IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1271

MICHAEL ALLEN GRIFFIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

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STATEMENT OF CASE AND FACTS

Defendant was charged, in an indictment filed on May 2, 1990, with: (1) the first degree murder of Off. Joseph Martin; (2) the armed burglary of Carlos Munoz's occupied hotel room; (3) the grand theft of Mr. Munoz's property; (4) the grand theft of Richard Marshall's car; (5) the aggravated assault of Off. Juan Crespo; (6) the theft of Off. Daphne Mitchelson's badge and (7) the possession of a firearm by a convicted felon. (R. 1-4)[1] The crimes charged in counts 1, 2, 3, 5 and 7 were alleged to have been committed on April 27, 1990. The crime charged in count 4 was alleged to have been committed between April 23 and 28, 1990. The crime charged in count 6 was alleged to have been committed between February 25, 1990 and April 28, 1990. On December 13, 1990, the State entered a nolle prosequi on count 5 and filed an information charging Defendant with the attempted first degree murder of Off. Crespo. (R. 5, 934) Count 7 was severed from the remaining counts. (R. 934)

The matter proceeded to trial on January 28, 1991. (R. 6)

[1] The symbol "R." will refer to the documents and transcripts contained in the record from the direct appeal, Florida Supreme Court Case No. 77,843. The symbol "PCR." will refer to the record from the appeal from the denial of Defendant's first motion for post conviction relief, Florida Supreme Court Case No. SC01-457. The symbols "PCR2." and "PCR2-SR." will refer to the record on appeal and supplemental record on appeal in the Florida Supreme Court case no. SC06-1055. The symbol "PCR3." will refer to the record in the instant appeal.

On February 8, 1991, the jury found Defendant guilty as charged on all counts. (R. 515-20) The trial court adjudicated Defendant in accordance with the jury's verdicts. (R. 489-91)

The penalty phase commenced on February 13, 1991. (R. 61) During the penalty phase, Defendant presented eight witnesses: Clarence Thomas Griffin, Betty Dobe, Randy Gage, Al Fuentes, Brenda Waters, Judy Baran, Mario Montejo and Peggy Eckman. Mr. Griffin testified that he married Geneva Herring in 1962, and had two children with her, Charles and Robert. (R. 3639-41) He subsequently married Maryann Capaforte in 1969, and Defendant was born of that marriage on March 27, 1970. (R. 3641-42) After Defendant was born, his mother became very depressed, and Mr. Griffin attempted to get her psychiatric help, which she refused. (R. 3643)

Ms. Griffin did not care for Defendant properly, and he had to be hospitalized when he was six or eight months old. (R. 3643) At the time, Mr. Griffin was running his own construction company, was working long hours and was traveling for business extensively. (R. 3644) As such, Mr. Griffin hired a full time baby sitter to care for Defendant. (R. 3643-44) Mr. Griffin found the baby sitters, the Montejos, through a newspaper ad. (R. 3644)

When Montejos first started caring for Defendant, Defendant

was not a year old, and Mr. Griffin would pick Defendant up every day. (R. 3644-45) Mr. Griffin believed that Defendant was well care for by the Montejos and started leaving Defendant in their care for longer periods of time. (R. 3645) Eventually, the Montejos moved, and Defendant began to live with them, being picked up by his father only on weekends. (R. 3645) During the time that Defendant lived with the Montejos, he had very little contact with his mother. (R. 3645-46)

When Defendant was around seven, Mr. Griffin stopped having to travel for business and brought Defendant back to live with him and Defendant's half-brother Charles. (R. 3645-47) Around 1978 or 1979, Mr. Griffin divorced Defendant's mother. (R. 3636) After the divorce, Mr. Griffin did not see Defendant's mother again and did not believe that Defendant had seen her. (R. 3646) However, Defendant did visit his maternal grandmother on occasion. (R. 3647) Mr. Griffin believed that the lack of interaction with his mother had a negative effect on Defendant even though Defendant did not speak about her much. (R. 3655)

When Defendant returned to the family, Mr. Griffin was still working eight to ten hours a day and used babysitters to care for Defendant while he worked. (R. 3648) Mr. Griffin also had a drinking problem, which he did not consider alcoholism, until 1981. (R. 3653) Mr. Griffin found it difficult to raise

Defendant on his own but described Defendant as a very easy-going child who never got mad and had a good relationship with his half-brothers. (R. 3648, 3650) However, Mr. Griffin did occasionally have to discipline Defendant by spanking him with a belt or using verbal discipline. (R. 3648-49) Defendant's immediate response to the discipline was good, but he would ignore the discipline as time passed and did not like being grounded. (R. 3649)

Because the family moved, Defendant attended three or four different elementary schools. (R. 3650-51) He also attended one junior high school and dropped out of high school around the age of 16. (R. 3651) When Defendant was around 15, he was placed in special classes because his grades dropped. (R. 3651) However, Mr. Griffin did not know why Defendant's grades dropped. (R. 3651) He admitted that he had only been to Defendant's school to meet with Defendant's teachers when Defendant was younger. (R. 3652)

When Defendant was about 10 or 11 and again when he was 15 or 16, Defendant experienced fainting spells. Mr. Griffin never sought treatment for Defendant because he did not think it was a problem. (R. 3653) However, Mr. Griffin believed that he was a good father to Defendant and supervised him. (R. 3655)

When Defendant was about 15, Defendant took his father's

gun without permission. (R. 3654) Mr. Griffin went to a pizza parlor where Defendant hung out and enlisted the assistance of the manager in getting his gun back. (R. 3654) Starting around the age of 12, Defendant had begun getting into trouble with the law. (R. 3663) Defendant was sent for a psychiatric exam in connection with his juvenile arrests and was given limited counseling. (R. 3665) This continued until the arrest in this case. (R. 3664) When Defendant was around 17, he worked with his father and half-brothers. (R. 3650) However, Defendant did not like working in construction, quit and never held a job for very long. (R. 3662)

Two months after Defendant's arrest for this crime, Defendant's half-brother Robert died of complications from AIDS. (R. 3652) On cross, Defendant's father admitted that he had only acted as a single parent to Defendant for about four years because he had been living with a woman for the past ten years. (R. 3658-59)

Ms. Dobe, an office manager at a law firm, testified that she met Defendant and his father at a friend's home in the summer of 1979. (R. 3672-74) At the time, Defendant and his father were living in the back of his father's car. (R. 3678) As a result, Ms. Dobe allowed them to move into her home for seven months. (R. 3678, 3680) Ms. Dobb stated that she moved away from

Defendant and his father because one of Defendant's father's friends had threatened her with a knife. (R. 3681) For the first couple months after she moved, Defendant and his father visited her on occasion. (R. 3682) She then lost touch with them until she saw them walking down the street when Defendant was around 15. (R. 3682) When she spoke to them, Defendant's father told Ms. Dobe that they were living in the Blue Royal Hotel, which she described as "probably the biggest sleeze joint in North Miami." (R. 3682)

Ms. Dobe stated that Defendant appeared to be a bright child but sullen and angry. (R. 3679) She knew that Defendant had just been removed from a home where he was loved. (R. 3679) She believed that Defendant acted that way because his mother had left and his father was drunk all the time. (R. 3680) She stated that she believed Defendant's father was an alcoholic and described him as developing the shakes when he once went two weeks without drinking. (R. 3680)

Mr. Gage testified that he met Defendant when Defendant hung out at a pizzeria he managed. (R. 3692) He struck up a friendship with Defendant, who seemed very quiet and withdrawn. (R. 3693) Mr. Gage once received a call from Mr. Griffin who was concerned that Defendant, who was not living with him at the time, had come to his house and stolen a gun. (R. 3694) Mr.

Griffin asked Mr. Gage to convince Defendant to return the gun so that he would not get into trouble with it. (R. 3695) When Mr. Gage saw Defendant later that evening, he convinced Defendant to give him the gun, got the gun from Defendant and returned it to Defendant's father. (R. 3695-96)

Mr. Gage stated he wrote an article about Defendant that was published in the New Times. (R. 3691-92) He stated that he decided to write the article because he had seen media coverage of Defendant's arrest and believed it unfairly depicted Defendant as a "monster killer." (R. 3696-97) He insisted that Defendant was just a messed up kid who did a horrible thing. (R. 3697-98)

Mr. Fuentes testified that he had been hired as a defense investigator in the case and had come to know Defendant. (R. 3711-13) Mr. Fuentes stated that he had visited Defendant in the jail three or four times, sat with him in the courtroom and spoken to Defendant about three times a week since he became involved in the case. (R. 3713-14) In addition, Mr. Fuentes had spoken to Defendant's father, his stepmother, members of the Montejo family, Defendant's school teacher and his friends about Defendant. (R. 3714-15) Everyone was very cooperative and wanted to help Defendant. (R. 3715)

Mr. Fuentes testified that he was familiar with the hotel

Ms. Dobe mentioned which he described as frequented by prostitutes, pimps and low-life type of people. (R. 3716-17) Mr. Fuentes stated that Defendant had acted as if he was remorseful. (R. 3717) He described a time when Defendant started crying while discussing the incident. (R. 3717)

Ms. Waters testified that she was a special education teacher and that Defendant had been one of her first students. (R. 3720-21) Ms. Waters stated that Defendant had been is a class for emotionally handicapped students, which she described as "students that could not function in a regular classroom for some underlying reason." (R. 3721-22) She stated that Defendant had been subjected to a "full battery of psychological tests" to be placed in the class. (R. 3722) She later added that students were sent to emotionally handicapped classes when they were social withdrawn, hyperactive or came from abusive or chemically dependent families. (R. 3723) However, Ms. Waters did not know much about Defendant's background and never met Defendant's father. (R. 3722)

Ms. Waters stated that Defendant was very well behaved and respectful in her class and seemed concerned about doing well and pleasing his father. (R. 3722) Defendant seemed to be of average or above average intelligence, read above his grade level and did well in most of his subjects. (R. 3723) She

admitted that Defendant's problems were not one of the most severe problems of her students. (R. 3728) She had corresponded with Defendant while he was in pretrial detention and had visited Defendant once in the jail. (R. 3724-25) She believed that Defendant was depressed and remorseful when she saw him. (R. 3725) She described Defendant as "choked up with tears." *Id.*

Ms. Baran testified that she had met Defendant when he was 10 or 11 because her husband had met Defendant's father and stepmother in a tavern. (R. 3730-31) She described Defendant as a warm, friendly and affectionate child. (R. 3732) She stated that Defendant gave her advice on raising her son and seemed wise beyond his years. (R. 3732) Ms. Baran stated that she was in an abusive marriage to an alcoholic at the time and that Defendant was very sympathetic to her plight and help her care for her son. (R. 3733) She stated that Defendant complained to her that his family had little money, that his stepmother squandered what money there was on expensive clothing and that he was always left to care for his younger half-sister. (R. 3733-34) She described Defendant's stepmother as an alcoholic and drug abuser who was always intoxicated and did not come home until five or six in the morning. (R. 3743)

Ms. Baran stated that Defendant seemed to eat a lot and

that she considered this Defendant's way of looking for love. (R. 3735) She believed that Defendant had low self esteem and was neglected by his family. (R. 3735) However, Ms. Baran believed that Defendant looked up to his father. (R. 3736) She also believed that Defendant committed crimes because he needed attention and love. (R. 3737)

Mr. Montejo testified that he met Defendant when Defendant was six months old and Mr. Montejo's wife was hired to baby sit him. (R. 3746) At first, Ms. Montejo only cared for Defendant for a few hours. (R. 3746) However, over time, Defendant stayed longer and longer until Defendant came to be living with his family. (R. 3746) Mr. Montejo treated Defendant as his son, and Defendant referred to the Montejos as Poppy and Mommy. (R. 3745, 3747)

Mr. Montejo stated that Defendant was smart and active but seemed insecure and frightened. (R. 3748) While he lived with the Montejos, Defendant did well in school, never missed a day and was loved by his teachers. (R. 3748) Mr. Montejo stated that he had never seen Defendant behave violently but added that Defendant always acted on impulse. (R. 3748)

When Defendant was nine, both the Montejos and Defendant's parents were having financial difficulties so Defendant was sent to live with his grandmother at her request. (R. 3747-48) Mr.

Montejo believed that Defendant loved his grandmother. (R. 3747) However, within months of Defendant going to live with her, she died. (R. 3747)

After Mr. Montejo's testimony, counsel indicated that he was attempting to arrange for two additional witnesses, one of whom was a relative of Defendant. (R. 3753) Counsel indicated that he had been in contact with this relative well before trial. (R. 3754) The next day, counsel indicated that this relative was Defendant's uncle Lewis Capaforte and that Defendant and counsel had made a decision not to call him. (R. 3769)

Peggy Eckman testified that she met Defendant in a park 7 years before trial and considered him a close friend. (R. 3780, 3782) She described Defendant as the nicest guy she ever met and had never seen him behave violently. (R. 3783-84) After considering this evidence, the jury recommended that Defendant be sentenced to death by a vote of 10 to 2. (R. 612)

On March 7, 1991, the trial court followed the jury's recommendation and sentenced Defendant to death. (R. 497-13) In aggravation, the trial court found Defendant had been convicted of a prior violent felony, the murder had been committed during the course of a burglary, the murder was committed to avoid a lawful arrest merged with the fact that Off. Martin was a police

officer in the lawful performance of his duties and the murder was committed in a cold, calculated and premeditated manner (CCP). (R. 502-09) In mitigation, the trial court found the Defendant's age of 20, Defendant's remorse, Defendant's learning disability, and Defendant's "traumatic childhood, having been abandoned first by his natural mother, shortly after birth, and then by his natural father, an alcoholic, followed by a forced permanent separation from his foster parents at the age of seven (7) through the actions of his natural father, and finally, living under deplorable conditions with his alcoholic father throughout the remainder of his childhood." (R. 509-11) The trial court did not specifically assign a weight to each of these mitigates. *Id.* Instead, it merely found that the aggravation "vastly overshadows" the mitigation. (R. 512)

The facts adduced at trial were:

> On April 27, 1993, [Defendant], Samuel Velez, and Nicholas Tarallo determined to commit a burglary. They left Tarallo's apartment in [Defendant's] father's Cadillac and drove to the location of a white Chrysler LeBaron where they switched cars. [Defendant] had previously stolen the Chrysler, and he used the vehicle during burglaries. Once in the Chrysler, the three proceeded to search for an appropriate target. After driving around, the trio approached an apartment building in Broward County. Nothing happened at this location, and as they left, [Defendant] suggested they go to the Holiday Inn Newport where [Defendant] had committed successful burglaries in the past. Upon arriving at the Holiday Inn, [Defendant] and Velez exited the car, entered a hotel room, and stole a cellular phone and purse. The three then left the

> Holiday Inn. Tarallo drove while [Defendant] and Velez divided the stolen property.
>
> While leaving the Holiday Inn and returning to the Cadillac, the three observed a police car. [Defendant] panicked and told Tarallo to turn, speed up, and turn several more times. During these maneuvers, another police car, driven by Officers Martin and Crespo, spotted the Chrysler, noticed the three men acting suspiciously, and began to follow. At this point, Tarallo tried to pull over but [Defendant] stated that he would not go back to jail and ordered Tarallo to continue to evade the police. Finally, Tarallo was able to pull over and attempted to exit the vehicle. As he got out, [Defendant] began shooting at the police, killing Officer Martin. After an exchange of gunfire, Tarallo and Velez exited the vehicle and surrendered to Officer Crespo. [Defendant] fled in the Chrysler and was eventually apprehended.

Griffin v. State, 639 So. 2d 966, 967 (Fla. 1994).

Defendant appealed his convictions and sentences to this Court, raising 6 issues. *Id.* at 970, 971, 971 n.4. This Court affirmed Defendant's convictions and sentences. *Griffin*, 639 So. 2d at 972. Defendant sought certiorari review in the United States Supreme Court, which was denied on March 6, 1995. *Griffin v. Florida*, 514 U.S. 1005 (1995).

On March 19, 1997, Defendant filed a shell motion for post conviction relief. (PCR-SR. 16-55) On December 10, 1999, Defendant filed his second amended motion for post conviction relief, raising 31 claims, including a claim that counsel had been ineffective in his investigation and presentation of mitigation and a claim that the State had written the sentencing order for the trial court. (PCR. 32-167) However, the motion

contained no claim that counsel was ineffective for failing to request the appointment of a second attorney. *Id.* After a *Huff* hearing, the lower court granted an evidentiary hearing on two claims: ineffective assistance of counsel for failing to investigate and present mitigation and the sentencing order was the product of *ex parte* communications between the State and trial court. (PCR. 251-55)

At the evidentiary hearing, Defendant first called Dr. Ernest Bordini, a neuropsychologist. (PCR. 270-71) Dr. Bordini testified that he had done evaluations in 5 to 7 capital cases previously. (PCR. 271-79) He first became involved in this matter in the spring or summer of 2000. (PCR. 279-80) As part of his evaluation, Dr. Bordini conducted a clinical interview with Defendant and reviewed Defendant's school, medical and prison records, depositions of his family members, police reports and witness statements. (PCR. 280-81) He also relied upon tests performed by Dr. Hyman Eisenstein. (PCR. 284-85) Dr. Eisenstein had given Defendant the WAIS, on which Defendant had score 102 or 103. (PCR. 285-86) This score was consistent with information from Defendant's school records. (PCR. 286-87) Dr. Bordini also believed that the pattern of performance on the test was consistent with some psychomotor difficulties that had been noted. (PCR. 287) He asserted that the tests of psychomotor

skills are very sensitive for brain damage. (PCR. 287) Dr. Bordini averred that this pattern indicated some difficulty with visual spatial perception, motor skills, attention and working memory. (PCR. 289) The result on the Wechsler Memory Scale showed that the auditory recognition memory was below recall memory. (PCR. 286) This pattern was sometimes associated with malingering, and no formal testing of malingering had been done. (PCR. 286)

In addition to relying on Dr. Eisenstein's testing, Dr. Bordini conducted his own testing. (PCR. 288) Two of those tests were specifically to determine if Defendant was malingering, and Dr. Bordini saw no signs of malingering. (PCR. 288) The battery of tests that Dr. Bordini performed was the Wechsler Memory Scale III, which Dr. Eisenstein had already done, the Halstein Reitan test and the California Verbal Learning Test. (PCR. 291-92)

Because of the pattern on the WAIS, Dr. Bordini tested Defendant's sensory perceptual skills. (PCR. 289) He found that Defendant had difficulty recognizing the fingers on his left hand and shapes placed in his left hand. (PCR. 290) These results indicated to Dr. Bordini that Defendant had something wrong with the right side of his brain. (PCR. 290)

Dr. Bordini next performed the Tactile Performance Test.

(PCR. 291) Defendant had a fair amount of difficulty in this test with his left hand, which caused Defendant to become frustrated. (PCR. 291) Dr. Bordini also found that Defendant had problems with motor persistence, which was consistent with frontal lobe problems. (PCR. 291) He found that Defendant demonstrated a severe level of impairment on some tests of visual memory but was normal on others. (PCR. 292-94)

Dr. Bordini also found that Defendant's ability to check appropriate and inappropriate responses was severely impaired. (PCR. 294) In tests of executive functioning, Defendant's results varied from normal to severe impairment. (PCR. 295) Dr. Bordini opined that Defendant's executive functioning measured was impaired at low or moderate level. (PCR. 295) He also found impairment in abstract reasoning, which he believed was indicative of frontal lobe damage. (PCR. 295-96) Defendant also showed mild perservation on figures and moderate perservation in learning a list of words. (PCR. 296-97) Again, Dr. Bordini opined that this was indicative of frontal lobe damage. (PCR. 297) He also observed difficulties in impulse and anger control. (PCR. 298-99) In Dr. Bordini's opinion, these finding of visual spatial perception problems and lack of impulse control were confirmed by Defendant's school records. (PCR. 299-300)

Dr. Bordini believed that Defendant's father's alcoholism,

his mother's history of mental illness, and the alleged difficulty of Defendant's birth were risk factors from neuropsychological problems in Defendant. (PCR. 300-01) He also felt that a report of a skull fracture was a risk factor. (PCR. 301) He asserted that there was a question about whether Defendant was a shaken baby based on an allegedly broken collarbone. (PCR. 301)

Dr. Bordini opined that Defendant suffered from attention deficit hyperactivity disorder, a conduct disorder and intermittent explosive disorder. (PCR. 309-16) He believed that Defendant could be treated for these problems with therapy and drugs. (PCR. 316-17) He also diagnosed Defendant as suffering from bipolar disorder not otherwise specified. (PCR. 318-21) Dr. Bordini felt that this diagnosis was supported by his interview with Defendant, Defendant's school records and the results of the MMPI administered by Dr. Eisenstein. *Id.* He also opined that Defendant had antisocial personality disorder. (PCR. 321-23)

Dr. Bordini believed that Defendant was abused and neglected as a child. (PCR. 326-28) The school records, Defendant's statements and the deposition of Defendant's father lead Dr. Bordini to believe that Defendant was raised in a cold, unpredictable environment with his family. (PCR. 328) He admitted that during the time Defendant lived with the Montejos,

he had a stable, loving family setting. (PCR. 328-29) Shortly after Defendant returned to his own family, Defendant's mother left and was not in contact with Defendant for years. (PCR. 329) Life with Defendant's father was chaotic. (PCR. 329) Dr. Bordini believed that this environment alone would cause a mood disorder. (PCR. 330-31) He found evidence of these problems in Defendant's school records and believed that the failure to have properly diagnosed and treated Defendant at that time was detrimental to him. (PCR. 331-32) Dr. Bordini believed that Defendant became severely emotionally handicapped while in school and should have been placed in a residential treatment facility. (PCR. 333)

Dr. Bordini opined that Defendant was acting under several emotional disturbances at the time of the murder. (PCR. 334) In reaching this opinion, Dr. Bordini relied upon the fact that Defendant had been on a two day crime spree before the murder. (PCR. 334-35) He believed that Defendant's behavior was both purposeful and impulsive as a means of retaliating against world for the death of his brother from AIDS and the shooting of his partner in crime. (PCR. 335-37) He also stated that the fact that Defendant preyed on victims of opportunity and panicked at the sight of the police shows that he was emotionally distressed. (PCR. 337-42)

Dr. Bordini had also seen a police report of an incident where someone had attempted to touch Defendant's genitals and had masturbated in front of Defendant when Defendant was 12. (PCR. 326-27) Dr. Bordini believed that the major effect on Defendant of this incident was his family's reaction to the incident. (PCR. 327)

Dr. Bordini had seen a report from Dr. Haber in which she had found antisocial personality disorder as well. (PCR. 323-24) However, he believed that Dr. Haber had conducted an insufficient clinical interview with Defendant. (PCR. 324-25) He had also reviewed Dr. Ansley's report and disagreed with her conclusions. (PCR. 301-09) He felt that Dr. Ansley had not conducted adequate testing, had improperly rejected Dr. Eisenstein's test results and had not conducted an adequate clinical interview. *Id.*

On cross, Dr. Bordini admitted that Defendant said that he began stealing from the Montejos when he lived with them. (PCR. 483) When he was caught, he was spanked. (PCR. 484) Defendant described his father as a warm person who helped him with his school work, indulged Defendant with toys and trips and was fair and understanding. (PCR. 485) Defendant's father was very lenient with him and only punished Defendant two or three times. (PCR. 487) As a result, Defendant believed he could get away

with anything. (PCR. 487) Defendant stated that his use of drugs and alcohol was minute. (PCR. 486) He stated that he avoided drugs and alcohol to stay in shape. (PCR. 489-90) Dr. Bordini admitted that Defendant's prior claim of having a problem with substance abuse was a lie to get a lesser sentence. (PCR. 526-28)

Defendant told Dr. Bordini that he first came in contact with the criminal justice system for carrying a concealed weapon at age 10 or 11. (PCR. 486-87) He progressed to joyriding and then stealing cars. (PCR. 488) Defendant made between $25,000 and $35,000 stealing cars. (PCR. 488) Defendant had successfully eluded the police before while stealing cars. (PCR. 489) He also shoplifted, ran away and lied. (PCR. 491) He was arrested for assault and battery and admitted to harming three or four other people physically. (PCR. 493) At 14, Defendant was placed in a juvenile facility. (PCR. 492) At 15, Defendant was placed in a halfway house and then enrolled in a juvenile intervention program. (PCR. 492-93)

By the age of 16 or 17, Defendant routinely carried a .9mm semiautomatic and had used a stun gun to disable a guard at an automotive dealership while stealing a car. (PCR. 493) By this time, Defendant had been transferred to the adult system. (PCR. 494) By the time Defendant killed Off. Martin, he had been

placed on probation and served three incarcerative sentences. (PCR. 493-94) After his last release from prison, Defendant became involved with a gang and started being involved in gunfights and threatening people with guns. (PCR. 494-95) Defendant became a leader in the gang. (PCR. 495)

Dr. Bordini admitted that Defendant had stated that he initially did well in school. (PCR. 496) However, he became a behavioral problem, talking excessively, fighting and being suspended. (PCR. 496) Dr. Bordini had read the PSI but had not realized that Defendant had committed a nearly identical burglary to the one he committed the night he killed Off. Martin 2 years earlier. (PCR. 497-500) Dr. Bordini had discounted Defendant's statement about killing the police rather than returning to jail because he considered them confusing. (PCR. 500-01) He had reviewed Defendant's prison records, which showed a long history of problems with authority figures. (PCR. 501-03) Defendant had claimed to have been hospitalized for being struck with a fishing pole while with the Montejos. (PCR. 503) However, Dr. Bordini found no records to support the alleged hospitalization and never spoke to the Montejos about it. (PCR. 503-05)

Dr. Bordini admitted that the results of his observations of Defendant in the mental status examination were mainly

normal. (PCR. 506-08) Dr. Bordini stated that Defendant had reported "some fragments of hallucinations" that were not "particularly meaningful." (PCR. 511) Dr. Bordini denied that Defendant's self-esteem was fair to positive but admitted that he had reported it as such. (PCR. 512) Among the behavior problems noted in Defendant's school records were aggression toward other students, threatening other students, lying and bringing weapons to school. (PCR. 515-16) Defendant's father did participate in a conference with Defendant's school about him and did authorize certain testing. (PCR. 517-18) By that time, Defendant was characterized as having no control over his behavior, knowing right from wrong and being remorseless. (PCR. 518-19) They indicated that Defendant's inappropriate behavior is goal-oriented. (PCR. 519) On November 10, 1982, Defendant was suspended from school for throwing a chair at a teacher and teacher's aide. (PCR. 523) Despite being placed in emotionally handicapped classes, Defendant remained disruptive, abusive and aggressive toward others. (PCR. 522-24) On October 4, 1983, Defendant was again suspended from school for wrestling with a teacher who was trying to stop Defendant from attacking another student. (PCR. 524) In 1984, he was suspended three times for physical attacks on teachers and students and once for bringing drugs to school. (PCR. 524-25) Defendant's EEG from 1988 was

normal. (PCR. 534) Dr. Bordini admitted that Defendant's performance on the WAIS-III, the Reitan-Klove Sensory-Perceptual Examination, the grip strength, the finger to nose, the Reitan Aphasia, WMS-III, Seashore Rhythm Test and the Speech Sound Perception Test, the Rey Fifteen Item Test, the CVLT word list, and the TPT memory and localization test were all average or above average. (PCR. 542-52) Dr. Bordini claimed that Defendant's alleged attention problem and his alleged problems with executive functioning did not cause Defendant to be unable to plan and execute his plans. (PCR. 552-69) Instead, it caused Defendant to be motivated to do inappropriate things. *Id.*

Maryann Griffin, Defendant's 58 year old mother, testified that she had been on disability for mental problems for about 10 years at the time of the evidentiary hearing. (PCR. 347-48) She had been being treated for mental illness periodically since the age of 12. (PCR. 353) At the age of 32, she met Clarence Thomas Griffin through her job. (PCR. 352) She believed that he was divorced at that time and began a romantic relationship with him. (PCR. 352-53) Eventually, she married Mr. Griffin and became pregnant. (PCR. 353-54) Mr. Griffin urged her to have an abortion, but she refused because she was afraid to do so. (PCR. 354-55) During her pregnancy, she experienced mental problems, which were not severe. (PCR. 355) After Defendant was born, Ms.

Griffin became depressed. (PCR. 355-56) Ms. Griffin did change Defendant's diapers, keep him clean and dress him nicely when he was in her care. (PCR. 356-57) However, Mr. Griffin kept taking Defendant to a babysitter because of her depression, but Defendant continued to live in her house. (PCR. 356-57) During this time, Mr. Griffin did not assist Ms. Griffin in caring for Defendant because he was not home. (PCR. 357) Mr. Griffin would either be at work or out drinking and gambling. (PCR. 357) Ms. Griffin characterized Mr. Griffin as an alcoholic and stated that he would say bad words to her when drunk. (PCR. 358) He also smoked marijuana and told Ms. Griffin that he took pills. (PCR. 361) Mr. Griffin also gambled and would lose thousands of dollars. (PCR. 361) Mr. Griffin was initially a good provider for his family, but his business circumstances changed and he was not being paid money owed him. (PCR. 360)

When Defendant was about 5 years old, Mr. Griffin would slap Defendant hard across the face if Defendant was too loud. (PCR. 359) When Defendant was 7 or 8, the family's house burned down because Mr. Griffin fell asleep holding a lit cigarette. (PCR. 360) Defendant was home at the time of the fire and sustained some scratches in being removed from the house through a broken window. (PCR. 360) Ms. Griffin separated from Mr. Griffin when Defendant was about 8 because of Mr. Griffin's

drinking. (PCR. 361-62) Defendant remained with his father, and Ms. Griffin lost touch with him. (PCR. 362) Ms. Griffin was next in contact with Defendant after he had been convicted and sentenced. (PCR. 362) No one contacted Ms. Griffin at the time of trial. (PCR. 363) However, Ms. Griffin claimed that she had tried to find Defendant during the time that she was not in contact with him. (PCR. 363-64)

On cross, Ms. Griffin admitted that she had abandoned and had not tried to contact another of her children. (PCR. 364-65) Ms. Griffin initially testified that she lived with Defendant and Mr. Griffin after the fire. (PCR. 365-66) However, she later stated that she did not know if Defendant had problems sleeping after the fire because she had not lived with him. (PCR. 367) She was impeached with her deposition testimony that she had lived with Defendant and that he had no problems sleeping. (PCR. 367-69) She then admitted that her memory was poor due to her mental problems. (PCR. 369-70) She also stated that she is frequently confused. (PCR. 370) She has been diagnosed with manic depression and schizophrenia and lives in an assisted living facility because she is incapable of caring for herself. (PCR. 370-73)

Ms. Griffin stated that Defendant's birth was normal and that Defendant was a normal, healthy child with no mental or

substance abuse problems when she lived with him. (PCR. 374) During that time, Defendant did well in school and was smart. (PCR. 375) Defendant never required medical treatment as a result of being slapped by his father, and Ms. Griffin never reported any of these incidents as child abuse. (PCR. 375-76) Ms. Griffin never sought mental health treatment for Defendant and characterized him as a good, happy-go-lucky child, who was well dressed in clean clothing. (PCR. 376-77) The times when Defendant was slapped by his father were when Defendant was misbehaving. (PCR. 377) She never saw Defendant being abused and did not abuse him herself. (PCR. 377)

Defendant originally only stayed at the Montejos' home when his parents were working. (PCR. 378) If they were busy in the evening or traveling out of town, Defendant would stay overnight. (PCR. 378) Ms. Griffin knew the Montejos, trusted them to watch her child and believed that they were fond of Defendant and treated him like their own. (PCR. 378-80) Mr. Griffin paid the Montejos to babysit Defendant. (PCR. 380) Around the age of 5 or 6, Defendant started spending more time at the Montejos' home then his own and moved in with them when he was about 8. (PCR. 380-82) However, Defendant had moved back with his family before the fire. (PCR. 381) Ms. Griffin did not remember a time when they stopped paying the Montejos for

babysitting Defendant and had never heard of the Montejos' desire to adopt Defendant. (PCR. 383) At the time of Defendant's trial, Ms. Griffin was in a hospital in North Carolina in a diabetic coma. (PCR. 384-86)

Mario Montejo testified that Defendant was brought to his home when he was about 6 months old and remained in his care for 9 years. (PCR. 390-92) When the Montejos first started babysitting Defendant, Defendant would be in their care for about 4 hours at a time during working hours. (PCR. 392) Overtime, the amount of time spent with the Montejos expanded to the full working day, then some overnights were added and finally Defendant was living with them. (PCR. 392) Mr. Montejo stated that they agreed to keep Defendant longer because they came to love him. (PCR. 392) Mr. Montejo stated that Defendant was fed and taken care of by his parents but that his mother was not affectionate. (PCR. 392-93) During the time Defendant was living with the Montejos, his family would visit him there for an hour at a time and no more than once month. (PCR. 394-95) Defendant's parents were not affectionate to Defendant during the visits but did bring Defendant clothes, toys and material things. (PCR. 395) Mr. Montejo claimed that Defendant's parents were initially responsible about paying for Defendant's care but that after about 2 years, they would only pay sporadically.

(PCR. 395-96) Attempts to obtain payment were met with excuses. (PCR. 396) Mr. Montejo stated that he observed Mr. Griffin to be intoxicated several times. (PCR. 396-97) He also believed that Ms. Griffin was drinking. (PCR. 397)

Mr. Montejo stated that he and his wife arranged for Defendant to be enrolled in school and were responsible for seeing to Defendant's medical care. (PCR. 397-98) Mr. Montejo stated that Ms. Griffin's mother had wanted the Montejos to adopt Defendant when he was about 7, but his parents wanted custody of him. (PCR. 398) When Defendant was between 9 and 10, the Montejos placed Defendant in the care of his grandmother because Defendant's parents would not consent to an adoption and were not paying for Defendant's care. (PCR. 399, 401)

Mr. Montejo considered Defendant to be a son, Defendant was close to Mr. Montejo's extended family. (PCR. 399-400) Defendant did well in school and was intelligent. (PCR. 400) In second grade, Defendant was the teacher's pet until Defendant introduced the Montejos as his parents. (PCR. 400) Thereafter, the teacher almost threw Defendant out of her class and began sending complaints home about Defendant. (PCR. 400) The Montejos addressed the situation with the principal, Defendant was removed from that class and Defendant's school performance was again good. (PCR. 400)

About a year after Defendant went to live with his grandmother, the Montejos arranged for Defendant to join them on a trip to Disney World. (PCR. 401) At that time, Mr. Montejo noticed that Defendant was rowdy and disobedient. (PCR. 401)

Mr. Montejo stated that he testified at the penalty phase. (PCR. 402) Prior to testifying, he had spoken to an investigator and had been deposed but claimed not spoken to Defendant's attorney before being called at trial. (PCR. 402-03) Mr. Montejo did not feel that his testimony at the penalty phase was complete because counsel did not ask enough questions and because he was upset. (PCR. 403-04) In fact, both he and his wife were extensively interviewed prior to trial by an investigator who worked for Defendant's attorney and who took extensive notes. (PCR. 425-27) He admitted that his testimony at the evidentiary hearing was basically the same as his testimony at trial. (PCR. 427-28) He acknowledged that he was testifying because he wanted to get Defendant off death row. (PCR. 428)

Mr. Montejo admitted that Defendant was raised in a warm, loving family environment without physical or substance abuse during the 10 years Defendant lived with them. (PCR. 408-13) During this time, Defendant was healthy and showed no signs of mental or emotional problems. (PCR. 414) Defendant did well and behaved in school and did not exhibit any violent tendencies.

(PCR. 414-15) Mr. Montejo admitted he had been to Mr. and Ms. Griffin's home, which was nice and well supplied. (PCR. 417) Mr. Montejo admitted that Mr. Griffin was more affectionate to his children than Ms. Griffin. (PCR. 417) He also acknowledged that all of Defendant's material needs were met and exceeded by his parents. (PCR. 418) Mr. Montejo stated that the idea of the adoption was proposed by Defendant's grandmother and was not his or his wife's idea. (PCR. 421) After Defendant's parents had refused to have him adopted, Defendant remained with the Montejos for many months. (PCR. 422)

Stephen Minnis, a 3 time convicted felon, testified that he met Defendant when Defendant was 15 years old and was with a group of people in a public park making an excessive amount of noise, such that the park officials turned off the lights at the park and tried to remove the group. (PCR. 431-33) Mr. Minnis mediated this incident and later assisted this group in settling a dispute with the park and city officials. (PCR. 433-34) Through these activities, Mr. Minnis noticed Defendant, who was treated as an outcast by the rest of the group. (PCR. 435) Eventually, Defendant began to attach himself to Mr. Minnis and started to visit his house frequently. (PCR. 435-37) During this time, Defendant indicated that his father did not care about him and that he did not like to be at home. (PCR. 436-37) Mr. Minnis

met Defendant’s father and always saw him either drinking or drunk. (PCR. 437-38) He believed that Defendant’s stepmother ignored Defendant and that his father thought Defendant was a lost cause. (PCR. 438) Defendant engaged in bad behavior to be considered cool. (PCR. 440) Defendant joined an auto-theft ring and earned the nickname Auto despite his lack of proficiency at stealing cars. (PCR. 440) Mr. Minnis did not consider Defendant to be a leader and noticed that he was self-conscious about his appearance. (PCR. 441) Shortly before the murder, Mr. Minnis observed an incident between Defendant and some police officers. (PCR. 442-43) During this incident, the police were attempting to disburse a group of teenagers loitering in a parking lot. (PCR. 443) Defendant and the rest of the group were mouthing off to the police, and one of the officers allegedly threatened Defendant’s life. (PCR. 443)

Mr. Minnis stated that he was called by Defendant’s attorney and asked to come to the trial. (PCR. 444) Mr. Minnis claimed that he came, went into the courtroom during proceedings and was told to wait in the hall. (PCR. 444) He claimed that while he was waiting, he was approached by police officers and was threatened. (PCR. 445-46) Mr. Minnis stated that he left the courthouse, did not ever talk to Defendant’s attorney again and never told anyone that he had been intimidated. (PCR. 446-47)

On cross, Mr. Minnis admitted that he had been dishonorably discharged from the military. (PCR. 449) He never noticed any signs of mental illness in Defendant. (PCR. 450-51) He knew that Defendant's father provided for his needs and was not physically abusive to Defendant. (PCR. 452-53) However, Defendant's father disapproved of Defendant's lifestyle and wanted Defendant to get an education. (PCR. 453-54) During the time Defendant knew Mr. Minnis, Defendant never held a full time job. (PCR. 454)

Mr. Minnis admitted that Defendant knew Off. Martin before he killed him. (PCR. 457-62) An incident had occurred between them over a girl Defendant liked. *Id.* However, Mr. Minnis denied that this angered Defendant. *Id.* Defendant knew that Off. Martin was one of the officers that had stopped him before he shot Off. Martin. (PCR. 462-63) Mr. Minnis never told anyone about the alleged intimidation. (PCR. 466-68) In fact, Mr. Minnis stated that he told his wife to tell the defense he was unavailable. (PCR. 468-69)

Charles Griffin, Defendant's half-brother who was 7 years older that Defendant, testified that he had previously been convicted of 3 felonies. (PCR. 597-98) Charles' brother Robert died of AIDS in 1987. (PCR. 598-99) Charles first met Defendant's mother, who was pregnant with Defendant, when she came to his mother's home with his father. (PCR. 601-02) By that

time, Charles' parents were divorced. (PCR. 601) Charles remembered his father caring for Defendant and stated that Defendant's mother would argue with their father because she wanted a nanny to care for Defendant. (PCR. 603) Charles visited Defendant on a few occasions at the Montejos when Defendant was 4 or 5. (PCR. 607-08) He believed that the Montejos treated Defendant well and loved him. (PCR. 608)

Charles claimed that after Defendant came to live with his father and his father's girlfriend, the family would have drugs open and available in the house. (PCR. 611) He characterized his father as an alcoholic, who gambled and used pills. (PCR. 622, 632) On 2 occasions, Defendant's father drove drunk with Defendant and Charles in the car and sideswiped the barricades on the side of the road. (PCR. 622-25) He stated that he would take Defendant and Charles to bars to eat and would not want to leave when they wanted to do so. (PCR. 625) Their father would occasionally leave them at the bar, and they would end up being cared for by barmaids. (PCR. 625) Charles' described Defendant's step-mother as an alcoholic who spent the household money on herself. (PCR. 633-34) At one point, Defendant lived with Charles' mother at one time but was sent back to his father because of his misbehavior. (PCR. 627-30) At other point, Charles claimed that Defendant stopped going to school because

his clothes were not clean. (PCR. 635)

Charles stated that he only knew of one time when his father struck Defendant. (PCR. 630-31) When Defendant was alone, he would talk to himself and seemed to be pretending to be at the Montejos' home. (PCR. 611-12) Charles also claimed that Defendant mouthed words after saying them. (PCR. 612-13) He asserted that Defendant's mother acted as if Defendant was not her child and called him names. (PCR. 613-17) Charles and Defendant once saw Defendant's mother exit a massage parlor and expose her buttocks and saw a picture of her with another man. (PCR. 617-20) Charles stated that at the time of Defendant's trial, he was living at his father's home and would have testified if he had been asked. (PCR. 638-39)

On cross, Charles believed that Defendant lived with his parents until he was 2 or 3 but admitted Defendant could have been 4 or 4. (PCR. 651-52) Charles claimed that Defendant did not do well in school. (PCR. 653) Charles stated that after Defendant left the Montejos' him, he lived with his father and his father's girlfriend in Jensen Beach and then moved back to Miami with his father and mother. (PCR. 656) These moves probably occurred when Defendant was between 7 and 8. (PCR. 656-57)

Charles first stated that he was in Georgia at the time of

Defendant's trial, and then claimed to have been in Miami. (PCR. 662-63) Charles admitted that he was not speaking to his father at that time. (PCR. 663-65) Charles also claimed that his father discouraged him from testifying. *Id.*

The State called Dr. Jane Ansley, a neuropsychologist. (PCR. 669-85) In reaching her opinion, Dr. Ansley reviewed Defendant's prison records, Dr. Eisenstein's raw test data, Dr. Bordini's raw test data, Dr. Eisenstein's deposition, Dr. Bordini's deposition, his direct testimony from the evidentiary hearing, Dr. Bordini's report, Defendant's prison records and Defendant's school records. (PCR. 686-87, 705) She also conducted a clinical interview with Defendant. (PCR. 687) Because Defendant had already been given a number of tests, had been through a clinical interview with Dr. Eisenstein and had become upset while being tested by Dr. Eisenstein, Dr. Ansley decided to rely upon Dr. Eisenstein's information, to truncate the personal interview and to select tests that Defendant had not taken that were specific to problems noted in Dr. Eisenstein's information. (PCR. 688-92) In reviewing Dr. Bordini's data, Dr. Ansley saw some evidence of the practice effect, an improvement caused by having seen the questions already. (PCR. 692-93)

After reviewing all this information and conducting her own

testing, Dr. Ansley opined that Defendant did not have any major neuropsychological impairment. (PCR. 693) She found no evidence of brain damage in the history. (PCR. 694) The incident described to Dr. Bordini in which Defendant was allegedly hit by a fishing pole was uncorroborated and insufficient to have caused brain damage. (PCR. 694) She found no evidence of a seizure disorder. (PCR. 694-95) The prior descriptions of a seizure disorder were the result of poor record-keeping and contradicted by testing. (PCR. 694-95) The alleged fainting episode was caused by Defendant's blood being drawn. (PCR. 695)

The results of the testing on Defendant were almost all in the average range. (PCR. 695-96) While Defendant's performance did vary within the average range, they did not indicate any impairment. (PCR. 696) Dr. Ansley saw no evidence of inconsistency between Defendant's right and left sides. (PCR. 696-97) She discounted Dr. Bordini's finding of a left side problem because Defendant had performed in the above average range in the test relied upon to support this finding when Dr. Eisenstein had given it. (PCR. 697) She found no pattern to the results of Defendant's testing. (PCR. 697) Dr. Ansley explained that the reason Defendant had done badly on some tests given by Drs. Eisenstein and Bordini was that Defendant became angry during the testing and was not concentrating. (PCR. 698) Dr.

Ansley stated that Defendant had no frontal lobe impairment or impairment in executive functioning. (PCR. 699-700) Dr. Bordini misinterpreted the test result to find this problem. *Id.*

In evaluating Defendant's personality, Dr. Ansley relied upon Dr. Eisenstein's administration of the MMPI, Defendant's history and her interview with Defendant. (PCR. 700-01) She diagnosed Defendant as having mixed personality disorder with narcissistic and antisocial features. (PCR. 701-02) She rejected Dr. Bordini's finding of ADHD because it was inconsistent with the findings by the doctors who evaluated Defendant as a child and Defendant's test results. (PCR. 703-04) She asserted that a finding of Intermittent Explosive Disorder was incorrect because it can only be diagnosed if there is no other explanation for aggressive behavior. (PCR. 704) Because Defendant was diagnosed with conduct disorder as a child and antisocial personality disorder as an adult, his aggressive behavior is otherwise explained. (PCR. 704-05) Moreover, people with Intermittent Explosive Disorder are remorseful after an episode, and Defendant is not. (PCR. 705)

She stated that Defendant did not qualify for Bipolar Disorder because Defendant had never had any major depressive episodes by Dr. Bordini's own admission. (PCR. 705-06) She also found no evidence of hypermanic episodes. (PCR. 706-07) Dr.

Ansley also disagreed with Dr. Bordini's finding of a cognitive disorder, as such disorders result from a psychological effect of a medical condition and there was no medical condition. (PCR. 708) Dr. Ansley did find some evidence of a learning disability. (PCR. 708-09) Dr. Ansley stated that there was nothing in Defendant's school records and clinical interviews to suggest that a neuropsychological evaluation was necessary. (PCR. 712-16) The record and interview presented no signs of neuropsychological impairment. (PCR. 717-18)

Andrew Kassier, Defendant's trial counsel, testified that he had been practicing law for 9 years at the time he was appointed in this case and had worked both as an assistant public defender and as a private practitioner. (PCR. 792-94) While with the Public Defender's Office, Mr. Kassier had defended first degree murder cases, including capital case, and served as a training attorney at the Public Defender's Office and Executive Assistant Public Defender. (PCR. 794-95, 797-98) As a result, Mr. Kassier was well aware of the law regarding defense in a capital case and had been deemed qualified to handle such cases. (PCR. 795-97)

Mr. Kassier hired a private investigator and a mental health expert to assist him. (PCR. 793) The mental health expert was Merry Haber, whom Mr. Kassier had known and worked with for

years. (PCR. 798-802) Dr. Haber was familiar with the issue of mitigation and was recommended to Mr. Kassier by other defense lawyers as one of the best mental health experts for mitigation. (PCR. 802-03) The investigator Mr. Kassier chose was Al Fuentes. (PCR. 803) Mr. Kassier had Mr. Fuentes obtain Defendant's school records and provided them to Dr. Haber. (PCR. 803-04) Dr. Haber interviewed Defendant for the purpose of identifying mitigation. (PCR. 804-05) Dr. Haber reported back to Mr. Kassier that she was not able to find anything in mitigation. (PCR. 805-06) Instead, she found that Defendant was antisocial. (PCR. 809) Having reviewed the school records, she did not recommend additional evaluation or testing of Defendant. (PCR. 806) Mr. Kassier was aware of the use of neuropsychologists and would have requested the appointment of one if there had been any indication that one was needed. (PCR. 806-08) After considering the evidence, Mr. Kassier decided not to present it because he felt it would be more harmful than beneficial. (PCR. 809)

Mr. Kassier was aware that Defendant's mother was alive and had discussed her with Defendant's father during his extensive interviews. (PCR. 809-10) Mr. Kassier decided not to use Ms. Griffin as a witness because of her mental illness and the fact that she was not around Defendant when he was growing up. (PCR. 810-11) He also had Mr. Fuentes look for Charles Griffin, who

could not locate him. (PCR. 811-13) Mr. Kassier also did not think that Charles would have been a good witness because Charles was not raised with Defendant and saw Defendant little when Defendant was growing up. (PCR. 813-14) Mr. Kassier was also aware of Defendant's father's girlfriend Linda. (PCR. 814) He did not call her as a witness because her testimony about Defendant would have been negative. (PCR. 814-15) Mr. Kassier was aware that Mr. Minnis had been interviewed as a witness for the penalty phase but had indicated that he was unavailable to testify. (PCR. 817) When Mr. Minnis showed up during the trial, Mr. Kassier asked him to wait outside the courtroom so that Mr. Kassier could speak to him because the rule had been invoked. (PCR. 817-18) However, Mr. Minnis had disappeared when Mr. Kassier went to talk to him. (PCR. 818) Mr. Kassier sent Mr. Fuentes to bring Mr. Minnis back to the courthouse but they were unable to have Mr. Minnis return. (PCR. 818-19) Mr. Kassier asked Defendant for the names of potential penalty phase witnesses, which Defendant provided. (PCR. 819-20) However, Mr. Kassier did not recall Charles' mother ever being mentioned. (PCR. 819-20)

Mr. Kassier admitted that he had been suspended from the practice of law for two years at the time of the evidentiary hearing. (PCR. 832-34) He was working as a paralegal and was

going to seek reinstatement when his suspension was over. (PCR. 834) Mr. Kassier did not expect anyone from the State Attorney's Office to support his application for reinstatement when he filed it. (PCR. 839) He also did not plan on citing his testimony in this matter in his application. (PCR. 839-40) Mr. Kassier did not recall having been the subject of any bar complaints at the time that he represented Defendant. (PCR. 840) Mr. Kassier did not request appointment of a second lawyer to assist in the case but knew he could have done so. (PCR. 854) When asked if he understood that his compensation on the case would be reduced if a second lawyer was appointed, Mr. Kassier responded, "I guess, theoretically it would have been if I gave part of the work that I ended up doing to another attorney, yes. It would have been." (PCR. 856) While this was the first time Mr. Kassier had actually tried a penalty phase, he had experience in preparing a case for a penalty phase previously. (PCR. 875-76)

Mr. Kassier stated that this matter went to trial about 9 months after he was appointed. (PCR. 841-42) Mr. Kassier stated that he did receive Dr. Haber's written report two days before the penalty phase began. (PCR. 842-43) However, Mr. Kassier was already aware of Dr. Haber's opinion through a conference with her before the report was sent. (PCR. 843-46) Mr. Kassier stated

that he would have asked for another expert, even at the last minute, if he had thought it would have been helpful. (PCR. 846-47) Mr. Kassier had provided Dr. Haber with police reports and discovery documents about the circumstances of Defendant's arrest and the crime. (PCR. 848-50) He had discussed the results of whatever testing Dr. Haber had done on Defendant. (PCR. 851) Both Mr. Kassier and Dr. Haber had extensive experience in developing mitigation, and Dr. Haber's evaluation was directed at doing so. (PCR. 852)

After the trial was over, Mr. Kassier heard from Defendant that Mr. Minnis had allegedly been intimidated. (PCR. 859-60) Mr. Kassier asserted that Mr. Fuentes also claimed that someone had attempted to intimidate him. (PCR. 860-61) Mr. Kassier did not bring this issue to Judge Snyder's attention because Mr. Fuentes was not intimidated and did not wish to make a big deal out of it. (PCR. 862-63)

In deciding what witnesses to call, Mr. Kassier met with Mr. Montejo personally. (PCR. 865) He also prepared Mr. Montejo to testify. (PCR. 865) In fact, he personally spoke to the penalty phase witnesses to prepare them to testify and also had Mr. Fuentes and a law clerk help prepare witnesses. (PCR. 879-80) However, he did not meet Ms. Griffin. (PCR. 864-65) Mr. Kassier's strategy for the penalty phase was to argue that

Defendant had a good life with the Montejos and a traumatic life with his father. (PCR. 866) If Defendant had claimed to have been the victim of sexual abuse, Mr. Kassier would have investigated the claim. (PCR. 866) Defendant never told Mr. Kassier about the alleged incident where a person touched his genitals, even though Mr. Kassier had asked about abuse. (PCR. 877-78)

Mr. Kassier stated that he had made the decision not to call Dr. Haber well before the penalty phase began. (PCR. 870) Dr. Haber had begun work in the case in October 1990, and reviewed records that had been provided. (PCR. 871) Mr. Kassier had not provided Dr. Haber with the records of Defendant’s juvenile incarceration because they were harmful. (PCR. 872) Dr. Haber’s bill also reflected that she had spoken to Defendant’s father. (PCR. 872-74)

After considering this evidence, the lower court denied remaining post conviction claims. (PCR. 257-62) Defendant appealed the denial of his motion for post conviction relief, raising 21 issues, including an issue regarding the denial of the penalty phase ineffective assistance claim. *Griffin v. State*, 866 So. 2d 1, 6-7 (Fla. 2003). Again, Defendant raised no issue regarding ineffective assistance of counsel for failing to request the appointment of a second attorney. This Court

affirmed the denial of the motion for post conviction. *Id.* at 4. Regarding the claim of ineffective assistance of counsel at the penalty phase, this Court held:

> [Defendant] alleges that counsel was ineffective in his presentation of the mental health and other mitigating evidence. We agree with the circuit court''s assessment that "the credible evidence does not support a conclusion that the defendant suffers from any organic brain damage" or "any significant mental illness." In preparation for trial, defense counsel had [Defendant] evaluated by psychologist Dr. Merry Haber, who offered her opinion that the mental health mitigation evidence would do more harm than good. Dr. Haber never recommended that [Defendant] be evaluated by a neuropsychologist. The two neuropsychologists who testified at the evidentiary hearing agreed that [Defendant] suffers from a personality disorder with antisocial and narcissistic features and has a learning disorder. However, the experts offered conflicting opinions as to [Defendant's] mental impairment. Dr. Ansley testified that [Defendant] had no history of neurological problems, had a normal EEG, scored in the average range on the great majority of the tests administered, and had no pattern of abnormality. While Dr. Bordini offered a different assessment of [Defendant's] mental impairment, he also described [Defendant] as violent and antisocial and revealed details of a long history of criminal behavior. This information was in direct contradiction of the trial testimony by defense witnesses who portrayed [Defendant] as a good, sympathetic, and loving person.
>
> With regard to the lay witnesses who testified at the postconviction hearing about [Defendant's] family background and childhood, the evidentiary hearing revealed that [Defendant] did not provide information about these claims to trial counsel, despite proper inquiry by counsel. Further, the record supports the circuit court's conclusions that trial counsel made a strategic decision not to call [Defendant's] mother based on her mental illness and confusion and her unavailability for trial due to ill health and that even though [Defendant's] half-brother could have

> added some details about [Defendant's] upbringing, this information was largely cumulative and counsel had been advised that the half-brother was unavailable during the trial. Furthermore, while [Defendant's] mother and half-brother could have provided additional information about his neglected childhood, these relatives had limited contact with [Defendant] during his childhood and much of this information was presented at trial through other witnesses. We also agree with the circuit court's determination that the testimony of [Defendant's] friend Minnis was a "double-edged sword." While Minnis could have revealed information about his association with [Defendant], he would also have revealed negative information about [Defendant's] penchant for stealing autos and his previous difficulty with the officer who was the murder victim. Further, the evidence showed that defense counsel did attempt to call Minnis as a witness, but Minnis left the courthouse before testifying and then refused counsel's attempts to contact him.
>
> In light of this evidence presented at the evidentiary hearing, we agree with the circuit court's conclusion that [Defendant] cannot prevail on his claim of ineffective assistance of counsel in the investigation and presentation of mental health and other mitigating evidence. Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. *See Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992) (finding counsel's decision to not put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); *see also State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). Accordingly, we affirm the denial of relief on this claim.

Id. at 8-9.

While the matter was pending on appeal, Kenneth Malnik, who had represented Defendant in the circuit court, withdrew from representing Defendant, and Michael Giordano assumed representation of Defendant. On June 23, 2003, after Malnik's withdrawal and while the matter remained on appeal, Malnik attempted to file a successive motion for post conviction in the lower court, raising 2 claims:

I.
[DEFENDANT'S] CONVICTION AND SENTENCE ARE UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

II.
NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES [DEFENDANT'S] RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND OF THE FLORIDA CONSTITUTION.

(PCR2. 79-103) The State moved to dismiss the motion on the grounds that it was filed by someone who did not represent Defendant at a time when the lower court was without jurisdiction. (PCR2-SR. 4-33) The lower court granted the State's motion. (PCR2-SR. 34-35)

Defendant filed a *pro se* appeal of the order dismissing this motion. The State moved to dismiss the appeal because Defendant could not file pro se proceedings and the order was not appealable. This Court ordered Defendant's counsel to file a response to the State's motion and to indicate whether he was adopting the appeal. Counsel filed a pleading adopting the

appeal. This Court affirmed the dismissal of the motion, without prejudice to Defendant refiling the motion. *Griffin v. State*, 894 So. 2d 970 (Fla. 2005).

On February 18, 2005, Defendant served a pleading seeking to adopt the previously dismissed motion. After the matter had been fully pled, Martin McClain filed a motion to substitute as counsel and a new version of the motion for post conviction relief, which sought to add another claim:

> III.
>
> THE STATE WITHHELD IMPORTANT EVIDENCE DURING THE PRIOR PROCEEDING THAT IMPEACHED ITS CLAIM THAT THE SENTENCING ORDER IN [DEFENDANT'S] CASE WAS NOT THE PRODUCT OF *EX PARTE* COMMUNICATION AND DID NOT VIOLATE [DEFENDANT'S] RIGHT TO AN INDEPENDENT SENTENCING ORDER PREPARED BY THE SENTENCING JUDGE. THE STATE'S FAILURE TO DISCLOSE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

(PCR2. 104-27, 134-37) The State moved to strike McClain's version of the motion, as an improper attempt to amend a motion without having been granted leave to do so. (PCR2. 138-51)

At a hearing held on March 30, 2005, the trial court heard argument on the motion to strike and granted it to the extent of striking the new claim, without prejudice to Defendant seeking leave to amend to add the claim. (PCR2. 392-409) On April 8, 2005, Defendant served his motion for leave to amend to add the claim that the lower court had stricken, Claim III. (PCR2. 242-46) On May 13, 2005, the trial entered its orders denying leave

to amend and the motion for post conviction relief. (PCR2. 384-86) Defendant took no further action regarding this matter until January 6, 2006, when he filed a motion for clarification. (PCR2. 266-70) On May 5, 2006, Defendant moved to disqualify the trial court, claiming that the trial court had engaged in improper ex parte communications by conducting noticed hearings at which Defendant failed to appear. (PCR2. 327-35)

On May 8, 2006, Defendant moved this Court to grant him a belated appeal of May 13, 2005 orders. On May 19, 2006, the trial court granted the motion to disqualify even though it found it was legally. (PCR2. 378-79) On July 5, 2006, Defendant moved the trial court to void its prior orders, which the trial court granted. (PCR2. 388-91, 475-82) The trial court then re-entered the orders denying the motion and leave to amend. (PCR2. 440, 442-46) Defendant attempted to appeal the new orders, but this Court instead granted Defendant a belated appeal of the original orders. After considering the issues raised in the belated appeal, this Court affirmed the denial of the second motion for post conviction relief and the denial of leave to amend on June 2, 2008. *Griffin v. State*, 992 So. 2d 819 (Fla. 2008).

On November 21, 2008, Defendant filed a petition, which he entitled a "Petition Seeking to Invoke This Court's All Writs

Jurisdiction and/or Petition for Writ of Habeas Corpus" in this Court. In this petition, Defendant sought to file a belated petition for writ of habeas corpus, raising claims of ineffective assistance of appellate counsel. On November 2, 2009, this Court denied this petition, finding that it was an untimely state habeas petition and that there was no right to file a belated petition. *Griffin v. McCollum*, 22 So. 3d 67 (Fla. 2009).

On November 29, 2010, Defendant, through Mr. McClain, filed this third motion for post conviction relief, raising one claim:

> [DEFENDANT'S] SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*.

(PCR3. 34-64) In support of that claim, Defendant argued that *Porter v. McCollum*, 130 S. Ct. 447 (2009), had somehow changed the manner in which the rejection of claims of ineffective assistance of counsel were reviewed and that the alleged change should be applied retroactively. *Id.* According to Defendant, this alleged change was significant with regard to the rejection of his claim of ineffective assistance of counsel for failing to investigate and present mitigation. *Id.*

After the lower court denied Mr. McClain's motion to be appointed as counsel, he withdrew, and the lower court appointed Defendant's present counsel to represent him. (PCR3. 92, 90) Defendant then delayed the *Huff* hearing on this motion until May

10, 2011. (PCR3. 91-104) At the beginning of the *Huff* hearing, Defendant acknowledged that the change in law that he was asserting had occurred because of *Porter* concerned this Court's appellate review of the prejudice prong of *Strickland*. (PCR3. 126) He then argued that this Court had improperly found a lack of prejudice because it did not adequately consider the effect that the evidence presented at the post conviction hearing on the jury. (PCR3. 130-31) He averred this was true because Mr. Griffin had been the only witness who was relied upon or presented regarding mitigation at trial and he did not admit to physically and sexually abusing Defendant. (PCR3. 132) He also asserted that the only records trial counsel had gathered regarding Defendant were school records. (PCR3. 132-34) He insisted that the lower court had also never really considered the evidence presented at the evidentiary hearing. (PCR3. 135) Finally, he suggested that presenting the claim was procedurally appropriate because of *Hitchcock*. (PCR3. 136-37)

The State responded that Defendant needed to show that the law had changed and that the change was retroactive before the merits of his claim were even properly before the court. (PCR3. 138) It then pointed out that while Defendant was suggested that *Porter* held that appellate review of factual findings regarding ineffective assistance of counsel claim was de novo, *Strickland*

itself required that deference be given to factual finding and *Porter* had not, and could not have, overruled *Strickland*. (PCR3. 138-39) As such, the State argued that there was no change in law. (PCR3. 139)

It further argued that even if there had been a change in law, Defendant had never shown that the alleged change would meet the *Witt* standard for retroactivity and that simply arguing that a different change in law met *Witt* was not the same thing. (PCR3. 139-40) It averred that *Witt* was not satisfied when one did an actual *Witt* analysis. *Id.* Finally, the State asserted that Defendant's claims regarding the merits of his claim were false, as far more mitigation was presented at trial than Defendant acknowledged, counsel did more of an investigation that Defendant admitted, Defendant's mother was in a coma at the time of trial and there was a complete lack of evidence in the post conviction record that Defendant was sexually abused. (PCR3. 141-43)

On May 19, 2011, the lower court denied the motion for post conviction relief. (PCR3. 106-11) It found that *Porter* did not change the law and that any change in law that might have occurred would not be retroactive or applicable to Defendant. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied this untimely, successive motion for post conviction relief. Defendant's claim did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B). *Porter* did not change the law, and even if it had, that change would not be retroactive. The claim in the motion was a procedurally barred attempt to relitigate previously denied claims. Further, Defendant failed to prove deficiency and does not even allege that the lack of deficiency was affected by *Porter*. Finally, Defendant's counsel was not even authorized to file this frivolous motion.

ARGUMENT

THE LOWER COURT PROPERLY SUMMARILY DENIED DEFENDANT'S SUCCESSIVE MOTION FOR POST CONVICTION RELIEF.

Defendant asserts that the lower court should have granted his successive motion for post conviction relief by holding that *Porter v. McCollum*, 130 S. Ct. 447 (2009), constitutes a fundamental change in law that satisfies the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), standard. He contends that it was proper for him to raise this claim in a successive, time barred motion for post conviction relief. He insists that if the alleged change in law from *Porter* was applied to this case, it would show that he was prejudiced by the alleged deficiency of counsel. However, the lower court properly denied this motion

because it was unauthorized, time barred, successive, procedurally barred and meritless.

Pursuant to Fla. R. Crim. P. 3.851(d), a defendant must present his post conviction claims within a year of when his conviction and sentence became final unless certain exceptions are met. Here, Defendant's convictions and sentences became final on March 6, 1995, when the United States Supreme Court denied certiorari from direct appeal. *Griffin v. Florida*, 514 U.S. 1005 (1995) As Defendant did not file this motion until 2010, more than 15 years after his convictions and sentences became final, this motion was time barred.

In recognition of the fact that the claim is time barred, Defendant attempts to avail himself of the exception for newly-recognized, retroactive constitutional rights. However, Defendant's claim does not fit within this exception. Pursuant to Fla. R. Crim. P. 3.851(d)(2)(B), the time bar is lifted if "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

Here, Defendant does not assert a claim based on a fundamental constitutional right that was not established within a year of when his convictions and sentences became final. In fact, he acknowledges that *Porter* did not change constitutional

law at all. Initial Brief at 21 n.14. Moreover, the fact that the Sixth Amendment right to counsel includes a requirement that counsel be effective has been recognized for decades. *Strickland v. Washington*, 466 U.S. 668 (1984).

Further, Defendant does not suggest that *Porter* "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). In fact, no court has held that *Porter* is retroactive, and instead, both this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of ineffective assistance of counsel. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Premo v. Moore*, 131 S. Ct. 733 (2011); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Renico v. Lett*, 130 S. Ct. 1855 (2010); *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Reed v. Sec'y, Fla. Dept. of Corrections*, 593 F.3d 1217, 1243 n.16, 1246 (11th Cir. 2010); *Boyd v. Allen*, 592 F.3d 1274, 1302 (11th Cir. 2010); *Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011); *Troy v. State*, 57 So. 3d 828, 836 (Fla. 2011); *Everett v. State*, 54 So. 3d 464, 472 (Fla. 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010); *Rodriguez v. State*, 39 So. 3d 275, 285 (Fla. 2010).

Since *Porter* neither recognized a new right nor has been

held to apply retroactively, it does not meet the exception to the time bar found in Fla. R. Crim. P. 3.851(d)(2)(B). The motion was time barred and properly denied as such. The lower court should be affirmed.

Instead of relying on a newly established right that has been held to be retroactive to meet Fla. R. Crim. P. 3.851(d)(2)(B), Defendant asserts that he met the exception by asserting a change in law regarding an existing right that he is seeking to have held retroactive. However, as this Court has held, court rules are to be construed in accordance with their plain language. *Koile v. State*, 934 So. 2d 1226, 1230 (Fla. 2006); *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). Moreover, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Here, the plain language of Fla. R. Crim. P. 3.851(d)(2)(B) requires "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Thus, it requires a new constitutional right and a prior holding that the right is to be applied retroactively. *See Tyler v. Cain*, 533 U.S. 656 (2001)(holding that use of past tense in federal statute regarding successive federal habeas petitions

requires the Court to hold new rule retroactive before it can be relied upon). Defendant cannot use the assertion that an alleged change in law regarding an existing right should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he must show that a newly established right that has been held retroactive for the exception to apply. The motion was time barred, and the lower court properly denied it as such. The lower court should be affirmed.

Even if Defendant could satisfy Fla. R. Crim. P. 3.851(d)(2)(B) by showing a change in law regarding an existing right and asking this Court to find it retroactive, the lower court would still have properly denied the motion as time barred because *Porter* did not change the law. While Defendant insists that *Porter* represents a "repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 20, and not simply a determination that this Court misapplied the correct law to the facts of one case, this is not true.

In making this argument, Defendant relies heavily on the fact that the United States Supreme Court granted relief in *Porter* after finding that this Court had unreasonably applied Strickland. He suggests that since this determination was made under the deferential AEDPA standard of review, the Court must have found a systematic problem with this Court's understanding

of the law under *Strickland*. However, this argument misrepresents the meaning of the term "unreasonable application" under 28 U.S.C. §2254(d), as amended by the AEDPA.

As the United States Supreme Court has explained, 28 U.S.C. §2254(d)(1), provides two separate and distinct circumstances under which a federal court may grant relief based on a claim that the state court rejected on the merits: (1) determining that the ruling was "contrary to" clearly established United States Supreme Court precedent; and (2) determining that the ruling was an "unreasonable application of" clearly established United States precedent. *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). The Court explained that a state court decision fits within the "contrary to" provision when the state court got the legal standard for the claim wrong or reached the opposition conclusion from the United States Supreme Court on "materially indistinguishable" facts. *Id.* at 412-13. It further stated that a state court decision would fit within the "unreasonable application" provision when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Given this holding, if the United States Supreme Court had determined that this Court had been applying an incorrect legal

standard to *Strickland* claims, it would have found that *Porter* was entitled to relief because this Court's decision was "contrary to" *Strickland*; it did not. Instead, it found that this Court had "unreasonably applied" *Strickland*. *Porter*, 130 S. Ct. at 448, 453, 454, 455. By finding that this Court "unreasonably applied" *Strickland* in *Porter*, the Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions." *Williams*, 529 U.S. at 412. It simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." Id. at 412. Thus, Defendant's suggestion that the *Porter* decision represents a "repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 20, is incorrect. Instead, as the lower court found, *Porter* represents nothing more than an isolated error in the application of the law to the facts of a particular case. Thus, *Porter* does not represent a change in law at all and does not make Fla. R. Crim. P. 3.851(d)(2)(B) applicable. The motion was time barred and properly denied as such. The lower court should be affirmed.

This is all the more true when one considers how Defendant seems to allege *Porter* changed the law. Defendant asserts that *Porter* held that it was improper to defer to the finding of fact that a trial court made in resolving an ineffective assistance

claim pursuant to the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). Initial Brief at 22-23. However, in making this assertion, Defendant ignores that the *Stephens* standard of review is directly and expressly mandated by *Strickland* itself:

> Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. §2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n.6, 83 S. Ct. 745, 755, n.6, 9 L. Ed. 2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. *See Cuyler v. Sullivan*, 446 U.S., at 342, 100 S. Ct., at 1714. **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.**

Id. at 698 (emphasis added).[2] As this passage shows, the Court

[2] The references to 28 U.S.C. §2254(d) in *Strickland* concern the provisions of the statute before the adoption of the AEDPA in 1996. Under the federal habeas statute as it existed at the time, a federal court was required to defer to a state court factual finding if it was made after a "full and fair" hearing and was "fairly supported by the record." 28 U.S.C. §2254(d) (1984). After the enactment of the AEDPA, the deference required of state court factual findings has been heightened and moved. 28 U.S.C. §2254(e)(1) (requiring a federal court to presume a state court factual finding correct unless the defendant presents clear and convincing evidence to overcome the presumption).

required deference not only to findings of historical fact but also deference to factual findings made in resolving claims of ineffective assistance while allowing *de novo* review of the application of the law to these factual findings. This is exactly the standard of review that this Court mandated in *Stephens*, 748 So. 2d at 1034, and applied in *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001), *Sochor v. State*, 833 So. 2d 766, 781 (Fla. 2004), and *Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2001). Thus, to find that *Porter* held that application of this standard of review was a legal error, this Court would have to find that the United States Supreme Court overruled this expressed and direct language from *Strickland* in *Porter*.

However, Defendant concedes that *Porter* did not overrule or alter any portion of *Strickland*. Initial Brief at 21. By making this concession, Defendant has agreed that the Court did not overrule this portion of *Strickland*. Since this Court's precedent on the standard of review is entirely consistent with this portion of *Strickland*, Defendant has conceded that the Court did not overrule this Court's precedent. His attempt to argue to the contrary is specious. The lower court properly determined that *Porter* did not change the law and that the motion was time barred as a result. It should be affirmed.

Even if Defendant were to attempt to take back his

concession and argue that the Court had overruled *Strickland*'s requirement of deference to factual findings made in the course of resolving claims of ineffective assistance of counsel, the lower court would still have properly found the law has not changed. In *Porter*, the Court never mentioned this portion of *Strickland* and made no suggestion that it was improper for a reviewing court to defer to factual findings made in resolving an ineffective assistance claim. *Porter*, 130 S. Ct. at 448-56. Instead, it characterized the opinion of the state trial court and this Court as having found there was no statutory mitigation established and there was no prejudice from the failure to present nonstatutory mitigation. *Id.* at 451. Under the standard of review mandated by *Strickland* and followed by this Court, the first of these findings was a factual finding but the second was not. *Strickland*, 466 U.S. at 698. Rather than determining that this Court's factual finding was not binding, the Court seems to have accepted it and found this Court had acted unreasonably by not making factual findings about nonstatutory mental health mitigation and making an unreasonable conclusion on the mixed question of fact and law regarding prejudice. *Id.* at 454-56. Thus, to find that *Porter* overruled *Stephens* and its progeny, this Court would have to find that the United States Supreme Court overruled itself *sub silencio* in a case where the Court

appears to have applied the allegedly overruled law. However, this Court is not even empowered to make such a finding, as this Court has itself recognized. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989); *Bottoson v. Moore*, 833 So. 2d 693, 694 (Fla. 2002). Thus, the lower court properly determined that *Porter* did not change the law, that Fla. R. Crim. P. 3.851(d)(2)(B) did not apply and that the motion was time barred. It should be affirmed.

Similarly, Defendant's reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010), also is misplaced. In *Sears*, the Georgia post-conviction court found trial counsel's performance deficient under *Strickland* but then stated that it was unable to assess whether counsel's inadequate investigation might have prejudiced Sears. *Id.* at 3261. In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings about the evidence presented. *Id.* at 3261. Thus, *Sears* does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

Defendant also seems to suggest that *Porter* requires a

court to grant relief on an ineffective assistance of counsel based solely on a finding that some evidence to support prejudice was presented at a post conviction hearing regardless of what mitigation was presented at trial, how incredible the new evidence was, how much negative information the new evidence would have caused to be presented at trial or how aggravated the case was. However, *Porter* itself states that this is not the standard for assessing prejudice. Instead, the Court stated that determining prejudice required a court to "consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding' - and "reweig[h] it against the evidence in aggravation." *Porter*, 130 S. Ct. at 453-54 (quoting *Williams*, 529 U.S. at 397-98).

Moreover, in *Wong v. Belmontes*, 130 S. Ct. 383, 386-91 (2009), the Court reversed the Ninth Circuit for finding prejudice by ignoring the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented and the aggravated nature of the crime. The Court noted that this error was probably caused by the Ninth Circuit's failure to require that the defendant meet his burden of affirmatively proving prejudice. *Id.* at 390-91. Similarly in *Bobby v. Van Hook*, 130 S. Ct. 13, 19-20 (2009), the Court

reversed the Sixth Circuit for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the evidence presented in post conviction and the aggravated nature of the crime.

Given what *Porter* actually says about proving prejudice and *Belmontes* and *Van Hook*, Defendant's suggestion that *Porter* requires a finding of prejudice anytime a defendant presents some evidence at a post conviction hearing is simply false. *Porter* did not change the law requiring that a defendant actually prove there is a reasonable probability of a different result. Since *Porter* did not change the law, the lower court properly determined that this motion was time barred and should be affirmed.

Even if Fla. R. Crim. P. 3.851(d)(2)(B) did apply to this situation and *Porter* had changed the law, the lower court would still have properly denied the motion because *Porter* would not apply retroactively. As Defendant admits, the determination of whether a change in law is retroactive is controlled by *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). As Defendant also properly acknowledges, to obtain retroactive application of the law under *Witt*, he was required to show: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental

significance. *Id.* at 929-30. To meet the third element of this test, the change in law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. Application of that three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001).

Here, Defendant did not attempt to show that the change in law he alleged was made in *Porter* met the *Witt* standard in his motion for post conviction relief or at the *Huff* hearing. (PCR3. 34-64, 136-17) Instead, he simply suggested that because this Court had found that *Hitchcock v. Dugger*, 481 U.S. 393 (1987), constituted a retroactive change in law, the lower court should find that *Porter* was also retroactive. *Id.* Given Defendant's failure to address the *Witt* factors, the lower court properly determined that Defendant had not shown that he was entitled to retroactive application of the alleged change in law in *Porter*. It should be affirmed.

This is particularly true since Defendant did not suggest that *Hitchcock* and *Porter* were alike in ways that actually were

relevant to a *Witt* analysis. Instead, he compared them based on the stage of the proceedings at which the error was found and the manner in which the United States Supreme Court issued its opinion. However, when one considers the difference in the errors found in those cases and the relationship between those errors and the *Witt* standard, the lower court was correct in rejecting this argument.

In *Hitchcock*, 481 U.S. at 398-99, the Court found that the giving of a jury instruction that told the jury not to consider nonstatutory mitigation was improper. As such, the purpose of finding this error was to permit a jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phase and could only have harmed a defendant if he was sentenced to death, the number of cases in which there had been an error that would need retroactive correction was limited. Further, because the error was in a jury instruction, determining whether that error occurred in a particular case was simple. All one needed to do was review the jury instructions that had been given in a particular case to see if it was the offending instruction. Courts were not required to comb through stale records looking for errors. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d

161 (Fla. 1987), retroactively). Thus, the purpose of the new rule, extent of reliance on the old rule and effect on the administration of justice in *Hitchcock* militated in favor of retroactivity.

In contrast, *Porter* involved nothing more than determining that this Court had unreasonably applied a correctly stated rule of law to the facts of a particular case, as noted above. Thus, the purpose of *Porter* was nothing more than to correct an error in the application of the law to the facts of a particular case. Moreover, as the lower court found, Florida courts have extensively relied on the standard of review from *Strickland* that this Court recognized in *Stephens* and the effect on the administration of justice from applying the alleged change in law in *Porter* retroactively would be to bring the courts of Florida to a screeching halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida.

Given these stark difference in the analysis of the changes in law in *Porter* and *Hitchcock* and their relationship to the *Witt* factors, the lower court properly determined that the alleged change in law from *Porter* would not be retroactive under *Witt* even if it had occurred. In fact, the more apt analogy regarding a change in law would be the change in law that this

Court recognized in *Stephens* itself, as both changes in law concerned the same legal issue. However, making that analogy merely shows that the lower court was correct to deny this motion. In *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001), this Court held the change in law in *Stephens* was not retroactive under *Witt*. Given the facts that *Porter* would fail the *Witt* test if it had changed the law and that this Court has already determined that changing the law regarding the standard of review for ineffective assistance of counsel claims does not meet *Witt*, the lower court properly determined that any change in law that *Porter* might have made would not be retroactive. Thus, it properly found that this motion was time barred and should be affirmed.

In belated attempt to show that the alleged change in law here meets *Witt*, Defendant compares the alleged change from *Porter* to the change in law in *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, this comparison is even more flawed that the comparison to *Hitchcock*. As was true of *Hitchcock*, the error in *Espinosa* concerned a jury instruction given at the penalty phase. *Espinosa*, 505 U.S. at 1080-81. As the United States Supreme Court has held, the Constitution only imposes two requirements on a capital sentencing scheme: (1) that it limit the class of death-eligible individuals, and (2) that it allow

individualized consideration of mitigation. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Thus, as was true in *Hitchcock*, the purpose of *Espinosa* was to correct an error in one of those requirements.

Further, the class of cases in which retroactive application of *Espinosa* was available was even more limited than in *Hitchcock*. In *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), this Court limited retroactive application of *Espinosa* to those cases in which the defendant had objected to the instruction at trial and raised the issue on direct appeal. Thus, the class of eligible cases was not only limited to those cases in which the offending jury instruction was given and the defendant was sentenced to death but also to those cases in which the issue had been pursue previously. Given this limitation on the class of eligible cases and the ease with which a determination of whether the error had occurred and whether the defendant was eligible for correction could be made, the extent of reliance on the old rule and the effect on the administration of justice were limited and favored retroactivity.

Again, the purpose of *Porter* was nothing more than to correct an error in the application of the correct law to the facts of a particular case. Moreover, as the lower court found,

Florida courts have extensively relied on the standard of review from *Strickland* that this Court recognized in *Stephens* and the effect on the administration of justice from applying the alleged change in law in *Porter* retroactively would be to bring the courts of Florida to a screeching halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida. Thus, Defendant's attempt to analogize the change in law that he alleges was made in *Porter* to the change of law in *Espinosa* is even less apt than his comparison to *Hitchcock*. The lower court properly determined that the *Witt* standard would not be met had *Porter* changed the law. It should be affirmed.

Moreover, it should be remembered that this claim is procedurally barred. Defendant is seeking nothing more than to relitigate the claim of ineffective assistance of counsel regarding mitigation that he raised in his first motion for post conviction relief and lost. As this Court has held, such attempts to relitigate claims that have previously been raised and rejected are procedurally barred. See *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Defendant cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-90 (Fla. 2003). It is also well

established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Defendant is attempting to do here, his claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004)(discussing application of res judicata to claims previously litigated on the merits).

In fact, this Court has rejected attempts to relitigate ineffective assistance claims simply because the United States Supreme Court issued opinions indicating that state courts have erred in rejecting claims of ineffective assistance of counsel. *Marek v. State*, 8 So. 3d 1123 (Fla. 2009). There, the defendant argued that his previously rejected claim of ineffective assistance of counsel at the penalty phase had to be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), because they had changed the standard of review for claims of ineffective assistance of counsel under *Strickland*. This Court decisively rejected the claim, stating "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*." *Marek*, 8

So. 3d at 1128. This Court did so even though the United States Supreme Court had found under the AEDPA standard of review that state courts had improperly rejected these claims. Given these circumstance, the claim was barred and was properly denied. The lower court should be affirmed.

Even if Fla. R. Crim. P. 3.851(d)(2)(B) could apply to changes in law regarding existing rights that had yet to be held retroactive, *Porter* had changed the law, the alleged change in law was retroactive and the claim was not procedurally barred, Defendant would still be entitled to no relief. As the Court recognized in *Witt*, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. *Witt*, 387 So. 2d at 930-31. Moreover, as the Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at 697.

Here, as Defendant admitted before the lower court, his claim is that *Porter* changed the appellate standard of review regarding prejudice. (PCR3. 126) However, his claim of ineffective of counsel was denied based on a lack of deficiency. *Griffin*, 866 So. 2d at 8-9. While Defendant insists that this

was error,[3] he does not suggest that *Porter* changed the law regarding deficiency. As such, Defendant's claim would be meritless even if *Porter* had changed the law and applied retroactively.[4] The lower court properly denied this motion and should be affirmed.

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[3] In doing so, Defendant misstates the law. Under *Strickland*, counsel has a duty to conduct a reasonable investigation or make a reasonable decision that such an investigation is unnecessary. *Strickland*, 466 U.S. at 690-91; *see also Wiggins v. Smith*, 539 U.S. 510, 521-22, 533 (2003). Moreover, the reasonableness of the decisions regarding investigations "may be determined or substantially influenced by the defendant's own statements." *Strickland*, 466 U.S. at 691. Thus, Defendant's suggestions that counsel was deficient because he did not conduct a "thorough" investigation and relied on information Defendant provided to determine the scope of his investigation are incorrect.

[4] Defendant also misstates the record regarding the evidence that was presented. Counsel did investigate Defendant's family history through more than Defendant's father. He contacted the Montejos, Defendant's step-mother, his maternal uncle and numerous friends. He obtained Defendant's school records, prison records, police reports and witness statements. He provided the school records, police reports and witness statements to Dr. Haber, whom he had retained months before voir dire began, and made a strategic decision not to provide her with the prison records because they contained negative information. Defendant's mother was not available not merely because she was hospitalized but because she was in a coma. Defendant presented no evidence that pertinent medical records even existed. While Defendant repeatedly suggests that he was physically abused and suggests that he was beaten daily, the actual testimony was that Defendant was never physically abused. While Defendant also suggests that he was sexually abused by his grandfather, the evidence refutes this suggestion. Defendant's grandfather was dead before Defendant was born; the evidence regarding sexual abuse concerned Defendant's half-brother. (PCR. 599-601, 605-07) Moreover, the jury heard about Defendant's parent's abandonment of him to the Montejos, Defendant move to his grandmother and his return to his father. They also heard about Defendant's life with his alcoholic father and step-mother thereafter through numerous friends.

Finally, it should be remembered that Defendant's counsel was not even authorized to file this motion. Pursuant to §27.702, Fla. Stat., "[t]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by statute." This Court has recognized the legislative intent to limit collateral counsel's role in capital post-conviction proceedings. *See State v. Kilgore*, 976 So. 2d 1066, 1068-69 (Fla. 2007).

The term "postconviction capital collateral proceedings" is defined in §27.711(1)(c), Fla. Stat., as:

> "Postconviction capital collateral proceedings" means one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, any appellate review of the sentence by the Supreme Court, any certiorari review of the sentence by the United States Supreme Court, and any authorized federal habeas corpus litigation with respect to the sentence. **The term does not include <u>repetitive or successive collateral challenges</u> to a conviction and sentence of death which is affirmed by the Supreme Court and undisturbed by any collateral litigation.**

§27.711(1)(c), Fla. Stat. Accordingly, counsel was not authorized to file this patently frivolous, repetitive and successive motion. Its denial should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

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SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Terri Backhus, 13014 N. Dale Mabry, #746, Tampa, Florida 33618, this 21st day of November 2011.

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SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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SANDRA S. JAGGARD
Assistant Attorney General