IN THE SUPREME COURT OF FLORIDA

MARK ALLEN DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
______________________________/

CASE NO. SC11-359
L.T. No. 85-8933 CFANO
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the record in this brief are as follows:

References to the direct appeal record on appeal will be designated as (DAR Vol. #/page #).

References to the original post conviction record on appeal will be designated as (PCR Vol. #/page #). The post conviction transcripts will be cited as (PCT Vol. #/page #).

References to the first successive post conviction record on appeal will be designated as (SPCR Vol. #/page #).

References to the instant second successive post conviction record on appeal will be designated as (2SPCR/page #) as the record consists of only one volume.

PROCEDURAL HISTORY

Defendant Davis was charged by Indictment filed August 18, 1985, with the first degree murder, robbery and grand theft of victim Orville Landis, occurring on July 1-2, 1985. Davis was convicted of first degree murder, robbery and grand theft. Following the jury's eight to four death recommendation, the trial court found four aggravating factors, no mitigating factors and imposed the death sentence. This Court affirmed the judgment and sentence on direct appeal. *Davis v. State*, 586 So. 2d 1038 (Fla. 1991). The United States Supreme Court vacated judgment and remanded the case for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). See, *Davis v. Florida*, 505 U.S. 1216 (1992). On remand, this Court again affirmed the death sentence. *Davis v. State*, 620 So. 2d 152 (Fla. 1993), *cert. denied*, 510 U.S. 1170 (1994).

Prior State Post Conviction Proceedings

Davis' initial motion for post conviction relief asserted claims of ineffective assistance of guilt and penalty phase counsel. Following an evidentiary hearing on the claims, the trial court denied relief. This Court affirmed the trial court's denial finding, among other things, that Davis had not established either deficient performance or prejudice . *Davis v. State*, 928 So. 2d 1089, 1112-13, 1117 (Fla. 2005), *cert. denied*, 549 U.S. 895 (2006).

Davis then filed a successive habeas corpus petition [*Roper v. Simmons* claim] which was denied. *Davis v. McDonough*, 933 So. 2d 1153 (Fla. 2006)[1] Davis' first successive motion to vacate (SPCR1/1-36), alleging newly discovered evidence, *Brady/Giglio*, *Strickland* and lethal injection claims was summarily denied and affirmed on appeal. *Davis v. State*, 26 So. 3d 519 (Fla. 2009), *cert den.*, 130 S. Ct. 3509 (2010). In finding the ineffective assistance of counsel claims properly summarily denied, this Court held that "Davis failed to allege specific facts to establish either deficient performance or prejudice." *Id*. at 533.

Instant Post Conviction Proceedings

Davis filed this, his second successive post conviction motion, on October 25, 2010. (2SPCR/1-34) After the State filed an answer on November 15, 2010 (2SPCR/35-128), a case management conference was held on December 13, 2010. (2SPCR/157-80)

At the case management conference Davis argued that the mitigation was just completely disregarded, (2SPCR/161) and that this Court's reliance on the trial court's resolution of conflicts was improper under *Porter v. McCollum*, 130 S. Ct. 447 (2009)

[1] Davis also filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida on April 19, 2007 to which the State filed a motion to dismiss. On or about February 19, 2008, Davis filed a motion to hold his federal habeas proceedings in abeyance pending resolution of a successive motion to vacate filed in the circuit court. On February 27, 2008, the federal court issued an Order granting Davis' motion to hold the proceedings in abeyance.

(2SPCR/174) and urged the lower court to tell this Court that based on *Porter*, its analysis was not done correctly, to find that there was mitigation presented that it was simply disregarded and that there was no consideration to what the jury would have thought of that evidence. (2SPCR/178)

The Honorable Chris Helinger on January 11, 2010 rejected those arguments and denied the motion as untimely, successive and procedurally barred. (2SPCR/144-49) The court recognized that this Court has already acknowledged that *Porter* does not represent a change in the *Strickland [v. Washington*, 466 U.S. 668 (1984)] analysis and that *Porter* has not been held to apply retroactively. The court further noted that on appeal in this case, unlike in *Porter*, this Court found no deficient performance and addressed the post conviction testimony as applied to statutory and non-statutory mitigation in finding no prejudice. (2SPCR/147-48)

The Notice of Appeal was filed February 10, 2011. (2SPCR/150-51)

Facts

The facts are set forth in the opinions of this Court affirming the conviction of January 20, 1987, and death sentence, *Davis v. State*, 586 So. 2d 1038 (Fla. 1991); 620 So. 2d 152 (Fla. 1993), and affirming denial of Appellant's Rule 3.850 Motion to Vacate, after an evidentiary hearing. *Davis v. State*, 928 So. 2d 1089 (Fla. 2005).

Davis was convicted of robbery, grand theft, and the first-degree murder of Orville Landis. *See Davis v. State*, 586 So. 2d 1038, 1039 (Fla. 1991), *vacated*, 505 U.S. 1216, 120 L. Ed. 2d 893, 112 S. Ct. 3021 (1992). The jury, by a vote of eight to four, recommended the death penalty. *See id.* Following that recommendation, the trial judge sentenced Davis to life in prison on the robbery conviction, five years on the grand theft conviction, and death for the first-degree murder conviction. On direct appeal, we affirmed Davis's conviction for first-degree murder and death sentence. *See id.* at 1042. In affirming Davis's conviction and sentence, we detailed the facts surrounding the murder of Landis:

> [Davis] came to St. Petersburg, Florida, during late June 1985, and immediately prior to the murder of Orville Landis apparently had been living in the parking lot of Gandy Efficiency Apartments. On July 1, 1985, Landis was moving into one of the apartments, and [Davis] offered to assist him. Subsequent to moving, the two men began drinking beer together, and [Davis] borrowed money from Landis. Witnesses testified that Landis had approximately $500 in cash that day. [Davis] told Kimberly Rieck, a resident of the apartment complex, that he planned to get Landis drunk and "see what he could get out of him." During approximately the same time, [Davis] told Beverly Castle, another resident, that he was going to "rip him [Landis] off and do him in." Shortly thereafter, Landis and [Davis] were seen arguing about money and they went to Landis' apartment.
>
> Landis was last seen alive on July 1, 1985, at approximately 8:30 p.m. Castle testified that [Davis] appeared at her door at about midnight and told her that he had to leave town right away, and would not be seen for two or three years. Castle observed [Davis] driving away in Landis' car. During the afternoon of July 2, Castle became concerned and had Landis' apartment window opened, through which she observed him lying on his bed in a pool of blood.
>
> When the police arrived they found Landis' wallet empty of all but a dollar bill. A fingerprint found on a beer can in the apartment was later identified as [Davis's]. The medical examiner testified that

> the victim sustained multiple stab wounds to the back, chest, and neck; multiple blows to the face; was choked or hit with sufficient force to break his hyoid bone; was intoxicated to a degree that impaired his ability to defend himself; and was alive and conscious when each injury was inflicted. The evidence showed that the slashes to the victim's throat were made with a small-bladed knife, which was broken during the attack, and the wounds to the chest and back were made with a large butcher knife, found at the crime scene.
>
> [Davis] confessed to the police to the killing, as well as to the taking of Landis' money and car. He also told a fellow inmate that he killed Landis but expected to "get second degree," despite his confession, by claiming self-defense.

Id. at 1040.

At the penalty phase, the State presented one witness, Detective Craig Salmon, a police officer in Pekin, Illinois. Salmon provided testimony relating to Davis's prior offense of attempted armed robbery in Illinois in 1980, which was used in part to provide the basis for the prior violent felony aggravator. Davis was the only witness to testify at the penalty phase on his behalf. The jury voted eight to four in favor of the death penalty. *See id.*

In sentencing Davis to death, the trial judge found three aggravating circumstances--that the murder was committed while Davis was under a sentence of imprisonment; that the murder was especially heinous, atrocious, or cruel ("HAC"); and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The trial court also found the following aggravators, but considered them collectively as constituting only one aggravating circumstance: that the murder was committed for pecuniary gain, that Davis had previously been convicted of another capital offense or felony involving the use of or threat of violence to some person, [fn1] and that the murder was committed while Davis was engaged in the commission of a robbery. The trial court found no mitigating circumstances.

> [fn1] The trial court specifically noted that Davis had been convicted of the crime of attempted armed robbery when he was sixteen years of age but that he was convicted and sentenced as an adult. Additionally, the trial court noted that Davis was found guilty of robbery in the instant case.

Davis v. State, 928 So. 2d 1089, 1102-03 (Fla. 2005).

Holdings on Ineffective Assistance Claims

Davis has twice presented this Court with claims of ineffective assistance of counsel. In denying those claims in the original 3.850 appeal, this Court stated:

> I. Ineffective Assistance of Counsel at the Penalty Phase
>
> Davis claims that his trial counsel, John Thor White (hereinafter "White"), provided ineffective assistance during the penalty phase. Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we have previously held that
>
>> [a] claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Downs v. State*, 453 So.2d 1102 (Fla. 1984). A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.
>
> *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986). The alleged ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland*. *See Stephens v. State*, 748 So.2d

1028, 1032 (Fla. 1999). Under this standard, we conduct an independent review of the trial court's legal conclusions, while giving deference to the factual findings. *See id*. at 1032-33.

There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *See id*. at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

A. Davis's Background and Upbringing

Davis contends that his trial counsel was ineffective at his penalty phase because his trial counsel only began preparing for the penalty phase after the jury found Davis guilty, trial counsel's billing records indicated that he spent less than eleven hours preparing for the penalty phase, the only investigation conducted by trial counsel was an interview of Davis and Davis's mother the day before the penalty phase, and trial counsel admitted that he never contemplated calling anyone other than Davis's mother to testify at the penalty phase. As to the timing and amount of trial counsel's preparation for Davis's penalty phase, we have held that "the finding as to whether counsel was adequately prepared does not revolve solely around the amount of time counsel spends on the case or the number of days which he or she spends preparing for mitigation. Instead, this must be a case-by-case analysis." *State v. Lewis*, 838 So.2d 1102, 1113 n. 9 (Fla. 2002). Accordingly, a comparison of the evidence presented at the penalty phase with the evidence presented at Davis's postconviction evidentiary hearing is essential in assessing counsel's performance.

At the penalty phase, trial counsel only presented the testimony of Davis. Trial counsel testified at the

evidentiary hearing that it was his strategy to present Davis's mother to testify with regard to the circumstances surrounding his upbringing. However, Davis's mother never testified due to Davis's last-minute decision that she not be called as a witness to avoid forcing her through the trauma of trial testimony. [FN4] Faced with this last-minute decision, trial counsel suggested an alternative approach, with the full agreement of Davis, whereby he would take the stand at the penalty phase in lieu of his mother. During Davis's testimony, trial counsel elicited only a very general description of his family background and upbringing. Davis also testified that he "wished to hell [the crime] had never happened" and that he had made the conscious decision not to call his mother to testify at the penalty phase to spare her the pain of that experience. Trial counsel used this testimony to Davis's advantage by arguing to the jury in closing that "Davis had the guts and decency not to put [his mother] up there in the box" and that his decision not to call his mother "was a profound gesture on his part and one worthy of consideration."

FN4. The trial court found Davis made a voluntary choice not to have his mother testify.

When trial counsel was asked at the evidentiary hearing why a more complete history had not been elicited from Davis during his testimony he responded that Davis told him he "did not want mitigating evidence presented" and said, "I want the electric chair. I want to stay alive ten or eleven years on death row. That's good enough for me." Faced with these statements from Davis and Davis's decision not to have his mother testify at the penalty phase, trial counsel reasonably determined that his best alternative was to have Davis testify in an effort to place before the jury Davis's decision to spare his mother the trauma of being forced to testify. Given the last-minute circumstances and the predicament that trial counsel faced as a result of Davis's decision and instruction that his mother not testify, we conclude that trial counsel's actions were not unreasonable, and that counsel was not deficient for selecting an alternative and making the best strategic decision available under a most difficult situation that had been created by Davis himself.

Davis also alleges that trial counsel's inadequate investigation resulted in his failure to discover a

wealth of available mitigating evidence and that the mitigation of which trial counsel was aware was never presented at the penalty phase. Davis now alleges that by interviewing his family members and friends, trial counsel would have learned that each person had different details to convey that would have provided mitigating information. Specifically, Davis asserts that evidence of his tragic upbringing and substance abuse should have been presented.

Pursuant to *Strickland*, trial counsel has an obligation to conduct a reasonable investigation into mitigation. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. When evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000) (quoting *Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998)). Moreover, as the United States Supreme Court recently stated in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003):

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.... [A] particular decision not to investigate must be directly assessed for reasonableness in *all the circumstances, applying a heavy measure of deference to counsel's judgments*.
>
> ....
>
> ... [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable*. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Id. at 521-23, 123 S.Ct. 2527 (citations omitted) (fifth alteration in original) (first emphasis supplied) (quoting *Strickland*, 466 U.S. at 688-89, 691, 104 S.Ct. 2052).

Davis's trial counsel testified at the evidentiary hearing that he was aware of Davis's difficult upbringing and the circumstances surrounding his family life and that it was his strategy at the penalty phase to call Davis's mother to testify regarding those facts. We find it significant that Davis's trial counsel had the full benefit of information obtained by the public defender's office, which included matters pertaining to Davis's background and upbringing. Specifically, trial counsel testified at the evidentiary hearing that the file he received from the public defender's office in Davis's case already contained records regarding his medical history, educational background, and other general background information surrounding his life. Moreover, trial counsel testified that he interviewed Davis and Davis's mother to gain an understanding of his life. Based on the information in the public defender's file that was reviewed and considered by trial counsel coupled with the additional information garnered by trial counsel through interviews of Davis's mother and Davis, we conclude that the investigation into Davis's background for mitigating evidence that was conducted here was neither inadequate nor unreasonable.

The United States Supreme Court's decision in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), its most recent discussion of this issue, does not require a different conclusion. In *Rompilla*, the High Court concluded that defense counsel's conduct in preparation for the sentencing phase fell below the level of reasonable performance that is required by *Wiggins* and *Strickland* where defense counsel failed to review the court file on Rompilla's prior conviction. *See id*. at 2463-64. The Court stressed that it was not creating a per se rule requiring defense counsel to "do a complete review of the file on any prior conviction." *Id*. at 2467. Rather, the Court noted that the facts before it demonstrated that

> [c]ounsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an

> aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. There is no question that defense counsel were on notice, since they acknowledge that a "plea letter," written by one of them four days prior to trial, mentioned the prosecutor's plans. It is also undisputed that the prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried.

Id. at 2464 (citations omitted). In concluding that trial counsel's performance was deficient, the Court noted that "counsel did not look at any part of that file, including the transcript, until warned by the prosecution a second time," the day before the evidentiary sentencing phase began. *Id*. Although the facts of Rompilla led the Court to the conclusion that defense counsel's performance was unreasonable, the Court held that "[o]ther situations, where a defense lawyer is not charged with knowledge that the prosecutor intends to use a prior conviction in this way, might well warrant a different assessment." *Id*. at 2467.

The facts of the instant matter are entirely distinguishable from those present in Rompilla. As noted above, defense counsel in the present case reviewed all of the materials that were in his possession in preparation for Davis's penalty phase trial. Moreover, unlike *Rompilla*, there is no indication that there was material here that trial counsel was aware the State was going to use in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase trial. Moreover, unlike defense counsel in Rompilla, Davis's trial counsel reviewed records in the public defender's file transmitted to him regarding Davis's medical history, educational background, and other general background information surrounding his life. A thorough reading of the United States Supreme Court's decision in *Rompilla* reveals that it is inapplicable to the facts of the instant matter. Unlike defense counsel's deficient performance in *Rompilla*, trial counsel's investigation in the instant matter was within the level of reasonable performance that is required by *Strickland*

and *Wiggins*. *See Rompilla*, 125 S.Ct. at 2463 ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste.") (citing *Wiggins*, 539 U.S. at 525, 123 S.Ct. 2527; *Strickland*, 466 U.S. at 699, 104 S.Ct. 2052).

Moreover, a review of the mitigating evidence presented at the evidentiary hearing in this posttrial review demonstrates that the matters now asserted were either cumulative to that which trial counsel anticipated presenting through Davis's mother or exposed negative information pertaining to Davis's prior criminal conduct and drug abuse-topics trial counsel made a reasonable strategic decision to avoid. [FN5] Trial counsel was fully aware of the pertinent information these witnesses possessed and any testimony that could have been elicited from these witnesses at the penalty phase would have been cumulative to the anticipated testimony of Davis's mother. Therefore, at the time of trial, once counsel secured Davis's mother to testify with regard to all of the pertinent information, his decision to forego further pursuit of other members of Davis's family and friends was not an unreasonable decision or approach. *See Ventura v. State*, 794 So.2d 553, 570 (Fla. 2001) (finding that penalty phase counsel was not deficient for failing to procure the testimony of witnesses for the penalty phase whose testimony would have mirrored the testimony that was offered at that proceeding); *Downs v. State*, 740 So.2d 506, 516 (Fla. 1999) (affirming the trial court's denial of the defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing); *Rutherford v. State*, 727 So.2d 216, 224-25 (Fla. 1998) (same); *Valle v. State*, 705 So.2d 1331, 1334-35 (Fla. 1997) (same).

FN5. Specifically, at the evidentiary hearing postconviction counsel presented the testimony of Rick Hall, a childhood friend who testified to Davis's alcohol and drug abuse and violent tendencies; Johansae Hayes, another childhood friend who testified to the poor financial status of the Davis family, verbal abuse imposed on Davis by his father, and Davis's father's physical abuse of Davis's older brother, Tracy; John Davis,

> Davis's father, who testified to his own alcoholism and abuse of family members; Mary Blinn, Tracy Davis's ex-wife, who testified regarding Davis's addiction to drugs and alcohol and the prior criminal activity he engaged in with Tracy; Michael Davis, Davis's oldest brother, who testified to the family's privation, his father's alcoholism, and his father's verbal and physical abuse of his family (including that Davis witnessed his father abuse his mother and, as one of the youngest children, suffered the brunt of his father's abuse); Shari Uhlman, Davis's younger sister, who reiterated testimony regarding the family's finances and her father's verbal and physical abuse; Candace Louis, Davis's older sister, who also testified to her father's alcoholism and abuse; and, finally, Mary Jo Buchanan, Davis's cousin, who testified to Davis's father's alcoholism and abuse of his wife.

Trial counsel testified at the evidentiary hearing that it was also his strategy to avoid presenting potentially mitigating evidence that carried negative factors that would cast Davis in a negative light before the jury. Specifically, trial counsel agreed that he would not have wanted to use "information about [Davis] being troubled, becom[ing] a drug addict." Trial counsel was well aware of Davis's alcohol and substance abuse problems, as he testified with regard to his review of Davis's mental health report, which contained such information. Therefore, the substance of the testimony offered at the evidentiary hearing regarding this subject was known to trial counsel at the time of the penalty phase. Davis's trial counsel was not ineffective in exercising his decision to discontinue further investigation into matters that were already known to him and that he had strategically determined should not be presented to the jury. *See Wiggins*, 539 U.S. at 521-22, 123 S.Ct. 2527 ("[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.") (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052); *see also Ruffin v. State*, 420 So.2d 591, 593 (Fla.1982) (concluding that the Court should not use hindsight to second-guess counsel's strategy).

Additionally, facts presented through the testimony of Davis's family members and friends at the evidentiary hearing regarding his family's poor economic situation and his father's abusive behavior and alcoholism were known to trial counsel through Davis and Davis's mother, and were therefore cumulative to that which trial counsel anticipated presenting through Davis's mother's testimony. In fact, several witnesses presented by Davis at the evidentiary hearing testified and recognized that Davis's mother would have been totally aware of the substance of their testimony and that she probably would have been even more familiar with all of those facts than the witnesses themselves. Given that trial counsel was aware of this information, we cannot conclude that trial counsel's investigation fell below the objective standard of reasonableness by which attorney performance is measured. *See Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527. We conclude that counsel was not deficient in making the decision not to interview these witnesses when the information they testified to at the evidentiary hearing was already known to trial counsel at the time of the penalty phase. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Moreover, with regard to the testimony of Davis's older brother Michael, we agree with the trial court's observation that this "witness grew up in the same household under the same circumstances as the defendant. And yet, he overcame this and established a stable life. The jury would have contrasted this with the defendant's lack of effort to overcome his circumstances." Davis has failed to establish how his trial counsel's performance was deficient in relation to the above witnesses.

Postconviction counsel's presentation of Tracy Davis ("Tracy"), Davis's second-oldest brother, merits special attention. Tracy testified at the evidentiary hearing with regard to the financial circumstances of his family, his father's alcoholism, and his father's abusive behavior, physically and mentally, towards his family. Additionally, Tracy testified that Davis was developing a drug habit and that he felt responsible for getting Davis involved with drugs and into trouble with the law. Tracy also admitted to having anally raped Davis when Davis was approximately six years old.

The trial court determined that Tracy would not have been available to testify at Davis's penalty phase. Our review of that determination on this record reveals that Tracy's testimony regarding his availability was unclear

at best. On cross-examination, Tracy stated that he was not sure if his family knew how to contact him during Davis's trial because he was on the run from a parole violation. However, Tracy stated that he would have come to Florida to testify even though he would have faced the possibility of being arrested and extradited back to Illinois. We conclude that the trial court's finding that Tracy was unavailable to testify at the time of Davis's penalty phase is adequately supported by competent evidence in the record.

Moreover, even if we were to conclude that Tracy was available to testify at the penalty phase, the record demonstrates that White was not deficient for failing to secure his testimony. Similar to other members of Davis's family, the majority of Tracy's testimony regarding Davis's home life and his father's substance abuse and abusive behavior was already known to White through Davis and his mother. White anticipated calling Davis's mother to testify to these facts at the penalty phase. We conclude that trial counsel's performance was not deficient for failing to secure this additional witness to provide testimony that would have been cumulative to that which he anticipated eliciting from Davis's mother. As to Tracy's testimony regarding Davis's substance abuse and criminal activity, Davis has failed to show that his attorney would have presented that testimony at the penalty phase given his strategic decision to avoid revealing such negative information to the jury.

With regard to Tracy's testimony that he anally raped Davis when Davis was six, the trial court accurately noted that this testimony was "suspect at best." Moreover, Davis never mentioned this information at any time to his trial counsel or his mental health expert, and no other member of the family seemed to know anything about this subject. In fact, Davis specifically denied having ever been sexually molested as a child or in prison when asked by his mental health expert. We cannot conclude that trial counsel was deficient for failing to pursue such mitigation when Davis himself failed to inform either counsel or mental health experts about this matter. *See Stewart v. State*, 801 So.2d 59, 67 (Fla. 2001) (holding that the defendant's failure to communicate instances of childhood abuse to defense counsel or defense psychiatrist precludes claim that counsel was deficient for failing to pursue such mitigation). In summary, we hold that trial counsel was

not deficient for failing to secure Tracy's testimony, considering that the information regarding Davis's upbringing was known to his mother, that Davis has not shown that Tracy was available to testify at the time of his penalty phase, that trial counsel's strategy was to avoid presenting negative information regarding Davis, and that Davis in fact denied prior sexual abuse.

Moreover, even if we were to assume that trial counsel was ineffective in performance and investigation, Davis has totally failed to establish the required element that his trial counsel's performance prejudiced him. In its sentencing order, the trial court found four aggravating factors and no mitigating circumstances. Given the facts of the crime and the overwhelming aggravating factors that were found to exist, along with the absence of mitigating circumstances, our confidence in the outcome of the proceedings below has not been undermined as Davis has totally failed to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *see also Hodges v. State*, 885 So.2d 338, 350-51 (Fla. 2004) (affirming death sentence even in light of postconviction evidence regarding defendant's impoverished and abusive upbringing where trial court found two aggravators, that the murder was committed to disrupt or hinder law enforcement and CCP); *Asay v. State*, 769 So.2d 974, 988 (Fla. 2000) (holding that there was no reasonable probability that evidence of the defendant's abusive childhood and history of substance abuse would have led to a recommendation of life where the State established three aggravators: the murder was committed by a person under sentence of imprisonment; defendant had been previously convicted of a capital felony; and CCP); *Breedlove v. State*, 692 So.2d 874, 878 (Fla. 1997) (holding that the aggravating circumstances of prior violent felony, murder committed during the course of a burglary, and HAC overwhelmed the mitigation testimony presented concerning childhood beatings and alcohol abuse).

B. Mental Health Mitigation

Davis claims that his trial counsel was deficient for failing to adequately investigate and prepare mental health mitigation as well as for failing to present mental health mitigation that was available. Prior to

trial, Davis's trial counsel engaged Dr. David C. Diffendale to perform a mental health evaluation of Davis and to prepare a report summarizing his findings regarding both Davis's competency to stand trial and other issues relevant to sentencing. At the evidentiary hearing, trial counsel testified that in his opinion the report would not have been helpful in establishing an intoxication defense or in negating specific intent. Additionally, trial counsel testified that the report contained information describing Davis's violent nature and concluding that he had a pattern of excessive violence. Trial counsel summed up his reasons for not presenting the report when he testified that after evaluating the report he

> didn't think that Dr. Diffendale's report was favorable to the defendant.... I mean he found that my fellow client didn't suffer any psychosis, any major mental problems, you know. He gave a very negative history ... that would put my client in a very negative light, in my judgment.... I felt that Dr. Diffendale was useless, as a witness. He was more negative than positive.

The language contained within the report supports trial counsel's decision not to present the report. The report, in pertinent part, notes Davis's

> explosive, impulsive anger. He has a history of over-responding with violent anger when sexually approached by males in jail. When asked, he reported continuing to beat others who had approached him long after they had ceased struggling. He reports "loosing (sic) it" when he feels threatened. This mode of behavior may explain the excessive stab wounds.

In the sentencing recommendation portion, the report states that

> [a]id for sentencing is difficult in this evaluation. His response to the situation leading to the victim's death is understandable given the defendant's family history, jail experiences, psychological make-up and intoxication. These circumstances might lead to recommending a lesser sentence. Further jail will more likely reinforce the behaviors that lead [sic] to the current crime. However, he has been involved with breaking the law

> for ten of his twenty three years. Thus, his sentence should be stiffer. *In this section I usually recommend some realistic form of rehabilitation. I do not find any such available for this case within the constraints of the criminal justice system.*

(Emphasis supplied.) Although the report does contain some potentially mitigating evidence regarding Davis's troubled upbringing and his father's abusive behavior, we determine that trial counsel's strategy of not presenting the report to the jury was reasonable given the highly negative information that was also contained in the report. Therefore, we hold that Davis's trial counsel was not deficient for failing to present Dr. Diffendale's report to the jury and that Davis's claim was properly denied. *See Hodges*, 885 So.2d at 348 ("In light of evidence demonstrating that counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the experts' findings does not constitute ineffective assistance of counsel."). [FN6]

> FN6. We also reject Davis's claim that his trial counsel was ineffective for failing to obtain a mental health expert to testify regarding an intoxication defense. As noted, Dr. Diffendale was retained by White to evaluate Davis and there is clear evidence in the record supporting counsel's decision not to present Dr. Diffendale at trial.

C. Other Mitigation

Davis asserts that his trial counsel was deficient for failing to present mitigating evidence concerning his good behavior during his previous incarceration to rebut the State's cross-examination of him concerning his involvement in escape attempts. The record reflects that trial counsel elicited testimony from Davis at the penalty phase that he had the will to live under the circumstances of confinement without being disruptive if he were given a life sentence. Based on our review of the record, it is apparent that trial counsel did in fact attempt to establish Davis's ability to live in confinement by establishing that he had been able to do so in the past without a problem and was willing to do so in the future. We conclude that Davis's claim is not supported by the record.

Next, Davis asserts that his trial counsel failed to present evidence to negate the existence of the "cold, calculated and premeditated" state of mind or evidence of justification. Davis fails to specify what evidence trial counsel should have presented other than that related to his alleged intoxication on the night of the offense, which would have undermined his ability to form the intent necessary to establish CCP. Contrary to Davis's assertion, however, his trial counsel did present evidence of Davis's intoxication on the night of the crime through cross-examination of State witnesses Kimberly Rieck and Beverly Castle. As this evidence was placed before the jury by Davis's trial counsel, this claim is without merit.

Even if we were to conclude that White's penalty phase performance, in its totality, was deficient, which we do not, Davis has failed to demonstrate that he was prejudiced by that performance. Given the significant aggravating circumstances and the complete lack of mitigation, White's performance did not so affect the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See Maxwell*, 490 So.2d at 932 (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052).

Davis v. State, 928 So. 2d 1089, 1104-1113 (Fla. 2005).

This Court also rejected the guilt phase IAC claim, explaining:

III. Ineffective Assistance of Counsel at the Guilt Phase

Davis alleges that his trial counsel was ineffective in failing to file a motion to suppress Davis's statements and motions in limine regarding photos and victim impact information. However, the testimony at the evidentiary hearing does not support Davis's allegation. White testified that he did not identify any issues worthy of motion practice. White further testified that he did not file a motion in limine regarding photos of the victim's body because, based on his experience as a criminal lawyer, the photos were necessary as demonstrative aids to assist Dr. Joan Wood in describing her testimony and, therefore, there were no legal grounds to exclude the photos. With regard to the victim impact

information, White testified that he did not recall whether he made an objection when one of the victim's relatives made a statement to the court, but he did object when the State identified to the jury one of the victim's family members who was in the audience at the sentencing.

Counsel's strategic decisions do not demonstrate ineffective assistance. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. White's testimony reveals that his decision not to file pretrial motions as Davis now challenges was based on his assessment at the time that the motions would not have been meritorious. Moreover, Davis does not allege how he was prejudiced by the alleged error. As adequately stated by the trial court, the testimony of defense counsel at the postconviction evidentiary hearing does not support Davis's claim, and thus we affirm the trial court's denial of this claim.

Next, Davis contends that his trial counsel failed to depose or obtain statements from key witnesses listed by the State who had information favorable to Davis's defense. Specifically, Davis asserts that his trial counsel should have interviewed four individuals who saw Davis and the victim at a bar on the day of the crime. White testified at the evidentiary hearing that he had the depositions of the key witnesses who had been deposed by the public defender's office as well as the police reports containing information provided by people who were at a local bar in the general vicinity of the crime scene. Trial counsel further testified that based on these depositions, the police reports, and his defense strategy, he decided it was not necessary to take additional depositions of the people at the bar.

This Court has held that when a failure to depose is alleged as part of an ineffective assistance of counsel claim, the appellant must specifically set forth the harm from the alleged omission, identifying "a specific evidentiary matter to which the failure to depose witnesses would relate." *Brown v. State*, 846 So.2d 1114, 1124 (Fla. 2003) (quoting *Magill v. State*, 457 So.2d 1367, 1370 (Fla. 1984)). Davis has not established that any of the individuals he claims White should have deposed had information that was unknown to White before trial. Moreover, there is nothing in the record demonstrating what evidence would have been elicited from these witnesses or what material might have been

discovered had trial counsel deposed them. Davis has failed to show prejudice resulting from trial counsel's decision not to depose these individuals, and thus this claim is without merit.

Davis next asserts that trial counsel was ineffective in failing to request funds for an investigator. Trial counsel is not absolutely required to hire an investigator under all circumstances. Trial counsel is only required to conduct a reasonable investigation. *See Freeman v. State*, 858 So.2d 319, 325 (Fla. 2003). White testified that he did not use an investigator in Davis's case because "the facts were pretty well developed and undisputed." He also testified that he had the public defender's file, which contained background information and documents on Davis that had been gathered by the public defender's investigator. Thus, although White did not retain a second investigator, he had full investigatory support already completed before he entered the case. Davis has failed to demonstrate what information would have been revealed had trial counsel hired an investigator or that trial counsel's investigation was otherwise unreasonable. Therefore, Davis has failed to demonstrate prejudice. Based on the foregoing, this claim was properly denied.

Davis contends trial counsel was ineffective during voir dire in failing to question jurors about their views regarding drugs, alcohol abuse, and mental illness, as well as stipulating to the removal for cause of eleven potential jurors. The record indicates that the jurors were in fact not questioned during voir dire regarding drugs, alcohol abuse, or mental illness. However, even if we were to conclude that this failure rendered trial counsel's performance deficient, Davis has failed to demonstrate how this prejudiced these proceedings. Davis has not provided evidence that any unqualified juror served in this case, that any juror was biased or had an animus toward the mentally ill or persons suffering from drug addiction. Thus, this claim is without foundation.

In addition, Davis has not demonstrated that trial counsel did not have a reasonable basis to stipulate to the removal for cause of eleven potential jurors. He attempts to surmount this problem by merely asserting that if counsel had "followed up" during voir dire with more specific questions and had effectively rehabilitated the jurors, there would not have been a basis for any

for-cause challenges. This is mere conjecture, and this Court has rejected a similar argument in *Reaves v. State*, 826 So.2d 932, 939 (Fla. 2002). Moreover, trial counsel did object to the current state of the law regarding stipulated challenges for cause relating to those individual jurors who were completely against the death penalty, preserving his claim in case of future change in the law.

Davis also asserts that he was prejudiced because juror Cantlin stated that she knew the judge. The record indicates that the judge and juror Cantlin made known to both sides that he knew Cantlin though her husband. The record indicates that the prosecutor questioned Cantlin regarding whether her knowing the judge would affect her ability to sit as a juror, and she responded that it would not. Cantlin further confirmed that she would not have a problem serving as a juror in this case. Davis has not demonstrated any legal basis for removal or that Cantlin demonstrated any bias or that he was in fact prejudiced by Cantlin sitting on the jury. Thus, this claim is also without merit.

Davis also challenges counsel's decision to waive opening statements. At the postconviction evidentiary hearing, trial counsel testified that his general strategy is to argue that the State has not met its burden without presenting witnesses to avoid boxing his client into a particular course of action and that he implemented this strategy in Davis's case. Trial counsel testified that because he was not presenting evidence in Davis's case, he decided against presenting an opening statement. The record supports the conclusion that it was a strategic decision to waive opening statement, that the decision was reasonable under the circumstances, and that trial counsel considered and rejected reasonable alternative courses of action. Thus, we conclude that trial counsel's strategic decision did not amount to ineffective assistance. *See Occhicone*, 768 So.2d at 1048 ("[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."). It is not necessary to address whether Davis has made a showing of prejudice because he has failed to establish the deficiency prong which is a prerequisite under *Strickland*. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an

ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

Davis next claims that trial counsel was ineffective for failing to use evidence of Davis’s intoxication at the time of the offense to argue a voluntary intoxication defense. Specifically, Davis asserts that voluntary intoxication could have been employed as a defense to Davis’s first-degree murder charge and could have rebutted the necessary elements of specific intent and premeditation. At the time of these events, voluntary intoxication was a recognized defense to premeditated first-degree murder. *See Occhicone*, 768 So.2d at 1045; *Gardner v. State*, 480 So.2d 91, 92 (Fla.1985).

White testified at the evidentiary hearing that the issues relating to intoxication were significantly developed during the State’s case and that the testimony of the witnesses he chose not to present, such as Carl Kearney and Glenda South, regarding Davis’s intoxication was not any stronger or more convincing than the information provided by the State’s witnesses during cross-examination. White also noted that calling additional witnesses would have resulted in losing his opportunity to present the first and last closing argument. Moreover, White stated that if he called a witness who had some favorable knowledge relating to the intoxication issue, that witness might also have provided damaging unfavorable information, including testimony with regard to statements made by Davis that the victim was a homosexual and that he was planning to take the victim’s money. White testified that he considered all of these aspects in deciding not to present additional witnesses to testify regarding the intoxication issue. He stated that he had a predesigned goal and strategy to present certain information about Davis’s intoxication to the jury and he completely met that goal through the State’s witnesses-Beverly Castle and Kimberly Rieck. White testified that based upon the facts with which he was faced, presenting an intoxication defense to preclude a first-degree murder conviction was not really a viable strategy; instead, he wanted intoxication to be in evidence to place it in context to achieve his overall goal and strategy of obtaining a second-degree murder conviction. White noted that there was much evidence tending to support premeditation and it was his desire to inject Davis’s intoxication to suggest that Davis did not

fully form a conscious intent to do that which ultimately occurred, but he did not use intoxication as the primary defense because he did not think the jury would accept and believe that defense in this case.

Ultimately, White testified that it was his strategy to allow the state witnesses to provide the background of Davis's intoxication sufficient to obtain an intoxication instruction and not present additional witnesses on the intoxication issue to avoid losing his ability to make first and last closing argument. We have deemed similar strategies reasonable in the past. *See Occhicone v. State*, 768 So.2d 1037 (Fla. 2000) (affirming the trial court's finding of reasonableness where attorneys consciously chose not to present evidence based on the belief they had presented enough evidence through cross-examination and that it was more important to have the first and last closing argument); *see also Reed v. State*, 875 So.2d 415, 430 (Fla.) (concluding that trial counsel's decision to reserve first and last closing arguments and avoid the presentation of potentially perjurious testimony was not deficient performance), *cert. denied*, 543 U.S. 980, 125 S.Ct. 481, 160 L.Ed.2d 358 (2004). The fact that collateral counsel would have chosen a different strategy does not render trial counsel's decision in the instant case unreasonable in hindsight. *See Cooper v. State*, 856 So.2d 969, 976 (Fla. 2003) ("The issue before us is not 'what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense.'") (quoting *Occhicone*, 768 So.2d at 1049).

Moreover, the record reflects that evidence of Davis's alleged intoxication was in fact presented to the jury through State witnesses Kimberly Rieck and Beverly Castle. Detective Rhodes also testified that Davis told him that on the date of the murder he had been drinking all day. Thus, Davis's claim on the intoxication issue is ultimately that the voluntary intoxication defense was not pursued as vigorously as it should have been because trial counsel failed to present additional witnesses who had knowledge of Davis's intoxication. However, the evidence of intoxication presented was in fact more than sufficient to support a jury instruction on voluntary intoxication and, if believed, provide a basis upon which the jury could respond. Therefore, this claim was properly denied. *See Patton v. State*, 878 So.2d 368, 373

(Fla. 2004) (rejecting the defendant's claim that the voluntary intoxication defense was not pursued as vigorously as it should have been when the record indicated that defense counsel relied on the limited evidence of intoxication elicited from the State's witnesses, all of which was enough to support a jury instruction on voluntary intoxication).

Davis claims that trial counsel was ineffective because he failed to discover prior to trial the inconsistent statements of Beverly Castle and Kim Rieck, which precluded counsel from effectively cross-examining these witnesses. At the evidentiary hearing, White testified that he did cross-examine both Rieck and Castle regarding their conflicting statements on the degree of Davis's intoxication on the date of the crime. Contrary to Davis's assertion, the transcript of White's cross-examination of both Rieck and Castle reveals that counsel was indeed aware of their prior statements to the police and that he did in fact use them to impeach these witnesses at trial. Based on the foregoing, this claim is without merit.

Davis further claims that trial counsel failed to object to the inadequate jury instruction on voluntary intoxication. The instruction on voluntary intoxication was given and is contained in the record, and, therefore, as a substantive matter this claim could and should have been presented on direct appeal. Accordingly, this claim is procedurally barred in this proceeding. Procedural bar of the substantive claim notwithstanding, the ineffective assistance of counsel claim is meritless. Davis has not explained how and why the instruction was inadequate. As noted by the trial court, White cannot be held ineffective for not objecting to a proper instruction. Therefore, we conclude that the trial court properly denied relief with regard to this claim.

Davis contends that trial counsel was ineffective in attempting to present a self-defense or sexual advance defense. At trial, Detective Rhodes testified that Davis told him that he knocked on the victim's door on the night of the murder and told the victim he needed to borrow some money. At that point, Davis told the detective that the victim told Davis he would have to do something for it and the victim reached down and grabbed Davis's testicles. This Court has not previously recognized that a nonviolent homosexual advance may constitute sufficient provocation to incite an individual

to lose his self-control and commit acts in the heat of passion, thus reducing murder to manslaughter. Therefore, Davis's claim with regard to the sexual advance theory is unpersuasive.

With regard to the self-defense theory, White testified at the evidentiary hearing that his strategy was not to seek an acquittal on the basis that the killing was committed in self-defense. Rather, the self-defense theory was part of an overall attempt to convince the jury to lessen any conviction down from first- to second-degree murder. In fact, trial counsel testified that he did not see evidence to believe a self-defense theory and it was his view the jury would also reject that approach. The fact that present counsel might or would have chosen a different strategy does not render trial counsel's decision unreasonable or ineffective. *See Cooper v. State*, 856 So.2d 969, 976 (Fla. 2003). Moreover, evidence of self-defense was actually presented before the jury. Detective Rhodes testified that Davis advised him that he and the victim began to fight and that it was the victim who first picked up a long butcher knife. It was Davis's statement that he obtained the knife as he disarmed the victim. As noted by the trial court, the crime scene video was shown to the jury and any evidence of a struggle would have been apparent to the jury from this crime scene video. Finally, White argued self-defense during closing and the jury was in fact given the self-defense instruction. Based on the foregoing, we conclude that counsel's performance was not deficient and that Davis has failed to establish prejudice.

Davis asserts that counsel was ineffective in forfeiting opportunities to negotiate with the State regarding whether the State would seek the death penalty in this case. At the evidentiary hearing, White testified that it was never communicated to him that the State had the authority to offer Davis a life sentence. Trial counsel stated that he did not believe that Davis ever asked him before trial to approach the State to seek a plea in exchange for a waiver of death. Davis has not presented any evidence demonstrating that the State in fact provided trial counsel an opportunity to engage in any negotiating. Therefore, Davis has failed to demonstrate that trial counsel was deficient in this respect. Accordingly, this claim should also be rejected.

> With regard to Davis's cumulative error argument, the trial court properly found this claim to be without merit. "Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So.2d 1, 21 (Fla.2003); *see also Downs v. State*, 740 So.2d 506, 509 n. 5 (Fla.1999).
>
> *Davis*, 928 So. 2d at 1116-1121.

Davis' first successive post conviction motion raising a similar claim was summarily denied by this Court which explained:

> In his motion, Davis failed to allege specific facts to establish either deficient performance or prejudice, which are necessary to demonstrate entitlement to an evidentiary hearing. *See Jones v. State*, 998 So.2d 573, 587-88 (Fla. 2008) (citing *Rhodes v. State*, 986 So.2d 501, 513–14 (Fla. 2008); *Doorbal v. State*, 983 So.2d 464, 483 (Fla. 2008); *Spera*, 971 So.2d at 758). Here, the motion stated that the "circumstances surrounding [Kearney] and Castle's trial testimony *was not known to trial counsel* or if it was known [then] trial counsel was ineffective in failing to inform the jury of the witnesses' true motive for testifying." (Emphasis supplied.) In addition, counsel stated during the *Huff* hearing that other than the record there was no further documentary evidence to prove these claims. Consequently, Davis failed to allege any specific facts that would establish ineffective assistance. This is a deficiency that could not be corrected through an amendment to the motion thereby rendering this claim legally insufficient. *See Spera*, 971 So.2d at 755. Absent a specific allegation that trial counsel was informed that Castle lied with regard to the statement that Davis planned to "do away with" the victim, trial counsel could not be deficient for failing to pursue a recantation of testimony that was neither suspect nor clearly false. In other words, without defense counsel being informed of or discovering perjury, counsel would be in the dark as to its falsity. Counsel cannot be expected to seek recantations of every witness without some indication that the testimony was false. Even if Davis could amend the pleading to set forth specific facts establishing ineffective assistance of counsel, this would inevitably undermine his newly discovered evidence claim because trial counsel would have known of the perjury at the time of trial and would

> have needed to make some efforts during this time to establish due diligence. Thus, the motion clearly demonstrates that Davis has no sufficient allegations to support this claim.
>
> Further, Davis would not be able to demonstrate prejudice even if an evidentiary hearing were granted on this claim because the recantation does not establish a probability of changing the outcome, such that it undermines this Court's confidence in the verdict. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Thus, we affirm the postconviction trial court's summary denial of this claim.
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> *Davis v. State*, 26 So. 3d 519, 533-534 (Fla. 2009).

Order of the lower court on *Porter* claim

The trial court denied the *Porter* claim, explaining:

> This Court finds that the Defendant's motion is untimely, successive, and procedurally barred. Rule 3.851 (d)(1) bars postconviction motions filed more than one year after a judgment and sentence become final. The Defendant's judgment and sentence became final in 1994 when the Florida Supreme Court denied certiorari, making his motion untimely. Davis v. Florida, 510 U.S. 1170 (1994); see also Florida Rule of Criminal Procedure 3.851(d)(1)(B).
>
> Rule 3.851(d)(2) provides several exceptions to this one-year time limitation; however, the Defendant fails to establish that his motion qualifies for any exception. Specifically, rule 3.851(d)(2)(B) allows for successive motions beyond the one-year time limit if the successive motion alleges a newly established fundamental constitutional right that applies retroactively. The Defendant does not specifically assert that Porter creates a retroactive fundamental right under rule 3.851(d)(2)(B). Instead, he argues that Porter represents a recent articulation of Strickland prejudice, correcting a misconception in state courts which had failed to conduct a probing, fact-specific prejudice analysis, which he characterizes as a "sweeping" change in the law. Relying on Witt v. State, 387 So. 2d 922 (Fla. 1980), the Defendant argues that Porter necessitates further review by this Court of his claim of ineffective assistance of counsel concerning mitigating evidence. And, the

Defendant relies on Delap v. Dugger, 513 So. 2d 659 (Fla. 1987), and Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which reference Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), in which the Florida Supreme Court permitted retroactive application of Hitchcock, which he claims allows him to re-raise his original ineffective assistance of counsel claims in the present, successive motion.

The Defendant's motion does not meet any exception to the time limits of rule 3.851. The Florida Supreme Court held in that "only the Florida Supreme Court and the United States Supreme Court can adopt a change of law sufficient to precipitate a post-conviction challenge to a final conviction and sentence." Witt, 387 So. 2d at 930. Witt limits the courts which can make such changes in the law to the Florida Supreme Court and the United States Supreme Court.

The Florida Supreme Court has acknowledged that Porter does not represent a change in the application of the ineffective assistance of counsel analysis under Strickland. See Everett v. State, 2010 WL 4007643 (Fla. Oct. 14, 2010); Schoenwetter v. State, 2010 WL 2605961 (Fla. July 1, 2010); Stewart v. State, 37 So. 3d 243, 247 (Fla. 2010); Rodriguez v. State, 39 So. 2d 275, 285 (Fla. 2010). The Defendant does not cite to any case holding that Porter establishes a new fundamental constitutional right which is to be applied retroactively. Because no court has held that Porter established a new fundamental constitutional right which is to be retroactively applied, the Defendant's argument amounts to a request that this Court find that Porter constitutes a retroactive, fundamental change to constitutional law. Therefore, this Court lacks the authority to grant the Defendant the relief he requests, the establishment of a new rule of constitutional significance and application of that rule retroactively.

While Witt and Hitchcock either announced a new right or a change in analysis of constitutional law claims, Porter does not. The United States Supreme Court explained that Porter does not change the Strickland analysis; it simply represents an application of Strickland to the facts of the Porter case. It does not provide a basis for this Court to reconsider the Defendant's postconviction claims. Furthermore, unlike Hitchcock, which involved the invalidity of jury instructions statewide, the ineffective assistance of

counsel claims addressed in Porter are unique to each individual defendant and case and must be separately analyzed in light of Strickland.

The Defendant reasserts his previously denied claims of ineffective assistance of counsel, relying on Sochor v. State, 883 So. 2d 766 (Fla. 2004). The Defendant argues that because Sochor cited to Porter the Florida Supreme Court's analysis in Sochor must have been flawed, implying that Porter found an inherent flaw in the Florida Supreme Court's Strickland analysis, which in turn permits a re-examination of the previously decided claims in his case. However, Sochor only cited to Porter as being a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence." Sochor, 883 So. 2d at 783, citing Porter. This finding is in accordance with the mixed standard of review applied in Strickland.

Claims raised in prior postconviction proceedings cannot be re-litigated in a successive postconviction motion unless the defendant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. See Wright v. State, 857 So. 2d 861, 868 (Fla. 2003). In the Defendant's case, unlike Porter, the state courts did address trial counsel's performance at the penalty phase, finding that it was not deficient, and did address the postconviction testimony as applied to statutory and non-statutory mitigation, and found no prejudice under Strickland. Therefore, because the Defendant's claims have been previously addressed, they are procedurally barred. See Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004).

Conclusion

In light of the above, the Defendant has failed to bring a timely, cognizable claim in this motion for postconviction relief. Therefore, the Defendant's motion is denied.

(2SPCR/146-48)

SUMMARY OF THE ARGUMENT

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

ARGUMENT

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

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

In the motion below Davis did not allege that his previously asserted claims of ineffective assistance of **guilt phase counsel** needed to be reconsidered in light of *Porter*. His argument urged only that he was prejudiced by the deficient performance of his penalty phase counsel. (2SPCR/3-26) As any argument concerning guilt phase counsel is not properly before this Court, it should be summarily denied as procedurally barred. *Lawrence v. State*, 969 So. 2d 294, 310-311 (Fla. 2007) (IAC claim raised on appeal was procedurally barred, where defendant failed to raise such claim below); *Armstrong v. State*, 862 So. 2d 705, 713 (Fla. 2003) ("This

Court will only review those claims actually presented to the court below and thus will not consider the modified versions of these claims under ineffective assistance analysis.”). As to the claim that was actually presented to the lower court, it was properly denied as time barred, successive, procedurally barred and meritless. (2SPCR/146-48)

Pursuant to Fla. R. Crim. P. 3.851(d), a defendant must present his post conviction claims within one year of when his conviction and sentence became final unless certain exceptions are met. Here, Appellant’s convictions and sentences became final in 1994, when the United States Supreme Court denied certiorari after direct review. *Davis v. Florida*, 510 U.S. 1170 (1994). As Appellant did not file this motion until 2010, this motion was time barred. Florida Rule of Criminal Procedure 3.851(d)(1)(B).

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

Here, Appellant does not assert a claim based on a fundamental constitutional right that was not established within a year of when

his convictions and sentences became final. In fact, he acknowledges that *Porter* did not change federal constitutional law at all, Initial Brief at 38, fn.12, but, rather, that this Court's analysis was at odds with the Court's existing precedent. Initial Brief at 45.

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

Since *Porter* neither recognized a new right nor has been held to apply retroactively, it does not meet the exception to the time

bar found in Fla. R. Crim. P. 3.851(d)(2)(B). The motion was time barred and properly denied as such. The lower court should be affirmed.

Instead of relying on a newly established right that has been held to be retroactive to meet Fla. R. Crim. P. 3.851(d)(2)(B), Appellant appears to be asserting that having improperly brought the claim in a Rule 3.851 motion this Court now has jurisdiction to determine whether *Porter* qualifies as new law since the lower court does not have the authority to make such a determination. Apparently it is his contention that the (d)(2)(B) exception doesn't really mean what it says when it says "has been held to be retroactive" and that this requirement can be met by a defendant who merely alleges a new case should be held to be retroactive.

He is wrong.

This Court has held that court rules are to be construed in accordance with their plain language. *Koile v. State*, 934 So. 2d 1226, 1230 (Fla. 2006); *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). Moreover, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Here, the plain language of Fla. R. Crim. P. 3.851(d)(2)(B) requires "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

Thus, it requires a new constitutional right and a prior holding that the right is to be applied retroactively. See, *Tyler v. Cain*, 533 U.S. 656 (2001) (holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). Appellant cannot use the assertion that the alleged change in law regarding an existing right should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he must show that a newly established right *has been held* retroactive for the exception to apply. The motion was time barred, and the lower court properly denied it as such. The lower court should be affirmed.

The significance of *Porter's* "unreasonable application" finding under 28 U.S.C. §2254(d), as amended by the AEDPA

Even if Appellant could satisfy Fla. R. Crim. P. 3.851(d)(2)(B) by showing a change in law regarding an existing right and asking this Court to find it retroactive, the lower court would still have properly denied the motion as time barred because *Porter* did not change the law. While Appellant insists that *Porter* represents a "repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 38, and not simply a determination that this Court misapplied the correct law to the facts of one case, this is not true.

In making this argument, Appellant mistakenly relies on the fact that the United States Supreme Court granted relief in *Porter*

after finding that this Court had unreasonably applied *Strickland*. He suggests that since this determination was made under the deferential AEDPA standard of review, the Court must have found a systematic problem with this Court's understanding of the law under *Strickland*.

This argument misrepresents the meaning of the term "unreasonable application" under 28 U.S.C. §2254(d), as amended by the AEDPA. As the United States Supreme Court has explained, 28 U.S.C. §2254(d)(1), provides two separate and distinct circumstances under which a federal court may grant relief based on a claim that the state court previously rejected on the merits. These are: (1) that the ruling was "contrary to" clearly established United States Supreme Court precedent; and (2) that the ruling was an "unreasonable application of" clearly established United States precedent. *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000).

The Court explained that a state court decision fit within the "contrary to" provision when the state court got the legal standard for the claim wrong or reached the opposite conclusion from the United States Supreme Court on "materially indistinguishable" facts. *Id.* at 412-13. It further states that a state court decision would fit within the "unreasonable application" provision when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to

the facts of the prisoner's case." *Id.* at 413.

Contrary to Davis' argument, if the United States Supreme Court in *Porter* had determined that this Court had been applying an incorrect legal standard to *Strickland*, it would have found that Porter was entitled to relief because this Court's decision was "contrary to" *Strickland*; it did not. Instead, it found that this Court had "unreasonably applied" *Strickland*. *Porter*, 130 S. Ct. at 448, 453, 454, 455.

By finding that this Court "unreasonably applied" *Strickland* in *Porter*, the Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions." *Williams*, 536 U.S. at 412. It simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." *Id.* at 412. Thus, Appellant's suggestion that the *Porter* decision represents a wholesale repudiation of this Court's *Strickland* jurisprudence is incorrect.

Instead, as the lower court found, *Porter* represents nothing more than an isolated error in the application of the law to the facts of a particular case. (2SPCR/147) Thus, *Porter* does not represent a change in law at all and does not make Fla. R. Crim. P. 3.851(d)(2)(B) applicable. The motion was time barred and properly denied as such. The lower court should be affirmed.

Deference to findings of fact

This is all the more true when one considers how Appellant seems to allege *Porter* changed the law. Appellant seems to suggest that *Porter* held that it was improper to defer to the findings of fact that a trial court made in resolving an ineffective assistance claim pursuant to the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). Initial Brief at 47. However, in making this assertion, Appellant ignores that the *Stephens* standard of review is directly and expressly mandated by *Strickland* itself:

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

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

[2] The references to 28 U.S.C. §2254(d) in *Strickland* concern the provisions of the statute before the adoption of the AEDPA in 1996. Under the federal habeas statute as it existed at the time, a federal court was required to defer to a state court factual finding if it was made after a "full and fair" hearing and "fairly supported by the record." 28 U.S.C. §2254(d) (1984). After the

required deference not only to findings of historical fact but also deference to factual findings made in resolving claims of ineffective assistance while allowing *de novo* review of the application of the law to these factual findings. This is exactly the standard of review that this Court mandated in *Stephens*, 748 So. 2d at 1034, and applied in *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001), *Sochor v. State*, 833 So. 2d 766, 781 (Fla. 2004). This is also the standard used to deny relief in both of Davis' prior post conviction motions. *Davis v. State*, 26 So. 3d 519 (Fla. 2009) and *Davis v. State*, 928 So. 2d 1089 (Fla. 2005). Thus, to find that *Porter* found that application of this standard of review to be a legal error, this Court would have to find that the United States Supreme Court overruled this expressed and direct language from *Strickland* in *Porter*.

Appellant does not contend that the Court overruled this portion of *Strickland*. Since this Court's precedent on the standard of review is entirely consistent with this portion of *Strickland*, Appellant's attempt to argue to the contrary is specious. The lower court properly determined that *Porter* did not change the law and that the motion was time barred as a result. It should be affirmed.

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enactment of the AEDPA, the deference required of state court factual findings has been heightened and moved. 28 U.S.C. §2254(e)(1) (requiring a federal court to presume a state court factual finding correct unless the defendant presents clear and convincing evidence to overcome the presumption).

Although Appellant goes so far as to argue that the Court overruled *Strickland*'s requirement of deference to factual findings made in the course of resolving claims of ineffective assistance of counsel, such an argument is baseless. Initial Brief at 46. *Porter* makes no mentioned of this portion of *Strickland.* More importantly, *Porter* does not even suggest that it was improper for a reviewing court to defer to factual findings made in resolving an ineffective assistance claim. *Porter*, 130 S. Ct. at 448-56.

Instead, it characterized the opinion of the state trial court and this Court as having found there was no statutory mitigation established and there was no prejudice from the failure to present nonstatutory mitigation. *Id.* at 451. Under the standard of review mandated by *Strickland,* and followed by this Court, the first of these findings was a factual finding but the second was not. *Strickland*, 466 U.S. at 698. Rather than determine that this Court's factual finding was not binding, the Court seems to have accepted it and found this Court had acted unreasonably by not making factual findings about nonstatutory mental health mitigation and making an unreasonable conclusion on the mixed question of fact and law regarding prejudice. *Id.* at 454-56. Thus, to find that *Porter* overruled *Stephens* and its progeny, this Court would have to find that the United States Supreme Court overruled itself *sub silencio* in a case where the Court appears to have applied the allegedly overruled law.

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

Sears v. Upton does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

Appellant's reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) to bolster this position is misplaced. In *Sears*, the State post conviction court found constitutionally deficient attorney performance under *Strickland*. Because Sears' counsel presented some - but not all of the significant mitigation evidence the court felt competent counsel should have uncovered - the state court mistakenly determined that it could not speculate as to what the effect of additional evidence would have been and denied relief. On appeal, the Georgia Supreme Court summarily affirmed the Georgia post conviction court's finding that it was unable to assess whether trial counsel's deficient performance and resulting inadequate investigation might have prejudiced Sears without explanation. *Id.* at 3261. The summary denial did not attempt to evaluate the evidence or even address the evidence presented or the lack of standard applied to same. (Order of Supreme Court of

Georgia, *Sears v. Hall [Upton]*, Case No. S08E1253, September 28, 2009; attached as exhibit A)

Upon review, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings about the evidence presented. *Id.* at 3261. Thus, *Sears* does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

Sears, like *Porter*, in no way changes the well established *Strickland* standard.

***Porter* requires a court to consider the totality of the available mitigation evidence and reweigh it against the evidence in aggravation.**

Appellant also seems to suggest that *Porter* requires a court to grant relief on an ineffective assistance of counsel claim based solely on a finding that some evidence to support prejudice was presented at a post conviction hearing regardless of what mitigation was presented at trial, how incredible the new evidence was, how much negative information the new evidence would have caused to be presented at trial or how aggravated the case was. However, *Porter* itself states that this is not the standard for assessing prejudice. Instead, the Court stated that determining prejudice required a court to "consider 'the totality of the

available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding' - and 'reweig[h] it against the evidence in aggravation.'" *Porter*, 130 S. Ct. at 453-54 (quoting *Williams*, 536 U.S. at 397-98).

Moreover, in *Wong v. Belmontes*, 130 S. Ct. 383, 386-91 (2009), the Court reversed the Ninth Circuit for finding prejudice by ignoring the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented and the aggravated nature of the crime. The Court noted that this error was probably caused by the Ninth Circuit's failure to require that the defendant meet his burden of affirmatively proving prejudice. *Id.* at 390-91. Similarly in *Bobby v. Van Hook*, 130 S. Ct. 13, 19-20 (2009), the Court reversed the Sixth Circuit for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the evidence presented in post conviction and the aggravated nature of the crime.

Given what *Porter* actually says about proving prejudice and *Belmontes* and *Van Hook*, Appellant's suggestion that *Porter* requires a finding of prejudice anytime a defendant presents some evidence at a post conviction hearing is simply false. *Porter* did not change the law in requiring that a defendant actually prove there is a

reasonable probability of a different result.[3] Since *Porter* did not change the law, the lower court properly determined that this motion was time barred and should be affirmed.

<u>Appellant failed to establish that the change in law he alleges occurred would be retroactive under *Witt*.</u>

Even if Fla. R. Crim. P. 3.851(d)(2)(B) did apply to this situation and *Porter* had changed the law, the lower court would still have properly denied the motion because *Porter* would not apply retroactively. As Appellant admits, the determination of whether a change in law is retroactive is controlled by *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). As Appellant also properly acknowledges to obtain retroactive application of the law under *Witt*, he was required to show: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental significance. *Id.* at 929-30. To meet the third element of this test, the change in law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as

[3] Using Appellant's analogy, the task of determining prejudice involves taking the bag of pennies and quarters as it existed from the time of trial, determining whether the new evidence actually adds any new pennies or quarters based on whether they are supported by credible, non-cumulative evidence, adding both the new pennies and the new quarters and deciding whether the defendant has proven that the total amount of pennies outweigh the total amount of quarters. *Porter*, 130 S. Ct. at 453-54; *Strickland*, 466 U.S. at 695-96.

ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. Application of that three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001).

Here, while Appellant admits that a change in law is not retroactive under *Witt* unless this standard is met, he makes no attempt to show how the change in law that he alleges occurred meets this standard. In fact, he never clearly identifies what change *Porter* made, offers no purpose behind that change in law and does not mention how extensive the reliance on the allegedly old law was or what the effect on the administration of justice would be. He does not even challenge the lower court's findings regarding these issues. Given these circumstances, the lower court properly found that Appellant failed to establish that the change in law he alleges occurred would be retroactive under *Witt*. It should be affirmed.

Instead of attempting to show that the change in law he alleges occurred meets *Witt*, Appellant notes that this Court found *Hitchcock v. Dugger*, 481 U.S. 393 (1987) to be retroactive, and implies that because both cases involved findings of error in Florida cases, the change in law he asserts occurred in *Porter* should be too. However, the mere fact that this Court found a

change in law based on a determination that this Court had made an error to meet the *Witt* standard in one case does not dictate that a finding that this Court committed a different error in a different case would constitute a change in law that satisfies *Witt* in a different case. This is particularly true when one considers the difference in the errors found in *Hitchcock* and *Porter* and the relationship between those errors and the *Witt* standard.

In *Hitchcock v. Dugger*, 481 U.S. at 398-99, the Court found that the giving of a jury instruction that told the jury not to consider nonstatutory mitigation was improper. As such, the purpose of finding this error was to permit a jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phase and could only have harmed a defendant if he was sentenced to death, the number of cases in which there had been an error that would need retroactive correction was limited. Further, because the error was in a jury instruction, determining whether that error occurred in a particular case was simple. All one needed to do was review the jury instructions that had been given in a particular case to see if it was the offending instruction. Courts were not required to comb through stale records looking for errors. See, *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). Thus, the purpose of the new rule, extent of reliance on the old rule and

effect on the administration of justice in *Hitchcock* militated in favor of retroactivity.

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

Given these stark difference in the analysis of changes in law in *Porter* and *Hitchcock* and their relationship to *Witt* factors, the lower court properly determined that the alleged change in law from *Porter* would not be retroactive under *Witt* even if it had occurred. In fact, the more apt analogy regarding a change in law would be the change in law that this Court recognized in *Stephens* itself, as both changes in law concerned the same legal issue. However, making that analogy merely shows that the lower court was correct to deny this motion.

In *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001), this Court held the change in law in *Stephens* was not retroactive under *Witt*. Given the fact that *Porter* would fail the *Witt* test if it had changed the law and this Court has already determined that changing the law regarding the standard of review for ineffective assistance of counsel claims does not meet *Witt*, the lower court properly determined that any change in law that *Porter* might have made would not be retroactive. Thus, it properly found that this motion was time barred and should be affirmed.

Moreover, it should be remembered that this claim is procedurally barred. Appellant is seeking nothing more than to relitigate the claim of ineffective assistance of counsel for failing to investigate and present mitigation that he raised in his first and second motions for post conviction relief and lost. As this Court has held, such attempts to relitigate claims that have previously been raised and rejected are procedurally barred. See, *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Appellant cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Appellant is attempting

to do here, his claim is barred and was correctly denied. See, *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of res judicata to claims previously litigated on the merits).

In fact, this Court has rejected attempts to relitigate ineffective assistance claims simply because the United States Supreme Court issued opinions indicating that state courts have erred in rejecting claims of ineffective assistance of counsel. *Marek v. State*, 8 So. 3d 1123 (Fla. 2009). There, the defendant argued that his previously rejected claim of ineffective assistance of counsel at the penalty phase had to be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), because they had changed the standard of review for claims of ineffective assistance of counsel under *Strickland*. This Court decisively rejected the claim, stating "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*." *Marek*, 8 So. 3d at 1128. This Court did so even though the United States Supreme Court had found the AEDPA standard of review that state courts had improperly rejected these claims. Given these circumstance, the claim was barred and was properly denied. The lower court should be affirmed.

<u>No reason to address the prejudice prong where counsel was not deficient</u>.

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

Here, the claim of ineffective assistance of counsel for failing to investigate and present mitigation and the unpreserved claim of guilt phase ineffectiveness were both denied after extensive review by this Court, not only on a finding that Appellant did not prove prejudice but also on a finding that Appellant did not prove deficiency. See, *Davis v. State*, 928 So. 2d 1089, 1109-13, 1121 (Fla. 2005) (denying both prongs as to both claims) and *Davis v. State*, 26 So. 3d 519, 533 (Fla. 2009) (Davis failed to allege specific facts to establish either deficient performance or prejudice, which are necessary to demonstrate entitlement to an evidentiary hearing.) Appellant does not even suggest how *Porter* would have affected this determination but,

rather, attempts to just reargue the same evidence that this court has twice considered and rejected.

Moreover, finding no deficiency in such a situation is in accordance with United States Supreme Court precedent. *Bobby v. Van Hook*, 130 S. Ct. 13 (2009). As such, Appellant’s claim that he was prejudiced by counsel’s deficiency — a deficiency that has never been found by this court - would be meritless even if *Porter* had changed the law and applied retroactively. The lower court properly denied this motion and should be affirmed.

Porter does not compel a different result. In *Porter* the issue was whether Porter was prejudiced when penalty phase counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records about the defendant and never requested mental health evaluation for mitigation at all. *Porter*, 130 S. Ct. at 453. In contrast here, this Court found:

> Davis’s trial counsel testified at the evidentiary hearing that he was aware of Davis’s difficult upbringing and the circumstances surrounding his family life and that it was his strategy at the penalty phase to call Davis’s mother to testify regarding those facts. We find it significant that Davis’s trial counsel had the full benefit of information obtained by the public defender’s office, which included matters pertaining to Davis’s background and upbringing. Specifically, trial counsel testified at the evidentiary hearing that the file he received from the public defender’s office in Davis’s case already contained records regarding his medical history, educational background, and other general background information surrounding his life. Moreover, trial counsel testified that he interviewed Davis and Davis’s mother to gain an understanding of his life. Based on the information in the public defender’s file that was reviewed and considered by trial counsel coupled

> with the additional information garnered by trial counsel through interviews of Davis's mother and Davis, we conclude that the investigation into Davis's background for mitigating evidence that was conducted here was neither inadequate nor unreasonable.
>
> *Davis*, 928 So. 2d at 1107.

and

> When trial counsel was asked at the evidentiary hearing why a more complete history had not been elicited from Davis during his testimony he responded that Davis told him he "did not want mitigating evidence presented" and said, "I want the electric chair. I want to stay alive ten or eleven years on death row. That's good enough for me." Faced with these statements from Davis and Davis's decision not to have his mother testify at the penalty phase, trial counsel reasonably determined that his best alternative was to have Davis testify in an effort to place before the jury Davis's decision to spare his mother the trauma of being forced to testify. Given the last-minute circumstances and the predicament that trial counsel faced as a result of Davis's decision and instruction that his mother not testify, we conclude that trial counsel's actions were not unreasonable, and that counsel was not deficient for selecting an alternative and making the best strategic decision available under a most difficult situation that had been created by Davis himself.
>
> *Id.* at 1106.

Given these circumstances, the lower court properly determined the claim was barred. It should be affirmed.[4]

[4] As previously noted Davis is also attempting to argue for the first time that "*Porter* error" also occurred with regard to the denial of his guilt phase IAC claim. This claim is not properly before this Court as he did not present it to the trial court. Further, as this Court also found no deficient performance with regard to those claims, Davis' claim would fail even if he could get past the procedural hurdle and even if he could establish that *Porter* required an analysis that was not done in the denial of his two post conviction motions raising IAC claims. Relief should be denied.

<u>Collateral Counsel is not authorized to file this motion</u>.

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

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

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

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

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State respectfully requests that this Court AFFIRM the denial of Davis' second successive motion for post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. mail to Linda McDermott, Esq., McClain & McDermott, P.A., 20301 Grande Oak Blvd., Suite 118 - 61, Estero, Florida 33928 and to Douglas E. Crow, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 30th day of June, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE