IN THE SUPREME COURT OF FLORIDA

PATRICK HANNON,

Appellant,

v. **Case No. SC11-843**
L.T. No. 91-1927

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM DENIAL OF 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT ON DESIGNATIONS TO THE RECORD

This is an appeal from the trial court's summary denial of Hannon's *successive* motion to vacate. The instant record on appeal, from the denial of Hannon's successive post-conviction motion based on *Porter v. McCollum, 130 S. Ct. 447 (2009),* will be cited as "PCR-2."

NOTICE OF SIMILAR CASES

Hannon's claim, based on *Porter v. McCollum*, has been asserted in 41 capital post-conviction cases in Florida:

Cases pending in the Florida Supreme Court

Arbelaez, Guillermo, 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
Hannon v. State, Case No. SC11-426
Franqui v. State, Case No. SC11-810
Griffin, Michael, Case No. SC11-1271
Hannon v. State, Case No. SC11-843
Hartley v. State, Case No. SC11-1884
Hildwin v. State, Case No. SC11-428
Hannon 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
Parker v. State, Case No. SC11-473
Peede v. State, Case No. SC11-1631
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
Stein v. State, Case No. SC11-1400
Thompson v. State, Case No. SC11-493
Turner v. State, Case No. SC11-946
Walton v. State, Case No. SC11-153
Willacy v. State, Case No. SC11-99
Zakrzewski v. State, Case No. SC11-1896

Cases pending in Circuit Courts

Archer, Robin (1st Circuit)
Byrd, Milford (13th Circuit)
Duckett, James (5th Circuit)
Groover, Tommy (4th Circuit)
Jimenez, Jose (11th Circuit) [pend. reh.]
Reed, Grover (4th Circuit)

STATEMENT OF THE CASE AND FACTS

In January of 1991, Patrick Hannon killed Brandon Snider and Robert Carter. First, Hannon killed Snider by slitting Snider's throat, nearly decapitating him. Then, Hannon killed Carter by shooting him six times as Carter tried to hide under a bed. Following his jury trial in July of 1991, Hannon was convicted of two counts of first-degree murder and sentenced to death. In 1994, Hannon's convictions and death sentences were affirmed on direct appeal. *Hannon v. State,* 638 So. 2d 39 (Fla. 1994). Hannon's petition for writ of certiorari was denied on February 21, 1995. *Hannon v. Florida*, 513 U.S. 1158 (1995).

On March 17, 1997, Hannon filed a shell motion for post-conviction relief; an amended motion to vacate was filed on April 10, 2000, alleging 21 claims. A *Huff* hearing was held on November 16, 2001. The trial court granted an evidentiary hearing on seven claims; the evidentiary hearing was held on February 18, 2002 and June 21, 2002. On February 3, 2003, the trial court issued a written order denying Hannon's motion to vacate. This Court affirmed the trial court's denial of post-conviction relief in *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006). In denying appellant's IAC/penalty phase claim in

Hannon, 941 So. 2d at 1124-1138, this Court painstakingly explained:

> **II. Ineffective Assistance of Counsel at the Penalty Phase**
>
> To succeed in an ineffective assistance of penalty phase counsel claim, the claimant must demonstrate that counsel performed deficiently and that such deficiency prejudiced his defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Pursuant to *Strickland*, trial counsel has an obligation to conduct a reasonable investigation into mitigation. *See id*. at 691, 104 S.Ct. 2052; *see also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Counsel's decision to not present mitigation evidence may be a tactical decision properly within counsel's discretion. *See Brown v. State*, 439 So.2d 872, 875 (Fla. 1983)("The choice by counsel to present or not present evidence in mitigation is a tactical decision properly within counsel's discretion."); *Valle v. State*, 705 So.2d 1331, 1335 n. 4 (Fla. 1997)(same); *Gorham v. State*, 521 So.2d 1067, 1070 (Fla. 1988)(same). 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)). Further, as the United States Supreme Court recently stated in *Wiggins*:
>
> > [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."

539 U.S. 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).

Contrary to the critical dissenting view, the counsel provided was neither standardless nor empty. As evidence of trial counsel's deficiency, Hannon asserts that trial counsel advanced an invalid lingering doubt argument during the penalty phase, hopeful that the jury would believe Hannon did not have the type of character to be involved in these crimes, and that trial counsel failed to investigate and present mitigation during the penalty phase. Specifically, Hannon asserts that trial counsel was ineffective in pursuing the innocence/alibi defense even after Hannon's alibi, Richardson, had changed his testimony to assist the State at the end of the trial and the jury had found Hannon guilty.

The nature of our bifurcated system in Florida places an onerous burden on death penalty counsel to be informed when making strategic and tactical decisions throughout both the guilt and penalty phases. Such is neither standardless nor an empty promise. We require and encourage death penalty counsel to conduct reasonable investigations as are appropriate to ensure that he or she can properly counsel and inform a defendant with regard to the

nature and extent of the mitigation that may be viable in the case. However, not every death penalty investigation will find mitigating evidence, and an investigation into mitigation will run the gamut from discovering latent superficial mental disabilities to very open and evident brain damage. In addition, *Strickland* does not require defense counsel to present mitigating evidence at sentencing in every case. *See Wiggins*, 539 U.S. at 533, 123 S.Ct. 2527. However, if defense counsel decides not to investigate mitigation, that "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." *Wiggins*, 539 U.S. at 521-22, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052); *see also Rose v. State*, 675 So.2d 567, 572 (Fla. 1996)(stating that in evaluating the competence of counsel "the actual performance of counsel in preparation for and during the penalty phase proceedings, as well as the reasons advanced therefor," must be considered).

Investigating and presenting mental health mitigation is not always but certainly at times may be inconsistent with presenting an innocence defense during the penalty phase. However, failing to investigate and present mental health mitigation is not the *sine qua non* of ineffective assistance of counsel. We therefore must determine whether trial counsel's particular decision in this case not to investigate and develop mitigation was reasonable under the circumstances. *See Wiggins*, 539 U.S. at 521-22, 123 S.Ct. 2527. **Based on the record in this case, Hannon has not and cannot demonstrate that his trial counsel was deficient during the penalty phase because, under these circumstances, Hannon's trial counsel at the time had specific tactical and calculated reasons for the strategy adopted. Counsel did not default in his obligation, as characterized by the dissent, but strategically adopted a different path. Further, the path taken was one with which Hannon agreed and which he fully supported.** [FN8]

[FN8] The dissent asserts that when trial counsel initially stated that he would not be

offering evidence in mitigation, the trial court "directed [counsel] to reconsider" his decision, see dissenting op. at 1158; however, the trial court merely gave Hannon's trial counsel overnight to review pertinent case law and "thoroughly discuss whether or not the defendant should put on mitigating evidence." With regard to the initial decision not to present mitigation, trial counsel stated, "We have discussed it, *but I was expressing [Hannon's] wishes*. I will continue to discuss it." (Emphasis supplied.) Even the trial judge expressly noted that "[i]f Mr. Hannon knowingly and intelligently waives his right to present mitigating evidence or circumstances, he has that right under the law."

In *Koon v. Dugger*, 619 So.2d 246, 250 (Fla. 1993), this Court acknowledged the "problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence" and announced the following prospective rule to be applied in such situations:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Id. at 250. Hannon's trial preceded this Court's decision in *Koon*. Therefore, counsel could not benefit from the aforementioned rule in memorializing on the record that Hannon had

> knowingly and voluntarily waived the presentation of any type of mitigation that would detract from Hannon's assertion that he was not at the crime scene and he did not possess the type of character to commit the murders.

At the postconviction evidentiary hearing, trial counsel testified that Hannon, as well as Hannon's parents, adamantly maintained Hannon's innocence throughout the guilt and penalty phases. Trial counsel therefore decided to focus on obtaining an acquittal during the guilt phase, arguing that Hannon was totally innocent and not present at the crime scene, and then only if necessary proceed to establish during the penalty phase that Hannon did not have the type of character to commit such murders. Trial counsel testified that Hannon assisted in every aspect of his defense, [FN9] including testifying in his own defense during the guilt phase, and agreed to continue with the presentation of the innocence theme defense during the penalty phase, even after he was convicted. Trial counsel stated that he explained mitigation to Hannon and advised Hannon that he could change his position and admit his involvement in the murders during the penalty phase, but Hannon said he did not wish to do so. *Cf. Cummings-El v. State*, 863 So.2d 246, 252 (Fla. 2003)(concluding that counsel was not ineffective in limiting mitigation investigation where defendant was adamant about not wanting his family to "beg for his life," and the defendant understood the nature and consequences of his decision not to present mitigating evidence). [FN10]

> [FN9] Trial counsel testified that Hannon understood the jury process and his rights in the criminal proceedings, that he paid attention to the progress of his case, and that he exhibited no signs of mental impairment.

> [FN10] Hannon's decision not to present evidence in mitigation is demonstrated by Mrs. Hannon stating as she testified at the penalty phase that Hannon "didn't want us to [testify] because he knows how badly we're hurting."

Trial counsel further testified that he had discussions with Hannon's parents and his sister Moreen, and he sought their input with regard to Hannon's defense. According to counsel, Hannon's parents and Moreen also agreed with a penalty phase strategy of character and to continue maintaining Hannon's innocence. Trial counsel stated that Hannon's parents "continued to believe their son did not and could not do this." Therefore, the dissent's assertion that counsel "blindly follow[ed] his client's desire to limit mitigation," *see* dissenting op. at 1161, is unsupported by the postconviction record. **Rather, counsel's adoption of a strategy that focused on Hannon's character was the product of discussions with not only Hannon, but with his most intimate family members. According to counsel, Hannon and his family agreed not to pursue a strategy where, after proceeding during the guilt phase on the theory that Hannon was not present at the time of the murders, Hannon at the penalty phase would suddenly admit he committed the crimes and begin offering evidence in mitigation of the murders. Counsel stated that he, Hannon, and his family "decided that [changing tactics] wasn't what it was going to be because Mr. Hannon was adamant. I can't tell you how much he was adamant he wasn't there." Neither Hannon nor any of his family members suggested any mitigation matters for the penalty phase. Rather, Hannon, his parents, and his sister consistently urged the strategy that counsel ultimately adopted and pursued; that is, "keep[ing] a consistent defense and a consistent position."**

Trial counsel further testified that he was fully aware that lingering doubt was not a statutory mitigator. However, trial counsel stated that providing evidence during the penalty phase that Hannon did not have the type of character to commit the murders, and continuing to support the underlying innocence defense, had a real and practical jury effect that would mitigate in favor of the jury sparing Hannon's life. [FN11] It was the character and demeanor of Hannon that trial counsel advanced in a very practical way. Even an expert in capital cases

presented by Hannon during the postconviction evidentiary hearing admitted that the consistent approach had a practical and real impact factor in the juror's vote in terms of whether to vote for life imprisonment, notwithstanding that lingering doubt is not a recognized and valid statutory mitigating factor.

> [FN11] Contrary to the dissent's assertion, we have not "transformed counsel's continuing innocence strategy into a lingering doubt strategy" or a "reasonable doubt" strategy. Dissenting op. at 1158. We reiterate that counsel's strategy was to demonstrate to the jury that Hannon in no way possessed the type of character to commit the crimes. Counsel also testified at the postconviction hearing that it was his strategy to persuade the jurors to recommend life over death by virtue of the fact that Hannon, who had already been found guilty of two murders, was not "begging for his life" but instead addressed and emphasized demeanor and character to continue to insist that he did not and could not commit the crimes.

The record supports trial counsel's postconviction testimony that a defense based on the notions that Hannon did not commit the murders and was not even the type of person who could have committed the murders was developed from the beginning of trial. Even during the guilt phase, trial counsel presented Rusty Horn and Paul Kilgore to show that Hannon did not have the type of character to commit the murders and moved all of their guilt phase testimony into evidence during the penalty phase. Horn, Hannon's roommate and supervisor at his stucco job, described Hannon as a "teddy bear" type who had a reputation for nonviolence. Kilgore, another of Hannon's roommates, testified that Hannon was a nice person. Trial counsel decided it was not necessary, and likely would not have made any difference, to recall Horn and Kilgore during the penalty phase to reiterate that to which they had already testified. **The record also demonstrates that trial counsel presented mitigation during the guilt phase through Hannon, who testified**

that he attended high school through the eleventh grade; wanted to work, earn money, and learn a trade; was a hard worker; obtained a job with Rusty Horn where he received an extra fifty cents an hour if he did not drink; worked at a gas station; delivered auto parts and pizza; and visited his sister's house on Christmas and celebrated with his nieces and nephews.

Trial counsel presented further evidence that Hannon did not have the type of character to commit these murders through the penalty phase testimony of Toni Acker and Hannon's mother and father. Acker testified that Hannon was "a good-time guy, carefree, liked to have fun"; that Hannon had cared for her child; and that Hannon was incapable of conduct such as these murders. Hannon's mother testified that Hannon had never hurt anyone in his entire life and that Hannon could not hurt any animal or person. Hannon's mother also pleaded with the jury, "Please, you've taken away his freedom for something he didn't do. Don't take away his life. Give us a chance, please, to prove that he never did anything like this. He couldn't." Hannon's father testified that Hannon had never been a violent person, and that he was always a "teddy bear." Hannon's father also testified that "[Hannon] says he's innocent. I believe he's innocent, and I think he ought to be given a chance to prove that he is innocent. That's it." The record supports trial counsel's postconviction evidentiary hearing testimony that his penalty phase strategy was to establish that Hannon did not have the type of character to commit the murders.

Contrary to the dissent's misdirected charge, we have not failed to recognize our legal precedent with regard to "lingering doubt" and have expressly factored that consideration into our decision today. This Court has repeatedly observed that residual doubt is not legally appropriate as a mitigating circumstance, *see, e.g., Darling v. State*, 808 So.2d 145, 162 (Fla. 2002), and has consistently concluded that it is not error to deny an instruction that would allow a jury to consider lingering doubt or exclude evidence of lingering doubt during the penalty phase. *See Duest v. State*, 855 So.2d 33, 40 (Fla. 2003)

(concluding that the trial court did not err in denying an instruction that the jury could consider lingering doubt in rendering its advisory sentence).

Although this Court has previously rejected an argument that trial counsel was ineffective in the penalty phase for failing to argue lingering doubt as a mitigating circumstance, *see Trepal v. State*, 846 So.2d 405, 434 (Fla. 2003), it has never expressly determined that trial counsel is per se ineffective for pursuing the practical impact that character evidence may create jury doubt and the impact it may have during the penalty phase. *But see Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 787 (11th Cir. 2003) ("Parker's attorneys were not deficient in focusing their time and energy on acquittal at trial and focusing their arguments at sentencing on residual doubt instead of other forms of mitigation." (parentheses omitted)). Further, contrary to the dissent's claim that we are ignoring United States Supreme Court case law, *see* dissenting op. at 1157, that Court has never resolved the issue advanced by the dissent either, not even in its most recent decision touching upon lingering doubt. *See Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006). [FN12] However, trial counsel's strategy in the instant case of presenting evidence to demonstrate that Hannon did not have the type of character to commit the murders was a tactical method used by trial counsel in an attempt to sway the jury's recommendation in favor of life over death. *See Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(concluding that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character that the defendant proffers as a basis for a sentence less than death). [FN13] It is certainly logical that a jury of laypersons is less likely to recommend death if they have some lingering concerns about guilt than if there is absolute certainty on the issue of guilt. *See Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)("[J]urors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts...about the evidence so as to bend

them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases.") (quoting *Grigsby v. Mabry*, 758 F.2d 226, 247-48 (8th Cir.1985)(Gibson, J., dissenting)); *Parker*, 331 F.3d at 787-88 ("Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but is perhaps the most effective strategy to employ at sentencing.")(internal quotation marks omitted). The dissent refuses to even consider that lawless conduct related to illegal drugs or alcohol at times may even itself operate to be aggravating in the eyes of a lay jury rather than mitigating, as the dissent portrays those factors present. *See generally Cummings-El*, 863 So.2d at 267 ("Counsel acknowledged that drug abuse can have a double-edged sword effect on the jury, as juries are not sympathetic to junkies generally.")(quoted from trial court's denial order attached to opinion).

> [FN12] In none of the cases cited by the dissent does the United States Supreme Court address the effectiveness of counsel for arguing that the commission of a murder was completely out of line with a defendant's character. Hence, contrary to the dissent's claim that we are ignoring Supreme Court case law on lingering doubt, *see* dissenting op. at 1157, we instead conclude that such case law is not dispositive as to the issue that we decide today.
>
> Moreover, to the extent the dissent asserts that in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court, and in *Rose v. State*, 675 So.2d 567 (Fla. 1996), this Court "explicitly disapproved" of a continuing assertion of innocence defense, *see* dissenting op. at 1157, this statement is misdirected. In neither *Wiggins* nor *Rose* did the Court hold that counsel was ineffective for pursuing an innocence strategy, nor prohibit a defense based on the character of the defendant. Rather, in both cases the Courts found that counsel was ineffective for failing to adequately

investigate into mitigation that could have been discovered had counsel conducted a reasonable investigation. **The instant case is distinguishable from *Wiggins* and *Rose* in that Hannon's counsel made a reasoned decision to limit his investigation into mitigation based on Hannon's express desire that he pursue a strategy that Hannon did not possess the type of character to commit the murders. Further, the instant case is distinguishable from *Rose* in that, while counsel in *Rose* pursued a penalty phase strategy that he believed to be ill-conceived, counsel in the instant case agreed with his client that maintaining a consistent position during the penalty phase was a viable strategy.**

[FN13] *See also King v. Dugger*, 555 So.2d 355, 360 (Fla. 1990)(Barkett, J., dissenting)("I believe that a jury is entitled to, and often does, mitigate a sentence because of 'lingering doubt' about the defendant's guilt."); *Melendez v. State*, 498 So.2d 1258, 1263 (Fla. 1986) (Barkett, J., specially concurring)("There is certainly nothing irrational-indeed, there is nothing novel-about the idea of mitigating a death sentence because of lingering doubts as to guilt.")(quoting *Heiney v. Florida*, 469 U.S. 920, 921, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984) (Marshall, J., dissenting from denial of certiorari)); *see also Way v. State*, 760 So.2d 903, 924 (Fla. 2000)(Pariente, J., concurring) ("I urge the Legislature [to] consider including evidence of residual doubt as a statutory mitigating factor that could be considered by juries in making a sentence recommendation, the trial court in imposing the death sentence, and this Court in determining whether the death penalty should be affirmed."). Although the dissent criticizes the reference to these views, they are presented not for authority, but for the common sense and grounded logic they set forth.

The conduct of Hannon's trial counsel does not constitute per se ineffective assistance of counsel. In *Haliburton v. Singletary*, 691 So.2d 466 (Fla. 1997), this Court determined that conduct similar to that of Hannon's counsel did not constitute ineffective assistance. *See id*. at 471. At the evidentiary hearing in *Haliburton*, trial counsel testified that, although he was aware that Haliburton had suffered physical and sexual abuse as a child and that he had a history of substance abuse, and that these factors would be considered mitigating in many cases, they were more harmful than helpful in the case. *See id*. This information would have been more mitigating than any factor in the present case. Trial counsel in *Haliburton* testified that he elected not to call the mental health expert, even though she could have testified that there was a strong indication of brain damage, because she would have also testified that *Haliburton* was an extremely dangerous person and that he was likely to kill again. *See id*. According to trial counsel, testimony that Haliburton's emotional problems and deprived upbringing caused him to commit the crime or lessened his culpability would have conflicted with the picture of charity and pacifism painted by the other defense witnesses and would have been inconsistent with Haliburton's strategy. *See id*. The testimony that the defense witnesses offered in *Haliburton* is similar to the character evidence presented by trial counsel in the instant case. Trial counsel's penalty phase strategy was to humanize Haliburton by dwelling upon his close family ties and on the positive influence he had on his family and fellow inmates. *See id*. This Court held that "[e]ven though this strategy was unsuccessful in persuading the court and jury to sentence Haliburton to life imprisonment, we cannot conclude that he was ineffective. In light of the substantial, compelling aggravation found by the trial court, there is no reasonable probability that had the mental health expert testified, the outcome would have been different." *Id.; see also Henry v. State*, 862 So.2d 679, 686 (Fla. 2003)(determining there was no deficient performance in counsel's decision to humanize defendant rather than use mental health testimony); *Shere v. State*, 742 So.2d 215, 223-24

(Fla. 1999)(determining that counsel was not ineffective for failing to request a neuro-psychological or neurological exam by a qualified expert even though trial counsel had obtained evidence of defendant's "severe head injury as a youth and his subsequent headaches" where counsel's penalty phase strategy was to portray the defendant as "a kind, gentle, God-fearing man"); *Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998)(determining there was no error where retrial counsel was aware of mental mitigation "but made a strategic decision under the circumstances...to instead focus on the 'humanization' of Rutherford through lay testimony"); *Bryan v. Dugger*, 641 So.2d 61, 64 (Fla. 1994)(determining that trial counsel was not ineffective for choosing a mitigation strategy of humanizing the defendant and not calling a mental health expert).

Similar to trial counsel's evidentiary hearing testimony in *Haliburton*, trial counsel in this case testified that his primary goal was to convince the jury that Hannon was not at the crime scene and that he was not the type of person to commit these murders, and that counsel intentionally sought to avoid contradicting that defense by presenting witnesses to testify that Hannon had used illegal drugs, was unstable, failed at school, or was abused. [FN14] Trial counsel's strategy in this case from the beginning of trial and through the penalty phase was to emphasize Hannon's good character traits. According to trial counsel, attempting to present testimony that Hannon may have had drug and alcohol problems that may have influenced him to commit the murders, or hiring a mental health expert attempting to discuss possible mental health mitigation to lessen his culpability would have been in total conflict with the picture of the nonviolent, "teddy bear" image of Hannon and would have been inconsistent with his innocence/alibi defense. Even though ultimately this strategy was unsuccessful in convincing the court and the jury to sentence Hannon to life imprisonment, we conclude, as in *Haliburton*, that trial counsel was not ineffective in this case. The dynamics of a jury and a jury trial may often place practical considerations of human nature and citizen interaction on a level that cannot

be simply ignored notwithstanding guiding statutory considerations when issues of life or death are involved.

> [FN14] The dissent proclaims that counsel was "unfamiliar with the prevailing death penalty case law on mitigation, such as *Ake v. Oklahoma*," *see* dissenting op. at 1164; however, this statement is hugely conclusory and not supported by the postconviction evidentiary transcript. The dissent takes counsel's statement that he was not familiar with the *Ake* case "off the top of my head," and untenably uses this one statement to reach the sweeping conclusion that counsel lacked knowledge about case law concerning mitigation in death penalty cases. Indeed, it is a conclusory statement in itself to presume that any particular case is "prevailing" in a particular legal area. **Further, the *Ake* case is not even relevant to the instant proceedings because counsel's strategy during the penalty phase - a strategy that Hannon himself approved – was to present evidence that Hannon did not possess the character to commit the murders and that he was innocent of the crimes - not that he suffered from some sort of brain injury or mental illness at the time of the murders.**

An analogy can also be drawn to *Straight v. Wainwright*, 422 So.2d 827 (Fla. 1982), a case in which the defendant challenged his trial counsel's failure to investigate for the purpose of developing evidence of mitigating circumstances. *See id*. at 832. There, trial counsel, as did trial counsel in this case, stated that he did not present mitigating circumstances because he felt them to be, even after the verdict of guilt, fundamentally inconsistent with the entire defense. *See id*. This Court concluded that trial counsel's performance was not ineffective where trial counsel viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case. *See id*. **Similar to trial counsel in *Straight*, Hannon's counsel here believed that any evidence of mitigating circumstances**

available would only damage the integrity of Hannon's case. Further, Hannon agreed with counsel in this case that mitigation evidence should not be presented during the penalty phase. Under the totality of the circumstances at the time of trial, counsel was not deficient in strategically choosing not to present mitigation evidence that would be in conflict with and contradict Hannon's innocence/alibi defense. *See Parker*, 331 F.3d at 788 (counsel not ineffective for failing to introduce evidence of mental defects and personality disorder where counsel did not see any signs of brain damage or mental disorder, and counsel further thought such evidence would be inconsistent with the defendant's alibi defense and would undermine defendant's credibility); *Cummings-El*, 863 So.2d at 252 (determining that counsel's performance was not deficient where penalty phase strategy was to present defendant in a positive light and not to present evidence of defendant's drug use, poor upbringing, and family members' criminal backgrounds; counsel believed that such evidence would have an adverse effect on the jury and, further, introducing any evidence of mental illness would have been inconsistent with the aforementioned strategy); *Brown v. State*, 439 So.2d 872, 875 (Fla. 1983)(concluding that under the totality of the circumstances at the time of trial, counsel was reasonably effective where he testified that in his opinion presentation of mitigation evidence during the penalty phase was contradictory to the alibi defense and the defendant did not assist in pursuing mitigating evidence).

Neither the United States Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), nor its recent decision in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), compels a different conclusion. In *Wiggins*, the Court concluded that defense counsel's performance fell below an objective standard of reasonableness where counsel abandoned their investigation into mitigation even though their limited investigation revealed information that would have led a "reasonably competent attorney to investigate further." 539 U.S. at 527, 123 S.Ct. 2527. The Supreme Court noted that defense counsel's

investigation included a review of reports which noted that Wiggins had spent most of his life in foster care and had displayed emotional difficulties while there and that Wiggins' mother was a chronic alcoholic who on at least one occasion left her children alone for days without food. *See id*. at 523, 525, 123 S.Ct. 2527. The Supreme Court concluded that a reasonable attorney would have realized the need to pursue these leads further, but defense counsel abandoned the investigation at this juncture. *See id*. at 527, 123 S.Ct. 2527. [FN15] The Supreme Court determined that counsel's failure to investigate further into Wiggins' background resulted from inattention rather than reasoned strategic judgment, in part because during opening statements, counsel informed the jurors, "You're going to hear that [Wiggins] has had a difficult life," but then failed to provide the jury with any details of Wiggins' life history. *See id*. at 526, 123 S.Ct. 2527. In holding that counsel's performance was deficient, the Supreme Court nonetheless noted that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing," *id*. at 533, 123 S.Ct. 2527, and distinguished Wiggins' case from others where the High Court had concluded that limited investigations into mitigation were reasonable. *See id*. at 535, 123 S.Ct. 2527.

> [FN15] The Supreme Court noted in part that further inquiry likely would have revealed repeated incidents of sexual abuse suffered by Wiggins that could have been offered in mitigation. *See id*. at 525, 123 S.Ct. 2527.

In the recently decided *Rompilla*, the Supreme Court concluded that the 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 a court file on the defendant's prior conviction. *See* 125 S.Ct. 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 High Court found that counsel's performance fell below a level of reasonable performance because

> counsel 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.

Id. at 2464. The Supreme Court in its conclusion emphasized that "the prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried," yet "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.

A careful reading of the Supreme Court's decisions in *Wiggins* and *Rompilla* reveals that those decisions are inapplicable to the facts of the instant matter. Unlike *Wiggins*, in the instant case there were no reports containing evidence of Hannon's life history which should have prompted trial counsel to conduct a deeper investigation into Hannon's background. In fact, trial counsel testified that during the criminal proceedings neither Hannon, his father, his mother, nor his sister Moreen ever mentioned that Hannon might suffer from some form of brain injury, that Hannon was abused or neglected, or that he had a traumatic childhood or a substantial

drug problem. According to counsel, when asked if Hannon had been born with any problems, Hannon's parents stated that they had "no problem with him." Moreover, unlike *Rompilla*, there is no indication here that the State planned to rely on particular material in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase trial. Finally, and most distinguishing, unlike the defendants in *Wiggins* and *Rompilla*, Hannon adamantly expressed his wish to proceed consistent with the innocence defense during the penalty phase. The dissent's assertion that we have "ignore[d] the mandate for defense counsel's duty to investigate," dissenting op. at 1157, does not accommodate these critical facts. Consistent with his client's wishes, trial counsel sought to demonstrate that Hannon did not have the type of character to commit the murders rather than offering evidence on Hannon's drug use, his mental fitness, or his family history. Therefore, unlike defense counsel's deficient performances in *Wiggins* and *Rompilla*, trial counsel's limited investigation into mitigation under the specific facts of the instant case, which was based on the express wishes of Hannon, was within the level of reasonable performance that is required by *Strickland* and *Wiggins*.

Hannon has also failed to demonstrate that he suffered prejudice. Contrary to the dissent's view that a per se rule of reversal is required, upon application of all applicable authorities, including *Wiggins* and *Rompilla*, relief is not available here. In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined. *See Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998)(stating that in assessing prejudice "it is important to focus on the nature of the mental mitigation" now presented); *see also Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."). We conclude that it does not. **There is no reasonable**

probability that had any of the mental health experts who testified at the postconviction evidentiary hearing testified at the penalty phase, Hannon would have received a life sentence. Our confidence has not been undermined in this outcome or proceeding.

At the evidentiary hearing, Hannon presented the testimony of Drs. Barry Crown, Faye Sulton, and Jonathan Lipman. Dr. Crown, an expert in clinical and forensic psychology and neuropsychology as well as substance abuse, testified that he performed a neuropsychological evaluation of Hannon and had reviewed background materials, as well as a cognitive test that had already been performed by Dr. Sulton. Dr. Crown testified that Hannon scored within normal limits on most of the tests that were administered and opined that Hannon's overall cognitive processing was "squarely within the heartland of what we would consider to be a typical person," but he demonstrated some difficulty with rapidly retrieving stored information and applying it to a new situation. Dr. Crown also testified that Hannon may have had some brain damage but he could not state that the brain damage in any way affected Hannon's behavior on the date of the crime because Dr. Crown had not been asked to consider or determine that in his evaluation.

Dr. Sulton, an expert in clinical psychology, testified that Hannon's thinking was not disturbed, nor was he having hallucinations or so deeply depressed that his thinking would be distorted. She opined that Hannon did not have any obvious major mental illness and that his behavior did not make much sense in light of his normal intelligence. She also testified that by January of 1991, Hannon had experienced many failures personally and professionally, worked several jobs, had been unsuccessful in the military, used vast amounts of illegal substances over a long period of time, and that his ability to function on a day-to-day basis, reason, use good judgment, and logically and sequentially plan activities were all compromised. She also testified that she found only nonstatutory mitigation through her interviews with family members and Hannon. These included areas of general parental

neglect, lack of structure, and lack of discipline and guidance in his early environment; a childhood history of illness that interfered with his school life at a crucial time; extreme dependence on other people to assist him in basic living skills; dependence on Ron Richardson for employment and drugs; substance abuse over many years; extraordinary impulsivity at times and great lack of concentration; and an inability to formulate goal-directed behavior and to live as an adult. Dr. Sulton further testified that Hannon's personality changes, impulsivity, irritability, difficulty with concentration, and paranoid thinking would have impacted his day-to-day life. Ultimately, Dr. Sulton testified that in her opinion Hannon was not incompetent to stand trial at any point, was not insane at the time of the incident, and was of average intelligence. [FN16] Dr. Sulton agreed with Dr. Crown's overall picture of Hannon's normalcy with only some areas of deficit.

> [FN16] Dr. Sulton testified that Hannon had a verbal IQ of 112, which is bright to average, a performance IQ of 102, which is average, and full scale IQ of 108, which is average.

Dr. Lipman, a neuropharmacologist, testified that Hannon's degree of intoxication at the time of the offenses would not suggest to him that Hannon was unable to remember what occurred or would have rendered him unable to know what he was doing at the time of the crime. Dr. Lipman, however, admitted that he probably underestimated Hannon's drug burden at the time of the offense because he was not aware that Hannon had used cocaine the night of the crimes. Dr. Lipman basically agreed with the State's expert's conclusions, which included a polysubstance abuse diagnosis.

The State's expert, Dr. Merin, an expert in the fields of neuropsychology and forensic psychology, testified that he reviewed Drs. Sulton and Crown's testing and administered the Wechsler Adult Intelligence Scale III test to Hannon. Dr. Merin testified that he agreed with Dr. Crown's conclusions with the exception of Dr. Crown's finding of

prefrontal lobe impairment. Dr. Merin explained the discrepancy was based on Dr. Crown using a shorter version of the Category Test. Dr. Merin testified that when he did the longer version of the test, three years after Dr. Crown, there was no indication of any prefrontal lobe impairment. Dr. Merin testified that he did not find any significant brain injury. Dr. Merin also opined that because Hannon was heavily into drugs and alcohol, he probably had destroyed some neurons in his brain, but not to the extent that it interfered with his ability to reason, to make decisions on his own behalf, to maintain goal-directed behavior, or to think logically. Dr. Merin further testified that he found no indication of any thought disorder or suggestion of psychosis or brain-related problems.

The postconviction testimony presented failed to establish the existence of statutory mental health mitigation (and indeed underscored Hannon's average intelligence and ability to reason), no expert was able to identify any significant brain damage, and there was contrary evidence. Even Dr. Crown, who arguably provided the most favorable testimony for Hannon, could not translate any brain damage as having any conceptual or actual impact on Hannon's behavior, and there was no evidence to establish any nexus between Hannon's mental health and his behavior or as it related to the crimes. Therefore, portraying Hannon as a drugged-out individual who had been involved in prior bad acts would have been more harmful, especially considering that the mental health implications were so equivocal.

Moreover, contrary to the dissent's claim that an investigation by trial counsel would have revealed "voluminous evidence of mitigation," *see* dissenting op. at 1169, the mitigation provided by witnesses during the postconviction evidentiary hearing was not compelling. [FN17] Indeed, the dissent offers what is actually a very one-sided presentation of postconviction witness testimony which creates a distorted view of Hannon's home life in an effort to bolster its assertion that trial counsel was ineffective for failing to conduct further

investigation into mitigation. [FN18] Further, in sentencing Hannon to death, the trial judge found substantial aggravation in this case. Specifically, the trial court found three aggravating circumstances applicable to both the murders of Snider and Carter-(1) previous conviction of a violent felony (the contemporaneous killings); (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. *See Hannon*, 638 So.2d at 41. As to Carter, the trial court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. *See id*. [FN19] On direct appeal, we affirmed the court's findings of aggravation. *See Hannon*, 638 So.2d at 43.

> [FN17] At the evidentiary hearing, information regarding Hannon's drug and alcohol abuse as well as his upbringing and family situation was presented through the testimony of Hannon's family. Hannon's mother, father, and two sisters (Hellen Coker and Moreen Hannon) testified that their home life was difficult, especially when Stephanie, another of Hannon's sisters, had scoliosis, at which time the parents were barely home. Hannon's mother and father both testified with regard to the problems they had with Moreen, who began abusing drugs and alcohol at age thirteen and had a close relationship with Hannon. Moreen also testified with regard to her running away from home as well as her alcohol and drug use. Hannon's mother testified that Hannon was a very good kid, had many friends, had developed rheumatic fever when he was seven or eight and was out of school for a few months, and was a pretty good student.
>
> Moreen seemed to have more specific information with regard to Hannon's substance abuse than the rest of his family. Moreen testified that she was aware of Hannon's drug and alcohol use while growing up, that Hannon's drug use escalated over the years, that Hannon drank on a regular basis in 1990, and that she, Hannon, Ron Richardson, and Mike Richardson all

drank alcohol as well as used cocaine. Moreen also testified that Hannon was a good worker and did not have any trouble getting a job although he moved around from job to job, and she described Hannon's behavior as agitated and irritated in 1990 during the time leading up to the murders. Hellen also testified that Hannon drank frequently when he was a teenager, and that Hannon was drinking and doing drugs excessively in 1990. Hannon's mother and father testified that they were unaware of the existence and extent of the substance abuse problem that emerged during Hannon's youth.

[FN18] For example, the dissent references Hellen Coker's testimony wherein she alleges physical abuse and emotional indifference by her parents. However, contrary to Hellen's testimony, Hannon's mother testified that she told her children that she loved them and hugged them, bought them birthday and Christmas presents, and that she never "smashed their face[s] into the wall." Hannon's father testified that he never spanked his children or struck them with a belt. While Mrs. Hannon admitted that she drank "a lot of wine," she also believed that it did not affect her ability to take care of the house and her children because "the kids looked terrific. The house was great." Despite the fact that Hannon developed rheumatic fever as a child, Hannon's mother testified that he did not have to make up the time he missed from school because his illness occurred partly during the summer, and further, "[Hannon] was a pretty good student, so he was okay." The dissent further takes out of context Hellen's statement that she left home five days after she turned eighteen because she "hated it." A review of her full testimony reveals that her home situation was not the only factor that led to her departure: "I hated it. I didn't like my home life. I didn't like the town we lived in. I mean you couldn't sneeze without somebody calling. They knew everything that went on. I just wanted to get away from there. Something

different." Finally, Dr. Merin testified that when he asked Hannon about his relationship with his father, Hannon stated, "I got along great with him. My only regret was that he was away so much." As to his mother, Hannon stated that they "[g]ot along great" and that he, as the Hannons' only son, received lenient treatment. In noting such testimony, we do not seek to present a lopsided view of Hannon's childhood in an effort to demonstrate that any existing mitigation was minimal. Rather, we only do so to demonstrate that the evidence in mitigation presented during the postconviction proceedings was equivocal and not "abundant," as the dissent proclaims. *See* dissenting op. at 1167. The dissent characterizes our discussion of these elements of Hannon's background as mere "lip service," *see* dissenting op. at 1162; however, the dissent lacks any basis for this assertion other than its subjective disagreement with our conclusion regarding the insignificance of the mitigation evidence presented at the postconviction hearing.

[FN19] Hannon asserts he was denied effective assistance of counsel because his trial counsel failed to adequately challenge the aggravators. However, once Hannon was convicted of the murders based on the facts in evidence, regardless of what trial counsel would have argued, the prior violent felony aggravator (contemporaneous killings) and the committed during a burglary aggravator were applicable as a matter of law. Although trial counsel in the instant case arguably could have more effectively challenged the HAC and the avoiding or preventing a lawful arrest aggravators during the penalty phase, the nature of the murders and facts in evidence in this case support the application of these aggravators, which were both challenged and upheld on direct appeal. *See id*. at 43-44. Thus, assuming without deciding whether trial counsel was deficient in challenging the aggravators, this claim is

meritless because Hannon has failed to demonstrate prejudice.

With regard to the HAC aggravator, we have previously noted that it is one of the most serious aggravators set out in the statutory sentencing scheme, *see Everett v. State*, 893 So.2d 1278, 1288 (Fla.2004), *cert. denied*, 544 U.S. 987, 125 S.Ct. 1865, 161 L.Ed.2d 747 (2005), and a review of the trial record demonstrates that the murders of Snider and Carter were particularly cruel. Hannon grabbed Snider, who had been stabbed by Acker fourteen times, from behind and slit his throat with such force that it nearly severed his head. Prior to that, Snider's screams could be heard throughout the apartment complex. An individual who was outside the apartment heard Snider gurgling on his own blood. At one point during the attack, Snider called to his roommate, "Call 911-my guts are hanging out." Upon hearing Snider's screams, Carter came downstairs and witnessed Snider's brutal stabbing. Carter pleaded with the attackers to spare his life, at one point saying to Acker, "[L]et me get out of here," and then retreated to a bedroom upstairs, hiding under a bed. Despite these pleas, Hannon went upstairs and proceeded to fire six shots into the huddled, defenseless Carter with a semiautomatic pistol. Hannon fired two shots into Carter at close range, and four shots with the pistol placed in contact with, or nearly up against, Carter's body. Despite the number of gunshot wounds, Carter did not die instantaneously. An officer who responded to the 911 call testified that when he arrived at the upstairs bedroom, Carter was still gasping for breath-Carter stopped breathing only just before the paramedics reached the bedroom. **Based on the brutal and disturbing nature of these murders, there is no reasonable possibility that Hannon would have received a life sentence. Therefore, Hannon has failed to demonstrate that if the mental health and lay witness testimony presented during the postconviction evidentiary testimony had been offered at trial "the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, and we fundamentally disagree with the dissent's assertion to the contrary. *See* dissenting op. at 1168.**

> **Our confidence in the outcome of this case has not been undermined. *See id*. Accordingly, this claim is without merit.**

Hannon, 941 So. 2d at 1124-1138 (e.s.)

Next, Hannon filed a federal petition for writ of habeas corpus, which was denied by the district court in *Hannon v. Sec'y, Dept. of Corrections*, 622 F. Supp. 2d 1169 (M.D. Fla. 2007). In 2009, the Eleventh Circuit affirmed the district court's judgment denying habeas relief on Hannon's claim of ineffective assistance of penalty phase counsel. *Hannon v. Sec'y, Dept. of Corrections*, 562 F.3d 1146 (11th Cir. 2009). The Eleventh Circuit agreed that the state courts' denial of relief on Hannon's IAC/penalty phase claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law. The Eleventh Circuit, in *Hannon*, 562 F.3d at 1154-1158, explained, in pertinent part:

> **The Supreme Court of Florida concluded that "trial counsel's limited investigation into mitigation under the specific facts of the instant case, which was based on the express wishes of Hannon, was within the level of reasonable performance that is required by *Strickland* and *Wiggins*." *Id*. at 1134. The district court found the state courts' resolution of this issue to be reasonable, and we agree.** Hannon cannot overcome the presumption of counsel's effectiveness nor can he show clear error in the state courts' finding that his trial counsel made a strategic decision regarding his investigation into mitigation evidence. *See Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1233 (11th Cir. 2008)(noting that the federal court gives a presumption of correctness to the state court's

factual determination whether counsel's actions were the product of a tactical or strategic decision), *cert. denied*, --- U.S. ----, 129 S.Ct. 217, 172 L.Ed.2d 171 (2008).

The record indicates that neither Hannon, his mother, his father, nor his sister ever mentioned to Episcopo that Hannon might suffer from some form of brain injury, that Hannon was neglected at home, or that he had a substantial drug and alcohol problem. Episcopo testified that he asked Hannon's parents if they had any problems with Hannon during his childhood, and they responded in the negative. (R. Ex. D-11, Vol. 11 at 2120.) Episcopo also stated that Hannon gave him no indication that he (Hannon) suffered from any mental deficiency because he participated in every aspect of his case, and he was in agreement with the decisions made regarding his defense. (*Id*. at 2140.) Episcopo commented that Hannon never exhibited any problem in processing and applying new information, and he did not exhibit any difficulty in paying attention to his case. (*Id*. at 2150.) Thus, Episcopo had no indication that a mental health evaluation would have been helpful.

Episcopo further testified that he did not investigate any potential drug abuse problem because it was not pertinent to the innocence defense that he and Hannon agreed to maintain throughout the guilt and penalty phases. (*Id*. at 2084, 2109-13.) As Episcopo stated, presenting testimony that Hannon might have had drug and alcohol problems that might have influenced him to commit the murders or hiring a mental health expert to discuss possible mental health mitigation to lessen his culpability would have been in total conflict with the penalty phase strategy of maintaining Hannon's innocence and showing that Hannon was a non-violent, hard-working, "teddy bear" type who would not have committed the crimes. Furthermore, Episcopo testified that he argued lingering doubt at sentencing as a "catch-all." (*Id*. at 2118.) **In accordance with the alibi/innocence defense that Hannon adamantly maintained, Episcopo strategically presented evidence that Hannon was not the type of person to commit such heinous crimes.**

At sentencing, Episcopo moved into consideration all the mitigation evidence submitted during the guilt phase, which included Hannon's proffer of innocence, his testimony regarding his work history and education, his roommates' testimony that he was a good person with a "teddy bear" personality, and his sister's testimony that he was dominated by Ron Richardson. In addition, Episcopo presented the testimony of Toni Acker, Barbara Hannon, and Charles Hannon, all of whom testified that Hannon could not have committed the crimes. We have noted in our circuit that this lingering doubt or residual doubt theory is very effective in some cases. *See Parker v. Sec'y, Dep't of Corr.*, 331 F.3d 764, 787-88 (11th Cir. 2003)(noting that "[c]reating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but is perhaps the most effective strategy to employ at sentencing" (internal quotation marks omitted)); *see also Blankenship v. Hall*, 542 F.3d 1253, 1280 (11th Cir. 2008)(finding pursuit of residual doubt "eminently reasonable"); *Stewart v. Dugger*, 877 F.2d 851, 856 (11th Cir. 1989) ("trial counsel made a strategic decision that in light of the atrocious nature of the offense, [the defendant's] only chance of avoiding the death penalty was if some seed of doubt, even if insufficient to constitute reasonable doubt, could be placed in the minds of the jury....Trial counsel cannot be faulted for attempting to make the best of a bad situation."); *Johnson v. Wainwright*, 806 F.2d 1479, 1482 (11th Cir. 1986)(noting the impact a lingering doubt argument has on a jury).

Thus, the record supports the state courts' finding that Episcopo made a reasoned strategic decision to limit the investigation into mitigation and to argue lingering doubt. Neither *Strickland* nor *Wiggins* requires counsel to investigate certain areas of mitigation. Moreover, Hannon's reliance upon *Rompilla* is to no avail. *Rompilla* requires "reasonable efforts to obtain and review material counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." 545 U.S. at 377, 125 S.Ct. at 2460. This directive does

not require a particular level of investigation in every case. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id*. at 383, 125 S.Ct. at 2463. **Hannon fails to acknowledge any aggravation evidence offered by the State that Episcopo did not obtain prior to the sentencing. Therefore, the district court correctly found that the state courts' conclusion that Episcopo was not deficient is not contrary to nor an unreasonable application of Supreme Court precedent.**

However, even assuming that Hannon's penalty phase counsel was deficient, Hannon cannot satisfy the prejudice prong of *Strickland*. In considering this prong, "the question is whether there is a reasonable probability that, absent the errors, the sentence... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

In sentencing Hannon to death, the trial court found three aggravating circumstances applicable to the murders of both Snider and Carter: (1) previous conviction of a violent felony; (2) the murders were committed during the commission of a burglary; and (3) the murders were heinous, atrocious, or cruel. As to victim Carter, the trial court found the additional aggravating factor that the murder was committed to avoid or prevent a lawful arrest. In mitigation, the trial court considered Hannon's guilt-phase testimony that he was a hard worker and was not present at the commission of the crimes. The trial court also considered his roommates' testimony that Hannon was a "teddy bear," his parents' and sister's testimony that Hannon was not a violent person, and the fact that Richardson was no longer facing a possible death sentence.

The Supreme Court of Florida reweighed the evidence and determined that the additional mitigation evidence would not have changed the outcome of the sentence. *See Porter v. Att'y Gen., State of Florida*, 552 F.3d 1260, 1269 (11th Cir. 2008). Because we presume the findings of fact by the state court are

correct, we consider whether the state court "unreasonably balance[d] the mitigating and aggravating factors." *Id*. at 1275. We will affirm the denial of Hannon's habeas petition if the Supreme Court of Florida's adjudication as to Hannon's penalty phase claims did not "result[ ] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law...or [did not] result[ ] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The Supreme Court of Florida found as follows:

* * *

> *[excerpt omitted, citing Hannon*, 941 So.2d at 1134-35 (footnote omitted).

We agree with the district court that the state court did not unreasonably apply *Strickland* when it weighed the factors and concluded that Hannon failed to establish prejudice from the alleged lack of investigation into mitigation evidence. The testimony failed to establish the existence of a mental health impairment, as alleged by Hannon. None of the experts was able to identify any significant brain damage, and there was contrary evidence presented by the experts. Further, no expert presented evidence to establish any nexus between Hannon's alleged mental impairment and his behavior and the crimes. In fact, Dr. Crown testified that he was not asked to assess Hannon's competency or to address whether his brain damage affected his behavior on the date of the crimes. (R. Ex. D-12, Vol. 12 at 2377.) Moreover, Dr. Sulton testified that Hannon was neither incompetent nor insane at the time of the murders. (*Id*. at 2423.)

Thus, the state court reasonably concluded that Hannon failed to demonstrate that if the mental health testimony presented during the post-conviction hearing had been presented at trial along with the other mitigation evidence that was presented during both the guilt and penalty phases of the trial there is a reasonable probability that the result of the

> **proceeding would have been different, especially in light of the gruesome nature of the manner in which the victims were murdered.** The record demonstrates that Hannon grabbed Snider from behind and slit his throat with such force that he was almost decapitated. Prior to this, Acker stabbed Snider about 14 times, and Snider's screams could be heard throughout the apartment complex. At one point, Snider yelled for Carter to call 911 because his guts were hanging out. The record also demonstrates that Carter ran from his attackers and tried to hide under the bed, but was shot six times. Despite the number of gunshot wounds, Carter did not die instantaneously. Emergency personnel testified that when they arrived, Carter was still gasping for breath. *See Hannon*, 941 So.2d at 1137. **Accordingly, the district court did not err in finding the state courts' resolution of the prejudice prong of Hannon's claim of ineffective assistance of penalty phase counsel was not unreasonable.**

Hannon, 562 F.3d at 1154-1158 (e.s.).

Hannon next filed a petition for writ of certiorari, which was denied by the United States Supreme Court on November 2, 2009. *Hannon v. McNeil*, 130 S. Ct. 504 (2009).

On November 24, 2010, Hannon filed a "Successive Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851." (PCR-2, 1/140-72). Hannon's successive motion to vacate was based on *Porter v. McCollum*, 130 S. Ct. 447 (2009). The State filed its response on December 14, 2010 (PCR-2, 2/173-225) and a case management conference was conducted on February 25, 2011. (PCR-2, 4/314-38). The circuit court issued an order summarily denying Hannon's successive motion to vacate on March 23, 2011.

(PCR-2, 2/288-91). Hannon's notice of appeal was filed on January 13, 2011. (PCR-2, 1/292-93). This appeal follows.

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 Hannon's second successive motion to vacate and providing for meaningful appellate review. *Id*., citing *Nixon*,

932 So. 2d at 1018.

SUMMARY OF THE ARGUMENT

Hannon's motion to vacate did not meet the requirements for an exception to the one-year time limitation as provided in Florida Rule of Criminal Procedure 3.851(d)(2)(B). *Porter* did not establish a new fundamental constitutional right. Hannon's successive post-conviction motion was a procedurally-barred attempt to relitigate his previously denied claim of ineffective assistance of penalty phase counsel. Further, Hannon failed to prove deficiency and does not show that the lack of deficiency was affected by the *Porter* decision. Finally, Hannon's collateral counsel was not authorized to file this successive, untimely, frivolous and procedurally-barred motion.

ARGUMENT

THE TRIAL COURT CORRECTLY SUMMARILY DENIED HANNON'S 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".

Hannon challenges the trial court's summary denial of his claim that his IAC/penalty phase claim must be re-litigated in light of *Porter v. McCollum*, 130 S. Ct. 447 (2009). The trial court's legal ruling is subject to *de novo* review. *Henyard v. State*, 992 So. 2d 120, 125 (Fla. 2008) (post-conviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*). 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 Hannon's motion as untimely, successive and procedurally barred.

The Trial Court's Order

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

> THIS MATTER is before the Court on Defendant's Successive Motion to Vacate Judgment and Sentence Pursuant to Rule 3.851, filed on November 24, 2010,

pursuant to Florida Rule of Criminal Procedure 3.851. On December 14, 2010, the State filed State's Answer to Defendant's Successive Rule 3.851 Motion to Vacate Judgment of Conviction and Sentence and, on February 25, 2011, the Court held a case management conference. After considering Defendant's motion, the State's answer, the arguments of counsel presented during the February 25, 2011 case management conference, as well as the court file and record, and applicable rules of procedure and case law, the Court finds as follows:

On July 23, 1991, a jury found Defendant guilty of two counts of first-degree murder. The jury recommended a death sentence on each count and, on August 5, 1991, the trial court sentenced Defendant to death on each count. On direct appeal, the Florida Supreme Court affirmed Defendant's convictions and death sentences. *See Hannon v. State*, 638 So.2d 39 (Fla. 1994). The United State Supreme Court denied his petition for writ of certiorari. *See Hannon v. Florida*, 513 U.S. 1158 (1995) (mem.).

On March 17, 1997, Defendant filed his initial 3.850 motion for postconviction relief and, on February 4, 2003, the postconviction court denied Defendant's motion. The Florida Supreme Court affirmed the denial of Defendant's 3.850 motion and denied his petition for writ of habeas corpus in *Hannon v. State*, 941 So.2d 1109 (Fla. 2006). Defendant's federal petition for writ of habeas corpus was also denied. *See Hannon v. Sec'y, Dep't of Corrections*, 622 F. Supp. 2d 1169 (M.D. Fla. 2007), *aff'd*, 562 F.3d 1146 (11th Cir. 2009). The United States Supreme Court denied certiorari on November 2, 2009. *See Hannon v. McNeil*, 130 SCt. 504 (2009) (mem.).

In the instant motion, Defendant again alleges — as he did in his original 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 constitutional right for a capital defendant, he asserts that *Porter* constitutes a change in law and, therefore, should be held to apply retroactively and applied in his case. [fn2] Defendant further requests that this Court hold an evidentiary hearing 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 3.85 1(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 in 1995. *See Hannon v. Florida*, 513 U.S. 1158 (1995).

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 any of the exceptions set forth 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 Hannon*, 941 So. 2d at 1124-38. **The Florida Supreme Court specifically found that counsel did not perform deficiently during Hannon' s penalty phase and the outcome of the proceedings were not prejudiced by counsel's alleged deficient performance. *See id*. 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.**
>
> fn1. *Strickland v. Washington*, 466 U.S. 668 (1984).
>
> fn2. Defendant cites to *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 raised in the instant motion.

(PCR-2, 2/288-91) (e.s.)

Analysis

The trial court correctly summarily denied Hannon's 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 Hannon did not identify any new constitutional

right created by *Porter,* nor show that *Porter* has been held to apply retroactively, his successive motion was facially insufficient, unauthorized, untimely and procedurally barred.

Hannon's motion to vacate was filed pursuant to Florida Rule of Criminal Procedure 3.851, which provides that motions for post-conviction relief must be brought within one year of the conviction and sentence becoming final unless the motion meets one of the exceptions outlined in the rule. Fla. R. Crim. P. 3.851(d)(1). Because Hannon's convictions and sentences became final in 1995, his motion was properly rejected as successive and untimely.

Hannon fails to demonstrate that he can satisfy any of the exceptions to the time limit of Rule 3.851. Instead, he asserts that *Porter* is subject to retroactive application under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), rendering his claim cognizable in post-conviction. However, his analysis is irrelevant; even satisfaction of the *Witt* retroactivity principles does not excuse a failure to comply with the procedural requirements in presenting a claim for relief. See, *Mills v. Dugger*, 574 So. 2d 63 (Fla. 1990); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821 (1987) (claim subject to time bar); *Clark v. Dugger*, 559 So. 2d 192, 194 (Fla. 1990)

(*Hitchcock* claim procedurally barred where previously considered and rejected in state and federal court). Thus, before considering *Witt*, this Court must assess the propriety of the trial court's finding this motion to be untimely and successive. Rule 3.851(d)(2) makes no exception to the time bar for consideration of cases to be applied retroactively under *Witt*. Rather, the rule only permits consideration of a new constitutional right which "has been held to apply retroactively." Rule 3.851(d)(2)(B). Hannon does not identify any new constitutional right created by *Porter* and 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); *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). 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).

Hannon's motion was barred as it raised an improper successive claim. The state courts have already considered and rejected the same claim that Hannon seeks to resurrect under the guise of *Porter*. Moreover, the state courts' rejection of this same IAC/penalty phase claim has already been reviewed for "*Porter*" error, since the federal courts expressly found that the state courts application of *Strickland* was reasonable.

Because Hannon's IAC/penalty phase claim has previously been rejected, his renewed IAC/penalty phase claim is procedurally barred. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Clark*, 559 So. 2d at 194. Piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope*, 702 So. 2d at 223; *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996).

Hannon's claim is procedurally barred and precluded by the law of the case doctrine and *res judicata*. See, *Topps v. State*,

865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits); *State v. McBride*, 848 So. 2d 287, 289-90 (Fla. 2003) (law of the case doctrine precludes relitigation of claim denied by trial court and affirmed on appeal). 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). In *Marek*, another death-sentenced inmate 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, 125 S. Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000), 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 the United States Supreme

Court had found that state courts had improperly rejected these claims. As in *Marek*, Hannon's renewed IAC/penalty phase claim was procedurally barred and was properly denied.

Even if this Court were to disregard the procedural obstacles and consider whether *Witt* requires retroactive application in an untimely motion, Hannon has not demonstrated this claim is cognizable. Hannon concludes that the *Porter* decision constitutes a change in state law, as the United States Supreme Court "repudiated" this Court's jurisprudence in resolving ineffective assistance of counsel claims under *Strickland*. To the contrary, as the court below found, *Porter* merely determined that this Court unreasonably applied *Strickland* on the facts of that particular case (V2/290).

Pursuant to *Witt*, retroactive application is only available where: (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. *Witt*, 387 So. 2d at 929-30. To meet the third element of this test, the change in law must (1) place the power to regulate certain conduct or impose certain penalties beyond the authority of the state; 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 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).

While Hannon 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. Hannon never clearly identifies what change *Porter* made, offers no purpose behind the change in law and does not mention how extensive reliance was on the allegedly old law or what the effect on the administration of justice would be.

Instead of attempting to show that an alleged change in law meets *Witt*, Hannon offers an analogy with the *Hitchcock* line of cases, suggesting that because both *Hitchcock* and *Porter* involved findings of error in Florida cases, his alleged change in law, based on *Porter,* should be treated similarly. However, the mere fact that this Court found a change in law met the *Witt* standard in one case does not dictate a finding that this Court's commission of a different error in a different case would constitute a change in law that satisfies *Witt* in a different case. This is particularly true in light of the

difference in the errors found in *Hitchcock* and *Porter* and the relationship between those errors and the *Witt* standard.

In *Hitchcock*, 481 U.S. at 398-99, the Court found that the advisory jury was instructed not to consider evidence of non-statutory mitigating circumstances. The purpose of finding this error was to permit a jury to consider evidence that 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. Because the error was in a jury instruction, determining whether that error occurred in a particular case was simple. It only required a review the jury instructions given in a particular case to see if it involved 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. 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.

Hannon apparently concludes that *Porter* rejected the standard of review in *Stephens v. State*, 748 So. 2d 1028 (2001). However, the standard of review in *Stephens* is consistent with *Strickland*, Florida courts have extensively relied on this standard of review, and the effect on the administration of justice from applying the alleged change in the standard of review 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. The differences in the analysis of changes in law in *Porter* and *Hitchcock* and their relationship to the *Witt* factors render Hannon's reliance on *Hitchcock* unpersuasive. 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. 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 even if it had changed the "standard of review" and this Court has already determined that changing the standard of review for IAC claims does not meet *Witt*, Hannon is not entitled to relief.

Moreover, *Porter* did not reject the *Stephens* standard of review, which compels deference to the lower courts' findings of fact. That standard is expressly sanctioned in *Strickland*, which specifically acknowledges that factual findings made in the course of assessing a claim of ineffectiveness are entitled to deference. *Strickland*, 466 U.S. at 698. Hannon recognizes that *Porter* did not change the law of *Strickland*, and any suggestion that Porter's finding of an unreasonable application of federal law was based on use of Stephens' standard of deference is without merit. In fact, if the United States Supreme Court determined that this Court applied an incorrect legal standard, it would not have found this Court's decision in *Porter* to be an "unreasonable application" of *Strickland*. Instead, it would have found that this Court ruled "contrary to" *Strickland* as the basis for granting habeas relief. See, *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (explaining a state court decision is "contrary to" established federal law 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, whereas the state court decision is an "unreasonable application" of established federal law 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").

In *Porter*, the United States Supreme Court never mentioned this portion of *Strickland* and made no suggestion 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 non-statutory mitigation. *Id*. at 451. Under the standard of review authorized 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 non-statutory mental health mitigation and making an

unreasonable conclusion on the mixed question of fact and law regarding prejudice. *Porter*, 130 S. Ct. 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, 109 S. Ct. 1917, 1922 (1989); *Bottoson v. Moore*, 833 So. 2d 693, 694 (Fla. 2002).

Hannon further asserts that *Porter* not only rejected the *Stephens'* standard, but repudiated this Court's analysis of prejudice under *Strickland* because it found that this Court failed to adequately "engage" with the mitigation presented in post-conviction proceedings. Hannon also appears to dispute that collateral "mitigation" might be permissibly discounted due to a conflict in the evidence or as a "double-edged sword" (such as substance abuse or a sociopathic diagnosis). Moreover, Hannon 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).

Hannon fails to acknowledge that aggravating factors are also part of the relevant analysis. Despite the fact that the only way to adequately assess whether a new jury would make a different sentencing recommendation is to "speculate" on what a jury might find truly persuasive and what a jury might discount as unsupported or simply irrelevant to a defendant's moral culpability, that is what *Strickland* requires. See, *Sears v. Upton*, 130 S. Ct. 3259, 3261 (2010) (reversing state court's refusal to "speculate" about the effect the collateral mitigation might have had at trial).

Any suggestion that *Porter* requires a court to grant relief on an IAC/penalty phase 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, is incorrect. The United States Supreme Court has addressed prejudice analyses under *Strickland* on many occasions. In *Wong v. Belmontes*, 130 S. Ct. 383, 386-91 (2009), the High 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 Supreme 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*, any claim that *Porter* requires a finding of prejudice anytime a defendant presents new mitigating evidence at a post-conviction hearing is without merit. *Porter* did not change the law which requires that a

defendant actually prove there is a reasonable probability of a different result. Furthermore, the cases cited by Hannon reflect that this Court has applied the proper standard of review, granting deference to factual findings in accordance with *Stephens*, as well as the proper prejudice inquiry, assessing whether there was any reasonable probability of a different outcome had counsel performed differently. See, *Sochor v. State,* 883 So. 2d 766, 771-72, 774 (Fla. 2004); *Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2001).

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, Hannon 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.

Hannon's claims of ineffective assistance of penalty phase counsel were denied after extensive review by this Court, not

only on a finding that Hannon did not prove prejudice, but also on a finding that Hannon did not prove deficiency. Hannon 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.

Finally, Hannon's 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. Accordingly, collateral counsel was not authorized to file this repetitive, successive, untimely, frivolous and procedurally-barred motion.

The trial court properly found that *Porter* did not compel reconsideration of Hannon's previously-denied claim of ineffective assistance of penalty phase counsel. The ruling to deny Hannon's unauthorized motion as untimely, successive and procedurally barred was correct and should be affirmed.

CONCLUSION

In conclusion, Appellee, State of Florida, respectfully requests that this Honorable Court affirm the trial court's denial of Hannon's 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 Suzanne Myers Keffer, Chief Assistant CCRC-South, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 11th day of October, 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

COUNSEL FOR APPELLEE