IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON,

Appellant,

v. **Case No. SC11-153**
L.T. No. CRC83-0630CFANO

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT ON DESIGNATIONS TO THE RECORD

This is an appeal from the trial court's summary denial of Walton's *second successive* motion to vacate. The State will utilize the same record designations as those used by the Appellant, Jason Dirk Walton, to wit:

Walton's resentencing record on appeal [FSC case no. SC69389] will be designated by "RS" followed by the appropriate page number.

Walton's initial post-conviction records [FSC case no. SC78070] will be designated as "PCR" and "PCR-2" (post-conviction record following remand).

Walton's prior successive post-conviction record on appeal [FSC case no. SC07-704] will be cited as "PCR-3" with the appropriate volume and page numbers.

The instant record on appeal, from the denial of Walton's second successive post-conviction motion based on *Porter v. McCollum,* will be cited as "PCR-4."

NOTICE OF SIMILAR CASES

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

Cases pending in the Florida Supreme Court

Bell v. State, Case No. SC11-694
Coleman v. State, Case No. SC04-1520
Davis v. State, Case No. SC11-359
Finney v. State, Case No. SC11-426
Franqui v. State, Case No. SC11-810
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Hodges v. State, Case No. SC11-762
Jennings v. State, Case No. SC11-817
Jones (Harry) v. State, Case No. SC11-363
Jones (Victor) v. State, Case No. SC11-474
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Melton v. State, Case No. SC11-973
Parker v. State, Case No. SC11-473
Phillips v. State, Case No. SC11-472
Pietri v. State, Case No. SC11-947
Ponticelli v. State, Case No. SC11-877
Randolph v. State, Case No. SC11-725
Reaves v. State, Case No. SC11-512
Thompson v. State, Case No. SC11-493
Turner v. State, Case No. SC11-946
Walton v. State, Case No. SC11-153
Willacy v. State, Case No. SC11-99

Cases pending in Circuit Courts

Arbelaez, Guillermo (11th Circuit); *Archer, Robin* (1st Circuit); *Byrd, Milford* (13th Circuit); *Duckett, James* (5th Circuit); *Griffin, Michael* (11th Circuit); *Groover, Tommy* (4th Circuit); *Hartley, Kenneth* (4th Circuit); *Jimenez, Jose* (11th Circuit); *Jones, Clarence* (2nd Circuit); *Pace, Bruce* (1st Circuit); *Peede, Robert Ira* (9th Circuit); *Peterka, Daniel* (1st Circuit); *Raleigh, Bobby* (7th Circuit); *Reed, Grover* (4th Circuit); *Stein, Steven* (4th Circuit); *Zakrzewski, Edward* (1st Circuit).

CITATIONS TO WALTON'S PRIOR APPEALS

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

***Walton v. State*, 481 So. 2d 1197 (Fla. 1985) (*Walton* I)** (direct appeal affirming Walton's Pinellas County convictions for three counts of first-degree murder, but reversing and remanding for new sentencing hearing).

***Walton v. State*, 547 So. 2d 622 (Fla. 1989) (*Walton* II)** (direct appeal after resentencing).

***Walton v. State*, 634 So. 2d 1059 (Fla. 1993) (Walton III)** (remanding for further circuit court proceedings on rule 3.850 motion and petition for writ of habeas corpus).

***Walton v. State*, 847 So. 2d 438 (Fla. 2003) (*Walton* IV)** (affirming denial of amended rule 3.850 motion and petition for writ of habeas corpus).

***Walton v. State*, 3 So. 3d 1000 (Fla. 2009) (*Walton* V)** (affirming denial of successive rule 3.851 motion to vacate).

RESPONSE TO WALTON'S "INTRODUCTION"

At pages 2 – 5 of the Appellant's Initial Brief, before his "Statement of the Case and Facts," Walton set forth three and one-half pages of blatant argument under the guise of an "Introduction." The State does not accept, and specifically disputes, Walton's arguments. Walton's initial brief, which improperly includes an argumentative "Introduction," fails to comply with the requirements of Florida Rule of Appellate Procedure 9.210. Walton's argumentative "Introduction" should be stricken. See, *Sabawi v. Carpentier*, 767 So. 2d 585 (Fla. 5th DCA 2000) (order striking appellate brief on the ground that the statement of facts was argumentative and failed to contain adequate record references).

STATEMENT OF THE CASE AND FACTS

Procedural History

The trial court's order denying Walton's second successive motion to vacate (PCR-4, 1/66-67) summarized the procedural background of this case as follows:

> On April 6, 1983, a grand jury indictment charged the Defendant with three counts of murder in the first degree. In February of 1984, the Defendant was tried and found guilty by a jury. On February 10, 1984, the jury recommended the death penalty. The Defendant was sentenced to death on March 14, 1984. An account of the facts in this case can be found at *Walton v. State*, 481 So. 2d 1197 (Fla. 1985). On direct appeal, the Florida Supreme Court affirmed the convictions but vacated the death sentences and remanded with instructions to conduct another sentencing hearing before a new jury. *Id.* at 1201.
>
> On remand, the circuit court conducted another penalty phase and, on August 14, 1986, the new jury recommended the death penalty. On August 29, 1986, the Defendant was sentenced to death. The Defendant appealed his death sentences. On June 29, 1989, the Florida Supreme Court affirmed the sentences. *Walton v. State*, 547 So. 2d 622 (Fla. 1989); *cert. denied*, 493 U.S. 1036 (1990).
>
> On December 17, 1990, the Defendant filed his initial motion for postconviction relief. The Defendant argued in part that counsel was ineffective for failing to uncover and present mitigating evidence. Following an evidentiary hearing, a final order denying the Defendant's motion was entered on February 28, 1991. On appeal, the Florida Supreme Court reserved ruling and relinquished jurisdiction for the trial court to address the public records issues and granted leave to the Defendant to file any new postconviction motions within 30 days. *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993). After resolving the public records issue, on July 12, 1995, the Defendant filed several amended motions for

> postconviction relief. After an evidentiary hearing on several grounds, on January 12, 2001, the court entered an order denying these motions. In 2003, the Florida Supreme Court affirmed the denial of postconviction relief, both on the issues upon which the Supreme Court reserved ruling in 1993, and on the Defendant's issues from his amended motions. *Walton v. State*, 847 So. 2d 438 (Fla. 2003).
>
> On February 10, 2006, the Defendant filed a successive Rule 3.851 Motion to Vacate and amendment thereto. Additionally, the Defendant filed a Motion for Production of Additional Public Records and Demand for Additional Public Records on February 13, 2006. This Court denied the Defendant's motions in an order entered on November 8, 2006. On March 12, 2007, this Court entered an order summarily denying the public records request and a separate order summarily denying the successive motion. On January 29, 2009, the Florida Supreme Court affirmed the denial of the Defendant's successive postconviction motion. *Walton v. State*, 3 So. 3d 1000 (Fla. 2009).
>
> On October 13, 2010, the Defendant filed a "Successive Motion to Vacate the Judgments of Conviction and Sentence Based on *Porter v. McCollum*." The State filed its response on November 2, 2010. On November 19, 2010, this Court held a case management conference on the Defendant's October 13, 2010 motion, pursuant to rule 3.851 (f)(5)(B). This order follows.
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> (PCR-4, 1/66-67)

Trial and Direct Appeal Proceedings
***Walton v. State*, 481 So. 2d 1197 (Fla. 1985) [*Walton I*]**

On direct appeal, *Walton v. State*, 481 So. 2d 1197 (Fla. 1985) [*Walton* I], this Court set forth the following summary of facts:

> On June 18, 1982, police discovered the bodies of three men killed by shotgun blasts lying face down on the living room floor of the home shared by two of the victims. The victims' wrists had been bound with duct

tape. Victim Steven Fridella's eight-year-old son, who summoned police, had been bound and locked in the bathroom but was otherwise unharmed. Six months after the murder, Fridella's ex-wife supplied police with information that led to the arrest of one of appellant's codefendants, and subsequently to the appellant, with whom she was romantically involved.

Following his apprehension, appellant initiated a conversation with detectives who were transporting him from the courthouse to jail. Although the detectives responded that appellant's attorney had admonished them not to discuss the case with appellant, appellant informed the detectives that he wished to talk and signed a waiver form. He then told the detectives that he did not shoot the victims. In response to a detective's further inquiry as to whether appellant wished to give a statement, appellant replied, "Well, yes, I would like to but I don't really want to," and answered the detectives' subsequent questions. Appellant told the detectives that he and codefendants Terry Van Royal and Richard Cooper planned to rob the victims of money and cocaine and entered the victims' house wearing ski masks. Appellant stated he carried a handgun and Van Royal and Cooper armed themselves with shotguns as "insurance"; that they did not intend to kill anyone; that when appellant entered the house, one of the victims asked, "Is that you, J.D.?"; that Fridella's son was placed in the bathroom so he would not be harmed; that he ransacked the house and, failing to find money or cocaine, returned to the living room where he observed Van Royal and Cooper pointing shotguns at the victims, who were lying face down on the floor; that he stated, "Let's get out of here"; and that he heard several gunshots as he exited the house. Appellant concluded his statement by noting that Fridella had been involved in a custody battle with his ex-wife, and that she told appellant she and Fridella might reconcile. Appellant repeated his statement on tape.

After appellant gave this statement, codefendant Cooper revealed that appellant's brother, Jeffrey McCoy, also took part in the incident. After obtaining a waiver of rights, detectives interrogated appellant concerning his failure to mention McCoy's

> participation in his earlier statement. Appellant responded that McCoy had bound the victims but was in the car when the shootings occurred. **Appellant then admitted that he had initiated the idea for the robbery and also stated that before entering the house, he tested his weapon but that it had misfired. Both statements were introduced at trial.** The jury found appellant guilty of all three counts of first-degree murder.
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> *Walton I*, 481 So. 2d at 1198-99 (e.s.)

This court affirmed Walton's convictions, but reversed the death sentences because the confessions of Walton's co-perpetrators, Cooper and McCoy, were introduced at Walton's penalty phase without either being available for cross-examination.[1] *Walton*, 481 So. 2d at 1200-01.

Resentencing Proceedings
***Walton v. State*, 547 So. 2d 622 (Fla. 1989) [*Walton II*]**

On Walton's resentencing appeal, this Court affirmed the death penalty and set forth the following summary of the facts presented at resentencing:

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[1]Two of Walton's co-defendants, Terry Van Royal, Jr., and Richard Cooper, were also tried and convicted of these three murders. Van Royal was sentenced to death, but his sentence was vacated because the trial judge failed to justify his reasons for imposing the death sentence in accordance with section 921.141(3), Florida Statutes (1981). *Van Royal v. State*, 497 So. 2d 625 (Fla. 1986). This Court affirmed Cooper's conviction and death sentence in *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987). Jeffrey McCoy, the fourth participant, pleaded guilty to three counts of first-degree murder and agreed to testify against the others in exchange for life imprisonment with a mandatory minimum 25 year sentence. See, *Walton v. State*, 547 So. 2d 622, 623 (Fla. 1989) [*Walton II*].

The facts at resentencing revealed that an eight-year-old boy summoned the police to a home, and, upon arrival, the police found three dead men lying face down on the living room floor, their wrists bound with duct tape. The boy was unharmed but had been bound and locked in the bathroom during the commission of the crimes. Each of the victims had been shot from a distance of three to six feet, and shotgun wounds were the sole causes of death. At the time of Walton's arrest, he was living with the ex-wife of one of the victims, who was also the mother of the eight-year-old boy. The boy was present at the time of Walton's arrest.

The state presented Walton's confession to the jury. There, he admitted being present at the time of the homicides, denied any part in the shootings, and stated that he, Richard Cooper, and Terry Van Royal, Jr., went to the residence to rob the victims because he had heard that one of them had a lot of money and cocaine. Further, Walton indicated that they entered the residence, with each carrying a gun. All three victims were brought into the living room, the young boy was placed in the bathroom, and the apartment was searched for drugs and money. Afterwards, Walton stated that he turned on the television full blast to prevent the neighbors from hearing the victims scream and that he heard shotgun blasts as he left. Later, he acknowledged that his younger brother, Jeffrey McCoy, also participated in the robbery.

The state introduced a taped statement given by Jeffrey McCoy. McCoy stated that the plan to rob the victims had first been discussed about two weeks prior to the incident; that Walton had complained that one of the victims had stolen some marijuana from his trailer; that Walton believed the victims had a great deal of money and cocaine; that the four carefully devised a plan concerning the robbery, making sure that the child was placed in the bathroom so he would not witness the robbery and that it took place on a rainy night to prevent tire tracks from being left behind. He testified that the participants decided to bring weapons, but stated that the purpose of the weapons was to scare the victims, preventing resistance to the robbery. To his knowledge, no plan

to shoot anyone existed. McCoy testified that Walton and the others entered the house and gathered each of the victims into the living room and, at Cooper's direction, McCoy taped the victims' wrists behind their backs. McCoy then left the house to start the car and wait. Upon starting the car, he heard a series of shots. After returning to the car, Cooper gestured to McCoy that the victims were dead.

Another state witness testified that Walton was experiencing problems in his relationship with the ex-wife of one of the victims and that Walton had once said that "the only way he could get [the victim] off his back was to waste him." The state presented a psychiatrist's testimony, indicating that the boy suffered a post-trauma stress reaction to the incident and that it would not be in the boy's best interest to appear in court and testify.

The defense presented evidence that Walton had never been convicted of a crime. A coworker testified that Walton was quiet, kind, considerate, and nonviolent. Further, she visited him at the prison and determined that he had adjusted very well and would pose no threat of violence to others. A friend of the family testified that Walton was a friendly, nonviolent person, who was a follower rather than a leader; that Walton had been in the army and was honorably discharged; and that Walton had a positive attitude toward prison. The prosecution questioned these two witnesses about whether Walton had shown any remorse for the homicides. The defense also presented testimony from Walton's mother, who stated that Walton had a normal childhood; that he had joined the army at age seventeen, receiving awards and an honorable discharge; and that he had adjusted very well to incarceration and would not be a threat to anyone.

In rebuttal, the state presented a witness who testified that he had purchased marijuana from Walton on three occasions and that he had seen Cooper carrying a fifty-pound bale of marijuana towards Walton's house. Another witness testified that he had seen Walton sell marijuana; that Walton never expressed any remorse for his actions; and that Walton purchased a truck owned by one of the victims from

that victim's father after the murders.

Walton II, 547 So. 2d at 623-624.

On resentencing appeal, this Court reiterated that Walton originated the plan to rob the victims on a rainy night, Walton armed the group prior to the robbery, and Walton was the only defendant involved who knew the location of the victims' residence. *Walton II*, 547 So. 2d at 623-24.

Walton's petition for writ of certiorari was denied on January 8, 1990. *Walton v. Florida*, 493 U.S. 1036, 110 S. Ct. 759 (1990).

Initial Rule 3.850/3.851 Motion to Vacate
***Walton v. State*, 634 So. 2d 1059 (Fla. 1993) [*Walton III*]**
***Walton v. State*, 847 So. 2d 438 (Fla. 2003) [*Walton IV*]**

On December 17, 1990, Walton filed his initial motion for post-conviction relief. Walton argued, *inter alia*, that penalty phase counsel was ineffective for failing to uncover and present mitigating evidence. Following an evidentiary hearing, a final order denying the motion was entered on February 28, 1991. On appeal, this Court reserved ruling and relinquished jurisdiction for the trial court to address the public records issues and granted leave to the Defendant to file any new post-conviction motions within 30 days. *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993). [*Walton III*]. After filing his third amended motion to vacate, evidentiary hearings were conducted on September 24,

1999, February 25, 2000, May 26, 2000, and June 23, 2000. On January 12, 2001, Walton's third Amended Motion to Vacate was denied. In 2003, this Court affirmed the denial of relief, both on the issues on which the Court reserved ruling in 1993, and on Walton's issues from his amended motion. *Walton v. State*, 847 So. 2d 438 (Fla. 2003) [*Walton IV*].[2]

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[2]As summarized by this Court in Walton's prior post-conviction appeal, *Walton IV*, 847 So. 2d at 442-443, n. 1 and n. 2, "[t]he substantive claims asserted in Walton's original 3.850 appeal, were: (1) the jury received improper instructions regarding statutory aggravating circumstances; (2) the trial court erred in allowing a codefendant's mental health expert to testify at Walton's evidentiary hearing; (3) Walton was denied the effective assistance of counsel; (4) the trial court failed to independently weigh the aggravating and mitigating circumstances; (5) Walton's second sentencing proceeding was contaminated with the same evidence that was determined to have been inappropriately presented at his first sentencing proceeding; (6) Walton's sentence is devoid of a finding of his individual culpability; (7) Walton's sentence is disproportionate, disparate, and invalid because an equally culpable codefendant received a life sentence; (8) the jury was improperly instructed; (9) Walton's conviction should be reversed because new law now mandates a holding that his statements should have been suppressed; (10) Walton's absence from a portion of the proceedings prejudiced his resentencing; (11) Walton's death sentence rests upon the unconstitutional aggravating circumstance of lack of remorse; (12) the trial court unconstitutionally shifted the burden of proof in its instructions at sentencing; and (13) the application of Florida Rule of Criminal Procedure 3.851 violated Walton's constitutional rights." *Walton IV*, 847 So. 2d at 442, n. 1. "Walton's new post conviction claims are: (1) Walton was denied effective assistance of counsel when his attorney failed to adequately investigate and prepare for trial; (2) the State prejudiced Walton by withholding exculpatory and impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963); (3) Walton was denied his fundamental rights to confrontation, due process, and a reliable

Prior Successive Rule 3.851 Motion to Vacate
***Walton v. State*, 3 So. 3d 1000 (Fla. 2009)**

On February 10, 2006, Walton filed a successive Rule 3.851 Motion to Vacate based on (1) *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398 (2005), (2) alleged newly discovered evidence regarding Paul Skalnik, a jail informant who testified at co-defendant Cooper's trial, but did not testify at Walton's resentencing, (3) a lethal injection claim, and (4) alleged newly discovered evidence based on the American Bar Association's report on the death penalty. On March 12, 2007, the trial court summarily denied all relief. (PCR-3, 5/626-37). On January 29, 2009, this Court affirmed the summary denial of Walton's successive motion to vacate. *Walton v. State*, 3 So. 3d 1000 (Fla. 2009).

Second Successive Rule 3.851 Motion to Vacate

On October 13, 2010, Walton filed a second successive Rule 3.851 motion to vacate. This successive motion was based on *Porter v. McCollum,* 130 S. Ct. 447 (2009). (PCR-4, 1/1-20). The State filed its response on November 2, 2010. (PCR-V4, 1/38-62). On November 19, 2010, the trial court held a case

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and individualized hearing when a codefendant's mental health expert testified as a witness for the State at the postconviction hearing; and (4) newly discovered evidence tending to show that Walton was not the leader of the group committing the murders at issue mandates a new trial." *Walton IV*, 847 So. 2d at 443, n. 2.

management conference. (PCR-4, 1/93-109). At the case management conference, Walton's collateral counsel (CCRC-S) conceded that *Porter* did not establish a new federal constitutional right. (PCR-4, 1/96). Instead, Walton alleged that this Court's "*Strickland* jurisprudence is at question because of [the *Porter v. McCollum*] decision, [and] that [this Court] . . . mistakenly applied *Strickland* and improperly evaluated the 6th Amendment claim in *Porter v. McCollum* and in other cases that [this Court] evaluated under the same line of cases." (PCR-4, 1/96). Collateral counsel agreed there was no need for an evidentiary hearing. (PCR-4, 1/97; 108).

On December 16, 2010, the trial court entered a detailed written order summarily denying Walton's second successive motion to vacate. (PCR-4, 1/66-71). The specifics of the trial court's order will be addressed within the argument section of the instant brief. Walton's notice of appeal was filed on January 13, 2011. (PCR-4, 1/72-73).

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 Walton's second successive motion to vacate and providing for meaningful appellate review. *Id*., citing *Nixon*, 932 So. 2d at 1018.

SUMMARY OF THE ARGUMENT

Walton's second successive motion to vacate, based on *Porter v. McCollum,* was patently frivolous -- it was untimely, unauthorized, successive, repetitive, procedurally barred and meritless. Walton admits that *Porter* did not establish a new retroactive federal constitutional rule. Instead, Walton alleges that *Porter* represents a "fundamental repudiation" of this Court's application of *Strickland* to every claim of ineffective assistance of counsel statewide and ought to be declared retroactive under *Witt*.

Walton cannot satisfy the *Witt* standard for a number of reasons, not the least of which is that *Porter* did not change the application of the ineffective assistance of counsel analysis under *Strickland* nor imply that this Court has been misapplying *Strickland's* standard of review. *Strickland* expressly compels the standard of review announced in *Stephens v. State,* 748 So. 2d 1028 (Fla. 1999).

The patently frivolous nature of the motion below is further highlighted by the fact that *Porter* was reversed on the *prejudice* prong analysis. Whereas, Walton's IAC/penalty phase claim – based on the allege failure to adequately investigate mitigation - was denied based on a lack of deficiency. Thus, any attempt to relitigate the prejudice prong is immaterial.

ARGUMENT

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

This is a post-conviction appeal from the circuit court's summary denial of Walton's second successive Rule 3.851 motion to vacate, based on *Porter v. McCollum*, 130 S. Ct. 447 (2009).[3] Walton seeks to relitigate his previously-denied claims of ineffective assistance of penalty phase counsel on the ground that *Porter* allegedly represents a "change in law" that should be retroactively applied. The only questions properly before this Court are: 1) Did *Porter* "change" the law on ineffective assistance of counsel and 2) if so, has the alleged "change in law" been held to apply retroactively under *Witt v. State*, 387

[3]In 2003, this Court affirmed the trial court's denial of Walton's initial [third amended] motion for post-conviction relief and rejected Walton's claims, including his claims of ineffective assistance of penalty phase counsel. *Walton v. State,* 847 So. 2d 438 (Fla. 2003). In 2006, Walton filed a successive motion to vacate, alleging a claim of inconsistent theories of prosecution under *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398 (2005) and newly discovered evidence regarding a jail informant's alleged role as a state agent who testified at co-defendant Cooper's trial. Walton also claimed that Florida's lethal injection protocol violated the Eighth Amendment. In 2009, this Court affirmed the trial court's summary denial of Walton's prior successive motion to vacate. *Walton v. State*, 3 So. 3d 1000 (Fla. 2009).

So. 2d 922 (Fla. 1980)? Because the answer to both questions is no, further review of any other issue presented is not warranted.

Walton has conceded that (1) an evidentiary hearing was not required because his successive motion raised a strictly legal claim based on existing files and records (PCR-4, 1/97; 108) and (2) *Porter* did not create a new fundamental constitutional right. (PCR-4, 1/96-97; 105; *Initial Brief of Appellant* at 34). Despite Walton's admission that *Porter* did not create a new fundamental and retroactive constitutional right, Walton nevertheless alleges that "*Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence" and constitutes a "*change in law*" cognizable in post-conviction under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). Walton asserts that this Court's previous denial of Walton's IAC/penalty phase claim was "premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052 (1984)." (*Initial Brief of Appellant* at 23). For the following reasons, the trial court's order summarily denying Walton's second successive motion to vacate should be affirmed.

The Trial Court's Order

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

The Court finds that the Defendant's motion is untimely, successive, and procedurally barred. Rule 3.851 (d)(1) requires that postconviction motions be filed within one year after the judgment and sentence become final. **While rule 3.85l(d)(2) provides several exceptions to this one-year time limitation, the Defendant has not alleged any grounds that would fall under that rule.** The only exception arguably relevant to this motion is that contained in rule 3.851(d)(2)(B), which allows for successive motions beyond the one-year time limit if the successive motion alleges a newly established fundamental constitutional right that applies retroactively. **However, the Defendant concedes that *Porter* does not create a retroactive fundamental right under rule 3.851 (d)(2)(B). Further, subsequent to *Porter*, no court has held that the case established a new fundamental constitutional right that is to be applied retroactively.**

Despite acknowledging that *Porter* does not create a retroactive, fundamental constitutional right under rule 3.851(d)(2)(B), the Defendant, relying on *Witt v. State*, 387 So. 2d at 922, 925, argues that *Porter* represents a change in the law that is of sufficient magnitude to necessitate further review of his claim concerning ineffective assistance of counsel in regard to mitigating evidence. Essentially, he asks this Court to find, independent of rule 3.851(d)(2)(B), that *Porter* constitutes a retroactive, "fundamentally significant" change to constitutional law. Specifically, he asserts that *Porter* finds a systemic fault in the Florida Supreme Court's *Strickland* analysis, which in turn permits a re-examination of previously decided claims in his case. The Defendant also cites *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987); and *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987). Those cases both refer to *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), in which the Florida Supreme Court allowed retroactive application of *Hitchcock*.

The requested relief is not available to the Defendant. First, this Court cannot provide the requested relief because this Court lacks authority to establish a new rule of constitutional import that is

declared to be retroactive. *Witt* limits which courts can make such changes to the Florida Supreme Court and the United States Supreme Court, as the Defendant acknowledges. *Witt*, 387 So. 2d at 931. Accordingly, this Court is not in a position to determine that *Porter* applies in the manner called for by the Defendant.

Moreover, the United States Supreme Court's opinion in *Porter* is merely the application of *Strickland* to the particular facts of that case and does not provide a basis for this court to reconsider the Defendant's postconviction claims. Unlike *Witt* or *Hitchcock*, *Porter* does not announce a new right or a change in the analysis used in determining constitutional law claims. The United States Supreme Court explained that *Porter* does not change the *Stricklard* analysis; rather, it represents an application of *Strickland* to the facts of *Porter*.

> "**To prevail under *Strickland***, Porter must show that his counsel's deficient performance prejudiced him. To establish deficiency, Porter must show his "counsel's representation fell below an objective standard of reasonableness." 466 U.S., at 688, 104 5. Ct. 2052. To establish prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S. Ct. 2052. Finally, Porter is entitled to relief only if the state court's rejection of his claim of ineffective assistance of counsel was "contrary to, or involved an unreasonable application of" *Strickland*, or it rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Porter, 130 S. Ct. 447, 452 (2009) (emphasis added).

In addition, the Florida Supreme Court has recognized that *Porter* does not represent a change to the application of *Strickland*'s ineffective assistance of counsel analysis. *Everett v. State*, 2010 WL 4007643 (Fla. Oct. 14, 2010) (*Strickland* does 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 the confidence in [that] outcome.'"); *Schoenwetter v. State*, 2010 WL 2605961 (Fla. July 1, 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010); *Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). **The Defendant has failed to identify any decision holding that *Porter* is anything other than an application of the *Strickland* test.**

The Supreme Court's decision in *Porter* does not represent a change in the *Strickland* analysis. Based upon the above-cited cases, it is clear that *Porter* does not represent a "fundamental repudiation of the Florida Supreme Court's *Strickland v. Washington* jurisprudence." Furthermore, the Defendant's successive rule 3.851 motion essentially reargues his previously denied claims of ineffective assistance of penalty phase counsel. *Walton*, 847 So. 2d at 455-459. **Claims raised in prior postconviction proceedings cannot be relitigated in a successive postconviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Therefore, as the Defendant's claims have been previously addressed, they are procedurally barred.** *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004)

Finally, the Court notes that the relief requested by the Defendant in his motion would not serve to change his sentence. **Specifically, the Defendant requests that the Court re-examine his claim that counsel was ineffective for failing to introduce mitigating evidence by conducting a new prejudice analysis under *Strickland*. However, the trial court found that counsel's performance was not deficient, and the Florida Supreme Court agreed with that assessment. *Walton v. State*, 847 So. 2d at 458 (Fla. 2003).** In analyzing an ineffective assistance of counsel claim under *Strickland*, a trial court need not address both prongs; if it determines that the defendant has not met one of the prongs, the inquiry ends. *Maxwell v. Wainwright*, 490 So. 2d 927 (Fla. 1986). **Because it previously was established that**

> **counsel was not deficient, the prejudice prong has no bearing on the Court's previous resolution of this claim.**
>
> (PCR-4, 1/68-70) (e.s.)

Analysis

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

Porter is merely the application of *Strickland* to the facts of Porter's case and does not provide any cognizable basis to relitigate Walton's IAC/penalty phase claim anew. *Porter* did not change the application of the ineffective assistance of counsel analysis under *Strickland.* Moreover, this Court has not been misapplying *Strickland's* standard of review – the standard of review announced in *Stephens* is expressly compelled by *Strickland*. In addition, even if Walton arguably could demonstrate that *Porter* represents both a "change in law" and satisfies the requirements for retroactivity under *Witt*, which the State emphatically disputes, Walton's attempt to relitigate

the prejudice prong is immaterial because this Court previously denied Walton's IAC/penalty phase claim – based on the alleged failure to adequately investigate mitigation - on the deficiency prong of *Strickland*.

Porter v. McCollum

In *Porter v. McCollum*, the state courts did not decide whether Porter's counsel was deficient under *Strickland*. As a result, the United States Supreme Court assessed the first prong of Porter's IAC/penalty phase claim *de novo.*[4] *Porter*, 130 S. Ct. at 452. The United States Supreme Court found that trial counsel failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service; and, "although Porter may have been fatalistic or uncooperative," that did not "obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 S. Ct. at 453. The United States Supreme Court determined that trial counsel was deficient under the first prong of *Strickland* and emphasized that if Porter's counsel had been effective, the judge and jury would have learned of "(1) Porter's heroic military service in two of the

[4] On federal habeas review, if the state court did not reach the merits of the petitioner's habeas claim, then "federal habeas review is not subject to the deferential standard that applies under AEDPA . . .," and instead, "the claim is reviewed *de novo*." *Cone v. Bell*, 129 S. Ct. 1769, 1784 (2009).

most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Porter*, 130 S. Ct. at 454.

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

regarding the existence of a brain abnormality and cognitive defects, was not considered in this Court's discussion of *nonstatutory* mitigation. *Porter,* 130 S. Ct. at 455, n. 7. In addition, the United States Supreme Court found that this Court unreasonably discounted evidence of Porter's childhood abuse and combat military service.[5]

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. Instead, since *Porter* was decided, both this Court and the federal courts,[6] including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of

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[5]In *Reed v. Sec'y, Fla. Dept. of Corr.*, 593 F. 3d 1217 (11th Cir. 2009), the Eleventh Circuit distinguished *Porter* on the basis of the "uniquely strong" mitigating nature of Porter's military service in combat. *Reed*, 593 F. 3d at 1249, n. 21 (noting ". . . Paragraph after paragraph in the *Porter* opinion concerns Porter's combat experience in Korea, recounted in great detail. *Id.* at 449-51, 455. The diagnosis in *Porter* was post-traumatic stress disorder from combat, not antisocial personality disorder. *Id*. at 450 n. 4, 455 & n. 9. Porter's military service was critical to the holding in *Porter* . . .")

[6]*Porter* is squarely based on *Strickland*. See, *Porter*, 130 S. Ct. at 452. This Court has recognized that *Porter* does not change the application of the ineffective assistance of counsel analysis under *Strickland.* See, *Everett v. State*, 54 So. 3d 464, 472 (Fla. 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010); *Rodriguez v. State*, 39 So. 3d 275, 285 (Fla. 2010); *Troy v. State*, 57 So. 3d 828, 836 (Fla. 2011); *Franqui v. State*, 2011 WL 31379, 8 (Fla. 2011). The Eleventh Circuit has also applied, and distinguished, *Porter*. See, *Reed v. Sec'y, Fla. Dept. of Corr.,* 593 F. 3d 1217, 1243 n. 16, and 1246 (11th Cir. 2010); *Boyd v. Allen*, 592 F. 3d 1274, 1302 (11th Cir. 2010).

ineffective assistance of counsel. See, *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Premo v. Moore*, 131 S. Ct. 733 (2011); *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Padilla v. Kentucky,* 130 S. Ct. 1473 (2010); *Renico v. Lett*, 130 S. Ct. 1855 (2010); *Sears v. Upton*, 130 S. Ct. 3259 (2010).

Walton's second successive Rule 3.851 motion to vacate was time-barred and did not meet any exception under Rule 3.851(d)(2)(B)

Florida Rule of Criminal Procedure 3.851(d)(2)(B) requires any motion to vacate judgment of conviction and death sentence to be filed within one year after the judgment and sentence become final, unless the motion alleges that a fundamental constitutional right was established after that period and "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). Walton's successive Rule 3.851 motion failed to satisfy both of the prongs required for this exception.[7]

Walton's judgment and sentence became final on January 8, 1990, when his petition for writ of certiorari was denied by the United States Supreme Court. *Walton v. Florida*, 493 U.S. 1036, 110 S. Ct. 759 (1990); Fla. R. Crim. P. 3.851(d)(1)(B) (a judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court").

[7]Walton does not assert any claim of newly discovered evidence based on *Porter*. In any event, this Court has rejected *Porter* as the basis for a newly discovered evidence claim. *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010).

Walton's second successive Rule 3.851 motion to vacate, filed in 2010, was untimely filed -- by two decades.

Although the exception to the time limitation in 3.851(d)(2)(B) restarts the clock for a new fundamental constitutional right that has been held to apply retroactively, *Porter* is not a new right. The fundamental constitutional right at issue in *Porter* was the Sixth Amendment right to effective assistance of counsel, a constitutional right that had been established decades before in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Porter* was merely an application of the *Strickland* standard to a particular case. Walton has conceded that *Porter* did not establish a new fundamental constitutional right. (PCR-4 1/96; *Initial Brief of Appellant* at 34) and does not dispute that the right to the effective assistance of counsel has long been recognized. See, *Strickland*.

Walton's claim was untimely filed and procedurally barred because *Porter* did not recognize a new fundamental constitutional right that "has been held to apply retroactively." Moreover, as the trial court found and Walton admits, the trial court lacked the authority to establish a new

rule of constitutional dimension and declare it retroactive.[8] (PCR-4 1/15; *Initial Brief of Appellant* at 30). *Witt* limits which courts can make such changes to this Court and the United States Supreme Court. *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). Walton's second successive motion, which failed to meet any exception to the time limits of Rule 3.851, was unauthorized, facially insufficient and procedurally barred.

Walton's claim is not cognizable under *Witt* and Rule 3.851

Applying Rule 3.851(d) to Walton's dual burden under *Strickland*, Walton must show that *Porter* established a new fundamental constitutional right on both prongs of *Strickland and* that this new right has been held to apply retroactively. Walton admits that *Porter* did not establish any new fundamental constitutional right at all. (PCR-4 1/96; *Initial Brief of Appellant* at 34). Instead, Walton argues that *Porter* marks a "fundamental repudiation of this Court's *Strickland* jurisprudence," and constitutes a "change in law" cognizable under *Witt*.

[8]The use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Thus, Walton could not plausibly invoke the exception in Fla. R. Crim. P. 3.851(d)(2)(B). Instead, Walton had to show that a new fundamental constitutional right was established and has been held retroactive for the exception to apply. See, *Tyler v. Cain*, 533 U.S. 656, 121 S. Ct. 2478 (2001) (holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon).

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

Walton recognizes that a court considering retroactivity under *Witt* looks at three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. See, *Initial Brief of Appellant* at 30; See also, *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001) (applying retroactively *Carter v. State*, 706 So. 2d 873 (Fla. 1997) where this Court held that a judicial determination of competency is required in certain capital post-conviction cases); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), wherein this Court announced a revised standard of review for ineffectiveness claims); *Chandler v. Crosby,* 916 So. 2d 728,

729-730 (Fla. 2005) (concluding that all three factors in the *Witt* analysis weighed against the retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) and emphasizing that the new rule did not present a more compelling objective that outweighs the importance of finality).

Although Walton spends several pages describing this Court's decision in *Witt* (*Initial Brief of Appellant* at 28-31), Walton fails to explain how his alleged "change" in law satisfies the three factors[9] identified in *Witt*. It is not enough to assert a new case has issued. *Witt* is in reality a rule of non-retroactivity; cases are not presumed to apply retroactively. A litigant seeking retroactive application bears the burden of demonstrating how the *Witt* factors are satisfied. Because Walton failed to carry his burden under *Witt*, the request for retroactive application of *Porter* as an alleged

[9]It appears that the purpose of "change" in law obliquely suggested by Walton would be to never give the findings of the trial court any deference, but only to have the appellate court "engage with the evidence" in the first instance. As for reliance on the "old" law, Walton apparently concludes that this Court has been misapplying *Strickland* for decades by giving deference to the trial court's findings of fact. Both of these suggestions are patently incorrect. As noted, *infra*, by independently reviewing mixed questions of law and fact, the appellate court is engaging with the evidence. Giving deference to the trial court's findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Finally, the effect on the administration of justice –- the relitigation of all IAC cases decided since *Strickland* -- would be overwhelming.

"change" in law should be denied.

Moreover, Walton ignores the fact that this Court found that the change of law in *Stephens* -- the standard of review of ineffectiveness claims -- did not satisfy *Witt* and was not retroactive. *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). In *Johnston,* this Court applied the principles of *Witt* and concluded that *Stephens* was not a change in the law that should have retroactive application. As *Johnston* explained, "this Court in *Stephens* sought to clarify any confusion resulting from the use of different language in various opinions analyzing ineffective assistance of counsel claims. In so doing, this Court reaffirmed its prior decision in *Rose v. State*, 675 So. 2d 567 (Fla. 1996), wherein this Court stated that an ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland*." *Id.* at 267. Since Walton is asserting that the same law has changed here, the alleged change would not be retroactive. The courts of this state have extensively relied upon the *Stephens* standard of review and the effect on the administration of justice would be overwhelming. If *Porter* is ruled a change in law which is retroactive, defendants will file untimely and successive motions for post conviction relief seeking to relitigate claims of ineffective assistance. The

courts of this State would be required to review stale records to reconsider these claims. See, *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987) retroactively). As such, *Porter* would not satisfy *Witt* even if it had changed the law. Walton's motion was untimely and was correctly denied as such.

Instead of conducting a *Witt* analysis of the alleged "change" in law, Walton asserts that *Porter* should be retroactive because *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821 (1987) was held to be retroactive. See *Initial Brief of Appellant* at 30-33, citing *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987), *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987), *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987); *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989).[10]

The trial court rejected Walton's reliance on *Hitchcock* and concluded, "[u]nlike *Witt* or *Hitchcock*, *Porter* does not announce

[10]Walton's analysis is also irrelevant because the cases he cites were decided before the current rule was adopted in 2001. As now written, Rule 3.851(d)(2) makes no exception for the consideration of cases to be applied retroactively under *Witt*. Rather, the rule only permits consideration of a new constitutional right which "has been held to apply retroactively." Rule 3.851(d)(2)(B). Because Walton did not identify any new constitutional right created by *Porter* nor allege that *Porter* has been held to apply retroactively by any court, his motion was facially insufficient, unauthorized and untimely.

a new right or a change in the analysis used in determining constitutional law claims. The United States Supreme Court explained that *Porter* does not change the *Strickland* analysis; rather, it represents an application of *Strickland* to the facts of *Porter*." (PCR-4 1/69). Nowhere in the *Porter* decision did the United States Supreme Court ever indicate or imply that *Porter* represents "a repudiation of *Strickland* jurisprudence" that would constitute a significant change in law to be applied retroactively. Walton has not identified any case in which *Porter* has been declared a change in law which is retroactive. Thus, Walton's successive motion to vacate was unauthorized and facially insufficient.

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

principle at issue in *Hitchcock* -- the statewide use of a standard jury instruction which unconstitutionally precluded consideration of mitigation at the penalty phase.

In *Hitchcock*, a determination of whether *Hitchcock* error had occurred was easily made by simply reviewing only those cases which involved the same penalty phase jury instruction. In contrast, the alleged change in law that Walton argues occurred here requires re-litigating all post-conviction cases in which fact-specific claims of ineffective assistance of counsel were previously adjudicated under *Strickland's* two-prong test in order to determine whether any possible prejudice prong error, based on *Porter,* either might – or might not - have occurred. Given this difference in the application of the *Witt* factors, the mere fact that the standard jury instruction claim in *Hitchcock* was found to be retroactive does not establish that Walton's alleged "change" in law is one which should be applied retroactively. Walton's reliance on the retroactivity of *Hitchcock* is misplaced.

Walton has failed to meet any of the prongs of the retroactivity test. Neither the United States Supreme Court nor this Court deemed *Porter* a change of law. It is not new law and there is no miscarriage of justice. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to

defense counsel that the entire criminal justice system suffers as a result." *Strickland* at 2069. *Porter* is very fact-specific and the Supreme Court certainly did not find every decision of this Court regarding ineffective assistance of counsel to be unreasonable.

As a practical matter, there probably will always be some "newer" United States Supreme Court case addressing claims of ineffective assistance of counsel. Indeed, in 2009, the same year that *Porter* was decided, the United States Supreme Court also issued a series of other decisions addressing *Strickland* claims -- *Knowles v. Mirzayance,* 129 S. Ct. 1411 (2009), *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) and *Wong v. Belmontes*, 130 S. Ct. 383 (2009). However, a criminal defendant may not relitigate previously-denied *Strickland* claims simply because there are more recent decisions addressing claims of ineffective assistance of counsel. In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected a similar attempt to relitigate a death-sentenced inmate's IAC/penalty phase claim under the guise of recently decided caselaw. In *Marek*, the defendant argued that his previously raised claim that trial counsel failed to conduct an adequate investigation of Marek's background for penalty phase mitigation should be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.

Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000). Marek argued that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). This Court decisively rejected Marek's attempt to relitigate his previously-denied *Strickland* claims. See, *Marek,* 8 So. 3d at 1128 (concluding that "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*"). Here, as in *Marek,* the existence of a "newer" case applying *Strickland* does not equate with a change in the law which is retroactive.

Porter did not change the standard of review; This Court has not been misapplying *Strickland's* standard of review and Walton's claim is legally insufficient and without merit

In an attempt to relitigate his IAC/penalty phase claim anew, Walton alleges that deference to the trial court's factual findings is error. *Porter* did not address, much less change, the standard of review for 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 v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070

In this Court's decision in *Porter v. State,* 788 So. 2d 917, 923 (Fla. 2001), 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 questions 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's findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*.

In addition, by giving deference to findings of fact and independently reviewing mixed questions of law and fact, the

appellate court would be "engaging with the evidence" as Walton suggests. Contrary to the defense argument that the standard must be how the new evidence would have affected the jury, *Strickland* states that the appellate court consider the effect on the judge or jury. 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, Walton failed to meet any exception under Fla. R. Crim. P. 3.851(d)(2)(B).

Walton also suggests that because *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (*Initial Brief of Appellant* at 35). *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*.

Furthermore, since Walton apparently concludes that the same law [the applicable standard of review] has changed here, he cannot show how *Witt* would be applicable to such a change

when it was not in *Stephens.* See, *Johnston,* 789 So. 2d at 267. Accordingly, any alleged change would not be retroactive*. And,* as previously noted, this Court has refused to allow relitigation of *Strickland* claims under the guise of more recent caselaw. See, *Marek,* 8 So. 3d at 1128. In other words, this Court has previously determined that the alleged "changes in law" suggested by Walton do not satisfy *Witt*.

The standard of appellate review approved in *Stephens* for claims of ineffective assistance of counsel was held to not be retroactive under *Witt*. See, *Johnston*, 789 So. 2d at 267. 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 Walton, is deemed a retroactive "change" in the law, the effect on the administration of justice would be overwhelming. Criminal defendants will file untimely and

successive motions for post-conviction relief seeking to relitigate claims of ineffective assistance of counsel which have long been final. The courts of this State would be required to review stale records to reconsider these claims. See, *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990).

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

Walton's successive motion to vacate, based on *Porter*, was correctly denied as untimely, successive and procedurally barred. Walton merely reargues the facts adduced in the prior post-conviction proceeding. Those issues were decided by this

Court in 2003 and are procedurally barred. Walton previously raised the same claims of ineffective assistance of counsel that he seeks to relitigate here. As this Court has held, such 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, Walton 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 Walton is attempting to do here, his IAC/penalty phase 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).

Even *if* *Porter* arguably changed the law *and* the alleged change was retroactive *and* the claim was not procedurally barred, which the State emphatically disputes, Walton still would not be entitled to any relief. As this Court recognized in *Witt*, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the

claim. *Witt*, 387 So. 2d at 930-31. And, as the United States Supreme Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at 697.

Walton's IAC/penalty phase claim – based on the alleged failure to investigate mitigation - was denied based on a lack of deficiency. Walton does not identify how *Porter* would have affected this determination. Moreover, finding no deficiency is in accordance with United States Supreme Court precedent. See, *Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) (finding that, as in *Strickland*, defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments.") As a result, Walton's claim would be meritless even if *Porter* somehow changed the law and applied retroactively.

Porter does not provide any basis to reconsider Walton's post-conviction claims. Unlike *Porter*, the state courts in Walton's case *did* address trial counsel's performance at the penalty phase and found that trial counsel was not deficient in investigating mitigation. Furthermore, in *Porter*, while the state courts had made factual findings that the statutory mental mitigators were not established, they had not considered whether

the mental health testimony established non-statutory mitigation. *Porter*, 130 S. Ct. at 451, 454-55 & n.7. In this case, the state courts did consider the post-conviction testimony as it applied to non-statutory mitigation. This Court specifically addressed the non-statutory mitigation on Walton's initial post-conviction appeal:

> **In his final allegation of ineffective assistance, Walton contends that his trial counsel failed to adequately investigate for evidence which could have been used as proof of nonstatutory mitigation.** During the resentencing, Walton's counsel presented three witnesses: a coworker, a childhood friend, and Walton's mother. At the evidentiary hearing below, Walton's trial counsel related his theory of the defense, stating:
>
> > The avenue of thought was pretty limited, and the theory of defense was that we-the road we went down was that this was, as far as my client was concerned, nothing more than a planned robbery gone bad, that he had divorced himself from that when it became apparent there were no goods to be had - goods, money, or drugs - and that he was in the act of leaving, having abandoned the robbery, when the murders occurred.
>
> During the postconviction hearings below, Walton introduced evidence through the testimony of his mother and sister that his home life as a child was awful - he grew up in a single parent home, his mother engaged in promiscuous behavior in front of Walton and his siblings, his alcoholic stepfather often encouraged Walton to abuse drugs, and his stepfather subsequently choked to death in front of Walton when he was an adolescent. Evidence was also introduced which revealed that Walton had abused drugs as an adolescent and teenager, and had been enrolled in a radical therapy program which likely left him severely emotionally scarred, but which had not halted his

continued abuse of illegal drugs.

Walton also introduced evidence during his postconviction hearings which raised questions regarding whether Robin Fridella, Walton's girlfriend and the wife of one of the victims at the time of the murders, may have played some role in the planning of the robbery and murders. Finally, Walton introduced the testimony of Bruce Jenkins, a friend of Walton's who explained that Walton's statement prior to the murder that he might be required to "waste" victim Stephen Fridella did not necessarily mean that he would kill him.

While it is clear that the evidence in mitigation illuminated during the postconviction proceedings below could have aided Walton's case before his resentencing jury, **it is also absolutely clear that his trial counsel competently investigated for evidence in mitigation before trial. Walton's trial attorney, Donald O'Leary, stated that he asked Walton and his family members "every question [he] could think to draw out relevant information concerning Jason's background." Indeed, the record reflects that O'Leary performed extensive discovery prior to trial, and the following portion of the hearing transcript details the facts before O'Leary after the completion of his investigation**:

* * *

Clearly, O'Leary was entitled to rely upon the veracity of his client and his client's family. Walton's trial counsel made every effort to explore his client's childhood and family background. Every person he spoke with - Walton's mother, coworkers, and other family members - related to him the same story. As O'Leary stated: "I kept getting this feedback that he was a normal, average, usual person, nonviolent, nonaggressive, average intelligence." The moderate alcohol and marijuana use revealed to Walton's attorney seemed to be "just what young boys, his peers in Marion county [did] on weekends." Our examination of the record before this Court leads us to conclude that Walton's trial attorney performed an adequate and thorough investigation for mitigating evidence before

> **trial. Walton cannot be heard to complain now that his attorney failed to unearth evidence which Walton and his family affirmatively kept from counsel before trial.**
>
> **In sum, there simply was no information before O'Leary at the time of Walton's resentencing which should have led him to investigate Walton's drug habits or mental state.** A thorough investigation was performed, and O'Leary's performance certainly did not fall below "prevailing professional standards."

Walton IV, 847 So. 2d at 457-459 (e.s.)

Any defense suggestion that this Court routinely fails to consider mental health testimony as non-statutory mitigation under *Strickland's* prejudice analysis is patently incorrect. See, *Hurst v. State*, 18 So. 3d 975, 1014 (Fla. 2009) ("Thus, mental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial."); *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010) (rejecting Grossman's claim that "[p]rior to *Porter*, Florida Courts did not consider non-statutory mental mitigation as mitigation" and emphasizing that "*Porter* did not grant Florida courts the authority to consider this type of mitigation, but rather recognized that Florida courts already do so: "Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating

circumstance may nonetheless be considered by the sentencing judge and jury as mitigating." 130 S. Ct. at 454 (citing *Hoskins v. State*, 965 So. 2d 1, 17-18 (Fla. 2007)).

The trial court correctly summarily denied Walton's second successive motion to vacate, based on *Porter*. Walton's motion was unauthorized, untimely filed, successive, repetitive, procedurally barred and also without merit.

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

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

The term "postconviction capital collateral proceedings" is defined in §27.711(1)(c), 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, CCRC-S was not authorized to file this patently frivolous, repetitive and successive motion.

Walton is not entitled to any relief because collateral counsel is not authorized to file the unauthorized successive motion to vacate, the motion is time-barred, *Porter* did not change the law, any alleged change in law would not apply retroactively and the alleged "change in law" is based on the prejudice prong analysis in *Porter* and would not apply to this defendant because relief on Walton's IAC/penalty phase claim - based on the alleged failure to adequately investigate and present mitigation - previously was denied under the deficient performance prong of *Strickland*. The trial court's order summarily denying Walton's second successive motion to vacate should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Regular Mail to William M. Hennis III, Capital Collateral Regional Counsel-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301 this 26th day of May, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE