IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Appellant,

v. **Case No. SC11-1631**
L.T. No. 1983-CF-001682

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

_____

ANSWER BRIEF OF THE APPELLEE

_____

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

PRELIMINARY STATEMENT ON DESIGNATIONS TO THE RECORD

This is an appeal from the trial court's summary denial of Peede's *successive* motion to vacate.

Citations to the direct appeal record [Case No. 65,318] will be designated as "R" with the volume and page number.

The record from the appeal of the summary denial of post-conviction relief [Case No. 90,002] will be cited as "PCR" with the volume and page number. The record from the appeal of the denial of post-conviction relief following the evidentiary hearing [Case No. SC04-2094] will be cited as "PCR-2" with the volume and page number.

The instant record on appeal, from the denial of Peede's successive post-conviction motion based on Porter v. McCollum, will be cited as "PCR-3" with the volume and page number.

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

Arbelaez v. State, Case No. SC11-1207
Archer v. State, Case No. SC11-2234
Bell v. State, Case No. SC11-694
Davis v. State, Case No. SC11-359
Finney v. State, Case No. SC11-426
Franqui v. State, Case No. SC11-810
Griffin v. State, Case No. SC11-1271
Hannon v. State, Case No. SC11-843

Hartley v. State, Case No. SC11-1884
Hildwin v. State, Case No. SC11-428
Hodges v. State, Case No. SC11-762
Jennings v. State, Case No. SC11-817
Jones (Clarence) v. State, Case No. SC11-1263
Jones (Harry) v. State, Case No. SC11-1385
Jones (Victor) v. State, Case No. SC11-474
Lightbourne v. State, Case No. SC11-878
Marshall v. State, Case No. SC11-616
Melton v. State, Case No. SC11-973
Pace v. State, Case No. SC11-1290
Parker v. State, Case No. SC11-473
Peede v. State, Case No. SC11-1631
Peterka v. State, Case No. SC11-1660
Phillips v. State, Case No. SC11-472
Pietri v. State, Case No. SC11-947
Ponticelli v. State, Case No. SC11-877
Raleigh v. State, Case No. SC11-1272
Randolph v. State, Case No. SC11-725
Reaves v. State, Case No. SC11-512
Reed v. State, Case No. SC11-2149
Stein v. State, Case No. SC11-1400
Thompson v. State, Case No. SC11-493
Turner v. State, Case No. SC11-946
Walton v. State, Case No. SC11-153 [affirmed December 1, 2011, pending motion for clarification]
Willacy v. State, Case No. SC11-99
Zakrzewski v. State, Case No. SC11-1896

Cases pending in Circuit Courts

Byrd, Milford (13th Circuit)
Duckett, James (5th Circuit)
Groover, Tommy (4th Circuit)[denied December 22, 2011]
Jimenez, Jose (11th Circuit)

CITATIONS TO PEEDE'S PRIOR STATE COURT APPEALS

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

Peede v. State, 474 So. 2d 808 (Fla. 1985) (direct appeal affirming Peede's Orange County conviction of first-degree murder and death sentence).

Peede v. State, 748 So. 2d 253 (Fla. 1999) (affirming in part and reversing in part, the summary denial of amended rule 3.850 motion, remanding to the trial court for an evidentiary hearing).

Peede v. State, 868 So. 2d 524 (Fla. 2004) (dismissing interlocutory appeal of circuit court order finding defendant competent to proceed in post-conviction proceedings) [Table].

Peede v. State, 955 So. 2d 480 (Fla. 2007) (affirming denial of post-conviction relief following an evidentiary hearing and denying state habeas petition).

STATEMENT OF THE CASE AND FACTS

A) State Court Procedural History

Following a jury trial, Peede was convicted of the first degree murder of Darla Peede in 1984. The trial court followed the jury's 11-1 recommendation and sentenced Appellant to death. The court found three aggravating circumstances: that Peede had previously been convicted of a prior violent felony (second degree murder and assault with a deadly weapon), that the murder was committed during the course of a kidnapping, and that the murder was committed in a cold, calculated, and premeditated manner. (R8/1263-64) The court found as a mitigating circumstance that Appellant committed the murder under an extreme emotional disturbance, but, gave the mitigator little weight. The court stated that this mitigation was outweighed by the single aggravating circumstance, standing alone, of Appellant's prior murder and assault with a deadly weapon offenses. (R8/1265)

On August 15, 1985, this Court affirmed Peede's conviction and death sentence but found the evidence insufficient to support the cold, calculated and premeditated aggravator. Peede v. State, 474 So. 2d 808, 818 (Fla. 1985), cert. denied, 477 U.S. 909 (1986).

On May 6, 1988, Governor Martinez signed a Death Warrant and Peede filed an Emergency Motion to Vacate Judgment of Conviction and Sentence with Special Emergency Request for Leave to Amend. (PCR, 3/48-159) The execution was stayed on June 24, 1988. (PCR, 3/225-26)

Peede filed an Amended Motion to Vacate Judgment of Conviction and Sentence on February 21, 1995 (PCR, 5/448-612) to which the State filed a Motion to Strike on March 13, 1995. (PCR, 5/613-20) On March 27, 1995 Peede filed a Response to the State's Motion to Strike (PCR, 5/621-24) after which the State filed a Memorandum of Law. (PCR, 5/625-31) The Honorable Michael F. Cycmanick issued an "Order Denying Motion for Postconviction Relief Filed June 22, 1988, and Entitled 'Emergency Motion to Vacate Judgment of Conviction and Sentence, ...'" (PCR, 6/632-836; 7/837-1019; 8/1020-1223; 9/1224-1404; 10/1405-1590; 11/1591-1636) Peede's motion for rehearing was denied January 28, 1997. (PCR 11/1637-1659; 1689)

The trial court summarily denied a motion for post-conviction relief and that decision was appealed to the Florida Supreme Court. On appeal, the Florida Supreme Court reversed the summary denial, determining that an evidentiary hearing was warranted for several claims. Peede v. State, 748 So. 2d 253, 255 (Fla. 1999). The issues the Florida Supreme Court stated

required factual development were as follows: 1) a Brady claim regarding whether the State had possession of the victim's diary and whether Peede's counsel had access to it; 2) whether the State improperly withheld evidence establishing Peede's longstanding mental illness; 3) whether counsel was ineffective for failing to present issues surrounding Peede's competency and; 4) whether Peede received an inadequate mental health evaluation and whether counsel was ineffective in failing to argue additional statutory mitigation and present witnesses to document Peede's alleged history of abuse, bizarre behavior, and manifestations of mental illness. Peede v. State, 748 So. 2d 253, 257-259 (Fla. 1999).

At a status conference, Peede's new counsel, Kenneth Malnik, Assistant CCRC, questioned Peede's competency. On November 29, 2000, the Honorable Judge Lawrence Kirkwood reaffirmed his prior competency ruling and granted the State's motion for Peede to submit to an examination by a mental health expert selected by the State. On December 6, 2001, Peede's counsel filed a written motion to determine competency based upon Peede's emotional display during a meeting with counsel at the jail.[1] The State filed a written objection to another round of competency examinations, noting that the issue of Peede's

[1] Previous counsel was allowed to withdraw based upon personal conflict with Peede.

competency had been fully litigated. The State argued the instant motion did not differ significantly from the conduct cited in the previous motion to determine competency.[2]

On February 8, 2002, the Honorable Lawrence Kirkwood granted the defense motion to reexamine or reopen the issue of Appellant's competency, and appointed Dr. Berns to examine Peede and submit a report. (PCR-2, 25/1537) Appellant refused to cooperate with the court appointed doctors. On the recommendation of Dr. Berns, Peede was transferred to the psychiatric unit of the Florida State prison where he could be monitored and the staff could report on his mental condition. (PCR-2, 25 at 1555)

On December 12, 2002, Dr. David Frank, a contract psychiatrist with Union Correctional Institution, submitted a report to the court. Dr. Frank's report noted the following:

> Following admission to the UNCI TCU, Inmate Peede was evaluated with a full initial psychiatric evaluation, weekly follow-up psychiatric interviews, around the clock nursing and security observations, and periodic observations by a recreational therapist. Inmate Peede chose to refuse most services and opportunities for evaluation, which necessitated a longer than expected evaluation period. During these seven weeks of observation/evaluation, he has not exhibited any signs or symptoms of psychosis, thought disorder, depression, mania, or any other major mental disorder.

[2] On January 4, 2002, Dr. Merin traveled to Union Correctional to meet with Mr. Peede but Peede refused to be examined.

> In fact, during the evaluation period, the multi-disciplinary services team has been unable to identify any disorder that would indicate the need for inpatient treatment...

(PCR-2, 25/1569)

Subsequently, on July 18, 2003, a successor judge, the Honorable Alan Lawson conducted a hearing to determine Peede's competency. After hearing expert testimony on the matter, on July 24, 2003, Judge Lawson found Peede competent to proceed. The court noted, in part:

> "Having evaluated the experts' reports, viewed Mr. Peede's in-court behavior, and carefully considered the testimony of Dr. Frank and this Court's discussion with Defendant, the Court finds Defendant to be competent. Simply put, Mr. Peede *could* assist his attorneys, if he wanted to, but is instead *choosing* not to discuss the facts of this case. It is clear to this Court that Mr. Peede is not incompetent, simply uncooperative."

(PCR-2, 25/1607)

Peede pursued a Petition for Extraordinary Relief in this Court challenging the trial court's competency finding. The Court dismissed the Petition on January 28, 2004. Peede v. State, 868 So. 2d 524 (Fla. 2004).

An evidentiary hearing was conducted in November, 2003 and January, 2004. On August 23, 2004, the trial court issued its Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR-2, 26/1774-86) Defendant's Motion for

Rehearing, filed August 30, 2004 (PCR-2, 27/1897-1912), was denied by the court on September 23, 2004. (PCR-2, 27/1917)

The order denying post-conviction relief was affirmed and petition for writ of habeas corpus was denied on January 11, 2007. Peede v. State, 955 So. 2d 480 (Fla. 2007).

On May 5, 2008, Peede filed a Petition for Writ of Habeas Corpus and Memorandum of Law in Support of Habeas Corpus Petition in the United States District Court, Middle District of Florida. The State filed its response on December 8, 2009 and Peede has filed his reply. Peede's federal habeas petition remains pending.

On or about November 16, 2010, Peede filed a successive Rule 3.851 motion to vacate, based on Porter v. McCollum. On May 2, 2011, the trial court entered a written order summarily denying Peede's successive motion to vacate. (PCR-3, 2/232-35) The specifics of the trial court's order will be addressed within the argument section of the instant brief. Peede's notice of appeal was filed on May 31, 2011. (PCR-3, 2/236-37)

B) Trial Facts

On direct appeal, this Court provided the following summary of facts:

> Intent on getting Darla to come back to North Carolina with him to act as a decoy to lure his former wife Geraldine and her boyfriend Calvin Wagner to a motel where he could kill them, Peede, on March 30, 1983, traveled from Hillsboro, North Carolina, to Jacksonville, Florida, on his motorcycle. He sold his motorcycle near Ormond Beach, took a cab to the airport, and flew to Miami. He attempted to call Darla at her daughter's residence several times, each time speaking with Darla's daughter Tanya because Darla was not at home. At 5:15 p.m., he called back and spoke with Darla who agreed to pick him up at the airport. Prior to leaving for the airport, however, Darla left very strict instructions with Tanya to call the police if she was not back by midnight and to give them the license plate number of her car because she may have been forced into the car. She was afraid of being taken back to North Carolina and being put with the other people he had threatened to kill. She gave Tanya the telephone numbers of Geraldine and the police in Hillsboro, North Carolina. She left her residence with only her purse and took no other belongings that would evidence her intention not to return home that evening. Although she would normally call Tanya if she were going somewhere and not coming back for the evening, Tanya received no such call.
>
> According to Peede, when Darla picked him up at the airport, she informed him that she planned to go back to her apartment and then to the beach the next day. He then directed her to drive north on Interstate 95, but, after gassing up Darla's car, they mistakenly got on the turnpike heading for Orlando. As they left the Miami area and the song "Swinging" came on the radio, Peede took his lock-blade knife and inflicted a superficial cut in Darla's side. In his confession, Peede described his belief that Darla and Geraldine had mutually advertised for sexual partners in a nationally publicized, pictorial "Swinger"

magazine which he had seen while imprisoned in California.

Peede said that on the way to Orlando they stopped and picked up a hitchhiker who drove the car while they had intercourse in the back seat. The hitchhiker was dropped off in Orlando and Peede drove east on I-4 toward Daytona Beach. As they drove, the conversation again returned to the subject of Peede's belief that Geraldine and Darla had advertised in "Swinger" magazine. Approximately five to six miles outside of Orlando, Peede stopped the car on the shoulder of the road, jumped into the back seat, and, with his lock-blade hunting knife, stabbed Darla in the throat which resulted in her bleeding to death within five to fifteen minutes. Still determined to get back to North Carolina to kill Geraldine and Calvin, he proceeded up I-95. He left Darla's body in a wooded area in Camden, Georgia, and he threw the murder weapon out of the car window on his way to North Carolina. When he returned to his home in Hillsboro, North Carolina, he decided that he would kill Geraldine and Calvin while they were on their way to work. He loaded his shotgun and placed it beside the door. Before he could carry out his plan, the police arrived, and he was arrested. Darla's heavily bloodstained car was parked at his residence. In addition to his lengthier confession to the authorities, Peede wrote out and had witnessed the following short confession:

> My name is Robert Peede, on March 31, 1983, I killed my wife Darla, by stabbing her in the neck with a Puma folding knife. This occurred on Hwy. 4 (interstate) about six miles east of Orlando Fla., in the back seat of Darla's 71 Buick.
>
> I ask for the death penalty in this crime, to be carried out as soon as possible.
>
> Robert Peede
>
> D.O.B. 6-30-44

Darla's body was found in the woods. She had a stab wound in the throat area which continued into the

> chest and into the superior vena cavae, a second stab wound nine inches below her shoulder in her side, and bruising on various parts of her legs and arms which the medical examiner characterized as defensive bruising. The contusions on her wrists evidenced a struggle.
>
> Peede was convicted of first-degree murder. The jury recommended that the death penalty be imposed, and the trial court sentenced him to death.

Peede v. State, 474 So. 2d 808, 809-810 (Fla. 1985).

C) Post-Conviction Proceedings

Following a several day hearing on a number of issues surrounding the effectiveness of counsel, the trial court found that counsel did not render deficient performance, nor, did Peede establish prejudice pursuant to Strickland v. Washington, 466 U.S. 668 (1984). On appeal, this Court affirmed, rejecting the claim that counsel was ineffective in presenting mitigating evidence during the penalty phase of Peede's trial. This Court stated, in part:

> Because Peede would not assist his counsel in providing any mitigating evidence or circumstances, the trial court concluded he cannot now complain that his counsel performed ineffectively in failing to pursue additional mitigation. The trial court also found that despite Peede's lack of cooperation, Peede's counsel employed an investigator and interviewed Peede's family and friends. Counsel also submitted some thirteen letters of support from Peede's friends and family to the jury. Ultimately, the trial court concluded that this performance, although not perfect, was adequate to meet the demands of *Strickland* and its progeny. We agree with that conclusion. Factually the record supports both the

finding of lack of cooperation by Peede and counsel's efforts notwithstanding Peede's recalcitrance. We find no *Strickland* error in the trial court's evaluation and conclusions.

The mitigating evidence Peede presented during the evidentiary hearing was his mother's suicide, his blistering skin condition as a child, his paranoid behavior regarding his wives' alleged sexual exploits, and his feelings of inadequacy. While this evidence could indeed be seen as mitigating, this mitigation would have been offset by the testimony of Peede's aggressive and impulsive behavior towards women, including his hitting Nancy Wagoner prior to killing Darla, and his bizarre accusations to various friends and family of sleeping with his second wife, Geraldine. It appears that Peede's aggression has not subsided in the years since the murder either. This is illustrated by Peede's reaction when his counsel put his childhood friend John Bell on the stand during the evidentiary hearing; Peede accused him of fathering his youngest child and threatened that he would shoot Bell if he had a gun. With this background of bizarre behavior and hostility, and because of Peede's refusal to allow his counsel to cross-examine Darla's daughters while they were on the stand during the guilt phase of his trial, reasonable defense counsel would hesitate before putting any of Peede's friends and family on the stand during the penalty phase.

With regards to counsel's failure to provide Dr. Kirkland with sufficient background information to evaluate Peede for the penalty phase, we note that Dr. Kirkland, a highly respected psychiatrist, interviewed Peede twice. He, in fact, provided evidence favorable to Peede in that he opined that the extreme emotional disturbance mitigator applied in Peede's case, and the trial court agreed. The fact that Peede produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective. *See Gaskin v. State*, 822 So. 2d 1243, 1250 (Fla. 2002) ("[C]ounsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'") (quoting *Asay v. State*, 769 So. 2d 974, 986 (Fla.

2000)). Postconviction experts have the benefit of hindsight, and of researching for a long period of time the factual circumstances surrounding the case with the benefit of the trial record. Moreover, although Peede's experts believed the trial court should have found the mitigator regarding capacity to conform conduct to the requirements of the law, the circuit court was within its discretion to agree with the expert witnesses who did not share this belief.

Prejudice

Even if deficient performance had been established, it is apparent that prejudice was not. As noted above, in order for a defendant to meet the prejudice prong of *Strickland*, "the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." *Maxwell*, 490 So. 2d at 932. Here, the record reflects that the proffered mitigation developed in the evidentiary hearing would have been countered by the substantial negative aspects of Peede's character and past brought out by the mitigation witnesses and by the established aggravators in this case. Additionally, Peede has not demonstrated prejudice by Dr. Kirkland's lack of background information because Dr. Kirkland's essential views would not have changed, and further, the mitigator of extreme mental or emotional disturbance was considered by the trial court due to Dr. Kirkland's testimony. In fact, the experts at the evidentiary hearing essentially agreed with many of Dr. Kirkland's main findings. Although this Court found that the CCP aggravator was not supported by the evidence, the trial court found two other substantial aggravators based on Peede having been previously convicted of two felony crimes involving the use or threat of violence, one of these crimes being second-degree murder, and the murder being committed in the commission of kidnapping. In sum, we find no error by the trial court in concluding that Peede has not demonstrated prejudice, and we affirm the trial court's denial of this claim.

Peede v. State, 955 So. 2d 480, 493-494 (Fla. 2007).

STANDARD 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).

SUMMARY OF THE ARGUMENT

The trial court correctly denied this successive, untimely, and procedurally barred motion to vacate. As an initial matter, Peede's collateral counsel was not authorized to file this successive motion for post-conviction relief. Peede's claim did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B). Porter v. McCollum, 130 S. Ct. 447 (2009) did not change the law in any manner but was a fact specific application of Strickland v. Washington. Peede did not offer or argue any new evidence in his successive motion, he simply asserted that Porter constituted a fundamental and retroactive change in the law. Since this Court has recently rejected this argument in Walton v. State, 36 Fla. L. Weekly S702, 704 (Fla. December 1, 2011), his appeal lacks any merit.

The claim in Peede's successive post-conviction motion was nothing more than a procedurally barred attempt to relitigate a previously denied claim of ineffective assistance of penalty phase counsel. Further, as this Court found in his previous appeal, Peede failed to prove deficient performance. The lack of deficient performance under the well established Strickland standard is not even arguably impacted by the Supreme Court's decision in Porter.

ARGUMENT

THE TRIAL COURT'S SUMMARY DENIAL OF PEEDE'S SUCCESSIVE RULE 3.851 MOTION TO VACATE SHOULD BE AFFIRMED AS THE MOTION WAS UNAUTHORIZED, TIME BARRED, AND WITHOUT MERIT AS IT DID NOT ADDRESS OR OFFER NEW EVIDENCE BUT INSTEAD RELIED UPON THE PORTER v. McCOLLUM DECISION FROM THE SUPREME COURT, WHICH THIS COURT HAS RECENTLY DETERMINED DOES NOT CONSTITUTE A NEW OR FUNDAMENTAL CHANGE IN THE LAW.

This is a post-conviction appeal from the circuit court's summary denial of Peede's successive Rule 3.851 motion to vacate, based on Porter v. McCollum, 130 S. Ct. 447 (2009). Peede 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 So. 2d 922 (Fla. 1980)? The answer to both questions is no, as this Court recently stated in Walton v. State, 36 Fla. L. Weekly S702, 704 (Fla. December 1, 2011). Therefore, the trial court properly denied Peede's motion as untimely, successive and procedurally barred.

I. The Trial Court's Order

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

> At the case management conference in the instant case, counsel for Mr. Peede argued that *Porter* was critical of the Florida Supreme Court's *Strickland* analysis, because the deference given to the trial court's factual findings was incorrect. She argued that *Porter* means the postconviction judge should have considered *de novo* how favorable evidence would have impacted the jury rather than simply noting the existence of conflicts in the testimony.
>
> This Court disagrees and finds that the holding in *Porter* was limited to the particular facts of that case. It does not mean the Florida Supreme Court has been applying *Strickland* incorrectly in every case or that it constitutes a change in Florida law regarding a fundamental constitutional right. Furthermore, since *Porter* was issued, no state or federal court has held that the opinion establishes a fundamental change in the law to be applied retroactively. The only case involving a successive Rule 3.851 motion based on *Porter* appears to be *Grossman v. State*, 29 So. 3d 1034 (Fla. 2010), issued on February 8, 2010, wherein the Florida Supreme Court held:
>
> > ...Grossman attempts to argue that the proposed testimony of his new expert, Dr. Maher, concerning non-statutory mental mitigation, is newly discovered evidence in light of the decision of the United States Supreme Court in *Porter v. McCollum*, U.S. ----, 130 S.Ct. 447, --- L.Ed.2d ---- (2009), because "[p]rior to *Porter*, Florida Courts did not consider non-statutory mental mitigation as mitigation." We reject this claim. *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)).
>
> *Id.* at 1042.
>
> This Court concludes that *Porter* does not announce a new right or a change in the *Strickland* analysis that justifies reconsideration of Mr. Peede's ineffective assistance of counsel claim. As the State argues, it is merely an application of the *Strickland* test to the facts of a particular case. Furthermore, this Court lacks authority to find a new basis, independent of Rule 3.85 1(d)(2)(B) and *Witt v. State*, 387 So. 2d 922, 929-930 (Fla. 1980), for filing successive motions.
>
> Finally, unlike *Porter*, the trial court and the Supreme Court of Florida specifically ruled that trial defense counsel's performance was not deficient, conducted a full analysis of the prejudice prong under *Strickland*, applied the postconviction testimony to proffered mental health mitigation, and found no prejudice. *Peede v. State*, 955 So. 2d 480, 493-494 (Fla. 2007). Therefore, *Porter* does not provide Mr. Peede with a basis for relief.

(PCR-3, 1/89-91)

II. Analysis

A) Collateral Counsel Was Not Authorized To File This Successive Motion For Post-Conviction Relief

As an initial matter, the State notes that Peede's collateral counsel was not even authorized to file the successive motion which is the subject of this appeal. Pursuant to § 27.702, Fla. Stat., "[t]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized

by statute." This Court has recognized the legislative intent to limit collateral counsel's role in capital post-conviction proceedings. See State v. Kilgore, 976 So. 2d 1066, 1068-69 (Fla. 2007). The term "postconviction capital collateral proceedings" is defined in § 27.711(1)(c), Fla. Stat., as:

> "Postconviction capital collateral proceedings" means one series of collateral litigation of an affirmed conviction and sentence of death, including the proceedings in the trial court that imposed the capital sentence, any appellate review of the sentence by the Supreme Court, any certiorari review of the sentence by the United States Supreme Court, and any authorized federal habeas corpus litigation with respect to the sentence. **The term does not include repetitive or successive collateral challenges to a conviction and sentence of death which is affirmed by the Supreme Court and undisturbed by any collateral litigation**.

§ 27.711(1)(c), Fla. Stat. (emphasis added). Collateral counsel is not authorized to file the unauthorized successive motion to vacate; the motion was time-barred, successive and procedurally barred. Porter did not change the law and Porter is based on the prejudice prong which would not apply to Peede anyway because his IAC/penalty phase claim was previously denied under the deficient performance prong of Strickland. Collateral counsel incorrectly believes that she can file successive motions for post-conviction relief at her own discretion, and, force the tax payers of this State to pay for her services. As explained below, this motion is clearly without merit and

collateral counsel should not have presented this claim to the lower court, much less expect the State to pay for it.

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

B) Porter Did Not Change The Law, Much Less Constitute A Fundamental Change In Constitutional Law Which Is Retroactive

Peede asserts that the trial court should have granted his successive motion for post-conviction relief by holding that Porter v. McCollum, 130 S. Ct. 447 (2009), constitutes a "fundamental repudiation of this Court's Strickland jurisprudence," which constitutes a change in law that satisfies the Witt v. State, 387 So. 2d 922 (Fla. 1980) standard. Peede concludes that it was therefore proper for him to raise this claim in a successive motion to vacate. Peede also insists that if the alleged "change in law" from Porter, as construed by Peede, was applied to his case, it would show that trial counsel

was deficient and that Peede was prejudiced by the alleged deficiency. Peede's argument lacks any merit.

This Court recently rejected any suggestions that Porter constituted a fundamental change in the law which might support a successive motion to vacate. In Walton, 36 Fla. L. Weekly at S704, this Court stated:

> 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.

Peede raises the same claim as the defendant in Walton and uses the same argument for retroactive application of Porter

that this Court rejected in Walton. Accordingly, the outcome of this appeal is governed by this Court's decision in Walton. Peede's claim was properly denied by the trial court below.

Pursuant to Fla. R. Crim. P. 3.851(d), a defendant must present his post-conviction claims within one year of when his conviction and sentence became final unless certain exceptions are met. Here, Peede's conviction and sentences became final in 1986, when the United States Supreme Court denied certiorari after direct review. See Peede v. State, 474 So. 2d 808 (Fla. 1985), cert. denied, 477 U.S. 909 (1986). Inasmuch as Peede did not file this motion until 2010, this motion was time-barred. Fla. R. Crim. P. 3.851(d)(1)(B).

Pursuant to Fla. R. Crim. P. 3.851(d)(2)(B), the time bar is lifted if "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Peede does not assert a claim based on a fundamental constitutional right that was not established within a year of when his convictions and sentences became final. As this Court held in Walton, Porter was nothing more than a fact specific application of Strickland and therefore did not constitute a fundamental change in the law which could support a successive motion for post-conviction relief. In fact, no court has held that Porter

established a "new law" that is retroactive; instead, both this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of Strickland v. Washington, 466 U.S. 668 (1984) to claims of ineffective assistance of counsel. See Cullen v. Pinholster, 131 S. Ct. 1388 (2011); Harrington v. Richter, 131 S. Ct. 770 (2011); Premo v. Moore, 131 S. Ct. 733 (2011); Padilla v. Kentucky, 130 S. Ct. 1473 (2010); Renico v. Lett, 130 S. Ct. 1855 (2010); Sears v. Upton, 130 S. Ct. 3259 (2010); Reed v. Sec'y, Fla. Dept. of Corrections, 593 F.3d 1217, 1243 n.16, 1246 (11th Cir. 2010); Boyd v. Allen, 592 F.3d 1274, 1302 (11th Cir. 2010); Franqui v. State, 59 So. 3d 82, 95 (Fla. 2011); Troy v. State, 57 So. 3d 828, 836 (Fla. 2011); Everett v. State, 54 So. 3d 464, 472 (Fla. 2010).

Since Porter neither recognized a new right nor has been held to apply retroactively, it does not meet the exception to the time bar found in Fla. R. Crim. P. 3.851(d)(2)(B). Here, the plain language of Fla. R. Crim. P. 3.851(d)(2)(B) requires "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Thus, for this exception to apply, it requires both a new fundamental constitutional right and a prior holding that the right is to be

applied retroactively. See Tyler v. Cain, 533 U.S. 656 (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). Rather, Peede must show that a newly established right has been held retroactive for the exception to apply. And, as this Court recently held in Walton, Porter does not constitute a change in the law that would apply retroactively to his case.

Peede is seeking nothing more than to relitigate his IAC/penalty phase claim. Peede raised the same IAC/penalty phase claims in his prior motion to vacate and relief was denied on both the deficient performance and prejudice prongs of Strickland after an extensive multi-day hearing. This decision was affirmed on appeal by this Court. See Peede, 955 So. 2d 480, 493-94. 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, Peede cannot relitigate a claim that has been denied by the trial court and affirmed by this 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 Peede is attempting to do here, his IAC/penalty phase claim is barred and his second successive motion to vacate 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). Peede has already had his day in court and in the interest of judicial economy, these claims cannot be re-litigated in any state court.

Peede seems to conclude that Porter held that it was improper to defer to the trial court's findings of fact in resolving an IAC claim pursuant to the standard of review in Stephens v. State, 748 So. 2d 1028 (Fla. 1999). However, in making this assertion, Peede ignores that the Stephens standard of review is mandated by Strickland itself:

> Furthermore, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. §2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n.6, 83 S.Ct. 745, 755, n.6, 9 L. Ed. 2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See *Cuyler v. Sullivan*, 446 U.S., at 342, 100 S.Ct., at 1714. **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 at 698 (emphasis added).[3] As this passage shows, the Supreme Court required deference not only to findings of historical fact but also deference to factual findings made in resolving claims of ineffective assistance while allowing *de novo* review of the application of the law to these factual findings. This is the standard of review that this Court mandated in Stephens, 748 So. 2d at 1034, and applied in Porter v. State, 788 So. 2d 917, 923 (Fla. 2001) and Sochor v. State, 883 So. 2d 766, 781 (Fla. 2004). This is also the standard used to deny relief in Peede's prior post-conviction appeal.

Peede's reliance on Sears v. Upton, 130 S. Ct. 3259 (2010) is misplaced. In Sears, the state post-conviction court found constitutionally deficient attorney performance under Strickland. Because Sears' counsel presented some - but not all of the significant mitigation evidence that the court felt competent counsel should have uncovered - the trial court

[3] Under the federal habeas statute as it existed at the time of Strickland, a federal court was required to defer to a state court factual finding if it was made after a "full and fair" hearing and "fairly supported by the record." 28 U.S.C. §2254(d) (1984). After the enactment of the AEDPA, the deference required of state court factual findings has been heightened and relocated. 28 U.S.C. § 2254(e)(1) (requiring a federal court to presume a state court factual finding correct unless the defendant presents clear and convincing evidence to overcome the presumption).

mistakenly determined that it could not speculate as to what the effect of additional evidence would have been and denied relief. On appeal, the Georgia Supreme Court summarily affirmed, without explanation, the post-conviction court's finding that it was unable to assess whether trial counsel's deficient performance might have prejudiced Sears.

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 an IAC claim or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the state courts had made findings about the evidence presented. Id. at 3261. Thus, Sears does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate. Sears, like Porter, in no way changed the Strickland standard.

C) Porter Provides No Support For Peede's Argument That His Prior Post-Conviction Appeal Was Improperly Decided

Here, Peede's claim of ineffective assistance of penalty phase counsel for failing to investigate and present mitigation was denied after extensive review by this Court, not only on a finding that Peede did not prove prejudice, but also on a finding that Peede did not prove deficiency. See Peede, 955 So. 2d at 493-94. Peede does not suggest how Porter would have

affected this determination but, rather, attempts to reargue the same evidence that this Court has previously considered and rejected.

Moreover, the finding of no deficiency on the part of Peede's two trial attorneys in this case is in accord 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.") Thus, Peede's claim that trial counsel was deficient – a deficiency that has never been found by this court - would be meritless even if Porter had changed the law and applied retroactively.

Assuming for a moment, this Court were even to entertain Peede's argument, which is barred under established Florida law, it is clear that no relief would be warranted in this case. Even though Peede refused to cooperate with his defense attorneys below with regard to penalty phase mitigation, they employed an investigator and gathered evidence in the form of 13 letters from individuals in North Carolina regarding Peede's life and character. Defense counsel testified that these individuals refused to come to Florida to testify on Peede's

behalf.[4] (PCR-2, 15/437, 445). Nonetheless, defense counsel's strategy was to use the letters to portray Peede as a polite, pleasant, and good person. (PCR-2, 15/437).

Collateral counsel only presented three lay background witnesses on Peede's behalf during the post-conviction evidentiary hearing and no truly compelling mitigating evidence was developed. And, the evidence which was presented, as noted by the trial court and this Court on appeal, was largely, if not entirely, offset by negative information about Peede. Such information certainly would have countered trial counsel's strategy of attempting to portray Peede as a nice, polite, "good person." (PCR-2, 15/437).

For example, Peede clearly was unhappy with collateral counsel for calling his childhood friend John Bell to testify on his behalf. Indeed, Peede threatened to kill John Bell when he was called to testify against his wishes. (PCR-2, 14/274). This display of potential dangerousness would alone outweigh the value of any non-statutory mitigation presented by Mr. Bell or, for that matter, the two additional witnesses called by collateral counsel. Moreover, while Bell did testify about

[4] Trial counsel DuRocher thought that most of the people who submitted letters on Peede's behalf were of advanced age. (PCR-2, 15/445). It was established during the evidentiary hearing that one of these individuals, Peede's Aunt, would have been willing to come to Florida to testify on Peede's behalf.

Peede's skin condition as a child, he noted that despite this condition Peede was able to play with other kids his age. (PCR-2, 14/291). He also testified that Peede's family was well off, and that Peede had a temper. (PCR-2, 14/292, 295). Moreover, collateral counsel did not establish that Bell was available to testify in 1984, because after hearing of Peede's second murder, Bell admitted he was laying low, and did not want anything to do with Peede. (PCR-2, 14/308).

Another background witness, Peede's cousin Michael Brown, noted that Peede had a temper, and that he was "overly aggressive" with girls: "[I]f they did not respond to his advances, he may get mad about that and say something very disparaging to them." (PCR-2, 14/315).

Peede's 71-year-old aunt testified that her sister felt that Peede, her only child, was the most important person in her life and that his education was very important to her. (PCR-2, 14/237). However, Peede didn't like school and he "didn't do that well." (PCR-2, 14/237-38). Her sister didn't "beat the child" but, she "spanked him" when he didn't behave or do well on his homework. (PCR-2, 14/238-40). Peede grew up in comfortable circumstances. (PCR-2, 14/240). She also related an incident where Peede struck her on her shoulder, causing her to 'trip' over a rubber mat and fall to the floor. (PCR-2,

14/256). Her testimony did not establish that Peede was abused as a child or that he suffered any kind of deprivation. Thus, while she may have provided some beneficial testimony regarding Peede's childhood medical conditions and the impact of her sister's suicide on Peede, her testimony on the whole, did not provide compelling mitigation.

Porter does not compel a different result from that reached by this Court in his prior post-conviction appeal. In Porter, the issue was whether Porter was prejudiced when penalty phase counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records about the defendant and never requested a mental health evaluation for mitigation at all. Porter, 130 S. Ct. at 453. The type of mitigation Peede developed in post-conviction pales in comparison to the specific and weighty evidence presented by the defendant in Porter; his extensive combat experience in the Korean war and its lasting impact upon the defendant. Thus, Porter provides no support for his argument on appeal.

In sum, Peede's attempt to relitigate previous adverse decisions of the trial court and this Court in this successive motion for post-conviction relief is unauthorized, untimely, and procedurally barred and otherwise without merit. Accordingly, this claim was properly denied without a hearing below.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0802743
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
scott.browne@myfloridalegal.com

COUNSEL FOR APPELLEE

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 Linda M. McDermott, Esquire, McClain & McDermott, 20301 Grande Oak Blvd., Estero, Florida 33928, this 29th day of December, 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).

_____

COUNSEL FOR APPELLEE