In the Supreme Court of Florida

DANIEL JON PETERKA,

Appellant,

v. CASE NO. SC11-1660

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

CASES PAGE(S)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, DANIEL JON PETERKA, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

No oral argument should be held in this appeal of a successive postconviction motion. The capital defense bar has filed approximately 40 successive motions based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). This Court has already cancelled the oral argument which had been originally scheduled in the lead case of *Willacy*. See *Willacy v. State*, SC11-99 (order of September 12, 2011 removing the case from the oral argument calendar and submitting the case without oral argument). Registry counsel, who counsel of record in many of these cases including *Willacy*, seems to be urging this Court to conduct 40 separate oral arguments. This Court should not conduct 40 separate oral arguments regarding the same issue. Oral argument is not warranted.

STATEMENT OF THE CASE AND FACTS

Peterka was convicted of the murder of his roommate, John Russell, and sentenced to death. Peterka gave a statement to police in which he admitted shooting Russell. The Florida Supreme Court affirmed the conviction and death sentence. *Peterka v. State*, 640 So.2d 59, 62 (Fla.1994)(vacating some of the aggravators but affirming the death sentence).

Peterka then filed a 3.850/3.851 motion, raising numerous claims, including a claim of ineffectiveness for failing to present military service and his refusal to participate in an escape as mitigation. *Peterka v. State*, 890 So.2d 219, 227, n.4. (Fla. 2004)(listing claims in the initial post-conviction motion filed in the trial court). Following an evidentiary hearing, the trial court denied the claim of ineffectiveness relating to mitigation, ruling: "As to the allegation that trial counsel was ineffective for failing to present penalty phase evidence of his commendations and leadership during his one year tenure in the Minnesota National Guard, the Court finds that the performance of Mr. Harllee was not deficient nor was there any resulting prejudice to the Defendant."[1] This Court explained that "Mr. Harllee testified that the decision to not put Peterka's military background into the case was a tactical decision based on the fact that the Defendant had committed illegal acts while in the military which led to his general discharge under honorable conditions" and

[1] The Assistant Public Defender's correctly spelled name is Mark Vernon Harllee, Florida Bar number 441392. This brief will use the correct spelling of Harllee rather than Harlee even within quotes.

"Mr. Harllee made the decision not to present any further military record evidence since the State could destroy the positive impact of the fact that the Defendant had served in the National Guard by presenting evidence of the acts that brought about his discharge from the military." The trial court found that "trial counsel made a reasoned tactical decision that was not deficient under the *Strickland* two prong test, and any omission regarding Mr. Peterka's military service did not prejudice the Defendant in light of the aggravating and mitigating factors that were presented during the penalty phase of the trial." (PCR Vol. III 584-587)(footnotes containing citations to evidentiary hearing omitted).

In his post-conviction appeal to this Court, Peterka raised the claim of ineffectiveness for failing to present this mitigation. *Peterka v. State*, 890 So.2d 219, 228 n.6 (Fla. 2004)(listing the six issues raised on appeal). The Florida Supreme Court affirmed the trial court's denial of the claim of ineffectiveness, agreeing that Assistant Public Defender Harllee made a reasoned tactical decision not to present Peterka's military background and that Peterka was not prejudiced by the omission of this evidence in light of the aggravating and mitigating factors that were presented during the penalty phase, finding there was "competent, substantial evidence to support the trial court's finding that trial counsel made a reasoned tactical decision not to present this evidence in mitigation" The Florida Supreme Court observed there "was a negative side to the military service mitigation because Peterka's illegal conduct led to his discharge from the National Guard" and that "Harllee believed that

because the trial was being held in a very heavy military area, Peterka's conduct could be viewed as besmirching the name of the military." The Florida Supreme Court concluded that "Harllee's tactical decision not to focus on Peterka's military service as a mitigating circumstance was not deficient performance." *Peterka*, 890 So.2d at 236-238.

On November 30, 2010, registry counsel, Linda McDermott, filed a third successive 3.851 motion raising a claim that this Court's prejudice analysis in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). (PC. Vol. I 1-27). On December 1, 2010, the State filed an answer to the third successive motion. (PC. Vol. I 28-54). On January 12, 2011, the trial court summarily denied the third successive motion finding "there has been no change in law" as a result of *Porter*. (PC. Vol. I 60-63).

Registry counsel then filed a motion for rehearing arguing that the trial court was required pursuant to 3.851(f)(5)(B) to conduct a case management conference before summarily denying the successive motion. (PC. Vol. I 64-68). The trial court granted the rehearing and scheduled a case management conference. (PC. Vol. I 69). On March 2, 2011, the trial court, Judge John T. Brown presiding, conducted a case management conference. (PC. Vol. II 301-319). The trial court also allowed registry counsel to file an amended successive motion to raise a lethal injection claim. (PC. Vol. I 71).

On April 7, 2011, registry counsel, Linda McDermott, filed a third amended successive 3.851 motion raising two claims: 1) a claim that

this Court's prejudice analysis in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009); and 2) a lethal injection claim. (PC. Vol. I 73-98). On April 12, 2011, the State filed an answer to the amended successive motion.[2] On June 15, 2011, the trial court summarily denied the third amended successive motion. (PC. Vol. I 168-171).

[2] The State's answer to the amended successive motion does not appear to be included in the record on appeal.

SUMMARY OF ARGUMENT

Peterka asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present military service as mitigation in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). Peterka claims, in his successive *Porter* motion, that the prejudice analysis conducted in the original motion has to be reassessed with a "full-throated and probing" analysis rather than the previous "truncated" analysis performed in the initial motion.

The successive motion was untimely. The motion was filed 16 years late and there is no exception to the time limitation in the rule that applies. *Porter* did not change the law governing ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984), was, is, and remains, the law regarding ineffectiveness.

This Court recently held that such successive *Porter* motions are untimely. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(No. SC11-153)(holding that the trial court 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 v. State*, 387 So.2d 922 (Fla. 1980)). This Court explained that any claim that "*Porter* applies retroactively is incorrect and insufficient as a matter of law" 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*." *Walton*, - So.3d at -, 2011 WL 5984284 at *5.

Furthermore, the motion is barred by the law of the case doctrine. This Court rejected the same type of argument in *Marek v. State*, 8 So.3d 1123 (Fla. 2009), and prohibited relitigation. As this Court held in *Marek*, capital defendants may not relitigate previously denied claims of ineffectiveness every time a new Supreme Court case is decided applying *Strickland*.

Even if this Court were to allow relitigation of the claim, it should be rejected on the merits. This case is not similar to the facts of *Porter*. There was no deficient performance. Unlike *Porter*, where defense counsel failed to uncover and present the defendant's combat experience that resulted in PTSD; here, in contrast, defense counsel made a strategic decision not to present Peterka's National Guard service. Nor was there any prejudice. Peterka, while in the National Guard for a year, was not in any combat. Peterka did not suffer PTSD as a result of intensive "horrific" combat like *Porter*.

Additionally, his claim of error applies only to the prejudice prong but both prongs of *Strickland* must be met to grant relief. This claim of ineffectiveness was rejected in this court based on a finding of no deficient performance as well as no prejudice. The "full-throated and probing" prejudice analysis Peterka seeks would not change this Court conclusion regarding there being no deficient performance in any manner and therefore, could not result in any

relief. Thus, the successive *Porter* motion was properly summarily denied as untimely, barred by the law of the case doctrine, and meritless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE SUCCESSIVE 3.851 MOTION ATTEMPTING TO RELITIGATE A CLAIM OF INEFFECTIVENESS FOR FAILING TO PRESENT MILITARY SERVICE AS MITIGATION BASED ON *PORTER V. MCCOLLUM*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)? (Restated)

Peterka asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present military service as mitigation in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). First, the successive motion was untimely. The motion was filed 16 years late and there is no exception to the time limitation in the rule that applies. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(finding a successive *Porter* motion was untimely). Furthermore, the motion is barred by the law of the case doctrine. As this Court held in *Marek*, capital defendants may not relitigate previously denied claims of ineffectiveness every time a new Supreme Court case is decided applying *Strickland*. Even if this Court were to allow relitigation of the claim, it should be rejected on the merits. This case is not similar to the facts of *Porter*. In *Porter*, defense counsel failed to uncover and present the defendant's extensive combat experience that resulted in PTSD. Here, in contrast, defense made a strategic decision not to present Peterka's limited National Guard service. There was no deficient performance. Nor was there any prejudice. Peterka's National Guard service was very limited in duration and did not involve any combat. Peterka certainly did not suffer PTSD as a result of intensive combat like

Porter. Thus, the successive *Porter* motion was properly summarily denied as untimely, barred by the law of the case doctrine, and meritless.

The trial court's ruling

The trial court summarily denied the amended motion. (PC. Vol. I 168-171). The trial court found "the decision in *Porter* left *Strickland* intact and did not alter the standards . . ." (PC. Vol. I 169). The trial court found the standard outlined in *Strickland* . . . was not affected by *Porter*. (PC Vol. I 170). The trial court found "that there has been no change in the law which would require the Court to consider those claims that have been previously addressed." (PC. Vol. I 170).

Standard of review

The standard of review of a trial court's summary denial of a successive 3.851 post-conviction motion is *de novo*. *Darling v. State*, 45 So.3d 444, 447 (Fla. 2010)(explaining that because a trial court's summary denial is based on the pleadings before it, its ruling is tantamount to a pure question of law and is subject to de novo review discussing *Ventura v. State*, 2 So.3d 194 (Fla. 2009)). Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." The phrase "conclusively show" is not limited to factual matters; the phrase also allows a summary denial as a matter of law.

If there is controlling precedent from this Court that is directly on point, then a trial court may summarily deny the successive motion. For example, this Court has routinely affirmed summary denials of lethal injection claims on this basis. *See e.g. Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008)(noting that this "Court has repeatedly rejected appeals from summary denials of Eighth Amendment challenges to Florida's August 2007 lethal injection protocol since the issuance of *Lightbourne*" citing cases). A trial court may decided as a matter of law that the movant is entitled to no relief as this trial court properly did.

Timeliness

The successive 3.851 post-conviction motion was untimely. The rule of criminal procedure governing collateral relief in capital cases contains a time limitation that requires any post-conviction motion be filed within one year. The motion is untimely pursuant to 3.851(d)(1)(B).[3] Under the rule any post-conviction motion must

[3] Specifically, rule 3.851(d)(1), provides:

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

be filed within one year of Peterka's convictions and sentence becoming final. Peterka's convictions and death sentence became final on January 23, 1995, when the United States Supreme Court denied his petition for writ of certiorari in the direct appeal. *Peterka v. Florida*, 513 U.S. 1129, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995)(No. 94-6845). The amended successive motion was filed in April of 2011. The motion is over sixteen years late.

The rule contains three exceptions to the time limitation, none of which apply. The Florida Supreme Court has held that *Porter* did not supply a basis for a newly discovered evidence claim and did not restart the clock. *Grossman v. State*, 29 So.3d 1034, 1042 (Fla. 2010)(finding a trial court's summary denial of a third successive motion to be proper and affirming that the motion was untimely because *Porter* did not change the law regarding consideration of non-statutory mitigation and was not newly discovered evidence). So, controlling precedent holds that the exception for new facts in 3.851(d)(1)(B) does not apply.

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Peterka is attempting to use the exception in rule 3.851(d)(2)(B), which restarts the clock for a new fundamental constitutional right that has been held to apply retroactively. Turner asserts that *Porter* is a new fundamental constitutional right that applies retroactively. It is not.

In *Porter*, the Supreme Court per curiam reversed the Eleventh Circuit's finding that the Florida Supreme Court's determination there was no prejudice was a reasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Agreeing with the district court, the Supreme Court was persuaded that it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented. *Porter* did not establish a new constitutional right. Rather, it is merely an application of *Strickland* to a particular case. The *Porter* Court merely found prejudice under the existing prejudice framework. Contrary to Peterka's assertion, the Supreme Court in *Porter* did not change the prejudice analysis - dramatically or otherwise. A claim that counsel was ineffective in violation of the Sixth Amendment right to counsel was, is, and remains, governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) including the prejudice prong. *Porter* did not overrule *Strickland*. The *Porter* Court itself repeatedly referred to *Strickland* and therefore, reaffirmed the *Strickland* standard. *Porter* contains several paragraphs describing the *Strickland* standard which cited *Strickland*

repeatedly. *Porter*, 130 S.Ct. at 452-454. This section of the *Porter* opinion starts with the sentence: "To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him" and then cites *Strickland* six times. *Porter*, 130 S.Ct. at 452. The *Porter* opinion ends by once again citing *Strickland*. *Porter*, 130 S.Ct. at 456. The *Porter* Court did not at any point change the prejudice prong of *Strickland*.

Moreover, the United States Supreme Court had repeatedly referred to the *Strickland* standard in numerous opinions since *Porter*. *Cullen v. Pinholster*, - U.S. -, -, 131 S.Ct. 1388, 1408, 179 L.Ed.2d 557 (2011)(observing that the "*Strickland* standard must be applied with scrupulous care."); *Harrington v. Richter*, - U.S. -, -, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011)(discussing the *Strickland* standard). Additionally, this Court has recently discussed the standard for ineffectiveness citing *Porter* in support of its discussion of the *Strickland* standard in numerous cases. *Hildwin v. State*, - So.3d -, -, 2011 WL 2149987 (Fla. 2011); *Franqui v. State*, 59 So.3d 82, 94-95 (Fla. 2011); *Troy v. State*, 57 So.3d 828, 836 (Fla. 2011). In one of those cases, this Court stated: "*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 confidence in that outcome. *Porter v. McCollum*, - U.S. -, -, 130 S.Ct. 447, 455-56, 175 L.Ed.2d 398 (2009)(quoting *Strickland*, 466 U.S. at 693-94)." *Troy*, 57 So.3d at 836. The Florida Supreme Court obviously does not think that *Porter* overruled *Strickland*. Peterka cites no appellate court

decision from any court as describing *Porter* as overruling or significantly altering *Strickland*.

This Court recently held that such successive *Porter* motions are untimely. *Walton v. State*, - So.3d -, 2011 WL 5984284 (Fla. December 1, 2011)(No. SC11-153)(holding that the trial court 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 v. State*, 387 So.2d 922 (Fla. 1980)). This Court explained that any claim that "*Porter* applies retroactively is incorrect and insufficient as a matter of law" 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*." *Walton*, - So.3d at -, 2011 WL 5984284 at *5.

Peterka attempts to distinguish between "new federal law" and "new Florida law" There is no such distinction in the area of *Strickland*. When the Supreme Court disagrees with this Court in a *Strickland* case, that does not change the law of *Strickland*. *Porter* did not alter the existing *Strickland* standard in any manner - state of federal.

Peterka engages in an extensive *Witt v. State*, 387 So. 2d 922 (Fla. 1980) retroactivity analysis. But one does not engage in a retroactivity analysis unless there is some change in the law. *Strickland* applies to this successive motion just as *Strickland* applied to the initial motion. If the law has not changed, as the

law of *Strickland* has not, then that ends the retroactivity analysis right there. Because there is no change in the law, there simply is no retroactivity issue presented by this case.

Furthermore, the Florida Supreme Court has directly held, in this context - the Sixth Amendment right to effective assistance of counsel context - refinements or clarifications in *Strickland* jurisprudence are not retroactive. *Johnston v. Moore*, 789 So. 2d 262, 266-267 (Fla. 2001)(holding that *Stephens v. State*, 748 So.2d 1028, 1033-1034 (Fla. 1999), which clarified the standard to be used in reviewing ineffective assistance of counsel claims, was not retroactive under *Witt v. State*, 387 So.2d 922 (Fla. 1980)). In the earlier case of *Stephens v. State*, 748 So.2d 1028, 1033-1034 (Fla. 1999), this Court clarified the standard of review that applied to *Strickland* claims of ineffectiveness. But *Porter* did not even involve a clarification or refinement of the law like *Stephens*. Rather, *Porter* was a mere application of standard law to a particular case. The successive motion was untimely.

Law of the case

The claim of ineffectiveness raised in the successive 3.851 motion is barred by the law of the case doctrine. Under the law of the case doctrine, questions of law actually decided on appeal govern the case through all subsequent stages of the proceedings. *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). A defendant cannot relitigate claims that have been denied by the trial court where that denial has been affirmed by an appellate court. *State v.*

McBride, 848 So.2d 287, 289-290 (Fla. 2003)(noting that the law of the case doctrine applies to post-conviction motions); *Tatum v. State,* 27 So.3d 700, 704 (Fla. 3rd DCA 2010)(finding the claims in a 3.800 motion to be barred by the law of the case doctrine because they were previously addressed by the Third District in an earlier appeal). As the Florida Supreme Court has explained, if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in any court. *Topps v. State*, 865 So.2d 1253 (Fla. 2004).

Peterka is seeking to relitigate the exact same ineffectiveness claim in this successive post-conviction motion that he raised in his first post-conviction motion. Peterka is once again claiming that his trial attorneys, Assistant Public Defenders Earl D. Loveless and Mark V. Harllee, were ineffective at penalty phase for not presenting his his National Guard service as mitigation. That same claim of ineffectiveness for failing to present National Guard service was raised in the initial post-conviction motion. This court rejected that particular claim of ineffectiveness. *Peterka v. State*, 890 So.2d 219, 236 (Fla. 2004)(agreeing with the trial court's findings "that Assistant Public Defender Harllee, who was responsible for the presentation of the penalty phase defense at trial, made a reasoned tactical decision not to present Peterka's military background and that Peterka was not prejudiced by the omission of this evidence in light of the aggravating and mitigating factors that were presented during the penalty phase."). Peterka may not relitigate the same

claim for a second time after this Court affirmed. The entire successive motion is barred by the law of the case doctrine.

A very similar argument was rejected by this court in *Marek v. State*, 8 So.3d 1123 (Fla. 2009). Marek filed a successive post-conviction motion attempting to relitigate the same claim of ineffectiveness in the successive motion that he had raised in the initial post-conviction motion. The trial court summarily denied the successive motion and the Florida Supreme Court affirmed. On appeal, Marek asserted that his previously raised claim of ineffectiveness for failing to investigate mitigation should be reevaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Marek argued that these cases modified the *Strickland* standard for claims of ineffective assistance of counsel. *Marek*, 8 So.3d at 1126. The Florida Supreme Court concluded the previously raised claim of ineffectiveness should not be reevaluated because "contrary to Marek's argument, the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*." *Marek*, 8 So.3d at 1128. The Florida Supreme Court explained that *Rompilla; Wiggins* and *Williams* were applications of *Strickland* to these various cases. The Florida Supreme Court observed that the *Wiggins* Court began its analysis discussing *Strickland*. *Marek*, 8 So.3d at 1129. The Florida Supreme Court noted that there were no reported decisions from any court

"adopting the view that *Rompilla*, *Wiggins*, and *Williams* modified the standard of review governing ineffective assistance of counsel claims." The Florida Supreme Court concluded that Marek was not entitled to relitigate the claim.

Marek controls here as well and precludes relitigation. *Porter*, like *Rompilla*, *Wiggins*, and *Williams,* is an application of *Strickland* to the particular case - nothing more. And, here, as in *Marek*, there is no reported decision holding, or even hinting, that *Porter* changed the *Strickland* standard.

Basically, this court has already rejected the idea that any new Supreme Court case dealing with a claim of ineffectiveness "changes" the *Strickland* standard and entitles every defendant to relitigate their previously denied claims of ineffectiveness. Post-conviction litigation would never cease if registry counsel's view was adopted. Peterka is not entitled to relitigate the previously denied claim anymore than Marek was.[4] The *Porter* claim is barred by the law of the case doctrine.

[4] Registry counsel McDermott asserts that no claim that *Rompilla* changed the *Strickland* standard was made in *Marek*. She asserts that the claim raised in *Marek* was based on the ABA report, not *Rompilla*. This is not how this Court interpreted the claim in *Marek*. This Court interpreted the claim to be based on both the ABA report and *Rompilla* and address the claim as such. So, in the view of this Court (the only view that counts), there was a claim that *Rompilla* changed the *Strickland* standard raised in *Marek*. Binding precedent flows from the published opinions of a court, not from the briefs of the parties. Binding precedent is simply not limited in this manner. When a court address a matter, the published opinion becomes binding precedent even if the party did not intend to raise the matter addressed by the Court. *Marek* is controlling precedent.

Merits

The Sixth Amendment provides a criminal defendant the right "to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The constitutional right to counsel means the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), the United States Supreme Court found counsel was ineffective for not presenting mitigation. Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend and her boyfriend and was sentenced to death. Porter represented himself at the guilt phase but changed his mind and had counsel represent him at the penalty phase. Defense counsel was appointed a little over a month prior to the penalty phase. Defense counsel had "only one short meeting with Porter regarding the penalty phase." Defense counsel "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." Defense counsel put on only one witness, Porter's ex-wife, who testified that Porter had a good relationship with his son. Defense counsel asserted that Porter was not "mentally healthy," but he did not put on any evidence to support the assertion. While Porter was "fatalistic and uncooperative" and instructed his counsel not to speak with his ex-wife or son, Porter did not give counsel any other instructions limiting the other witnesses counsel could interview.

Porter filed a state postconviction motion asserting that his trial counsel was ineffective for failing to investigate and present

mitigating evidence of his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity. Neither the state trial court nor the Florida Supreme Court addressed the deficient performance prong of *Strickland*. Both the state trial court and the Florida Supreme
Court, however, found no prejudice.

The *Porter* Court disagreed, finding deficient performance concluding that "the decision not to investigate did not reflect reasonable professional judgment." The *Porter* court found that defense counsel "ignored pertinent avenues for investigation of which he should have been aware" such as the court-ordered competency evaluations, which reported Porter's military service; his wounds sustained in combat, and his father's "over-discipline." The Court stated that while Porter may have been fatalistic or uncooperative, "that does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 U.S. at 453 citing *Rompilla v. Beard*, 545 U.S. 374, 381-382, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

The United States Supreme Court also found prejudice because the jury did not hear about (1) Porter's heroic military service in two of the most critical - and horrific - battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling. Porter's father was abusive. On one occasion, Porter's father shot at him for

coming home late, but missed and just beat Porter instead. Porter attended classes for slow learners and left school when he was twelve or thirteen years old. As a result of his abusive father, Porter enlisted in the Army at age 17 and fought in the Korean War. Porter's company commander in Korea, Lt. Col. Pratt, testified at the postconviction hearing regarding the combat his unit had endured by the Chinese attacks. Lt. Col. Pratt testified that the unit was "ordered to hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day." Lt. Col. Pratt testified that the unit "went into position there in bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant - for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies" and that the next morning, the unit engaged in a "fierce hand-to-hand fight with the Chinese" and later that day received permission to withdraw, making Porter's regiment the last unit of the Eighth Army to withdraw. Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers "were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can imagine and they were just dropping like flies as they went along." Porter's

company lost all three of its platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations. Porter received an honorable discharge. Lt. Col. Pratt testified that these battles were "very trying, horrifying experiences," particularly Chip'yong-ni. In Lt. Col. Pratt's experience, an "awful lot of [veterans] come back nervous wrecks. Our [veterans'] hospitals today are filled with people mentally trying to survive the perils and hardships [of] ... the Korean War," particularly those who fought in the battles he described.

Porter suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night. Porter also developed a serious drinking problem. Porter was diagnosed as suffering from posttraumatic stress disorder (PTSD). The *Porter* Court noted that PTSD is not uncommon among veterans returning from combat and quoted testimony from a Congressional hearing that approximately 23 percent of the Iraq and Afghanistan war veterans had been preliminarily diagnosed with PTSD. *Porter*, at n.4.

The *Porter* Court noted the uniquely mitigating nature of military service especially in combat situations. Indeed, the Supreme Court started its opinion by stating: "Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately

left him a traumatized, changed man." The Court then explained: "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did." *Porter*, at n.8 & n.9. In the footnotes, the Court cited a movement to pardon prisoners who were Civil War veterans; a 1922 study discussing "the greater leniency that may be shown to ex-service men in court" and noted that some states have statutes specifically providing for special sentencing hearing for veterans. *Porter*, at n.8 & n.9. The *Porter* Court explained that military service has two mitigating aspects to it. The *Porter* Court explained that "the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter" and "[t]o conclude otherwise reflects a failure to engage with what Porter actually went through in Korea."

This case compared to *Porter*

Peterka asserts that his penalty phase counsel was ineffective for failing to present his one year service in the Minnesota National Guard during which he received a commendation for being a platoon leader in basic training and the class leader in advanced individual training (AIT). There was no deficient performance in this case. In *Porter*, defense counsel failed to uncover and present the defendant's combat experience that resulted in PTSD. In the *Porter* Court's words, counsel "did not even take the first step of interviewing

witnesses or requesting records." *Porter*, - U.S. at –, 130 S.Ct. at 453. Here, in contrast, defense counsel made a strategic decision not to present Peterka's National Guard service. In this Court's words, defense counsel's "tactical decision not to focus on Peterka's military service as a mitigating circumstance was not deficient performance." *Peterka*, 890 So.2d at 237. On this basis alone, *Porter* does not apply.

Nor was there any prejudice. The Eleventh Circuit has explained that "Porter's military service was critical to the holding in *Porter*." *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1249, n.16 & n.21 (11th Cir. 2010)(characterizing mitigation of military service in combat situations as "uniquely strong" and rejecting any reliance on *Porter* because Reed had no military service); see also *Boyd v. Allen*, 592 F.3d 1274, 1302 n.7 (11th Cir. 2010)(finding the case "easily distinguishable" from *Porter* because Boyd never "served in the military, much less during the most critical-and horrific-battles of the Korean War"); *Keough v. State*, 2010 WL 2612937, 32 (Tenn. Crim. App. Ct. 2010)(rejecting any reliance on *Porter* because the defendant had never "served in the military, much less in combat."). Peterka served about one year in the Minnesota National Guard prior to being discharged. Peterka was never in combat. Peterka was never even overseas. There is no evidence that Peterka ever even responded to a local emergency. While Peterka was in the National Guard, he was never in combat, much less in any horrific battles. Peterka, unlike Porter, was not wounded or decorated. And Peterka's National Guard service of one

year, unlike Porter's horrific combat service, did not leave him a "traumatized, changed man." Peterka, unlike Porter, did not struggle "to regain normality upon his return from war." Peterka, unlike Porter, did not suffer from PTSD as a result of intense and horrific combat duty. The vast majority of the *Porter* Court's reasoning, concerning mental damage from intense combat, simply does not apply to Peterka. There was no prejudice in this case.

Negative aspects to the omitted mitigation

There was a negative aspect to the military service mitigation. Peterka served about one year in the Minnesota National Guard. He was supposed to serve eight years. Peterka was not honorably discharged. Peterka was generally discharged which is very different. And Peterka was being tried in a military area with jurors who would know the difference. Indeed, the jury contained an Air Force major. Juror Page was a retired major in the Air Force who had had some involvement with court martial proceedings. (T. Vol. III 458-459). Any juror who did not know the difference between a general discharge and an honorable discharge would certainly be informed of the difference by Juror Page.

Penalty phase counsel, Mark Harllee, testified at the evidentiary hearing, normally any mitigation related to military service should be presented because the area where the trial was conducted was a military area. (EH VI 230). However, he also testified that because Peterka's discharge from the Minnesota National Guard was based on fact that he was going to be sent to prison based on his Nebraska

conviction, there was a "negative" side to the military service mitigation. (EH VI 229-230). If a defendant engaged in illegal conduct while being in the military, this type of mitigation "could actually cut against you". (EH VI 230). Penalty phase counsel testified that his decision today, as well as eleven years ago, would be not to introduce the military service mitigation. (EH VI 230).

The prosecutor noted that if penalty phase counsel had introduced military service as a mitigator, he would have attacked the weight of the mitigation by pointing out that Peterka had to be discharged from the military based on his illegal conduct while in the military and penalty phase counsel responded: "I would expect nothing less from you." (EH VI 230). During cross-examination, penalty phase counsel testified that it was a tactical decision not to present the military service mitigation. (EH VI 258). He explained that "this is a very heavy military area" with many retired military people. (EH VI 258). Jurors, with a military background, normally, are impressed with a good record in military service; however, it could have a negative impact with such jurors if a defendant committed crimes while in the military. (EH VI 258). Such conduct could be viewed as "besmirching the name of the military." (EH VI 259). Penalty phase counsel admitted that he did not think the crimes were committed while Peterka was on duty. (EH VI 259).

Postconviction counsel asked penalty phase counsel to explain the downside of presenting military service as mitigation when they had stipulated to the under sentence of imprisonment aggravator. (EH VI 259). Penalty phase counsel noted that the military service was

mentioned by one witness during the penalty phase. (EH VI 259). Penalty phase counsel decided to leave it at that, fearing that if the military service was highlighted, the prosecutor would "come back and destroy" it. (EH VI 259-260). He did not recall presenting any evidence regarding Peterka's military commendations. (EH VI 260).

Penalty phase counsel explained, that while he was not familiar with military matters, co-counsel was ex-military who knew the difference between an honorable and a dishonorable discharge. (EH VI 285-286). The judge, who was an "old military fellow" himself, noted that it was a general discharge under honorable conditions. (EH VI 286). Penalty phase counsel noted that they would have to explain the general discharge which is why they "didn't bring out more". (EH VI 286).

On re-direct, penalty phase counsel testified that being kicked out of the service early because you were committing felony crimes would have an "extremely negative impact." (EH VI 289). Penalty phase counsel noted from his experience living in this area, "disgracing the military was about the worst thing you could do."

As this Court explained in the first postconviction appeal raising this exact same claim of ineffectiveness, in this case there was a "negative" side to the military service mitigation because Peterka's illegal conduct led to his discharge from the National Guard. *Peterka*, 890 So.2d at 237. Harllee believed that because the trial was being held in "a very heavy military area," Peterka's conduct could be viewed as "besmirching the name of the military." Fearing that the prosecutor would "come back and destroy" it if Peterka's military

service was highlighted, Harllee decided not to pursue this mitigation. *Peterka*, 890 So.2d at 237.

The United States Supreme Court recently explained that any consideration of the prejudice prong must account for the negative aspect to any proposed mitigation. In *Wong v. Belmontes*, 558 U. S. -, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009), the United States Supreme Court per curiam reversed the Ninth Circuit's granting of habeas relief. The *Belmontes* Court concluded that counsel was not ineffective at penalty phase for failing to investigate and present family and expert mitigating evidence. Belmontes asserted his counsel should have presented (1) Belmontes's difficult childhood and good character, (2) expert opinion that he was likely to have a nonviolent adjustment to a prison setting, and (3) evidence of Belmontes's emotional instability and impaired planning and reasoning ability. Belmontes argued, in part, that counsel should have presented expert testimony in the penalty phase to "make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity."

The *Belmontes* Court, after reasoning that there was no need for such expert testimony, also noted that any expert's testimony would have opened the door to damaging additional aggravation evidence. Presenting this mitigation likely would have open the door to a prior murder that Belmontes committed. The Supreme Court observed that "the worst kind of bad evidence would have come in with the good" mitigation. The Court also observed that "[i]t is hard to imagine

expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder."

Here, as in *Belmontes*, the additional mitigation had a cost associated with presenting it. Here, as in *Belmontes*, bad evidence would have come in with the good mitigation. Peterka could not fulfill his obligation to serve for several more years due to his criminal conduct. There was no price tag associated with the mitigation in *Porter*.

It is *Belmontes*, not *Porter*, that governs this case and shows that this Court's estimation of the prejudice from the omitted mitigation was correct. Peterka's argument in his second motion, like his argument in the first motion, totally ignores this negative aspect of the military service as mitigation. Peterka does not even address this Court's reasoning for rejecting this claim in the first postconviction appeal.

Both prongs

Moreover, even if Peterka could show prejudice (which he cannot), he could not prevail on his claim of ineffectiveness because this Court found there was no deficient performance. *Peterka*, 890 So.2d at 236-237 (agreeing with the trial court's findings "that Assistant Public Defender Harllee, who was responsible for the presentation of the penalty phase defense at trial, made a reasoned tactical decision not to present Peterka's military background . . ."). This Court found that counsel was not deficient, concluding that "Harllee's tactical decision not to focus on Peterka's military service as a

mitigating circumstance was not deficient performance" and only in the alternative found no prejudice because "[m]ilitary service is not strong mitigation" when "weighed against the CCP, avoid arrest, and under sentence of imprisonment aggravators." *Peterka*, 890 So.2d at 237. Peterka cannot establish a violation of his right to effective counsel regardless of prejudice because there was no deficient performance. A defendant raising a claim of ineffectiveness must establish both prongs of *Strickland*. *Waterhouse v. State*, 792 So.2d 1176, 1182 (Fla. 2001)(explaining that because *Strickland* requires both prongs, it is not necessary to address prejudice when a deficient performance has not been shown). Because a petitioner's failure to show either deficient performance or prejudice is fatal to a *Strickland* claim, a court need not address both *Strickland* prongs if the petitioner fails to satisfy either of them. *Kokal v. Secretary, Dept. of Corrections*, 623 F.3d 1331, 1344 (11th Cir. 2010). Peterka must show deficient performance as well as prejudice. Given that this Court found that counsel's performance regarding the mitigation was not deficient, this entire successive motion and appeal of that motion is merely a theoretical exercise in prejudice analysis and therefore, a waste of this Court's time. The finding of no deficient performance is fatal to Peterka's *Strickland* claim regardless of prejudice.

Accordingly, the trial court's summary denial of the successive motion should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive 3.851 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Linda McDermott, McClain & McDermott, 20301 Grande Oak Blvd., Suite 118-61, Estero, FL 33928 this 5th day of December, 2011.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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