

IN THE SUPREME COURT OF FLORIDA

CLARENECE JAMES JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1263

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 159089

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Jones." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The State uses "**DR**" to indicate the record of the trial proceedings as it was constructed for the direct appeal to the Florida Supreme Court; "**DT**" designates the transcript for that direct appeal. "**PR**" references the record of the various state postconviction proceedings; "**PT**" indicates a postconviction transcript. Each symbol is preceded by any applicable volume number and followed by any distinguishing dates and applicable page number(s).

Because there are multiple records for postconviction proceedings, the **year** of the document will be added to citations to postconviction records subsequent to 1999. For example, the order attacked in this appeal (and attached to this brief) is found at 1PR2011 159-172, that is, volume 1 of the postconviction record for an order dated in 2011 and found on pages 159-172 of the record.

"**-Supp**" is added to indicate a supplemental record.

"**IAC**" references the claim of ineffective assistance of counsel.

"**IB**" designates Jones' Initial Brief, followed by any applicable page number(s).

Unless the contrary is indicated, bold-typeface and bold-underlined emphasis is supplied.

Unless otherwise indicated, cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

DATE	NATURE OF EVENT
1988	Tallahassee police officer Ernest Ponce de Leon murdered in the line of duty (<u>See, e.g.</u> , 8DT 1441, 1492, 1510-16);
1988	Five-count Indictment of Jones for the (1) First Degree Murder of Officer Ponce de Leon, (2) Attempted First degree Murder of Officer Greg Armstrong, (3) Armed Robbery of Officer Ponce de Leon's firearm, (4) Armed Burglary of a Dwelling of L.M. Black, and (5) Armed Kidnapping of Sidney Earl (R 1-3); subsequently, Count 5 of the Indictment was dropped (1DR 160), and a count charging Jones with Aggravated Assault on Sidney Earle was added (2DR 214);
1989	Jones convicted as charged of the Indictment counts of (1) First Degree Murder, (2) Attempted First Degree Murder, (3) Armed Robbery, and (4) and also of the Aggravated Assault (1DR 128-33); 183-90)
1989	Jury recommended that Jones be sentenced to death by a vote of 11 to 1 (1DR 161; 21DR 3545-47);
1989	Trial court sentenced Jones, including death (1DR 183-90), finding five aggravating factors, combining two of the aggravators, (2DR 224-26) and evaluating various proposed mitigating factors (2DR 227-29);
1991	<u>Jones v. State</u> , 580 So.2d 143 (Fla. 1991), affirmed Jones' conviction and, while rejecting one of the aggravators,

	also affirmed the death sentence;
1991	<u>Jones v. Florida</u> , 502 U.S. 878 (1991), denied certiorari from this Court's 1991 direct-appeal affirmance;
1992	Jones filed a postconviction motion pursuant to Fla.R.Crim.P. 3.850 (1PR 1-31);
1994	Jones filed an amended postconviction motion (1PR 32-96);
1996	Jones filed another amended postconviction motion (1PR 97-162), including allegations of IAC (ineffective assistance of counsel) alleging deficient preparation and presentation of mitigation in the penalty/sentencing phase (1PR 101-121; <u>see also</u> 1PR 142-56);
1996	Postconviction evidentiary hearing (4PR 18-153, 5PR 158-330);
1997	Trial court's written order (2PR 223-33; (<u>attached</u> to this brief and at 1PR2011 97-107) denying the postconviction motion and rejecting the IAC penalty/sentencing phase claim (2PR 226-30);
1999	<u>Jones v. State</u> , 732 So.2d 313 (Fla. 1999)(<u>attached</u> to this brief and at 1PR2011 108-18), unanimously affirmed the Circuit Court's denial of the postconviction motion and held, concerning the IAC/Penalty phase issue that neither of Strickland's prongs was established;
2000	Jones filed a federal habeas petition in the Northern District case #4:00cv96-RH, which remains pending;
2001	<u>Jones v. Moore</u> , 794 So.2d 579 (Fla. 2001), denied a habeas petition that raised a number of claims, including IAC appellate counsel;
2002	Successive postconviction motion alleging mental retardation (1PR2002 1-19); "Supplement" alleging a violation of <u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428 (2002) and adding argument to the mental retardation claim (1R2002 21-34);
2002	Trial court's order summarily denying the 2002 successive postconviction motion (1R2002 79-83);
2004	This Court's Order in SC03-37 relinquishing jurisdiction for an evidentiary hearing on the 2002 mental retardation claim; subsequently, in 2004, Jones filed a mental-retardation motion that cited to Fla.R.Crim.P. 3.203 (1PR-

	Supp2004 1-28);
2005	Circuit Court's evidentiary hearing on Jones' mental retardation claim (PT-Supp2005 1-152) and Circuit court's order denying relief on that claim (1PR-Supp2005 121-24; (<u>attached</u> to this brief);
2007	This Court's unpublished Order in SC03-37 affirming the trial court's denial of mental retardation and <u>Ring</u> claims;
2010	Jones filed another successive postconviction motion and asserted <u>Porter v. McCollum</u> , __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), and alleged that fraudulent evidence of a G.E.D. had been used in prior proceedings (1PR2010 1-31, 37-67); this motion will be referenced in this brief as the <u>2010 Successive Motion</u> ;
2011	Another <u>Huff</u> hearing, this time on the 2010 successive postconviction motion at issue here (2PR2010 195-219);
2011	Trial court's order denying the 2010 successive postconviction motion (1PR2011 159-172; <u>attached</u> to this brief), at issue here; Notice of Appeal (1PR2011 173-74), resulting in this case.

Guilt-Phase Facts.

Jones v. State, 580 So.2d 143, 144-45 (Fla. 1991), summarized the basic guilt-phase facts:

On July 7, 1988 Tallahassee police officers Greg Armstrong and Ernest Ponce de Leon responded to a call regarding a car parked behind a laundromat. They found Henry Goins, Clarence Jones, and Irvin Griffin, escapees from a Maryland prison, and Beverly Harris, a woman traveling with the trio, seated in the car. While Armstrong checked on the driver's identification and Ponce de Leon tried to run a computer check on the car's license tag,[FN1] one of the car's passengers fired two shots at Ponce de Leon. Armstrong then engaged the car's occupants in a gun battle. Jones picked up Ponce de Leon's service weapon, and he and Griffin, both of whom were wounded, fled the scene on foot. They broke into a nearby home, where police captured them a short time later. Officer Ponce de Leon was dead at the scene from two gunshot wounds to the chest.

FN1. Authorities later established that the car had been stolen.

The state indicted Goins, Jones, and Griffin for, among other things, first-degree murder. Goins negotiated a guilty plea to second-degree murder in exchange for a thirty-year prison sentence, and the state conducted a joint trial of Jones and Griffin. Harris testified at trial for the state and identified Jones as the person who shot Ponce de Leon. Jones testified on his own behalf that an unknown drug dealer who met them at the laundromat shot the officer. The jury convicted both Jones and Griffin as charged.

Penalty Phase-Facts and Related Postconviction & Appellate Determinations.

The State will contend infra that Jones' "ARGUMENT I" re-argues an IAC penalty phase claim that has been litigated and resolved at the trial and appellate levels against Jones, thereby barring the argument here. Therefore, the State extensively excerpts from prior pertinent judicial determinations.

Jones v. State, 732 So.2d 313, 315-16 (Fla. 1999), summarize some basic facts surrounding the penalty phase of the trial:

The trial record reflects the following. Before commencement of the penalty phase, appellant's lawyer moved the trial court to appoint Dr. Lawrence Anis to help in developing evidence of statutory and nonstatutory mitigation. At that time, Dr. Anis, a clinical psychologist who specialized in forensic psychology, served as the chief psychologist for the Corrections Mental Health Institution at the Florida State Hospital. Dr. Anis was also engaged in private practice and taught part-time at Florida State University. The trial court appointed Dr. Anis.

Dr. Anis testified during the penalty phase that he had a credible and sufficient information base from which to make an evaluation and render opinions concerning appellant's mental and emotional status. Dr. Anis testified that, in preparing to make an evaluation and render his opinion with respect to appellant's mental and emotional status, he reviewed appellant's extensive prison records, a copy of appellant's GED, and copies of various certificates awarded to appellant. The prison records were important because appellant had been incarcerated for a major portion of his adult life.[FN3]

FN3. Record evidence reveals that appellant was born in 1955. In November 1975, appellant was convicted of attempted robbery and sentenced to eight years' imprisonment. Appellant was paroled in

August 1978. In May 1979, appellant was convicted of a handgun violation and sentence to five years' imprisonment. Appellant was released in January 1983. Appellant was again incarcerated in the state of Maryland in December 1983, when he was sentenced to concurrent twenty-five year terms on three counts of robbery with a deadly weapon and to a concurrent five-year term on one count of attempted robbery with a deadly weapon. Appellant escaped from this detention in June 1988, approximately two weeks before committing this murder.

Dr. Anis also interviewed appellant. Dr. Anis testified that appellant was very cooperative during their meetings. Appellant openly discussed: (1) the early separation of his parents; (2) his father's early death and the circumstances surrounding the death; (3) having to deal with moving back with his mother, who lived with an abusive boyfriend; (4) drug use and addiction (marijuana, LSD, heroin, barbiturates, and cocaine); (5) alcohol use and addiction; (6) juvenile arrests; (7) his brother being stabbed to death; (8) another brother dying of a heart attack; (9) his mother dying of a heart attack; (10) his worries about congenital heart problems; (11) his daughter's crib death in 1984, while he was incarcerated in Maryland; and (12) his HIV. Based on this history and his review of the relevant documents, Dr. Anis testified in the penalty phase that: appellant's life leading to his 1983 incarceration was one of being either under the influence of drugs or trying to obtain drugs for that purpose; his evaluation of appellant was that he suffers from feelings of helplessness and hopelessness; and that a person with the history and psychological impairment of appellant is often dominated by others. An IQ test administered while appellant was in public school established that appellant was in the 'moderately retarded' range. An IQ test administered by Dr. Anis indicated that appellant scored in the higher 'dull-normal' range. Dr. Anis testified that appellant's IQ was in the third percentile, between 70 and 75.

Jones v. State, 580 So.2d 143, 146 (Fla. 1991), itemized the trial court's determinations concerning aggravation and mitigation and struck one aggravator:

[T]he trial court found that five aggravating circumstances, 1) committed while under sentence of imprisonment, 2) prior conviction of violent felony, 3) committed during a robbery, 4) committed to avoid or prevent arrest, and 5) victim was a law enforcement officer engaged in performing official duties, had been established. Because factors 4 and 5 overlapped to some degree in this case, the court considered those factors collectively. Factors 1, 2, and 4 and 5 are supported by the evidence. Number 3, however, is not. Taking the officer's service weapon, technically an armed robbery, was only

incidental to the killing, not the reason for it. See *Parker v. State*, 458 So.2d 750 (Fla.1984), cert. denied, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). Reversal is not warranted, however, because the trial court stated: 'This circumstance is not determinative; the sentence of death would be imposed even if it were not applied.'

The court found that none of the statutory mitigating circumstances applied and, after carefully examining the nonstatutory mitigating evidence, found that no mitigators had been established.

On direct appeal, Jones, 580 So.2d at 146 (case citations omitted), continued its summary and review of the penalty/sentencing:

The court found that none of the statutory mitigating circumstances applied and, after carefully examining the nonstatutory mitigating evidence, found that no mitigators had been established. Jones argues that the court should have found statutory and nonstatutory mitigators, but '[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, we have no authority to reweigh that evidence.' ... Although cultural deprivation and a poor home environment may be mitigating factors in some cases, sentencing is an individualized process. We cannot say the trial court erred in finding the evidence presented insufficient to constitute a relevant mitigating circumstance. ... Therefore, the trial court's conclusion that death is the appropriate penalty in this case is affirmed.

Jones, 732 So.2d at 316-19, reviewed a trial court order denying postconviction relief on IAC penalty-phase claims and summarized the pertinent trial court's postconviction proceedings as follows:

The record of the postconviction evidentiary hearing before the trial court reflects the following. Clifford L. Davis represented appellant during all facets of the trial and the subsequent appeal. At the time of appellant's trial, Davis had been a member of The Florida Bar for seventeen years and had substantial experience in practicing criminal defense law. Additionally, Davis had previously tried twelve to fifteen capital cases, with approximately six of those cases reaching penalty phase verdict.

Davis testified at the postconviction hearing that upon his appointment to represent appellant he began preparing for the possibility of a penalty phase proceeding by questioning appellant regarding his family history and background. Davis corroborated much

of what appellant told him through appellant's extensive prison records. Appellant told Davis he had little contact with his family over the years. Appellant did, however, give Davis the names of three relatives living in the Baltimore area who could be contacted. Davis testified that he telephoned these relatives but that they were not interested in helping appellant. Davis testified that the relatives he spoke to refused his offer to fly them to Tallahassee at no personal expense. Davis did not attempt to compel their attendance. Davis concluded he had enough information regarding appellant's background which Davis obtained from appellant and appellant's prison records. Also, based on his telephone conversations with appellant's relatives, Davis concluded that their testimony would not be particularly helpful to appellant.

Regarding Dr. Anis, Davis testified that he requested this appointment in order to present mitigation evidence. Davis provided Dr. Anis with his case file. Davis testified that Dr. Anis did not indicate the information in the file, coupled with appellant's interview, was insufficient to conduct a competent mental evaluation.[FN4] Davis testified that he had no question regarding appellant's mental health because appellant was attentive and focused and did not exhibit any signs of mental disturbance. Davis testified he did not question Dr. Anis regarding statutory mitigating circumstances because Dr. Anis indicated his opinion was that none existed.

FN4. In fact, Dr. Anis indicated to the contrary during his penalty phase testimony, as evidenced by the following question and answer:

Q. [by Davis] Dr. Anis, did you have sufficient materials in conjunction with the interviews that you had of [appellant] to feel comfortable with the evaluation and the opinions that you gave to this jury?

A. I am comfortable with the evaluation, the written evaluation that I gave you and to the State attorney and with the statements I've made today.

During the postconviction evidentiary hearing, appellant presented the testimony of Cecilia Alfonso, a clinical social worker; Jethro Toomer, a psychologist; Barry Crown, a neuropsychologist; Scott Folk, a physician; Audrey Sullivan, appellant's sister; and Carolyn Felton, the mother of appellant's son. Based on her review of the relevant records and her interviews with appellant, Alfonso opined that appellant was 'intrapsychically affected by his childhood and the environment and the traumas that he was subjected to.' After interviewing appellant and administering a battery of tests, Dr. Toomer opined that two statutory mitigating circumstances applied to appellant in that (1) appellant was under extreme mental or emotional disturbance at the time he committed the murder, and (2) appellant's

capacity to conform his conduct to the requirements of the law was substantially impaired. Dr. Toomer also stated his opinion that appellant showed signs of an underlying neurological impairment. Dr. Crown concurred with Dr. Toomer's diagnosis regarding the two statutory mitigating circumstances. Further, Dr. Crown concluded that appellant suffers and did suffer at the time of the crime from organic brain damage and auditory selective attention disorder. Scott Folk, a physician who specializes in the treatment of HIV and acquired immunodeficiency syndrome (AIDS), testified that appellant is HIV positive and about the nature of HIV and the resulting AIDS disease. Audrey Sullivan and Carolyn Felton testified regarding appellant's impoverished childhood. Felton added that a psychiatrist diagnosed appellant's son as mentally disturbed.

After considering this evidence and argument based on this evidence, the trial court denied appellant the relief he requested in his ineffective assistance claims, concluding that appellant failed to meet either prong of the Strickland test. The trial court order states in pertinent part:

In several parts of the postconviction motion, the defendant has directly alleged a claim of ineffective assistance of counsel. He contends that his trial counsel, Clifford Davis, was ineffective during the penalty phase because he had not adequately investigated the potential mitigating circumstances (Claim II); that trial counsel was ineffective in that he failed to file a pretrial motion for change of venue (Claim V); and that trial counsel was ineffective during the penalty phase because he failed to obtain an adequate mental health evaluation of the defendant (Claim XI). These claims must be resolved by the standard set in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There the Court held that a criminal defendant asserting a claim of ineffective assistance of counsel has the burden of showing (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. In summary, the defendant in this case has not established either element of the test.

During the evidentiary hearing, the defendant's postconviction counsel focused on the claim that his trial lawyer failed to investigate potential mitigating evidence and that he failed to obtain an adequate mental health evaluation. However, the record is clear that defense counsel did obtain a mental health evaluation and that he did present the testimony of the expert during the penalty phase. The problem is that the evaluation did not yield a favorable result. Trial counsel explained during the evidentiary hearing that the reason he did not ask the expert a direct question regarding the existence of the statutory mitigating circumstances is that the expert had told him

beforehand that he could not testify that those factors existed in the defendant's case. Trial counsel cannot be faulted for refraining from asking a question when he knew the answer would be harmful to his client. Nor can it be said that trial counsel was ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case.

The defendant also claims that trial counsel failed to present testimony by family witnesses who could have provided mitigating evidence. This argument was refuted by Attorney Davis' testimony that the relatives he was able to locate were not willing to come to Florida to attend the trial and that he did not think it was appropriate to compel their attendance. Moreover, the arguments Davis actually made in mitigation with the evidence available to the jury are generally the same as those the defendant would have made with the testimony of the additional witnesses.

The court rejects the defendant's claim that trial counsel should have advised the jury that the defendant was infected with the AIDS virus. During the hearing on the postconviction motion, the defendant presented testimony regarding the nature of his illness and his prognosis. This evidence may have evoked sympathy among those jurors who would have been persuaded that the death penalty was unnecessary because the defendant would eventually die a painful death in any event, but the fear and stigma that some jurors might have associated with AIDS out of ignorance in 1989 may have outweighed the potential sympathy for the defendant. The defense attorney did not refer to the defendant's illness during the guilt phase and minimized its effect during the penalty phase. The court is not prepared to say that these decisions amount to ineffective assistance of counsel.

Mr. Davis obtained the defendant's medical records from the Department of Corrections in Maryland, he called family members in an effort to get them to testify in the penalty phase hearing, and he secured the services of a mental health expert who did testify in the penalty phase hearing. Unlike the attorney in *Rose v. State*, 675 So.2d 567 (Fla.1996), who was unfamiliar with the capital sentencing process and conducted no investigation at all, the attorney in this case did make a reasonable effort to investigate and present the available mitigating evidence.

Postconviction counsel did discover additional evidence of mitigation, but the defendant has failed to show that it would have made a difference in the outcome of the penalty phase proceeding. A defendant who claims ineffective assistance of counsel in the penalty phase of a capital case 'must demonstrate that but for counsel's errors he would have probably received a life sentence.' *Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.1995). In this case, the sentence of death does not rest on any of the

subjective aggravating circumstances. On the contrary, the death sentence rests on the following objective aggravating circumstances: (1) the murder was committed while the defendant was under sentence of imprisonment, (2) the defendant has a prior conviction of a violent felony, (3) the murder was committed during a robbery, (4) the murder was committed to avoid or prevent arrest, and (5) the victim was a law enforcement officer. The sentence was based on an eleven-to-one jury recommendation for death and it was upheld on direct appeal by a unanimous court. See *Jones v. State*, 580 So.2d 143 (Fla.1991). The additional evidence of mitigation presented in the postconviction proceeding would not have changed the result in the face of these objective aggravating factors.

State v. Jones, No. 88-3111, order at 4-8 (Fla.Cir.Ct. Mar. 31, 1997) (footnote omitted) (Final Order Denying Postconviction Relief).

Jones, 732 So.2d at 319, affirmed the trial court's denial of the IAC penalty-phase claim and held that "[c]ompetent, substantial evidence supports the trial court's factual findings." Jones, 732 So.2d at 319-321, reasoned:

Upon his appointment to represent appellant, Davis began an inquiry into appellant's family history. Appellant imparted much of this sordid history to Davis. Although appellant told Davis he had little contact with his family over the years, Davis contacted the three family members appellant said might be helpful. These family members were not very cooperative and even refused to help at trial. Based on his conversations with these relatives, Davis determined that their testimony would not be helpful. Davis concluded he had sufficient evidence of appellant's background from appellant himself, much of which was corroborated through prison records.[FN5] In view of appellant's extensive prison records detailing much of appellant's history and the lack of family interest as reported in the sworn testimony of Davis and found to be a fact by the trial judge, we agree with the trial court that the performance of Davis did not fall below the Strickland standard. See *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ('[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.');

Johnston v. Singletary, 162 F.3d 630, 642 (11th Cir.1998) (same); see also *Rose v. State*, 617 So.2d 291, 294-95 (Fla. 1993) (trial counsel was not ineffective for failing to call family members where defendant told counsel that he

had not had contact with his family for a number of years and that his family's testimony would not be helpful).

FN5. We give the conclusion of Davis in this respect substantial deference in light of his experience in representing capital defendants at the time he represented appellant. See *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ('Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.').

b. Mental Health Evaluation by Dr. Anis

We also agree with the trial court's conclusion that Davis, through Dr. Anis, provided appellant with a competent mental evaluation. As is evident from our opinion in *Rutherford*, [*Rutherford v. State*, 24 727 So.2d 216 (Fla. 1998)] trial counsel is not obligated to procure and present mental health experts as long as there is a valid reason for not doing so. In this case, however, Davis did procure and present an eminently qualified mental health expert. Our review of the trial record here shows that Dr. Anis presented strong testimony in mitigation of a death sentence. Appellant did not present any evidence at the postconviction hearing which demonstrated an inadequacy the evaluation by Dr. Anis. Rather, appellant only presented mental health experts who came to a different conclusion from that of Dr. Anis based on similar evidence. The evaluation by Dr. Anis is not rendered less than competent, however, simply because appellant has been able to provide testimony to conflict with that presented by Dr. Anis. See *Correll v. Dugger*, 558 So.2d 422, 426 (Fla. 1990) (mental health examination is not inadequate simply because defendant is later able to find experts to testify favorably based on similar evidence); see also *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987) ('[A] new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage.').

c. HIV

The trial court correctly concluded that Davis was not ineffective for failing to obtain an expert to discuss the effects of HIV and the resulting AIDS. During the penalty phase of appellant's trial, Davis did state to the jury the fact that appellant was infected with the HIV virus, although he did not emphasize the point. The emphasis to be placed on such evidence is again clearly within the broad range of reasonableness afforded trial counsel in strategic matters. Davis testified that he believed extensive focus on the HIV would be more prejudicial to appellant than helpful. On this record, we conclude that the strategic decision of Davis not to focus on appellant's HIV was well within the wide range of professional assistance. See

Strickland, 466 U.S. at 690, 104 S.Ct. 2052 ('[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.').

d. Prejudice

Assuming *arguendo* that trial counsel was ineffective, we agree with the trial court that appellant did not demonstrate prejudice. The State proved five aggravating circumstances beyond any reasonable doubt: (1) the murder was committed while appellant was under a sentence of imprisonment; (2) appellant had a prior violent felony conviction; (3) the murder was committed during the course of a robbery; (4) the murder was committed to avoid or prevent arrest; and (5) the victim was a law enforcement officer engaged in performing his official duties. The trial court merged factors four and five.[FN6] Although the court found no statutory or nonstatutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of most of the nonstatutory mitigation regarding appellant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and excessive use of marijuana. Nevertheless, the jury recommended a sentence of death by an eleven-to-one vote, and the trial court sentenced appellant in accordance with that recommendation. On this record, we conclude that appellant has failed to establish a reasonable probability that, absent the claimed errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.

FN6. On direct appeal, we struck the robbery aggravating circumstance. *Jones v. State*, 580 So.2d 143, 146 (Fla. 1991).

The 2010 Proceedings and the Trial Court's Order on Appeal Here.

As shown in the Timeline supra, in 2010, Jones, through counsel filed about his fifth or sixth (depending on how they are counted) motion for postconviction relief. CLAIM I of the 2010 Successive Motion alleged that Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), creates fundamentally new law and changes the IAC analysis in the case. CLAIM II asserted that G.E.D. evidence that had been previously referenced in proceedings and that the defense had introduced in the penalty phase (See 21DR 3455) is actually fraudulent.

The trial court rendered a 14-page order (PR2011 159-172, attached in the Appendix of this brief) that rejected each of the claims. This order is on appeal here. The trial court ruled that CLAIM I of the 2010 Successive Motion was untimely (1PR2011 160-61) and that no exception to Fla.R.Crim.P. 3.851's one-year limitation applies (1PR2011 161-63). The order also ruled that, due to the prior litigation and judicial rejection of the same claim, the law of the case bars it. (1PR2011 163-64) Alternatively, the order ruled that, even if Porter is applied to the IAC penalty phase claim, it does not change the result that Jones has failed to demonstrate that Strickland's tests are met. (1PR2011 164-65)

The trial court also rejected CLAIM II of the 2010 Successive Motion, ruling that the claim is untimely as beyond Fla.R.Crim.P. 3.851's one-year deadline, and "there is not even an attempt to demonstrate an exception in Fla.R.Crim.P. 3.851(d)(2)." (1PR2011 165) Alternatively, the order ruled that requisite factual support for the elements of the claim's theories under Brady v. Maryland, 373 U.S. 83 (1963), and Strickland v. Washington, 466 U.S. 668 (1984), were not alleged (1PR2011 166-67), and, in contrast, the existing record rebuts those elements (1PR2011 167-72).

SUMMARY OF ARGUMENT

ARGUMENT¹ I.

ARGUMENT I essentially argues that Porter's prejudice-prong discussion allows Jones to re-hash and re-package his 1996 IAC penalty phase claim 14

¹ The Initial brief labels its issues as "Arguments."

years later in his 2010 Successive Motion. Jones is incorrect. Porter was an application of Strickland; it did not establish a new "fundamental constitutional right" that might have otherwise excepted the claim from Fla.R.Crim.P. 3.851's one-year deadline. ARGUMENT I attempts to by-pass of Fla.R.Crim.P. 3.851's one-year deadline by arguing that Jones should get the same method of analysis as Porter, but the foundation of his argument, that Porter created a new mode of analysis on Strickland's prejudice prong, is incorrect, as the United States Supreme Court's 2011 Harrington v. Richter's affirmance of a one-sentence state order illustrates. In any event, Jones fails to make the requisite argument, per Fla.R.Crim.P. 3.851, that any supposed change in analysis rises to the level of a new "fundamental constitutional right."

Indeed, even if the Court were to erroneously adopt all of Jones' recent prejudice-prong arguments, Jones would still be barred by the Rule's one-year deadline because Strickland requires the defense demonstration of the deficiency prong, as well as the prejudice prong, and Jones does not even attempt to argue that Porter did anything new concerning the deficiency prong.

Further, this Court's affirmance of the trial court's denial of the 1996 IAC penalty phase claim established the law of this case, which also resolves ARGUMENT I against Jones.

Moreover, even if somehow Jones' 1996 IAC claim were re-reviewed on its merits, the trial court's reasoning and this Court's reasoning rejecting

the IAC penalty-phase claim remains as sound today as it did over a decade ago.

ARGUMENT II.

In ARGUMENT II, like ARGUMENT I, Jones wants a do-over of the 1996-1999 postconviction proceedings in which Jones was provided a full opportunity to tender and prove postconviction claims. Now, over a decade later, Jones says that he can prove that the G.E.D. certificate his attorney introduced in the penalty phase was a fake. As the trial court found, the 2010 Successive Motion did not even attempt to justify its delay in raising this claim, and the 2010 Successive Motion failed to specify any factual support for the elements of either a Brady claim or a Strickland IAC claim. In any event, the falsity of the G.E.D. would not rise to requisite prejudice/materiality under either Brady or Strickland, given the totality of the record in this case. The status of the G.E.D pales in comparison with the extreme aggravation in this case and Jones' responsive and articulate trial testimony and Jones' IQ scores; indeed, evidence that Jones told Dr. Keyes that someone else probably took the IQ test for him would have affirmatively harmed Jones in the penalty phase.

Furthermore, contrary to ARGUMENT II, there is no "correct the appellate record" exception to alleging specific facts that meet the elements Brady and Strickland. If there were such an exception, it would render meaningless those elements as well as Fla.R.Crim.P. 3.851's one-year deadline.

ARGUMENT

OVERARCHING STANDARD OF APPELLATE REVIEW.

A ruling of the trial court² is the subject of an appeal. Accordingly, this Court recently re-affirmed the "Topsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Topsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("As an appellate court, however, we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason"); U.S. v. Benitez, 165 Fed.Appx. 764, 767, 2006 WL 222828, 3 (11th Cir. 2006)(unpublished; "We may

² In cases of fundamental error, the error rises to a level so grievous that the trial court should have ruled but did not. Even in cases of fundamental error, the focus is on a trial court ruling.

affirm a district court's decision on grounds the district court did not address").

STRICKLAND'S REQUIREMENTS.

ARGUMENTS I AND II involve IAC³. Therefore, prior to discussing each of the appellate claims, the State covers some basic IAC principles.

For IAC claims, Strickland v. Washington, 466 U.S. 668 (1984), and its progeny impose upon the defendant rigorous burdens of demonstrating that defense counsel was deficient and that this deficiency was prejudicial. "[B]ecause the *Strickland* standard requires establishment of both [the deficiency and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

For the deficiency prong, the standard for counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." Stein v. State, 995 So.2d 329, 335 (Fla. 2008)(quoting Strickland, 466 U.S. at 689.) "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

³ As previously noted, the Initial brief labels its issues as "Arguments."

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. "The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. "[O]missions are inevitable." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). "[T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Id. at 1313 (quoting Burger v. Kemp, 483 U.S. 776 (1987)).

The standard is not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, ___U.S.___, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals, which used "improper standard of review ... [of] blam[ing] counsel for abandoning the NGI claim because there was nothing to lose by pursuing it").

The defendant must establish that his counsel's performance was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997). Accord Chandler v. U.S., 218 F.3d 1305, 1315 (11th Cir. 2000)("because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take").

Applying Strickland's principles to the penalty phase, defense counsel is not required to present every available mitigation witness to be considered effective. See Bell v. Cone, 535 U.S. 685, 696 98 (2002)(not ineffective where defense counsel presented no mitigating evidence in the

penalty phase). Accordingly, Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001), explained that a failure to find more of the same type of mitigation is not unconstitutionally deficient:

'A failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past or present behavior or life history.' Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001). However, counsel is not required to investigate and present all mitigating evidence in order to be reasonable. See Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir. 1999).

For the prejudice prong, Dillbeck v. State, 964 So.2d 95, 99 (Fla. 2007)(quoting Strickland, 466 U.S. at 694), summarized: "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" The reviewing court analyzes IAC penalty phase claims to determine whether the allegedly "'missing' testimony is significant enough to 'undermine [[its]] confidence in the outcome' of 'the defendant's sentencing,' Strickland, 466 U.S. at 694, not to ask whether it would have had 'some conceivable effect on the outcome of the proceeding,' Id. at 693." Cade v. Haley, 222 F.3d 1298, 1305 (11th Cir. 2000).

Applying these standards, the trial court correctly summarily denied Jones' 2010 Successive Motion.

ISSUE-ARGUMENT I: CAN A 1996 IAC PENALTY-PHASE CLAIM THAT WAS AFFORDED AN EVIDENTIARY HEARING IN 1996, REJECTED BY THE TRIAL COURT IN 1997, AND REJECTED BY THIS COURT IN 1999 BE RE-LITIGATED IN 2010 BASED ON PORTER V. MCCOLLUM, __U.S.__, 130 S.CT. 447, 175 L.ED.2D 398 (2009)? (IB 12-49, RESTATED)

A. Notice of Related Cases Concerning ARGUMENT I.

Several cases are in the process of being presented to this Court that contend that Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), allows a defendant to re-litigate an IAC penalty phase claim outside of the one-year limitation of Fla.R.Crim.P. 3.851(d)(1). For example, briefing has been completed in Mark Allen Davis v. State (SC11-359) and Chadwick Willacy v. State (SC11-99), and the State recently filed its Answer Brief in William T. Turner v. State (SC11-946).

B. The Standard of Appellate Review.

Ventura v. State, 2 So.3d 194, 197-98 (Fla. 2009), summarized the applicable standard of appellate review of a summary denial of a successive Rule 3.851 postconviction motion:

Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. See, e.g., *Rose v. State*, 985 So.2d 500, 505 (Fla.2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. See *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000). The Court will uphold the summary denial of a newly-discovered-evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. See *McLin v. State*, 827 So.2d 948, 954 (Fla.2002).

Accordingly, Fla.R.Crim.P. Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the

motion, files, and records in the case conclusively show that the movant is entitled to no relief."

Here, under applicable law, the 2010 Successive Motion was legally insufficient and the record conclusively demonstrates that the 2010 Successive Motion was untimely, barred by the law of the case, and meritless, as the trial court found.

C. The Trial Judge's Order (attached to this brief).

The State has attached the trial court's order to this brief and submits that its reasoning is sound and merits affirmance because --

1. CLAIM I of Defendant Jones' 2010 Successive Postconviction Motion, couched as ARGUMENT I here, is untimely under Fla.R.Crim.P. 3.851(d) (1PR2011 160-61);
2. No exception to the Rule's one-year deadline applies, and, specifically, Porter, as an application of Strickland, does not constitute an exception to the one-year deadline (1PR2011 161-63);
3. The law of the case bars this IAC claim because it has already been fully litigated and resolved against Jones (1PR2011 163-64); and,
4. This claim still has no merit when Porter is applied, as previous in-depth judicial analyses, including by this Court, have determined (1PR2011 164-65).

The State elaborates.

D. The Correctness of the Trial Court's Order.

1. CLAIM I of Defendant Jones' 2010 Successive Postconviction Motion is untimely under Fla.R.Crim.P. 3.851(d) (Order, at 1PR2011 160-61).

This 2010 successive postconviction motion is untimely. Fla.R.Crim.P. 3.851(d)(1) requires a post-conviction motion to be filed within one year of when Jones' judgment and sentence became final. Jones' convictions and sentence became final on October 7, 1991, when Jones v. Florida, 502 U.S.

878 (1991), denied certiorari from the Florida Supreme Court direct-appeal affirmance. The 2010 Successive Motion was filed in late 2010, several years too late.⁴

2. No exception to the Rule's one-year deadline applies, and, specifically, Porter, as an application of Strickland, does not constitute an exception to the one-year deadline (Order at 1PR2011 161-63).

Fla.R.Crim.P. 3.851(d) contains three exceptions to the one-year time limitation:

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the [one-year] period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

The 2010 Successive Motion and, now, ARGUMENT I purport to rely upon Porter v. McCollum, __U.S.__, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), to the point of the Initial brief including it in its issue statement (at IB 12).

⁴ Jones gets no relief from the 2001 effective date of current Fla.R.Crim.P. 3.851 because, even arguendo accepting that 2001 effective date, his 2010 Successive Motion remains almost a decade too late. Further, predecessor rules provided one and two-year time limits, making the 2010 Successive Motion untimely by several years. See, e.g., In re Rule of Crim. Procedure 3.851, 626 So.2d 198 (Fla. 1993)(in capital cases without a showing of good cause to the Florida Supreme Court, postconviction motions must be filed within one year of the "the disposition of the petition for writ of certiorari by the United States Supreme Court."); Amendments to Fla. Rules of Crim. Procedure 3.851, 797 So.2d 1213 (Fla. 2001)(one year requirement maintained).

Jones ignores the time requirements of Fla.R.Crim.P. 3.851(d)(1)&(2), which is fatal to ARGUMENT I.

Instead of arguing how he meets the requirements of Fla.R.Crim.P. 3.851(d), Jones suggests, on the one hand, that Porter is a "sweeping change of law" (IB 14) and asserts that Porter is a "repudiation of this Court's *Strickland* analysis" (IB 22-23), and on the other hand, Jones' Initial Brief contends that "Mr. Jones does not allege that *Porter* changes *Strickland*" (IB 16). Jones contends that Porter requires this Court, in conducting a Strickland prejudice analysis, to "engage with [mitigating evidence], *Porter*, 30 S.Ct. at 454" (IB 28). Jones suggests (IB 29) that Porter requires that engagement includes "to embrace, connect with, internalize" aspects of the "defendant's humanity" and that this Court "*try to find a constitutional violation*" by "*trying to find prejudice*" using "reasonable" speculation (IB 31-34). Jones is wrong on all his points, wrong in his analysis of Porter, wrong on his presumption and speculation of prejudice, and wrong in not addressing the requirements of Fla.R.Crim.P. 3.851(d)(1)&(2).

As a threshold but dispositive matter, Jones argues only Porter's prejudice analysis. Arguendo, assuming that somehow Porter does provide Jones a 2010 gateway to argue that a new prejudice analysis applies to his 1996 IAC penalty-phase claim, his 2010 claim still remains untimely. Strickland requires that a defendant demonstrate **BOTH** prejudice **AND** deficiency. See, e.g., Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001)("because the Strickland standard requires establishment of both [the

deficiency and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong"). Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), itself bluntly stated a defendant's IAC burdens:

First, the defendant must show that counsel's performance was **deficient**. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. **Second**, the defendant must show that the deficient performance **prejudiced** the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. **Unless a defendant makes both showings**, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Thus, Jones needed an exception for the one-year deadline for both of Strickland's prongs in order to raise an IAC claim, and he has argued an exception for only one of the prejudice prong, thereby rendering this claim untimely, even arguendo accepting Jones' argument at face value.

Indeed, here, the trial court found that Jones failed to meet his burden to prove deficiency, as well as prejudice. (1PR 226 et seq.) In this case, this Court affirmed the trial court, cited to Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998), and similarly concluded:

In *Rutherford v. State*, 24 Fla. L. Weekly S3, 727 So.2d 216 (Fla. 1998), we reviewed a similar ineffective assistance claim. Rutherford alleged in a postconviction motion that his trial counsel was ineffective for failing to investigate his background sufficiently and for failing to present a mental health expert. After an evidentiary hearing, the trial court denied Rutherford the relief he requested. In affirming the trial court's judgment, we quoted the often cited rule from *Strickland* which guides our evaluation of ineffective assistance claims:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Rutherford, ... (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). Applying this analysis here, we conclude that appellant has failed to establish that his trial counsel was ineffective. Further, assuming ineffectiveness, we conclude that appellant failed to demonstrate any resulting prejudice.

Jones, 732 So.2d at 319.

In sum, on its face, the 2010 Successive Motion, through its omission of alleging anything new concerning the deficiency prong,⁵ palpably failed to allege a legally cognizable factual and legal basis why this claim was raised outside of the one-year deadline.

Even if the 2010 Successive Motion's fatal deficiency on the Strickland deficiency prong is erroneously overlooked, it still was properly denied summarily in the trial court.

⁵ Concerning Strickland's deficiency prong, in the absence of any state court finding on deficiency prong, Porter reviewed the facts de novo and held that defense counsel was deficient for "fail[ing] to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." Counsel, a novice in capital sentencing, "had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." Porter, 130 S.Ct. at 453. Thus, Porter's application changed nothing, fundamental or otherwise, concerning Strickland's deficiency prong. Porter merely applied Strickland's deficiency prong to the facts in that case.

Jones' brief contains another foundation for the trial court's proper summary denial of this claim. The Initial Brief (IB 16) is correct that Porter does not change Strickland. However, then the Initial Brief devotes pages that essentially argue that Porter changed Strickland. As the trial court found (1PR2010 162) and in contrast with Jones' arguments, Porter was an application of existing law to the facts of that case. Porter did not "sweeping[ly]" (IB 14) change the law and did not require a newly distinctive mode of prejudice analysis (See IB 16 et seq.). The State elaborates.

In Porter, the United States Supreme Court reversed the Eleventh Circuit. Relying upon Strickland v. Washington, 466 U.S. 668 (1984), Porter merely applied of Strickland's two prongs of deficiency and prejudice to that particular case.

Applying Strickland's prejudice prong **to the facts of that case**, the United States Supreme Court found it was objectively unreasonable for this Court to conclude there was no reasonable probability Porter's death sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's trial counsel failed to present, especially Porter's Korean war heroics.

Supporting its decision finding Strickland prejudice, Porter provided detailed facts of the mitigation evidence defense counsel omitted. Perpetual violence and physical abuse by Porter's father caused Porter to enlist in the Army at age 17. In the Korean War, Porter was shot in the leg during an advance "above the 38th parallel to Kunu-ri," but while wounded,

Porter's unit was "attacked by Chinese forces." Porter's unit was ordered to "hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day." The weather was "bitter cold" and the unit was "terribly weary" and zombie-like because they had been in "constant contact with the enemy fighting [their] way to the rear, [and had] little or no sleep, little or no food," yet the unit "engaged in a 'fierce hand-to-hand fight with the Chinese' and later that day received permission to withdraw, making Porter's regiment the last unit of the Eighth Army to withdraw." Porter, 130 S.Ct. at 449-50.

Porter, 130 S.Ct. at 450-51 (internal citations omitted), continued:

Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers 'were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can imagine and they were just dropping like flies as they went along. ... Porter's company lost all three of its platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Colonel Pratt testified that these battles were 'very trying, horrifying experiences,' particularly for Porter's company at Chip'yong-ni. ... Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.

Colonel Pratt testified that Porter went absent without leave (AWOL) for two periods while in Korea. He explained that this was not uncommon, as soldiers sometimes became disoriented and separated from the unit, and that the commander had decided not to impose any punishment for the absences. ...

Based on these mitigation facts, Porter merely applied Strickland, found Strickland prejudice, and held that this Court's failure to find Strickland

prejudice was unreasonable under federal habeas-corpus law. Contrary to Jones' assertion, the United States Supreme Court in Porter did not change Strickland prejudice analysis. Porter did not overrule Strickland or otherwise establish a new "fundamental constitutional right," Fla.R.Crim.P. 3.851(d)(2)(B).

Instead, Porter reaffirmed the Strickland standard. Porter contains several paragraphs describing the Strickland standard and cited Strickland repeatedly. See Porter, 130 S.Ct. at 452-454. Porter, 130 S.Ct. at 456, ends by once again by citing, indeed, quoting, Strickland.

In contrast with Jones' arguments (See IB 31-34) that Porter requires some sort of attempt to find prejudice, Porter re-affirmed Strickland's requirement that it is the defendant's burden to demonstrate prejudice. Porter, 130 S.Ct. at 452, explained, "To prevail under *Strickland*, **Porter** **must show** that his counsel's deficient performance prejudiced him" and then cites Strickland several times.

Jones (IB 31; see also IB 28) purports to quote Porter: "Courts must 'engage with [mitigating evidence],' *Porter*, 30 S.Ct. at 454." However, this is a distortion of Porter, which discussed engaging the mitigation as follows:

[T]he Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions,' 788 So.2d, at 925, simply because the jury would also have learned that Porter went AWOL on more than one occasion. Our Nation has a long tradition of according

leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. **To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.**

Porter, 130 S.Ct. at 455 (footnotes omitted). In other words, the United States Supreme Court simply disagreed with this Court's prejudice analysis under the facts of that case.

Jones' argument that somehow the United States Supreme Court's "engage" language requires courts to look for prejudice is absurd and unsupported by Porter. Strickland put the burden of demonstrating prejudice on the defendant, and it remains there post-Porter. Porter merely held, under the facts of that case, that this Court erred in concluding that the defendant failed to meet his burden:

Although **the burden is on petitioner** to show he was prejudiced by his counsel's deficiency, the Florida Supreme Court's conclusion that Porter failed to meet this burden was an unreasonable application of our clearly established law. We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine* confidence in [that] outcome.' Strickland, 466 U.S., at 693-694, 104 S.Ct. 2052. **This Porter has done.**

Porter, 130 S.Ct. at 455-56.

Accordingly, in Sears v. Upton, 130 S.Ct. 3259, 3266 (2010), the United States Supreme Court repeatedly referred to, without modifying, the Strickland standard. Contrary to Jones' argument (IB 31-34) that Sears requires courts to speculate in an effort to find prejudice, Sears reviewed

a state court's prejudice discussion that did not evaluate the very substantial mitigation evidence that trial counsel failed to present, including, for example, the defendant's parents in "a physically abusive relationship... and divorced when Sears was young"; the defendant "suffer[ing] sexual abuse at the hands of an adolescent male cousin"; defendant's mother's "favorite word for referring to her sons was 'little mother fuckers'"; defendant's father "verbally abusive" and "discipline[ing] Sears with age-inappropriate military-style drills"; "Sears struggle[ing] in school, demonstrating substantial behavior problems from a very young age," for example, "Sears repeat[ing] the second grade ... and ... referred to a local health center for evaluation at age nine"; "[b]y the time Sears reached high school," Sears being "'described as severely learning disabled and as severely behaviorally handicapped'"; Sears' father "'berate[ing] [him] in front of' the school principal and her during a parent-teacher conference," which left an indelible and distinctive impression on a teacher; observable "significant frontal lobe abnormalities"; "several serious head injuries he suffered as a child, as well as drug and alcohol abuse" and "brain damage"; and, standardized tests showing Sears as "among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." Sears, 130 S.Ct. at 3262-63.

In Sears, the state court had found the deficiency prong but refused to evaluate the prejudice prong because some mitigation was introduced in the penalty phase; in Sears, the state court also confused "reasonableness"

with a prejudice analysis. Sears, 130 S.Ct. at 3261, 3265. Consistent with Strickland, Sears, 130 S.Ct. at 3265, held that the state court erred in confusing "abstract" reasonableness of a defense theory with prejudice. The determination of whether a defendant has demonstrated Strickland prejudice is independent of reasonableness determination, which, instead, concerns the deficiency prong, See Strickland, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 (discussing deficiency prong, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness"; "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances").

Thus, Sears, 130 S.Ct. at 3265 n.10, noted that "the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory." **The absence of any state court evaluation of Strickland prejudice** where the state court had found deficiency was error:

A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. *See Porter*, ... 130 S.Ct. at 453-54;...; *Strickland*, *supra*, at 694, 104 S.Ct. 2052. It is for the state court-and not for either this Court or even Justice SCALIA-to undertake this reweighing in the first instance.

Sears, 130 S.Ct. at 3267.

Here, in contrast with Sears, the trial court and this court have "undertake[n]" Strickland-compliant prejudice analyses.

Consistent with Sears, the Eleventh Circuit has treated Porter as a fact-bound, non-fundamental, decision. Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010), explained that the "the crux of counsel's deficient performance in *Porter* was the failure to investigate and present Porter's compelling military history." Similarly, Suggs v. McNeil, 609 F.3d 1218, 1232 (11th Cir. 2010), recently cited to Porter for a Strickland principle: "Suggs cannot contend that his sentencing judge and jury 'heard almost nothing that would humanize [Suggs] or allow them to accurately gauge his moral culpability.' *Porter v. McCollum*,"

In a number of cases, this Court has recently cited to Porter in support of its discussion of pre-existing Strickland principles. See Hildwin v. State, 2011 WL 2149987, *5 (Fla. June 2, 2011); 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); Stewart v. State, 37 So.3d 243, 247-48 (Fla. 2010); Rodriguez v. State, 39 So.3d 275, 285 (Fla. 2010); Grossman v. State, 29 So.3d 1034, 1042 (Fla. 2010). Thus, this Court has correctly recognized that Porter does not change the prejudice analysis. Instead, Porter applied the prejudice analysis to the distinctive facts of that case where war heroics and extreme suffering in the line of combat duty was omitted from the trial.

Indeed, Grossman, 29 So.3d at 1042, expressly rejected a claim that "the proposed testimony of his new expert, Dr. Maher, concerning nonstatutory mental mitigation, is newly discovered evidence in light of the decision of the United States Supreme Court in *Porter v. McCollum*." Grossman held that Porter merely recognized a type of mitigator that Florida law already considers. Porter restarted no timeliness clocks. Thus, Grossman's claim was untimely, and so was CLAIM I of Jones 2010 Successive Motion.

Actually, under federal habeas-corpus law ("AEDPA"), Porter could not substantially change Strickland. Porter was a federal habeas case governed by the AEDPA. According to the habeas statute, to grant habeas relief a state court decision must be contrary to "clearly establish Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). Therefore, federal courts, including the Supreme Court when reviewing a habeas case, can only grant relief if the law was already established.

On January 19, 2011, Harrington v. Richter, __U.S.__, 131 S.Ct. 770 (2011), re-confirmed that Porter established no new law and established no new required mode of prejudice analysis. Richter upheld a state court rejection of a Strickland claim even though the state court denied the defendant postconviction relief "in a one-sentence summary order," Richter, 131 S.Ct.at 783. Richter indicated that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to

deny relief," Richter, 131 S.Ct.at 784. Certainly, in Richter the state court did not explicitly "engage with [mitigating evidence]" (IB 31) and it did not apply Jones' groundless principle of "try[ing] to find a constitutional violation" (IB 31), yet Richter essentially upheld the state court rejection of the Strickland claim and reversed the U.S. Court of Appeals' reversal of a United States District Court order that had denied habeas relief:

The California Supreme Court's decision on the merits of Richter's *Strickland* claim required more deference than it received. Richter was not entitled to the relief ordered by the Court of Appeals. The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Richter, 131 S.Ct. at 792.

Therefore, the retroactivity discussions in the 2010 Successive Motion's (pp. 5-7) and in the Initial Brief (IB 14 et seq.) are wrong. Porter presents no new law to be retroactive. Further, arguendo, even if Porter were somehow some sort of new law, it "has [not] been held to apply retroactively," thereby making the 2010 Successive Motion still untimely under Fla.R.Crim.P. 3.851(d)(2)(B). Accordingly, this Court held that, in the Sixth Amendment right to effective assistance of counsel context, refinements or clarifications in Strickland jurisprudence are not retroactive. See Johnston v. Moore, 789 So.2d 262, 266-267 (Fla. 2001)(holding that Stephens v. State, 748 So.2d 1028, 1033-34 (Fla. 1999), which clarified the standard to be used in reviewing ineffective assistance of counsel claims, was not retroactive under Witt v. State, 387 So.2d 922 (Fla. 1980)). However, of course, as the State has argued here, Porter did

not even involve a clarification or refinement of the law; instead, it applied pre-existing law.

In addition to the inapplicability of Porter and Sears to Jones' cause, Jones' attempted reliance on Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995), is misplaced. In essence, Jones' attempted use of Kyles is like his treatments of Porter and Sears: He extracts excerpts out of context, then adds a self-serving interpretation that is not grounded in the opinion or other law. As an illustration that Jones' version of the law is law-less, Porter does not even cite to Kyles. If Kyles were so important to a Porter-type analysis, one would have expected Porter to at least cite to Kyles. Indeed, Kyles is not an IAC case at all, but rather a Brady case.

Arguendo, erroneously overlooking Kyles as a Brady case, not an IAC case, Jones (IB 31) cites to Kyles concerning a "search for constitutional error," but this takes language out of context; instead of Jones' presentation, the United States Supreme Court was referring to its role in conducting certiorari review where "there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard," Kyles, 514 U.S. at 422; in other words, Jones overlooks the sentence immediately preceding the one that he quoted. Thus, Kyles' reversal of the Court of Appeals focused on the Court of Appeals' use of an erroneous standard in evaluating a Brady claim. Kyles, 514 U.S. at 435, indicated that, contrary to the Court of Appeals decision, when all elements of Brady have been found, there is no additional harmless error inquiry. Further, Kyles, 514 U.S. at 440, questioned whether the Court of

Appeals conducted a requisite analysis of the cumulative effect of all of the prosecution's non-disclosures and concluded that disclosing the non-disclosures "would have made a different result reasonably probable"; Kyles then conducted a lengthy analysis of the Brady material and facts pursuant to the reasonable probability test. Accordingly, for example, this Court in Rimmer v. State, 59 So.3d 763, 785 (Fla. 2010), discussed the appellate process that defers to a trial court's specific factual findings and then conducts its "independent[] review[of] the cumulative effect of the suppressed evidence."

In sum, Jones misuses Kyles. Kyles is a Brady case, and Kyles remains consistent with well-grounded case law that a pertinent fact-finder merits deference but subject to the applicable legal test applied to those facts.

Therefore, Jones' so-called "*Porter/Kyles/Sears*" test (E.g., IB 31) is Jones' wishful thinking, not the law.

In conclusion, Porter is not new fundamental law -- indeed, it is not new law at all -- and therefore the Rules' exception to the time limitation for a new "fundamental constitutional right" does not apply. The 2010 Successive Motion was untimely.

3. The law of the case controls this claim (Order at 1PR2011 163-64).

The claim of ineffectiveness raised in the 2010 Successive Motion and in this appellate claim is barred by the law of the case doctrine in which questions of law actually decided on appeal govern the case through all subsequent stages of the proceedings. See Florida Dep't of Transp. v. Juliano, 801 So.2d 101, 105 (Fla. 2001). A defendant cannot re-litigate

claims that have been denied by the trial court where that denial has been affirmed by an appellate court. See State v. McBride, 848 So.2d 287, 289-290 (Fla. 2003)(reasoning that the law of the case doctrine applies to post-conviction motions)(citing Kelly v. State, 739 So.2d 1164, 1164 (Fla. 5th DCA 1999)). Cf. Topps v. State, 865 So.2d 1253, 1255 (Fla. 2004)(res judicata).

As discussed in the "Penalty Phase-Facts and Related Postconviction & Appellate Determinations" section of the "Statement of the Case and Facts" supra, Jones' initial postconviction motion alleged IAC in the penalty/sentencing phase, the trial court rejected the claim after an evidentiary hearing and concluded that Jones proved neither Strickland prong, and this Court affirmed at Jones, 732 So.2d at 315-21. Jones is improperly seeking to re-litigate the same claim⁶ of ineffectiveness.

Accordingly, in Marek v. State, 8 So.3d 1123 (Fla. 2009), the defendant filed a successive post-conviction motion attempting to re-litigate the same claim of ineffectiveness that he had raised in the initial post-conviction motion. The trial court summarily denied the successive motion. On appeal, Marek asserted that his previously raised claim of ineffectiveness for failing to investigate mitigation should be reevaluated under the standards enunciated in Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123

⁶ To the degree that Jones claims any new facts, any such new facts remain time-barred because no due-diligence is alleged, making those allegations facially insufficient under Fla.R.Crim.P. 3.851(d)(2)(A).

S.Ct. 2527, 156 L.Ed.2d 471 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Marek argued that these cases modified the Strickland standard for claims of ineffective assistance of counsel. Marek, 8 So.3d at 1126. This Court concluded that the previously raised claim of ineffectiveness should not be reevaluated because "contrary to Marek's argument, the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*." Marek, 8 So.3d at 1128. Marek, 8 So.3d at 1128-29, discussed how Rompilla, Wiggins, and Williams were applications of Strickland.

Marek, 8 So.3d at 1129, held that "Marek's argument is procedurally barred because he previously litigated this issue."

Applying Marek's rationale, here Porter, like Rompilla, Wiggins, and Williams, is an application of Strickland to the particular case, not a new method of analysis or otherwise new law. Here, like in Marek, the defendant is not entitled to re-litigate the previously denied claim. Here, the purportedly Porter-based claim is barred by the law of the case doctrine.

Here, Jones has had his day in court on his IAC-at-the-penalty-phase claim, and he lost that claim, which remains the binding law of the case and thereby required the trial court to summarily deny the 2010 Successive Motion. The trial court's decision merits affirmance.

4. Even if this claim were erroneously considered on the merits, it has none (Order at 1PR2011 164-65).

The State contests Jones' (IB 35-48) factual assertions. Jones' collateral counsel had made many of these assertions in his 1998 Initial

Brief in this Court's case number 90,976, the State rebutted them in its Answer brief in that case, and this Court rejected them in its 1999 decision at Jones, 732 So.2d at 315-21 (attached to this brief) affirming Judge Padovana's 1997 "Final Order Denying Postconviction Relief" (attached to this brief). Those judicial determinations apply now and more than satisfy Strickland's prejudice standard.

Jones contends (IB 35-36) that the "sum total" of defense counsel's penalty-phase preparation was telephoning "three people in Baltimore (Mr. Jones' home)," "speak[ing] to his client," and "reading his prison records (PC-R.IV 24)." Jones minimizes the substance of the phone calls to soliciting money for clothing for Jones to wear (IB 36) and minimizes the prison records as "provided by the State on discovery" and not seeking any other records (IB 36). In contrast with Davis' assertions, the trial court believed defense counsel's postconviction testimony and found concerning defense counsel's preparation:

The defendant also claims that trial counsel failed to present testimony by family witnesses who could have provided mitigating evidence. This argument was refuted by attorney Davis' testimony that the relatives he was able to locate were not willing to come to Florida to attend the trial and that he did not think it was appropriate to compel their attendance. Moreover, the arguments Davis actually made in mitigation with the evidence available to the jury are generally the same those the defendant would have made with the testimony of the additional witnesses.

...

Mr. Davis obtained the defendant's medical records from the Department of Corrections in Maryland, he called family members in an effort to get them to testify in the penalty phase hearing, and he secured the services of a mental health expert who did testify in the penalty phase hearing. ... [T]he attorney in this case did make a reasonable effort to investigate and present the available mitigating evidence.

(2PR 227-29)

Accordingly, this Court, approvingly quoted from the trial court's order (at Jones, 732 So.2d at 317-19), then reasoned and held concerning these points:

Upon his appointment to represent appellant, Davis began an inquiry into appellant's family history. Appellant imparted much of this sordid history to Davis. Although appellant told Davis he had little contact with his family over the years, Davis contacted the three family members appellant said might be helpful. These family members were not very cooperative and even refused to help at trial. Based on his conversations with these relatives, Davis determined that their testimony would not be helpful. Davis concluded he had sufficient evidence of appellant's background from appellant himself, much of which was corroborated through prison records.[FN5] In view of appellant's extensive prison records detailing much of appellant's history and the lack of family interest as reported in the sworn testimony of Davis and found to be a fact by the trial judge, we agree with the trial court that the performance of Davis did not fall below the *Strickland* standard. See *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 ('[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.');

Johnston v. Singletary, 162 F.3d 630, 642 (11th Cir. 1998) (same); see also *Rose v. State*, 617 So.2d 291, 294-95 (Fla. 1993) (trial counsel was not ineffective for failing to call family members where defendant told counsel that he had not had contact with his family for a number of years and that his family's testimony would not be helpful).

FN5. We give the conclusion of Davis in this respect substantial deference in light of his experience in representing capital defendants at the time he represented appellant. See *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ('Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.').

Jones, 732 So.2d at 319-20.

As this Court footnoted, 732 So.2d at 319-20 n.5, defense counsel, Cliff Davis, testified at the 1996 postconviction evidentiary hearing concerning his extensive experience. Davis has been a member of the Florida

Bar since 1971 (4PT 18). At the time of the Jones trial, Davis had tried 12-15 cases in which capital juries had been qualified (4PT 19).

Mr. Davis knew early-on that this case was one in which a death sentence was highly likely if the defendant was convicted (4PT 23). Jones gave Davis the names of some of his relatives in Baltimore. "[A]lmost immediately" after being appointed and meeting Jones, Davis called these relatives. He does not recall their names, but he talked to one "elderly" uncle, and older woman and a younger woman (4PT 24). These three persons told Davis basically that Jones had been "in prison a long time." (4PT 27; see also 4PT 68)) Jones provided no other names for Davis to contact. (4PT 68)

In Davis' conversations with Jones' family, they showed little interest in him. Davis testified that the "three people ... didn't have time or I think the old gentleman told me he didn't feel well enough to travel to come to trial." (4R 27) From his phone conversations with Jones' family, Davis concluded that the family "did not appear to be interested enough for it to be overall positive." (4PT 72)

Mr. Davis requested that the family assist with Jones' clothing for court, but Davis "ultimately paid for it [himself] and was not reimbursed for it." (4PT 27)

Davis subpoenaed⁷ Jones' Maryland prison records, which were "very complete." (4PT 28, 38) The prison records showed that Jones had spent "most of his life in some kind of institution" (4PT 29). Jones told Davis that he had very little contact with his family; other than the people Davis contacted, Jones gave him no other names. (4PT 68)

Davis indicated that the records contained Jones' PTL membership, logs of visitors, counseling records, a public-school IQ score of 67, (4PT 28) and multiple references to the diagnosis of Jones as HIV positive (4PT 73).

Consistent with the family's apparent lack of interest in these phone calls, prison records showed that Jones' family had seldom visited him in prison. (4PT 27) Davis continued:

He spent most of his life in some kind of institution and his life was well documented and the family members I was able to find did not have enough time or interest, which was demonstrated by their lack of contact with him in prison, to be of any assistance.

(4PT 29)

In view of their expressed and demonstrated lack of interest, Davis did not go to Baltimore; he thought "it would have been a waste of my time and the resources available" (4PT 29). Jones' family "did not have enough interest other than curiosity as to the outcome of the case to be terribly concerned about Mr. Jones." (4PT 30)

⁷ Davis initially testified that he thought he or perhaps "Mr. Taylor" subpoenaed the prison records "and then they were provided" through discovery (4PR 28-29), and, subsequently, a question from Jones' postconviction counsel acknowledged that Mr. Davis had subpoenaed the prison records (See 4PR 38).

Davis had no doubts about Jones' competence or sanity; Jones "never exhibited any kind of characteristics of not being alert, not being attentive, not knowing what was going on or not being able to assist me in his defense." (4PT 31) Mr. Davis' observation is corroborated by Jones' guilt-phase testimony, which, although sometimes using flawed grammar, was lengthy, detailed, and responsive (See 18DR 2965-3133).⁸

However, Mr. Davis obtained the assistance of Dr. Anis to assist him "in presenting nonstatutory and/or statutory mitigators at sentencing." (4PT 32) Although Davis had not retained Dr. Anis until the day of the guilty verdict, he had already prepared that part of the penalty phase dealing with his history, which "Dr. Anis was able to review and present to the factfinder." (4PT 33)

⁸ For example, Jones testified that Griffin had been asleep when the shooting started. The killer, Jones testified, was a drug dealer with whom they planned to trade two guns for drugs (18DR 3007-09). The drug dealer, Jones testified, had a .357 in his hand. (18DR 3009) When officers Armstrong and Ponce de Leon approached, the drug dealer said, "Here come the police. What's this, a set-up?" (18DR 3009). While Goins and Harris were outside the car talking to the police, the drug dealer "got up and shot the police." (18DR 3013) Subsequently, Jones said the drug dealer left, and he has not seen the drug dealer since then. (18DR 3021-22.)

On cross-examination, Jones admitted to ten prior felony convictions, that he had escaped from the Maryland House of Corrections, and that, at the murder scene, he and others were in a car stolen from Jessup, Maryland. (18DR 3044-47; see also 18DR 3132-33) Jones had an ID card in the name of Antoine Smith. (18DR 3180-81) He said that he and his companions had a six-inch .357 Magnum Ruger, a six-inch .38 revolver, a Beretta .380 semiautomatic, a two-inch .38 revolver, and a 410 sawed-off shotgun. (18DR 3076-77) Jones admitted to purchasing the shotgun and the Beretta. (18DR 3078) Jones "rotated" carrying the various guns. (18DR 3079)

Davis did not attempt to force Jones' family to travel to Florida to testify; it would have been counterproductive to have done so, and he believed that all relevant family history could be elicited through Dr. Anis. (4PT 49-50) Because of Jones' long history of incarceration, substantial information existed about Jones' life "that Dr. Anis was able to obtain without subpoenaing somebody that didn't really want to come to give it." (4PT 65) He indicated that he was able to establish what he needed without compelling others to appear in the penalty phase. Davis did not recall Dr. Anis asking for any additional documents. (4PT 65-66) Davis was "sure" that his preparation included asking Dr. Anis if Jones met the criteria for the two statutory mental mitigators. (4PT 45)

Here, in contrast to the judicially accredited facts supporting the rejection of the IAC deficiency prong, in Porter, counsel was a novice in capital sentencing and "had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." Porter, 130 S.Ct. at 453. Mr. Davis was highly experienced, pursued three family members provided by Jones, and obtained prison records that extensively covered Jones' life, but any further investigation was impeded by Jones' failure to provide additional information and by Jones' lengthy history of incarceration. Nevertheless, Mr. Davis was able to elicit favorable testimony from a mental health expert, Dr. Anis (See DT 3437 et seq.).

In support of the judicially accredited facts supporting the rejection of the IAC prejudice prong, this was an extremely aggravated case, including aggravators, upheld in Jones v. State, 580 So.2d 143, 146 (Fla. 1991): (a) committed while under sentence of imprisonment; (b) prior conviction of violent felony; and, (c) committed to avoid or prevent arrest, the victim was a law enforcement officer engaged in performing official duties, and taking the officer's weapon. Jones' criminal history included his escape status from a Maryland prison when, in this case, he gunned down Officer Ernest Ponce de Leon in the line of duty in Tallahassee. Jones had escaped from a 25-year sentence for three counts of robbery with a deadly weapon and attempted robbery with a deadly weapon. The trial court's sentencing order described additional convictions for violent felonies. (See 2DR 225) See also discussion of aggravating factors and significance of killing a police officer in the line of duty under ARGUMENT II infra.

In the context of this extremely aggravated case, defense counsel was able to marshal mitigating testimony during the penalty phase. In contrast with Jones' life of crime and imprisonment, Porter's counsel, as the Eleventh Circuit observed, failed to present powerful prejudice-establishing mitigating evidence that: "(1) Porter was 'a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War'; (2) 'his combat service unfortunately left him a traumatized, changed man'; and (3) he 'struggle[d] to regain normality upon his return from war.'" Reed, 593 F.3d at 1217, 1249 n.21. The

Eleventh Circuit continued by emphasizing that "[p]aragraph after paragraph in the *Porter* opinion concerns Porter's combat experience in Korea, recounted in great detail." No information of this magnitude was missed by trial counsel here: No military heroics; no change in personality due to those heroics; and no response by struggling to regain normalcy. Strickland prejudice has not been demonstrated here.

Here, applying the treatment of Porter in Suggs, 609 F.3d at 1232: "[Jones] cannot contend that his sentencing judge and jury 'heard almost nothing that would humanize [Jones] or allow them to accurately gauge his moral culpability.'..."

Therefore, Jones still fails to meet his burden of demonstrating both of Strickland's prongs, and, therefore, if the merits of ARGUMENT I are addressed, this claim should still be rejected.

ISSUE-ARGUMENT II: DID THE TRIAL COURT REVERSIBLY ERR BY REJECTING THE CLAIM THAT (A) DEFENSE COUNSEL WAS INEFFECTIVE "AND/OR" THE STATE FAILED TO DISCLOSE IN DISCOVERY FRAUDULENT EVIDENCE OF JONES' G.E.D. AND (B) THE RECORD IN PRIOR APPEALS MUST BE CORRECTED? (IB 50-55, RESTATED)

"ARGUMENT II" contends (IB 50-51) that that defense counsel unreasonably and prejudicially presented Defense Exhibit 9, a G.E.D., to the jury when he should have known it was false. It also suggests (IB 54) that Brady v. Maryland, 373 U.S. 83 (1963), applies because "the prosecution has a continuing duty to disclose evidence even in post-conviction." It also contends (IB 51-53, 55) that the appellate record should be corrected "with accurate information." These claims were insufficiently alleged in the 2010 Successive Motion, and the record conclusively refutes key aspects of the claims.

A. The Standard of Appellate Review.

The Standard of review discussed under ARGUMENT I, *supra*, also applies here. According to, for example, Ventura v. State, 2 So.3d 194, 197-98 (Fla. 2009), the summary denial of a successive postconviction motion claim is permitted "'[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief'" and "depends upon the written materials before the court." the summary denial " is tantamount to a pure question of law and is subject to de novo review." On appeal, a summary denial will be upheld "if the motion is legally insufficient or its allegations are conclusively refuted by the record." A successive postconviction motion can be denied without an evidentiary hearing "'[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief."

Here, on its face, the claim was insufficiently pled. It alleged no specifics concerning Fla.R.Crim.P. 3.851's one-year limitation. It failed to allege sufficient facts concerning each of Strickland's IAC deficiency and prejudice prongs, and, indeed, it alleged inconsistent theories. It alleged nothing specific whatsoever concerning a supposed Brady violation. And, as a matter of law, records in previously completed appeals are not a backdoor for Brady claims. In any event, on the face of the 2010 Successive Motion vis-a-vis all the record in this case, correcting the false nature of G.E.D. would have not changed any material result in this case, and, moreover, its disclosure would have affirmatively harmed Jones' plea for a life sentence.

Therefore, the trial court's summary denial of this successive claim should be affirmed.

B. The Trial Judge's Order (attached to this brief).

The trial court ruled that the G.E.D. claim of the 2010 Successive Motion was untimely (1PR2011 165); the claim failed to specify requisite elements of IAC or Brady (1PR2011 166-67); the record conclusively rebuts requisite elements (1PR2011 168-71); and the principle of correcting the record in prior appeals is inapplicable (1PR2011 171-72).

The trial court was correct on each of its points and merits affirmance.

C. The Correctness of the Trial Court's Order.

1. Untimeliness.

As the trial court ruled, the 2010 Successive Motion failed to even attempt to justify why Jones waited 21 years to raise this claim. Indeed, opposing counsel candidly conceded at the Huff hearing, "I don't know why it wasn't discovered before." (2PR2011 200) Therefore, Jones' failure to sufficiently allege the timeliness of this claim remains palpable and confirmed. The summary denial of this claim should be affirmed because the claim failed to specify how it was timely. See Fla.R.Crim.P. 3.851(d)(2)(A)(postconviction motion filed in excess of rule's 1-year limit must allege "due diligence" ...); 3.851(e)(2)(B) (requires reason why not previously raised); Geralds v. State, 2010 WL 3582955, *15 (Fla. Sept. 16, 2010)(affirmed "postconviction court ... summarily denying ... newly discovered evidence claim that Dr. Lauridson testified falsely at his resentencing";

"Gerald has not alleged how or when he discovered Dr. Lauridson's letter"); Jimenez v. State, 997 So.2d 1056, 1064 (Fla. 2008)("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence")(citing Mills v. State, 684 So.2d 801, 804-05 (Fla. 1996)(establishing such an interpretation for rule 3.850(b)(1), which has language identical to rule 3.851(d)(2)(A)). Compare Davis v. State, 26 So.3d 519, 528-29 (Fla. 2009)(specific corroborative details of due diligence provided at Huff hearing).

Further, in contrast to Jones' burden to show good cause and filing within one-year of discovery through due diligence, the 2010 Successive Motion actually supports the untimeliness of this claim. The 2010 Successive Motion (1PR2011 61) alleged that Jones had made comments to Dr. Keyes for the 2005 mental retardation proceeding indicating "Mr. Jones did not specifically remember the GED test, but told Dr. Keyes that someone else probably took the test for him (T. 46-47)." Therefore, the collateral defense was on notice of this claim at least five years prior to the filing of the 2010 Successive Motion, making this claim palpably untimely.

Further, the attachments to the 2010 Successive Motion affirmatively show that it was not presented within one year of its discovery. One attachment that purports to support this claim is Fax-dated "2008-Dec-04" and dated "12/4/08" (1PR2011 65) and the other one bears November 2006 and December 2006 dates (1PR2011 66), yet the claim was not filed until 2010.

(See also 1PR2005 123-24, where, in 2005, trial court indicates that falsity of G.E.D. is conjecture)

In sum, the trial court correctly ruled that this claim was untimely.

2. The Proper Summary denial of the IAC Claim.

The 2010 Successive Motion alleged a violation of Strickland:

6. Trial counsel unreasonably presented defense exhibit 9 contrary to his client's comments that he could not remember taking such a course and without investigating the State's discovery.

Contrary to this claim's assertion that a reasonable trial counsel was on notice to investigate the authenticity of the G.E.D., Dr. Anis, as a defense witness, explained at the 1989 trial how Jones could have the capacity to obtain the G.E.D.:

Q. During your consultation then, your review of the records, did you determine the educational status or level of Mr. Jones?

A. Yes, sir.

Q. And how did you determine that and what did you determine it to be?

A. The defendant has a GED from Maryland. Also, I saw in the record a letter that he had written, which was a quite mature, well-spelled, well-phrased letter. However, in the course of testing, it became apparent that while he is fairly adept at mathematics, at the fifth-grade or perhaps six-grade level in arithmetic, his writing skills and looks like his reading skills, too, are probably going to be first-, second-, or third-grade levels. Leading me to suspect that the good letter I saw that he had written was perhaps written out by someone else and he may have copied it. My inmates do that a lot when they write me. [21T 3446-47]

...

Q. [cross-examination]: ... Doctor, to what do you ascribe the fact that he's gotten a GED? Is that helplessness in life? I mean, he has no goal in life, so he goes and gets a GED? Is that consistent, Doctor?

A. Persons who are motivated get GED's. That is certainly showing a lot of strength. That is showing an effort to improve one's self to

avoid being overwhelmed by the world. ... People who feel helpless and hopeless do still often make efforts to improve themselves. And it is characteristic of many people who are feeling very bad about themselves, their existence, have periods in which they make great effort. [21T 3451-52]

Accordingly, as discussed under ARGUMENT I *supra*, defense counsel Davis testified at the 1996 evidentiary hearing that he had no doubts about Jones' competence; Jones "never exhibited any kind of characteristics of not being alert, not being attentive, not knowing what was going on or not being able to assist me in his defense." (4PT 31) Mr. Davis' observation is corroborated by Jones' guilt-phase testimony, which, although sometimes using flawed grammar, was lengthy, detailed, and responsive (See 18DT 2965-3133).

More specifically, Jones, at the guilt-phase, tendered details that Griffin had been asleep when the shooting started. The killer, Jones testified, was a drug dealer with whom they planned to trade two guns for drugs (18DT 3007-09). The drug dealer, Jones testified, had a .357 in his hand. (18DT 3009) When officers Armstrong and Ponce de Leon approached, the drug dealer said, "Here come the police. What's this, a set-up?" (18DT 3009). While Goins and Harris were outside the car talking to the police, the drug dealer "got up and shot the police." (18DT 3013) Jones testified that he woke Griffin up; Griffin "didn't know what was going on." (18DT 3013). Jones grabbed a "nine millimeter Beretta" and claimed he did not shoot it, and he and Griffin ran away, hiding in a house a short distance away. (18DT 3019-20, 3113, 3116) While they were at the house, the drug dealer who had shot the officer showed up and helped Jones take his

hospital clothes off. Jones said the drug dealer left, and he has not seen the drug dealer since then. (18DT 3021-22). The police approached the house, and Jones surrendered to them. (18DT 3023-24)

On cross-examination, Jones admitted to ten prior felony convictions, that he had escaped from the Maryland House of Corrections, and that, at the murder scene, he and others were in a car stolen from Jessup, Maryland. (18DT 3044-47; see also 18DT 3132-33) Jones had an ID card in the name of Antoine Smith. (18DT 3180-81) He said that he and his companions had a six-inch .357 Magnum Ruger, a six-inch .38 revolver, a Beretta .380 semiautomatic, a two-inch .38 revolver, and a 410 sawed-off shotgun. (18DT 3076-77) Jones admitted to purchasing the shotgun and the Beretta. (18DT 3078) Jones "rotated" carrying the various guns. (18DT 3079)

Moreover, defense counsel also obtained additional records that were consistent with the G.E.D.: a certificate of completion of an introductory Bible course, certificate award from the PTL ministry, and a certificate of completion for woodworking or woodshop. (21T 3454-55) These records further support Dr. Anis' trial opinion that Jones can achieve a G.E.D. through determination and negate any inference that trial counsel should have investigated the G.E.D.

Moreover, the G.E.D. was included in Davis' prison records (Compare 21T 3439 with 3446-47, 3455), which defense counsel had obtained through his subpoena and discovery (See 4PT 28, 38, discussed and footnoted in ARGUMENT I, supra).

Further, on its face, the G.E.D. bears the name "Clarence J. Jones" (1PR2011 64), which is consistent with "Clarence James Jones" on documents in this case (See, e.g., 1DR 4), and the G.E.D. indicates that it is from Maryland (1PR2010 64), and it remains uncontested that Jones came from Maryland and was imprisoned in Maryland (See, e.g., 18DT 3044-47; 21DT 3439-40; 4PT 49).

In contrast with defense counsel's reasonable reliance on the G.E.D., the 2010 Successive Motion conclusorily and belatedly claimed (1PR2010 61) that "[t]here are no records of Mr. Jones ever getting his GED from the Maryland Board of Education" and attached two documents that Jones alleges support his allegation of falsity. However, they do not bear the same social security number for Jones as multiple locations in this case's record. (See Complaints/Arrest Affidavits at 1DR 4, 7, 8, 18; NCIC printout at 1DR 9; Intake Interview Sheet at 1DR 13; presentence investigation introduced as Defense Exhibit #2, 6/23/05) Jones cannot inquire of an agency using a non-matching social security number and then claim that the agency not finding a G.E.D. under that social security number facially demonstrates his claim. Where a defendant submits alleged documentation for a claim that does not support it, the claim must be summarily denied, meriting affirmance here. See, e.g., Johnston v. State, 27 So.3d 11, 20-24 (Fla. 2010)(affirmed summary denial of a "newly discovered evidence claim based on the National Academy of Sciences report"; "Nothing in the report renders the forensic techniques used in this case unreliable").

In sum, the 2010 Successive Motion contained no prima facie showing that any reasonable defense counsel should have investigated the authenticity of the G.E.D., and given Davis' opinion that Jones was competent, alert, and knowledgeable about the proceedings (4PT 31), which was further grounded in the trial record by Jones' detailed guilt-phase testimony and the context of facially valid prison records containing Jones' additional achievements, the existing record conclusively rebuts this IAC claim. The existing record rebuts any suggestion that any reasonable trial counsel would have been on notice that the G.E.D. was false and investigated the matter. Compare, e.g., Haliburton, 691 So.2d at 471 (test for deficiency, whether "so patently unreasonable that no competent attorney would have chosen it"); Chandler, 218 F.3d at 1315 ("because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take") with, e.g., Jones v. State, 998 So.2d 573, 587 (Fla. 2008)(in affirming summary denial of IAC based on alleged shackling, applied principle "that to be entitled to an evidentiary hearing on a motion claiming ineffective assistance of counsel, the defendant must allege specific facts establishing both deficient performance of counsel and prejudice to the defendant"); Hannon v. State, 941 So. 2d 1109, 1140 n.20 (Fla. 2006)("Hannon must allege specific facts that, if accepted as true, establish a prima facie case that ..."); Blackwood v. State, 946 So.2d 960, 968 (Fla. 2006)(affirmed summary denial of IAC claim; postconviction motion

must demonstrate both ineffective performance and prejudice as a result of that deficiency); Allen v. State, 854 So.2d 1255, 1258-1259 (Fla. 2003)("conclusory allegations" insufficient; "defendant must allege specific facts").

Therefore, Strickland's deficiency prong was not sufficiently alleged, and also, it is rebutted by the record.

As the trial court found (See 1PR2-11 167-71, attached to this brief), the 2010 Successive Motion was also fatally deficient on Strickland's prejudice prong. While some references to the G.E.D. do appear in the very lengthy record of this case, the 2010 Successive Motion failed to make a prima facie case that "there is a reasonable probability" that a discovery of falsity of the G.E.D. would have changed the result of the penalty phase. See, e.g., Dillbeck, 964 So.2d at 99 (quoting Strickland, 466 U.S. at 694; "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," "'a probability sufficient to undermine confidence in the outcome'").

In contrast with Jones' burden to show prejudice, the totality of the record in this case, including the extreme aggravation and the inconsequential role the G.E.D. played in the case demonstrate the non-prejudice. The aggravators, upheld in Jones v. State, 580 So.2d 143, 146 (Fla. 1991), included:

- committed while under sentence of imprisonment;
- prior conviction of violent felony;

- committed to avoid or prevent arrest, the victim was a law enforcement officer engaged in performing official duties, and taking the officer's weapon.

Jones' criminal history included his escape status from a Maryland prison when he gunned down Officer Ernest Ponce de Leon in the line of duty in Tallahassee. Jones had escaped from a 25-year sentence for three counts of robbery with a deadly weapon and attempted robbery with a deadly weapon. The trial court's sentencing order described Jones' additional convictions for violent felonies. (See 2DR 225)

Killing a police officer in the line of duty is correctly recognized as an extremely weighty aggravator. See Burns v. State, 699 So.2d 646, 650 (Fla. 1997)("the gravity of the single merged aggravator was not reduced by any particular factual circumstance. On the contrary, we agree with the trial court that this aggravator was entitled to great weight"); Reaves v. State, 639 So.2d 1, 6 (Fla. 1994)(defendant shot a police officer after shortly after the officer responded to a 911 telephone call and conducted a warrants check on the defendant; characterized as "strong aggravating factors" the aggravators of prior violent felony and avoiding or preventing a lawful arrest or effecting an escape from custody); Bailey v. State, 998 So.2d 545, 553 (Fla. 2008)(officer murdered in line of duty; applied Burns and Reaves); see also Terry v. Ohio, 392 U.S. 1, 23-24 (1968)(discussing magnitude of murder of police officers in line of duty).

In contrast with the extremely weighty aggravators, the trial court's sentencing order did not even cite to the G.E.D. in evaluating mitigating factors (See 2DR 227-29), and this Court affirmed the trial court's

mitigation evaluation, See Jones, 580 So.2d at 146 ("We cannot say the trial court erred in finding the evidence presented insufficient to constitute a relevant mitigating circumstance"); (see also 1997 order denying postconviction relief,⁹ PR 223-33, attached), affirmed Jones, 732 So.2d 313. Indeed, the prosecutor actually argued at trial that all of Jones' certificates, including the G.E.D., are inconsequential:

You know, he gives you those certificates concerning his past. I think he got his GED. He got a certificate in woodworking course. I think he got a prison ministries certificate; he got a couple of certificates from the PTL Club signed by Mr. Bakker. You know, we're not interested in his past. What we're interested in is July 8, 1988, because that has the most effect. ...

... Tallahassee police officer Ponce De Leon is dead. He was killed by those two bullets fired from a .357 Magnum. The hand that was wrapped around the trigger that fired those bullets belonged to Clarence Jones, seated right there. ...

(21DT 3529-30)

Further, Jones (IB 54) erroneously attempts to apply constitutional IAC to postconviction proceedings by mis-using a Brady case (i.e., Kyles) and a statute. The trial court correctly ruled that constitutional IAC is inapplicable at the postconviction stage (1PR 169 n.6). Indeed, the 2010 Successive Motion fatally failed to develop any argument that Strickland's

⁹ However, Strickland measures deficiency and prejudice pertaining to the proceedings in which defense counsel participated. Deficiency and prejudice are determined by defense counsel's actions/inactions preparing for trial and participating in the trial and their effect on the fairness and reliability of the outcome of those proceedings; prejudice is not determined by an evaluation of proceedings in which defense counsel did not participate. As discussed further in the next full paragraph in the body *infra*, as this Court has held many times, and as the trial court observed (See 1PR2011 169 n.6 and accompanying text; collecting cases), Strickland IAC does not apply to postconviction proceedings.

deficiency prong applied to postconviction proceedings, but, instead, only mentioned postconviction prejudice (See 1PR2010 61). In any event, IAC remains insufficiently pled and rebutted by the record, regardless of where one focuses in the prior proceedings.

Thus, as the trial court found here (1PR2011 170), the trial court's June 2005 rejection of mental retardation did not turn on whether Jones had a G.E.D. Instead, while the 2005 mental-retardation order mentioned the conjectural status of any falsity of the G.E.D (See paragraph 17, 1PR2005 123-24), the full scale IQ scores of 79 and 75 were dispositive of the mental retardation issue (See paragraph 9, 1PR2005 122).

Finally, as the trial court found,

... the disclosure at the penalty phase of a fraudulent GED in this case, if it had any effect, would have probably prejudiced Defendant Jones. Jones' motion (at p. 25) cites to Dr. Keyes' testimony ("T. 46-47") at a June 23, 2005, evidentiary hearing. In that testimony, Dr. Keyes opined that 'Clarence [Jones] probably got somebody else to take the test for him' and that Jones told Keyes that someone else probably took the test for him. This suggestion of Jones' deception in obtaining someone else to take the test for him would not have persuaded jurors to vote for life nor persuaded a Court to impose life. *See Cummings v. Secretary for Dept. of Corrections*, 588 F.3d 1331, 1367 (11th Cir. 2009)('we have rejected prejudice arguments where mitigation evidence was a "two-edged sword' or would have opened the door to damaging evidence').

(1PR2011 170-71, attached)

In conclusion, the 2010 Successive Motion failed to prima facie demonstrate IAC prejudice, and also the record conclusively rebuts IAC prejudice.

3. The Proper Summary denial of the "Brady" Claim.

There was no Brady claim in the 2010 Successive Motion that was remotely developed enough to be judicially cognizable.

Riechmann v. State, 966 So.2d 298, 307-308 (Fla. 2007), summarized a defendant's postconviction burdens to establish a claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963):

Brady requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti*, 894 So.2d at 168 [*Mordenti v. State*, 894 So.2d 161 (Fla. 2004)] (*citing Guzman v. State*, 868 So.2d 498, 508 (Fla. 2003)). To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence—either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See *Strickler v. Greene*, 527 U.S. 263 (1999).

To establish prejudice or materiality under *Brady*, a defendant must demonstrate 'a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial.' *Smith v. State*, 931 So. 2d 790, 796 (Fla. 2006) (*citing Strickler v. Greene*, 527 U.S. 263, 289 (1999)). 'In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' *Id.* (*quoting Strickler*, 527 U.S. at 290).

Ponticelli v. State, 941 So.2d 1073, 1084-85 (Fla. 2006). With regards to *Brady*'s second prong, this Court has explained that '[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense ... had the information.' *Provenzano v. State*, 616 So.2d 428, 430 (Fla. 1993) (*citing Hegwood v. State*, 575 So.2d 170, 172 (Fla. 1991); *James v. State*, 453 So.2d 786, 790 (Fla. 1984)). Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. *Way v. State*, 760 So.2d 903, 911 (Fla. 2000). This Court then reviews de novo the application of the law to these facts. *Lightbourne v. State*, 841 So. 2d 431, 437-38 (Fla. 2003).

Here, the totality of the 2010 Successive Motion's supposed Brady claim consisted of this sentence with a citation to general law:

To the extent that the State knew and failed to disclose the fraudulent document, this is a *Brady* violation. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Banks v. Dretke*, 540 U.S. 668,696 (2004)(a rule 'declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.')

(1PR2010 61-62) This allegation is patently insufficient, as the trial court found:

CLAIM II alleges a *Brady* claim as an alternative, but it fails to allege any specific facts demonstrating that the State of Florida had any knowledge of, or withheld information of, any falsity of the GED, thereby requiring the summary denial of a *Brady* claim. See, e.g., *Hannon v. State*, 941 So.2d 1109, 1140-41 (Fla. 2006)(affirmed summary denial of *Brady/Giglio* claim; 'Hannon must allege specific facts that, if accepted as true, establish a prima facie case'; 'Hannon simply asserts that Richardson's testimony was fabricated without additional facts, or any facts that the State knew Richardson's testimony was false'); *Parker v. State*, 904 So.2d 370, 378 (Fla. 2005)(postconviction allegations that 'then either the police planted ... or the police found a thirteenth spent cartridge and planted this cartridge on the victim's body'; defendant 'provides no factual support for these allegations but simply asserts that either one of these theories might be true ... conclusory, and Parker has not cited to specific facts to support his theory ... not entitled to an evidentiary hearing on this claim').

(1PR2011 166-67, attached) Indeed, Jones' counsel only mentioned the word "Brady" in passing at the Huff hearing on the 2010 Successive Motion. (See 2PR2011 201)

There has never been an allegation specifying that, and how, the State of Florida knew that a State of Maryland certificate that the defense introduced into evidence was false. The State denies any such innuendo. Indeed, the State's reliance on the facial validity of the G.E.D., like defense counsel's, was grounded on the certificate bearing Jones' name and emanating from a prison system in a state (Maryland) in which Jones spent many years.

Further, contrary to Jones's position (IB 54), as a matter of law, Brady is inapplicable to postconviction proceedings. See District Attorney's Office for Third Judicial Dist. v. Osborne, 129 S.Ct. 2308, 2319–20 (2009) (reversed Court of Appeals' "conclu[sion] that the State had an obligation to comply with the principles of *Brady*" in postconviction).¹⁰ (Accord Order at 1PR2011 n.7) Jones incorrectly cites to Kyles, discussed *supra*, for his assertion. Kyles stands for no such principle; instead, Kyles discussed non-disclosed evidence for the trial, not for postconviction. Kyles concerned litigation at postconviction of a Brady claim that contended that the prosecution did not disclose material for the trial. Jones' citation to a state statute does not support his point; a statute establishes no constitutional right, and Jones does not even specify what part of the statutes on which he relies. However, this discussion is a red herring because of the egregious pleading deficiency of any Brady claim concerning the G.E.D., as discussed in the preceding paragraphs.

Moreover, for the same reasons that Jones' IAC claim failed on Strickland's prejudice prong, his Brady claim fails on Brady's requirements that Jones demonstrate that knowledge of falsity was "exculpatory or impeaching" and material and prejudicial: the G.E.D.'s minor role in the case pales in comparison with the extreme aggravation in this cold-blooded

¹⁰ Duckett v. State, 918 So.2d 224, 239 (Fla. 2005), had previously indicated that Brady may apply to postconviction proceedings, but Brady is based on the federal constitution, and Osborne settles the matter.

shooting of a police officer in the line of duty, and the disclosure at the penalty phase of a fraudulent G.E.D., if it had any effect, would have probably prejudiced Defendant Jones.

4. The Proper Summary denial of the Correct-the-Prior-Appellate Record Claim.

As the trial court ruled, this claim is not only time-barred but also meritless:

Jones also interjects an argument that 'appellate counsel' must 'correct the appellate record.' Accepting Jones' argument would erroneously require an evidentiary hearing in about every case in which a postconviction defendant has claimed a *Brady* or *Giglio* violation based on alleged misrepresentations recorded in the pre-trial or trial proceedings. This is not the law. The cases[FN8] and rule Jones cites concern the accuracy of the record that is constructed for the appellate court's review of the events being appealed at that time, not attempting to correct the record of cases in which appellate review has been already completed. CLAIM II does not support re-opening the records of the appeals that have already been finalized.

FN8. *Stuyvesant Ins. Co. v. State*, 375 So.2d 620 (Fla. 3d DCA 1979)('where the record on appeal is thought to be inaccurate, it is the duty of the party concerned to submit and settle the matter in the lower court; otherwise, that party is bound by the recital in the record'); *Nations v. State*, 145 So.2d 259, 260 (Fla. 2d DCA 1962)('This portion of the transcript is alleged to be inaccurate and, in effect, a fabrication as indicated by supporting affidavits ... not properly before this court ...')(quoting appellate rule ("If any dispute arises as to whether any transcript truly discloses what occurred in the lower court ...").

(1PR2011 171-72)

In response to the trial court's reasoning that Jones' appellate rationale "would erroneously require an evidentiary hearing in about every case in which a postconviction defendant has claimed a *Brady* or *Giglio* violation," Jones (IB 54-55) now argues that "Fla.R.Crim.P. 3.851 does allow for an evidentiary hearing in every case that raises a legitimate

Brady/Giglio violation, even in a successor post-conviction motion. See Fla. R. Crim. P. 3.851 (5)(B)." However, Jones' bare mention of "legitimate" erroneously slights rules and decades of case law that determine the requirements of timing, allegations of specific elements, allegations of specific facts in support of those elements concerning a "Brady" or "Giglio" claim, and, indeed, the preceding sections covered some of those rules that are fatal to the G.E.D. claim. Essentially, Jones now asks this Court to throw all those requirements, rules, and case law away in order to, supposedly, correct the appellate record of appellate cases that are final. He is asking to by-pass those requirements, rules, and case law and allow his claim to come in through a backdoor of correcting the record. Thus, Jones' "Conclusion" (IB 56) requests a new penalty phase based upon "introducing a fraudulent trial exhibit," which would be the relief for a timely and sufficiently alleged (and ultimately proved) IAC claim.

Interestingly, the 2010 Successive Motion (1PR2010 62) cited to Stuyvesant Ins. Co. v. State and Nations v. State, and, in response, the trial court ruled that those cases "concern the accuracy of the record that is constructed for the appellate court's review of the events being appealed at that time, not attempting to correct the record of cases in which appellate review has been already completed." Now, Jones (IB 55) says that those cases do not prohibit raising an improper exhibit whenever counsel receives information of its falsity. So, Jones' motion argues that two cases support his claim, the trial court disagrees and rules that the

two cases do not, and the Initial Brief argues that the two cases do not prohibit the claim, which distills down to the claim failing to demonstrate a basis for relief.

Finally, Jones contends (IB 54-55) that the appeals in this case are not "completed" as long as a postconviction motion and federal habeas remain pending. This overlooks that each appeal has been completed when the rehearing has been denied and/or when the mandate issues. See Fla.R.App.P. 9.330, 9.340.

Accordingly, in State v. Stang, 41 So.3d 206 (Fla. 2010), Justice Lewis' concurring opinion explained that the record on appeal of a case from the DCA cannot be expanded by adding it to a pleading in this Court, "well after the decision of the Second District was final."

Jones' rationale would render meaningless the abundant case law that analyzes whether a new holding in another case will be applied retroactively. Under Jones' rationale, as here, a 20-year old 1991 appellate decision in Jones v. State, 580 So.2d 143 (Fla. 1991), is not final and so arguably new case law can be applied to it without any analysis of retroactivity. This would be an absurd result and contrary to sound case law. For example, this Court's determinations that Ring and related cases are not retroactive would be meaningless under Jones' rationale, such as in Pagan v. State, 29 So.3d 938, 959 (Fla. 2009):

We have held that Ring does not apply retroactively to defendants whose convictions were final when the decision was rendered. *See Johnson v. State*, 904 So.2d 400 (Fla.2005).

This returns the discussion of this claim to its origin and the correct rationale of the trial court, that, under Jones' reasoning, any purported Brady claim could be raised any time without any regard to the sufficiency of allegations pertaining to timeliness, Brady elements, or specific facts alleged in support of those elements. Under Jones' rationale, without any regard to timeliness requirements, he can raise any Brady claim any time up until when he is executed, See Fla.R.Crim.P. 3.851(h)(postconviction proceedings "[a]fter death warrant signed"). For good reason, this is not the law. See, e.g., Tompkins v. State, 994 So.2d 1072 (Fla. 2008)(successive postconviction motion in context of death warrant; affirming summary denial).

Therefore, Jones' proposed by-pass of all pertinent requirements through his proposal of correcting the prior appellate record should be rejected.

None of ARGUMENT II has any merit.

CONCLUSION

This is the fifth or sixth (depending on how they are counted) motion for postconviction relief. This successive postconviction motion alleged much too little, much too late.

Based on the foregoing discussions and the discussions in the trial court's order (attached), the State respectfully requests this Honorable Court affirm the trial court's summary denial of Jones' 2010 Successive Motion.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by
U.S. MAIL on October 17th, 2011: Terri L. Backhus; 13014 N. Dale Mabry,
#746; Tampa, FL 33618.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New
12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

By: STEPHEN R. WHITE
Florida Bar No. 159089
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 487-0997 (FAX)

IN THE SUPREME COURT OF FLORIDA

CLARENECE JAMES JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC11-1263

APPENDIX TO ANSWER BRIEF

- A. 1997 trial court ordering denying postconviction relief. (2PR 223-33)
- B. Jones v. State, 732 so.2d 313 (Fla. 1999), affirming trial court's 1997 denial of postconviction relief.
- C. 2005 trial court order denying mental retardation claim (1PR2005 121-24).
- D. 2011 trial court order denying 2010 Successive Motion, the subject of this appeal. (1PR2011 159-72, the order that is being attacked in this appeal).

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