IN THE SUPREME COURT OF FLORIDA

HARRY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1385

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Jones." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The State uses the following formats for its citations to documents contained within the prior records on appeal in this case:

> "R" and "TT" designate, respectively, the record of the direct appeal to this Court and the related transcript of the trial court's proceedings, resulting in the opinion at Jones v. State, 648 So.2d 669 (Fla. 1994);
>
> "PC" designates the record of the appeal from the trial court's denial of postconviction relief to this Court, resulting in the opinion at Jones v. State, 998 So.2d 573 (Fla. 2008);
>
> "PC2" designates the record of the appeal from the trial court's denial of postconviction relief to this Court, resulting in the unpublished Order at Jones v. State, 2010 WL 4261400 (Fla. Oct. 15, 2010)(reported at 53 So.3d 230 (Table)).
>
> "PC3" references the record from the trial court's denial of postconviction relief on appeal in this case (SC11-1385).

Each symbol is followed by a slash and any applicable volume number, then any applicable page number(s). For example, "R/1 1-2" indicates the record on direct appeal, Volume 1, and pp. 1-2.

The acronym "IAC" is used for "ineffective assistance of counsel."

Unless the contrary is indicated, bold-typeface and bold-undelined emphasis are supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

ORAL ARGUMENT

Jones' Initial Brief (IB ii) contains a request for oral argument. The state submits that this case presents nothing meritorious to distinguish it from other trial court denials of successive postconviction motions appealed to this Court, and, therefore, the State suggests that this case does not merit oral argument. However, ultimately, the State defers to the sound discretion of the Court concerning whether to grant oral argument.

"STANDARD OF REVIEW"

Prior to the Table of Contents, the Initial Brief (IB ii) briefly discusses what it proposes as the standard of review. At this juncture, the State only notes that it disputes Jones' interpretation of Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), and that it will elaborate on its disagreement with Jones under the Argument section infra.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

DATE	NATURE OF PLEADING OR COURT EVENT
1991	George Wilson Young, Jr., was murdered (Compare, e.g., T/II 275-84 with T/II 353-61, T/III 430-35, & T/IV 659-60);
1991	Harry Jones was indicted for the murder of George Wilson Young, Jr., and related felonies of Robbery and Grand Theft of Mr. Young's motor vehicle (R/1 1-2);
1992	Jones was found guilty of each count of the

	indictment as charged (R/5 786-90; TT/5 942-44);
1992	The jury recommended death by a 10-to-2 vote (R/5 785; TT/6 1002), and, the trial court conducted a sentencing hearing (R/6 974-93) and sentenced Jones to death (R/5 828-36; R/6 994-1009);
1994	Jones v. State, 648 So.2d 669 (Fla. 1994), affirmed Jones' conviction and death sentence;
1995	United States Supreme Court denied certiorari, Jones v. Florida, 515 U.S. 1147 (1995);
1997	Jones filed a "shell" Rule 3.850 motion for postconviction relief (PC/2 235-47);
2003	Jones filed his amended 3.850 motion (PC/3 465-573, PC/4 574-82);
2004	Trial court conducted evidentiary hearing on aspects of the amended 3.850 motion (PC/12; PC/13; PC/14);
2005	Jones filed a "Supplemental Motion to Vacate Judgments of Conviction and Sentences (PC/5 845-61);
2005	Trial court filed its Order Denying Grounds 1, 2, 3, 4, & 13 of Amended Motion to Vacate Judgment and Sentence; the Order rejected IAC (ineffective assistance of counsel) claims concerning the penalty/sentencing phase of the trial (PC/5 933-35); Jones appealed this 2005 order to this Court (which resulted in Jones v. State, 998 So.2d 573 (Fla. 2008);
2007	While the appeal from the trial court's denial of postconviction relief was pending in this Court, by pleading dated as served June 18, 2007, Jones filed another postconviction motion he styled as "Motion to Vacate Judgments of Conviction and Sentences" (PC2/2 258-80);
2008	Jones v. State, 998 So.2d 573 (Fla. 2008), affirmed trial court's 2005 order denying of postconviction relief, including affirming trial court's denial of

	the IAC penalty/sentencing phase claims, 998 So.2d at 582-87;
2009	Jones filed a Petition for Writ of Habeas Corpus in United States District Court (Case #4:09-cv-00054-RH-WCS), which remains pending;
2009	After another Huff hearing (PC2/2 366-91), the trial court denied the additional 2005 and 2007 postconviction motions (PC2/2 341-55), and this Court, in an unpublished order, affirmed in Jones v. State, 2010 WL 4261400 (Fla. Oct. 15, 2010);
2010	Jones filed yet-another postconviction motion (PC3/1 1-44), entitled "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" (referenced in this Answer brief as "2010 Successive Motion"); the 2010 Successive Motion alleged that Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), changed IAC analysis and thereby requires that Jones' IAC penalty claim be revisited; in January 2011, the State responded in opposition (PC3/1 47-118);
2011	Jones filed a petition for extraordinary relief in this Court, which this Court denied without prejudice (SC11-363);
2011	After the trial court conducted another Huff hearing (PC3/2 199-218), it summarily denied the 2010 Successive Motion (PC3/1 152-89); in this appeal (SC11-1385), Jones alleges that the trial court's 2011 denial of postconviction relief was error.

Guilt-Phase Facts.

Jones v. State, 998 So.2d 573, 577-78 (Fla. 2008), which affirmed the denial of Jones previous postconviction motion after an evidentiary hearing, summarized the guilt-phase facts concerning this murder of George Wilson Young, Jr.:

> The facts are taken from Jones's direct appeal. *See Jones v. State*, 648 So.2d 669 (Fla. 1994). Young's body was found in Boat Pond on

Horseshoe Plantation in north Leon County. Although Young suffered several injuries, the cause of death was freshwater drowning.

On the day of the murder, Young had gone to a liquor store on the west side of Tallahassee. While he was talking with his friend Archie Hamilton, who worked there, Harry Jones and Timothy Hollis came in. When Hollis, who was intoxicated, appeared to get sick, Jones took him to the restroom. He returned in time to see Young pull money from his pocket to pay for a half pint of gin. Young helped Jones take Hollis outside, and agreed to give the two men a ride home. Several witnesses saw the three men leave the liquor store in Young's red Ford Bronco II a little before 7 p.m. Hollis's mother testified that Jones and a white-haired man brought her son home in a red truck and then left the house together. Young and Jones were next seen together between 7:30 and 8 p.m. purchasing a six-pack of beer at a local convenience store.

At about 8:05 p.m., Young's truck was involved in an accident on the north side of town, west of Boat Pond. Jones, the only occupant, was taken to the emergency room and admitted to the hospital. When authorities realized that the owner of the truck Jones was driving was missing, a detective was sent to question Jones. He told the detective that he borrowed the car from a man in 'Frenchtown' for twenty dollars. The next day, when authorities learned that Jones had been seen with Young before the accident, officers questioned him again.

While in Jones's hospital room, officers seized a bag of his clothing, which hospital personnel had removed. The clothing was tested. Soil and pollen samples taken from Jones's shoes and pants were similar to samples taken from Boat Pond. Law enforcement also seized lottery tickets and cash that had been removed from Jones's pockets. The lottery tickets had been purchased at the same time and place as tickets found in Young's truck.[1]

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[1] Evidence seized from the hospital room was the subject of extensive discussion in Jones, 648 So.2d at 673-76, which concluded:

> Although we agree with Jones that the illegally seized evidence and testimony relating thereto should have been suppressed, we find the admission of this evidence harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). At the time of the accident, Jones was the only occupant in George Young's truck. Jones had been seen with Young a relatively short time before the accident. The accident occurred on the north side of town not far from where Young's body was later found. Jones admitted to a cellmate that he

> Jones was charged with first-degree murder, robbery, and grand theft of a motor vehicle and incarcerated in a medical cell with Kevin Prim and Jay Watson. Prim testified that Jones told him that he met a 'guy' at a liquor store. After observing the guy pull money from his pocket to pay for his purchase, Jones talked the guy into giving him and his intoxicated 'cousin' a ride home. After dropping the cousin off, Jones and the guy went to a pond. Jones attempted to take the man's money and a struggle ensued. Jones admitted breaking the man's arm during the struggle and then holding him down in water until he stopped 'popping up.' Watson, the other cellmate, testified that he overheard Jones tell Prim that he killed a man. Jones was found guilty as charged.

The Penalty Phase.

The issue in this appeal contests the trial court's order rejecting Jones' 2010-2011 IAC penalty-phase claim, which he argues should be re-visited now in light of Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009).

In the penalty phase of the trial, defense counsel introduced evidence of mitigation through Jones' older sister (TT/VI 952-57) who was a 16-year veteran of the Miami Dade Police Department (TT/VI 953, 956). In the jury penalty phase, Jones also testified about mitigating aspects of his background. (TT/VI 957-68)

> took a man he met in a liquor store to a pond where the two struggled when Jones tried to take the man's money. He also admitted pushing the man's head under water until he stopped struggling. On this record, there is no reasonable possibility that the outcome of Jones' trial would have been different had the illegally seized evidence been suppressed.

648 So.2d at 678-79.

After the jury recommended death by a 10-to-2 vote (R/5 785; TT/VI 1002), the trial court sentenced Jones to death (R/5 828-36; PC/1 138-46) and found the following aggravating circumstances: (1) Jones was previously convicted of another violent felony, listing Jones' prior convictions for Attempted Robbery, Robbery, two counts of Robbery with a Firearm, and Robbery with a Firearm and Kidnapping; (2) the murder was committed while Jones was engaged in the commission of a robbery[2]; and (3) the murder was especially heinous, atrocious, or cruel. (R/5 829-32)

More specifically concerning the prior-violent felony aggravator, Jones had been previously convicted of the four offenses of (1) attempted robbery (TT/VI 949 50), (2) robbery (TT/VI 950 51), (3) robbery with a firearm (TT/VI 951), and (4) robbery with a firearm and kidnapping (TT/VI 951 52).

Concerning HAC, the trial court explained:

> … the evidence presented by the medical examiner regarding the seriousness of the wounds to the victim indicated that the wounds were consistent with defensive, premortem injuries. The wounds consisted of an acute fracture of the long bone in the forearm, fractured ribs, numerous tears of the skin of the left arm and numerous blows to the head. The evidence clearly reveals that the victim, George Young, Jr., experienced a great deal of pain and terror as he attempted to avoid being killed.

(R/V 831-32; TT/VI 1002)

Concerning mitigation, the trial court found a statutory mitigating circumstance: Jones' capacity to appreciate the criminality of his conduct

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[2] The trial Court "combined" the aggravator of "committed for pecuniary gain" with the while-engaged-in-commission-robbery aggravator (R/5 831).

or to conform this conduct to the requirements of law was substantially impaired. The trial court explained that the "evidence established that Defendant had been drinking beer and gin on the day of the murder and the evening prior to the murder. Defendant testified that his medical records indicate that his blood alcohol level was 0.269. Defendant further testified that when he was drinking he got into trouble." The trial court gave this mitigator, whether viewed as statutory or non-statutory, "some weight." (R/V 834; see TT/VI 1002) the trial court found the non-statutory circumstance that Jones suffered from "childhood traumatic and a difficult childhood" (R/V 834-35; see TT/VI 1005-1006), giving it "some weight" and reasoning that it was not entitled to "great weight" because of "its remoteness in time and the fact that his similarly situated sisters have become productive citizens … ." (R/V 835) The trial court also found that Jones had the love and support of his family and gave it "some weight." (R/V 835; see TT/VI 1006)

On November 10, 1994, Jones v. State, 648 So.2d 669 (Fla. 1994), affirmed Jones' conviction and death sentence. This Court rejected a challenge to the HAC aggravator, which, in Florida jurisprudence, is very weighty, See, e.g., Douglas v. State, 878 So.2d 1246, 1262-63 (Fla. 2004)(collecting cases; "HAC is one of the most serious aggravators in the statutory sentencing scheme"):

> Although the medical examiner could not say whether Young was conscious at the time he was drowned, he could say that the victim was conscious during the initial struggle with Jones, when his arm and ribs were fractured. According to the medical examiner, Young's broken arm and ribs were consistent with premortem defensive wounds. This evidence along with Jones' account of the incident as recounted

> by his cellmate-Jones pushed Young's head into the water until it stopped popping up-supports the trial court's finding that George Young, Jr., experienced a great deal of pain and terror as he attempted to fend off his killer prior to being drowned.

Jones, 648 So.2d at 679.

This Court "compared this case to other death penalty cases and [found] that death is proportionally warranted … having found no reversible error, … affirm[ed] the convictions and sentences." Jones, 648 So.2d at 680.

2003-2008 Postconviction Proceedings Concerning Alleged IAC in the Penalty Phase.

Having conducted a postconviction evidentiary hearing (PC/12; PC/13; PC/14), the trial court's 2005 order rejected Jones' IAC/Penalty phase claim, which Jones attempts to resurrect now. The trial court analyzed the mental health and lay witness aspects of the claim, and, on appeal, this Court affirmed the denial of postconviction relief.

1. Mental Health Expert.

The trial court's Order (PC/5 934-35) found and ruled concerning the mental health expert:

> 8. Defendant in Ground 4 of his motion also claims Trial Counsel was ineffective for failing to investigate or present mental health mitigation during the penalty phase of the trial. Defendant relies on the testimony of Robert Berland who testified that in 1991 he conducted an MMPI 1 on the Defendant and relied in large part on those results in reaching his conclusions. (Exhibit S, 3.850 Transcript, P. 270, ll. 7 14; Exhibit T, 3.850 Transcript, P. 279, l. 23 through P. 280, 1.19). While Dr. Berland believes the interviews of Defendant in 2003 supported what he found in 1991, Dr. Berland readily admitted that in 1991 he did not administer the newer test, MMPI 2, even though the same had been available since 1989. (Exhibit U, 3.850 Transcript, P. 283, l. 19 through P. 284, l. 1; Exhibit V, 3.850 Transcript, P. 308, ll. 21 25). Further Dr. Berland when confronted with the findings of The Supreme Court of Florida relating to a case in which Dr. Berland had testified and concluded that the

older version of the MMPI overestimated the degree of mental illness in black males by as much as 90%, claimed that said finding was incorrect or the result of an error in reporting. Philmore v. State, 820 So.2d 919 (Fla. 2002). It is undisputed that Dr. Berland administered the older version of the MMPI on Defendant and that Defendant is a black male.

An examination of the record clearly reveals that counsel spoke with and observed the Defendant; investigated possible mental health mitigation; investigated the information in Defendant's Department of Corrections' records; considered the downside of presenting mental health mitigation, and made a reasoned, informed and professional decision not to present mental health mitigation during the penalty phase of the trial. (Exhibit W, 3.850 Transcript, P. 67, 1.1 through P. 86, 1.9; Exhibit Y, 3.850 Transcript, P. 90, 1.19 through P. 91, 1.4). Defendant's ground is without merit.

Based on the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984), this Court affirmed the trial court's rejection of the sub-claim:

Jones contends that his trial counsel was ineffective for failing to prepare and present evidence of his mental impairment as a mitigating factor. Although we conclude that counsel was deficient in failing to conduct a reasonable investigation of Jones's mental health mitigation, Jones fails to prove prejudice.

i. Deficient Performance

While we do not require a mental health evaluation for mitigation purposes in every capital case, ... and *'Strickland* does not require counsel to investigate every conceivable line of mitigating evidence . . . [or] present mitigating evidence at sentencing in every case,' *Wiggins*, 539 U.S. at 533 [Wiggins v. Smith, 539 U.S. 510, 521 (2003)], 'an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence.' ... Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty."'

Here, counsel was aware of possible mental mitigation. When counsel inherited Jones's case from the public defender's office, the file contained a letter discussing the results of a psychological test (a Minnesota Multiphasic Personality Inventory, or MMPI) conducted on Jones by forensic psychologist Dr. Robert Berland. While the letter suggested 'not running out and getting medical testing done,' it clearly indicated that Jones suffered from mental illness and needed neuropsychological testing. The letter stated that Jones 'has a long standing psychotic disturbance.' It referred to the psychosis as "a

biological problem with the brain" that is 'either … genetic or due to brain damage.'

Counsel failed to further investigate this potentially mitigating evidence. Despite Dr. Berland's suggestion that Jones suffered from mental impairments, Jones was not evaluated by a mental health expert, and at the penalty phase no expert testimony was presented regarding Jones's 'psychotic disturbance.' Trial counsel, at a minimum, did not follow up with Dr. Berland; in fact, he could not specifically recall speaking with anybody about Jones's mental health. Trial counsel could only speculate that his decision not to pursue mental health mitigation was based on his review of the record combined with his own observations of Jones. Trial counsel's own testimony makes evident that the decision to abandon mental mitigation was not informed or strategically made after considering the alternatives. … Because this is not a case where trial counsel was aware of, but rejected, possible mental mitigation in favor of a more favorable strategy, and instead demonstrates a serious lack of effort by trial counsel, we find counsel's performance 'unreasonable under the prevailing professional norms.' …

At the evidentiary hearing, Jones established the existence of mental mitigation evidence through Dr. Berland. After conducting the MMPI, reviewing relevant documentation, and interviewing Jones and other lay witnesses, Dr. Berland concluded that Jones was psychotic at the time of the homicide, and thus the statutory mitigating circumstances of extreme mental or emotional disturbance and inability to conform to the requirements of the law would have applied. He explained that although it was hard to differentiate to what extent Jones's actions were a result of mental illness and to what extent they were the product of criminality, 'the biological mental illness is a more salient, more persistent adverse influence on his behavior.' Dr. Berland also testified that Jones suffered from brain impairment. He could not definitively rule out Jones's post homicide accident as the cause of the brain injury, but he opined that the brain impairment existed at least two years before his 1991 evaluation.

In rebuttal, the State presented Dr. Albert McClaren, also a forensic psychologist. His conclusions were based solely on Jones's medical and prison records, and a review of the MMPI Dr. Berland conducted in 1991. From the test results, Dr. McClaren opined that Jones had difficulty with close emotional relationships, distrusted others, was socially withdrawn, and was dissatisfied with his relationships with other people. Jones demonstrated anger and resentful qualities that served to exacerbate his alienation from others. Jones's test scores place him in a category of people who see the world as dangerous and other people as rejected and unreliable. People like Jones have a history of criminal activity, are frequently arrested, and their crimes are often poorly planned and executed. Dr. McClaren ultimately

concluded that Jones did not suffer from brain impairment or a major mental illness, but he likely suffered from antisocial personality disorder. While Dr. McClaren conceded that Jones's MMPI profile 'could be associated with someone who is quite mentally ill,' he also said it 'could be associated with somebody who is principally a personality disordered.'

It is clear from the testimony that there was available expert testimony that would have supported mental health mitigation but was never presented.

ii. Prejudice

While we conclude that trial counsel's performance was deficient, Jones has failed to prove prejudice. He offers nothing more than the blanket assertion that '[h]ad the evidence been presented, the result of the penalty proceedings would have been different.' A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different that is, a probability sufficient to undermine confidence in the outcome. …

Notwithstanding the insufficiency of the claim, we are confident that had the additional mitigation evidence been introduced, there is no reasonable probability that the outcome would have been different i.e., our confidence in the outcome remains. 'Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.' ... Here, the mental mitigation evidence presents a 'double edged sword' and is not sufficient to overcome the substantial aggravation. …

The mitigating evidence at issue would likely have proved more harmful than helpful. There was ample evidence in the record to impeach Jones's mental health mitigation. The only psychological diagnosis the experts could agree upon was that Jones suffered from antisocial personality disorder. Moreover, every other mental health evaluation Jones underwent confirms that he suffers not from mental illness but antisocial personality disorder. This Court has acknowledged that antisocial personality disorder 'is a trait most jurors tend to look disfavorably upon.' …

Additionally, the only mental evaluations Jones underwent before the murder and before the accident in which he suffered brain injury indicate that he did not suffer from mental illness. The Department of Corrections evaluated Jones's mental status in 1978. At that time,

chief psychiatrist Laura Parado and psychiatrist Eduardo Infante both opined that Jones did not suffer from mental illness. The doctors described him as well oriented, well developed, and well nourished. He exhibited well organized speech patterns, no evidence of thought disorders, and no hallucinations. Jones scored in the upper average range of intelligence on the Wechsler Adult Intelligence Scale. Also, Jones's mental health records are replete with his own admissions that he did not suffer from mental illness or the accompanying symptoms.

Moreover, while there was clearly mental health mitigation available, damaging evidence accompanied it. For example, at the evidentiary hearing the State's expert, reading from various treatises, profiled a defendant with mental health scores similar to Jones. Those sharing Jones's profile demonstrated characteristics frequently found in child molesters and rapists. Their behavior is unpredictable and erratic and may involve strange sexual obsessions and responses. These individuals are typically aggressive, cold, and punitive and have a knack of inspiring guilt and anxiety in others. The State would certainly have seized the opportunity to expose these negative characteristics in addition to highlighting Jones's lengthy criminal history. Such a showing would not have proved favorable to Jones.

Further, in recommending death, the trial court found three aggravating factors: (1) prior violent felony; (2) commission during the course of a robbery; and (3) HAC. In mitigation the court found: (1) Jones's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was substantially impaired; (2) Jones has suffered from a traumatic and difficult childhood; and (3) Jones had the love and support of his family. Thus, in light of the significant aggravation, Jones has not demonstrated how the enhanced mitigation would create a probability sufficient to undermine our confidence in the outcome. *See Singleton v. State*, 783 So. 2d 970 (Fla. 2001) (upholding a death sentence where the trial court found the prior violent felony and HAC aggravating factors and substantial mitigation, including extreme mental or emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law, age of sixty nine at time of offense, under the influence of alcohol and possibly medication at time of offense, mild dementia, and attempted suicide); *Spencer v. State*, 691 So.2d 1062, 1066 (Fla. 1996) (affirming a death sentence where the trial court found the prior violent felony and HAC aggravating factors and the mitigation included extreme mental or emotional disturbance; impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law; drug and alcohol abuse; paranoid personality disorder; sexual abuse; honorable military record; good employment record; and ability to function in structured environment); *see also Offord v. State*, 959 So.2d 187, 191 (Fla. 2007) ("HAC is a weighty

> aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme."); *Sireci v. Moore*, 825 So.2d 882, 887 88 (Fla. 2002) (noting that prior violent felony conviction and HAC aggravators are 'two of the most weighty in Florida's sentencing calculus.').
>
> Because Jones could not demonstrate prejudice, we affirm the trial court's denial of this claim.

Jones, 998 So.2d at 585-86 (Fla. 2008)(some internal citations omitted; bold sub-headings in original).

2. Lay Testimony.

The trial court's Order (PC/5 933-34) found and ruled concerning alleged additional mitigation evidence from lay witnesses:

> 7. Defendant in Ground 4 of his motion claims Trial Counsel was ineffective in failing to adequately investigate and prepare mitigating evidence to challenge the State's position in the penalty phase of the trial.
>
> During the penalty phase of the trial, counsel called two witnesses Betty Jones Stewart, Defendant's sister, and the Defendant. Mrs. Stewart testified how the Defendant and the family were abandoned by their father; that their father had been abusive toward Defendant's mother; how the Defendant had a hard time dealing with the abandonment; how Defendant's mother became an alcoholic and married an abusive alcoholic man with whom she fought quite often; how Defendant's mother stabbed the step father to death during one of their fights and had been sent to prison; and how the Defendant had become uncontrollable after his mother went to prison and started getting into trouble with the law. (Exhibit Q, TT, P. 958, 1.1 through P. 961, 1.9).
>
> Defendant presented numerous witnesses at the motion hearing: Johnnie Lambright, brother of Defendant; Theresa Valentine, sister of Defendant; and Evelyn Diane Jones, sister of Defendant. An examination of their testimony clearly demonstrates that their testimony would have been merely cumulative to the testimony of Defendant's sister, Betty Jones Stewart.
>
> Trial Counsel testified at the motion hearing that he made a conscious decision to rely on Defendant's childhood in mitigation and that he only called Defendant's sister, Betty Jones Stewart, as a mitigation witness because he believed that she was the most articulate and that as a police officer the State could not attack

her credibility. (Exhibit R, 3.850 transcript, P. 91, 11.2 through P. 92, 1.19). Trial Counsel's decision was reasonable under the norms of professional conduct.

On the sub-claim concerning lay testimony, this Court upheld the trial court based upon both the deficiency and prejudice prongs of Strickland:

> Jones also asserts that trial counsel was ineffective in failing to present additional witnesses to corroborate his sister's testimony about his traumatic childhood. During the penalty phase, Jones and his sister, Betty Stewart, testified at length about his difficult childhood. After trial counsel personally interviewed Jones's family, he selected Stewart to testify to the exclusion of other family members. Trial counsel decided on Stewart because, in addition to helping raise Jones while their mother was incarcerated, she was a 16 year veteran of the Miami Dade County Police Department and was articulate, measured, and very knowledgeable about Jones's upbringing. In trial counsel's opinion, Stewart was 'the best person to explain … the family dynamics as they were when [Jones] was growing up.'
>
> Trial counsel's strategic decision to call Stewart to testify about Jones's childhood was made after considering alternative witnesses. Therefore, Jones has not demonstrated that the trial court erred in finding counsel's performance was reasonable under the norms of professional conduct. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) ('[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.')
>
> Even if we were to find counsel's performance deficient, Jones cannot demonstrate prejudice. At the evidentiary hearing, Jones presented several witnesses, including family members and his youth football coach, to support his claim that counsel was ineffective in failing to present sufficient background mitigation. The testimony, however, was cumulative to that presented at the penalty phase. We have repeatedly held that counsel is not ineffective for failing to present cumulative evidence. *See, e.g., Darling v. State*, 966 So. 2d 366, 377 78 (Fla. 2007); *Whitfield v. State*, 923 So. 2d 375, 386 (Fla. 2005).
>
> Furthermore, based on testimony presented at trial, the trial court found, as a nonstatutory mitigating circumstance, that Jones suffered from childhood trauma and a difficult childhood. The additional testimony would only have added to this mitigation. In light of the aggravation in this case, Jones's sentence would not have been

> different had the court given more weight to the nonstatutory mitigator.

Jones, 998 So.2d at 586-87.

2010-2011 Postconviction Proceedings Concerning Alleged IAC in the Penalty Phase.

As timelined, supra, in late 2010, Jones filed yet-another postconviction motion (PC3/1 1-44), entitled "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" (referenced in this Answer brief as "2010 Successive Motion"); the 2010 Successive Motion alleged that Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), changed IAC analysis and thereby requires that Jones' IAC penalty claim be revisited.

In January 2011, the State responded in opposition. (PC3/1 47-118)

The trial court conducted another Huff hearing (PC3/2 199-218) and then summarily denied the 2010 Successive Motion (PC3/1 152-89). This appeal attacks that trial court order.

The State discusses additional factual details in the Argument section infra, and unlike the Initial Brief (See IB 20-24, 45-52),[3] the State provides citations to the postconviction record as well as to this Court's facts.

SUMMARY OF ARGUMENT

This appeal essentially argues that Porter's prejudice-prong discussion allows Jones to re-hash and re-package his 2003 IAC penalty phase claim

[3] On this ground, the State objects to Jones' "facts." It is

years later in his 2010 Successive Motion. Jones is incorrect. Porter was an application of Strickland; it did not establish a new "fundamental constitutional right" that might have otherwise excepted the claim from Fla.R.Crim.P. 3.851's one-year deadline. Jones attempts to by-pass of Fla.R.Crim.P. 3.851's one-year deadline by arguing that he should get the same method of analysis as Porter, but the foundation of his argument, that Porter created a new mode of analysis on Strickland's prejudice prong, is incorrect, as the United States Supreme Court's 2011 Harrington v. Richter's affirmance of a one-sentence state order illustrates. In any event, Jones fails to make the requisite argument, per Fla.R.Crim.P. 3.851, that any supposed change in analysis rises to the level of a new "fundamental constitutional right."

Indeed, even if the Court were to erroneously adopt all of Jones' recent prejudice-prong arguments, Jones' argument concerning additional lay mitigation evidence would still be barred by the Rule's one-year deadline because Strickland requires the defense's demonstration of the deficiency prong, as well as the prejudice prong, and Jones does not attempt to argue that Porter did anything new concerning the deficiency prong.

Further, this Court's affirmance of the trial court's denial of the 2003 IAC penalty phase claim established the law of this case, which also resolves the appellate issue against Jones.

Moreover, even if somehow Jones' 2003 IAC claim were re-reviewed now on its merits, this Court's reasoning rejecting the IAC penalty-phase sub-claims remains as sound today as it did in 2008, prior to Porter.

NOTICE OF RELATED CASES.

Several cases are in the process of being presented to this Court in which the defendants contend that Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), allows a defendant to re-litigate an IAC penalty phase claim outside of the one-year limitation of Fla.R.Crim.P. 3.851(d)(1). For example, briefing has been completed in Mark Allen Davis v. State (SC11-359) and Chadwick Willacy v. State (SC11-99), William T. Turner v. State (SC11-946), and Clarenece James Jones v. State (SC11-1263).

OVERARCHING STANDARD OF APPELLATE REVIEW.

A ruling of the trial court[4] is the subject of an appeal. Accordingly, this Court recently re-affirmed the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State,

[4] An exception is fundamental error, where the error rises to a level so grievous that the trial court should have ruled but did not. Even in cases of fundamental error, the focus is on a trial court ruling.

804 So.2d 415, 419 (Fla. 4th DCA 2001)("As an appellate court, however, we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason"); U.S. v. Benitez, 165 Fed.Appx. 764, 767, 2006 WL 222828, 3 (11th Cir. 2006)(unpublished; "We may affirm a district court's decision on grounds the district court did not address").

ARGUMENT

ISSUE: CAN A 2003 IAC PENALTY-PHASE CLAIM THAT WAS AFFORDED AN EVIDENTIARY HEARING IN 2004, REJECTED BY THE TRIAL COURT IN 2005, AND REJECTED BY THIS COURT IN 2008 BE LAWFULLY RE-LITIGATED IN 2010-2011 BASED ON PORTER V. MCCOLLUM, __U.S.__, 130 S.CT. 447, 175 L.ED.2D 398 (2009)? (IB 26-52, RESTATED)

A. Standards of Review.

1. Strickland's Requirements.

The issue on appeal alleges IAC. For IAC claims, Strickland v. Washington, 466 U.S. 668 (1984), and its progeny impose upon the defendant rigorous burdens of demonstrating that defense counsel was deficient and that this deficiency was prejudicial. "[B]ecause the *Strickland* standard requires establishment of both [the deficiency and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the deficiency prong, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S.

at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008)(quoting Strickland, 466 U.S. at 689.) "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. "The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. "[O]missions are inevitable." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313 (quoting Burger v. Kemp, 483 U.S. 776 (1987)).

The standard is not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals, which used "improper standard of review ... [of] blam[ing] counsel for abandoning the NGI claim because there was nothing to lose by pursuing it").

The defendant must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997). Accord Chandler v. U.S., 218 F.3d 1305, 1315 (11th Cir. 2000)("because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was

unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take").

Applying Strickland's principles to the penalty phase, defense counsel is not required to present every available mitigation witness to be considered effective. See Bell v. Cone, 535 U.S. 685, 696 98 (2002)(not ineffective where defense counsel presented no mitigating evidence in the penalty phase). Accordingly, Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001), explained that a failure to find more of the same type of mitigation is not unconstitutionally deficient:

> 'A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past or present behavior or life history.' Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001). However, counsel is not required to investigate and present all mitigating evidence in order to be reasonable. See Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir. 1999).

For the prejudice prong, Dillbeck v. State, 964 So.2d 95, 99 (Fla. 2007)(quoting Strickland, 466 U.S. at 694), summarized: "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" The reviewing court analyzes IAC penalty phase claims to determine whether the allegedly "'missing' testimony is significant enough to 'undermine [[its]] confidence in the outcome' of' the defendant's sentencing,' *Strickland*, 466 U.S. at 694, not to ask whether it would have had 'some conceivable effect on the outcome of the proceeding,' Id. at 693." Cade v. Haley, 222 F.3d 1298, 1305 (11th Cir. 2000).

2. Appellate Review of Summary Denial.

Ventura v. State, 2 So.3d 194, 197-98 (Fla. 2009), summarized the applicable standard of appellate review of a summary denial of a successive Rule 3.851 postconviction motion:

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See, e.g., Rose v. State*, 985 So.2d 500, 505 (Fla.2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000). The Court will uphold the summary denial of a newly-discovered-evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. *See McLin v. State*, 827 So.2d 948, 954 (Fla.2002).

Accordingly, Fla.R.Crim.P. Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief."

Here, under applicable law, the record conclusively demonstrates that the 2010 Successive Motion was untimely and barred by prior litigation, as the trial court found. Further, the motion was meritless. The trial court's summary denial of the 2010 Successive Motion should be affirmed.

B. The Trial Judge's Order.

The trial court ruled:

> Rule 3.851(d)(1), Florida Rules of Criminal Procedure, provides that any motion to vacate judgment of conviction and sentence of death shall be filed within one year after judgment and sentence become final. The defendant's judgment and sentence became final on June 19,

> 1995, when Jones v. Florida, 515 U.S. 1147 (1995), denied certiorari from the Florida Supreme Court's direct-appeal affirmance. Even if this Court were to use the Florida Supreme Court's August 20, 1997 extension for Defendant to file his initial 3.850 motion, the current motion is still untimely as it was not filed until on November 23, 2010.
>
> Rule 3.851(d)(2) lists three exceptions to the one year time limitation, none of which are applicable to the defendant. Rule 3.851(d)(2)(B) allows motions beyond the one year time limit if the motion asserts a fundamental constitutional right which was not established within the period provided for in subdivision (d)(l) and has been held to apply retroactively.
>
> ...
>
> ... [T]he Court finds that the United States Supreme Court's opinion in Porter does not represent a new law or a change in the application of Strickland's ineffective assistance of counsel analysis. Rather, the Porter opinion is an application of Strickland's two prongs to the facts of that case and does not provide a basis for this Court re-exam[ine] the defendant's claim. Porter simply found that the Florida Supreme Court was incorrect in its application of Strickland because it had unreasonably deferred to the trial court's determination regarding the prejudice prong of Strickland **in the face of extensive mitigating evidence that should have been presented for the jury's consideration**. Porter did not establish a new fundamental right but rather applied the existing Strickland analysis. There have been no court decisions subsequent to the Porter opinion holding that Porter constitutes a change in law or that it represents a fundamental repudiation of the Strickland jurisprudence. In fact, the Florida Supreme Court has referred to the Strickland analysis in several post-Porter opinions. *See*, Hildwin v. State, No. SC09-1417 (Fla. June 2, 2011); Schoenwetter v. State, 46 So. 3d 535 (Fla. 2010).
>
> Accordingly, because Porter is not a retroactive fundamental law, the defendant's motion is time-barred. Additionally, because the defendant's ineffective assistance of counsel claim concerning the penalty phase has been previously litigated and addressed by both this Court and the Florida Supreme Court, the motion is also denied as successive and procedurally barred. (See attachments A and B); Schoenwetter, 46 So.3d at 562.

(PC3/2 154-55; case underlining in original; bold underlining supplied)

The trial court was correct.

C. The Correctness of the Trial Court's Order.

1. The claim in Defendant Jones 2010 Successive Postconviction Motion is untimely under Fla.R.Crim.P. 3.851(d) (Trial court's Order at PC3/1 154).

This 2010 successive postconviction motion is untimely. Fla.R.Crim.P. 3.851(d)(1) requires a post-conviction motion be filed within one year of when Jones' judgment and sentence became final. Jones' convictions and sentence became final in 1995 when United States Supreme Court denied certiorari in Jones v. Florida, 515 U.S. 1147 (1995); The 2010 Successive Motion was filed in late 2010, years too late.[5]

2. No exception to the Rule's one-year deadline applies, and, specifically, Porter, as an application of Strickland, does not constitute an exception to the one-year deadline (Order at PC3/1 154-55).

Fla.R.Crim.P. 3.851(d) contains three exceptions to the one-year time limitation:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

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[5] Jones gets no relief from the 2001 effective date of current Fla.R.Crim.P. 3.851 because, even arguendo accepting that 2001 effective date, his 2010 Successive Motion remains several years too late. Further, predecessor rules provided one and two-year time limits, also making the 2010 Successive Motion untimely by several years. See, e.g., In re Rule of Crim. Procedure 3.851, 626 So.2d 198 (Fla. 1993)(in capital cases without a showing of good cause to the Florida Supreme Court, postconviction motions must be filed within one year of the "the disposition of the petition for writ of certiorari by the United States Supreme Court."); Amendments to Fla. Rules of Crim. Procedure 3.851, 797 So.2d 1213 (Fla. 2001)(one year requirement maintained).

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the [one-year] period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

The 2010 Successive Motion and, now Jones in this appeal, purport to rely upon Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), to the point of the Initial brief including it in its issue statement (at IB 26).

The time requirements of Fla.R.Crim.P. 3.851(d)(1)&(2) remain dispositive of Jones' appellate claim.

Instead of developing an argument how he meets the requirements of Fla.R.Crim.P. 3.851(d), Jones suggests, on the one hand, that Porter is a "sweeping change of law" (IB 30) and asserts that Porter is a "repudiation of this Court's *Strickland* jurisprudence" (IB 26), and on the other hand, Jones contends that Porter does not change Strickland (See IB 27 n.11; 38-39). Jones contends that Porter, along with Sears v. Upton, __U.S.__, 130 S.Ct. 3259 (2010), require this Court, in conducting a Strickland prejudice analysis, to conduct a "'probing and fact-specific analysis' of prejudice" (IB 44) that Jones characterizes as "full-throated and probing" (IB 45). Jones submits that "[n]either the circuit court order nor this Court's opinion properly considered the record[6] before it when finding that Mr.

[6] It is also noteworthy that the facts in Jones' Initial Brief contain

Jones was not prejudiced by trial counsel's deficient performance," thereby "violat[ing] *Porter*." (IB 51-52) Jones is incorrect on all his points, and his 2010 Successive Motion is an improper attempt to re-litigate the IAC/Penalty 1997-to-2008 postconviction proceedings.

As a threshold, but at least partially dispositive, matter, Jones argues only Porter's prejudice analysis. Arguendo, assuming that somehow Porter does provide Jones a 2010 gateway to argue that a new prejudice analysis applies to his 1996 IAC penalty-phase claim, his 2010 claim still remains untimely. Strickland requires that a defendant demonstrate BOTH prejudice AND deficiency. See, e.g., Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001)("because the *Strickland* standard requires establishment of both [the deficiency and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong"). Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), itself bluntly stated a defendant's IAC burdens:

> **First, the defendant must show** that counsel's performance was **deficient**. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. **Second**, the defendant must show that the deficient performance **prejudiced** the defense. This requires showing that counsel's errors were so serious as to deprive the

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no citation to the postconviction record, thereby rendering the appellate claim facially insufficient. If Jones is attempting to assert any facts that were not tendered in the 1997-2008 postconviction proceedings, then any such new facts remain time-barred because no specific due-diligence or reason is alleged, making those allegations facially insufficient under Fla.R.Crim.P. 3.851(d)(2)(A) and 3.851(e)(2)(B),(C).

> defendant of a fair trial, a trial whose result is reliable. **Unless a defendant makes both showings**, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Thus, Jones needed an exception for the one-year deadline for both of Strickland's prongs in order to raise an IAC claim, and he has argued an exception for only the prejudice prong.

Indeed, Porter clearly changed nothing concerning the deficiency prong. In Porter, in the absence of any state court finding on Strickland's deficiency prong, the United States Supreme Court reviewed the facts regarding that prong de novo and held, pursuant to Strickland and its progeny, that defense counsel was deficient for "fail[ing] to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." Counsel, a novice in capital sentencing, "had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." Porter, 130 S.Ct. at 453. Thus, Porter's application changed nothing, fundamental or otherwise, concerning Strickland's deficiency prong. Porter merely applied Strickland's deficiency prong.

Here, since this Court upheld the rejection of IAC/penalty phase concerning lay witnesses on the deficiency prong, See Jones, 998 So.2d at 586-87, and since Jones (correctly) does not develop an argument that Porter established new law on the deficiency prong, it is clear that Jones' argument concerning lay witnesses is untimely, even arguendo accepting Jones' argument at face value. At most, Jones is limited to arguing on

appeal his IAC claim pertaining to the mental health expert, on which this Court did find deficiency. See Jones, 998 So.2d at 585-86.

However, contrary to Jones' argument, Porter also established no new fundamental law on the prejudice prong, making all aspects of the 2010 Successive Motion untimely under Fla.R.Crim.P. 3.851(d) and supporting affirmance of the trial court.

Even if the 2010 Successive Motion's fatal flaw on the Strickland deficiency prong is erroneously overlooked, it still was properly denied summarily in the trial court. Concerning the prejudice prong, as the trial court found (PC3/1 155) and in contrast with Jones' arguments, Porter was an application of existing law to the facts of that case. Porter did not "sweeping[ly]" (IB 30) change the law and did not require a newly distinctive mode of prejudice analysis (See IB 44-45). The State elaborates.

In Porter, the United States Supreme Court reversed the Eleventh Circuit. Relying upon Strickland v. Washington, 466 U.S. 668 (1984), Porter merely applied of Strickland's two prongs of deficiency and prejudice to that particular case.

Applying Strickland's prejudice prong **to the facts of that case**, the United States Supreme Court found it was objectively unreasonable for this 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 trial counsel failed to present, especially Porter's Korean war heroics.

Supporting its decision finding Strickland prejudice, Porter provided detailed facts of the mitigation evidence defense counsel omitted, including the following. Perpetual violence and physical abuse by Porter's father caused Porter to enlist in the Army at age 17. In the Korean War Porter was shot in the leg during an advance "above the 38th parallel to Kunu-ri," but while wounded, Porter's unit was "attacked by Chinese forces." Porter's unit was ordered to "hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day." The weather was "bitter cold" and the unit was "terribly weary" and zombie-like because they had been in "constant contact with the enemy fighting [their] way to the rear, [and had] little or no sleep, little or no food," yet 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." Porter, 130 S.Ct. at 449-50.

Porter, 130 S.Ct. at 450-51 (internal citations omitted), continued:

> 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. 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.
>
> Colonel Pratt testified that Porter went absent without leave (AWOL) for two periods while in Korea. He explained that this was not uncommon, as soldiers sometimes became disoriented and separated from the unit, and that the commander had decided not to impose any punishment for the absences. …

Based on these mitigation facts, Porter merely applied Strickland, found Strickland prejudice, and held that this Court's failure to find Strickland prejudice was unreasonable under federal habeas-corpus law. Contrary to Jones' assertion, Porter did not overrule other cases from this Court; it also did not overrrule Strickland or otherwise establish a new "fundamental constitutional right," Fla.R.Crim.P. 3.851(d)(2)(B).

Instead, Porter reaffirmed the Strickland standard. Porter contains several paragraphs describing the Strickland standard and cited Strickland repeatedly. See Porter, 130 S.Ct. at 452-454. Porter, 130 S.Ct. at 456, ends by once again by citing, indeed, quoting, Strickland.

Porter re-affirmed Strickland's requirement that it is the defendant's burden to demonstrate prejudice. Porter, 130 S.Ct. at 452, explained, "To prevail under *Strickland*, **Porter must show** that his counsel's deficient performance prejudiced him" and then cites Strickland several times. Porter simply held that, under its facts, the defendant met his burden:

> [T]he Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions,' 788 So.2d. at 925, simply because the jury would also have learned that Porter went AWOL on more than one occasion. Our Nation has a long tradition of according

> leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. **To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea**.
>
> …
>
> Although **the burden is on petitioner** to show he was prejudiced by his counsel's deficiency, the Florida Supreme Court's conclusion that Porter failed to meet this burden was an unreasonable application of our clearly established law. We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine* confidence in [that] outcome.' *Strickland*, 466 U.S., at 693-694, 104 S.Ct. 2052. **This Porter has done**

Porter, 130 S.Ct. at 455-56 (footnotes omitted).

In other words, in Porter the United States Supreme Court simply disagreed with this Court's prejudice analysis **under the facts of that case**.

Jones (IB 43-45) also incorrectly attempts to rely upon Sears v. Upton, __U.S.__, 130 S.Ct. 3259 (2010). Sears reviewed a state court's prejudice discussion that did not evaluate the very substantial mitigation evidence that trial counsel failed to present, including, for example, the defendant's parents in "a physically abusive relationship... and divorced when Sears was young"; the defendant "suffer[ing] sexual abuse at the hands of an adolescent male cousin"; defendant's mother's "favorite word for referring to her sons was 'little mother fuckers'"; defendant's father "verbally abusive" and "discipline[ing] Sears with age-inappropriate

military-style drills"; "Sears struggle[ing] in school, demonstrating substantial behavior problems from a very young age," for example, "Sears repeat[ing] the second grade ... and ... referred to a local health center for evaluation at age nine"; "[b]y the time Sears reached high school," Sears being "'described as severely learning disabled and as severely behaviorally handicapped'"; Sears' father "'berate[ing] [him] in front of' the school principal and her during a parent-teacher conference," which left an indelible and distinctive impression on a teacher; observable "significant frontal lobe abnormalities"; "several serious head injuries he suffered as a child, as well as drug and alcohol abuse" and "brain damage"; and, standardized tests showing Sears as "among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." Sears, 130 S.Ct. at 3262-63.

In Sears, in contrast with this Court's 2008 opinion, the state court had found the deficiency prong but **refused to evaluate the prejudice prong** because some mitigation was introduced in the penalty phase and it confused "reasonableness" with a prejudice analysis. Sears, 130 S.Ct. at 3261, 3265. Consistent with Strickland, Sears, 130 S.Ct. at 3265, held, in contrast to here, that the state court erred in confusing "abstract" reasonableness of a defense theory with prejudice. The determination of whether a defendant has demonstrated Strickland prejudice is independent of reasonableness determination, which, instead, concerns the deficiency prong, See Strickland, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 (discussing deficiency

prong, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness"; "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances").

Thus, Sears, 130 S.Ct. at 3265 n.10, noted that "the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory." **The absence of any state court evaluation of Strickland prejudice** where the state court had found deficiency was error:

> A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. *See Porter*, ... 130 S.Ct. at 453-54;...; *Strickland*, supra, at 694, 104 S.Ct. 2052. It is for the state court-and not for either this Court or even Justice SCALIA-to undertake this reweighing in the first instance.

Sears, 130 S.Ct. at 3267.

Unlike Sears, here this Court's 2008 opinion did evaluate prejudice and did not confuse reasonableness with prejudice.

Consistent with Sears, the Eleventh Circuit has treated Porter as a fact-bound, non-fundamental, decision. Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010), explained that the "the crux of counsel's deficient performance in *Porter* was the failure to investigate and present Porter's compelling military history." Similarly,

Suggs v. McNeil, 609 F.3d 1218, 1232 (11th Cir. 2010), recently cited to Porter for a Strickland principle: "Suggs cannot contend that his sentencing judge and jury 'heard almost nothing that would humanize [Suggs] or allow them to accurately gauge his moral culpability.' *Porter v. McCollum*, …."

In a number of cases, this Court has recently cited to Porter in support of its discussion of pre-existing Strickland principles. See Hildwin v. State, 2011 WL 2149987, *5 (Fla. June 2, 2011); 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); Stewart v. State, 37 So.3d 243, 247-48 (Fla. 2010); Rodriguez v. State, 39 So.3d 275, 285 (Fla. 2010); Grossman v. State, 29 So.3d 1034, 1042 (Fla. 2010). Thus, this Court has correctly recognized that Porter does not change the prejudice analysis. Instead, Porter applied the prejudice analysis to the distinctive facts of that case where war heroics and extreme suffering in the line of combat duty was omitted from the trial.

Indeed, Grossman, 29 So.3d at 1042, expressly rejected a claim that "the proposed testimony of his new expert, Dr. Maher, concerning nonstatutory mental mitigation, is newly discovered evidence in light of the decision of the United States Supreme Court in *Porter v. McCollum*." Grossman held that Porter merely recognized a type of mitigator that Florida law already considers. Porter restarted no timeliness clocks. Thus, Grossman's claim was untimely, and so was Jones 2010 Successive Motion.

Actually, under federal habeas-corpus law ("AEDPA"), Porter could not substantially change Strickland. Porter was a federal habeas case governed by the AEPDA. According to the habeas statute, to grant habeas relief a state court decision must be contrary to "clearly establish Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). Therefore, federal courts, including the Supreme Court when reviewing a habeas case, can only grant relief if the law was already established.

On January 19, 2011, Harrington v. Richter, __U.S.__, 131 S.Ct. 770 (2011), re-confirmed that Porter established no new law and established no new required mode of prejudice analysis. Richter upheld a state court rejection of a Strickland claim even though the state court denied the defendant postconviction relief "**in a one-sentence summary order**," Richter, 131 S.Ct.at 783. Richter indicated that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief," Richter, 131 S.Ct.at 784. Certainly, in Richter the state court did not explicitly "prob[e]" prejudice (IB 44, 45) with a "full-throat[]" (IB 45), contrary to Jones' argument, and, yet Richter essentially upheld the state court rejection of the Strickland claim and reversed the U.S. Court of Appeals' reversal of a United States District Court order that had denied habeas relief:

> The California Supreme Court's decision on the merits of Richter's *Strickland* claim required more deference than it received. Richter was not entitled to the relief ordered by the Court of Appeals. The

> judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Richter, 131 S.Ct. at 792.

Therefore, Jones' retroactivity discussion (IB 28 et seq.) is misplaced. Porter presents no new law to be retroactive. Further, arguendo, even if Porter were somehow some sort of new law, it "has [not] been held to apply retroactively," thereby making the 2010 Successive Motion still untimely under Fla.R.Crim.P. 3.851(d)(2)(B). Accordingly, this Court has held that, in the Sixth Amendment right to effective assistance of counsel context, refinements or clarifications in Strickland jurisprudence are not retroactive. See Johnston v. Moore, 789 So.2d 262, 266-267 (Fla. 2001)(holding that Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999), which clarified the standard to be used in reviewing ineffective assistance of counsel claims, was not retroactive under Witt v. State, 387 So.2d 922 (Fla. 1980)). However, of course, as the State has argued here, Porter did not even involve a clarification or refinement of the law; instead, it applied pre-existing law.

Here, in contrast with the facts in Porter and in contrast with the refusal of state courts in Sears, to conduct a prejudice analysis, this Court has "undertake[n]" Strickland-compliant prejudice analyses. Moreover, concerning the mental health expert sub-claim, this Court's prejudice analysis held that, on a procedural ground, Jones failed to meet his burden of demonstrating prejudice, Alternatively, this Court conducted the analysis of the prejudice prong that far exceeded even Jones' self-serving interpretation of Porter and Sears:

… Jones has failed to prove prejudice. He offers nothing more than the blanket assertion that '[h]ad the evidence been presented, the result of the penalty proceedings would have been different.' A mere conclusory allegation that the outcome would have been different is insufficient to state a claim of prejudice under *Strickland*; the defendant must demonstrate how, if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different-that is, a probability sufficient to undermine confidence in the outcome. *See Holland v. State*, 916 So.2d 750, 758 (Fla. 2005) (defendant's claim that 'he was prejudiced because penalty phase counsel's deficiencies substantially impair confidence in the outcome of the proceedings is merely conclusory and must be rejected'); *Brown v. State*, 894 So.2d 137, 160 (Fla. 2004); *Armstrong v. State*, 862 So.2d 705, 712 (Fla.2003) (finding that a mere conclusory allegation of prejudice was legally insufficient).

Notwithstanding the insufficiency of the claim, we are confident that had the additional mitigation evidence been introduced, there is no reasonable probability that the outcome would have been different-i.e., our confidence in the outcome remains. 'Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.' *Gaskin v. State*, 737 So.2d 509, 516 n. 14 (Fla.1999). Here, the mental mitigation evidence presents a 'double-edged sword' and is not sufficient to overcome the substantial aggravation. *See Reed v. State*, 875 So.2d 415, 437 (Fla.2004) ('An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.').

The mitigating evidence at issue would likely have proved more harmful than helpful. There was ample evidence in the record to impeach Jones's mental health mitigation. The only psychological diagnosis the experts could agree upon was that Jones suffered from antisocial personality disorder. Moreover, every other mental health evaluation Jones underwent confirms that he suffers not from mental illness but antisocial personality disorder. This Court has acknowledged that antisocial personality disorder 'is a trait most jurors tend to look disfavorably upon.' *Freeman v. State*, 858 So.2d 319, 327 (Fla. 2003).

Additionally, the only mental evaluations Jones underwent before the murder and before the accident in which he suffered brain injury indicate that he did not suffer from mental illness. The Department of Corrections evaluated Jones's mental status in 1978. At that time, chief psychiatrist Laura Parado and psychiatrist Eduardo Infante both opined that Jones did not suffer from mental illness. The doctors

described him as well-oriented, well-developed, and well-nourished. He exhibited well-organized speech patterns, no evidence of thought disorders, and no hallucinations. Jones scored in the upper average range of intelligence on the Wechsler Adult Intelligence Scale. Also, Jones's mental health records are replete with his own admissions that he did not suffer from mental illness or the accompanying symptoms.

Moreover, while there was clearly mental health mitigation available, damaging evidence accompanied it. For example, at the evidentiary hearing the State's expert, reading from various treatises, profiled a defendant with mental health scores similar to Jones. Those sharing Jones's profile demonstrated characteristics frequently found in child molesters and rapists. Their behavior is unpredictable and erratic and may involve strange sexual obsessions and responses. These individuals are typically aggressive, cold, and punitive and have a knack of inspiring guilt and anxiety in others. The State would certainly have seized the opportunity to expose these negative characteristics in addition to highlighting Jones's lengthy criminal history. Such a showing would not have proved favorable to Jones.

Further, in recommending death, the trial court found three aggravating factors: (1) prior violent felony; (2) commission during the course of a robbery; and (3) HAC. In mitigation the court found: (1) Jones's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was substantially impaired; (2) Jones has suffered from a traumatic and difficult childhood; and (3) Jones had the love and support of his family. Thus, in light of the significant aggravation, Jones has not demonstrated how the enhanced mitigation would create a probability sufficient to undermine our confidence in the outcome. *See Singleton v. State*, 783 So.2d 970 (Fla. 2001) (upholding a death sentence where the trial court found the prior violent felony and HAC aggravating factors and substantial mitigation, including extreme mental or emotional disturbance, impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law, age of sixty-nine at time of offense, under the influence of alcohol and possibly medication at time of offense, mild dementia, and attempted suicide); *Spencer v. State*, 691 So.2d 1062, 1066 (Fla. 1996) (affirming a death sentence where the trial court found the prior violent felony and HAC aggravating factors and the mitigation included extreme mental or emotional disturbance; impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law; drug and alcohol abuse; paranoid personality disorder; sexual abuse; honorable military record; good employment record; and ability to function in structured environment); *see also Offord v. State*, 959 So.2d 187, 191 (Fla.2007) ('HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme.'); *Sireci v. Moore*, 825 So.2d 882, 887-88 (Fla. 2002) (noting

> that prior violent felony conviction and HAC aggravators are 'two of the most weighty in Florida's sentencing calculus.').
>
> Because Jones could not demonstrate prejudice, we affirm the trial court's denial of this claim.

Jones, 998 So.2d at 584-86.

In conclusion, Porter is not new fundamental law -- indeed, it is not new law at all -- and therefore the exception to the time limitation for a new "fundamental constitutional right" does not apply. The 2010 Successive Motion was untimely. Indeed, this Court's 2008 analysis more than met even Jones' incorrect reading of Porter.

3. The law of the case controls this claim (See Order, PC3/1 155).

The claim of ineffectiveness raised in the successive 3.851 motion and in this appellate claim is barred by the law of the case doctrine in which questions of law actually decided on appeal govern the case through all subsequent stages of the proceedings. See Florida Dep't of Transp. v. Juliano, 801 So.2d 101, 105 (Fla. 2001). A defendant cannot relitigate claims that have been denied by the trial court where that denial has been affirmed by an appellate court. See State v. McBride, 848 So.2d 287, 289-290 (Fla. 2003)(reasoning that the law of the case doctrine applies to post-conviction motions)(citing Kelly v. State, 739 So.2d 1164, 1164 (Fla. 5th DCA 1999)). Cf. Topps v. State, 865 So.2d 1253, 1255 (Fla. 2004)(res judicata).

Jones' initial postconviction motion alleged IAC in the penalty/sentencing phase, the trial court rejected the claim after an

evidentiary hearing, and this Court affirmed in Jones, 998 So.2d 573. Jones is improperly seeking to re-litigate the same claim[7] of ineffectiveness.

Here, the trial court correctly ruled that because the IAC penalty phase claim "has been previously litigated and addressed" by the trial court and this Court, "the motion is also denied as successive and procedurally barred." Accordingly, Marek v. State, 8 So.3d 1123, 1129 (Fla. 2009), held that "Marek's argument is procedurally barred because he previously litigated this issue." In Marek v. State, 8 So.3d 1123 (Fla. 2009), the defendant filed a successive post-conviction motion attempting to re-litigate the same claim of ineffectiveness that he had raised in the initial post-conviction motion. The trial court summarily denied the successive motion. On appeal, Marek asserted that his previously raised claim of ineffectiveness for failing to investigate mitigation should be reevaluated under the standards enunciated in Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Marek argued that these cases modified the Strickland standard for claims of ineffective assistance of counsel. Marek, 8 So.3d at 1126. This Court concluded that the previously raised claim of ineffectiveness should not be reevaluated

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[7] As noted above, to the degree that Jones claims any new facts, any such new facts remain time-barred because no due-diligence or reason is alleged, making those allegations facially insufficient under Fla.R.Crim.P. 3.851(d)(2)(A) and 3.851(e)(2)(B),(C).

because "contrary to Marek's argument, 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. Marek, 8 So.3d at 1128-29, discussed how Rompilla, Wiggins, and Williams were applications of Strickland.

Applying Marek's rationale, here Porter, like Rompilla, Wiggins, and Williams, is an application of Strickland to the particular case, not a new method of analysis or otherwise new law. Here, like in Marek, the defendant is not entitled to relitigate the previously denied claim. Here, the purportedly Porter-based claim is barred by the law of the case doctrine.

Here, Jones has had his day in court to present his IAC-at-the-penalty-phase claim in 1997 to 2004, and he lost that claim, which remains the binding law of the case and thereby required the trial court to summarily denial the 2010 Successive Motion. The trial court's decision merits affirmance.

4. Even if this claim were erroneously considered on the merits, it has none.

As a preliminary but important matter, the State objects to Jones' factual assertions in his argument. Neither Jones' argument section (IB 45-52) nor Jones' facts section (IB 20-24) provides any citations to the 2004 postconviction evidentiary hearing (PC/12; PC/13; PC/14) or any other specific citations purportedly supporting Jones' factual assertions. See, e.g., Fla.R.App.P. 9.210(b)(3)("References to the appropriate volume and pages of the record or transcript **shall be** made"); R.E. v. Department of Children and Families, 996 So.2d 929, 930 n.1 and accompanying text (Fla.

4th DCA 2008)(no citations to the record; DCA would have struck brief, but review was expedited and DCA could rely upon Appellee's facts); Greenfield v. Westmoreland, 2007 WL 518637, *1 (Fla. 3d DCA 2007)(unpublished; struck initial brief; "Citations to the record are inadequate throughout the brief"; "At one point, appellant's 'statement of facts' includes a three-page recitation of purported occurrences in an apparently disputed real estate development matter without a single record citation"; citing Davis v. Sails, 306 So.2d 615 (Fla. 1st DCA 1975) (struck Davis' initial brief for failure to cite to record in accordance with Florida Rule of Appellate Procedure 9.120(b)(3)); Williams v. Winn-Dixie Stores, Inc., 548 So.2d 829, 830 (Fla. 1st DCA 1989)(multiple violations of Rules; "appellant uses three pages to summarize the testimony he gave at trial. There is not one reference to the record throughout those three pages"; requiring "pinpoint citations to the record on appeal to substantiate each statement made in the brief").[8] On the other hand, under the particular circumstances of this case and in order to resolve, without further delay, Jones' main appellate point, that is, that Porter requires re-litigation of Jones' IAC penalty

[8] Thus, a party should not be required to comb the record to attempt to find where the record might support each of the opponent's "fact" and then evaluate whether to rebut the party's own guess.

Indeed, as noted supra, to the degree that Jones asserts any fact that was not proved in the 2004 evidentiary hearing, he must justify why each such new alleged fact was not timely submitted within the 1997-2004 postconviction proceedings. See Fla.R.Crim.P. 3.851(d)(2)(A)(showing of due diligence required); 3.851(e)(2)(successive motion must include reason why the claim was not raised earlier; newly discovered evidence must be tendered with witnesses' names,..., evidentiary support, why witness or document not previously available).

phase claim, the State does not object to this Court considering as Jones' facts those IAC-penalty-related facts that this Court discussed at Jones, 998 So.2d at 583-87, block-quoted supra. Cf. Kokal v. Secretary, Dept. of Corrections, 623 F.3d 1331, 1344 (11th Cir. 2010)("We review the highest state court decision reaching the merits of the petitioner's claim"; "state court's factual findings are presumed correct unless rebutted by the petitioner with clear and convincing evidence"; "'This presumption of correctness applies equally to factual determinations made by state trial and appellate courts''; citing 28 U.S.C. § 2254(e)(1); Bui v. Haley, 321 F.3d 1304, 1312 (11th Cir. 2003); Sumner v. Mata, 449 U.S. 539, 547, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)); Dill v. Allen, 488 F.3d 1344, 1354 (11th Cir. 2007)("presumption of correctness applies both to findings of fact made by the state trial court as well as the state appellate court").

Here, even if the Rules' timeliness requirement were erroneously ignored by re-evaluating the evidence at the 2004 evidentiary hearing, the IAC penalty phase claim would still have no merit for the same reasons in this Court's 2008 analysis of Strickland's prejudice prong,[9] reported at Jones, 998 So.2d at 583-87, block-quoted supra.

The State elaborates on the record supporting this court's finding of no Strickland prejudice concerning the IAC penalty phase claim.

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[9] The State respectfully disagrees with the Court's finding of deficiency concerning the mental health expert, but this finding is now also law of the case. However, because Jones must demonstrate both of Strickland's prong, Jones' continued failure to demonstrate prejudice remains fatal to Jones' IAC penalty phase claim.

A crucial aspect of Jones' witness' (Dr. Berland's) testimony concerned anti-social personality disorder, which he admitted may be applicable to Jones. Berland indicated that he "wouldn't rule out" anti-social personality disorder. There may be some evidence of it. It may be "mixed in." (PC/14 317 18) He discussed the MMPI test administered to Jones, indicating that "Scale 4 ... can measure potentially criminal thinking" but "in the long run, the biological mental illness is a more salient, more persistent adverse influence on his behavior." (Id. at 298-99) He continued:

> And it will interact with any potentially criminal inclinations he has. It will potentiate the criminality because of poor judgment and because of drug abuse and alcohol abuse and so forth.

(Id. at 299)

Dr. McLaren testified at the 2004 postconviction evidentiary hearing that Jones' MMPI profile "is often encountered with violent criminals. It is a malignant profile." (Id. 382) He later elaborated that "[u]sually, there will be anti-social behavior resulting in legal complications. These individuals also lack empathy and are non-conforming and impulsive." (Id. at 384-85)

McLaren reviewed the DOC psychological reports from trial defense counsel Cummings' file (Id. 391) and discussed the potential devastating rebuttal that prosecutors can muster (Id. 392 93). He pointed out that DOC diagnosed Jones with anti-social personality disorder, not psychotic passive aggressive personality. Contrary to Berland, DOC found no delusions, hallucinations. (Id. 395) He explained the desirability of

avoiding "testimony where the jury would perceive the person as very wicked, evil, bad, dangerous ...." (Id. 407)

McLaren indicated that there is nothing to indicate brain damage (Id. 399) and that "a lot of information suggest[ed] that [Jones] didn't suffer from a major mental illness" (Id. 405 406).

While McLaren had not personally examined Jones, McLaren read the trial transcript (Id. 389-90), unlike Berland (Id. 315-16), and struck home with the facts of this case: "Crimes are likely to be bizarre and often extremely violent including homicide and/or sexual assault. Their behaviors are usually impulsive ...." (Id. at 386) McLaren said that the facts of this murder fit Jones' MMPI profile:

> In regard to it being a homicide where there was apparent excessive force, broken arm, both ribs on both sides of the body broken, facial injuries. And the drowning, if it is true, that the victim was killed by being held beneath the water, conscious or unconscious, until he drowned until his head stopped bobbing up, according to one of the, quote, jailhouse snitch's rendition of Mr. Jones' statements.
>
> This would be sounding kind of cruel to me. And it would seem to me that some of the people that I've examined to generate profiles like this.

(Id. 390-91)

Consistent with Dr. McLaren's warning about the desirability of avoiding "testimony where the jury would perceive the person as very wicked, evil, bad, dangerous ...," (Id. 407) Cummings testified:

> ... [T]his evidence was out there, and certainly available to the State. But when you raise a mental health issue, there's a good chance that it is going to come in. Because on cross examination, if we get an expert that says: A, B and C; the State would say, well, did you have a chance to review this record and bring out these results, and did they have an affect on your diagnosis, or your testimony today?

> So, I mean, a lot of this stuff, just about everything I highlighted would probably come back to haunt us at some point in time.
>
> And I still think that way today. *** I don't know if I made that specific decision based on what I'm saying today, but the way these things are highlighted and noted leads me to believe that's why a decision was made not to use a mental health expert, in addition to the results of the graph.

(PC/12 80-81)

DOC said that Jones had "no schizophrenic process," is not "suffering from any thought disorder," "no hallucinations or delusions," "well oriented in all spheres," "speech was well organized," "no evidence of any thought disorder." (PC/12 75-77) These observations comported with Cummings' observations of Jones, as he viewed and spoke with Jones many times (See PC/Defense Exhibit #15) and concluded that Jones was articulate (See PC/12 67-69), always coherent (PC/12 68), showed no signs of hallucinating or being delusional or paranoid (PC/12 70, 71-72), saw nothing that would lead him "to believe Mr. Jones had some mental health issues" (PC/12 71), "seemed to be able to relay the facts, communicate, understand the law" (PC/12-51).

Cummings pointed out the DOC records indicating that Jones is "not suffering from any disabling mental illness, but prognosis is guarded with respect to his anti-social behavior." Cummings continued:

> Mood and affect are appropriate. And immediately after that, it talks about diagnostic impression is a personality disorder, anti-social personality.

(PC/12 75 77) Cummings interpreted the report to indicate that there is "potentially anti-social behavior developing and watch out for it in the future ...." (PC/12 76)

Cummings said he had also highlighted parts of a 1978 DOC report by Hugo Santiago Ramos, a psychologist at the DeSoto Correctional Institution, including its narrative of Jones breaking into a house while completely nude and "Anti social personality." The report recommended that Jones be placed in a mentally disordered sex offender program, which Cummings not only highlighted but also starred. The report also said that Jones is "highly rebellious and non conformist." (PC/12 79 80)

Moreover, in addition to inviting the portrayal of Jones as a sociopath, thereby contradicting counsel's penalty-phase humanizing theme, Jones' postconviction expert evidence would have depicted Jones as chronically hallucinating and delusional (PC/14 279-80), which would have not only conflicted with that humanizing theme but also with much of the lay evidence that Jones adduced at the postconviction evidentiary hearing.

Thus, Jones' 2004 postconviction mental health evidence actually was no "two-edged sword" but rather only a sword with one-edge, harmful to Jones' mitigation pursuit. The record affirmative rebuts Strickland prejudice concerning the mental-health-expert aspect of this claim. See, e.g., Cade v. Haley, 222 F.3d 1298, 1304-1305 (11th Cir 2000)(anti-social personality diagnosis; citing Clisby v. Alabama, 26 F.3d 1054, 1056 & n. 2 (11th Cir.1994) (noting reasons why antisocial personality disorder diagnoses are not mitigating). Here, Jones' postconviction expert, Dr. Berland, not only would have opened the door for the prosecution's explorations into Jones' dangerous sociopathic personality, his postconviction testimony was generally far less impressive than Cade's three experts. Compare, e.g.,

Rutherford v. Crosby, 385 F.3d 1300, 1314-16 (11th Cir. 2004)(defendant failed to meet his prejudice-prong burden) with Rutherford v. State, 727 So.2d 216, 220-26 (Fla. 1998).

Concerning Jones' 2004 "additional" lay mitigation testimony, as discussed supra, here this Court has already held that Jones failed to demonstrate Strickland's deficiency prong, See Jones, 998 So.2d at 586-87, and it is clear that Porter changed nothing about Strickland's deficiency prong, thereby palpably barring Jones' attempt to resurrect this sub-claim years after his postconviction deadline. Moreover, even if this dispositive prior holding on the deficiency prong is incorrectly overlooked and the prejudice prong is again evaluated post-Porter, the claim remains meritless.

Concerning the prejudice prong, this Court correctly held:

> Even if we were to find counsel's performance deficient, Jones cannot demonstrate prejudice. At the evidentiary hearing, Jones presented several witnesses, including family members and his youth football coach, to support his claim that counsel was ineffective in failing to present sufficient background mitigation. The testimony, however, was cumulative to that presented at the penalty phase. We have repeatedly held that counsel is not ineffective for failing to present cumulative evidence. *See, e.g., Darling v. State*, 966 So.2d 366, 377-78 (Fla2007); *Whitfield v. State*, 923 So.2d 375, 386 (Fla.2005).
>
> Furthermore, based on testimony presented at trial, the trial court found, as a nonstatutory mitigating circumstance, that Jones suffered from childhood trauma and a difficult childhood. The additional testimony would only have added to this mitigation. In light of the aggravation in this case, Jones's sentence would not have been different had the court given more weight to the nonstatutory mitigator.

Jones, 998 So.2d at 586-87.

Accordingly, the 2004 evidentiary hearing, included evidence that defense counsel Cummings went to Miami and personally interviewed family members (PC/12 51 52; PC/14 366) and selected Jones' older sister to testify at the penalty phase. (TT/VI 952; PC/12 92). She was a 16 year veteran of the Miami-Dade police department (TT/VI 953, 956), articulate, measured, and very knowledgeable concerning Jones' childhood (See TT/VI 952 57; PC/12 52). He elaborated that Officer Stewart "was the most articulate, ... [a]nd she was somebody that you could believe. She was a police officer ... that the State could not attack her credibility ...." (PC/12 91; see also PC/12 105)

> She was, in my choice of the family, the best person to explain Mr. Jones' childhood and the family dynamics as they were when he was growing up. *** Well, she seemed to be leading the person I talked to most. She's a police officer. She was good at asking questions and wanting, you know, here is my number, contact me. Yeah, I think the family looked up to her, too.

(PC/12 92) Cummings believed that Stewart was one of the siblings who helped raise Jones when their mother went to prison, (PC/12 92 93) and he added that he thought that Jones looked up to Officer Stewart. (PC/12 92)

Even judged by hindsight, Cummings chose Stewart wisely. (See TT/VI 952 et seq.) Armed with her position as a 16 year police officer, in the penalty proceedings she articulated key events in Jones' life that negate any supposed postconviction prejudice:

- Jones knew his father "until he was about five years old. ... Up until he was about five or six years old" (TT/VI 953 54);
- Their father did not abuse Jones (TT/VI 954);
- Jones "was very attached" to their father (TT/VI 954);

- The "father was very abusive" to their mother and "beat her a lot" (TT/VI 954);
- After their father left the home, Jones "had a very hard time dealing with the fact that he didn't have a father and it became difficult for Harry just to adjust without a father" (TT/VI 954);
- After the father left, their "mother worked several jobs, trying to take care of us" (TT/VI 954);
- It was "hard" on the mother (TT/VI 954);
- Their mother "met this other man and he worked and he started to help her raise [them]" and "they eventually got married and moved in, moved together" (TT/VI 954);
- Jones "didn't accept his stepfather" (TT/VI 955);
- Their "stepfather was an alcoholic" (TT/VI 955);
- Their "mother became an alcoholic" (TT/VI 954; see also 955);
- Their "stepfather and ... mother ... began to fight a lot"; he became " became very abusive" (TT/VI 954, 955);
- The stepfather "was in the war and when he drank, he would always start talking crazy" (TT/VI 955);
- "[O]ne night" their mother and the stepfather "fought" and the mother "stabbed him to death" (TT/VI 955);
- Their mother "was sent away to prison" "for about three years" when Stewart "was about 15 or 16" (TT/VI 955);
- When the mother was sent to prison Jones "became a different person. He wasn't controllable" (TT/VI 955); "he just started to rebel and get in trouble at that point" (TT/VI 956);
- Stewart "got a job" (TT/VI 956);
- Stewart and her sister, with the assistance of their aunt, "basically raised" Jones (TT/VI 955 56);
- They "stay[ed] together as a family so [they] wouldn't be separated to foster homes and here and there" (TT/VI 956).

As the trial court and this Court found, these were essentially the same facts to which the witnesses testified at the postconviction evidentiary hearing. Indeed, concerning the prejudice prong, Jones' 2004

postconviction witnesses would have showed more of the negative "edge" of the "double edged sword."

At the 2004 postconviction evidentiary hearing, Jones called Jones Joseph Accurso, who was Jones' football coach, as a witness. Accurso testified that Jones became "involved" with marijuana and left the football team (PC/13 121-22), and Theresa Valentine, Jones' older sister, (PC/13 212), testified about an incident in which Jones stole a bicycle, and it had something to do with the football team (Id. 219-20).

Diane Jones, another older sister (PC/13 223 24) was not present for the trial, and she admitted that "There's no excuse." (Id. 236) The mother did not come to the trial either. (Id.) Even though the sister came from the same family as Jones, she never had problems with alcohol (Id. 219) and she has a "facility for senior citizens and ... mental retardation. (Id. 222)

Diane Jones also testified that their brother Donnie did not provide support for the family until after he "got out of the military." (Id. 217) Contrary to Diane Jones, Johnnie "Donnie" Lambright, Jones' older brother (PC/13 204), testified that he joined the military to assist with supporting the family. (PC/13 206)

Bertha Middleton, Jones' first cousin (PC/13 162-63), testified that Jones was into robbing and breaking into places when he started to get into trouble (Id. 171). The other kids in the family were upset when the mother was imprisoned (Id. 170), but the other kids "turned out good children." (Id. 171)

Kay Underwood dated Jones when she was about 16 or 17 years old. (PC/13 174-75) They became "intimate." (Id. 181) Initially, her mother was not "too happy" about her relationship with Jones. (Id. 175) She said that Jones did not have a problem with alcohol, but she admitted that Jones used marijuana, but she did not know if he used cocaine. (Id. 183-84)

Post-Porter, Jones still fails to show that "it was reasonably likely that absent counsel's errors he would have received only a life sentence," Bertolotti v. State, 534 So.2d 386, 391 (Fla. 1988). Indeed, similar to Bertolotti, "[c]onsidering the nature of this offense," and the fact that the Defendant "had previously been convicted of three violent felonies," Jones failed to satisfy the prejudice prong. Jones had been previously convicted of the four offenses of (1) attempted robbery (TT/VI 949-50), (2) robbery (TT/VI 950-51), (3) robbery with a firearm (TT/VI 951), and (4) robbery with a firearm and kidnapping (TT/VI 951-52). And, as the trial court found in 1992, the evidence supported HAC.

The bottom-line is that Jones' background and mental condition limited defense counsel options and contained many factors that would have prejudiced Jones' cause. Even armed with Strickland-prohibited hindsight, Jones' 2004 evidence, if anything, would have reduced Jones' chances of a life sentence. Under Strickland, Jones bore the burden of demonstrating a "reasonable probability" of life sentence. He failed.

In contrast with Jones' failure and in contrast with Jones' prejudice-saturated background, in Porter the defendant demonstrated the omission of "Porter's compelling military history." Reed v. Secretary, Florida Dept. of

Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010), including the compelling evidence summarized and quoted supra. Unlike Porter, here trial counsel did not omit that Jones "(1) ... was 'a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War'; (2) 'his combat service unfortunately left him a traumatized, changed man'; and (3) he 'struggle[d] to regain normality upon his return from war.' Reed, 593 F.3d at1217, 1249 n.21. The Eleventh Circuit, in Reed, continued by emphasizing that "[p]aragraph after paragraph in the *Porter* opinion concerns Porter's combat experience in Korea, recounted in great detail." No information of this magnitude was missed by trial counsel here: No military heroics and no change in personality due to those heroic experiences. Instead of serving his country in the military, Jones' background includes, for example, as discussed supra, diagnoses of antisocial personality (See, e.g., PC/12 75-77, 79-80; see also PC/14 382-90, 395, 317-18) and, accordingly, Jones' background is saturated with lengthy and weighty negative criminal history (See, e.g., R/5 829; PC/13 201-203).

In sum, Porter changes nothing of Jones' failure to demonstrate the prejudice prong in the prior postconviction proceedings. If the merits of this issue are addressed, the IAC claim should still be rejected.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of Jones' 2010 Postconviction Motion.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on November 21st, 2011: Linda McDermott; McClain & McDermott P.A.; 20301 Grande Oak Blvd., Suite 118-61; Estero, FL 33928.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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