In the Supreme Court of Florida

STEVEN EDWARD STEIN,

Appellant,

v. CASE NO. SC11-1400

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE(S)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, STEVEN EDWARD STEIN, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument should be held in this appeal of a successive postconviction motion. The capital defense bar has filed approximately 40 successive motions based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). This Court has already held that these *Porter* motions are untimely. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(No. SC11-153). Registry counsel, who counsel of record in many of these cases, seems to be urging this Court to conduct 40 separate oral arguments. This Court should not conduct 40 separate oral arguments regarding the same issue with controlling precedent against it. Oral argument is not warranted.

STATEMENT OF THE CASE AND FACTS

Stein, during a robbery of a Pizza Hut, shot the two shift supervisors in the men's bathroom of the restaurant. After shooting Dennis Saunders and Bobby Hood multiple times with his rifle, Stein and his co-perpetrator took $980.00 from the restaurant. Stein gave a confession in which he admitted to the robbery and described it as a robbery "gone bad." See *Stein v. State*, 632 So.2d 1361, 1363 (Fla. 1994); see also *Christmas v. State*, 632 So.2d 1368 (Fla. 1994).

Stein was convicted of two counts of first-degree murder and one count of armed robbery and sentenced to death. *Stein*, 632 So.2d at 1364. On appeal to the Florida Supreme Court, Stein raised nine issues. *Stein v. State,* 995 So.2d 329, 332. n.1 (Fla. 2008)(listing issues). The Florida Supreme Court affirmed, holding that even though the trial court erred in finding that the murders were heinous, atrocious, or cruel ("HAC"), there was no reasonable possibility of a different result. *Stein,* 995 So.2d at 332 citing *Stein*, 632 So.2d at 1367.

Stein filed a petition for writ of certiorari in the United States Supreme Court, claiming the HAC jury instruction violated *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). The United States Supreme Court denied certiorari on October 3, 1994. *Stein v. Florida*, 513 U.S. 834, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994).

On November 15, 1995, Stein filed a state postconviction motion. *Stein v. State*, 995 So.2d 329, 332-333 (Fla. 2008)(detailing procedural history). The state postconviction court conducted an evidentiary hearing on several issues including the claim of

ineffective for failing to investigate and present certain mitigation witnesses.

At the evidentiary hearing, defense trial counsel, Mr. Jeff Morrow, testified that he was appointed to represent Stein on January 21, 1991 and did all the pretrial work, as well as the trial and penalty phase. (PC Vol. I 10). This was the first capital cases that he handled by himself and his first penalty phase. (PC Vol. I 16,17,92). His timesheet was introduced as defense exhibit #1. (PC Vol. I 11). He had billed for discussions of Stein's case with both Hank Coxe and Alan Chipperfield. (PC Vol. I 10,67).[1] He consulted with Resource Attorney Hank Coxe on mitigation strategy. (PC Vol. I 22-23,67). Because the co-perpetrator Christmas was represented by two very experienced attorneys, Mr. Morrow, would often follow their lead regarding discovery, etc. (PC Vol. I 30-31).[2] He hired a defense investigator, Ken Moncrief, to help him. (PC Vol. I 18). He obtained Stein's records from Phoenix, Arizona, where Stein grew up, including records from the Phoenix Institute of Technology, which was a technical school that Stein attended. (PC Vol. I 19). Mr. Morrow

[1] Henry M. Coxe III, who is president-elect of the Florida Bar, is listed as a resource attorney on the Commission for Capital Cases' website. Resource Attorneys, such as Mr. Coxe, are experienced criminal defense lawyers who are available to consult with registry attorneys on capital cases.

APD Chipperfield represented the co-perpetrator, Marc Chistmas, who was tried separately. So, Mr. Chipperfield was intimately acquainted with the details of this robbery/murder case.

[2] During the evidentiary hearing, trial counsel explained that he had to leave the motion to suppress hearing because he was "real sick" but counsel for Christmas continued with the hearing. (PC Vol. I 55)

could not recall his reason for not introducing the technical school records at the penalty phase. (PC Vol. I 26). The record from the Phoenix Institute of Technology was introduced as defense exhibit #2. (PC Vol. I 28). His billing notes reflect he reviewed school records. (PC Vol. I 21).

His billing notes also reflect numerous conversations with Dr. Krop, who was retained to consult on mental issues, but ultimately was not called at the penalty phase. (PC Vol. I 22,71). Dr. Krop is a licensed psychologist who often testifies in mitigation in capital cases and who knows "neuro psych." (PC Vol. I 94). Dr. Krop makes an excellent witness in counsel's opinion. (PC Vol. I 94). However, Dr. Krop could not provide counsel with mental mitigation. (PC Vol. I 32,72). Dr. Krop himself informed counsel, after his examination of Stein, that he would not be helpful which is why counsel did not call him as a mental health expert during the penalty phase. (PC Vol. I 72-73,94). Trial counsel was aware that mental health mitigation is some of the best possible mitigation but it was not available. (PC Vol. I 34).

He presented Ms. Moss (Stein's girlfriend) and Ms. Griffin (Stein's sister) in the penalty phase as mitigation witnesses. (PC Vol. I 36).[3] He had contacted Stein's sister months prior to the

[3] Trial counsel presented two witnesses at the penalty phase. Stein's older sister, Sandra Griffin, who was also adopted, testified that sentencing Stein to death would serve no useful purpose. (T. X 856, T. X 862). Stein's girlfriend, Christine Moss, testified that Stein was a "father figure" to her son and that sentencing Stein to death would serve no useful purpose and if sentenced to life there was the possibility that he could develop into "a person capable of great things" (T. X 862-865). Basically, both defense witnesses pled for mercy.

penalty phase. (PC Vol. I 37). Mr. Morrow testified that he spoke on the telephone, on "several occasions", with Stein's sister who was presented as a mitigation witness in the penalty phase. (PC Vol. I 18). He discussed Stein's background with the sister in the months prior to the penalty phase. (PC Vol. I 37). He prepared Stein's sister for her testimony at the penalty phase. (PC Vol. I 36). He was hoping to humanize Stein with the testimony of Stein's girlfriend and Stein's sister. (PC Vol. I 37).

Trial counsel discussed mitigation with Stein. (PC Vol. I 66). Stein did not want his parents involved in the penalty phase. (PC Vol. I 23). His adoptive parents were old and in poor health. (PC Vol. I 23). He urged Stein to allow him to call his parents in mitigation. (PC Vol. I 66). Both Stein and his sister informed counsel that his parents did not want to get involved and "they just don't want anything to do with it". (PC Vol. I 66). Counsel noted that under federal caselaw that if a defendant does not want his parents called to testify that was "his prerogative". (PC Vol. I 18).

Mr. Morrow explained his trial strategy was basically to try to save Stein's life by humanizing him and portraying Christmas as the actual triggerman during the robbery. (PC Vol. I 31). He was worried because he had little in the way of good mitigation evidence. (PC Vol. I 33-34). Mr. Morrow expressed regret for not visiting Phoenix, Stein's hometown. (PC Vol. I 34). Today, looking back on it and with more experience, he would "camp out there." (PC Vol. I 35,36).

He planned conceding to robbery and seeking a jury pardon on the murder charges. (PC Vol. I 38). Mr. Morrow also explained that he

was concerned about evidence that Stein was a skinhead and he was attempting to keep that out of the trial. (PC. Vol. I 50). Stein had racial tattoos and was involved in a hate crime. (PC. Vol. I 50,69). Mr. Morrow noted that there was evidence that Stein was a white supremacist. (PC Vol. I 68). Counsel noted that he managed to keep that out of the trial. (PC Vol. I 68). He did not want the issue of a hate crime coming up because it would be too damaging. (PC Vol. I 68).[4] One of the victims was African-American. (PC Vol. I 70). Stein gave counsel the names of friends as mitigation witnesses but the investigator could not locate them. (PC Vol. I 70). Counsel was concerned about the friends having information regarding Stein's white supremacist views. (PC Vol. I 71). The prosecutor went through trial counsel's billing record as to the mitigation preparation. (PC Vol. I 82-87). Counsel did not want to present drug abuse as mitigation. (PC Vol. I 88). Counsel believes that drug abuse is "not good". (PC Vol. I 89). It is a two-edged sword and a jury can view drug abuse as aggravation rather than mitigation. (PC Vol. I 89,90). Stein did not have a significant criminal history and this was found in mitigation. (PC. Vol. I 51).[5]

[4] Counsel did, by and large, succeed in keeping this out of the trial. It was accidently referred to in passing at one point but was not a feature of the trial. *Stein*, 632 So.2d at 1365 (affirming the denying of a mistrial where a statement made by a detective during a deposition in which the detective referred to Stein as a "skin head" was inadvertently read to the jury).

[5] Stein had been convicted of attempted burglary according to the PSI. (PC. Vol. I 52).

Collateral counsel presented Stein's sister, Sandra Griffin Bates, who had testified at the penalty phase, once again at the evidentiary hearing. (PC Vol. I 104). She is a registered nurse. (PC Vol. I 130). Both she and Stein were adopted. (PC Vol. I 106,110). She testified that her adoptive parents had waited 13 years for children. (PC Vol. I 106). Her mother had nine miscarriages. Her parents opened their hearts to their adopted children. (PC Vol. I 109-110). Her parents had a loving relationship with Stein, whom they adored. (PC Vol. I 107,109). They grew up in Maywood, New Jersey, which is a very small city, where Stein was involved in Boy Scouts. (PC Vol. I 107,126). In 1977, when Stein was nine years old, they moved to Phoenix, Arizona due to her mother's health. (PC Vol. I 107-108). While the move improved her mother's arthritis, her mother suffered from other illnesses. (PC Vol. I 109). At first, their father was unemployed and money was tight, so it was a stressful time. (PC Vol. I 111). Stein lived in an orphanage until he was adopted at eight months. (PC Vol. I 110). She knew nothing about Stein's natural mother. (PC Vol. I 110). She got married when she was eighteen and moved to Guam. (PC Vol. I 113). She wrote letters to Stein during this time. (PC Vol. I 113). She got a divorce and moved back home. (PC Vol. I 114). She remarried and had a child. (PC Vol. I 114). She remembers Stein being in a bad accident and being hospitalized on June 14. (PC Vol. I 115). One of the passengers died. (PC Vol. I 115). Stein fractured his jaw in the accident. (PC Vol. I 115). Their mother was diagnosed with diabetes which led to renal failure. (PC Vol. I 116). Her father had a form of emphysema. (PC

Vol. I 116). She did not remember Stein's counsel preparing her for her penalty phase testimony. (PC Vol. I 118). On cross, she testified that the family was rich in love and emotional support. (PC Vol I 121). Her parent's marriage was long and they were devoted to each other. (PC Vol. I 123). She testified that Stein was "very smart." (PC Vol. I 126). She did not recall Stein being arrested or convicted for attempted burglary. (PC Vol. I 128-129). Nor did she recall Stein being arrest for stealing from a business. (PC Vol. I 129).

Donna Nolz, who went to elementary school with Stein in Phoenix, testified at the evidentiary hearing. (PC Vol. I 133). They were in the same grade but not the same class. (PC Vol. I 134). She testified Stein was a quiet, laid back person. (PC Vol. I 134). Stein did not attend school regularly, not because he was sick but because, as Stein told her, he "just didn't feel like going to school." (PC Vol. I 135). The other kids in school would tease Stein about being an albino because he was so pale. (PC Vol. I 136,137,142-143). It was hard for her to recall anything else about Stein because they "had not encountered each other that much." (PC Vol. I 136). Stein was peaceful and did not pick fights. (PC Vol. I 136-137). Stein was not disliked but was not popular. (PC Vol. I 137). Stein was someone that you would be glad to run into in the store. (PC Vol. I 138). She testified that no one came out to Phoenix to talk to her about Stein but she admitted that they had lost contact since high school. (PC Vol. I 138). She would have been glad to testify if contacted and probably would have been able to recall more about Stein. (PC Vol. I 139). On cross, she testified that she and Stein lost contact about

the freshman year of high school. (PC Vol. I 139). She knew nothing about Stein's life after age 15. (PC Vol. I 140). She knew Stein from about the 4th grade through the 8th grade. (PC Vol. I 140). They also lived in the same neighborhood. (PC Vol. I 141). She did not know that Stein had an older sister. (PC Vol. I 141). She went to his home once. (PC Vol. I 141). She expressed concern about his parents allowing Stein to skip school whenever he wanted. (PC Vol. I 141). She was not close enough to Stein to know whether he was telling the truth about being allowed to miss school or being sick. (PC Vol. I 142). Stein was not picked on in school, just occasionally teased. (PC Vol. I 143).

Shandra Elaine Johnson Mann, who was Stein's teenage wife and the mother of his child, testified at the evidentiary hearing. (PC Vol. I 144-145). They met when a friend of hers brought her over to Stein's parent's home when she was 15 years old. (PC Vol. I 145). She testified that Stein was "very smart." (PC Vol. I 147,157). She also testified that she like the fact that Stein was "very reckless" and "did not really care about consequences." (PC Vol. I 147,152,153). She basically moved into Stein's parent's house. (PC Vol. I 147). Stein's parent's were ill and elderly and did not care what they did. (PC Vol. I 148). She got pregnant. (PC Vol. I 148). She told Stein that she was going to give the baby up for adoption. (PC Vol. I 148). Stein was upset and wanted to keep the child. (PC Vol. I 148). Stein was opposed to adoption because he had been adopted himself which caused him pain. (PC Vol. I 148-149). Stein was devastated by her decision which went against everything he believed. (PC Vol. I 151).

Stein “as a child of adoption” had been lonely and felt no bond with his parents. (PC Vol. I 151). Stein was hurt by the whole adoption process and did not want to do that to his child. (PC Vol. I 152). They were married at the time she became pregnant. (PC Vol. I 149). While they were married, Stein worked at a gas station “for a while”. (PC Vol. I 159). She moved to another state and gave the child up for adoption. (PC Vol. I 150). She was seventeen at the time she became pregnant. (PC Vol. I 150). She did not speak with Stein for a “really long time” after the adoption. (PC Vol. I 151,152). They were divorced. (PC Vol. I 152). The reason for the divorce was her decision to give their child up for adoption. (PC Vol. I 152). They had no further contact after her moving away and the adoption. (PC Vol. I 152). She was pressured by her parent to give the child up for adoption. (PC Vol. I 153). No one contacted her to discuss Stein or testify at the penalty phase. (PC Vol. I 153). They were together for 1½ to 2 years. (PC Vol. I 154). They had little to no contact after that. (PC Vol. I 154). Her knowledge of Stein is limited to about 24 months of his life. (PC Vol. I 154). She admitted that they had no respect for bedtime or mealtime or his parents. (PC Vol. I 155). She was not aware of any legal steps Stein took to retain his parental rights of their daughter. (PC Vol. I 156). She testified that Stein and his sister were not interested in each other. (PC Vol. I 158). She was not aware of Stein’s conviction for attempted burglary or his subsequent arrest. (PC Vol. I 159). She and Stein started writing letters about their daughter Sara. (PC Vol. I 160). Stein and his daughter have also started writing. (PC Vol. I 160). When the

prosecutor objected to this testimony on the basis of relevancy, Stein did also because he wanted to Sara kept out of this. (PC Vol. I 160).

Phillip Douglas Bacha, who was a teenage friend of Stein's, testified at the evidentiary hearing. (PC Vol. I 161). They were passing acquaintances in grade school. (PC Vol. I 162). They became friends when he visited Stein after the car accident. (PC Vol. I 163). Stein's friend Diana was killed in the accident. (PC Vol. I 163). Stein's injuries were fairly bad. (PC Vol. I 163). He and Stein hung out together and "did some drinking" and "some drugs" and did typically stupid teenager type stuff like "raising hell" and smoking marijuana. (PC Vol. I 164). He testified that Stein was "a very highly intelligent guy". (PC Vol. I 165). When he went into the Navy, he and Stein remained in contact by writing letters. (PC Vol. I 166). They were very good friends and he trusted Stein. (PC Vol. I 166). Stein's attorney never contacted him to testify. (PC Vol. I 167). He entered the Navy in June of 1986 and remained in the Navy about 6 years. (PC Vol. I 168). He is currently a stationary engineer at a hospital. (PC Vol. I 169). He is aware of Stein's tattoos. (PC Vol. I 170). Stein got the white supremacist tattoos after they went their separate ways. (PC Vol. I 172). He did not think that Stein was a card-carrying Nazi. (PC Vol. I 171). He noticed that Stein was hanging around with "a certain individual" who was shooting up drugs. (PC Vol. I 172). He was not aware that Stein was convicted of attempted burglary or arrested for theft. (PC Vol. I 173). Stein drifted into harder drugs which had a negative effect on him. (PC Vol. I 174).

Shari Roinestad, who was the mother of one of Stein's childhood friends, testified. (PC Vol. II 10). She lived in the same neighborhood as Stein's parents. (PC Vol. II 11). She knew Stein for about a decade. (PC Vol. II 17). She would discuss politics and poetry with Stein. (PC Vol. II 11). Her son and Stein were both fatherless boys. (PC Vol. II 12). Stein's father was very uninvolved. (PC Vol. II 13). Stein's father was ill and "did not have the lung power to keep Steve down". (PC Vol. II 13). She would often see Stein daily or at least weekly when he was a teenager. (PC Vol. II 13). She visited Stein when he was in the hospital after the car accident in which the girl died. (PC Vol. II 14). She testified that he and Michael had several automobile accidents. (PC Vol. II 14). She admitted that Stein started "self-destructing". (PC Vol. II 14). Stein told her that he kept seeing the girl fly out the window, over and over again. (PC Vol. II 15). She thought that Stein suffered from post-traumatic stress disorder from the accident. (PC Vol. II 15). When her son got married, he and Stein split apart and she did not see Stein as much. (PC Vol. II 15). Stein's attorney did not contact her. (PC Vol. II 16). She felt that Stein was a "very tenderhearted guy" who "has made some bad choices" but "haven't we all." (PC Vol. II 16). She testified that she thought that Stein had a "great respect for human life" from his poetry and songs. (PC Vol. II 21). She did not know the details of this double homicide. (PC Vol. II 28). She was very liberal and Stein was very conservative. (PC Vol. II 23). She was aware of Stein's racism (PC Vol. II 23). She admitted that

Stein's views were racist. (PC Vol. II 24). She testified that Stein was "very intelligent." (PC Vol. II 25).

Michael Roinestad, who was Shari Roinestad's son and one of Stein's teenage friends, also testified. (PC Vol. II 30). He and Stein became good friends after he dropped out of high school. (PC Vol. II 31). Stein received a settlement from the car accident and planned on opening a garage. (PC Vol. II 32). Stein put himself through mechanic school. (PC Vol. II 32). It was his former girlfriend that was killed in the car accident. (PC Vol. II 33). Rob Suber, not Stein, was driving the car. (PC Vol. II 34). Both the girl and Stein were passengers. (PC Vol. II 34). He knew the girl's first name was Diana but could not remember her last name. (PC Vol. II 34). The driver rolled his truck. (PC Vol. II 34). There was an awkwardness about the situation because the girl was becoming Stein's girlfriend shortly after breaking up with him, so, they did not discuss the accident much. (PC Vol. II 36). Stein was injured in the accident including having a shattered jaw. (PC Vol. II 36). The accident causes Stein's eyes to change color from a unique blue color to a deep purple. (PC Vol. II 37). Stein's father loved him but he was not a father figure. (PC Vol. II 40). Stein loved his parents but he would not classify him as a "loving son" and Stein was not "a typical Walton loving son." (PC Vol. II 40). He was not contacted by Stein's attorney or investigator but he would have been glad to testify and would do anything for Stein. (PC Vol. II 41). He was one year younger than Stein and became good friends with Stein when he was 16 years old. (PC Vol. II 42). They stopped having regular contact when he

was 19 years old. (PC Vol. II 42). So, he and Stein were close friends for three years. (PC Vol. II 42). Stein's parents were loving, caring people who were good providers. (PC Vol. II 44). He was aware that Stein abused drugs. (PC Vol. II 45). At 14 or 15, Stein was smoking marijuana. (PC Vol. II 46). He knew that Stein used crystal meth "pretty heavily". (PC Vol. II 47). They both snorted meth on several occasions. (PC Vol. II 48). He was aware of Stein's tattoos. (PC Vol. II 48). He knew that Stein had racist views. (PC Vol. II 49). Stein would tone down his racist views around Michael because Michael did not have any tolerance for racism. (PC Vol. II 49). He knew that Stein had rather pronounced racial views. (PC Vol. II 49). Collateral counsel objected to this testimony but the trial court noted that he tried "the best I could to keep these views out of the trial" and that trial counsel had testified he was concerned about keeping these views out also. (PC Vol. II 50). The trial court overruled the objection. (PC Vol. II 50). One of the reason they drifted apart was that Stein's racial views were becoming stronger. (PC Vol. II 51). He would not be surprised that when Stein was arrested there was white supremacy literature in Stein's home. (PC Vol. II 51). He was not familiar with Stein's life for the three years prior to the murders. (PC Vol. II 51). Stein would have had to have changed from the person he knew to be a murderer. (PC Vol. II 53). The Stein he knew would not have committed these crimes and Stein "was a different person" which is what led to them drifting apart. (PC Vol. II 53). When he and Stein were friends, skin color did not make a difference. (PC Vol. II 54).

They had black friends at that time and Stein did not treat them differently from their white friends. (PC Vol. II 54).

The prosecutor noted that collateral counsel had stipulated to the evidence in Christmas' affidavit and agreed that Christmas would testify as in this statement if called to testify at the evidentiary hearing. (PC Vol. I 178). At the end of the evidentiary hearing, the prosecutor introduced Christmas' statement as State's exhibit #1. (PC Vol. II 55-56). The State's exhibit was a sworn statement by Christmas which was taken on May 16, 1996 which was 22 pages. (PC Vol. II 57). Collateral counsel introduced Stein's adoption records as an defense exhibit #3. (PC Vol. II 55-56).

The postconviction trial court rejected the claim of ineffectiveness regarding the handling of mitigation finding both no deficient performance and no prejudice. *Stein*, 995 So.2d at 339 (noting that the "trial court denied this claim, finding that defense counsel did conduct a reasonable investigation for mitigation, and that even if the new evidence of mitigation was considered, Stein had not established any prejudice by the failure to present such evidence.").

In the postconviction appeal to the Florida Supreme Court, Stein raised four issues including a claim that trial counsel was ineffective for failing to investigate and present certain mitigation witnesses. *Stein*, 995 So.2d at 333 (listing issues in the postconviction appeal). The Florida Supreme Court affirmed the postconviction trial court's finding of no deficient performance and no prejudice. *Stein*, 995 So.2d at 339 (stating: "we find no error in

the trial court's conclusion that counsel's actual performance did not fall outside a constitutionally accepted range of effective assistance.").

On November 30, 2009, Stein filed a federal habeas petition in the Middle District. *Stein v. McNeil*, Case No. 3:09-cv-1162-J-32. The petition is still pending in the federal district court.

On October 22, 2010, registry counsel, Linda McDermott, filed a successive 3.851 motion in the trial court raising a claim that the prejudice analysis in the initial postconviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). The State filed an answer to the successive motion asserting that the motion should be summarily denied as untimely, barred by the law of the case doctrine, and meritless. The trial court summarily denied the successive motion.

SUMMARY OF ARGUMENT

Stein asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present numerous friends in mitigation in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). Stein claims that the prejudice analysis conducted in the original motion has to be reassessed with a "full-throated and probing" analysis rather than the previous "truncated" analysis performed in the initial motion.

The successive motion was untimely. The motion was filed over fifteen years late and there is no exception to the time limitation in the rule that applies. *Porter* did not change the law governing ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984), was, is, and remains, the law regarding ineffectiveness.

This Court recently held that such successive *Porter* motions are untimely. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(No. SC11-153)(holding that the trial court properly denied Walton's second successive postconviction motion because the decision in *Porter* does not constitute a fundamental change in the law that mandates retroactive application under *Witt v. State*, 387 So.2d 922 (Fla. 1980)). This Court explained that any claim that "*Porter* applies retroactively is incorrect and insufficient as a matter of law" because "the decision in *Porter* does not concern a major change in constitutional law of fundamental significance." "Rather, *Porter* involved a mere application and evolutionary refinement and

development of the *Strickland* analysis, i.e., it addressed a misapplication of *Strickland*." *Walton*, - So.3d at -, 2011 WL 5984284 at *5.

Furthermore, the motion is barred by the law of the case doctrine. This Court rejected the same type of argument in *Marek v. State*, 8 So.3d 1123 (Fla. 2009), and prohibited relitigation. As this Court held in *Marek*, capital defendants may not relitigate previously denied claims of ineffectiveness every time a new Supreme Court case is decided applying *Strickland*.

Even if this Court were to allow relitigation of the claim, it should be rejected on the merits. This case is not similar to *Porter* in any manner. *Porter* concerned the unique mitigation of combat military service. Stein was never in the military. Furthermore, the omitted mitigation has a negative aspect to it. While these friends could help humanize Stein, they could also be cross-examined regarding numerous of Stein's more unsavory characteristics including Stein's racist views in a case where one of the victims was African-American.

Additionally, his claim of error applies only to the prejudice prong but both prongs of *Strickland* must be met to grant relief. This claim of ineffectiveness was rejected in this court based on a finding of no deficient performance as well as no prejudice. The "full-throated and probing" prejudice analysis registry counsel seeks would not change this Court's conclusion that there was no deficient performance in any manner and therefore, could not result

in any relief. Thus, the successive *Porter* motion was properly summarily denied.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE SUCCESSIVE 3.851 MOTION ATTEMPTING TO RELITIGATE A CLAIM OF INEFFECTIVENESS FOR FAILING TO PRESENT FRIENDS AS BACKGROUND MITIGATION BASED ON *PORTER V. MCCOLLUM*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)? (Restated)

Stein asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to friends as general background mitigation in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). The motion is untimely, barred by the law of the case doctrine and meritless. First, the successive motion was untimely. The motion was filed over fifteen years late and there is no exception to the time limitation in the rule that applies. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(finding a successive *Porter* motion was untimely). Furthermore, the motion is barred by the law of the case doctrine. As this Court held in *Marek*, capital defendants may not relitigate previously denied claims of ineffectiveness every time a new Supreme Court case is decided applying *Strickland*. Even if this Court were to allow relitigation of the claim, it should be rejected on the merits. This case is not similar to *Porter*. In *Porter*, defense counsel failed to uncover and present the defendant's extensive combat experience that resulted in PTSD. Here, in

contrast, Stein was never in the military. Thus, the successive *Porter* motion was properly summarily denied.

Standard of review

The standard of review of a trial court's summary denial of a successive 3.851 post-conviction motion is *de novo*. *Darling v. State*, 45 So.3d 444, 447 (Fla. 2010)(explaining that because a trial court's summary denial is based on the pleadings before it, its ruling is tantamount to a pure question of law and is subject to de novo review discussing *Ventura v. State*, 2 So.3d 194 (Fla. 2009)). 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." The phrase "conclusively show" is not limited to factual matters; the phrase also allows a summary denial as a matter of law. If there is controlling precedent from this Court that is directly on point, then a trial court may summarily deny the successive motion. For example, this Court has routinely affirmed summary denials of lethal injection claims on this basis. *See e.g. Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008)(noting that this "Court has repeatedly rejected appeals from summary denials of Eighth Amendment challenges to Florida's August 2007 lethal injection protocol since the issuance of *Lightbourne*" citing cases). A trial court may decided as a matter of law that the movant is entitled to no relief as this trial court properly did.

Timeliness

The successive 3.851 post-conviction motion was untimely. The rule of criminal procedure governing collateral relief in capital cases contains a time limitation that requires any post-conviction motion be filed within one year. The motion is untimely pursuant to 3.851(d)(1)(B).[6] Under the rule any post-conviction motion must be filed within one year of Stein's convictions and sentence becoming final. Stein's convictions and sentence became final on October 4, 1994, the day after the United States Supreme Court denied his

[6] Specifically, rule 3.851(d)(1), provides:

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(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:

(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 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.

petition for writ of certiorari in the direct appeal. *Stein v. Florida*, 513 U.S. 834, 115 S.Ct. 111, 130 L.Ed.2d 58 (1994). This successive motion was filed in October of 2010. The motion is over fifteen years late.

The rule contains three exceptions to the time limitation, none of which apply. The Florida Supreme Court has held that *Porter* did not supply a basis for a newly discovered evidence claim and did not restart the clock. *Grossman v. State*, 29 So.3d 1034, 1042 (Fla. 2010)(finding a trial court's summary denial of a third successive motion to be proper and affirming that the motion was untimely because *Porter* did not change the law regarding consideration of non-statutory mitigation and was not newly discovered evidence). So, controlling precedent holds that the exception for new facts in 3.851(d)(1)(B) does not apply.

Stein is attempting to use the exception in rule 3.851(d)(2)(B), which restarts the clock for a new fundamental constitutional right that has been held to apply retroactively. Stein asserts that *Porter* is a new fundamental constitutional right that applies retroactively. It is not.

In *Porter*, the Supreme Court per curiam reversed the Eleventh Circuit's finding that the Florida Supreme Court's determination there was no prejudice was a reasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Agreeing with the district court, the Supreme Court was persuaded that it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing

judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented. *Porter* did not establish a new constitutional right. Rather, it is merely an application of *Strickland* to a particular case. The *Porter* Court merely found prejudice under the existing prejudice framework. Contrary to registry counsel's assertion, the Supreme Court in *Porter* did not change the prejudice analysis - dramatically or otherwise. A claim that counsel was ineffective in violation of the Sixth Amendment right to counsel was, is, and remains, governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) including the prejudice prong. *Porter* did not overrule *Strickland*. The *Porter* Court itself repeatedly referred to *Strickland* and therefore, reaffirmed the *Strickland* standard. *Porter* contains several paragraphs describing the *Strickland* standard which cited *Strickland* repeatedly. *Porter*, 130 S.Ct. at 452-454. This section of the *Porter* opinion starts with the sentence: "To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him" and then cites *Strickland* six times. *Porter*, 130 S.Ct. at 452. The *Porter* opinion ends by once again citing *Strickland*. *Porter*, 130 S.Ct. at 456. The *Porter* Court did not at any point change the prejudice prong of *Strickland*.

Moreover, the United States Supreme Court had repeatedly referred to the *Strickland* standard in numerous opinions since *Porter*. *Cullen v. Pinholster*, - U.S. -, -, 131 S.Ct. 1388, 1408, 179 L.Ed.2d 557 (2011)(observing that the "*Strickland* standard must be applied with

scrupulous care."); *Harrington v. Richter*, - U.S. -, -, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011)(discussing the *Strickland* standard). Additionally, this Court has recently discussed the standard for ineffectiveness citing *Porter* in support of its discussion of the *Strickland* standard in numerous cases. *Hildwin v. State*, - So.3d -, -, 2011 WL 2149987 (Fla. 2011); *Franqui v. State*, 59 So.3d 82, 94-95 (Fla. 2011); *Troy v. State*, 57 So.3d 828, 836 (Fla. 2011). In one of those cases, this Court stated: "*Strickland* does 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. *Porter v. McCollum*, - U.S. -, -, 130 S.Ct. 447, 455-56, 175 L.Ed.2d 398 (2009)(quoting *Strickland*, 466 U.S. at 693-94)." *Troy*, 57 So.3d at 836. The Florida Supreme Court obviously does not think that *Porter* overruled *Strickland*. Registry counsel cites no appellate court decision from any court as describing *Porter* as overruling or significantly altering *Strickland*.

This Court recently held that such successive *Porter* motions are untimely. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(No. SC11-153)(holding that the trial court properly denied Walton's second successive postconviction motion because the decision in *Porter* does not constitute a fundamental change in the law that mandates retroactive application under *Witt v. State*, 387 So.2d 922 (Fla. 1980)). This Court explained that any claim that "*Porter* applies retroactively is incorrect and insufficient as a matter of law" because "the decision in *Porter* does not concern a major

change in constitutional law of fundamental significance." "Rather, *Porter* involved a mere application and evolutionary refinement and development of the *Strickland* analysis, i.e., it addressed a misapplication of *Strickland*." *Walton*, - So.3d at -, 2011 WL 5984284 at *5.

Registry counsel engages in an extensive *Witt* retroactivity analysis. *Witt v. State*, 387 So. 2d 922 (Fla. 1980). But one does not engage in a retroactivity analysis unless there is some change in the law. *Strickland* applies to this successive motion just as *Strickland* applied to the initial motion. If the law has not changed, as the law of *Strickland* has not, then that ends the retroactivity analysis right there. Because there is no change in the law, there simply is no retroactivity issue presented by this case.

Furthermore, the Florida Supreme Court has directly held, in this context - the Sixth Amendment right to effective assistance of counsel context - refinements or clarifications in *Strickland* jurisprudence are not retroactive. *Johnston v. Moore*, 789 So. 2d 262, 266-267 (Fla. 2001)(holding that *Stephens v. State*, 748 So.2d 1028, 1033-1034 (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)). In the earlier case of *Stephens v. State*, 748 So.2d 1028, 1033-1034 (Fla. 1999), this Court clarified the standard of review that applied to *Strickland* claims of ineffectiveness. But *Porter* did not even involve a clarification or refinement of the law like *Stephens*. Rather, *Porter* was a mere

application of standard law to a particular case. The successive motion was untimely.

Law of the case

The claim of ineffectiveness raised in the successive 3.851 motion is barred by the law of the case doctrine. Under the law of the case doctrine, questions of law actually decided on appeal govern the case through all subsequent stages of the proceedings. *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. *State v. McBride*, 848 So.2d 287, 289-290 (Fla. 2003)(noting that the law of the case doctrine applies to post-conviction motions); *Tatum v. State,* 27 So.3d 700, 704 (Fla. 3rd DCA 2010)(finding the claims in a 3.800 motion to be barred by the law of the case doctrine because they were previously addressed by the Third District in an earlier appeal). As the Florida Supreme Court has explained, if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in any court. *Topps v. State*, 865 So.2d 1253 (Fla. 2004).

Stein is seeking to relitigate the exact same claim of ineffectiveness in this successive postconviction motion that he raised in his first postconviction motion. Stein is once again claiming that his attorney, Jeff Morrow, was ineffective at penalty phase for not presenting numerous friends as general background

mitigation. That same claim of ineffectiveness for failing to background mitigation was raised in the initial postconviction motion. Both the trial court and the Florida Supreme Court rejected that particular claim of ineffectiveness. *Stein*, 995 So.2d at 339 (stating: "we find no error in the trial court's conclusion that counsel's actual performance did not fall outside a constitutionally accepted range of effective assistance."). Stein may not relitigate the same claim of ineffectiveness for a second time after the Florida Supreme Court affirmed this Court's decision regarding the claim on appeal. The entire successive motion is barred by the law of the case doctrine.

A very similar argument was rejected by this court in *Marek v. State*, 8 So.3d 1123 (Fla. 2009). Marek filed a successive postconviction motion attempting to relitigate the same claim of ineffectiveness in the successive motion that he had raised in the initial postconviction motion. The trial court summarily denied the successive motion and the Florida Supreme Court affirmed. 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. The Florida Supreme Court concluded the previously raised claim of ineffectiveness should not

be reevaluated 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. The Florida Supreme Court explained that *Rompilla; Wiggins* and *Williams* were applications of *Strickland* to these various cases. The Florida Supreme Court observed that the *Wiggins* Court began its analysis discussing *Strickland*. *Marek*, 8 So.3d at 1129. The Florida Supreme Court noted that there were no reported decisions from any court "adopting the view that *Rompilla*, *Wiggins*, and *Williams* modified the standard of review governing ineffective assistance of counsel claims." The Florida Supreme Court concluded that Marek was not entitled to relitigate the claim.

Marek controls here as well and precludes relitigation. *Porter*, like *Rompilla*, *Wiggins*, and *Williams,* is an application of *Strickland* to the particular case - nothing more. And, here, as in *Marek*, there is no reported decision holding, or even hinting, that *Porter* changed the *Strickland* standard.

Basically, this court has already rejected the idea that any new Supreme Court case dealing with a claim of ineffectiveness "changes" the *Strickland* standard and entitles every defendant to relitigate their previously denied claims of ineffectiveness. Postconviction litigation would never cease if registry counsel's view was adopted. Stein is not entitled to relitigate the previously denied claim anymore than Marek was. The *Porter* claim is barred by the law of the case doctrine.

Merits

The Sixth Amendment provides a criminal defendant the right "to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The constitutional right to counsel means the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), the United States Supreme Court found counsel was ineffective for not presenting mitigation. Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend and her boyfriend and was sentenced to death. Porter represented himself at the guilt phase but changed his mind and had counsel represent him at the penalty phase. Defense counsel was appointed a little over a month prior to the penalty phase. Defense counsel had "only one short meeting with Porter regarding the penalty phase." Defense counsel "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." Defense counsel put on only one witness, Porter's ex-wife, who testified that Porter had a good relationship with his son. Defense counsel asserted that Porter was not "mentally healthy," but he did not put on any evidence to support the assertion. While Porter was "fatalistic and uncooperative" and instructed his counsel not to speak with his ex-wife or son, Porter did not give counsel any other instructions limiting the other witnesses counsel could interview.

Porter filed a state postconviction motion asserting that his trial counsel was ineffective for failing to investigate and present mitigating evidence of his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity. Neither the state trial court nor the Florida Supreme Court addressed the deficient performance prong of *Strickland*. Both the state trial court and the Florida Supreme
Court, however, found no prejudice.

The *Porter* Court disagreed, finding deficient performance concluding that "the decision not to investigate did not reflect reasonable professional judgment." The *Porter* court found that defense counsel "ignored pertinent avenues for investigation of which he should have been aware" such as the court-ordered competency evaluations, which reported Porter's military service; his wounds sustained in combat, and his father's "over-discipline." The Court stated that while Porter may have been fatalistic or uncooperative, "that does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 U.S. at 453 citing *Rompilla v. Beard*, 545 U.S. 374, 381-382, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

The United States Supreme Court also found prejudice because the jury did not hear about (1) Porter's heroic military service in two of the most critical - and horrific - battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality,

difficulty reading and writing, and limited schooling. Porter's father was abusive. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead. Porter attended classes for slow learners and left school when he was twelve or thirteen years old. As a result of his abusive father, Porter enlisted in the Army at age 17 and fought in the Korean War. Porter's company commander in Korea, Lt. Col. Pratt, testified at the postconviction hearing regarding the combat his unit had endured by the Chinese attacks. Lt. Col. Pratt testified that the unit was "ordered to hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day." Lt. Col. Pratt testified that the unit "went into position there in bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant - for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies" and that the next morning, the unit engaged in a "fierce hand-to-hand fight with the Chinese" and later that day received permission to withdraw, making Porter's regiment the last unit of the Eighth Army to withdraw. Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers "were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar,

artillery, machine gun, and every other kind of fire you can imagine and they were just dropping like flies as they went along." Porter's company lost all three of its platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations. Porter received an honorable discharge. Lt. Col. Pratt testified that these battles were "very trying, horrifying experiences," particularly Chip'yong-ni. In Lt. Col. Pratt's experience, an "awful lot of [veterans] come back nervous wrecks. Our [veterans'] hospitals today are filled with people mentally trying to survive the perils and hardships [of] ... the Korean War," particularly those who fought in the battles he described.

Porter suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night. Porter also developed a serious drinking problem. Porter was diagnosed as suffering from posttraumatic stress disorder (PTSD). The *Porter* Court noted that PTSD is not uncommon among veterans returning from combat and quoted testimony from a Congressional hearing that approximately 23 percent of the Iraq and Afghanistan war veterans had been preliminarily diagnosed with PTSD. *Porter*, at n.4.

The *Porter* Court noted the uniquely mitigating nature of military service especially in combat situations. Indeed, the Supreme Court started its opinion by stating: "Porter is a veteran who was both

wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man." The Court then explained: "[o]ur 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." *Porter*, at n.8 & n.9. In the footnotes, the Court cited a movement to pardon prisoners who were Civil War veterans; a 1922 study discussing "the greater leniency that may be shown to ex-service men in court" and noted that some states have statutes specifically providing for special sentencing hearing for veterans. *Porter*, at n.8 & n.9. The *Porter* Court explained that military service has two mitigating aspects to it. The *Porter* Court explained that "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" and "[t]o conclude otherwise reflects a failure to engage with what Porter actually went through in Korea."

This case compared to *Porter*

Stein asserts that his counsel, Jeff Morrow, was ineffective for failing to present numerous friends as general background mitigation. There was no deficient performance. In *Porter*, defense counsel failed to uncover and present the defendant's combat experience that resulted in PTSD. In the *Porter* Court's words, counsel "did not even take the first step of interviewing witnesses or requesting records."

Porter, - U.S. at –, 130 S.Ct. at 453. Here, in contrast, defense counsel investigated and presented some background. Defense counsel presented Stein's sister and his girlfriend at penalty phase. Stein did not want his parents, who were in poor health, presented at penalty phase.

Nor was there any prejudice. The Eleventh Circuit has explained that "Porter's military service was critical to the holding in *Porter*." *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1249, n.16 & n.21 (11th Cir. 2010)(characterizing mitigation of military service in combat situations as "uniquely strong" and rejecting any reliance on *Porter* because Reed had no military service); see also *Boyd v. Allen*, 592 F.3d 1274, 1302 n.7 (11th Cir. 2010)(finding the case "easily distinguishable" from *Porter* because Boyd never "served in the military, much less during the most critical-and horrific-battles of the Korean War"); *Keough v. State*, 2010 WL 2612937, 32 (Tenn. Crim. App. Ct. 2010)(rejecting any reliance on *Porter* because the defendant had never "served in the military, much less in combat.").

Stein was never in the military. Stein did not serve his country in combat or otherwise. The vast majority of the *Porter* Court's reasoning which concerned mental illness resulting from intense combat, simply does not apply to Stein.

Additionally, the omitted mitigation in this case borders on the trivial. In *Strickland*, the defendant claimed that his attorney was ineffective for failing to present mitigation of several friends who would have testified that he was a good guy. The *Strickland* Court

found a "stark" lack of merit to any claim of prejudice. *Strickland*, 466 U.S. at 699-700, 104 S.Ct. at 2071. The *Porter* Court observed that that case was "not a case in which the new evidence would barely have altered the sentencing profile presented to the sentencing judge." *Porter*, 130 S.Ct. at 454 (citing *Strickland*). This case, like *Strickland* but unlike *Porter*, is a case where the new mitigation "would barely have altered the sentencing profile presented to the sentencing judge." The omitted mitigation in this case, while similar in type to the omitted mitigation in *Strickland*, is even less compelling than that in *Strickland* and nothing like the type of omitted mitigation at issue in *Porter*. There was no prejudice in this case.

Negative aspects to the omitted mitigation

There was also a negative aspect to the friends' testimony presented at the evidentiary hearing. The United States Supreme Court recently explained that any consideration of the prejudice prong must account for the negative aspect to any proposed mitigation. In *Wong v. Belmontes*, 558 U. S. -, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009), the United States Supreme Court per curiam reversed the Ninth Circuit's granting of habeas relief. The *Belmontes* Court concluded that counsel was not ineffective at penalty phase for failing to investigate and present family and expert mitigating evidence. Belmontes asserted his counsel should have presented (1) Belmontes's difficult childhood and good character, (2) expert opinion that he was likely to have a nonviolent adjustment to a prison setting, and

(3) evidence of Belmontes's emotional instability and impaired planning and reasoning ability. Belmontes argued, in part, that counsel should have presented expert testimony in the penalty phase to "make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity."

The *Belmontes* Court, after reasoning that there was no need for such expert testimony, also noted that any expert's testimony would have opened the door to damaging additional aggravation evidence. Presenting this mitigation likely would have open the door to a prior murder that Belmontes committed. The Supreme Court observed that "the worst kind of bad evidence would have come in with the good" mitigation. The Court also observed that "[i]t is hard to imagine expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder."

Here, as in *Belmontes*, the additional mitigation had a cost associated with presenting it. As in *Belmontes*, bad evidence would have come in with the good mitigation. Indeed, here, the family background is less mitigating than that in *Belmontes*. Stein had loving parents who adopted him. *Stein*, 995 So.2d at 340 (noting that testimony at the evidentiary hearing was "that Stein came from a loving family."). As this Court explained in the postconviction appeal raising this same issue, the friends present at the evidentiary hearing "could have caused substantial damage" to the mitigation case. *Stein*, 995 So.2d at 340. As the Florida Supreme Court explained,

> Bacha and Michael and Shari Roinestad testified that Stein abused drugs, which the jury could have viewed in a negative light. Bacha and Michael testified that Stein had racist views and was associated with the skinhead movement. Michael and Mann testified that Stein was reckless in his general conduct. Mann testified that Stein had no respect for his adoptive parents' rules, and Michael testified that Stein was not a loving son.

Stein, 995 So.2d at 340. The omitted mitigation carried a high price tag. The omitted mitigation involved evidence that Stein was a skin head with racist views in a case where one of the two victims was an African-American. *Stein*, 995 So2d at 338 (noting that "one of the murder victims was black."). Presenting friends who will also testify that the defendant was a racist is a steep price to pay for such marginal mitigation testimony. It is *Belmontes*, not *Porter*, that governs this case and shows that this Court's estimation of the prejudice from the omitted mitigation was correct.

Stein's argument in his successive motion, like his argument in the first motion, totally ignores the negative aspects of presenting the friends' testimony as mitigation. Stein does not even address this Court's reasoning for rejecting this claim in the first postconviction appeal in his brief.

Both prongs

Moreover, even if Stein could show prejudice (which he cannot), he could not prevail on his claim of ineffectiveness because both the trial court and this Court found there was no deficient performance.

A defendant raising a claim of ineffectiveness must establish both prongs of *Strickland*. *Waterhouse v. State*, 792 So.2d 1176, 1182 (Fla. 2001)(explaining that because *Strickland* requires both prongs, it is

not necessary to address prejudice when a deficient performance has not been shown). Because a petitioner's failure to show either deficient performance or prejudice is fatal to a *Strickland* claim, a court need not address both *Strickland* prongs if the petitioner fails to satisfy either of them. *Kokal v. Secretary, Dept. of Corrections*, 623 F.3d 1331, 1344 (11th Cir. 2010). Stein must show deficient performance as well as prejudice. Given that both the trial court and this Court found that counsel's performance regarding the mitigation was not deficient, this entire successive motion and appeal of that motion is merely a theoretical exercise in prejudice analysis and therefore, a waste of this Court's time.

The trial court found no deficient performance in the initial motion raising this exact same claim of ineffectiveness, ruling:

> Mr. Morrow's tactical decision was to keep out evidence regarding the Defendant's racists views, connections with white supremacy and substance abuse. Mr. Bacha testified that his time spent with the Defendant consisted of drinking and doing drugs, like marijuana. Mr. Bacha testified that the Defendant ultimately drifted into harder drugs. Mr. Bacha also knew of the Defendant's white supremacist tattoos and racist views. If Mr. Bacha was called as a witness, the Defendant would have opened the door for the exact type of evidence counsel diligently tried to keep out.

The Florida Supreme Court also found no deficient performance. *Stein*, 995 So.2d at 339 (noting that the "trial court denied this claim, finding that defense counsel did conduct a reasonable investigation for mitigation, and that even if the new evidence of mitigation was considered, Stein had not established any prejudice by the failure to present such evidence."); *Stein*, 995 So.2d at 339 (stating: "we find no error in the trial court's conclusion that

counsel's actual performance did not fall outside a constitutionally accepted range of effective assistance.”). Stein cannot establish a violation of his right to effective counsel regardless of prejudice because there was no deficient performance. The finding of no deficient performance is fatal to this *Strickland* claim regardless of any prejudice.

Accordingly, the trial court’s summary denial of the successive motion should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive 3.851 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Linda McDermott, McClain & McDermott, 20301 Grande Oak Blvd., Suite 118-61, Estero, FL 33928 this 13th day of December, 2011.

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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