IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-428

PAUL CHRISTOPHER HILDWIN

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a second successive post-conviction proceeding. Hildwin's first 3.851 motion (subsequent to re-sentencing) was affirmed by this Court. *Hildwin v. State*, 951 So. 2d 784 (Fla. 2006). Hildwin then sought to "reactivate" the 3.851 motion on two discreet ineffectiveness claims relating to the 1996 resentencing. Over the State's objection that Hildwin had abandoned this proceeding when he appealed the Rule 3.851 motion based on the DNA evidence, the circuit court ordered a hearing on specific claims contained in the motion. The circuit court denied any remaining claims and this Court affirmed that decision in *Hildwin v. State*, 36 Fla. L. Weekly S234 (Fla. June 2, 2011). That decision summarized the factual and procedural history as follows:

> Paul Christopher Hildwin was convicted and sentenced to death in 1986 for the murder of Vronzettie Cox. This Court affirmed Hildwin's conviction and sentence of death on direct appeal. *Hildwin v. State* (*Hildwin I*), 531 So. 2d 124, 129 (Fla. 1988). Hildwin was subsequently granted a new penalty-phase trial on the basis that his trial counsel rendered ineffective assistance for failing to adequately investigate, prepare, and present mitigating evidence. *Hildwin v. Dugger* (*Hildwin II*), 654 So. 2d 107, 110–11 (Fla. 1995). After the new penalty-phase proceeding was held in 1996, Hildwin was again sentenced to death, and this Court affirmed his sentence on direct appeal. *Hildwin v. State* (*Hildwin III*), 727 So. 2d 193, 198 (Fla. 1998). Hildwin then filed a motion for postconviction relief attacking his death sentence under Florida Rule of Criminal Procedure 3.850, which was denied by the trial court after an evidentiary hearing.
>
> This appeal follows from the denial of postconviction relief alleging ineffective assistance of counsel in the second penalty-phase proceeding. [FN1] For the reasons

explained in this opinion, we affirm the trial court's denial of Hildwin's motion for postconviction relief.

> [FN1] Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction. See art. V, § (b)(1), Fla. Const.

FACTS AND PROCEDURAL HISTORY

The following facts were set forth in this Court's 1988 decision on direct appeal from the conviction and sentence:

Appellant was arrested after cashing a check purportedly written to him by one Vronzettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.

The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's

account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.

The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi for the time of the murder and was found to be a secretor.

Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.

Hildwin I, 531 So. 2d at 125–26. Hildwin was convicted of first-degree murder. During the penalty phase, Hildwin did not present any mental health expert testimony, but did present lay witness testimony that "was quite limited." *Hildwin II*, 654 So. 2d at 110 n.7. The testimony "revealed that Hildwin's mother died before he was three, that his father abandoned him on several occasions, that Hildwin had a substance abuse problem, and that Hildwin was a pleasant child and is a nice person." *Id*. Following the penalty phase, the jury unanimously recommended death. The trial court followed the jury's recommendation, finding four aggravators and no mitigation. This Court affirmed Hildwin's conviction and sentence on direct appeal. *Hildwin I*, 531 So. 2d at 129.

Hildwin then filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and a habeas petition. *See Hildwin II*, 654 So. 2d at 108. Among other things, Hildwin asserted that his counsel was ineffective for failing to investigate and present mitigating evidence. *Id*. at 109. An evidentiary hearing was held in which Hildwin put on testimony from experts and lay witnesses to show that counsel's investigation and presentation of evidence was deficient and constituted ineffective assistance of counsel. This Court

agreed, noting that Hildwin had “presented an abundance of mitigating evidence which his trial counsel could have presented at sentencing,” including two mental health experts that the trial court found “most persuasive and convincing,” as well as “substantial lay testimony.” *Id*. at 110 & n. 8. This Court vacated Hildwin's sentence of death and remanded for a new penalty-phase trial. *Id*. at 111.

The new penalty-phase trial was held in 1996. At the trial, Hildwin presented two mental health experts, Drs. Maher and Berland, who testified that Hildwin had a brain injury or impairment and was mentally ill. Lay witnesses also testified that Hildwin had a horrible childhood, which included physical and mental abuse inflicted by his father, suicide attempts, and abandonment and neglect.

After the new penalty-phase trial, the jury voted to recommend the death sentence by a vote of eight to four, and the trial court sentenced Hildwin to death. In its resentencing order, the trial court found four aggravators: (1) Hildwin was under a sentence of imprisonment at the time of the murder; (2) he had previously been convicted of prior violent felonies; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel (HAC). *Hildwin III*, 727 So. 2d at 194.

...

Hildwin filed a postconviction motion attacking the performance of his counsel in the second penalty-phase proceeding. The trial court granted an evidentiary hearing on the following two claims raised in the motion: (1) ineffective assistance of penalty-phase counsel for failing to investigate, prepare, and present mitigating evidence; and (2) ineffective assistance of penalty-phase counsel in failing to object to improper remarks made by the prosecutor in closing argument. [FN2] At the evidentiary hearing, the following witnesses testified: Dr. Richard S. Greenbaum (an expert on posttraumatic stress disorder); Dr. Robert M. Berland (one of the mental health experts who testified at resentencing); William Hallman (resentencing co-counsel); and Richard Howard (resentencing lead counsel). [FN3]

> [FN2] The following claims raised in the motion were summarily denied: (1) violations

of chapter 119, Florida Statutes, because various agencies have not furnished public records to the records repository or to defense counsel; (2) ineffective assistance of penalty-phase counsel for failing to investigate, prepare, and present evidence regarding the circumstances of the offense; (3) ineffective assistance of penalty-phase counsel for failing to request an instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), pertaining to Hildwin's ineligibility for parole; (4) the death sentence was based on consideration of two invalid aggravating circumstances and penalty-phase counsel was ineffective in failing to request a limiting instruction on the same; (5) the resentencing jury was preconditioned to recommend death because the jury heard that Hildwin had been previously found guilty, and penalty-phase counsel was ineffective for failing to request an instruction pursuant to *Hitchcock v. State*, 673 So. 2d 859 (Fla.1 996), to advise the resentencing jury on its proper role; (6) Florida's death penalty statute is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and (7) Hildwin may be incompetent at the time of execution.

[FN3] William Hallman and Richard Howard are now circuit court judges.

ANALYSIS

Hildwin raises two issues for this Court's review: (1) ineffective assistance of penalty-phase counsel for failing to investigate, prepare, and present mitigating evidence, and (2) ineffective assistance of penalty-phase counsel in failing to object to improper remarks made by the prosecutor in closing argument. [FN4]

[FN4] We reject the State's contention that Hildwin has abandoned or waived the claims at issue in this case. The delay between the filing of the postconviction motion and the evidentiary hearing was caused by the unique and unusual procedural posture of this case. While the postconviction motion at issue was

> pending in the trial court, DNA testing was conducted on two items found at the crime scene. The DNA test excluded Hildwin as the source of the DNA profile found on the items, and Hildwin moved for postconviction relief on the basis of the test results. The trial court denied relief, and this Court agreed in a four-three decision, holding that "[a]lthough the newly discovered DNA evidence is significant, this evidence is not 'of such nature that it would probably produce an acquittal on retrial.'" *Hildwin v. State* (*Hildwin IV*), 951 So. 2d 784, 789 (Fla. 2006).
>
> The DNA results are also the subject of a pending all-writs petition in this Court, which seeks to have the DNA profile compared to DNA profiles in CODIS (the FBI-maintained national DNA databank) and the Florida statewide databank for the purpose of identifying the source of the DNA. *See Hildwin v. State*, No. SC10–1082 (Fla. pet. filed June 9, 2010).

Hildwin v. State, 36 Fla. L. Weekly S234, _____ (Fla. June 2, 2011).

On November 29, 2010, Hildwin filed a second successive motion to vacate based on *Porter v. McCollum*, 558 U.S. __, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). (V1, R1-290). The State responded. (V1, R30-64). The case management conference was held January 18, 2011. (V1, R80-172). The trial judge denied the successive 3.851 motion on January 31, 2011. (V1, R67-71).

The trial judge held:

> Florida Rules of Criminal Procedure Rule 3.851(d)(1) provides: "Any motion to vacate judgment of conviction and sentence shall be filed within 1 year after the judgment and sentence become final." *Id*. Subsection (d)(2)(b) provides that no motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subsection (d)(1) unless one of either three exceptions is met. Relevant to the

Defendant's pending motion is the second exception which provides: "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." *Fl. R. Crim. P.* 3.851(d)(2)(B).

The Florida Supreme Court held that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance..." *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980).

In the instant motion, Defendant alleges that the United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009), represents "a fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence, and as such Porter constitutes a change in law which renders the Defendant's claim cognizable in these postconviction proceedings." (Defendant's Motion page 2.)

In arguing that *Porter* represents a "fundamental repudiation of the Florida Supreme Court's *Strickland* jurisprudence" the Defendant analogizes *Porter* and its relationship to *Strickland v. Washington*, 466 U.S. 668 (1984) to that of *Hitchcock v. Dugger*, 481 U.S. 393 (1987) and its relationship to *Lockett v. Ohio*, 438 U.S. 586 (1978).

In *Lockett v. Ohio*, the U.S. Supreme Court held that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett v. Ohio*, 481 U.S. at 604.

Prior to the U.S. Supreme Court's opinion in *Hitchcock*, the Florida Supreme Court interpreted Lockett to mean that a defendant merely have the opportunity to present mitigation evidence during the sentencing phase of a capital murder case. However, in *Hitchcock*, the United States Supreme Court stated that the Florida Supreme Court had misunderstood what Lockett required. The *Hitchcock* Court held that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not

the particular mitigating circumstance had been statutorily identified. *See id*. at 1070.

As noted in the Defendant's Motion, following *Hitchcock*, the Florida Supreme Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress...*Lockett* claim[s] on [their] merits." *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987) *citing Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987).

Defendant argues that just as *Hitchcock* rejected the Florida Supreme Court's analysis in *Lockett*, *Porter* has rejected the Florida Supreme Court's analysis and application of *Strickland*.

Nowhere within the *Porter* decision, however, did the U.S. Supreme Court indicate or imply that Porter represents "a repudiation of Strickland jurisprudence" that constitutes a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that Defendant's counsel during the sentencing phase was not ineffective for failing to introduce certain mitigating factors that could have altered the sentencing verdict against the Defendant. An objective reading of *Porter* indicates that its holding stems from and is confined to the specific facts of the *Porter* case itself.

Moreover, the Defendant has not cited any cases where either the United States Supreme Court or the Florida Supreme Court has indicated that *Porter* establishes a new fundamental right that is to be applied retroactively. In fact, the Florida Supreme Court has addressed a number of ineffective assistance of counsel claims since *Porter*, using the same *Strickland* framework that the United States Supreme Court used in *Porter*. *See Everett v. State*, 2010 WL 4007643 (Fla. Oct. 14, 2010); *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010); *Stewart v. State*, 37 So. 3d 243, 247 (Fla. 2010).

Claims raised in prior postconviction proceedings cannot be re-litigated in a successive postconviction motion unless the defendant can demonstrate that the grounds for relief were not known and could not have been known at the time of earlier proceeding. *See Wright v. State*, 857 So. 2d 801, 868 (Fla. 2003).

> Defendant argues that in light of *Porter*, it is necessary to conduct a new prejudice analysis on both the guilt phase ineffective assistance of counsel claim and the *Brady*[1] claim in this case.
>
> Since *Porter* does not establish a new fundamental right that is to be applied retroactively, the Defendant's claim is barred as untimely. Further, since the substance of the Defendant's pending motion was raised in Defendant's 1995 Post Conviction Motion that was denied by this Court and affirmed by the Florida Supreme Court, Defendant's pending Motion is denied as inappropriately successive as a matter of law.

(V1, R68-70).

SUMMARY OF ARGUMENT

Hildwin's successive Rule 3.851 motion is time-barred and does not come within any exception to Rule 3.851(d)(2). The motion was an attempt to relitigate his previously-denied (in 1995) guilt phase ineffectiveness of counsel claim and/or *Brady* claim under the theory that *Porter v. McCollum*, 130 S. Ct. 447 (2009) is a retroactively-applicable "change in law." Despite Hildwin's insistence to the contrary, *Porter* is no more than the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), to the particular facts of that case. The Supreme Court did not hold that the *Porter* decision established a new fundamental constitutional right that is to apply retroactively.

The trial court held Hildwin's motion untimely, successive, procedurally barred, facially insufficient, and unauthorized under

Rule 3.851(d)(1),3.851 (d)(2), and 3.851 (e)(2), of the *Florida Rules of Criminal Procedure*. These rulings should be affirmed. Finally, collateral counsel is not authorized to file the this successive motion, anyway. *See*, § 27.702(1) and § 27.711(1)(c), *Fla. Stat.*

STANDARDS OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for post-conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009), *citing State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); *Fla. R.Crim. P.* 3.851(f)(5)(B).

In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Here, as in *Rose v. State*, 985 So. 2d 500 (Fla. 2008), the trial court entered a

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

comprehensive written order disclosing the basis for the summary denial of Hildwin's successive motion to vacate and providing for meaningful appellate review. *Id., citing Nixon*, 932 So. 2d at 1018.

ARGUMENT

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

Hildwin raises several issues in this appeal, and asserts an entitlement to relitigate his guilt phase ineffective assistance of counsel claims and/or *Brady* claim on the ground that *Porter v. McCollum,* 558 U.S. ---, 130 S.Ct. 447 (2009) allegedly changed the *Strickland* prejudice analysis and should be retroactively applied. The only questions properly before this Court are: 1) Did *Porter* change the law 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)? Because the answer to both questions is no, further review of the issues presented is not warranted.

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. *Porter* does not constitute a change in law cognizable in a collateral proceeding under the standards of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). This Court's previous affirmance of the denial of Hildwin's ineffectiveness claims was not premised upon any

misreading or misapplication of *Strickland v. Washington*, 466 U. S. 668 (1984).

The trial judge properly denied the successive motion as follows:

> Since *Porter* does not establish a new fundamental right that is to be applied retroactively, the Defendant's claim is barred as untimely. Further, since the substance of the Defendant's pending motion was raised in Defendant's 1995 Post Conviction Motion that was denied by this Court and affirmed by the Florida Supreme Court, Defendant's pending Motion is denied as inappropriately successive as a matter of law.

(V1, R70).

The trial judge also found:

> - *Porter* is the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) to the particular facts of that case;
>
> -Unlike *Porter,* the undersigned judge and the Supreme Court of Florida specifically found that trial defense counsel's performance was not deficient;
>
> - Both the lower court and this Court also conducted a full analysis of the prejudice prong under *Strickland,*

(V1, R69-70). The trial court's order summarily denying Hildwin's successive motion to vacate should be affirmed.

> **Hildwin's successive Rule 3.851 motion to vacate is time-barred and does not meet any exception under Rule 3.851(d)(2)(B).**

Florida Rule of Criminal Procedure 3.851(d)(2)(B) requires any motion to vacate judgment of conviction and death sentence to be filed within one year after the judgment and sentence become final, unless the motion alleges that a fundamental constitutional right

was established after that period and "has been held to apply retroactively." *Fla. R. Crim. P*. 3.851(d)(2)(B).[2] Hildwin's successive Rule 3.851 motion failed to satisfy both of the prongs required for this exception.

The guilt stage of Hildwin's trial became final in 1989. *Hildwin v. Florida*, 490 U.S. 638 (1989). Hildwin's sentence became final in 1999, when the United States Supreme Court denied certiorari. *See, Hildwin v. Florida*, 528 U.S. 856, 120 S.Ct. 139, 145 L.Ed.2d 119 (1999); *Fla. R. Crim. P*. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Hildwin's 2010 successive Rule 3.851 motion, which challenges the guilt stage, is untimely by more than 20 years.[3]

Although there is an exception to the time limitation in 3.851(d)(2)(B), which would restart the clock for a new fundamental

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[2] The use of the past tense in a rule conveys the meaning that an action has already occurred. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). Thus, Hildwin could not plausibly invoke the exception in *Fla. R. Crim. P.* 3.851(d)(2)(B). Instead, Hildwin had to show that a new fundamental constitutional right was established and has been held retroactive for the exception to apply. *See Tyler v. Cain*, 533 U.S. 656 (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).

[3] As to any penalty phase issues, that judgment became final in 1999. *Hildwin v. Florida*, 528 U.S. 856 (1999). Hildwin also asserts a claim of newly discovered evidence (*Initial Brief* at 71-75) based on *Porter*. This Court has rejected *Porter* as the basis for a newly discovered evidence claim. *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010).

constitutional right that has been held to apply retroactively, *Porter* is not a new right of any sort -- it is not "new" at all.

Porter is not a retroactive change in law.

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. Since *Porter* was decided, both this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of ineffective assistance of counsel.[4] *See, Harrington v. Richter*, 131 S.Ct. 770 (2011); *Premo v. Moore*, 131 S.Ct. 733 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011); *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); *Renico v. Lett*, 130 S.Ct. 1855 (2010); *Sears v. Upton*, 130 S.Ct. 3259 (2010).

Porter is no more than the application of *Strickland* to the facts of *Porter*'s case -- it does not provide any cognizable basis to relitigate Hildwin's guilt phase ineffectiveness claim. *Porter* changed nothing about the *Strickland* ineffective assistance of

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

counsel analysis. Moreover, this Court has not been misapplying *Strickland*'s standard of review –- the standard of review contained in *Stephens* is expressly compelled by *Strickland*. And, even if Hildwin could somehow demonstrate that *Porter* represents both a "change in law" and that it satisfies the requirements for retroactivity under *Witt,* Hildwin's attempt to relitigate the prejudice prong is immaterial because this Court previously denied Hildwin's guilt phase ineffectiveness claim on the deficiency prong of *Strickland*.

Applying Rule 3.851(d) to the two-part *Strickland* analysis, Hildwin would have to show that *Porter* established a new fundamental constitutional right on *both* prongs of *Strickland* **and** that this new right has been held to apply retroactively. In *Witt*, 387 So. 2d at 929-30, this Court set out the process for determining whether a decision has retroactive application. Under that standard, a defendant can only obtain retroactive application of a new rule if he shows that either the United States Supreme Court or this Court has made a significant change in constitutional law which so drastically alters the underpinnings of a defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30.

(11th Cir. 2010).

There are three factors under *Witt*: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. *See Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001) (applying retroactively *Carter v. State*, 706 So. 2d 873 (Fla. 1997) where this Court held that a judicial determination of competency is required in certain capital post-conviction cases); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), wherein this Court announced a revised standard of review for ineffectiveness claims); *Chandler v. Crosby*, 916 So.2d 728, 729-730 (Fla. 2005) (concluding that all three factors in the *Witt* analysis weighed against the retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and emphasizing that the new rule did not present a more compelling objective that outweighs the importance of finality) *Id*. at 729-730, *citing State v. Glenn*, 558 So. 2d 4, 7 (Fla. 1990).

Even if *Porter* could be considered a change in the law, it would still not be retroactive under *Witt.* While Hildwin recites the *Witt* factors, he makes no attempt to explain how the alleged "change in law" in *Porter* satisfies any of these factors.[5] The bare

[5] It appears that the purpose of "new" law, as construed by Hildwin, would be to never give the findings of the trial court any deference, but only to have the appellate court "engage with the evidence" in the first instance. As for reliance on the "old" law,

assertion that a "new" case has been decided is not enough. *Witt* is a rule of non-retroactivity (*i.e.* cases are not presumed to apply retroactively), and a litigant seeking retroactive application of a decision bears the burden of demonstrating how the *Witt* factors are satisfied. Because Hildwin has failed to carry his burden, the request for retroactive application of *Porter* should be denied.

Moreover, Hildwin ignores the fact that this Court found that *Stephens* **did not satisfy *Witt* and was not retroactive.** *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). Specifically, in *Johnston*, this Court applied the principles of *Witt* and concluded that *Stephens* was not a change in the law that should have retroactive application. As *Johnston* explained, "this Court in *Stephens* sought to clarify any confusion resulting from the use of different language in various opinions analyzing ineffective assistance of counsel claims. In so doing, this Court reaffirmed its prior decision in *Rose v. State*, 675 So. 2d 567 (Fla. 1996), wherein this Court stated that an ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland." Id* at 267.

Hildwin evidently contends that this Court has been misapplying *Strickland* for decades by giving deference to the trial court's findings of fact. Both of these apparent suggestions by the defense are patently incorrect. As noted, *infra*, by independently reviewing mixed questions of law and fact, the appellate court is engaging with the evidence. Giving deference to the trial court's findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Finally, the effect on the

Since Hildwin is asserting that the same law has changed here, that alleged "change" is no more retroactive than the "change" in *Stephens* was. The courts of this State have extensively relied upon the *Stephens* standard of review. The effect of a "change" in the law on the administration of justice would be overwhelming. If *Porter* is held retroactive, defendants will file untimely and successive motions for post-conviction relief seeking to relitigate claims of ineffective assistance. The courts of this State would be required to review stale records to reconsider these claims. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987) retroactively). As such, *Porter* would not satisfy *Witt* even if it had changed the law. Thus, the motion is untimely and should be denied as such.

Instead of actually presenting a *Witt* analysis of the alleged change in *Porter*, Hildwin makes the *ipse dixit* argument that *Porter* should be retroactive because *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was held to be retroactive. (Initial Brief at 8-9, 55 n.42). In making this comparison, Hildwin ignores the difference between the change in law *Hitchcock* made and the alleged change here. In *Hitchcock*, the Court invalidated a jury instruction finding that it unconstitutionally precluded consideration of mitigation. *Id.* at 398-99. A determination of whether *Hitchcock* error had occurred was easily made by simply reviewing the jury

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administration of justice would be overwhelming.

instructions and was limited to only those cases in which a defendant had been sentenced to death. In contrast, the change in law that Hildwin asserts occurred here involves reviewing fact-specific claims of ineffective assistance of counsel to determine if an error even occurred and doing so in all criminal cases. Given this difference in the application of the *Witt* factors, the mere fact that *Hitchcock* was found to be retroactive does not mean that *Porter* is also retroactive. Hildwin's reliance on *Hitchcock* to support his retroactivity argument is misplaced. It is an attempt to put a square peg in a round hole.

The trial court rejected Hildwin's arguments under *Witt*, stating:

> Nowhere within the *Porter* decision, however, did the U.S. Supreme Court indicate or imply that *Porter* represents "a repudiation of Strickland jurisprudence" that constitutes a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that Defendant's counsel during the sentencing phase was not ineffective for failing to introduce certain mitigating factors that could have altered the sentencing verdict against the Defendant. An objective reading of Porter indicates that its holding stems from and is confined to the specific facts of the *Porter* case itself.
>
> Moreover, the Defendant has not cited any cases where either the United States Supreme Court or the Florida Supreme Court has indicated that Porter establishes a new fundamental right that is to be applied retroactively. In fact, the Florida Supreme Court has addressed a number of ineffective assistance of counsel claims since Porter, using the same *Strickland* framework that the United-States Supreme Court used in *Porter*. *See Everett v. State*, 2010 WL 4007643 (Fla. Oct. 14, 2010); *Schoenwetter v. State*, 46 So.3d 535 (Fla. 2010); *Stewart v. State*, 37

So. 3d 243, 247 (Fla. 2010).

(V1, R69). The trial court is correct.

Nowhere in *Porter* did the United States Supreme Court ever indicate or imply that *Porter* represents a significant change in law to be applied retroactively. Hildwin has failed to meet any of the prongs of the retroactivity test. Neither the United States Supreme Court nor this Court deemed *Porter* a change of law. It is not new law and there is no miscarriage of justice. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland* at 2069. *Porter* is very fact-specific and the Supreme Court certainly did not find every decision of this Court regarding ineffective assistance of counsel to be unreasonable.

As a practical matter, there will always be some "newer" United States Supreme Court case addressing claims of ineffective assistance of counsel. Indeed, in 2009, the same year that *Porter* was decided, the United States Supreme Court also issued a series of other decisions addressing *Strickland* claims -- *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009), *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) and *Wong v. Belmontes*, 558 U.S. ––––, 130 S.Ct. 383 (2009). However, a criminal defendant may not relitigate previously-denied *Strickland* claims simply because there are more recent decisions addressing claims of ineffective assistance of counsel.

In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected a similar attempt to relitigate a death-sentenced inmate's IAC claim under the guise of recently decided case law. That defendant argued that his previously-raised claim that trial counsel failed to conduct an adequate investigation of Marek's background for penalty phase mitigation should be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). Marek argued that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This Court decisively rejected Marek's attempt to relitigate his previously-denied *Strickland* claims. *See Marek*, 8 So. 3d at 1128 (concluding that "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*"). Here, as in *Marek*, the existence of a "newer" case applying *Strickland* does not equate with a change in the law which is retroactive.

Porter did not change the standard of review and this Court has not been misapplying *Strickland*'s standard of review. Hildwin's claim is legally insufficient and without merit.

Porter is limited to the facts in that case.

In *Porter v. McCollum*, the state courts did not decide whether *Porter*'s counsel was deficient under *Strickland*. As a result, the United States Supreme Court assessed the first prong of *Porter*'s penalty phase ineffectiveness claim *de novo*. *Porter*, 130 S.Ct. at 452. The United States Supreme Court found that trial counsel failed to uncover and present any evidence of *Porter*'s mental health or mental impairment, his family background, or his military service; and, "although Porter may have been fatalistic or uncooperative," that did not "obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 S.Ct. at 453. The United States Supreme Court determined that trial counsel was deficient under the first prong of *Strickland* and emphasized that if *Porter*'s counsel had been effective, the judge and jury would have learned of "(1) Porter's heroic military service in two of the most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Porter*, 130 S.Ct. at 454.

In addressing this Court's resolution of the prejudice prong of *Strickland*, the United States Supreme Court reiterated that the test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at

694, 104 S.Ct. at 2068. And, "[t]o assess that probability, [the Court] consider[s] the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - and reweigh[s] it against the evidence in aggravation." *Porter*, 130 S.Ct. 447, 453-54 (quotation marks and brackets omitted). The United States Supreme Court ruled that this Court's decision that *Porter* was not prejudiced by his counsel's failure to conduct a thorough (or even cursory) investigation was unreasonable because it "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 130 S.Ct. at 454-455. For example, the mental health evidence, which included Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects, was not considered in this Court's discussion of nonstatutory mitigation. *Porter*, 130 S.Ct. at 455, n. 7. In addition, the United States Supreme Court found that this Court unreasonably discounted evidence of *Porter*'s childhood abuse and combat military service.[6]

The fundamental constitutional right at issue in *Porter* was

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

the Sixth Amendment right to effective assistance of counsel, a constitutional right that had been established decades before in *Strickland* v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). *Porter* is no more than the application of the *Strickland* standard to a particular case.

Hildwin's claim is procedurally barred.

Hildwin's guilt phase ineffectiveness claim is time barred, and no exception to the time bar exists. Hildwin does no more than reargue facts adduced in the prior postconviction proceedings -- those issues were decided by this Court in 1995 and are procedurally barred. *Hildwin v. Dugger*, 654, So. 2d 107 (Fla. 1995). Hildwin previously raised the same claim of ineffective assistance of counsel that he seeks to relitigate here, **and this Court decided that claim**. As this Court has held, attempts to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Hildwin cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well-established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Hildwin is attempting to do here, his guilt phase

ineffectiveness claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

The appellate review process.

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

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

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

In this Court's decision in *Porter*, 788 So. 2d at 923, this Court cited *Stephens v. State,* 748 So. 2d 1028, n.2 (Fla. 1999) and stated that while the factual findings of the lower court should be

given deference, the appellate court independently reviews mixed question of law and fact. The *Stephens* standard of review is expressly compelled by *Strickland*. This Court has not been misapplying *Strickland*'s standard of review. Giving deference to the lower court findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Since the standard utilized by this Court in *Porter* is the same standard the United States Supreme Court enunciated in *Strickland*, there is no change in law. Because there has been no change in law, Hildwin failed to meet any exception under Fla. R. Crim. P. 3.851(d)(2)(B).

Hildwin, nevertheless, suggests that because *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (Initial Brief at 59). *Sochor* cited to *Porter* as a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence. *Sochor*, 883 So. 2d at 783, citing *Porter*. Again, this finding is in accordance with the mixed standard of review applied in *Strickland*.

In addition, this Court has refused to allow relitigation of previously denied *Strickland* claims under the guise of more recent case law. *See, Marek*, 8 So. 3d at 1128. In other words, this Court has previously determined that the alleged "changes in law"

suggested by Hildwin do not satisfy *Witt.*

As previously noted, the appellate review standard approved in *Stephens* (for claims of ineffective assistance of counsel) was held to not be retroactive under *Witt* in *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). The courts of this State have extensively relied upon the *Stephens* standard of review and continue to do so today. *See Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011) (stating, "[b]ecause ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004) (*citing Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999))." Thus, if *Porter*, as construed by Hildwin, is deemed a retroactive "change" in the law, the effect on the administration of justice would be overwhelming.

Hildwin's reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) also is misplaced. (Initial Brief 70, 74). In *Sears*, the Georgia post-conviction court found trial counsel's performance deficient under *Strickland*, but then stated that it was unable to assess whether counsel's inadequate investigation might have prejudiced Sears. *Id.* at 3261. In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel

or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings about the evidence presented. *Id*. at 3261. *Sears* does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

HILDWIN IS NOT ENTITLED TO RELIEF.

Even if *Porter* arguably changed the law and the alleged change was retroactive and the claim was not procedurally barred, Hildwin still would not be entitled to any relief. As this Court recognized in *Witt*, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. *Witt,* 387 So. 2d at 930-31. As the United States Supreme Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at 697.

Hildwin's guilt phase ineffectiveness claim was denied as meritless. *Hildwin v. Dugger*, 654 So. 2d at 109. Here, Hildwin generally argues that the circuit court's and this Court's analysis in the prior postconviction proceeding was flawed. Hildwin re-argues the evidence presented in the first postconviction motion (Initial Brief at 62-69) and (again) concludes that counsel was deficient.

However, Hildwin fails to explain how the *Porter* prejudice analysis applies to claims where this Court held **the issues had no**

merit (which disposed of the prejudice prong and counsel was not deficient. Further, Hildwin fails to explain how, since counsel was not **deficient**, any "misapplication" of the *Strickland* **prejudice** standard would impact his case. *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011) ("To successfully prove a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied."). In *Porter*, there was no finding by the state courts on the deficiency prong and the Supreme Court analyzed the deficiency prong *de novo.* Here, as outlined above, the state courts found no deficient performance of Hildwin's counsel after a thorough analysis of the facts and law. Hildwin cannot meet the deficiency prong of *Strickland*; thus, there is no ineffectiveness and this appeal is patently frivolous.

Under the law of the case doctrine, Hildwin cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). In addition, finding no deficiency is in accordance with United States Supreme Court precedent. *See Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) (finding that, as in *Strickland*, defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."). As a result, Hildwin's claim would be meritless even if *Porter* somehow changed the law and applied retroactively. Simply put, *Porter* is clearly

distinguishable from Hildwin because the State courts addressed trial counsel's performance and found that counsel was not deficient.

The Re-argued DNA Claim

On pages 71-75 of his brief, Hildwin presents what is effectively a much-delayed motion for rehearing of this Court's 2006 decision denying relief on Hildwin's DNA claim. *Hildwin v. State*, 951 So. 2d 784 (Fla. 2006). In the 3.851 motion, this claim consisted of three sentences, a presentation that is woefully insufficient to plead a claim for relief. (V1, R25, 27). *Wyatt v. State/Buss*, 2011 WL 2652195, *3 n.11 (Fla. July 8, 2011). That fact alone is sufficient to affirm the denial of relief.

In any event, this claim is untimely, time-barred, and unpreserved for the same reasons that the other "*Porter* claims" are not available as a basis for relief.

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

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

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

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

§27.711(1)(c), *Fla. Stat*. Accordingly, CCRC-S was not authorized to file this patently frivolous, repetitive and successive motion.

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

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the

circuit court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Martin J. McClain**, McClain & McDermott, 141 NE 30th Street, Wilton Manors, FL 33334 this ____ day of July, 2011.

Senior Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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