IN THE SUPREME COURT OF FLORIDA

GEORGE M. HODGES,

Appellant,

v. **Case No. SC11-762**
L.T. No. 82-2165-CF

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM DENIAL OF SECOND SUCCESSIVE RULE 3.851 MOTION
THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

_____

ANSWER BRIEF OF THE APPELLEE

_____

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PRELIMINARY STATEMENT ON DESIGNATIONS TO THE RECORD

This is an appeal from the trial court's summary denial of Hodges' *second successive* motion to vacate.

The instant record on appeal, from the denial of Hodges' second successive post-conviction motion based on *Porter v. McCollum,* will be cited as "PC-R3" with volume and page numbers.

NOTICE OF SIMILAR CASES

The appellant's claim of an alleged "change" in law, based on *Porter v. McCollum*, 130 S. Ct. 447 (2009), has been asserted in 41 capital post-conviction cases in Florida:

Cases pending in the Florida Supreme Court

Arbelaez v. State, Case No. SC11-1207
Bell v. State, Case No. SC11-694
Coleman v. State, Case No. SC04-1520
Davis v. State, Case No. SC11-359
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Hodges v. State, Case No. SC11-762
Jennings v. State, Case No. SC11-817
Jones (Clarence) v. State, Case No. SC11-1263
Jones (Harry) v. State, Case No. SC11-363
Jones (Victor) v. State, Case No. SC11-474
Kokal v. State, Case No. SC10-2514
Lightbourne v. State, Case No. SC11-878
Marshall v. State, Case No. SC11-616
Melton v. State, Case No. SC11-973
Pace v. State, Case No. SC11-1290
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Peterka v. State, Case No. SC11-1660
Phillips v. State, Case No. SC11-472
Pietri v. State, Case No. SC11-947

Ponticelli v. State, Case No. SC11-877
Raleigh v. State, Case No. SC11-1272
Randolph v. State, Case No. SC11-725
Reaves v. State, Case No. SC11-512
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Cases pending in Circuit Courts

Archer, Robin (1st Circuit); *Byrd, Milford* (13th Circuit); *Duckett, James* (5th Circuit); *Groover, Tommy* (4th Circuit); *Hartley, Kenneth* (4th Circuit); *Jimenez, Jose* (11th Circuit); *Reed, Grover* (4th Circuit); *Zakrzewski, Edward* (1st Circuit).

CITATIONS TO HODGES' PRIOR STATE COURT APPEALS

The citations to this Court's prior opinions on Hodges' direct appeal and post-conviction appeals are:

Hodges v. State, 595 So. 2d 929 (Fla. 1992) (direct appeal affirming Hodges' Hillsborough County conviction of first-degree murder and death sentence).

Hodges v. State, 619 So. 2d 272 (Fla. 1993) (direct appeal following remand by U.S. Supreme Court, affirming conviction and sentence).

Hodges v. State, 885 So. 2d 338 (Fla. 2004) (affirming denial of amended rule 3.850 motion and petition for writ of habeas corpus).

Hodges v. Crosby, 907 So. 2d 1170 (Fla. 2005) (order denying successive habeas petition [*Crawford* claim]) [Table].

Hodges v. State, 26 So. 3d 1290 (Fla. 2010) (affirming denial of successive rule 3.851 motion to vacate [lethal injection claim]) [Table].

STATEMENT OF THE CASE AND FACTS

Procedural History

In this appeal, the trial court denied Hodges' second successive motion to vacate as untimely, successive, and procedurally barred. The trial court summarized the procedural background of this case as follows:

> On July 13, 1989, a jury found Defendant guilty of first degree murder. The jury recommended a death sentence and, on August 10, 1989, the trial court sentenced Defendant to death. On direct appeal, the Florida Supreme Court affirmed Defendant's conviction and death sentence. *See State v. Hodges*, 595 So.2d 929 (Fla. 1992). Thereafter, the United States Supreme Court granted certiorari, vacated *Hodges*, and remanded for further consideration in light of the Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). *See Hodges v. Florida*, 506 U.S. 803 (1992). On remand from the United States Supreme Court, the Florida Supreme Court again affirmed the death sentence in *Hodges v. State*, 619 So.2d 272 (Fla. 1993), and the United State Supreme Court denied certiorari in *Hodges v. Florida*, 510 U.S. 996 (1993).
>
> On June 20, 1995, Defendant filed a 3.850 motion for post conviction relief and, on June 6, 2001, the postconviction court denied Defendant's motion. The Florida Supreme Court affirmed the denial of Defendant's 3.850 motion in *Hodges v. State*, 885 So.2d 338 (Fla. 2003).
>
> On April 22, 2002 and March 4, 2005, Defendant filed habeas corpus petitions in the Florida Supreme Court. Those petitions were denied on June 19, 2003 and June 23, 2005, respectively. *See Hodges v. State*, 885 So.2d 338 (Fla. (2003); *Hodges v. Crosby*, 907 So.2d 1170 (Fla. 2005). Defendant also filed a federal petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, and that petition was denied. *See Hodges v. Sec'y, Dep't of Corrections*, 2007 WL 604982 (M.D. Fla.

February 22, 2007). The Eleventh Circuit Court of Appeal affirmed. *Hodges v. Attorney Gen., State of Florida*, 506 F.3d 1337 (11th Cir. 2007). Defendant then filed a petition for writ of certiorari, which the United States Supreme Court denied on October 6, 2008. *See Hodges v. McNeil*, 129 S.Ct. 122 (2008).

On July 28, 2008, Defendant raised a lethal injection issue in a successive 3.851 motion and that motion was summarily denied. The Florida Supreme Court affirmed the denial of his successive motion in *Hodges v. State*, No. SC09-575, 2010 WL 93468, at *1 (Fla. January 11, 2010).

(PCR-3, 2/232-233)

Trial and Direct Appeal Proceedings

In *Hodges v. State*, 595 So. 2d 929 (Fla. 1992), this Court summarized the following facts adduced at trial:

In November 1986 Plant City police arrested Hodges for indecent exposure based on the complaint of a twenty-year-old convenience store clerk. Around 6:00 a.m. on January 8, 1987, the day Hodges' indecent exposure charge was scheduled for a criminal diversion program arbitration hearing, the clerk was found lying next to her car in the store's parking lot. She had been shot twice with a rifle and died the following day without regaining consciousness.

Hodges worked on the maintenance crew of a department store located across the road from the convenience store. A co-worker told police that she saw Hodges' truck at the convenience store around 5:40 a.m. on January 8. Hodges, however, claimed to have been home asleep at the time of the murder because he did not have to work that day. His stepson, Jesse Watson, and his wife, Jesse's mother, supported his story. The police took a rifle from the Hodges' residence that turned out not to be the murder weapon. The investigation kept coming back to Hodges, however, and the police arrested him for this murder in February 1989.

At trial Watson's girlfriend testified that, during the summer of 1988, she asked Hodges if he had ever shot anyone. She said he responded that he had shot a girl and had given Watson's rifle to the police and had disposed of his. Hodges' wife, contrary to her original statement to the police, testified that she did not know if Hodges had been in bed all night or when he had gotten up, that her son and husband had identical rifles, and that she did not know that Hodges had been arrested for indecent exposure.

As did his mother's, Watson's trial testimony differed from his original statement. He testified that he and Hodges had identical rifles and that his, not Hodges', had been given to the police. He said that he awakened before 6:00 a.m. the morning of the murder and heard Hodges drive up in his truck. Hodges then came into the kitchen carrying his rifle. When asked why he did not originally tell the police about this, he responded that he had wanted to protect Hodges. Watson also said that, two months after the murder, he saw the rifle in the back of Hodges' truck, wrapped in dirty plastic, and that there was a hole in the ground near the tool shed. He also testified that, several months later, Hodges told him that he had shot the girl at the convenience store.

The jury convicted Hodges as charged, and the penalty proceeding began the following day. At the end of the defense presentation counsel told the court that Hodges had become uncooperative, and Hodges stated on the record that he did not want to testify in his own behalf. After the jury retired to decide its recommendation, it sent a question to the court regarding the instructions. The court had the parties return to discuss the jury's request, but, shortly before that, Hodges had attempted to commit suicide in his holding cell. Defense counsel moved for a continuance and said that he could not waive Hodges' presence. The court, however, held that Hodges had voluntarily absented himself, told the jury that Hodges was absent because of a medical emergency, and reread the instructions on aggravating and mitigating circumstances. When the jury returned with its recommendation of death, Hodges was still absent.

> After accepting the jury's recommendation, the court appointed two mental health experts to determine Hodges' competency to be sentenced. These experts' reports cautioned that Hodges might attempt to commit suicide again because of his anger and frustration, but concluded that he was competent to be sentenced. After considering these reports and hearing argument on the appropriate sentence, the court sentenced Hodges to death.

Hodges, 595 So. 2d at 930-31 [*Hodges* I]

This Court affirmed Hodges' conviction and death sentence in *Hodges v. State*, 595 So. 2d 929, 935 (Fla. 1992). [*Hodges* I] On July 16, 1992, Hodges filed a Petition for Writ of Certiorari to the United States Supreme Court challenging the CCP jury instruction. On October 5, 1992, the United States Supreme Court granted the Petition and remanded the case to this Court "for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992)." *Hodges v. Florida*, 506 U.S. 803, 113 S. Ct. 33 (1992). On remand, this Court reaffirmed the earlier decision, finding the sufficiency of the CCP instruction was not preserved for review and error in the instruction, if any, was harmless and would not have affected the jury's recommendation or the judge's sentence. *Hodges v. State*, 619 So. 2d 272, 273 (Fla. 1993) [*Hodges* II]. The United States Supreme Court denied certiorari in *Hodges v. Florida*, 510 U.S. 996, 114 S. Ct. 560 (1993).

Prior Post-Conviction Proceedings in State and Federal Court

Hodges' previous motion to vacate alleged claims of ineffective assistance of counsel at the guilt and penalty phase. A multi-day evidentiary hearing was conducted on Hodges' IAC claims and post-conviction relief was denied on June 1, 2001. In affirming the denial of Hodges' IAC/penalty phase counsel claims, this Court determined that Hodges had not established either deficient performance or resulting prejudice. See, *Hodges v. State*, 885 So. 2d 338 (Fla. 2004), rehearing denied, December 22, 2004. [*Hodges* III]. This Court concluded, among other things, that Hodges' penalty phase counsel conducted a reasonable background investigation, engaged an investigator who made inquiries of more than one dozen potential witnesses, including both of Hodges' sisters, his parents, Hodges' best friend, and former employers; and, "[i]n 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." *Hodges* III, 885 So. 2d at 346-348. In denying Hodges' IAC/penalty phase claim, this Court painstakingly explained:

Ineffective Assistance of Counsel—Background Investigation

Hodges argues that his penalty phase counsel was

ineffective in failing to conduct a reasonable background investigation that, but for counsel's ineffectiveness, would have unearthed substantial mitigating evidence. Hodges contends that the insufficient background investigation also resulted in inadequate mental health evaluations at trial, thereby depriving him of the benefit of substantial mental mitigating evidence. In advancing this argument, Hodges relies heavily on the fact that one of the experts who evaluated Hodges prior to trial amended his evaluation for the postconviction proceeding, finding substantial mental mitigation.

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla.1986). The first inquiry requires the demonstration of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. The second prong requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. The U. S. Supreme Court has determined that a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* To fairly assess counsel's performance, the reviewing court must make every effort to eliminate the "distorting effects of hindsight" and to evaluate the conduct from counsel's perspective at the time. *Id*. at 689, 104 S.Ct. 2052. The Supreme Court recently reiterated and applied these standards in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The trial court here determined that penalty phase counsel conducted a reasonable background investigation, and that the deficient results of that investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses. [FN2] **Ineffective assistance of counsel**

claims are mixed questions of law and fact, and are thus subject to plenary review based on the *Strickland* test. See *Gaskin v. State*, 822 So.2d 1243, 1246–47 (Fla.2002). Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. See *id*.; see also *Ragsdale v. State*, 798 So.2d 713, 715 (Fla. 2001). Employing that standard, we affirm the trial court's determination that Hodges' penalty phase counsel conducted a reasonable background investigation, and confirm that Hodges indeed had the benefit of counsel as constitutionally guaranteed. Moreover, even if we assume that counsel performed deficiently, we cannot agree that there is a reasonable probability that, but for such deficiency, Hodges would have received a life sentence.

> [FN2] The trial court acknowledged that analysis of the case was hampered by penalty phase counsel's limited personal recollection of the case and the loss of the public defender's case file.

The mitigating evidence presented during the postconviction proceeding did exceed the quality and quantity of that presented at trial. Trial counsel presented two witnesses in mitigation, Hodges' mother and brother-in-law, who provided testimony regarding Hodges' character and dedication to his family. Postconviction counsel obtained and presented both lay and expert witnesses. During the postconviction proceeding, two of Hodges' siblings and one neighbor provided testimony regarding his impoverished and abusive upbringing. A toxicologist testified that the general area in which Hodges grew up was polluted, and that a river from which Hodges' family reported that Hodges caught and consumed fish contained lead. A sociologist testified that Hodges' hometown constituted a classic example of social disorganization characterized, in part, by a distrust of outsiders.

The opinion testimony of Dr. Michael Scott Maher, a psychiatrist, changed sharply between the time of trial and the postconviction proceeding. Prior to

trial, Dr. Maher evaluated Hodges and found that he suffered from depression related to his then-current circumstances, but found no evidence in mitigation. Dr. Maher later changed his testimony to suggest that Hodges suffers from a chronic depressive disorder, and now believes he was likely under the influence of an extreme emotional disturbance at the time of the crime. Dr. Maher now also believes that Hodges has brain damage in the form of frontal lobe impairment, which, combined with his depression, would have prevented him from exhibiting the detached, logical decisionmaking process that characterizes the cold, calculated, and premeditated aggravator. [FN3] Dr. Maher attributed his change in opinion to the ability to review additional background materials provided by postconviction counsel. Despite this contention, Dr. Maher testified that he rendered an opinion at the time of trial, and did not in any way indicate that he needed or required additional information to reach his conclusions at that time. [FN4]

> [FN3] These conclusions now mirror those of a forensic psychologist, Dr. Craig Beaver, also presented by Hodges during the postconviction proceeding.
>
> [FN4] Dr. Maher conceded that Hodges exhibited an emotional flatness during the initial evaluation prior to trial and that he must have simply missed the diagnosis at that time.

The presentation of changed opinions and additional mitigating evidence in the postconviction proceeding does not, however, establish ineffective assistance of counsel. See *Asay v. State,* 769 So.2d 974, 987 (Fla. 2000); *Rutherford v. State*, 727 So.2d 216, 224 (Fla. 1998). The pertinent inquiry remains whether counsel's efforts fell outside the "broad range of reasonably competent performance under prevailing professional standards." See *Maxwell*, 490 So.2d at 932. **Upon review of the trial court's order and record, we conclude that Hodges' penalty phase counsel performed in accordance with such standards. Our analysis of this case turns on the distinction between the after-the-fact analysis of the results of a reasonable investigation, and an investigation that**

is itself deficient. Only the latter gives rise to a claim of ineffective assistance of counsel.

As stated by the trial court, Hodges' penalty phase counsel was experienced with capital cases, and keenly aware of his responsibility to find and introduce mitigating evidence. During the postconviction proceeding, counsel testified that he would have introduced any available evidence that would have illuminated mitigating factors from Hodges' background or possible mental health issues. While not conclusive, counsel's experience in trying capital cases and appreciation of the necessity to enter mitigating evidence into the record distinguishes this case from others in which counsel rendered constitutionally ineffective assistance. See *Ragsdale*, 798 So.2d at 718; *Rose v. State*, 675 So.2d 567, 572 (Fla. 1996).

More importantly, the record in the instant case shows that penalty phase counsel conducted a comprehensive investigation in an attempt to uncover mitigating evidence. The record in this case directly contravenes the assertion propounded in the dissenting opinion that Hodges' trial counsel flatly "failed to investigate Hodges' medical or psychological history, failed to investigate Hodges' educational history, and failed to investigate Hodges' military history." Dissenting op. at 362. **Counsel engaged an investigator who made inquiries of more than one dozen potential witnesses, including both of Hodges' sisters, his parents, Hodges' best friend, and former employers. While counsel did not contact Hodges' brother, who would have been less than a good witness having been released from prison just shortly before Hodges' trial, record evidence shows that Hodges' sister, Karen Sue Tucker, was indeed contacted. Penalty phase counsel testified that Hodges' family members were not at all cooperative with the defense, that his best friend refused to become involved in the matter or to provide any information, and that his former employers could not even remember him.**

The sufficiency of the investigational activity is validated by evidence demonstrating that Hodges' sister, Karen Sue Tucker, was contacted and imposed

impossible parameters of availability that effectively removed her from the list of witnesses available to testify, and that Hodges' other sister simply failed to appear at trial despite assurances that she would attend. Hodges' mother did indeed testify during the penalty phase, but did not come forward at that time with any information concerning his upbringing that provided substantial mitigation. The record also shows, as highlighted by the trial court, that Hodges himself became uncooperative with counsel during the penalty phase, refusing to testify on his own behalf. **[**FN5] The scope and nature of counsel's investigative effort and family contact distinguish this case from those in which this Court has made a determination of ineffective assistance of counsel. See, e.g., *Ventura v. State*, 794 So.2d 553, 570 (Fla. 2001) (deeming background investigation deficient where defendant served as counsel's sole source for mitigating evidence); *Stevens v. State*, 552 So.2d 1082, 1086 n. 7 (Fla. 1989) (deeming assistance ineffective where counsel, among other failures, made no attempt to contact potential witnesses to obtain mitigating evidence).

> [FN5] Contrary to the view expressed in the dissenting opinion, there is ample record evidence in support of the conclusion that Hodges became uncooperative with counsel during the penalty phase. See dissenting op. at 364–65. **In our initial decision affirming Hodges' conviction and sentence, this Court noted in the recitation of the pertinent facts that "[a]t the end of the defense presentation counsel told the court that Hodges had become uncooperative, and Hodges stated on the record that he did not want to testify in his own behalf."** Hodges I, 595 So.2d at 931 (emphasis supplied). Indeed, the record shows that after the jury retired to commence sentencing deliberations, Hodges attempted to commit suicide. **In the text of the suicide note he left, Hodges essentially admitted that he had failed to cooperate with counsel during the penalty phase.** While Hodges' trial counsel testified during the postconviction hearing that Hodges was cooperative and unassuming, such testimony does not erase trial counsel's previous

assessment of his client's behavior as uncooperative, and does not negate the other record evidence supporting this Court's determination that Hodges became uncooperative during the penalty phase, refusing to testify on his own behalf.

In addition to contacting numerous lay witnesses, penalty phase counsel engaged the assistance of two mental health professionals. Dr. Maher testified that at the time of trial, counsel asked him to evaluate Hodges' competency to proceed, and his state of mind at the time of the offense, and to provide any and all other information that might be relevant to his medical or psychiatric condition and mitigation issues. Given that mandate, Dr. Maher, who testified that he is familiar with what constitutes mitigating evidence under Florida law, found absolutely none to present at that time. A second mental health professional also failed to find any helpful mitigating evidence and, in fact, recommended that his name not even appear on the witness list because his findings may have been more useful to the State than the defense. Trial counsel testified that he made a strategic decision not to present the experts' findings to the jury. 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. See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000); see also *Asay*, 769 So.2d at 986 (no ineffective assistance of counsel in deciding against pursuing additional mental health mitigation after receiving an unfavorable diagnosis); *State v. Sireci*, 502 So.2d 1221, 1223 (Fla. 1987) (not ineffective assistance of counsel to rely on psychiatric evaluations that may have been less than complete).

While the record does show that counsel did not obtain all of Hodges' background materials until after the mental health experts had made their reports, there is absolutely no indication in any of the school, military, or medical records referenced by postconviction counsel that Hodges had been diagnosed with, or even suspected of suffering from, the

existence of brain damage or mental health problems. [FN6] Contrary to postconviction arguments, Hodges' military records show that he was discharged due to a "defective attitude," his inability to adjust to a disciplined environment, and repeated training infractions. Additionally, with regard to the abstract environmental and sociological reports and testimony offered during postconviction, there is no nexus between the testimony regarding the general social dysfunction of Hodges' hometown area, or the alleged general area environmental pollution, and a connection with Hodges. The environmental and sociological status of St. Albans, West Virginia in the abstract has never been connected to anything related to Hodges, other than that he lived in the area at one time.

> [FN6] We note that the records even contain a mixture of those related to Hodges and other members of his family. Conditions that may or may not relate to other family members cannot be attributed to Hodges by simply co-mingling records.

Based on the record in this case, and despite the assertion of new additional postconviction arguments, we conclude that penalty phase counsel conducted a reasonable background investigation. This case is analogous to *Asay v. State*, in which this Court rejected an ineffective assistance of counsel claim where defense counsel presented mitigating evidence bearing on the defendant's character, but did not discover evidence regarding the defendant's poverty-stricken and abusive childhood. See *Asay*, 769 So.2d at 987–88. In determining that trial counsel did not provide unconstitutionally ineffective assistance of counsel, this Court highlighted the reasonableness of counsel's efforts coupled with the difficulty counsel encountered in obtaining information from the defendant's mother. See *id*. at 988. **Likewise, counsel's reasonable efforts to conduct a background investigation in the instant case were significantly hampered by the failure of the defendant, his relatives, and his friends to either participate in the process or provide useful information.** See *Rutherford*, 727 So.2d at 222.

Contrary to the conclusion reached in the dissenting opinion, defense counsel's performance in the instant matter is entirely distinguishable from that deemed constitutionally deficient in *Wiggins*. Based on the facts presented in Wiggins, the High Court determined that trial counsel's decision to end the background investigation after review of the presentence investigation report and records kept by the Baltimore City Department of Social Services (DSS) did not reflect "reasonable professional judgment," and did not comport with the professional standards that prevailed in Maryland in 1989, which called for the preparation of a social history report. See *Wiggins*, 539 U.S. at 522–23, 533–34, 123 S.Ct. 2527. [FN7] The *Wiggins* Court noted that the DSS records revealed that Wiggins' mother was an alcoholic, that he resided in numerous foster homes, had emotional difficulties, was frequently absent from school for long periods, and was left alone with his siblings without food. The Supreme Court concluded that such information should have reasonably led to further investigation. See *id*. at 534, 123 S.Ct. 2527.

> [FN7] The Court specifically noted that funds had been made available for Wiggins' trial counsel to retain a forensic social worker, but that counsel had chosen not to commission such a report. See *id.* at 524, 123 S.Ct. 2527.

In the same vein, Hodges contends that further research into the St. Albans area of West Virginia would have led trial counsel to discover a wealth of mitigating information, from extreme privation and physical, emotional, and sexual abuse suffered by Hodges, to the effects of pollution and social disorganization of his community. The dissenting opinion wholeheartedly endorses that argument, stating that "despite the fact that trial counsel knew Hodges grew up in one of the poorest and most polluted communities in the nation, counsel failed to visit the area in order to develop a meaningful understanding of Hodges' cultural and environmental influences." Dissenting op. at 361.

While it may be true that counsel did not travel to St. Albans, West Virginia to assess the community

conditions, such a decision can hardly be deemed deficient when counsel consulted numerous—and arguably better—resources in an attempt to obtain background information. Counsel made inquiries of more than a dozen potential mitigation witnesses, including Hodges' parents, two sisters, and his best friend—all of whom were intimately familiar with Hodges' family life, childhood experiences, and the conditions in St. Albans. If related in any way to Hodges, each of these persons had the opportunity to know and alert trial counsel to any problems in Hodges' background, but none came forward with helpful information during the investigation and conversations. It was simply not unreasonable for counsel to expect the people who surrounded Hodges throughout his formative years, and who had first-hand knowledge of the family and community in which he had lived, to bring out during interviews whatever mitigating evidence was available. Indeed, without assistance from these valuable resources in supplying the context for Hodges' background, it is unclear what value would have redounded from merely a visit to St. Albans or environmental and social conditions in the abstract. **Trial counsel also elicited the help of two mental health experts whose direct interviews with Hodges failed to yield mitigating evidence.** This is simply not a case, like *Wiggins*, in which trial counsel unreasonably narrowed the scope of the background investigation to records and reports which facially indicated the need for further investigation.

Even if we could conclude that penalty phase counsel conducted a deficient background investigation, Hodges' ineffective assistance of counsel claim would still fail because he cannot establish that he was prejudiced by such deficiency. See *Maxwell*, 490 So.2d at 932. **As a threshold matter, Hodges' position overstates the mitigative value of the postconviction testimony regarding the social dysfunction of his community and the environmental toxins in the area where he previously lived.** The environmental expert who testified during the postconviction proceeding admitted that she did not even know whether Hodges was actually exposed to the toxins present in the area in which he previously lived, and never even examined him for signs of lead

exposure, the alleged river toxin. The sociologist who testified as to the dysfunctional nature of St. Albans could never connect the social commentary to Hodges because he admitted that he had never spoken with Hodges, and conceded that Hodges successfully extricated himself from whatever conditions existed in the town when he moved to Florida, and apparently into functioning normally in a normal Florida environment.

In assessing the prejudice prong of the Strickland standard, the *Wiggins* Court reweighed the evidence in aggravation against the totality of the mitigating evidence, and determined the evidence of severe privation, physical and sexual abuse and rape, periods of homelessness and diminished mental capacities, comprised the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535, 123 S.Ct. 2527. Noting that in Maryland, the death recommendation must be unanimous, the High Court determined, "Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that one juror would have struck a different balance." *Id*. at 537, 123 S.Ct. 2527.

A similar analysis in the instant matter fails to yield a similar result. Certainly, the absence of generalized evidence pertaining to the asserted social dysfunction of Hodges' entire hometown, and his exposure to environmental toxins in the general area, even when coupled with more specific evidence regarding his abusive and impoverished upbringing, would not have rendered the sentencing proceeding unreliable. The jury recommended a death sentence by a ten-to-two majority, and the trial court found that the State had established two serious aggravators: commission of murder to disrupt or hinder law enforcement and that the act was committed in a cold, calculated, and premeditated manner. See *Hodges* I, 595 So.2d at 934. Even with the postconviction allegations regarding Hodges' upbringing, it is highly unlikely that the admission of that evidence would have led four additional jurors to cast a vote recommending life in prison. See *Asay*, 769 So.2d at 988 (determining 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 had established three aggravating factors, including CCP); see also *Breedlove v. State*, 692 So.2d 874, 878 (Fla.1997).

Furthermore, we determine that Hodges was not prejudiced by penalty phase counsel's failure to present mitigating evidence pertaining to Hodges' mental health. The strongest mitigating factor presented during postconviction was that Hodges was likely under the influence of an extreme emotional disturbance at the time of the crime. However, on cross-examination both mental health experts retreated from and softened their conclusions in this regard. In fact, Dr. Maher could not opine with any specificity that Hodges was under the influence of an extreme emotional disturbance at the time of the crime, but came to a "general conclusion" that at that time in his life, Hodges' mental state more likely than not would have satisfied the statutory requirement for mitigation. Additional cross-examination revealed that the test used by Dr. Beaver to evaluate Hodges' symptoms of depression in April of 2000 may not serve as a reliable indicator of Hodges' mental state at the time of the crime. Moreover, their conclusions regarding Hodges' mental state were totally rebutted by the State's expert, who characterized Hodges as suffering from a dysthymic disorder, a form of long-term depression marked by symptoms less profound than major depression. Based on the marginal nature of the evidence, we do not agree with the dissent that, but for trial counsel's failure to present such mental mitigation, there is a reasonable probability, which has been defined as a probability sufficient to undermine our confidence in the outcome, that Hodges would have received a life sentence. See *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

In addition, neither defense expert could conclude with any precision that Hodges' depression and purported brain dysfunction would preclude him from engaging in a cold, calculated, and premeditated act. As found by the trial court, the fact that Hodges had been convicted of a premeditated murder involving the act of lying in wait for the victim and the

concocting of an intricate cover-up would contravene any such conclusion. [FN8] According to the State's rebuttal expert, other indicators of Hodges' ability to perform a cold, calculated, and premeditated act included his attempt to talk the victim out of prosecuting the indecent exposure charge prior to the murder, the advanced planning required to commit suicide while in jail, and his success in extricating himself from the impoverished area where he grew up. **The fact that these mental health professionals provided such tepid and inconclusive diagnoses after reviewing the background materials provided by postconviction counsel undermines the contention that trial counsel's failure to provide like information resulted in deficient mental evaluations at trial. Indeed, as previously discussed, the content of Hodges' school, medical, and military records, as judged by the postconviction conclusions drawn from them, simply does not support the assertion that trial counsel's failure to provide such information to Hodges' evaluators constituted deficiency resulting in prejudice.**

> [FN8] On a related topic, we decline to address Hodges' contention that guilt and penalty phase counsel were ineffective for failing to present evidence showing that Hodges' mental capacity prevented him from acting in a manner that is cold, calculated, and premeditated. This Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent. See, e.g., *Spencer v. State*, 842 So.2d 52, 63 (Fla. 2003) (holding that evidence of defendant's disassociative state would not have been admissible during the guilt phase); *Bunney v. State*, 603 So.2d 1270, 1273 (Fla. 1992) (reiterating that commission of a crime during an epileptic seizure constitutes an exception to the broad prohibition against diminished capacity defenses); *Chestnut v. State*, 538 So.2d 820, 821 (Fla.1989) (rejecting the argument that the defendant did not have the requisite mental state for premeditated murder as a result of extremely low intelligence, a seizure disorder, diminished cognitive skills, and a passive and dependent

personality).

> This case is distinguishable from *Phillips v. State*, 608 So.2d 778 (Fla. 1992), in which we determined that the defendant was prejudiced by counsel's failure to present "strong mental mitigation" at trial. *Id*. at 783. In that case, two experts opined in the postconviction proceeding that the defendant was suffering from an extreme emotional disturbance at the time of the crime, was unable to conform his conduct to the requirements of law, and could not form the requisite intent to fall under the aggravating factors of CCP or heinous, atrocious, or cruel. See *id*. Also important to our analysis of that case was the fact that the mental mitigation was essentially unrebutted and that the jury had recommended the death sentence by the slim majority of seven to five. See *id*. Based on those factors, we concluded that there was a reasonable probability that "but for counsel's deficient performance . . . the vote of one juror would have been different, . . . resulting in a recommendation of life." *Id*. **The comparatively weak mental mitigation offered in Hodges' postconviction proceeding coupled with the State's rebuttal of that evidence and the wide margin by which the jury recommended the death penalty distinguish this case from *Phillips*, and undermine any reasonable probability that presentation of the evidence would have resulted in a life recommendation.**

Hodges III, 885 So. 2d at 345-352 (e.s.)

The Mandate issued on Hodges' post-conviction appeal on January 7, 2005,. On March 4, 2005, Hodges filed an untimely, successive petition for writ of habeas corpus in this Court alleging confrontation clause error under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) at his 1989 jury

trial.[1] On June 23, 2005, this Court denied the petition. *Hodges v. Crosby*, 907 So. 2d 1170 (Fla. 2005) [Table].

On January 1, 2006, Hodges filed a federal habeas corpus petition in the United States District Court, Middle District of Florida. The federal district court rejected all of Hodges' claims for relief and denied his § 2254 petition with prejudice. *Hodges v. Sec'y, Fla. Dept. of Corrections,* 2007 WL 604982, at *40 (M.D. Fla. 2007) (*Hodges IV*); *Hodges v. Sec'y, Fla. Dept of Corrections*, 2007 WL 949421, at *4 (M.D. Fla. 2007) (*Hodges V*). After addressing Hodges' IAC/penalty phase claims in fact-specific detail, the District Court concluded:

> **Hodges' claim of ineffective assistance of counsel is refuted by the postconviction record, and was properly denied by the state trial court.** The state trial court record reflects that trial counsel pursued reasonable avenues of investigation and presented evidence from family members. That evidence was weighed by the trial court in mitigation. The Florida Supreme Court found that the state trial court's conclusion that counsel conducted a reasonable background investigation was supported by the record. **Trial counsel explored Hodges' background to the extent that he was able to do so, often encountering resistance from Hodges' family and friends. Trial counsel also explored possible mental health mitigation with two experts, and the strategic decision against presenting expert mental health testimony was made after counsel investigated the mitigation available.**

[1]The *Crawford* decision does not apply retroactively to cases on collateral review. See, *Chandler v. Crosby*, 916 So. 2d 728, 731 (Fla. 2005), *cert. denied*, 127 S. Ct. 382 (2006); *Peede v. State*, 955 So. 2d 480, 502 (Fla. 2007); *Whorton v. Bockting*, 549 U.S. 406, 127 S. Ct. 1173 (2007).

Hodges v. Secretary, 2007 WL 604982 (e.s.)

The Eleventh Circuit affirmed the District Court's denial of habeas relief in *Hodges v. Attorney General*, 506 F.3d 1337 (11th Cir. 2007). [*Hodges* VI]. Hodges' Petition for Writ of Certiorari was denied by the United States Supreme Court on October 6, 2008. *Hodges v. McNeil*, 555 U.S. 855, 129 S. Ct. 122 (2008).

In 2008, Hodges also filed a successive Rule 3.851 motion to vacate challenging the constitutionality of Florida's lethal injection procedure. The circuit court summarily denied Hodges' successive Rule 3.851 motion on February 11, 2009. This Court affirmed this summary denial on January 11, 2010. *Hodges v. State*, 26 So. 3d 1290 (Fla. 2010) [Table].

On October 21, 2010, Hodges filed a second successive Rule 3.851 motion to vacate, based on *Porter v. McCollum*. On March 4, 2011, the trial court entered a detailed written order summarily denying Hodges' second successive motion to vacate. (PCR-3, 2/232-35). The specifics of the trial court's order will be addressed within the argument section of the instant brief. Hodges' notice of appeal was filed on April 6, 2011. (PCR-3, 2/236-37).

STANDARDS OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for post-conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009) citing *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); Fla. R. Crim. P. 3.851(f)(5)(B).

In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Here, as in *Rose v. State*, 985 So. 2d 500 (Fla. 2008), the trial court entered a detailed written order disclosing the basis for the summary denial of Hodges' second successive motion to vacate and providing for meaningful appellate review. *Id*., citing *Nixon*, 932 So. 2d at 1018.

SUMMARY OF THE ARGUMENT

The trial court correctly denied this successive, untimely, and procedurally barred motion to vacate. Hodges' 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 Hodges' second successive post-conviction motion was a procedurally barred attempt to relitigate a previously denied claim of ineffective assistance of counsel. Further, Hodges failed to prove deficiency and does not show that the lack of deficiency was affected by the *Porter* decision. Finally, Hodges' collateral counsel was not authorized to file this successive, untimely, frivolous and procedurally-barred motion.

ARGUMENT

THE TRIAL COURT CORRECTLY SUMMARILY DENIED HODGES' SECOND SUCCESSIVE RULE 3.851 MOTION TO VACATE BECAUSE THE MOTION, BASED ON *PORTER v. McCOLLUM*, WAS TIME-BARRED, UNAUTHORIZED, SUCCESSIVE, PROCEDURALLY BARRED AND WITHOUT MERIT -- *PORTER* DID NOT CONSTITUTE A NEW FUNDAMENTAL AND RETROACTIVE "CHANGE IN LAW".

This is a post-conviction appeal from the circuit court's summary denial of Hodges' second successive Rule 3.851 motion to vacate, based on *Porter v. McCollum*, 130 S. Ct. 447 (2009). Hodges seeks to relitigate his previously-denied claims of ineffective assistance of penalty phase counsel on the ground that *Porter* allegedly represents a "change in law" that should be retroactively applied. The only questions properly before this Court are: 1) Did *Porter* "change" the law on ineffective assistance of counsel and 2) if so, has the alleged "change in law" been held to apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980)? The answer to both questions is no. Therefore, the trial court properly denied Hodges' motion as untimely, successive and procedurally barred.

The Trial Court's Order

In denying Hodges' second successive motion to vacate, based on *Porter*, the trial court stated, in pertinent part:

> On July 13, 1989, a jury found Defendant guilty of first degree murder. The jury recommended a death sentence and, on August 10, 1989, the trial court

sentenced Defendant to death. On direct appeal, the Florida Supreme Court affirmed Defendant's conviction and death sentence. *See State v. Hodges*, 595 So.2d 929 (Fla. 1992). Thereafter, the United States Supreme Court granted certiorari, vacated *Hodges*, and remanded for further consideration in light of the Court's decision in *Espinosa v. Florida*, 505 U.S. 1079 (1992). *See Hodges v. Florida*, 506 U.S. 803 (1992). On remand from the United States Supreme Court, the Florida Supreme Court again affirmed the death sentence in *Hodges v. State*, 619 So.2d 272 (Fla. 1993), and the United State Supreme Court denied certiorari in *Hodges v. Florida*, 510 U.S. 996 (1993).

On June 20, 1995, Defendant filed a 3.850 motion for post conviction relief and, on June 6, 2001, the postconviction court denied Defendant's motion. The Florida Supreme Court affirmed the denial of Defendant's 3.850 motion in *Hodges v. State*, 885 So.2d 338 (Fla. 2003).

On April 22, 2002 and March 4, 2005, Defendant filed habeas corpus petitions in the Florida Supreme Court. Those petitions were denied on June 19, 2003 and June 23, 2005, respectively. *See Hodges v. State*, 885 So.2d 338 (Fla. (2003); *Hodges v. Crosby*, 907 So.2d 1170 (Fla. 2005). Defendant also filed a federal petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, and that petition was denied. *See Hodges v. Sec'y, Dep't of Corrections*, 2007 WL 604982 (M.D. Fla. February 22, 2007). The Eleventh Circuit Court of Appeal affirmed. *Hodges v. Attorney Gen., State of Florida*, 506 F.3d 1337 (11th Cir. 2007). Defendant then filed a petition for writ of certiorari, which the United States Supreme Court denied on October 6, 2008. *See Hodges v. McNeil*, 129 S.Ct. 122 (2008).

On July 28, 2008, Defendant raised a lethal injection issue in a successive 3.851 motion and that motion was summarily denied. The Florida Supreme Court affirmed the denial of his successive motion in *Hodges v. State*, No. SC09-575, 2010 WL 93468, at *1 (Fla. January 11, 2010).

In the instant motion, Defendant again alleges –

as he did in his original January 20, 1995 postconviction relief motion - that he received ineffective assistance of counsel during the penalty phase, and argues this issue should be re-evaluated in light of the United Supreme Court's decision in *Porter v. McCollum*, 130 S.Ct. 447 (2009). In *Porter*, the Court found the Florida Supreme Court misapplied the Strickland [fn1] analysis in Porter's case, and failed to "consider or unreasonably discounted the mitigation evidence" presented during his evidentiary hearing. *Porter*, 130 S.Ct. at 454-56. Defendant contends that Porter "represents a fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law . . . which renders [his] *Porter* claim cognizable in these postconviction proceedings." Although Defendant acknowledges that *Porter* did not create a new right for a capital defendant, he asserts that *Porter* constitutes "a development of fundamental significance" and, therefore, should be held to apply retroactively and applied in this case. [fn2] Defendant further requests that this Court hold a new evidentiary on his claim of ineffective assistance of penalty phase counsel, and conduct the probing fact-specific analysis required by *Porter.*

The State essentially argues that Defendant's motion is untimely, successive, procedurally barred and unauthorized. Specifically, the State argues that *Porter* did not create a fundamental change in constitutional law, but only applied the *Strickland* analysis to the facts of Porter's case. Therefore, the State asserts, Defendant's motion is successive, does not fall within any of the exceptions authorized in rule 3.851(d)(2), and should be summarily denied.

The Court first notes rule 3.851 requires that any motion to vacate a conviction and sentence of death be filed within 1 year after the judgment and sentence become final. See Fla. R. Crim. P. 3.851(d)(1). As relied on by Defendant, the rule further permits a court to consider such a motion beyond the 1-year time limit when "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Fla. R.

Crim. P. 3.851(d)(2)(B). Defendant's judgment and sentence became final on November 29, 1993, when the United State Supreme Court denied certiorari. *See Hodges v. Florida*, 510 U.S. 996 (1993).

The Court finds that *Porter* merely applied the *Strickland* analysis to the particular facts of Porter's case, and found that the Florida Supreme Court was incorrect in its *Strickland* analysis as to Porter's case. However, Porter did not change the *Strickland* standard or its application, and does not constitute a fundamental change or development in Florida or constitutional law. Therefore, the instant motion does not fall within in any of the exceptions delineated in rule 3.851(d)(2). Defendant herein essentially seeks to re-litigate ineffective assistance of penalty phase counsel issues which were previously raised, denied following an evidentiary hearing, and affirmed on appeal. *See Hodges*, 885 So.2d at 345-53, 359. Consequently, after considering the motion, answer, court file and record, **the Court finds the instant motion is untimely, successive and procedurally barred.** As such, no relief is warranted on Defendant's motion.

It is therefore ORDERED AND ADJUDGED that Defendant's motion is hereby DENIED.

fn1. *Strickland v. Washington*, 466 U.S. 668 (1984).

fn2. Defendant cites to the three-prong test for retroactive application of a change in the law as set forth in *Witt V. State*, 387 So.2d 922 (Fla. 1980), as well as other Florida cases which permitted retroactive application of changes in the law, to support his assertion that this issue is properly and timely raised in the instant motion.

(PCR-3, 2/232-35) (e.s.)

Analysis

The trial court correctly summarily denied Hodges' second successive motion to vacate, based on *Porter*, because the motion was patently frivolous –- it was unauthorized, time-barred, successive, repetitive, procedurally barred and also without merit. Because Hodges did not identify any new constitutional right created by *Porter,* nor show that *Porter* has been held to apply retroactively, his motion was facially insufficient, unauthorized, untimely and procedurally barred.

Hodges asserts that the trial court should have granted his second 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. Hodges concludes that it was proper for him to raise this claim in a successive, time-barred motion to vacate. Hodges also insists that if the alleged "change in law" from *Porter*, as construed by Hodges, was applied to his case, it would show that trial counsel was deficient and that Hodges was prejudiced by the alleged deficiency.

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, Hodges' conviction and sentences became final in 1993, when the United States Supreme Court denied certiorari after direct review. See, *Hodges v. State*, 619 So. 2d 272 (Fla. 1993), *cert. denied*, *Hodges v. Florida*, 510 U.S. 996 (1993). Inasmuch as Hodges did not file this motion until 2010, this motion was time barred. Florida Rule of Criminal Procedure 3.851(d)(1)(B).

In an effort to circumvent the time-bar, Hodges attempts to rely on the exception for newly-recognized, retroactive constitutional rights. However, Hodges' 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." Hodges 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, Hodges concedes that *Porter* did <u>not</u> change federal constitutional law at all, Initial Brief at 33, fn. 7, but, rather, concludes that this Court's analysis was at odds with the United States Supreme Court's existing precedent. Hodges 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* established a "new law" that is retroactive; instead, both this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland v. Washington,* 466 U.S. 668 (1984) 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). Instead of relying on a newly-established fundamental constitutional right that has been held to be retroactive in order to meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B), Hodges

apparently concludes that having improperly raised the unauthorized claim in a successive, untimely and procedurally barred Rule 3.851 motion, this Court now has jurisdiction to determine whether *Porter* qualifies as new law, since the trial court does not have the authority to do so. In other words, under Hodges' view, the (d)(2)(B) exception doesn't really mean what it says when it says "has been held to be retroactive" and this prerequisite can be ignored by any defendant who unilaterally declares that a recent case establishes a new fundamental constitutional right that should be applied retroactively.

Hodges is incorrect. 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, 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, for this exception to apply, it requires both a new fundamental 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). Hodges cannot use his unilateral declaration for the exception in Fla. R. Crim. P. 3.851(d)(2)(B) to apply. Rather, Hodges must show that a newly established right has been held retroactive for the exception to apply. The trial court properly denied Hodges' second successive motion to vacate as time-barred, successive and procedurally barred.

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

Even if Hodges arguably 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 trial court still properly denied the motion because *Porter* did not change the law. While Hodges insists that *Porter* represents a "fundamental repudiation of this Court's *Strickland* jurisprudence," Initial Brief of Appellant at 31, 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, Hodges relies on the fact that the United States Supreme Court granted relief in *Porter* after

finding that this Court had unreasonably applied *Strickland*. Hodges mistakenly concludes that since this determination was made under the deferential AEDPA standard of review, the United States Supreme Court must have found a systematic problem with this Court's understanding of the law under *Strickland*.

Hodges' argument misconstrues 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 Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). The United States Supreme 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. 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.

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,* but it did not. Instead, the Supreme Court 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 Supreme Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions." *Williams*, 536 U.S. at 412. The Supreme Court simply found that this Court had acted unreasonably in applying that correct law to "*the facts of [Porter's] case*." *Id.* at 412 (e.s.). Thus, Hodges' assertion -- that *Porter* represents a "fundamental repudiation of this Court's *Strickland* jurisprudence" -- is incorrect. *Porter* represents nothing more than an isolated error in the application of the law to the facts of a particular case. *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 trial court properly denied Hodges' second successive motion to vacate

as untimely, successive and procedurally barred.

Deference to findings of fact

Hodges seems to conclude that *Porter* held that it was improper to defer to the trial court's findings of fact in resolving an IAC claim pursuant to the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). However, in making this assertion, Hodges ignores that the *Stephens* standard of review is mandated by *Strickland* itself:

> Furthermore, 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.**

Strickland at 698 (e.s.).[2] As this passage shows, the Supreme

[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)

Court 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 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) and *Sochor v. State*, 833 So. 2d 766, 781 (Fla. 2004). This is also the standard used to deny relief in Hodges' prior post-conviction appeal.

Thus, to conclude 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 express and direct language from *Strickland* in *Porter*. Hodges 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*, Hodges' attempt to argue to the contrary is specious. The trial court properly determined that *Porter* did not change the law and that Hodges' second successive motion to vacate was time-barred and procedurally barred.

(1984). After the enactment of the AEDPA, the deference required of state court factual findings has been heightened and relocated. 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).

Hodges also apparently concludes that the Supreme Court overruled *Strickland's* requirement of deference to factual findings made in the course of resolving IAC claims. This conclusion is baseless. *Porter* makes no mention 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, in *Porter*, the Supreme Court 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 non-statutory 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 United States Supreme Court seems to have accepted it and found this Court 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, in order 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). The trial court properly determined that *Porter* did not change the law, Fla. R. Crim. P. 3.851(d)(2)(B) did not apply, and the second successive motion was time-barred and procedurally barred.

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

Hodges' reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) 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 that the court felt competent counsel should have uncovered - the trial 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, without explanation, the post-conviction court's finding that it was unable to assess whether trial counsel's deficient performance might have prejudiced Sears.

In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on an IAC claim or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the state 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 changed the *Strickland* standard.

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

Hodges also appears to conclude that *Porter* requires a court to grant relief on an IAC claim based solely on a finding that some evidence to support prejudice was presented at a post-conviction hearing. 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 United States Supreme 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 Supreme 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 Supreme Court reversed the Sixth Circuit for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the post-conviction evidence and the aggravated nature of the crime.

Given what *Porter* itself actually says about proving prejudice and *Belmontes* and *Van Hook*, any suggestion that *Porter* requires a finding of prejudice anytime a defendant presents some evidence at a post-conviction hearing is incorrect. *Porter* did not change the law in requiring that a defendant actually prove there is a reasonable probability of a different result. Since *Porter* did not change the law, the trial court properly determined that this second successive motion was time-barred.

Hodges failed to establish that the alleged change in law would be retroactive under *Witt*.

Even if, *arguendo*, Fla. R. Crim. P. 3.851(d)(2)(B) did apply and even if *Porter* arguably changed the law, which the State emphatically disputes, the trial court still would have properly denied the second successive motion because *Porter* would not apply retroactively. As Hodges recognizes, the determination of whether a change in law is retroactive is controlled by *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). To obtain retroactive application of the "change in law" law under *Witt*, Hodges 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, the change in law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. Application of the 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).

While Hodges admits that a change in law is not retroactive under *Witt* unless this standard is met, he makes no attempt to show how any alleged "change in law" actually meets the *Witt* standard. Hodges never clearly identifies what change *Porter* actually made, offers no purpose behind the alleged 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. Instead of showing that an alleged "change in law" actually occurred in *Porter* and would meet the *Witt standard*, Hodges spends several pages discussing the fact that this Court found *Hitchcock v. Dugger*, 481 U.S. 393 (1987) to be retroactive. Hodges implies that because both cases involved findings of error in Florida cases, his alleged "change in law" from *Porter* should be too. However, the mere fact that this Court determined that the *Hitchcock* jury instruction error met the *Witt* standard does not dictate that a different type of error in a different case would constitute a change in law that satisfies *Witt*. 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 Supreme Court found that giving a jury instruction that told the jury not to consider non-statutory 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 this jury instruction 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 retroactively apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987). Thus, in *Hitchcock*, the purpose of the new rule, extent of reliance on the old rule and effect on the administration of justice 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 that particular case. Thus, the purpose of *Porter* was to correct an error in the application of the law to facts of a particular case. Moreover, 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 retroactively applying the alleged "change in law" 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 IAC case previously denied.

Given the stark difference in the analysis of the alleged changes in law in *Porter* and *Hitchcock* and their relationship to the *Witt* factors, the alleged change in law from *Porter*, even if one had occurred, would not be retroactive under *Witt*. 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 – the standard of review.

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 (1) the alleged change in law urged by Hodges -- the standard of review -- would fail the *Witt* test even if *Porter* arguably had changed the law and (2) this Court has already determined that changing the law regarding the standard of review for IAC claims does not meet *Witt*, any alleged "change in law" that Porter might have made would not be retroactive. Thus, the trial court properly found that Hodges' second successive motion was time-barred and procedurally

barred.

Hodges is seeking nothing more than to relitigate his IAC/penalty phase claim anew. Hodges raised the same IAC/penalty phase claim in his prior motion to vacate and relief was denied on both the deficient performance prong and the prejudice prong of *Strickland*. See, *Hodges v. State*, 885 So. 2d 338, 345-353 (Fla. 2004). 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, Hodges 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 Hodges is attempting to do here, his IAC/penalty phase claim is barred and his second successive motion to vacate 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).

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). In *Marek*, 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 allegedly 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 under the AEDPA standard of review, the United States Supreme Court found that state courts had improperly rejected these claims. Given these same circumstances, the IAC/penalty phase claim was barred and relief was properly denied.

No reason to address the prejudice prong where counsel was not deficient.

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, and *Porter* had changed the law, and the alleged

change in law was retroactive and the claim was not procedurally barred, Hodges still would not be entitled to any relief. As this 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 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, Hodges' claims of ineffective assistance of penalty phase counsel for failing to investigate and present mitigation were denied after extensive review by this Court, not only on a finding that Hodges did not prove prejudice, but also on a finding that Hodges did not prove deficiency. See, *Hodges*, 885 So. 2d at 346-350. Hodges does not suggest how *Porter* would have affected this determination but, rather, attempts to reargue the same evidence that this court has previously considered and rejected.

Moreover, finding no deficiency in such a situation is in accordance with United States Supreme Court precedent. See, *Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) (finding that, as in *Strickland*, defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally

reasonable judgments.") Thus, Hodges' claim that trial counsel was deficient – a deficiency that has never been found by this court - would be meritless even if *Porter* had changed the law and applied retroactively. *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. Here, this Court previously found that penalty phase counsel conducted "a comprehensive investigation in an attempt to uncover mitigating evidence," and contacted numerous law witnesses and engaged the assistance of two mental health professionals. *Hodges*, 885 So. 2d at 347; 348. Given these circumstances, the trial court properly determined that the IAC/penalty phase claim was procedurally barred.

Collateral Counsel is not authorized to file this motion.

Finally, Hodges' collateral 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 repetitive or successive collateral challenges 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). Collateral counsel is not authorized to file the unauthorized successive motion to vacate; the motion was time-barred, successive and procedurally barred; *Porter* did not change the law; any alleged change in law would not apply retroactively; any alleged "change in law" from *Porter* is based on the prejudice prong and would not apply to Hodges anyway because his IAC/penalty phase claim was previously denied under the deficient performance prong of *Strickland*. The trial court's order summarily denying Hodges' second successive motion to vacate, as successive, untimely and procedurally barred, should be affirmed.

CONCLUSION

In conclusion, Appellee, State of Florida, respectfully requests that this Honorable Court affirm the trial court's summary denial of Hodges' second successive motion to vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Regular Mail to Linda M. McDermott, Esquire, McClain & McDermott, 20301 Grande Oak Blvd., Estero, Florida 33928, this 29th day of September, 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).

_/s/Katherine V. Blanco_____
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