IN THE SUPREME COURT OF FLORIDA

ANTHONY JOHN PONTICELLI,

Appellant,

v. **Case No. SC11-877**

STATE OF FLORIDA,

Appellee.
_____ /

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal from a successive post-conviction proceeding. The trial court summarized Ponticelli's procedural history as follows:

> On August 12, 1988, this case was presented to a jury which found the Defendant guilty of first degree murder. On September 6, 1988, the Court imposed the death penalty on this Defendant. Upon appeal, the Florida Supreme Court affirmed the decision of the trial court. *Ponticelli v. State*, 593 So. 2d 483 (Fla. 1991). The Defendant's effort to obtain certiorari review by the United States Supreme Court resulted in a vacating of the judgment and a remand for further consideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). *Ponticelli v. Florida*, 506 U.S. 802, 113 S.Ct. 2926, 120 L.Ed.2d 5 (1992). Thereafter, the Florida Supreme Court determined that the Defendant's challenge was procedurally barred. *Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993). The Defendant's effort to obtain certiorari review by the United States Supreme Court was denied on October 13, 1993. *Ponticelli v. Florida,* 510 U.S. 935, 114 S.Ct. 352, 126 L.Ed.2d 316 (1993).
>
> The Defendant's initial motion for postconviction relief was filed on April 10, 1995; his second amended motion to was filed on or around January 17, 1996; his third amended motion was filed on or around April 4, 1996; his fourth amended motion was filed on or around June 23, 1997; and his fifth amended motion was filed on July 31, 1998. On September 23, 1998, the trial court held a *Huff* hearing and subsequently issued an order on November 3, 1998, denying thirty-two of the claims raised in the Defendant's motion for postconviction relief. The November 3, 1998, order also granted an evidentiary hearing on the ineffective assistance and *Brady/Giglio* issues in the remaining nine claims. Beginning July 10, 2000, the trial court held a series of evidentiary hearings, and on November 1, 2001, the trial court issued an order denying most of the Defendant's claims. On September 9, 2004, in response to an order from the Supreme Court of Florida granting the State's motion to relinquish jurisdiction,

> the trial court issued a supplemental order denying the Defendant's claim of ineffective assistance of counsel during the penalty phase. The Defendant also filed a petition to the Supreme Court of Florida for a writ of habeas corpus. The Supreme Court of Florida affirmed the trial court's denial of the Defendant's motion for postconviction relief and denied his habeas petition. *Ponticelli v. State*, 941 So. 2d 1073 (Fla. 2006).
>
> On or about May 18, 2007, the Defendant filed a Successive Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. On or around March 16, 2009, this Court denied the Successive Motion for Post-Conviction Relief. The Florida Supreme Court affirmed the denial on November 10, 2010. *Ponticelli v. State*, 49 So. 3d 236 (Fla. 2010) (table).

(V1, R234-36).

Ponticelli filed a petition for a writ of habeas corpus in the United States Middle District Court on November 2, 2007. He then filed an amended petition on November 16, 2010. The Middle District Court denied relief on March 29, 2011. On April 27, 2011, Ponticelli appealed to the Eleventh Circuit Court of Appeals, which is now pending before that Court. *Ponticelli v. Secretary, Department of Corrections, et al.,* Case No.11-11966-P.

On October 4, 2010, Defendant filed a successive motion for post conviction relief. (V1, R1-34). The State responded. (V1, R60-88). The trial judge held a case management hearing. (V3, R1-49). The successive motion was denied. (V2, R234-240).

In its denial of the successive postconviction motion, the trial judge held:

> In the motion currently before the Court, the Defendant alleges that the United States Supreme Court's decision

in *Porter v. McCollum*, 130 S. Ct. 447 (2009), represents "a fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in [the] law." Defendant's Motion, p. 4.

In arguing that *Porter* represents a "fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence" the Defendant analogizes *Porter* and its relationship to *Strickland v. Washington*, 466 U.S. 668 (1984) to that of *Hitchcock v. Dugger*, 481 U.S. 393 (1987) and its relationship to *Lockett v. Ohio*, 438 U.S. 586 (1978).

In *Lockett* v. Ohio, the U.S. Supreme Court held that mitigating factors in a capital case cannot be limited such that those imposing sentence are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett*, 481 U.S. at 604.

Prior to the U.S. Supreme Court's opinion in *Hitchcock*, the Florida Supreme Court interpreted *Lockett* to mean that a defendant merely have the opportunity to present mitigation evidence during the sentencing phase of a capital murder case. *See, e.g., Songer v. State*, 365 So. 2d 696 (Fla. 1978). However, in *Hitchcock*, the United States Supreme Court stated that the Florida Supreme Court had misunderstood what *Lockett* required. *Hitchcock*, 481 U.S. 393. The *Hitchcock* Court held that a court imposing a capital sentence must be free to consider and give effect to any mitigating circumstances that it found to be present, whether or not the particular mitigating circumstances had been statutorily identified. *Id*.

As noted in the Defendant's Motion, following *Hitchcock*, the Florida Supreme Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress ... *Lockett* claim[s] on [their] merits." *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987).

The Defendant argues that just as *Hitchcock* rejected the Florida Supreme Court's analysis in *Lockett*, *Porter* has rejected the Florida Supreme Court's analysis and application of *Strickland*.

Nowhere within the *Porter* decision, however, did the U.S. Supreme Court indicate or imply that *Porter* represents "a repudiation of *Strickland* jurisprudence" that constitutes a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that the defendant's counsel during the sentencing phase in that particular case was not ineffective for failing to introduce certain mitigating factors that could have altered the sentencing verdict against the defendant. The most logical and objective reading of *Porter* indicates that its holding stems from, and should be confined to, the specific facts of the *Porter* case itself.

Moreover, the Defendant has not cited any cases where either the United States Supreme Court or the Florida Supreme Court has indicated that *Porter* establishes a new fundamental right that is to be applied retroactively. In fact, the Florida Supreme Court has addressed a number of ineffective assistance of counsel claims since *Porter*, using the same *Strickland* framework that the United States Supreme Court used in *Porter*. *See Everett v. State*, _ So. 2d _ (Fla. 2010), 2010 WL 4007643 (Fla. Oct. 14, 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010).

Claims raised in prior postconviction proceedings cannot be relitigated in a successive postconviction motion unless the defendant can demonstrate that the grounds for relief were not known and could not have been known at the time of earlier proceeding. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003).

The Defendant argues that in light of *Porter*, it is necessary to conduct a new prejudice analysis in the guilt phase ineffective assistance of counsel claim in this case.

Since *Porter* does not establish a new fundamental right that is to be applied retroactively, the Defendant's claim is barred as untimely. Further, since the substance of the Defendant's pending motion was raised in the Defendant's postconviction motions filed in 1995 (and amended four times) that were denied by this Court and affirmed by the Florida Supreme Court, the Defendant's pending Motion is denied as inappropriately successive as

a matter of law.

> The State also presented the argument that appointed capital collateral counsel is barred from filing successive collateral motions pursuant to Section 27.711, *Fla. Stat*. The Defendant cited *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002), to dispute that contention. (The rules of professional conduct themselves prohibit an attorney from asserting frivolous or successive claims, and claims based on a change in the law applicable retroactively, or arguing for the expansion or modification of existing law were not claims which would be deemed frivolous, successive, or repetitive). The Court determines that the State's position is based on an overly broad reading of the statutory language, and the State's position is not adopted. This argument is denied.

(V2, R238-39). This appeal follows.

STATEMENT OF THE FACTS

This Court previously summarized the facts in its direct appeal opinion:

> Anthony J. Ponticelli appeals his convictions of first-degree murder and sentences of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences. According to testimony at trial, on November 27, 1987, Ponticelli was invited to watch video movies at the home of Keith Dotson, whom Ponticelli met while at a convenience store that afternoon. Ponticelli arrived at Dotson's house between 6:30 and 7:00 p.m. and stayed thirty to forty-five minutes. Later that evening he returned to Dotson's house in an automobile. Upon his return, Ponticelli told Dotson's cousin, Ed Brown, that there were two people in the car whom he intended to kill for money and cocaine. Ponticelli showed Brown a gun and told him he would need a ride back to his house. Brown agreed to give him a ride and gave Ponticelli Dotson's telephone number. When the phone later rang several times, Dotson and his friends intentionally did not answer it. Around 11:30 p.m., Ponticelli returned to Dotson's house in a taxi cab. He told those

present that he had killed the two people in the car for cocaine and $ 2,000. Ponticelli asked Brown if he thought that a person would live after being shot in the head. Although Brown told him he did not think he had to worry about it, Ponticelli expressed concern, telling Brown that he had heard one of his victims moaning. After Ponticelli washed his clothes to remove blood stains, Brown drove him home. According to testimony of Timothy Keese, who lived with Ralph and Nick Grandinetti, on the evening of November 27, Keese saw Ponticelli at the Grandinetti brothers' home around 7:30 p.m. The three were discussing money Ponticelli owed the brothers for cocaine he had purchased from Ralph. Ponticelli told the brothers that he would sell whatever cocaine they had and then settle up with them. The brothers agreed to take Ponticelli to sell the cocaine. Keese left the house; and when he returned around 10:00 p.m. the Grandinettis were not at home. The brothers did not return that night. The Grandinettis were found in their car the following day. Nick was found badly injured with his head on the floorboard of the car. He was gasping for air and kicking his foot when found. Nick's head was covered with blood and there was blood spattered all over the car. Ralph was found dead in the back seat. According to the medical examiner, Ralph died within one to two minutes of being shot once in the back of the head at close range. Nick Grandinetti survived until December 12, 1987. An autopsy revealed that he had suffered two gunshot wounds to the back of the head. There were a number of bruises on the back and side of his head that were consistent with blunt trauma to the head. The skin on the right ear was peeling and red which was consistent with hot pressure being placed on the ear for an extended period of time. Nick died of cardiac arrest which was secondary to the gunshot wounds. Ponticelli's best friend, Joseph Leonard, testified that around 9:30 p.m. on November 27, Ponticelli came to Leonard's house and returned a gun Leonard had given him. Ponticelli told Leonard that he "did Nick" which Leonard understood to mean that Ponticelli had shot and killed Nick Grandinetti. Ponticelli asked Leonard and his roommate what he should do with

the bodies. Leonard further testified that the next day Ponticelli told him that the Grandinettis had been harassing him about money that he owed them and were not going to let him leave their house until they got their money. The three left in a car. Ponticelli directed the brothers around the back roads trying to sell their cocaine. He then shot them both in the head. After dropping the gun off at Leonard's house, he had a flat tire so he left the bodies and took a cab home. Leonard eventually gave the police the murder weapon and a statement. After the murder weapon was given to police and statements from Leonard and his roommate were taken, Ponticelli was arrested. There was also testimony that on the Sunday after the shootings, Ponticelli burned some clothes in Ronald Halsey's back yard. When asked why he was burning the clothes, Ponticelli told Halsey that he had shot two men whom he owed money for cocaine. He told Halsey that he shot both of the men in the back of the head and threw one of them in the back seat. The other man was still moving so he hit him a couple of times in the head with the butt of the gun. He parked the car when he had a flat tire and took several grams of cocaine and $900 in cash. After his arrest for the murders, Ponticelli discussed the murders with a cellmate, Dennis Freeman, who testified at trial. According to Freeman, Ponticelli asked him if he would help him dispose of some evidence and drew Freeman a map showing the location of the evidence. The map had Keith Dotson's name and telephone number on it. Ponticelli told Freeman that he made several phone calls from the victims' house to get them to believe that he was trying to sell cocaine for them. He thought about killing the brothers at their home but there were other people there, so he asked the brothers to take him to Keith Dotson's house to sell the cocaine. After leaving Dotson's house, they drove to a place where he killed them. Ponticelli told Freeman that he shot the driver first with two shots to the head and then shot the passenger once in the head. One of the men was still alive. Ponticelli then drove to Joey Leonard's house, where he told Leonard and his roommate what he had done. He gave Leonard the gun and discussed disposing of the bodies. After

> he left Leonard's house, he had a flat tire, so he abandoned the car. He took a cab to Dotson's house where he washed his clothes which he later burned. Ponticelli told Freeman that he shot the brothers because he wanted to rob them of cocaine and money. Ponticelli was charged with two counts of first-degree murder and one count of robbery with a deadly weapon. At the close of the state's case-in-chief, a judgment of acquittal was entered as to the robbery charge. The jury found Ponticelli guilty of both counts of first-degree murder and recommended that he be sentenced to death for each murder. The trial court sentenced Ponticelli to death in connection with both convictions. The court found two aggravating factors [FN1] applicable to both murders and a third factor [FN2] applicable to the murder of Nick Grandinetti and two mitigating factors in connection with both murders. [FN3]
>
> FN1 The murders were committed for pecuniary gain, and the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
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> FN2 The murder was especially heinous, atrocious or cruel.
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> FN3 In mitigation the court found that Ponticelli had no significant history of prior criminal activity, and that he was twenty years old at the time of the offense.

Ponticelli v. State, 593 So. 2d 483, 486-487 (Fla. 1991).

SUMMARY OF ARGUMENTS

Ponticelli's successive Rule 3.851 motion is time-barred and does not come within any exception to Rule 3.851(d)(2). The motion was an attempt to relitigate his previously-denied IAC/penalty phase ineffective assistance of counsel claims under the guise that *Porter v. McCollum*, 130 S. Ct. 447 (2009) constitutes an alleged

"change in law" which should be applied retroactively. Despite Ponticelli's insistence to the contrary, *Porter* is no more than the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), to the particular facts of that case. The Supreme Court did not hold that the *Porter* decision established a new fundamental constitutional right that is to apply retroactively.

The trial court held Ponticelli's motion untimely, successive, and procedurally barred under Rule 3.851, Florida Rules of Criminal Procedure. These rulings should be affirmed.

Last, collateral counsel is not authorized to file the instant successive motion. See, § 27.702(1) and § 27.711(1)(c), *Fla. Stat.*

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 comprehensive written order disclosing the basis for the summary denial of Ponticelli's successive motion to vacate and providing for meaningful appellate review. *Id., citing Nixon*, 932 So. 2d at 1018.

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN DENYING THE SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

Ponticelli claims that he is entitled to relief from his convictions and sentences of death because this Court "did not perform a proper *Strickland* analysis for the reasons explained in *Porter v. McCollum.*" *Initial Brief*, at iii. For the reasons set out below, that claim is not a basis for relief. Ponticelli's position is he is entitled to rehearing on his ineffective assistance of counsel claims because *Porter* changed the *Strickland* prejudice analysis and applies retroactively.

Arguments are waived.

Despite the length of his brief, Ponticelli has not identified

the “errors” this Court is supposed to have committed. In fact, the only case-specific argument is found at pages 65-75, and Ponticelli’s “analysis under *Porter*” consists of a single page beginning at the bottom of page 74 and continuing to page 75. That cursory treatment is insufficient to present an argument for consideration.

Because Ponticelli fails to specifically identify the alleged errors, describe the factual determination he believes was necessary, or even set out the facts he believes are pertinent to the claim, he has waived the argument. *See Cooper v. State*, 856 So. 2d 969, 977 n. 7 (Fla. 2003) (“Cooper ... contend[s], without specific reference or supportive argument, that the ‘lower court erred in its summary denial of these claims.’ We find speculative, unsupported argument of this type to be improper, and deny relief based thereon.”); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla.1990) (“The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues.”). *See also Johnston v. State*, 63 So.3d 730 (Fla. 2011); *Victorino v. State*, 23 So. 3d 87, 103 (Fla. 2009) (“We have previously stated that ‘[t]he purpose of an appellate brief is to present arguments in support of the points on appeal.’” (*quoting Duest v. Dugger*, 555 So. 2d 849, 852 (Fla.1990)).

Arguments have no merit.

In affirming the denial of postconviction relief in the original collateral litigation, this Court held:

> Ponticelli alleges his counsel rendered ineffective assistance during the penalty phase of his trial because defense counsel failed to adequately investigate the penalty phase and also made a number of errors in its presentation. "In order to prove ineffective assistance of counsel, a petitioner must demonstrate both that counsel's performance was deficient and that the deficiency caused prejudice." *Suggs,* 923 So. 2d at 429 (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Deficiency requires a showing that "counsel's representation 'fell below an objective standard of reasonableness,'" *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (*quoting Strickland*, 466 U.S. at 688, 104 S.Ct. 2052), and prejudice in regard to the penalty phase requires a showing that "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sochor v. State*, 883 So. 2d 766, 771 (Fla. 2004) (*quoting Strickland*, 466 U.S. at 695, 104 S.Ct. 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. Failure to establish either deficiency or prejudice results in the denial of the claim. *Ferrell v. State*, 918 So. 2d 163, 172-73 (Fla. 2005). Because the trial court denied these claims after an evidentiary hearing, this Court "review[s] the deficiency and prejudice prongs as 'mixed questions of law and fact subject to a de novo review standard but ... the trial court's factual findings are to be given deference.'" *Arbelaez v. State,* 898 So. 2d 25, 32 (Fla. 2005) (*quoting Sochor*, 883 So. 2d at 781). Applying this standard to the case at hand, we deny these claims.
>
> 3. Analysis
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> In its September 9, 2004, order, the trial court denied this ineffectiveness claim. Regarding the lay witness testimony, the trial court found that Ponticelli "did not

establish that he was prejudiced by counsel's failure to offer [this] testimony." The court recognized that much of this testimony was cumulative to that presented at trial since "counsel incorporated the witnesses from the guilt phase into consideration in the penalty phase." Furthermore, to the extent the testimony at the evidentiary hearing differed from testimony at trial, it would have had a negative effect on Ponticelli's case. As the trial court explained:

> Instead of being a young man who naively experimented with drugs for a short period of time, the lay witnesses presented at the evidentiary hearing portray the Defendant as a man who escaped the ill effects of drugs for a substantial period of time in Florida and then returned to a habit he knew was evil.

The trial court found that Ponticelli had not established that evidence available to counsel at the time of trial demonstrated Ponticelli had used cocaine at the time of the crime. Furthermore, regarding the mental health expert testimony, the trial court summarized the testimony presented at the evidentiary hearing and found Dr. Conger's testimony to be the most credible. These findings are supported by competent, substantial evidence; therefore, we affirm the trial court's denial of this claim. While we find that defense counsel's investigation into mitigating evidence was inadequate and constituted deficient performance, Ponticelli has not established that this deficiency prejudiced him.

a. Deficient Performance

Ponticelli has established that counsel's penalty phase investigation and presentation were deficient. "An attorney has a duty to conduct a reasonable investigation for possible mitigating evidence." *Jones v. State*, 855 So. 2d 611, 618 (Fla. 2003). In determining whether counsel's investigation was reasonable, a court must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Ferrell*, 918 So. 2d at 170 (*quoting Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527).

Counsel's testimony at the evidentiary hearing and our

review of the record reveal that counsel's penalty phase investigation consisted of interviewing Ponticelli's parents and asking Dr. Mills to testify. Counsel apparently failed to contact the persons suggested by Ponticelli's parents, made no effort to obtain any of Ponticelli's school or medical records, and did not request that Dr. Mills evaluate Ponticelli again before testifying at the penalty phase. While we recognize that a mental health evaluation is not required in every *1096 case, the record shows that Dr. Mills' penalty phase testimony was based on the fifteen-minute evaluation he conducted on Ponticelli before the competency hearing and his review of the record. FN24 *Cf. Arbelaez*, 898 So. 2d at 34-35 ("A competency and sanity evaluation as superficial as the one [the mental health expert] performed ... obviously cannot serve as a reliable substitute for a thorough mitigation evaluation."); *see also Sochor,* 883 So. 2d at 772 (finding counsel deficient when counsel introduced the reports of three mental health experts who testified during the guilt phase but did not "specifically instruct [the experts] to examine and evaluate [the defendant] for the purpose of establishing mitigating evidence").

> FN24. The record also reveals that Dr. Mills' competency evaluation lasted only fifteen minutes because Ponticelli refused to speak with him. We do not find that Dr. Mills' competency evaluation was inadequate, only that counsel should not have considered it "a reliable substitute for a thorough mitigation evaluation." *Arbelaez*, 898 So. 2d at 34; *cf. Porter v. State,* 788 So. 2d 917, 922-23 (Fla. 2001) (recognizing that a defendant's failure to speak with the mental health expert whom defense counsel sent to evaluate him was a significant factor in leading the court to deny an ineffectiveness claim).

Counsel's stated reason for not investigating this potential mitigation was that he did not know how to conduct a penalty phase. Inexperience is not an excuse for deficient performance. *See Rose v. State*, 675 So. 2d 567, 573 (Fla. 1996) (finding counsel deficient despite the fact that counsel's poor handling of the case was due, in part, to his inexperience). Furthermore, counsel's failure to investigate cannot be justified

simply because Ponticelli refused to cooperate. While we recognize that Ponticelli willfully chose not to speak with defense counsel, there is no indication that he asked counsel not to pursue an area of mitigation or otherwise precluded a proper investigation. *Cf. State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000) (finding counsel deficient for not investigating potential mitigation, in part, because although some of the defendant's statements indicated he did not want counsel to pursue this line of mitigation, the defendant did "not instruct [counsel] or preclude him from investigating further or presenting mitigating evidence"). Moreover, counsel's decision to present positive character evidence during the guilt phase does not free him from the strict duty to conduct a reasonable investigation into the penalty phase of trial. *See Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001) (*citing Riechmann*, 777 So. 2d at 350, for the proposition that "[a]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"); *see also Lewis*, 838 So. 2d at 1113 (recognizing that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated"). Defense counsel's failure to conduct an adequate investigation resulted in a deficient penalty phase presentation. He presented only one witness at the penalty phase and asked this witness to base his testimony on a hypothetical that was not entirely accurate. FN25 We agree with Ponticelli that counsel's penalty phase investigation and presentation were deficient.

> FN25. Ponticelli asked Dr. Mills to assume that Ponticelli had no history of cocaine abuse until Ponticelli returned from his visit to New York in October 1987. The unrefuted testimony at the evidentiary hearing revealed that Ponticelli was heavily abusing cocaine by the age of sixteen.

b. Prejudice

Even though Ponticelli has established that defense counsel's penalty phase performance was deficient, he has not established that this deficiency prejudiced him. As in *Arbelaez*, 898 So. 2d at 35, Ponticelli has failed to present the "fairly strong evidence" of mitigation that

would be required to overcome the significant aggravators and the overwhelming amount of evidence convicting Ponticelli of these homicides. A number of witnesses testified at trial that Ponticelli first announced his plan to kill the Grandinettis; then, after following through on this plan, confessed that he did it and asked for help in covering it up. Furthermore, two of the three aggravating factors found for Nick Grandinetti's death, *i.e.,* HAC and CCP, have been recognized as "two of the most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999). FN26

> FN26. The CCP aggravator was established for Ralph Grandinetti's murder alone, and the "committed for pecuniary gain" aggravator was established for both murders.

The lay witness testimony presented at the evidentiary hearing is certainly not sufficient to establish mitigators that outweigh these aggravators. As the trial court recognized, the testimony presented at the evidentiary hearing was largely cumulative to that presented at trial and to which defense counsel referred in his closing statement during the penalty phase. During the guilt phase, the jury heard a number of witnesses testify to Ponticelli's positive character and the effect of cocaine on his life. Ponticelli's father testified that Ponticelli worked a part-time job during high school and was a "good kid." John Turner, Ponticelli's close friend, testified that he was with Ponticelli every day after Ponticelli returned from his visit to New York and that Ponticelli used cocaine almost constantly during this time. Turner and Ponticelli's father also testified to Ponticelli's paranoid behavior when he was under the effects of cocaine, and Brian Burgess testified at trial that Ponticelli was acting nervous on the night he appeared at Dotson's. At the penalty phase, which occurred nine days after the guilt phase ended, defense counsel specifically connected the testimony regarding Ponticelli's paranoid behavior to his cocaine use. Counsel led Dr. Mills to testify that this paranoia was indicative of the mental health mitigators. On numerous occasions, this Court has denied ineffectiveness claims when the evidence presented at the evidentiary hearing was merely cumulative to that presented at trial. *See, e.g., Holland v. State*, 916 So. 2d 750, 757 (Fla. 2005),

cert. denied, 547 U.S. 1078, 126 S.Ct. 1790, 164 L.Ed.2d 531 (2006). FN27 This is true even when the mitigating evidence is presented during the guilt phase. *See Gorby v. State,* 819 So. 2d 664, 675 (Fla. 2002) (denying ineffectiveness claim based on counsel's failure to provide a witness to testify at the penalty phase when the witness's testimony was largely cumulative to the testimony of a mental health expert presented during the guilt phase). Therefore, Ponticelli has failed to establish that there is a reasonable probability that the result of the penalty phase proceeding would have been different if defense counsel had conducted a reasonable investigation into the lay witness testimony. *See Sochor*, 883 So. 2d at 774 (deferring to the trial court's factual finding that even if defense counsel had adequately investigated the penalty phase, he would not have been able to present evidence substantially different than that presented at the penalty phase).

> FN27. The only relevant piece of the lay witness testimony presented at the evidentiary hearing, but not at trial, was Ponticelli's cocaine use as an adolescent. Given the fact that Dr. Mills had no difficulty testifying to the mental health mitigation without it, we find no reasonable probability that this additional evidence would have led the trial court to establish either mitigator or find that these mitigators outweighed the weighty aggravators in this case.

Ponticelli has also failed to establish prejudice in regard to the mental health testimony. “In assessing prejudice, ‘it is important to focus on the nature of the mental health mitigation’ now presented.” *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000) (*quoting Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998)). First, neither Dr. Crown's nor Dr. Herkov's testimony was sufficient to establish mental health mitigation which would, in all reasonable probability, have outweighed the significant aggravators in this case. Neither testified that Ponticelli suffered from a major mental illness or was mentally retarded. FN28 *See Suggs*, 923 So. 2d at 435 (finding defendant was not prejudiced by failure to obtain an additional psychological evaluation in preparation for the penalty phase when postconviction expert found defendant suffered from a significant

neurological impairment in the executive functions of the brain but had an “average IQ [of 102]” and “did not suffer from any major psychiatric disorder”). Furthermore, Herkov's and Crown's testimony that Ponticelli's brain damage rose to the extent necessary to establish the mitigators was based on findings that were directly contradicted by Dr. Krop and Dr. Conger. After weighing all the expert testimony, the trial court found Dr. Conger's testimony most credible, and we defer to the trial court's finding of fact when faced with conflicting expert testimony. *See Sochor*, 883 So. 2d at 783.

> FN28. Dr. Poettner, who evaluated Ponticelli in preparation for the evidentiary hearing, determined Ponticelli's verbal IQ was 102. This was not refuted at the evidentiary hearing.

Second, our finding that Ponticelli has not established that counsel's deficient investigation prejudiced him is supported by the fact that the mental health expert testimony presented at the evidentiary hearing is largely cumulative to Dr. Mills' testimony presented at the penalty phase. *See Walls v. State*, 926 So. 2d 1156, 1170 (Fla. 2006) (denying claim that defense counsel was ineffective for not presenting an expert to testify to the effect of Ritalin on the defendant's behavior and for not presenting a pharmacologist to testify to the effects of drug and alcohol abuse because this testimony was merely cumulative to that presented at trial). Dr. Mills unequivocally testified at trial that both statutory mental health mitigators applied in Ponticelli's case and that Ponticelli's paranoid behavior was consistent with an extreme cocaine addiction. While Dr. Crown and Dr. Herkov may have presented more compelling testimony at the evidentiary hearing, this is not dispositive. *See Rivera v. State,* 859 So. 2d 495, 504 (Fla. 2003) (*citing Asay,* 769 So. 2d at 986, for the proposition that “counsel's reasonable mental health investigation and presentation of evidence is not rendered incompetent ‘merely because the defendant has now secured the testimony of a more favorable mental health expert’”). There is no reasonable probability that these experts would have led the trial court to find the mitigating factors at the time of trial. The trial court did not find the mitigators from Dr. Mills' testimony because there was no evidence Ponticelli had used cocaine on the

day of the offenses, and none of the evidence presented at the evidentiary hearing to refute this finding was available to counsel at the time of trial, even after a reasonable investigation. FN29 Therefore, we find that Ponticelli has not established that defense counsel's deficient investigation and presentation at the penalty phase prejudiced him.

> FN29. As we discussed in regard to Ponticelli's Giglio and Brady claims, Ponticelli refused to speak with defense counsel regarding his cocaine use; counsel repeatedly asked Keesee if he had seen Ponticelli use cocaine, and Keesee denied it; and the West Virginia boys testified that they first met Ponticelli when he appeared at Dotson's immediately before the crimes. Turner's deposition testimony does not indicate that he saw Ponticelli use cocaine immediately before the murders.

C. Ineffective Assistance of Counsel During the Guilt Phase

Ponticelli also claims that defense counsel provided ineffective assistance during the pretrial and guilt phases of trial by: (1) failing to adequately investigate and present evidence that Ponticelli was incompetent at the time of trial; (2) taking inconsistent positions regarding Ponticelli's guilt by arguing both voluntary intoxication/insanity and reasonable doubt, and then failing to present evidence of voluntary intoxication; (3) conceding the truthfulness of the West Virginia boys' testimony, Freeman's statements, and the state investigator's credibility; (4) allowing the state investigator to be excluded from the rule prohibiting one witness from hearing another witness's testimony; and (5) failing to object to improper prosecutorial comments, failing to object to the admission of inflammatory and prejudicial evidence, and failing to effectively cross-examine witnesses. FN30 Our analysis begins with the testimony presented at the evidentiary hearing that is relevant to this claim. Next, we provide the standard of review and applicable law; and finally, we apply this standard to each of Ponticelli's claims. For the reasons explained below, we deny each claim.

FN30. Ponticelli's brief on appeal begins with nearly a full page of clauses alleging instances where defense counsel was ineffective. We address only those that were supported with a complete claim later in the brief. *See Whitfield v. State*, 923 So. 2d 375, 378-79 (Fla. 2005) (summarily affirming the trial court's denial of claims raised as conclusory statements in the appellant's brief).

1. Facts Presented at the Evidentiary Hearing

The testimony at the evidentiary hearing regarding this claim involved defense counsel's strategy during the guilt phase and the issue of whether Ponticelli was competent to stand trial.

On July 5, 1988, defense counsel filed a motion for a psychiatric evaluation after Ponticelli declared he would not discuss this case with defense counsel because he had "turned the case over to God." The trial court appointed three mental health experts who evaluated Ponticelli before trial and testified at an August 2, 1988, competency hearing. Two of these experts, Dr. Harry Krop and Dr. Rodney Poettner, testified that they believed Ponticelli was competent. As discussed earlier, Dr. Robin Mills testified that Ponticelli was not competent. FN31

FN31. As we recognized earlier, Dr. Mills' report was based on a fifteen-minute evaluation. The report stated that it was "essentially impossible" to record Ponticelli's testimony because there were breaks in it, and it did not make sense. At the evidentiary hearing, Dr. Krop testified that Ponticelli had intentionally refused to speak with Dr. Mills because a fellow inmate had advised against it.

At the evidentiary hearing, Dr. Krop testified that for the first time in his professional career, he had changed his opinion regarding a defendant's competency. Dr. Krop testified that in 1988 Ponticelli presented a difficult case because he appeared candid, oriented, and coherent and did not exhibit any significant mental health issues or resentment toward the State or his defense counsel.

FN32 Yet, Ponticelli adamantly refused to speak with counsel about his case. On September 9, 1999, Dr. Krop evaluated Ponticelli a second time, and based on a report prepared in 1997 by the agency responsible for Ponticelli's adoption and the testimony at the evidentiary hearing regarding Ponticelli's significant cocaine use at the time of the crimes, Dr. Krop testified that there was sufficient evidence to find Ponticelli incompetent at the time of trial. Dr. Krop testified that he believed Ponticelli's religious convictions rose to the level of a delusion that prevented Ponticelli from communicating with counsel at the time of trial. Dr. Krop did not believe his original evaluation was inadequate, but rather that the new information helped sway a difficult case.

> FN32. Dr. Krop interviewed Ponticelli's parents before issuing his report in 1988, and Ponticelli's parents confirmed this diagnosis. They told Dr. Krop that Ponticelli had not exhibited any significant medical problems or difficulties at birth. Dr. Krop's report indicated that Ponticelli appeared well-nourished, did not exhibit loose associations, tangentiality, thought block, poor concentration, or poor attention span, and, according to Dr. Poettner's findings, had a verbal IQ of 102. While Ponticelli admitted he had used crack cocaine in Florida, he did not discuss the extent of the cocaine use. Dr. Krop's initial report contradicted both Dr. Mills' report and Dr. Herkov's findings, and Dr. Herkov recognized that Dr. Krop's report was based on an evaluation that occurred sixteen days before trial.

Dr. Michael Herkov and Dr. Barry Crown each agreed with Dr. Krop's findings at the evidentiary hearing. Dr. Herkov testified that Ponticelli's refusal to speak with defense counsel was due to a religious psychosis or delusion of reference that went above and beyond a jailhouse conversion and was likely spurred by the initial stress of being incarcerated. FN33 Dr. Barry Crown testified that Ponticelli suffered from moderate brain damage, most likely caused by the deprivation of oxygen at birth and exacerbated by Ponticelli's cocaine use, which rose to the level of “cocaine kindling.” FN34

On cross-examination, Dr. Herkov testified that he could not render a specific diagnosis twelve years after the fact, and he believed Ponticelli understood the adversarial process and the charges against him. Dr. Crown admitted that he did not interview other witnesses or consider Ponticelli's behavior at the time of the homicides when he made this diagnosis.

> FN33. Dr. Herkov defined a delusion as a fixed, false belief that is not rational. Dr. Herkov based this diagnosis on Ponticelli's statements that he believed God spoke to him by making his arm tingle and Ponticelli's reports of euphoria (i.e., a burst of incredible energy that leads one to sleep and eat very little). Dr. Herkov also testified that Ponticelli's willingness to cooperate with postconviction counsel was evidence that his delusion was waning now that the initial stress of incarceration had worn off.
>
> FN34. Dr. Crown testified that “cocaine kindling” is a disorder in which the brain's neurotransmitters are altered in such a way as to allow the cocaine to have a greater effect in a shorter period of time. This is very prevalent in chronic cocaine users, especially those who had some brain damage before using cocaine and who began using cocaine during adolescence. Crown testified that his report was supported by Ponticelli's reports that he suffered headaches immediately following his incarceration.

The State's expert, Dr. Thomas Conger, disagreed with the other mental health experts. In Dr. Conger's opinion, Ponticelli exhibited unusual religious beliefs, but these beliefs did not constitute a delusion. Dr. Conger pointed to portions of the record that indicated Ponticelli had the ability to communicate with counsel. For example, Ponticelli stated, “That's false right there” to defense counsel when Dr. Krop made a statement at the competency hearing that Ponticelli disagreed with, and *1101 defense counsel's notes indicated that Ponticelli had called counsel from jail and provided him with the name of two potential mitigating witnesses.

Three former cellmates also testified to Ponticelli's strange behavior at the time of trial. They testified that they often saw Ponticelli pacing in his cell, at times with a cloth over his head, and constantly reading his Bible and praying. An inventory of his jail cell at the time of trial revealed eight Bibles; several friends and family members testified that Ponticelli wrote them long letters from jail that were fragmented and uncharacteristically religious; and defense counsel testified that Ponticelli's bizarre behavior continued throughout trial. Ponticelli's sister testified at the evidentiary hearing that Ponticelli's father was fundamental in his religious beliefs, but she had never known Ponticelli to be.

There was also testimony regarding defense counsel's strategy in this case and whether counsel was ineffective for not further investigating Ponticelli's mental health at the time of the crimes. FN35 Counsel testified that he had two theories in regard to Ponticelli's defense: (1) an acquittal based on insanity or cocaine psychosis; and (2) second-degree murder based on the voluntary intoxication defense. At the time of trial, counsel truly believed he had all the evidence available to him, and he argued the alternative theories of cocaine psychosis and reasonable doubt during his opening statement because he had no evidence Ponticelli was under the influence of cocaine at the time of the offense. He testified that he would not have conceded that Ponticelli met the West Virginia boys four hours before the homicide if he had known the testimony presented at the evidentiary hearing. He also testified that he would not have made statements allegedly vouching for the state investigator's credibility if he had known the state investigator had withheld evidence. FN36 Counsel also admitted that he did not follow up on Dr. Branch's suggestion to obtain a clinical mental health expert to testify at trial, even though Dr. Poettner gave him the name of an expert before trial.

> FN35. Much of the testimony presented at the evidentiary hearing regarding Ponticelli's mental health is summarized in the discussion of the facts surrounding Ponticelli's ability to establish ineffective assistance of counsel during the penalty phase.

> FN36. The appellant's brief alleges that trial counsel vouched for the state investigator's credibility many times at trial, but it fails to provide a specific citation. Because the trial court's November 1, 2002, order cites to the following two statements, we will address this part of Ponticelli's claim.

The first statement came in the context of a situation in which defense counsel objected to the State's motion to introduce an exhibit during the state investigator's testimony. Defense counsel stated:

> Judge I think it's pretty clear the [exhibit] has not been tied to the defendant by anything or anybody else .... I'm certain [the state investigator] found it out there where he says he found it, but that particular [exhibit] has not been tied to the defendant in this charge. It's immaterial, it's irrelevant, and at this point hasn't been shown to be either material or relevant.

The second cited statement came during defense counsel's cross-examination of the state investigator when defense counsel stated:

> You probably couldn't remember Investigator .... This thing is 135 pages long, so I'm not surprised that you don't remember. Let me see if I can refresh your memory a little bit.

2. Standard of Review and Applicable Law

Claims of ineffective assistance of counsel during the pretrial and guilt phases are reviewed under *Strickland,* 466 U.S. 668, 104 S.Ct. 2052. To establish this claim, a defendant must show that counsel's performance was deficient in that it “fell below an objective standard of reasonableness,” *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527 (*quoting Strickland*, 466 U.S. at 688, 104 S.Ct. 2052), and that “counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Failure to establish either deficiency or prejudice results in a denial of the claim. *Ferrell*, 918 So. 2d at 172-73. Because the trial court denied these claims after

an evidentiary hearing, this Court "review[s] the deficiency and prejudice prongs as 'mixed questions of law and fact subject to a de novo review standard but ... the trial court's factual findings are to be given deference.'" *Arbelaez,* 898 So. 2d at 32 (*quoting Sochor*, 883 So. 2d at 781).

3. Analysis

For the reasons explained below, we find that none of the five allegations Ponticelli raises here constitute ineffective assistance under *Strickland.*

Ponticelli's first claim alleges that counsel was ineffective for waiting until a month before trial to file his motion for psychiatric evaluation and for failing to obtain jail records and to interview cellmates who would have provided additional information regarding Ponticelli's strange behavior. This claim is without merit. Ponticelli has not presented sufficient evidence to overcome the strong presumption that counsel's representation was reasonable. *See State v. Duncan*, 894 So. 2d 817, 823 (Fla. 2004) (*citing Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, and recognizing that "[t]he defendant alone carries the burden to overcome the presumption of effective assistance"). He has provided no evidence that it was unreasonable for defense counsel to file his motion for a psychiatric evaluation a month before trial; in fact, counsel testified that he filed this motion as soon as he noticed Ponticelli consistently refusing to speak with him about the case. Furthermore, Ponticelli has provided no evidence that the mental health evaluations were inadequate because of lack of time or inadequate information. While the mental health experts who testified at the evidentiary hearing disputed one or two of the tests conducted or the results obtained in some of the 1988 mental health evaluations, none testified that all of the evaluations were inadequate. In fact, the 1988 evaluations took a similar amount of time and relied on similar tests as those conducted in preparation for the evidentiary hearing. Even Dr. Krop, who changed his opinion at the evidentiary hearing based on information largely not available to defense counsel at the time of trial, testified that his initial evaluation was adequate. Furthermore, there is no evidence Ponticelli's former cellmates revealed anything significant that the experts did not know when they

evaluated Ponticelli. The cellmates' testimony was not a factor Dr. Krop pointed to when he decided to change his opinion. Having established neither deficiency nor prejudice, Ponticelli has not established counsel was ineffective in regard to this claim.

Ponticelli's second claim alleges that counsel was ineffective for taking inconsistent positions during opening argument without adequately investigating and supporting his voluntary intoxication defense. Ponticelli claims this action was per se ineffective because, in essence, counsel conceded Ponticelli's guilt.

In its November 3, 1998, order, the trial court found that defense counsel did not concede that Ponticelli committed the homicides, but the trial court permitted Ponticelli to question defense counsel about making a potentially inconsistent argument*1103 at the evidentiary hearing. Defense counsel testified that he presented alternative positions in his opening argument because he planned to present both defenses but was unable to do so when Dr. Branch's testimony was excluded because Ponticelli refused to discuss his cocaine use around the time of the crimes. The trial court ultimately denied this claim, finding counsel's approach was reasonable strategy and that Ponticelli's refusal to speak about his drug use prevented counsel from establishing the voluntary intoxication defense. This finding is supported by competent, substantial evidence; therefore, we affirm the trial court's holding that Ponticelli has failed to establish deficiency. *See Brown v. State*, 846 So. 2d 1114, 1125 (Fla. 2003) (*citing Johnson v. State*, 769 So. 2d 990, 1001 (Fla. 2000), for the proposition that “this Court will not second-guess counsel's strategic decisions on collateral attack”); *see also Brown v. State*, 894 So. 2d 137, 146 (Fla. 2004) (*quoting Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000), for the proposition that “the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions”).

We also affirm the trial court's finding that even if defense counsel was deficient, Ponticelli has not established prejudice. Neither Dr. Krop, Dr. Crown, nor Dr. Herkov, who had all the evidence Ponticelli claims defense counsel was deficient for not obtaining, testified at the evidentiary hearing that Ponticelli was

insane at the time of the murders. Moreover, because Dr. Branch was not qualified to testify to cocaine psychosis even if counsel could have provided him with the evidence presented at the evidentiary hearing regarding Ponticelli's significant drug history, he would not have been able to testify to this at trial. The fact that the jury did not hear his testimony does not undermine our confidence in the verdict. We affirm the trial court's denial of this claim.

Ponticelli's third claim alleges that counsel was ineffective for conceding the truthfulness of the West Virginia boys' testimony, the state investigator's credibility, and the truth of Freeman's statements. Ponticelli claims this action, in effect, entered a guilty plea without Ponticelli's consent and was per se ineffective. The trial court denied Ponticelli's claim regarding the West Virginia boys' testimony because even if counsel vouched for their credibility, there is no indication this was unreasonable because counsel did not know their statements were untruthful. The trial court also denied Ponticelli's claim regarding the state investigator because defense counsel did not vouch for the state investigator's credibility, and even if he did, Ponticelli has not established that this was unreasonable or resulted in prejudice. The trial court's findings are supported by competent, substantial evidence.

Counsel was not aware that Brown and Burgess testified falsely, as both men testified at the evidentiary hearing that they never told defense counsel about the cocaine party. Furthermore, defense counsel's statements to and about the state investigator during trial do not indicate that defense counsel was vouching for the investigator's credibility, and Ponticelli has not established that the investigator was not credible.

Finally, in regard to Freeman's statements, the trial court did not address this claim, but we find it without merit. As we explained in regard to Ponticelli's *Brady* and *Giglio* claims, Freeman's credibility and capacity for truthfulness were significantly impeached by defense counsel at trial. Moreover, his testimony was corroborated by the evidence presented at trial. We do not find counsel's conduct deficient given the context of these statements and the circumstances at trial. Therefore, we deny this claim.

Ponticelli's fourth claim alleges that counsel was ineffective for allowing the state investigator to be excluded from the rule of witness sequestration. In its November 1, 2002, order, the trial court determined that defense counsel had made a strategic decision not to object to the state investigator's presence in the courtroom because defense counsel had no basis to object. Ponticelli has not established that this strategy was unreasonable. The trial court has great discretion regarding the rule of sequestration, and this Court has more than once upheld the trial court's decision to permit a state detective to sit through trial. *See, e.g., Knight v. State*, 746 So. 2d 423, 430 (Fla. 1998) (finding trial court did not abuse its discretion in granting State's motion to allow a detective to remain in the courtroom when investigator was a fact witness); *see also Randolph v. State*, 463 So. 2d 186, 191 (Fla. 1984) (recognizing that the "rule of witness sequestration is not an absolute rule," and that trial court did not abuse its "sound judicial discretion" in allowing the state investigator to remain in the courtroom because the investigator was not "a principal actor in the crime," or a witness whose testimony "was actually suggested by what he heard in the courtroom").

Furthermore, even if counsel should have objected, Ponticelli has not established that the presence of the state investigator prejudiced him. While Turner testified at the evidentiary hearing that he felt intimidated by the state investigator's presence, there is no evidence the investigator did anything at trial that affected Turner's testimony. In fact, the state investigator's presence did not prevent Turner from testifying to Ponticelli's significant cocaine use in the weeks immediately preceding the homicides. Ponticelli has not established that the state investigator would have been excluded upon defense counsel's objection or that a reasonable probability exists that this exclusion "led to an improper conviction." *Randolph*, 463 So. 2d at 192 ("We cannot say that the presence of [the detective] in the courtroom led to an improper conviction."). Therefore, his claim was properly denied.

Ponticelli's fifth claim alleges counsel was ineffective for failing to object to improper prosecutorial comments and the admission of inflammatory and prejudicial

> evidence lacking in relevance and for failing to competently cross-examine witnesses. These claims are legally insufficient because Ponticelli has not alleged how he was prejudiced by each of these deficiencies. *See Waterhouse v. State,* 792 So. 2d 1176, 1181 n. 10 (Fla. 2001) (finding procedurally barred claims couched as conclusory allegations of ineffective assistance of counsel were facially insufficient where the defendant did not allege how he was prejudiced by the failure to object).

Ponticelli v. State, 941 So. 2d 1073, 1094-1104 (Fla. 2006)

Ponticelli fails to explain how any misapplication of the *Strickland* standard would impact his case. *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011) ("To successfully prove a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied."). Ponticelli's claim fails for lack of prejudice because:

(1) The successive motion was untimely, successive, and procedurally barred;

(2) *Porter* not a retroactive change in the law; and

(3) This Court's *Strickland* analysis on prejudice is not flawed.

Untimely, successive, and procedurally barred.

Ponticelli's convictions and sentences became final on October 13, 1993, when the United States Supreme Court denied his petition for certiorari review. *Ponticelli v. Florida*, 510 U.S. 935, 114 S.Ct. 352, 126 L.Ed.2d 316 (1993). *Fla. R. Crim. P.* 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for

writ of certiorari by the United States Supreme Court"). Ponticelli's successive Rule 3.851 motion, filed in 2010, is untimely filed – by almost twenty (20) years.

No exception to the time bar exists. The ineffectiveness-of-counsel issues were decided by this Court in 2006 and are procedurally barred. As this Court has held, attempts to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Ponticelli cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well-established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Ponticelli is attempting to do here, his penalty phase ineffectiveness claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

Although there is an exception to the time limitation in 3.851(d)(2)(B), which would restart the clock for a new fundamental constitutional right that has been held to apply retroactively,

Porter is not a new right.

***Porter* is not a retroactive change in law.**

Porter is merely the application of *Strickland* to the facts of that case -- it does not provide any cognizable basis to relitigate Ponticelli's penalty phase ineffectiveness claim anew. *Porter* did not change the application of the ineffective assistance of counsel analysis under *Strickland*. Moreover, this Court has not been misapplying *Strickland*'s standard of review –- the standard of review announced in *Stephens* is expressly compelled by *Strickland*.

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. Instead, since *Porter* was decided, both this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of ineffective assistance of counsel. *See, Harrington v. Richter*, 131 S.Ct. 770 (2011); *Premo v. Moore*, 131 S.Ct. 733 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388 (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).

Applying Rule 3.851(d) to Ponticelli's dual burden under *Strickland*, he would have to show that *Porter* established a new fundamental constitutional right on *both* prongs of *Strickland* and that this new right has been held to apply retroactively. In *Witt*,

387 So. 2d at 929-30, this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or Florida Supreme Court has made a significant change in constitutional law, which so drastically alters the underpinnings of a defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30.

A court considering retroactivity under *Witt* looks at three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. *See Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001) (applying retroactively *Carter v. State*, 706 So. 2d 873 (Fla. 1997) where this Court held that a judicial determination of competency is required in certain capital post-conviction cases); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), wherein this Court announced a revised standard of review for ineffectiveness claims); *Chandler v. Crosby*, 916 So. 2d 728, 729-730 (Fla. 2005) (concluding that all three factors in the Witt analysis weighed against the retroactive

application of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and emphasizing that the new rule did not present a more compelling objective that outweighs the importance of finality) *Id*. at 729-730, *citing State v. Glenn*, 558 So. 2d 4, 7 (Fla. 1990).

Ponticelli fails to explain how his suggested "change" in law allegedly satisfies any of the three factors identified in *Witt*. Ponticelli fails to even identify the purpose served by the new case; the extent of the reliance on the "old law" statewide; and the sweeping impact on the administration of justice from retroactive application of his alleged "change in law."

Instead, Ponticelli asserts that *Porter* should be retroactive because *Hitchcock v. Dugger*, 481 U.S. 393 (1987) was held to be retroactive. (*Initial Brief* at 50-54), citing *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987), *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987), *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987). Ponticelli also cites to *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), in which this Court held that *Hitchcock* claims should be presented to the trial court in a Rule 3.850 motion for post-conviction relief. (*Initial Brief* at 47). Unlike *Hall,* Ponticelli has not identified any case in which *Porter* has been declared a change in law which is retroactive. This successive motion to vacate was unauthorized and facially insufficient.

The trial court rejected Ponticelli's arguments on retroactivity and concluded:

> The Florida Supreme Court has held that a change in law can be raised in a postconviction: motion if it "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance ..." *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980).
>
> In the motion currently before the Court, the Defendant alleges that the United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009), represents "a fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence, arid as such *Porter* constitutes a change in [the] law." Defendant's Motion, p. 4.
>
> In arguing that Porter represents a "fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence" the Defendant analogizes *Porter* and its relationship to *Strickland v. Washington* 466 U.S. 668 (1984) to that of *Hitchcock v. Dugger*, 481 U.S. 393 (1987) and its relationship to *Lockett v. Ohio,* 438 U.S. 586 (1978).
>
> In *Lockett v. Ohio*, the U.S. Supreme Court held that mitigating factors in a capital case cannot be limited such that those imposing sentence are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett*, 481 U.S. at 604.
>
> Prior to the U.S. Supreme Court's opinion in *Hitchcock,* the Florida Supreme Court interpreted *Lockett* to mean that a defendant merely have the opportunity to present mitigation evidence during the sentencing phase of a capital murder case. *See, e.g., Songer v. State,* 365 So. 2d 696 (Fla. 1978). However, in *Hitchcock,* the United States Supreme Court stated that the Florida Supreme Court had misunderstood what *Lockett* required. *Hitchcock,* 481 U.S. 393. The *Hitchcock* Court held that a court imposing a capital sentence must be free to consider and give effect to any mitigating circumstances that it found to be present, whether or

not the particular mitigating circumstances had been statutorily identified. *Id*.

As noted in the Defendant's Motion, following *Hitchcock,* the Florida Supreme Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987).

The Defendant argues that just as *Hitchcock* rejected the Florida Supreme Court's analysis in *Lockett, Porter* has rejected the Florida Supreme Court's analysis and application of *Strickland.*

Nowhere within the *Porter* decision, however, did the U.S. Supreme Court indicate or imply that *Porter* represents "a repudiation of *Strickland* jurisprudence" that constitutes a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that the defendant's counsel during the sentencing phase in that particular case was not ineffective for failing to introduce certain mitigating factors that could have altered the sentencing verdict against the defendant. The most logical and objective reading of Porter indicates that its holding stems from, and should be confined to, the specific facts of the Porter case itself.

Moreover, the Defendant has not cited any cases where either the United States Supreme Court or the Florida Supreme Court has indicated that *Porter* establishes a new fundamental right that is to be applied retroactively. In fact, the Florida Supreme Court has addressed a number of ineffective assistance of counsel claims since *Porter,* using the same *Strickland* framework that the United States Supreme Court used in *Porter*. *See Everett v. State,* _ So. 2d _ (Fla. 2010), 2010 WL 4007643 (Fla. Oct. 14, 2010); *Schoenwetter v. State,* 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010).

Claims raised in prior postconviction proceedings cannot be relitigated in a successive postconviction motion unless the defendant can demonstrate that the grounds for relief were not known and could not have been known at the time of earlier proceeding. *See Wright v. State,* 857

So. 2d 861, 868 (Fla. 2003).

> The Defendant argues that in light of *Porter*, it is necessary to conduct a new prejudice analysis in the guilt phase ineffective assistance counsel claim in this case.

(V2, R236-238).

That result is correct. Nowhere in the *Porter* decision did the United States Supreme Court ever indicate or imply that *Porter* represents a significant change in law to be applied retroactively.

However, even if *Porter*, as construed by Ponticelli, arguably could be considered a "change" in the law, which the State categorically disputes, it would still not be retroactive under *Witt*. In making a comparison to *Hitchcock*, Ponticelli ignores the significant difference between the change in law in *Hitchcock* and the alleged change here. *Hitchcock* dealt with an invalid jury instruction at the penalty phase, 481 U.S. at 398-99; and, in *Hitchcock*, the United States Supreme Court found that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances. Ponticelli does not allege any violation of the principle at issue in *Hitchcock* -- the statewide use of a standard jury instruction which unconstitutionally precluded consideration of mitigation at the penalty phase.

In *Hitchcock*, a determination of whether *Hitchcock* error had occurred was easily made by simply reviewing only those cases which

involved the same penalty phase jury instruction. In contrast, the alleged change in law that Ponticelli argues occurred here requires re-litigating all post-conviction cases in which fact-specific claims of ineffective assistance of counsel were previously adjudicated under *Strickland*'s two-prong test in order to determine whether any possible prejudice prong error, based on *Porter*, either might – or might not - have occurred.

Given this difference in the application of the Witt factors, the mere fact that the standard jury instruction claim in *Hitchcock* was found to be retroactive does not establish that Ponticelli's alleged "change" in law is one which should be applied retroactively. This reliance on the retroactivity of *Hitchcock* is misplaced.

Ponticelli has failed to meet any of the prongs of the retroactivity test. Neither the United States Supreme Court nor this Court deemed *Porter* a change of law. It is not new law and there is no miscarriage of justice. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland* at 2069. *Porter* is very fact-specific and the Supreme Court certainly did not find every decision of this Court regarding ineffective assistance of counsel to be unreasonable.

As a practical matter, there probably will always be some

"newer" United States Supreme Court case addressing claims of ineffective assistance of counsel. Indeed, in 2009, the same year that *Porter* was decided, the United States Supreme Court also issued a series of other decisions addressing *Strickland* claims -- *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009), *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) and *Wong v. Belmontes*, 558 U.S. ----, 130 S.Ct. 383 (2009). However, a criminal defendant may not relitigate previously-denied *Strickland* claims simply because there are more recent decisions addressing claims of ineffective assistance of counsel. In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected a similar attempt to relitigate a death-sentenced inmate's penalty phase ineffectiveness claim under the guise of recently decided caselaw. In *Marek*, the defendant argued that his previously raised claim that trial counsel failed to conduct an adequate investigation of Marek's background for penalty phase mitigation should 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). Marek argued that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This Court decisively rejected Marek's attempt to relitigate his previously-denied *Strickland* claims. *See*

Marek, 8 So. 3d at 1128 (concluding that "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*"). Here, as in *Marek*, the existence of a "newer" case applying *Strickland* does not equate with a change in the law which is retroactive.

Porter did not change the standard of review and this Court has not been misapplying *Strickland*'s standard of review. Ponticelli's claim is legally insufficient and without merit.

***Porter* is limited to the facts in that case.**

In *Porter v. McCollum*, the state courts did not decide whether *Porter*'s counsel was deficient under *Strickland*. As a result, the United States Supreme Court assessed the first prong of *Porter*'s penalty phase ineffectiveness claim *de novo*. *Porter*, 130 S.Ct. at 452. The United States Supreme Court found that trial counsel failed to uncover and present any evidence of *Porter*'s mental health or mental impairment, his family background, or his military service; and, "although *Porter* may have been fatalistic or uncooperative," that did not "obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 S.Ct. at 453. The United States Supreme Court determined that trial counsel was deficient under the first prong of *Strickland* and emphasized that if *Porter*'s counsel had been effective, the judge

and jury would have learned of "(1) *Porter*'s heroic military service in two of the most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Porter*, 130 S.Ct. at 454.

In addressing this Court's adjudication of the second -– prejudice -- prong of *Strickland*, the United States Supreme Court reiterated that the test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. And, "[t]o assess that probability, [the Court] consider[s] the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- and reweigh[s] it against the evidence in aggravation." *Porter*, 130 S.Ct. 447, 453-54 (quotation marks and brackets omitted). The United States Supreme Court ruled that this Court's decision that *Porter* was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation was unreasonable because it "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 130 S.Ct. at 454-455. For example, the mental health evidence, which included Dr. Dee's

testimony regarding the existence of a brain abnormality and cognitive defects, was not considered in this Court's discussion of nonstatutory mitigation. *Porter*, 130 S.Ct. at 455, n. 7. In addition, the United States Supreme Court found that this Court unreasonably discounted evidence of *Porter*'s childhood abuse and combat military service.

The fundamental constitutional right at issue in *Porter* was the Sixth Amendment right to effective assistance of counsel, a constitutional right that had been established decades before in *Strickland* v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). *Porter* was merely an application of the *Strickland* standard to a particular case. Because there has been no change in law, Randolph failed to meet any exception under Fla. R. Crim. P. 3.851(d)(2)(B).

This Court's *Strickland* analysis is not "flawed."

Ponticelli nevertheless suggests that because *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (Initial Brief at 31). *Sochor* cited to *Porter* as a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence. *Sochor*, 883 So. 2d at 783, citing *Porter*. Again, this finding is in accordance with the

mixed standard of review applied in *Strickland*.

In *Stephens*, although this Court announced a revised standard of appellate review for claims of ineffective assistance of counsel, it expressly stated that a change in the appellate standard of review for claims of ineffective assistance of does not satisfy *Witt*. *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001) (concluding that *Stephens* was not retroactive under *Witt)*. Since Ponticelli apparently concludes that the same law has changed here, he cannot show how *Witt* would be applicable to such a change when it was not in *Stephens*. *See Johnston*, 789 So. 2d at 267. Accordingly, any alleged change would not be retroactive. In addition, this Court has refused to allow relitigation of previously denied *Strickland* claims under the guise of more recent caselaw. *See, Marek*, 8 So. 3d at 1128. In other words, this Court has previously determined that the alleged "changes in law" suggested by Ponticelli do not satisfy *Witt.*

The courts of this state have extensively relied upon the *Stephens* standard of review and continue to do so today. *See Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011) (stating, "[b]ecause ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent substantial evidence, but reviewing the

circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771–72 (Fla. 2004) (*citing Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999)).” Thus, if *Porter*, as construed by Ponticelli, is deemed a retroactive “change” in the law, the effect on the administration of justice would be overwhelming. Criminal defendants will file untimely and successive motions for post-conviction relief seeking to relitigate claims of ineffective assistance of counsel which have long been final. The courts of this State would be required to review stale records to reconsider these claims. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply *Carawan v. State,* 515 So. 2d 161 (Fla. 1987) retroactively).

Ponticelli’s reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) also is misplaced. In *Sears*, the Georgia post-conviction court found trial counsel’s performance deficient under *Strickland*, but then stated that it was unable to assess whether counsel’s inadequate investigation might have prejudiced Sears. *Id*. at 3261. In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings about the evidence presented. *Id*. at 3261. Sears does not support

the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

Ponticelli is not entitled to relief.

Even if *Porter* arguably changed the law and the alleged change was retroactive and the claim was not procedurally barred, which the State emphatically disputes, Ponticelli 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. As the United States Supreme Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at 697.

Ponticelli's penalty phase ineffectiveness claim – based on the alleged failure to investigate mitigation - was denied specifically based on the failure to establish prejudice. Ponticelli argues no basis for reversal of that decision other than his disagreement with it. This Court's "no-prejudice" finding is correct, and *Porter* does not supply any basis to revisit the denial of relief.

Collateral Counsel was not authorized to file this successive motion to vacate.

Pursuant to §27.702, "[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." The Florida Supreme 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, 1068-1069 (Fla. 2007).

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

> "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, registry counsel was not authorized to file this patently frivolous, repetitive and successive motion.

Ponticelli is not entitled to any relief because: collateral counsel is not authorized to file the unauthorized successive motion to vacate; the motion is time-barred; *Porter* did not change the law; and, any alleged change in law would not apply retroactively. The trial court's order summarily denying Ponticelli's successive motion to vacate should be affirmed.

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Linda McDermott, Esquire, McClain and McDermott, P.A., 20301 Grand Oak Blvd., Suite 118-61, Estero, FL 32928 on this ____ day of October, 2011.

BY:_____
Senior Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New Roman 12 point.

_____
Kenneth S. Nunnelley