IN THE SUPREME COURT OF FLORIDA

BRUCE DOUGLAS PACE

Appellant,

v. CASE NO. SC11-1290

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

PRELIMINARY STATEMENT

Appellant, BRUCE DOUGLAS PACE, appeals from the denial of a successive motion for post-conviction relief. References to the appellant will be to “Pace” or “Appellant”. References to the appellee will be to the “State” or “Appellee”.

The record in this case consists of two volumes. The record will be referred to as “SPCR” preceded by the appropriate volume number and followed by the appropriate page number. The record from Pace’s initial post-conviction proceedings will be referred to as “PCR” preceded by the appropriate volume and followed by the appropriate page number. The record from Pace’s direct appeal will be referred to as “TR” preceded by the appropriate volume and followed by the appropriate page number. References to Appellant’s initial brief will be to “IB” followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On November 7, 1989, Bruce Pace murdered a man who he knew and considered a friend. Pace murdered Mr. Covington despite the fact that Mr. Covington had done nothing to him, other than give him a ride when he needed it. The facts underlying Pace's judgment and sentence, as found by the Florida Supreme Court, are as follows:

> ... On November 7, 1989, investigators found Floyd Covington's bloodstained taxicab in a wooded area. Bloodstain patterns indicated that Covington was shot while he was sitting in the driver's seat, with the first shot coming from the passenger's side. Covington's body was found three days later in another wooded area approximately twelve miles from where the taxicab was found. Covington had been shot twice with a shotgun. Serology testing showed that the blood in the taxicab was consistent with Covington's type. An investigation led police to Pace, who was an acquaintance of Covington's.
>
> During Pace's trial, the State presented evidence that Pace was seen driving Covington's taxicab on the morning of the murder; Pace's clothing had bloodstains that were consistent with Covington's blood type; Pace's fingerprint was found on the driver-side window of the taxicab; and Pace stated to a witness the night before the murder that he was going to do something he hated to do because he needed money. Pace's stepfather testified that Pace informed him that after Covington had given Pace a ride to his stepfather's home, Pace entered the home through an open window and was choked to unconsciousness. Pace told his stepfather that he awoke in the woods, lying next to a shotgun and Covington's car, and after noticing blood in the car, he grabbed the gun and left the scene. Also, on the morning after the murder, Pace's stepfather recovered from the front yard of his house two shotgun shells that were consistent with the type used to kill Covington. Pace had possession of the shotgun believed to be the murder weapon.

Pace v. State, 854 So. 2d 167 (Fla. 2003).

Pace was represented at trial by Sam Hall and Randy Etheridge of the Public Defender's Office. After a jury trial, Pace was found guilty of first-degree murder and armed robbery.

During the penalty phase, the State introduced a copy of a judgment of conviction for strong-arm robbery that Pace committed on December 4, 1981, for which he was sentenced to fifteen years imprisonment. Additionally, the State presented the testimony of probation officer Robert Mann. Mr. Mann testified that Pace was on parole at the time of the murder.

Pace also presented evidence in mitigation. Pace's counsel presented five witnesses to testify on Pace's behalf: Paul Campbell, Hurley Manning, Robert Settles, Evelyn Rich and Lillian Rich.

Paul Campbell was a Santa Rosa County correctional officer who testified that he had been in contact with Pace since his arrest for Mr. Covington's murder. Pace was a model prisoner. According to Mr. Campbell, Pace was extremely cooperative and respectful and had given his jailers "absolutely no trouble whatsoever." (6TR 1041).

Hurley Manning had been head football coach at Milton High School before retiring a year before trial. (6TR 1043). He described Pace as the kind of athlete "you would like to have in

the program." Pace would work, he did what he was told, and he stayed out of trouble. (6TR 1044). Coach Manning had a "very good" relationship with Pace while he was in high school. (6TR 1047).

Robert Settles was a home builder, operating out of Milton. (6TR 1049-50). He had known Pace over ten years. He first met Pace when Settles was the vocational coordinator at Milton High. (6TR 1050). Settles went into business for himself, and after Pace graduated from high school, Settles hired Pace to work for him. (6TR 1051). Pace did a "super" job for him. (6TR 1052). Pace was a "master sawman." Pace had a lot of potential which he unfortunately had not lived up to. (6TR 1054).

Eleanor Louise Rich is Pace's aunt. (6TR 1057-58). She described Pace as a "loving, caring person." (6TR 1059). Pace helped care for his siblings when his stepfather left. He also helped care for Mrs. Rich after she had surgery. (6TR 1060-61). Pace came from a good, supportive family. (6TR 1062).

Lillian Rich is Pace's mother. (6TR 1063). She testified that, before Pace went to prison in 1981, he had never been in any kind of trouble as a juvenile or as an adult. He had never been arrested. (6TR 1065). Pace had worked to help support the family after his stepfather left them when Pace was 13 or 14. Pace provided clothes and other needs for his four siblings. (6TR 1066-67). Mrs. Rich identified photographs dating from

Pace's early childhood, as well as Pace's various athletic awards, school records, and report cards from elementary, middle and high school. (6TR 1069-70). Ms. Rich asked the jury to show her son mercy. (6TR 1071-72).

During the penalty phase closing arguments, the State argued that five aggravating circumstances applied: (1) Pace was on parole at the time of the murder; (2) Pace was previously convicted of a violent felony; (3) the murder was committed during the commission of a robbery; (4) the murder was committed to avoid arrest; and (5) the murder was committed in a cold, calculated, and premeditated manner. (6TR 1093-1096). The State argued that the only real mitigation that Pace presented was that he was a human being who has a loving family and people who care about him. (6TR 1102).

Defense counsel Sam Hall gave the defense closing argument. (6TR 1104-1119). He argued that the jury's sentencing decision was not a "clinical process;" it was not just about "the law," it was about "human beings." (6TR 1104). He noted that even the prosecutor had acknowledged that Mrs. Rich's testimony was "moving." (6TR 1105).

In response to the prosecutor's argument that the only mitigation offered was that Pace was a "human being," Hall argued that when you say someone is a human being, you are not saying just that he has a heart and lungs and breathes, you are

saying he is a “good person.” That, Hall urged, was what Pace’s family had said; Pace was a good person with a good heart, a person who had taken care of his family. (6TR 1108).

Hall pointed out that the State had trusted Pace’s family members enough to have used a number of them as witnesses at the guilt phase; they had done what “was right” and now only asked that the jury be fair at the penalty phase. (6TR 1105). Hall argued that the prosecutor had greatly exaggerated how aggravated this murder was; Pace in fact had only one prior conviction of any kind, having otherwise never before been in trouble in his entire life. (6TR 1106). Pace had also been a good athlete and a good employee with great potential.

Hall told the jury that Pace had demonstrated, while in jail, he behaved himself and was not a threat to others in prison. (6TR 1114). Hall pointed out that, if his life were spared, Pace would serve at least a life sentence with no chance of parole for 25 years, and could get a life without parole sentence on the robbery charge. (6TR 1115). He appealed to the jury’s “compassion” and asked the jury to “do something positive and not something vindictive.” (6TR 1116).

The jury recommended by a seven-to-five (7-5) vote that Pace be sentenced to death. The trial court followed the jury’s recommendation. In sentencing Pace to death, the trial court found three aggravating circumstances: (1) Pace had a previous

conviction for a violent felony; (2) Pace was on parole at the time of the murder; and (3) the murder was committed during the course of a robbery. The trial court found no mitigating circumstances. Pace v. State, 596 So. 2d 1034, 1035 (Fla. 1992); Pace v. State, 854 So. 2d 167, 170 (Fla. 2003).

On March 26, 1992, the Florida Supreme Court affirmed Pace's convictions. Pace v. State, 596 So. 2d 1034, 1035 (Fla. 1992). As to the penalty phase, the Florida Supreme Court held that the aggravating circumstances found by the trial court were all supported beyond a reasonable doubt. This Court also concluded, considering the totality of the circumstances, the trial judge's finding of no mitigation was supported by the record. Id.

The Florida Supreme Court noted that, even if the trial court wrongfully rejected one or more non-statutory mitigators, any error was harmless beyond a reasonable doubt. Finally, this Court found Pace's sentence proportionate. Pace v. State, 596 So. 2d at 1035-1036.

On July 16, 1992, Pace filed a petition for a writ of certiorari in the United States Supreme Court. The Court denied Pace's petition on October 5, 1992. Pace v. Florida, 506 U.S. 885 (1992).

On October 11, 1993, Pace filed an initial motion for post-conviction relief. Pace amended the motion several times. In the

final amendment filed on March 7, 1997, Pace raised twenty-one (21) claims including the same claim Pace presents to this Court. Pace v. State, 854 So. 2d 167, 171 n.2 (Fla. 2003).

The collateral court granted an evidentiary hearing on several of Pace's claims and summarily denied the rest. (7 PCR 1192-1203). Particularly relevant for this appeal, the collateral court granted an evidentiary hearing on Pace's claim that counsel was ineffective, during the penalty phase of Pace's capital trial, for failing to investigate and present evidence of Pace's crack cocaine addiction. (7PCR 1195).

Pace put on fourteen (14) witnesses at the evidentiary hearing: (1) Jim Martin, (2) Randy Etheridge, (3) Sam Hall, (4) Dr. James Larson, (5) Dr. Peter Szmurlo, (6) Dr. Barry Crown, (7) Dr. Michael Herkov, (8) Kennth Bembo, (9) Melanie Pace, (10) Margaret Dixon, (11) Barry Copeland, (12) Ora Kay Jones, (13) Cynthia Pace, and (14) Thomas Hill. These witnesses included several mental mitigation experts and several lay witnesses, including more than one convicted felon.

Trial defense investigator Jim Martin testified at the evidentiary hearing that he talked to Pace on November 10, 1988 (the day police found Covington's body). (11PCR 1909). Pace confessed to Martin that he had murdered Floyd Covington. (11PCR 1910). Pace told Martin he had shot Covington twice, reloading between shootings. (11PCR 1910). Pace did not say that anyone

else was involved. (11PCR 1911). When Martin took the statement, Pace was "coherent and did not act like he was under the influence of anything at that time" (11PCR 1913).

Martin testified that this was not the first or the last capital case he had investigated. (11PCR 1932, 1941). He recalled that police reports mentioned Pace's crack cocaine usage. (11PCR 1939). It was not easy, however, to "find people on the street" who would admit buying crack or selling it to a defendant. (11PCR 1940). He knew Barry Copeland, and knew that Pace had stayed with him. (11PCR 1936). In fact, Barry Copeland was well known in the community as a drug dealer and addict. (11PCR 1950). Martin also was aware of Kenny Bembo, Cynthia Pace, Danny Hood, Dawson Rich, and Booker T. Jones. (11PCR 1936-38, 1941).

Trial counsel, Randall Etheridge, testified, at the evidentiary hearing, that he was second chair in this case, with primary responsibility for the guilt phase. (11PCR 1964-65, 1986). Although Etheridge was not primarily responsible for the penalty phase preparation, he was involved "somewhat" (12PCR 1994). His recollection was that the evidence of the length of time Pace had been using crack cocaine was "kind of vague" (12PCR 1995). It was his impression that Pace was not a long time user. (12PCR 1995).

The defense team considered the possibility that Pace's cocaine use may have aggravated the case with a Milton or Santa Rosa County jury. It was a concern. (12PCR 2001). In Etheridge's opinion, putting on evidence of crack cocaine use at the penalty phase "certainly could be a double edged sword." (12PCR 1995). In his view, one factor to consider is the particular locale where trial is held.

Sam Hall testified that he was the attorney primarily responsible for investigating and presenting the penalty phase case. He was assisted by Randy Etheridge. (12PCR 2008, 2014).

At the time of Pace's trial, both Hall and Etheridge were experienced capital attorneys. The pair had worked together on the Tony Dupree case. (12PCR 2009-10). Hall was aware that Pace had been struck on the head as a child and that he had a possible history of drug or alcohol use. As a result, Hall had Pace evaluated by Dr. Larson and Dr. Szmurlo "to see if there was any brain damage" or other possible mental mitigation. (12PCR 2013, 2018-19, 2069).

Dr. Larson was an experienced forensic psychologist; Hall has relied on him many times with "a lot of success." (12PCR 2134). Hall testified that it took some effort to find a psychiatrist willing to take the case; in his experience "it is fairly easy to find a psychologist, but not too easy to find a

psychiatrist." (12PCR 2020). He talked to several psychiatrists before securing Dr. Szmurlo to evaluate Pace. (PCR 2020).

Hall specifically asked both Dr. Larson and Dr. Szmurlo to focus on the possibility of neurological damage of some kind. (12PCR 2113-14). Neither Dr. Larson nor Dr. Szmurlo found any sign of organic brain damage. Their reports were otherwise unfavorable and damaging to Pace. (12PCR 2115-16, 2016-17). Dr. Szmurlo did an E.E.G. that did not indicate brain damage. (12PCR 2116).

In addition to evidence of brain damage, Hall asked both experts to evaluate for any other mitigation. Dr. Larson specifically addressed and rejected statutory mental mitigation. (12PCR 2120). Hall asked Dr. Szmurlo "to look at the case from the standpoint of determining any mitigating circumstances which would be presented to the jury to aid them in deciding whether to recommend to the court a sentence of life or death in the electric chair should the jury convict Mr. Pace of first degree murder." (12PCR 2028-29).

Dr. Szmurlo reported back that he found nothing which would help in the penalty phase. Dr. Szmurlo concluded that Pace was not under the influence of intoxicants and knew what he was doing at the time of the murder. (12PCR 2031-33). This conclusion was consistent with what Pace himself had told counsel. (12PCR 2033-34, 2036-37).

Hall testified that, despite repeated questioning, Pace insisted to defense counsel that he had not been intoxicated at the time of the crime. (12PCR 2073). Hall was not going to "beat the bushes" to find witnesses who could say he was intoxicated at the time of the crime when Pace insisted that he was not intoxicated. (12PCR 2075).

Asked by post-conviction counsel whether Hall would have used Dr. Larson if he had provided two statutory mitigators, Hall answered, "Yes . . . if he had something to back that up with." (12PCR 2016). But in view of the many damaging things in Dr. Larson's report, Hall "would have hesitated to put him on unless I had strong evidence that [Pace] was operating under extreme emotional distress at the time." (12PCR 2016-17). Hall did not doubt that long-term drug abuse could be mitigating, but he did not think such evidence would play well with the jury if you could not link it to the crime; otherwise, proof that the defendant is a drug abuser may very well have a negative impact on a jury. (12PCR 2074, 2077).

Hall's penalty phase strategy was "basically to try to tell the jury that Bruce Pace was somebody that had a life, [was] a human being, he should be saved." He had good qualities; he had helped raise his siblings, he was a good employee, and he was a good athlete who was well thought of by his coach. Even though Pace had previously been convicted of strong-armed robbery, the

murder was out of his ordinarily non-violent character. Trial counsel also wanted to convince the jury that Pace could live in prison and not be a threat to anyone. (12PCR 2122-23).

Hall testified that the problem with presenting evidence of drug addiction was that it was inconsistent to "[p]ut on all this good stuff to show what a good person he is, and then also, ladies and gentlemen, also by the way, he is [a] drug addict and a drug user." (12PCR 2123). In Mr. Hall's opinion, presenting evidence that Pace was a drug addict and user creates a risk that the evidence would undercut the evidence showing what a good person Pace is. (12PCR 2124). There might be some people that just dislike people that use drugs and vote for death because of it. (12 PCR 2125). While he had evidence available to show Pace used cocaine, he had no expert testimony that would tie that cocaine usage to the murder. (12PCR 2125). All things considered, including the absence of expert testimony that might have tied Pace's cocaine usage to any mitigating circumstances, Hall thought the cocaine usage "was a negative." (12PCR 2124-25).

Dr. Larson, a psychologist, acknowledged that he had examined Pace in 1989, looking for possible mitigation, and had not found extreme mental or emotional disturbance or substantial impairment. (9PCR 1739-40). Dr. Larson testified he had re-evaluated his previous opinion in light of affidavits gathered

during post-conviction proceedings focusing on Pace's cocaine use and the PSI from Pace's prior strong arm robbery conviction. The PSI showed that Pace had no juvenile criminal history and that the robbery had been a senseless crime committed while Pace was intoxicated. (9PCR 1742-1744). Dr. Larson testified he was now of the opinion that Pace was under "appreciable emotional distress" at the time of the murder and that, "[a]ssuming that he was drug dependent, . . . he would have impairments to his capacity to conform his behavior to the requirements of the law." (9PCR 1747-48).

Dr. Larson acknowledged on cross-examination that in 1989 he had been provided with a lot of information, that he was "aware of the extent of [Pace's] drug problem at that time," and that he had felt he had enough information to evaluate Pace's mental condition accurately. (9PCR 1754, 1756-57, 1758). Otherwise, he would have sought additional information before delivering his conclusions to trial counsel. (9PCR 1759). Dr. Larson acknowledged there was much in his report to trial counsel that "would not be beneficial to someone in a penalty phase." (9PCR 1758).

Dr. Szmurlo, a psychiatrist, testified at the post-conviction hearing. Dr. Szmurlo told the collateral court that trial counsel sought his assistance in evaluating Pace for mitigation. (11PCR 1871, 1890).

Dr. Szmurlo testified that he understood the simple definition of the word “mitigating” and understood that he was looking for any pre-existing psychiatric condition or for any intoxication or drug use which might have rendered Pace’s judgment deficient. (11PCR 1877-78). After he completed his evaluation, he did not believe he would be called to testify because his findings were unfavorable to the defense. (11PCR 1891).

Dr. Szmurlo told the collateral court that Pace clearly related the details of the crime, admitted he shot Mr. Covington, and clearly pointed out where he disposed of the body, Mr. Covington’s taxi and the gun. (11PCR 1892-1893). Pace’s clear and detailed history of the crime gave rise to Dr. Szmurlo’s view that Pace had the capacity to recognize what he was doing was wrong. (11PCR 1893).

Pace told Dr. Szmurlo he had been using cocaine for the past three months, but had not used cocaine the day of the murder (although he did claim to have used it the night before). Pace told Dr. Szmurlo he had been using $150 worth of cocaine a day, but it only cost him $100 a week because he was “buying for people who were afraid or did not want to do it by themselves.”

Pace described his background and history, including a claim of head trauma while playing football in the fourth grade. Dr. Szmurlo administered neurological screening, which failed

"to reveal any signs of organicity." Dr. Szmurlo concluded that Pace had known what he was doing at the time of the crime and that there were no psychiatric problems that could influence a court's sentencing decision "except for a rather heavy use of cocaine prior to the offense."

Dr. Szmurlo testified that while he had not found mitigation in his original evaluation, he was now of the opinion that the two statutory mental mitigators applied. (11PCR 1888). He testified, however, that this change of heart was not due to any new evidence, but to his belief that he had approached his original evaluation from the "wrong angle." (11PCR 1895). Before trial, he was looking for any "connectiveness between his intoxication and the crime" when he should have been trying "to provide an explanation why this crime seemed to be out of his character." (11PCR 1895-96).

Dr. Barry Crown is a neuropsychologist. Dr. Crown testified that, on November 22, 1994 (some six years after the murder), he had administered a neuropsychological battery of tests to Pace, the results of which indicate "organic brain damage." (9PCR 1619-21). He acknowledged that testing conducted in 1994 would have indicated Pace's brain functioning at that time; it would only be "probabilistic" as to his brain functioning in 1988. (9PCR 1633). Pace's present impairments include a reduced ability to "shift" smoothly from one task to another, to pay

attention and concentrate, especially in the face of distractions, and to draw. (9PCR 1622-1628). Dr. Crown acknowledged that Pace functioned normally in many ways and that many people with Pace's degree of impairment do not commit crimes. (9PCR 1633-35). In fact, Pace's "impairments" could easily be overlooked in a clinical psychological examination. (9PCR 1639-40).

Dr. Michael Herkov testified at the postconviction hearing that, in his opinion, Pace is crack cocaine dependent and that the two statutory mental mitigators apply to his crime. (9PCR 1708-09). He acknowledged on cross-examination that he had not reviewed Pace's pre-trial statement or the trial transcript and was not familiar with the facts of the murder. (9PCR 1712-13, 1715). His opinion was largely based on what Pace told Dr. Herkov eleven years after the crime. (9PCR 1712, 1715). Dr. Herkov admitted that it would have "an effect" on his opinion if Pace had not used cocaine the day of the murder. (9PCR 1713). Dr. Herkov told the collateral court that in rendering his opinion, he was not saying that Pace did not know what he was doing. Pace clearly knew the nature of his behavior and the consequences of his behavior. He clearly knew what was going on. (9PCR 1718).

Kenneth Bembo is Bruce Pace's cousin. Bembo is a convicted felon, having been convicted of the sale of cocaine. (9PCR

1650). Bembo told the collateral court that in 1987 and 1988 he would see Pace twice a week. They would all get together in the "bottom". When they got together, they would get high and drunk. (9PCR 1651). Bembo has used crack cocaine. He knew Pace was using crack between 1987-1988. Pace would do $50 to $100 of crack per day. (9PCR 1652). When Pace was on cocaine, he was paranoid and nervous. He couldn't keep still. (9PCR 1652-1653). When Pace was not on crack, he was a normal person, a good guy. (9PCR 1652). He was not violent. (9PCR 1653). Asked if Pace was in control of himself, Bembo answered "no." (9PCR 1653). Bembo testified, moments later, that he had not seen Pace lose control of himself. (9PCR 1655).

Bembo had last seen Pace either Thursday night, Friday night or Sunday night before the murder. (9PCR 1658). He was acting "jittery, nervous, paranoia [sic]" (9PCR 1660).

Bembo gave a statement to law enforcement in 1988 or 1989. (9PCR 1662). He does not recall whether he gave a deposition taken by the defense attorneys. (9PCR 1665).

Bembo acknowledged on cross-examination that he was not with Pace every day and did not really know how much Pace was spending on crack. (9PCR 1667-68). Effects of cocaine would last for a couple of hours. (9PCR 1669). Bembo has no idea if Pace used cocaine on the day of the murder. (9PCR 1669).

Melanie Pace, Pace's cousin, testified that on the morning of the day Floyd Covington disappeared, she saw Pace. He needed a bath and smelled of alcohol (9PCR 1778). He was on his way to see his probation officer. (9PCR 1778).

Ms. Pace was deposed prior to Pace's trial. Ms. Pace admitted that she testified, in her pre-trial deposition, that when she had seen Pace that same morning, he had not appeared to be under the influence of drugs or alcohol. (9PCR 1780-1781).

Margaret Dixon, Pace's second cousin, testified that at the end of 1987 she "noticed" that Pace had started using crack cocaine. She could tell by the nervous way he acted. (9PCR 1786-87). By the middle to the end of 1988, Pace was "on it real heavy." (9PCR 1787). She "felt sorry for him," but there was nothing she could do. Pace spent his time "on the side of" Floyd Covington's place smoking drugs. (9PCR 1788). She was 15 years old in 1988 when Mr. Covington was murdered.

Barry Copeland testified that he has a number of felony convictions, most of which are drug related. (10PCR 1816). He has known Pace all his life. (10PCR 1806). Pace began smoking crack cocaine in the late 1980s. Copeland sometimes smoked it with Pace. (10PCR 1807). Copeland claimed that Pace was using $300 to $500 worth of crack a day. (10PCR 1807). He also drank alcohol, partly to keep the "want" for crack down. (10PCR 1810). Pace became "paranoid" from crack cocaine use. (10PCR 1808).

Before the murder, Copeland saw Pace off and on Tuesday through Thursday, and then again on Friday afternoon, when the two of them smoked crack. (10PCR 1811-13).

Copeland was deposed before trial. (10PCR 1813). On cross-examination, Copeland acknowledged having given a pretrial deposition in which he had testified that Pace smoked crack, but he did not know whether Pace was a heavy user. (10PCR 1816). Copeland admitted that he was doing $300-500 worth of crack a day himself at the time of the murder, paying for it by selling drugs. (10PCR 1817).

Ora Kay Jones testified she is a convicted felon, having been convicted of uttering a forged instrument. (10PCR 1820). She has been Pace's friend since childhood. She smoked crack with Pace in the 1980s. (10PCR 1820-21). In the week before the murder, Pace was dirty, fidgety, high and nervous. Pace had tried to sell her a VCR which, she believed, did not belong to him. (10PCR 1822).

Cynthia Pace, another cousin, testified that, after Pace's grandmother died, Pace "got to the point" that he did not keep himself neat and clean. (10PCR 1834). She saw Pace the night before the murder in the company of several others. He looked worried. (10PCR 1835). She saw him late the next morning, wearing the same clothes he had on the night before. He did not

appear to be under the influence of either alcohol or drugs. (PCR 1836, 1839). Ms. Pace was deposed prior to trial.

Ms. Pace told the collateral court that Ms. Lillian Rich, Pace's mother, could testify about what Pace's upbringing and the effects of Pace's grandmother's death had on him. Pace went to prison for robbery before his grandmother died. (10PCR 1839).

Thomas Hill, who at the time of the hearing was an inmate at Century Correctional Institution for "about four or five different charges," testified at the evidentiary hearing. Mr. Hill he had seen Pace smoke crack with Booker T. Jones in 1987 and 1988. (10PCR 1842-45).

On June 11, 2001, the collateral court denied Pace's amended motion for post-conviction relief in an extensive twenty-eight page order. The collateral court did not reach Strickland's prejudice prong in disposing of Pace's IAC claim. Instead, the collateral court found that trial counsel's performance was not deficient. Distilled to its bottom line, the collateral court found that counsel reasonably concluded that further investigation into the Defendant's drug history would not develop significant mitigation based on the representations of the Defendant, his friends and family, and the mental health professionals who had examined him.

The collateral court also found that, given the unfavorable psychological opinions, counsel's tactical decision to humanize

the Defendant and not present any evidence of his drug use was a reasonable strategy. (7PCR 1172-1183).

On June 21, 2001, Pace filed a motion for rehearing. The motion focused entirely on the collateral court's ruling on Pace's claim that trial counsel was ineffective for failing to introduce evidence of Pace's cocaine addiction. (8PCR 1393-1399).

On June 27, 2001, the collateral court denied Pace's motion for rehearing. On July 24, 2001, Pace filed an appeal from the denial of his amended motion for post-conviction relief.

On appeal, Pace raised six claims. Among them was Pace's allegation that the post-conviction court erred in denying Pace's claim that counsel was ineffective at the penalty phase. Pace also challenged the collateral court's denial of his Brady claims. Pace v. State, 854 So.2d 167, 171-172 (Fla. 2003). Pace also filed a petition for writ of habeas corpus, raising five claims. Id.

On May 22, 2003, the Florida Supreme Court affirmed the collateral court's order denying Pace's motion for post-conviction relief. The Court also denied Pace's petition for writ of habeas corpus.

As to Pace's claim that trial counsel was ineffective for failing to present evidence of Pace's crack cocaine addiction during the penalty phase of Pace's capital trial, the Florida

Supreme Court denied Pace's claim. Like the collateral court below, this Court did not address Strickland's prejudice prong in disposing of Pace's claim. Applying the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), this Court ruled, in pertinent part:

> ... Pace alleges that penalty-phase counsel Sam Hall was ineffective for failing to investigate and present evidence that Pace was addicted to crack. An attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000). This claim was rejected by the post-conviction court after the evidentiary hearing. At the hearing, attorney Hall testified that at the time of Pace's trial, Hall considered himself an experienced capital attorney. Hall had fully tried one capital case and worked substantially on another prior to Pace's trial. He further testified regarding the details of the penalty-phase investigation.
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> The post-conviction court found that the evidence presented at the evidentiary hearing showed that Hall's investigation consisted of the following: (1) deposing several witnesses; (2) utilizing an investigator to interview witnesses for potential mitigating evidence; (3) obtaining witness statements from the State; (4) obtaining Pace's school records; and (5) securing two mental health experts, psychologist Dr. James Larson and psychiatrist Dr. Peter Szmurlo, to examine Pace. Dr. Larson and Dr. Szmurlo provided Hall with examination reports that did not reveal any significantly mitigating information and were otherwise unfavorable to Pace. Although Dr. Szmurlo's examination report stated that Pace denied having any psychiatric problems "[e]xcept for a rather heavy use of cocaine," attorney Hall testified that Pace consistently related to Hall that he was suffering from no drug-related effects at the time of the offense. Neither expert requested that Pace be evaluated by an addiction specialist nor indicated that Hall's crack use might have affected his mental health at the time of the offense. Hall

interviewed several of Pace's friends and relatives regarding Pace's crack use but, as the post-conviction court stated, "individuals close to Pace failed to disclose any information that either augmented or sharply contradicted Pace's own self reports of crack use." Post-conviction order at 13. We find no error in the post-conviction court's denial of relief based upon that court's detailed evaluation of the evidence.

Regarding Pace's claim that Hall was ineffective for failing to present evidence of Pace's crack use, the post-conviction court concluded that "given the unfavorable psychological opinions, counsel's tactical decision to humanize [Pace] and not present any evidence of his drug use was a reasonable strategy." Post-conviction order at 20. The post-conviction court's conclusion is supported by the testimony regarding Pace's representations to Hall and by the generally unfavorable expert opinions. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. Thus, there is competent, substantial evidence to support the post-conviction court's finding that Hall made a strategic decision to present Pace's positive attributes over evidence of his crack use. We find no legal error in the post-conviction court's determination that Hall's decision was not deficient performance in light of the information that both the experts and Pace provided to Hall. Cf. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998).

Pace asserts that in denying this claim, the post-conviction court erroneously relied upon the same assumption that Hall had relied upon—that Pace had to be under the influence of drugs at the time of the offense. However, we do not find that either Hall or the post-conviction court relied upon such an assumption. Hall's testimony was that in his experience, Pace's cocaine addiction would only be considered "significantly" mitigating if some effect of the addiction could be linked to Pace's conduct at the time of the offense. Because Pace continued to assert that he was not affected by his crack use at the time of the offense and because Dr. Larson and Dr. Szmurlo, the experts hired by Hall, did not report that Pace's crack use affected his mental health at

> the time of the offense, Hall concluded that evidence of Pace's past crack use would be more prejudicial than beneficial under the circumstances of the defense. Hall concluded that the evidence of crack use would be contrary to his strategic efforts to emphasize with the jury that Pace "had some good qualities and was a human being who should be saved." Our review of the post-conviction order reveals that the court made a factual determination based upon the evidence presented that Hall's decision was strategic and that the post-conviction court applied the correct rule of law.

Pace v. State, 854 So. 2d 167, 173-174 (Fla. 2003).

This Court also denied Pace's Brady claims. The Court ruled in pertinent part:

A. The Fingerprint Smudge Report

> On the second day of Pace's trial, prosecutor Kim Skievaski directed sheriff's officers to conduct an experiment to determine whether a fingerprint on the window of the victim's taxicab would smudge if the window was rolled down and up again. The officers determined in a written report that a fingerprint would not smudge. This report was not provided to Pace's counsel.
>
> The postconviction court held that Pace failed to demonstrate that the withheld smudge report was sufficiently exculpatory. The court cited the following facts to support its conclusion.
>
> > *At the Defendant's trial, the evidence revealed the existence of one latent print attributable to Pace on the exterior of the driver's side window of Covington's cab. Defense counsel diminished the evidentiary value of this print by eliciting testimony that Pace occasionally worked for Covington and had often ridden in his cab. In addition, the State's expert conceded that there is no scientific method to determine the age of a print and a print can remain on a surface for an indefinite period of time under ideal conditions. Thus, the fingerprint evidence*

> *alone failed to establish a sufficient link between the Defendant and the murder of Covington.[n.] Given the weakness of the fingerprint evidence, a report that indicated that a print would not smudge if the window were rolled down is of little significance.*
>
> *[n.] Examples of more substantial evidence linking Pace to the crime are the following: witnesses placed the Defendant in Covington's cab on the morning of the murder, Pace had possession of the shotgun believed to be the murder weapon, the Defendant had human blood that matched the victim's blood type on his clothing the day of the murder, and witnesses placed the Defendant near the location where the cab was dumped after the murder. Postconviction order at 25-26 (record citations omitted).*

The record supports the postconviction court's factual findings, and we approve the postconviction court's denial of this claim. Pace has not demonstrated that the evidence is sufficiently exculpatory or that prejudice ensued. The information provided in the smudge report would have been cumulative to other evidence presented by Pace's counsel, and it was not favorable enough "to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435, 115 S.Ct. 1555.

B. Reprimand of Investigator Jean Shirah

Investigator Jean Shirah was a deputy sheriff who testified during Pace's trial. Two months before Pace's trial, Shirah knowingly gave false information under oath during a deposition for an unrelated case. Shirah had testified that she had collected a particular exhibit during a search, when in fact the item had been collected by another officer. The State Attorney's office subsequently reprimanded Shirah, issued her a written reprimand, and notified the Public Defender's office. Pace asserts that the failure to disclose the written reprimand issued to Shirah constitutes a Brady violation.

The postconviction court held that Pace failed to demonstrate that the State suppressed this evidence

> because the State Attorney's office communicated to Pace's counsel that Shirah gave false testimony, and Pace's counsel testified that he was probably aware that Shirah had been reprimanded. Additionally, the postconviction court held that Pace failed to establish that prejudice ensued. We find no error in the decision that there was no Brady violation. *See* Stewart v. State, 801 So.2d 59, 70 (Fla.2001).

Pace v. State, 854 So. 2d 167, 177-179 (Fla. 2003).

On June 6, 2003, Pace filed a motion for rehearing. On September 2, 2003, the Florida Supreme Court denied Pace's motion for rehearing. Pace v. State, 2003 Fla. LEXIS 1522 (Fla. Sep. 2, 2003). Mandate issued on October 2, 2003.

On November 13, 2003, Pace filed a petition for a writ of certiorari seeking review of his post-conviction proceedings. On January 20, 2004, the United States Supreme Court denied review. Pace v. Florida, 540 U.S. 1153, 124 S.Ct. 1155 (2004).

On September 28, 2004, Pace filed a timely petition for a writ of habeas corpus in the District Court for the Northern District of Florida, Pensacola division. Among his claims, Pace alleged the Florida Supreme Court's disposition of his ineffective assistance of counsel claims were contrary to, or an unreasonable application of the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984). On October 1, 2007, the Court denied Pace's petition.

The Eleventh Circuit granted Pace permission to appeal one claim raised in his habeas petition: whether trial counsel was

ineffective for failing to develop and present evidence of Pace's crack cocaine addiction. On February 9, 2009, the Eleventh Circuit Court of Appeals denied Pace's claim.

The Eleventh Circuit, as did the collateral court and the Florida Supreme Court, only addressed Strickland's deficient performance prong, ruling, in pertinent part:

> ... Pace has never challenged the supreme court's findings of fact as lacking evidentiary support, either in litigating his petition in the district court or in his brief on appeal. Nor does he challenge the United States Supreme Court precedent the Florida Supreme Court applied in rejecting his ineffective assistance claim. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, clearly controlled the issue in this case and the state court applied it. His argument on appeal therefore boils down to whether the supreme court misapplied Strickland in holding that defense counsel made a reasonable strategic choice in opting to forego additional investigation into Pace's crack cocaine addiction and portraying Pace as a decent human being rather than as a crack cocaine addict.
>
> "Strategic choices made after thorough investigation of law and facts relevant to possible options are virtually unchallengeable." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. That is to say, "[c]ourts conduct a highly deferential review of counsel's performance and indulge the strong presumption that counsel's performance was reasonable." Stewart, 476 F.3d at 1209 (internal quotation marks omitted).
>
> Here, the supreme court found that defense counsel made a reasonable investigation into Pace's drug abuse. Martin and Hall both questioned Pace regarding his drug abuse and Pace told them that he abused crack cocaine and had been doing so for months preceding the murder. Pace made the same statement to Drs. Larson and Szmurlo. Szmurlo's report to Hall stated that Pace was engaged in "a rather heavy use of cocaine prior to the offense." Hall asked members of Pace's family and friends about his drug abuse; he took the depositions

of five of the ten people who gave collateral counsel the affidavits that were submitted to Drs. Crown and Herkov. He took the depositions of those most likely to know about Pace's behavior; they revealed nothing significant about Pace's drug use, though they were asked about it point blank.

Providing an affidavit that contradicts what the affiants previously said under oath is not unknown: It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called .... Such affidavits usually prove at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.

Implicit in the supreme court's rejection of Pace's ineffective assistance claim is the notion that Hall went far enough in investigating Pace's crack cocaine addiction. Hall could have deposed all ten, instead of just five, of the witnesses who gave affidavits to collateral counsel. However, "[t]o be effective, a lawyer is not required to pursue every path until it bears fruit or until all hope withers .... [A] decision to limit investigation is accorded a strong presumption of reasonableness." Id. at 1236-37 (citations omitted). Given the statements Pace made to defense counsel, the investigator, and Drs. Larson and Szmurlo-that he was not under the influence of crack cocaine or alcohol when he committed the Covington murder-and what the witnesses said on deposition, we agree with the supreme court that it was reasonable for counsel to limit their investigation into Pace's substance abuse addiction. We also agree with the supreme court that "[t]rial counsel cannot be deemed ineffective for failing to provide information to [Drs. Larson and Szmurlo] that the affiants chose not to disclose to counsel when originally questioned."

Moreover, as Hall himself recognized, presenting evidence of a defendant's drug addiction to a jury is often a "two-edged sword": while providing a mitigating factor, such details may alienate the jury

> and offer little reason to lessen the sentence. For example, in Housel v. Head, 238 F.3d 1289, 1296 (11th Cir.2001), we held that an attorney's strategy to show a "family-friendly side of [defendant], rather than dwelling on the evidence of [his] extensive drug use and drinking with a sociopathic biker crowd" was reasonable because the jury would likely not consider alcohol and drug use to be mitigating. Here, as in Housel, Hall chose to draw upon the sympathy of the jurors by portraying Pace as a good person who helped and cared for his family rather than as a crack cocaine addict with poor hygiene and a paranoid personality while on drugs. The supreme court correctly held that this was a reasonable strategy choice.
>
> There is no basis in this record to conclude that the Florida Supreme Court's decision denying Pace's claim of ineffective assistance of counsel in the penalty phase of the trial was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts. We therefore resolve in the State's favor the issue presented in the certificate of appealability, and the district court's decision denying a writ of habeas corpus is, accordingly, AFFIRMED.

Pace v. McNeil, 556 F.3d 1211 (11th Cir. 2009).

Pace petitioned the United States Supreme Court to review the Eleventh Circuit's decision in his case. On October 5, 2009, the United States Supreme Court denied Pace's petition. Pace v. McNeil, 130 S.Ct. 190 (2009).

On November 30, 2010, Pace filed a successive motion for post-conviction relief. Pace raised two claims, an ineffective assistance of penalty phase counsel claim and a Brady claim. Pace had raised both of these claims in his initial post-

conviction proceedings and this Court had rejected these claims on appeal. Pace v. State, 854 So. 2d 167, 177-179 (Fla. 2003).

Before the collateral court, Pace claimed that he was entitled to file a successive motion because there was "new law" from the United States Supreme Court. Pace pointed to the United States Supreme Court's decision in Porter v. McCollum, 130 S.Ct. 447 (2009). Pace alleged Porter stands for the proposition that the Florida Supreme Court misapplied Strickland v. Washington, 466 U.S. 668 (1984) in disposing of Pace's ineffective assistance of counsel claim. Pace averred that Porter is new law that repudiates the Florida Supreme Court's Strickland jurisprudence in general. (1SPCR 1-40). On December 13, 2010, the State filed an answer to Pace's successive motion. (1SPCR 44-108).

On January 11, 2011, the collateral court held a case management conference (Huff hearing). (1SPCR 124). On March 23, 2011, the collateral court denied Pace's successive motion. (1 SPCR 133-136). The Court found Pace's motion untimely, successive, procedurally barred and without merit. The Court ruled, in pertinent part:

> ..Defendant bases the instant motion on the case of Porter v. McCollum, 130 S.Ct 447 (2009) and alleges that Porter constitutes a change in the law that should be applied retroactively; therefore Defendant's Porter claim is cognizable in a successive motion for post-conviction relief. Defendant is incorrect in his assertion.

> Pursuant to rule 3.851(f)(5)(B), a successive motion for postconviction relief may be denied "[i]f the motion, files, and records conclusively show that the movant is entitled to no relief." The Court finds that the subject motion is untimely, successive, procedurally barred, and unauthorized under Rule 3.851(d)(10(2)(e)(2), Florida Rules of Criminal Procedure. Contrary to Defendant's allegations, Porter does not establish a new fundamental right to be applied retroactively.FN7 Porter is the United States Supreme Court's application of Strickland v. Washington, 466 U.S. 668 (1984), to the particular facts of that case. Accordingly, Defendant's motion is not based on any newly established fundamental constitutional right that "has been held to apply retroactively" and does not meet any exception to the time and successiveness bars espoused in Rule 3.851, Florida Rules of Criminal Procedure.
>
> FN7: As Porter is not considered a new rule of law, Witt v. State, 387 So.2d 922 (Fla. 1980) is inapplicable.
>
> Arguendo, even if Defendant's claims were properly before this Court, Defendant would not be entitled to relief. In the instant case, unlike Porter, the trial court and the Supreme Court of Florida specifically found that trial defense counsel's performance was not deficient. See Pace v. State, 854 So.2d 167, 173-177 (Fla. 2003). Consequently, neither court reached the prejudice prong of the Strickland analysis when denying, and affirming the denial of, postconviction relief. The extensive analysis of Strickland's prejudice prong in Porter would in no way affect Defendant's case, as the prejudice prong need not be considered when the deficiency prong is not met. See Strickland, 466 U.S. at 697.

(1SPCR 133-136).

Pace appealed. On August 29, 2011, Pace served his initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

The collateral court correctly found that Pace's successive motion is time barred. The successive motion, filed some 17 years after Pace's convictions and sentences became final, did not fall within any exception to the one year limitation period set forth in Rule 3.851(d)(1), Florida Rules of Criminal Procedure. Although Pace purports to rely on an exception to the one year limitation period that would allow a successive and out of time motion to be filed if it were based on a newly established constitutional right that had already been declared retroactive at the time Pace filed his motion, Pace met neither prerequisite. The United States Supreme Court's decision in Porter v. McCollum, 130 S.Ct. 447 (2009) did not establish a new constitutional right nor is it new law. Instead, Porter is a case in which the United States Supreme Court applied its 1984 decision in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to the unique facts of Mr. Porter's case. Even if Porter were new law, the decision in Porter had not already been declared retroactive at the time Pace filed his motion. Accordingly, the collateral court correctly ruled Pace's claim was not appropriately or timely brought in a successive motion for post-conviction relief.

The collateral court also correctly found Pace's claims were procedurally barred. In Marek v. State, 8 So.3d 1123, 1129

(Fla. 2009), this Court has previously rejected a similar attempt, after several new decisions of the United States Supreme Court were issued, to re-litigate ineffective assistance of counsel claims already raised and rejected in previous post-conviction proceedings.

Additionally, the collateral court correctly found Pace's claim was without merit because nothing in Porter, a case in which the United States Supreme Court focused on Strickland's prejudice prong, would affect the Florida Supreme Court's 2003 rejection of Pace's ineffective assistance of counsel claims on the grounds that counsel's performance was not deficient. In this Court's 2003 decision in Pace, this Court never addressed Strickland's prejudice prong. Accordingly, Porter does not control in any event.

Finally, even if this Court were to look to Strickland's prejudice prong and apply it to the merits of Pace's case in accord with Porter, Pace would not be entitled to any relief. The United States Supreme Court's decision in Porter turned on two powerful pieces of evidence that Porter presented at a post-conviction evidentiary hearing; significant mental mitigation and Porter's heroic combat service during the Korean War. Pace had neither. In comparison to Porter, Pace had no military service and spent his time down at the "bottom" smoking crack and hanging out with convicted felons. Pace's only time in

uniform was in a prison uniform. The collateral court properly denied Pace's claim and this Court should affirm.

ARGUMENT

ISSUE

WHETHER THE TRIAL JUDGE ERRED IN SUMMARILY DENYING PACE'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF.

In this claim, Pace seeks to re-litigate two claims; trial counsel was ineffective during the penalty phase of his capital trial and a Brady claim, both of which this Court rejected, some eight years ago, in Pace v. State, 854 So. 2d 167, 173-174 (Fla. 2003). Pace suggests he is, nevertheless, allowed to raise these same two claims again because of the United States Supreme Court decision in Porter v. McCollum, 130 S.Ct. 447 (2009).

The collateral court properly denied Pace's successive motion for post-conviction relief. This is so for several reasons.

First, Pace's motion was untimely. Pace chose to raise his claims in a successive motion for post-conviction relief pursuant to Rule 3.851, Florida Rules of Criminal Procedure.[1] Having chosen that avenue, Pace is required to comply with the rule.

[1] Pace's latest motion is successive because Pace already had litigated one full round of post-conviction claims that were denied on the merits and then affirmed on appeal.

Rule 3.851, Florida Rules of Criminal Procedure sets forth a one year limitation period in which a capital defendant may file a motion for post-conviction relief. The period begins to run on the day a defendant's conviction becomes final. *Rule 3.851(d)(1)(A), Florida Rules of Criminal Procedure.* Pace's convictions and sentence became final on October 5, 1992 when the United States Supreme Court denied Pace's petition for certiorari review of his direct appeal proceedings. Pace v. Florida, 506 U.S. 885 (1992).

Rule 3.851(d) provides that no (emphasis mine) motion for post-conviction relief may be filed or considered if it is filed outside the one year time limitation unless it falls within one of three narrow exceptions. One of these, and the one Pace purported to invoke before the collateral court below, is found in Rule 3.851(d)(2)(B), Florida Rules of Criminal Procedure. This exception provides that a defendant may file an out of time motion for post-conviction relief if the claim is based on a newly established retroactive fundamental constitutional right.[2]

On the face of the rule, there are two prerequisites to filing an out of time motion for post-conviction relief: (1) a

[2] For the most part, a new fundamental constitutional right for the purposes of Rule 3.851(d)(2)(B), comes as a result of new case law from the United States Supreme Court. (e.g. Roper v. Simmons, 543 U.S. 551 (2005), the case in which the United States Supreme Court determined that a person who commits a murder before the age of 18 cannot be executed).

new fundamental constitutional right has been established and (2) the new fundamental constitutional right has already been held to be retroactive to cases on collateral review. Pace's Porter claim is untimely because Pace can meet neither pre-requisite of Rule 3.851(d)(2)(B) to overcome the one year limitation period imposed by Rule 3.851.

First, Porter is not a case that establishes a new fundamental constitutional right. Indeed, Pace admits this is the case. (IB 17). The "constitutional right" at issue in Porter is a defendant's right to effective assistance of counsel. Long before Porter, the fundamental constitutional right to effective assistance of counsel was established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Likewise, in Strickland, the United States Supreme Court outlined a two-pronged test to be applied in analyzing such claims. On its face Porter does not, and does not even purport to, establish a new constitutional right.

In Porter, the United States Supreme Court, *per curiam*, reversed the Eleventh Circuit Court of Appeals. Citing to Strickland v. Washington, the United States Supreme Court found it was objectively unreasonable for the Florida Supreme Court to conclude there was no reasonable probability Porter's death sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's

counsel neither uncovered nor presented; most importantly Porter's compelling combat service in Korea during the Korean conflict for which he was decorated. See Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010)(noting that "the crux of counsel's deficient performance in Porter was the failure to investigate and present Porter's compelling military history.").

Before Porter, claims of ineffective assistance of counsel claims were governed by a two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). After Porter, a claim that counsel was ineffective in violation of the Sixth Amendment right to counsel remains governed by a two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Even a cursory reading of Porter reveals that the United States Supreme Court changed nothing about Strickland. Nor did Porter establish the Florida Supreme Court's analysis of Pace's claims was incorrect. Instead, the United States Supreme Court ruled, simply, that both the collateral court and this Court got it wrong in Porter's individual case.

Even if Pace could show Porter was "new law", which he cannot, Pace's motion would still be untimely because Pace cannot show that Porter has already been held retroactive to cases already final at the time Porter was decided. Rule

3.851(d)(2)(B) provides an exception to the one year limitation period when "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." The use of the term "has been held" is significant. This language means that in order to file an out of time successive motion for post-conviction relief, the new law upon which the defendant stakes his claim must have already been declared retroactive. Chandler v. Crosby, 916 So.2d 728 (Fla. 2005)(Wells, J. concurring specially)(noting that an untimely motion filed pursuant to Rule 3.851(d)(2)(B) must assert the new constitutional right upon which he relies has been held to apply retroactively in a case decided before [emphasis mine] the motion was filed in order for the motion to be considered timely filed); Sims v. State, 753 So.2d 66, 70 (Fla. 2000)(use of past tense in a rule is not happenstance, instead use of the past tense means something has already happened). *See also* Tyler v. Cain, 533 U.S. 656 (2001) (holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon).[3]

[3] A defendant whose litigation is already in successive post-conviction land is not without remedy if his claim is truly premised on a new constitutional right that was not established until after his first round of post-conviction litigation is complete. If the new law is declared retroactive, a defendant

Pace has not alleged, nor can he show, that Porter had already been declared to be retroactive by the United States Supreme Court, the Florida Supreme Court, or indeed any Court, at the time he filed his motion. As such, the collateral court correctly concluded Pace's motion was time barred.[4]

Pace's successive post-conviction claims are also procedurally barred. Pace's claims are procedurally barred because Pace raised, and this Court rejected, these same claims in Pace's initial post-conviction proceedings. Pace v. State, 854 So.2d 157, 172-179 (Fla. 2003).

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can then file a successive motion for post-conviction relief and the collateral court may properly consider his claim. Retroactivity is only properly litigated, however, in a post-conviction motion filed within the one year period set forth in Rule 3.851(d), Florida Rules of Criminal Procedure.

[4] Pace attempts to persuade this Court to apply this Court's decision in Witt v. State, 387 So.2d 922 (Fla. 1980) and declare Porter retroactive. (IB 10-17). However, a Witt analysis is not appropriate when considering a successive motion for post-conviction relief filed outside the one year time limitations. This is so because to file a post-conviction motion outside the one year limitation period of Rule 3.851(d)(1), the new right has to already been declared retroactive to cases on collateral review at the time the motion is filed. *Rule 3.851(d)(2)(B), Florida Rules of Criminal Procedure*. Even if this were not the case, Witt does not help Pace in his cause because a Witt analysis is only appropriate when new law has been established. Porter is not new law. Porter merely applied Strickland to the facts of Porter's case. *See e.g.* Marek v. State, 8 So. 3d 1123, 1128 (Fla. 2009) (rejecting a similar claim of retroactivity and concluding that the United States Supreme Court in Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456 (2005), Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000) did not change the standard of review for claims of ineffective assistance of counsel under Strickland).

Pace avers he may re-litigate these claims in light of the Porter decision. Pace is mistaken. This Court has already rejected a similar argument in another case. Marek v. State, 8 So.3d at 1129(ruling that Marek's attempt to re-litigate his ineffective assistance of counsel claim was procedurally barred because Marek had already raised, and the Florida Supreme Court rejected, this claim in an earlier post-conviction proceeding and additionally rejecting Marek's suggestion he could re-litigate the claim in light of several recent decisions from the United States Supreme Court). As it did in Marek, this Court should conclude Pace's Brady claim and ineffective assistance of penalty phase counsel claim are procedurally barred.

Finally, this Court may affirm the collateral court's order denying Pace's Porter motion because it is singularly without merit. This is true for two reasons. First, even assuming the decision in Porter was broader than the facts of Porter itself (which it isn't), Porter did nothing to alter this Court's analysis of Pace's claims.

In Porter, the United States Supreme Court criticized this Court's application of Strickland's prejudice prong to the facts of Porter's case. It could not, and did not, criticize this Court's analysis of Strickland's performance prong in Porter's case because this Court did not address Strickland's performance prong in Porter's case. Porter v. State, 788 So.2d 917, 923-924

(Fla. 2001). Instead, this Court concluded only that Porter had not met Strickland's prejudice prong. Id.

In Pace, however, this Court never reached Strickland's prejudice prong because this Court concluded that Pace had failed prove deficient performance. Pace v. State, 854 So.2d 167, 172-177 (Fla. 2003). Of course, such an approach is perfectly consistent with the United States Supreme Court's decision in Strickland. A reviewing court need not review Strickland's prejudice prong if the defendant has failed to show deficient performance (and vice versa). Strickland v. Washington, 466 U.S. 668, 700 104 S.Ct. 2052, 2071 (1984) (failure to show either deficient performance or sufficient prejudice defeats an ineffectiveness claim).

The United States Supreme Court in Porter criticized this Court's analysis of Strickland's prejudice prong and not this Court's analysis of Strickland's performance prong. In Pace, this Court rejected Pace's ineffective of assistance of counsel claim based solely on an analysis of Strickland's performance prong. Accordingly, in no event can the United States Supreme Court's decision in Porter have any effect on Pace's case.

This claim is also without merit because even if this Court were to look to Strickland's prejudice prong and apply it to the merits of Pace's case in accord with Porter, Pace would not be entitled to any relief. The evidence Pace presented at his

evidentiary hearing falls far, far, short of the compelling mitigation evidence presented in Porter's case.

Contrary to Pace's assertion that Porter's reach is wide, the United States Supreme Court's decision in Porter is actually a narrow one. Porter's case turned on the very powerful mitigation evidence that trial counsel failed to uncover and present during the penalty phase of Porter's capital trial. At the evidentiary hearing, Porter presented evidence, through the depositions of his brother and sister, that Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead. According to his brother, Porter attended classes for slow learners and left school when he was 12 or 13.

Porter also presented evidence that to escape his horrible family life, Porter enlisted in the Army at age 17. Porter fought in the Korean War. His company commander, Lieutenant Colonel Sherman Pratt, testified at Porter's postconviction hearing. Porter was with the 2d Division, which had advanced above the 38th parallel to Kunu-ri when it was attacked by Chinese forces. Porter suffered a gunshot wound to the leg

during the advance but was with the unit for the battle at Kunu-ri. While the Eighth Army was withdrawing, the 2d Division was ordered to hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day. As Colonel Pratt described it, the unit “went into position there in bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant-for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies.” The next morning, the unit engaged in a “fierce hand-to-hand fight with the Chinese” and later that day received permission to withdraw, making Porter’s regiment the last unit of the Eighth Army to withdraw.

Less than three months later, Porter fought in a second battle, at Chip’yong-ni. His regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter’s company was charged with retaking those positions. In the charge up the hill, the soldiers “were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can imagine and they were just dropping like flies as they went along.” Porter’s company lost all three of its

platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Lieutenant Colonel Pratt testified that these battles were "very trying, horrifying experiences," particularly for Porter's company at Chip'yong-ni. Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.

Porter presented evidence that after he was discharged, he suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night. Porter's family eventually removed all of the knives from the house. According to Porter's brother, Porter developed a serious drinking problem and began drinking so heavily that he would get into fights and not remember them at all. According to one expert that Porter called to testify, Porter's symptoms would "easily" warrant a diagnosis of posttraumatic stress disorder (PTSD).

In addition to this testimony regarding his life history, Porter presented an expert in neuropsychology, Dr. Dee, who had examined Porter and administered a number of psychological assessments. Dr. Dee concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior. Dr. Dee testified that at the time of the murder, Porter was

substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances. Porter v. McCollum, 130 S.Ct. 447, 449-451 (2009).

In comparison, Pace had no military service and spent his time down at the "bottom" smoking crack. His only time in uniform was in a prison uniform.

Rather than heroic combat service, brain damage and PTSD present in Porter, had counsel put on the mitigation Pace claims he should have, the jury would have heard that Pace associated and voluntarily used drugs with convicted felons like Barry Copeland, Ora Kay Jones, and Kenneth Bembo. (9PCR 1650; 10PCR 1816, 1820). The jury would have heard that Pace's contribution to society and his family was hanging out in the "bottom." The jury would have also learned that Pace was spending between $50 to $500 per day on crack cocaine, evidence that would have undercut any notion that Pace was a good family man who could, and did, provide for his extended family. (9PCR 1652; 10 PCR 1807).

Ora Kay Jones's testimony would have led the jury to conclude that Pace was not only a murderer but a thief who tried to sell a friend a stolen VCR in order to get drug money. (10PCR 1822). Finally, jurors would have heard evidence that Pace was not under the influence of crack cocaine the day of the murder,

knew what he was doing, and clearly understood the consequences of his actions. (9PCR 1718).

Pace's mitigation at the evidentiary hearing did not even come close to the compelling evidence that Porter presented at his own evidentiary hearing. The collateral court's order denying Pace's Porter claim should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the collateral court's order denying Pace's successive motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to Paul Kalil, CCRC-South, 101 NE 3d Avenue, Suite 400, Fort Lauderdale, Florida 33301-1100, this 27th day of September 2011.

_____
MEREDITH CHARBULA
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA
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