IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1272

BOBBY RALEIGH,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

PAMELA J. BONDI
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Fla. Bar No. 998818
SENIOR ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., 5th Floor
DAYTONA BEACH, FLORIDA 32118
(386)238-4990
FAX-(386)226-0457
COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

In his last appearance before this Court, this Court summarized the factual and procedural history of Raleigh's case in the following way:

> In the early morning hours of June 5, 1994, while at the Club Europe in DeLand, Domingo Figueroa told his cousin, Bobby Raleigh, that someone had slapped his mother, Janice Figueroa. [FN1] Raleigh and Figueroa confronted Douglas Cox and his brother. While they were talking in the parking lot, Raleigh's mother ran out of the bar screaming at Cox. Raleigh took his mother to the car and returned to confront Cox. Raleigh apologized to Cox for his mother's actions and they shook hands. After confronting Cox, Raleigh obtained guns from his home, and he and Figueroa drove to Cox's trailer.
>
> > [FN1] The facts are taken from Raleigh's direct appeal. *Raleigh*, 705 So. 2d 1324.
>
> Raleigh went to the door of the trailer with a gun in his hand and asked about Cox. He was told that Cox was asleep. Raleigh and Figueroa left Cox's trailer, drove down a nearby dirt road, and parked. They returned and entered Cox's trailer carrying guns. Raleigh went to the end of the trailer and shot Cox in the head three times at close range. Figueroa and Raleigh each shot Cox's roommate, Tim Eberlin, until their guns jammed. Raleigh then beat Eberlin in the head with the barrel of his gun until Eberlin stopped screaming.
>
> Raleigh and Figueroa next drove to Raleigh's home where they burned their clothes and dumped bullets into a neighbor's yard. They later hid the guns in a secret compartment in Raleigh's Subaru. The police went to Raleigh's house that night, and he agreed to talk to them. Raleigh initially denied his involvement in the murders, but after being told that Figueroa had implicated him, he made a second statement, which was taped. In this second statement, Raleigh admitted killing both Cox and Eberlin.

Raleigh was charged with two counts of first-degree murder, one count of burglary, and one count of shooting into a building. He entered into a plea agreement with the State in which he agreed to plead guilty to both counts of murder and, in exchange, the State agreed to *nolle prosequi* the counts of burglary and shooting into a building. The court accepted Raleigh's plea pursuant to this agreement on June 6, 1995. Figueroa was tried and sentenced separately.

Raleigh's penalty phase proceeding was conducted in August 1995. Figueroa was not called to testify. Instead, a prior taped statement Figueroa had given to police investigator Lawrence Horzepa on the day of the murders was introduced through Horzepa. Initially, through a series of leading questions during cross-examination, Raleigh's counsel asked Horzepa to confirm specific portions of Figueroa's statement. Specifically, defense counsel asked Horzepa to confirm that Figueroa had told him that his “Aunt Janice” (Raleigh's mother) had been called a bad name by the victim, Cox, and to confirm that Figueroa admitted to owning the safe that contained the guns. On its redirect examination of Horzepa, the State sought to introduce Figueroa's entire statement by playing the tape. Defense counsel stated that the defense had no objection. When the tape was played, the jury heard Figueroa say that he shot Eberlin once at Raleigh's direction, but Figueroa was not sure if his shot hit Eberlin. The jury also heard Figueroa say that Raleigh had already shot Eberlin once.

Raleigh testified on his own behalf at the penalty phase. In addition to eight other witnesses, defense counsel called psychologist Dr. James Upson as its mental health expert. Dr. Upson testified that he met with Raleigh for approximately eleven and a half hours, interviewed Raleigh's mother for approximately one hour, reviewed Raleigh's school and medical records, and conducted twenty tests. Dr. Upson found Raleigh to be of normal intelligence with an IQ of ninety-eight. He further testified that Raleigh is a follower who is easily manipulated by others and that Raleigh portrayed some allegiance to Figueroa. Dr. Upson testified that Raleigh fit the criteria for antisocial personality, although Dr. Upson would not clinically diagnose Raleigh with a personality

disorder. Dr. Upson further testified that Raleigh's neuropsychological functions may have been impaired by the consumption of alcohol at the time of the murders, but there was no significant impairment. Ultimately, Dr. Upson concluded that he could not find any statutory mitigators to apply in Raleigh's case except Raleigh's age at the time of the murders (nineteen).

At the end of the penalty phase, the jury unanimously recommended the death penalty for Raleigh on both counts of first-degree murder. However, before Raleigh was sentenced, he learned that Figueroa had made another statement about his involvement in the crime. The day following the murder, Figueroa told his uncle that he had killed one victim and Raleigh killed the other. The State had introduced this statement at Figueroa's trial; and, during closing argument, the State had argued that this statement demonstrated that Figueroa had formed the intent to kill Eberlin, regardless of whether Figueroa was the one who actually killed Eberlin. The State argued that this statement, coupled with the forensic evidence that two of the three shots which hit Eberlin may have been fired from Figueroa's gun, demonstrated that Figueroa had downplayed his role in the murders when he gave the statement to investigator Horzepa.

On February 16, 1996, Raleigh was sentenced to death upon the trial court's finding that the five statutory aggravators [FN2] outweighed the one statutory and several nonstatutory mitigators. [FN3] On direct appeal, Raleigh raised fourteen claims. [FN4] After denying each claim, this Court affirmed Raleigh's death sentence. *Raleigh*, 705 So. 2d at 1331. Raleigh then filed an amended 3.851 motion for postconviction relief, in which he raised fourteen claims. On August 2, 2001, the trial court held a *Huff* [FN5] hearing and ordered an evidentiary hearing on seven of Raleigh's claims. [FN6]

> [FN2] The aggravating circumstances found by the trial judge were: (1) prior violent felony (applied to both Cox and Eberlin); (2) that the murders were committed while engaged in a burglary (applied to the murders of both Cox and Eberlin); (3) that the murder of Cox was cold, calculated, and

premeditated (CCP); (4) that the murder of Eberlin was committed to avoid arrest or effect escape; and (5) that the murder of Eberlin was especially heinous, atrocious, or cruel (HAC). *Raleigh*, 705 So. 2d at 1327 n. 1.

[FN3] The trial court found one statutory and fifteen nonstatutory mitigators. The statutory mitigator is Raleigh's age-he was nineteen at the time of the crime. *Id.* at 1327 n. 2. The nonstatutory mitigators were that the defendant (1) was intoxicated; (2) was remorseful; (3) pled guilty; (4) offered to testify against codefendant Figueroa; (5) could probably adjust well to prison life; (6) was a good son and friend to his mother; (7) was a good brother; (8) was a good father figure to ex-girlfriend's daughter; (9) was born into dysfunctional family; (10) did not know who fathered him; (11) attempted suicide; (12) had low self-esteem; (13) suffered from an adjustment disorder and was antisocial; (14) used poor judgment and engaged in impulsive behavior; and (15) was a follower. *Id.* at 1327 n. 3.

[FN4] Raleigh alleged the trial court erred in (1) failing to instruct the jury on the "no significant history of criminal activity" statutory mitigator; (2) instructing the jury on the "pecuniary gain" aggravator; (3) failing to give the requested instruction on the CCP aggravator; (4) dismissing a juror over defense objection where there was no showing that the juror could not be fair; (5) finding the "during the course of a burglary" aggravator; (6) finding the "avoid arrest" aggravator; (7) finding the CCP aggravator for Cox's murder; (8) finding the HAC aggravator for Eberlin's murder; (9) rejecting the "under substantial domination of another" statutory mitigator; (10) rejecting the "no significant history of criminal activity" statutory mitigator; (11) giving only "some weight" to the "remorseful

and cooperative with authorities" nonstatutory mitigator; (12) rejecting Figueroa's life sentences as a nonstatutory mitigator; (13) giving "little weight" to Raleigh's voluntary intoxication; and (14) sentencing Raleigh to death because death is disproportionate. *Id*. at 1327 n. 4. For each of the fourteen issues, this Court found that either the trial court committed no error or that the claim lacked merit. *Id.* at 1327-31.

[FN5] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[FN6] The court granted an evidentiary hearing on the following claims: (1) penalty phase defense counsel was ineffective for failing to object to the admission of the codefendant's taped statement in violation of section 921.141(1), *Florida Statutes* (1995); (2) the State knowingly presented false evidence in violation of defendant's rights under the United States Constitution and the Florida Constitution; (3) defendant was deprived of his rights because the mental health expert who evaluated defendant did not render adequate mental assistance as required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); (4) defense counsel was ineffective for failing to adequately investigate and present mitigation and to adequately challenge the State's case; (6) defense counsel was ineffective for recommending that the defendant plead guilty to first-degree murder; (9) defense counsel was ineffective for recommending that defendant accept the plea based on their prediction of a life sentence from the judge; and (11) defense counsel was ineffective for advising defendant that in exchange for his plea, he would receive a nonjury sentencing phase proceeding or a jury override.

At the evidentiary hearing, Raleigh presented the testimony of a second mental health expert, Dr. Ernest

> Bordini. Dr. Bordini diagnosed Raleigh as suffering from a nondescript neuropsychological dysfunction. Dr. Bordini further testified that several statutory mitigators applied, including that Raleigh was acting under the dominion and control of Figueroa. The trial court denied relief. Raleigh now appeals the trial court's denial as it relates to five of his claims. [FN7] He also petitions this Court for a writ of habeas corpus.
>
> > [FN7] Raleigh does not challenge the trial court's denial of his claim that defense counsel was ineffective for recommending that defendant accept the plea based on their prediction of a life sentence from the judge or his claim that defense counsel was ineffective for advising defendant that, in exchange for his plea, he would receive a nonjury sentencing phase proceeding or a jury override.

Raleigh v. State, 932 So. 2d 1054, 1056-1059 (Fla. 2006).

On November 27, 2010, Raleigh filed a successive post-conviction relief motion, in which he claimed that the United States Supreme Court decision in *Porter v. McCollum,* 130 S. Ct. 447 (2009), somehow entitled him to relief. The Circuit Court denied relief, stating:

> Defendant argues that the recent case of *Porter v. McCollum,* 130 S.Ct. 447 (2009) establishes a new, fundamental constitutional right that must be applied retroactively to the claim of ineffective assistance of counsel in the instant case.
>
> A close reading of the *Porter* decision reveals that the case was decided by applying the principles of *Strickland v. Washington,* 466 U.S. 668 (1984) to the specific facts of that case. It did not establish a new constitutional right. The Supreme Court found that the Florida Supreme Court's application of the principles of *Strickland* was improper.

> 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 v. McCollum, supra, at 456.

> The defendant's motion is nothing more than a re-argument of the previous motion heard and denied on the merits. *See, Raleigh v. State,* 932 So. 2d 1054 (Fla. 2006).
>
> In accordance with *Fla. R. Crim. P.* 3.851(f)(5)(B), the court finds that this successive motion should be denied in that it is untimely, successive, procedurally barred, unauthorized and fails to present any new fundamental constitutional right that has been held to apply retroactively.

(V2, R266-67).

Raleigh filed his *Initial Brief* on or about November 4, 2011.

SUMMARY OF ARGUMENT

On December 1, 2011, this Court decided *Walton v. State,* 36 Fla. L. Weekly S702 (Fla. Dec. 1, 2011), which explicitly rejected the precise *Porter* claim contained in Raleigh’s brief. This claim is not viable.

While *Walton* is in all respects dispositive of this claim, there are additional reasons for affirming the denial of relief. Raleigh's successive Rule 3.851 motion is time-barred and does not come within any exception to Rule 3.851(d)(2). Despite Raleigh's insistence to the contrary, *Porter v. McCollum*, 130 S. Ct. 447 (2009) is no more than the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), to the particular facts of that case. The Supreme Court did **not** hold that the *Porter* decision established a new fundamental constitutional right that is to apply retroactively.

The trial court held Raleigh's motion untimely, successive, procedurally barred, unauthorized and failed to present any new fundamental constitutional right that has been held to apply retroactively under Fla. R. Crim. P. 3.851(f)(5)(B). (V2, R267). These rulings should be affirmed.

STANDARDS OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for post-conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). This Court reviews the circuit court's decision to

summarily deny a successive rule 3.851 motion *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009), *citing State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); *Fla. R.Crim. P.* 3.851(f)(5)(B).

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

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN DENYING THE SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF. RALEIGH'S RULE 3.851 MOTION TO VACATE WAS UNTIMELY, SUCCESSIVE, PROCEDURALLY BARRED, UNAUTHORIZED AND FAILED TO PRESENT ANY NEW FUNDAMENTAL CONSTITUTIONAL RIGHT THAT HAS BEEN HELD TO APPLY RETROACTIVELY

Raleigh asserts an entitlement to relitigate his ineffective assistance of counsel claims on the ground that *Porter v. McCollum,* 558 U.S. ---, 130 S.Ct. 447 (2009) allegedly

changed the *Strickland* prejudice analysis and should be retroactively applied. This claim was squarely rejected by this Court in *Walton*, where this Court held:

> The trial level postconviction court here properly denied Walton's second successive postconviction motion because the decision in *Porter* does not constitute a fundamental change in the law that mandates retroactive application under *Witt*. Walton filed his motion well after the one-year deadline for postconviction motions under rule 3.851. Walton's claim that *Porter* applies retroactively is incorrect and insufficient as a matter of law for a successive motion because the decision in *Porter* does not concern a major change in constitutional law of fundamental significance. Rather, *Porter* involved a mere application and evolutionary refinement and development of the *Strickland* analysis, *i.e.,* it addressed a misapplication of *Strickland. Porter*, therefore, does not satisfy the retroactivity requirements of *Witt. See generally Witt*, 387 So. 2d at 924–31.
>
> Further, in the proceedings below, collateral counsel essentially asked the postconviction trial court to reevaluate Walton's claims of ineffective assistance of counsel that had been litigated in his prior postconviction motion in light of the decision in *Porter.* This is not a permitted retroactive application as articulated in Witt, which allows a limited retroactive application only to changes in the law that are of fundamental constitutional significance.
>
> Therefore, we affirm the postconviction court's denial of Walton's second successive postconviction motion.

Walton v. State, 36 Fla. L. Weekly S702 (Fla. Dec. 1, 2011). *Walton* is dispositive, and there is no need or justification for the expenditure of any further resources on Raleigh's *Porter* claim.

Raleigh's claim is procedurally barred.

In addition to being foreclosed by binding precedent, Raleigh's "*Porter* claim" is time barred, and no exception to the time bar exists. Raleigh does no more than re-argue facts adduced in the prior postconviction proceedings -- those issues were decided by this Court in 2006 and are procedurally barred. *Raleigh v. State*, 932 So. 2d 1054, 1056-1059 (Fla. 2006).

Raleigh previously raised the same claim of ineffective assistance of counsel that he seeks to relitigate here, **and this Court decided that claim**. As this Court has held, attempts to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Raleigh cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well-established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Raleigh is attempting to do here, his guilt phase ineffectiveness claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

The appellate review process.

Porter did not address, much less change, the appellate standard of review of factual findings. In fact, the United States Supreme Court never even mentioned the standard of review for factual findings in *Porter*. See *Porter*, 130 S. Ct. at 448-56. In *Strickland*, the United States Supreme Court stated that reviewing courts are required to give deference to factual findings made in resolving claims of ineffective assistance of counsel and then review the rejection of the claim *de novo. Strickland*, 466 U.S. at 698. The United States Supreme Court addressed the extent to which the appellate or federal courts review the findings of the trial court and explained:

> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698, 104 S.Ct. at 2070.

In this Court's decision in *Porter*, 788 So. 2d at 923, this Court cited *Stephens v. State,* 748 So. 2d 1028, n.2 (Fla. 1999) and stated that while the factual findings of the lower court should be given deference, the appellate court independently reviews mixed question of law and fact. The *Stephens* standard of review is expressly compelled by *Strickland*. This Court has not

been misapplying *Strickland*'s standard of review. Giving deference to the lower court findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Since the standard utilized by this Court in *Porter* is the same standard the United States Supreme Court enunciated in *Strickland*, there is no change in law. Because there has been no change in law, Raleigh failed to meet any exception under *Fla. R. Crim. P.* 3.851(f)(5)(B), as the circuit court correctly found. (V2, R267). However, Raleigh says that because *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (*Initial Brief* at 62). *Sochor* cited to *Porter* as a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence. *Sochor*, 883 So. 2d at 783, citing *Porter*. Again, this finding is in accordance with the mixed standard of review applied in *Strickland*.

As previously noted, the appellate review standard approved in *Stephens* (for claims of ineffective assistance of counsel) was held to not be retroactive under *Witt* in *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). The courts of this State have extensively relied upon the *Stephens* standard of review and continue to do so today. *See Troy v. State*, 57 So. 3d 828, 834

(Fla. 2011) (stating, "[b]ecause ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004) (*citing Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999))." Thus, if *Porter*, as construed by Raleigh, is deemed a retroactive "change" in the law, the effect on the administration of justice would be overwhelming.

Raleigh's reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) also is misplaced. (*Initial Brief* at 35, 43, 48, 50). In *Sears*, the Georgia post-conviction court found trial counsel's performance deficient under *Strickland*, but then stated that it was unable to assess whether counsel's inadequate investigation might have prejudiced Sears. *Id.* at 3261. In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings about the evidence presented. *Id*. at 3261. *Sears* does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

RALEIGH IS NOT ENTITLED TO RELIEF.

This Court's decision in *Walton* removed any doubt that *Porter* establishes any grounds for relief. The circuit court found that Raleigh's successive motion was "untimely, successive, procedurally barred, unauthorized and fail[ed] to present any new fundamental constitutional right that has been held to apply retroactively." (R267). There can be no colorable argument that that result is incorrect.

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

Finally, pursuant to §27.702, "[t]he capital collateral regional counsel and the attorneys appointed pursuant to §27.710 shall file only those postconviction or collateral actions authorized by statute." This Court has recognized the legislative intent to limit collateral counsel's role in capital post-conviction proceedings. *See State v. Kilgore*, 976 So. 2d 1066, 1068-1069 (Fla. 2007).

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

> "Postconviction capital collateral proceedings" means one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, any appellate review of the sentence by the Supreme Court, any certiorari review of the sentence by the United States Supreme Court, and any authorized federal habeas corpus litigation with

> respect to the sentence. The term does not include repetitive or successive collateral challenges to a conviction and sentence of death which is affirmed by the Supreme Court and undisturbed by any collateral litigation.

§27.711(1)(c), *Fla. Stat*. Accordingly, Raleigh's counsel was not authorized to file this patently frivolous, repetitive and successive motion.

In addition to having no legal basis because *Porter* is not retroactively available to him, Raleigh is not entitled to any relief because collateral counsel is not authorized to file the unauthorized successive motion to vacate. The trial court's order summarily denying Raleigh's successive motion to vacate should be affirmed in all respects.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Martin McClain**, 141 N.E. 30th Street, Wilton Manors, Florida 33334 on this _____ day of December, 2011.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL