evidentiary hearing, presumably) for the reasons set out below.

The first reason that this claim is not a basis for relief is because, as the trial court found (TR347), it is procedurally barred because it could have been but was not raised at trial or on direct appeal. *See, e.g., Archer v. State*, 673 So.2d 17 (Fla. 1996); *Walls v. State*, 641 So.2d 381 (Fla. 1994); *Johnson v. State*, 593 So.2d 206

(Fla. 1992). That is a sufficient basis for denial of relief.

To the extent that further discussion of this claim is necessary, whatever may be said about the heinous, atrocious, or cruel aggravating circumstance jury instruction, this Court struck that aggravator on direct appeal. *Porter v. State,* 564 So.2d at 1063. This Court did, however, go on to find that death was still the proper sentence. *Id.,* at 1064-65. Insofar as the cold, calculated and premeditated aggravator is concerned, this Court found:

> However, the state did meet its burden in proving beyond a reasonable doubt that the murder was committed in a cold, calculated or premeditated manner without any moral or legal justification. Sec. 921.141(5)(i), Fla. Stat. (1985). To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, [footnote omitted] section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder. Therefore, section 921.141(5)(i) must apply to murders more cold-blooded, more ruthless, and more plotting thank the ordinarily reprehensible crime of premeditated first-degree murder. [footnote omitted].
>
> The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. *See, e.g., Hamblen v. State,* 527 So.2d 800, 805 (Fla. 1998); *Rogers v. State,* 511 So.2d 526, 533 (Fla. 1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. *Hamblen,* 527 So.2d at 805; *Rogers,* 511 So.2d at 533. *See, e.g., Koon v.*

> *State,* 513 So.2d 1253 (Fla. 1987), *cert. denied,* 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). *Hamblen* and *Rogers* show that heightened premeditation does not apply when a perpetrator intends to commit an armed robbery of a store but ends up killing the store clerk in the process. Nor does it apply when a killing occurs during a fit of rage because "rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. *Mitchell v. State,* 527 So.2d 179, 182 (Fla.), cert. denied, 488 U.S. 960, 109 S.Ct. 404, 102 L.Ed.2d 392 (1988).
>
> This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance.

Porter v. State, 564 So.2d at 1063-64. Those findings by this Court are more than sufficient to establish that this murder was cold, calculated and premeditated no matter how that aggravator is defined. *See, Archer, supra; Walls, supra.*

To the extent that Porter complains because the jury was "not told that the" during the comission of a burglary aggravator was insufficient by itself to support a sentence of death, that claim is alternatively procedurally barred and meritless, as the trial court found. (TR346-7). No component of this claim is sufficient to state a basis for an evidentiary hearing or any other relief.

VIII. THE AUTOMATIC AGGRAVATOR CLAIM

On pages 85-86 of his brief, Porter argues that his case should be remanded to the trial court for that court to consider the merits of his claim that his death sentence rests on an "automatic"

aggravator. Porter is not entitled to relief of any sort for the reasons set out below.

The first reason that Porter is not entitled to relief is because this claim is procedurally barred because it could have been but was not raised on direct appeal. That is a procedural bar under settled Florida law. *See, Garcia v. State,* 622 So.2d 1325, 1326 (Fla. 1993); *Roberts v. State,* 568 So.2d 1255 (Fla. 1990); *Jennings v. State,* 583 So.2d 316 (Fla. 1991).

The second reason that Porter is not entitled to relief on this claim is because the claim has no merit. *Hudson v. State,* 708 So.2d 256 (Fla. 1998); *Blanco v. State,* 706 So.2d 7 (Fla. 1997); *Orme v. State,* 677 So.2d 258 (Fla. 1996); *Mills v. State,* 476 So.2d 172 (Fla. 1985); *Clark v. State,* 443 So.2d 973 (Fla. 1983).

IX. THE FAILURE TO FIND MITIGATION CLAIM

On page 87 of his brief, Porter argues that certain matters should have been but were not found as mitigation by the sentencing court. As the Circuit Court found, this claim is procedurally barred because it could have been but was not raised on direct appeal. (TR352). That is a procedural bar under settled law. *See, Johnston v. Dugger,* 583 So.2d 657 (Fla. 1991); *Jennings v. State*, 583 So.2d 316 (Fla. 1991); *Engle v. Dugger,* 576 So.2d 696 (Fla. 1991); *Correll v. Dugger,* 559 So.2d 422 (Fla. 1990). Porter is not entitled to relief, and the trial court should be affirmed in all respects.

X. THE PROSECUTORIAL ARGUMENT CLAIM

On pages 88-90 of his brief, Porter argues that he is entitled to relief based upon "inflammatory and improper comments and arguments" on the part of the prosecutor. As the Circuit Court found, this claim is procedurally barred because it could have been but was not raised at trial or on direct appeal. (TR352-53). That is a procedural bar under settled law. *Van Poyck v. State,* 694 So.2d 636, (Fla. 1997); *Medina v. State,* 573 So.2d 293 (Fla. 1990); *Correll, supra.* Porter is not entitled to relief on this claim.

CONCLUSION

Based upon the foregoing arguments and authorities, the Circuit Court's denial of Porter's Rule 3.850 motion should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Amy Settlemire, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of December, 1998.

Of Counsel