IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-472

HARRY FRANKLIN PHILLIPS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On January 6, 1983, Defendant was charged by indictment, in case no. 83-435, with the First Degree Murder of Bjorn Thomas Svenson, with a firearm, which was alleged to have occurred on August 31, 1982. (DAR. 1)[1] After a trial, Defendant was convicted as charged and sentenced to death based on a 7-5 jury recommendation of death. (DAR. 277, 1068-69, 329-42)

Defendant appealed his conviction and sentence to this Court, which affirmed. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). In affirming Defendant's conviction and sentence, this Court outlined the facts of the case as follows:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.

[1] The symbol "DAR." refers to the record from the direct appeal in case no. 64883. The symbol "PCR1." refers to the record from the first motion for post conviction relief appeal, case no. 75598. The symbols "RSR." and "RST." refer to the resentencing record and transcripts, respectively, in appeal case no. 83731. The symbols "PCR2." and "PCR2-SR." refer to the record and supplemental record from appeal from the denial of the second motion for post conviction relief, respectively, case nos. SC00-2248. The symbols "PCR3." and "PCR3-SR." will refer to the record and supplemental in the appeal from the dismissal of the third motion for post conviction relief. The symbol "PCR4." will refer to the record from the denial of the fourth motion for post conviction relief. The symbol "PCR5." will refer to the record on appeal from the denial of the third motion for post conviction relief.

> As parole supervisor, the victim had responsibility over several probation officers in charge of [Defendant's] parole. The record indicates that for approximately two years prior to the murder, the victim and [Defendant] had repeated encounters regarding [Defendant's] unauthorized contact with a probation officer. On each occasion, the victim advised [Defendant] to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, [Defendant's] parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against [Defendant]. Neither was injured in the incident, for which [Defendant] was subsequently charged.
>
> Following the victim's murder, [Defendant] was incarcerated for parole violations. Testimony of several inmates indicated that [Defendant] told them he had killed a parole officer. [Defendant] was thereafter indicted for first-degree murder.
>
> * * * *
>
> The trial court found four statutory aggravating circumstances applicable in sentencing [Defendant] to death: the murder was committed while [Defendant] was under a sentence of imprisonment, [Defendant] was previously convicted of another felony involving the use of violence, the murder was especially heinous, atrocious or cruel, and was committed in a cold, calculated and premeditated manner.

Id. at 195-96.

On November 4, 1987, while under a death warrant, Defendant filed a petition for writ of habeas corpus in this Court, which was denied. *Phillips v. Dugger*, 515 So. 2d 227 (Fla. 1987).

Defendant also filed his initial motion for post conviction relief and an amendment to that motion in November 1987. (PCR1. 89-158) The trial court denied post conviction relief, after an evidentiary hearing. (PCR1. 882, 8691-8702)

Defendant appealed the denial of his first motion for post conviction relief. On September 24, 1992, this Court affirmed the denial of the post conviction motion with regard to the guilt phase issues but reversed it regarding the penalty phase, finding counsel had been ineffective in failing to investigate and present mitigation. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992).

On April 4, 1994, the resentencing proceedings began before a new jury. After considering the evidence presented, the jury recommended that Defendant be sentenced to death by a vote of 7 to 5. (RST. 811-12) The trial court followed this recommendation and sentenced Defendant to death. (RST. 826-45) In doing so, the trial court found four aggravating factors: (1) under sentence of imprisonment; (2) two prior violent felony convictions; (3) disruption or hindrance of the lawful exercise of any government function; and, (4) murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (RSR. 174-89) It did not find any statutory mitigating factors. (RSR. 182-88) It found as

nonstatutory mitigation Petitioner's low IQ, his poor family background and his abusive childhood, including his lack of proper guidance from his father, and gave them little weight. (RSR. 185-87)

Defendant appealed his sentence to this Court, which affirmed. *Phillips v. State*, 705 So. 2d 1320, 1321-22 (Fla. 1997). Defendant sought certiorari review in the United States Supreme Court, which was denied on October 5, 1998. *Phillips v. Florida*, 525 U.S. 880 (1998).

Despite the fact that the State had sent public records to the repository in full compliance with Fla. R. Crim. P. 3.852, Defendant filed a shell motion for post conviction relief on September 13, 1999, claiming that he needed to do so because of a lack of public records. (PCR2-SR. 265-309) After finding that Defendant was intentionally delaying the proceedings, the lower court ordered Defendant to file an amended motion for post conviction relief by December 2, 1999. (PCR2. 317-20, 322-25)

Based on the trial court's findings regarding delay, Defendant moved to recuse the judge. (PCR2-SR. 10-18) The lower court denied the motion. (PCR2-SR. 27-28) Defendant sought a writ of prohibition from this Court, based upon the denial of this motion, which was denied. *Phillips v. State*, 751 So. 2d 1253 (Fla. 2000).

On December 2, 1999, Defendant filed his amended motion for post conviction relief, raising 24 claims, including a claim that counsel was ineffective for failing to investigate and present mitigation properly and that his rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), were violated by the selection of mental health experts. (PCR2. 29-141) On August 28, 2000, the trial court summarily denied the second motion for post conviction relief. (PCR2. 142-44) Regarding the claims about the presentation of mitigation, the trial court found that these claims were insufficiently plead and refuted by the record. (PCR2. 142)

Defendant appealed the denial of the second motion for post conviction relief to this Court, raising 11 issues, including that the trial court had erred in summarily denying the claims regarding the investigation and presentation of mitigation. He also filed a petition for writ of habeas corpus in this Court. On October 14, 2004, this Court issued its opinion, affirming the denial of post conviction relief and denying state habeas relief. *Phillips v. State*, 894 So. 2d 28 (Fla. 2004). Regarding the claims related to the investigation and presentation of mitigation, this Court held:

> [Defendant] next contends that the trial court erred in summarily denying other claims, including a claim under *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), and two ineffective

assistance of counsel claims concerning resentencing counsel's failure: (1) to present definitive evidence of his organic brain damage and mental retardation; and (2) to argue the application of section 921.137, Florida Statutes (2001). A defendant is entitled to an evidentiary hearing on his motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the defendant is not entitled to any relief, or (2) the motion or a particular claim is facially invalid. *See Cook v. State*, 792 So. 2d 1197, 1201-1202 (Fla. 2001); *Maharaj*, 684 So. 2d at 728. In determining whether or not an evidentiary hearing on a claim is warranted, we must accept the defendant's factual allegations to the extent the record does not refute them. *See Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001); *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). The defendant must establish a prima facie case based upon a legally valid claim, and mere conclusory allegations are insufficient to meet this burden. *See Freeman v. State*, 761 So. 2d 1055 (Fla. 2000); *Kennedy v. State*, 547 So. 2d 912, 913 (Fla. 1989).

1. Presenting Evidence of Mental Retardation

[Defendant] asserts that the trial court erred by failing to conduct an evidentiary hearing on his counsel's failure to investigate and present further testing as to his possible mental retardation and organic brain damage at the time of his resentencing. Specifically, he contends that resentencing counsel never had him examined by a competent mental health expert for a definitive diagnosis of mental retardation and organic brain damage. Postconviction counsel argued at the *Huff* hearing and appellate counsel asserted at oral argument that a mental retardation specialist and a neurologist were prepared to testify at an evidentiary hearing about [Defendant's] mental retardation and organic brain damage.

We disagree that counsel's performance was deficient. The record in this case is replete with mitigation testimony from both of [Defendant's] mental health experts, each of whom comprehensively evaluated [Defendant] and provided significant testimony

concerning [Defendant's] possible mental retardation and organic brain damage, such that the record conclusively establishes that counsel was not ineffective in investigating and presenting evidence on this issue.

Both Dr. Joyce Carbonell and Dr. Jethro Toomer testified at [Defendant's] initial evidentiary hearing in 1988, before we remanded for new sentencing proceedings. *See Phillips*, 608 So. 2d at 778. Dr. Carbonell interviewed [Defendant] for 4 1/2 hours and reviewed his prison records, personnel records, parole records, school records, jail records, his attorney's file, testimony and depositions, police reports, and affidavits from his family, friends and a school teacher. She even spoke personally to one of [Defendant's] teachers. Dr. Carbonell administered a battery of tests, including the Wechsler Adult Intelligence Scale Revised (WAIS-R), the Wide Range Achievement test, Level 2 Revised (WRAT-R-2), the Peabody Individual Achievement Test (PIAT), the Rorschach test, the Wechsler Memory Scale, the Canter Background Interference procedure for the Bender Gestalt, and the Minnesota Multiphasic Personality Inventory (MMPI).

Although Dr. Carbonell did not testify personally at [Defendant's] resentencing-her testimony from the 1988 hearing was read into evidence-it was apparently not due to any lack of diligence on the part of defense counsel. Prior to resentencing, defense counsel asked the trial court to appoint Drs. Toomer and Carbonell as his experts. Defense counsel subsequently indicated that he was having trouble with Dr. Carbonell because she was ill, and was unable to schedule another evaluation by Dr. Carbonell until the middle of trial. The State objected to the lateness of this reevaluation, and the trial court refused to grant a continuance to have Dr. Carbonell reexamine [Defendant]. On the day resentencing commenced, defense counsel again moved for a continuance because Dr. Carbonell was unavailable. However, the parties agreed to have Dr. Carbonell testify at a time certain, alleviating the need for a continuance. The next day, defense counsel indicated that he would be either introducing Dr. Carbonell's testimony

telephonically or having her prior testimony read because her testimony had not changed. Counsel later indicated that [Defendant] had agreed to use Dr. Carbonell's prior testimony instead of her telephonic testimony. The trial court asked [Defendant] about this agreement, and [Defendant] confirmed it.

Dr. Jethro Toomer did testify at the resentencing. He testified that he evaluated [Defendant] in 1988 and again in 1994. Dr. Toomer met with Defendant for 3 to 3 1/2 hours in 1988 and for an hour in 1994. During his interview, Dr. Toomer gave [Defendant] the revised Beta IQ test, the Carlson Psychological Survey, the Rorschach test, the Bender Gestalt Design test and the verbal reasoning portion of the WAIS. In preparing to testify, Dr. Toomer also reviewed affidavits from [Defendant's] family, friends, teachers and coworkers, his school records, DOC records, personnel file, documents used during his interviews with [Defendant], [Defendant's] trial attorney's file and the transcript of his prior testimony and of the original trial. Dr. Toomer reviewed the affidavits and records to corroborate the history [Defendant] had provided.

The comprehensive mental mitigation investigation performed in this case is a far cry from those cases where we have found error in a trial court's failure to hold an evidentiary hearing to determine whether counsel failed to properly investigate and present evidence in mitigation. *See Ragsdale v. State*, 720 So. 2d 203, 208 (Fla. 1998) (holding trial court erred in summarily denying defendant's ineffective assistance of counsel claim where "defense counsel never had him examined by a competent mental health expert for purposes of presenting mitigation" and defendant claimed that, among other things, he suffered from organic brain damage and was mentally retarded); *see also Arbelaez v. State*, 775 So. 2d 909, 913 (Fla. 2000) (finding that trial court erred in failing to hold evidentiary hearing regarding defendant's ineffective assistance of counsel claim where defendant alleged that "no expert was appointed to evaluate him for the purposes of presenting mitigation"); *O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1984) (holding that trial court erred in

summarily denying defendant's ineffective assistance of counsel claim where defense counsel never conducted psychiatric examination of defendant and called no mitigation witnesses at the sentencing hearing despite mental health professional's affidavit asserting defendant exhibited evidence of brain damage and mental illness).

Moreover, we find no error in a trial court's failure to hold an evidentiary hearing on a defendant's claim that defense counsel was ineffective for failing to present evidence in mitigation where the record shows similar mitigation evidence was presented through other witnesses. *See Atwater*, 788 So. 2d at 232-34; *see also Arbelaez*, 775 So. 2d at 913 (finding no error in trial court's failure to hold an evidentiary hearing on defendant's claim that defense counsel was ineffective for failing to present adequate evidence or expert testimony as to defendant's epilepsy where the record showed that counsel presented evidence of defendant's epilepsy through defendant's own testimony and the testimony of two of his friends).

In this case, the record is clear that each expert not only testified extensively about the battery of tests administered to [Defendant], they each also testified that [Defendant] was borderline mentally retarded and probably brain-damaged. Dr. Toomer testified that [Defendant] "is in the borderline range of mental functioning." He also testified that [Defendant's] results on the Bender Gestalt Design test "suggested some motor perception problems, and there [were] discrepancies that reflected or suggested that there was some organicity or brain damage." Later Toomer stated that the design [Defendant] drew "indicated or suggested" to him that [Defendant] had organicity or brain damage. On cross-examination, Toomer testified that he found some evidence of "mild organicity." Dr. Carbonell testified that [Defendant] had a verbal IQ of 75 and a performance IQ of 77, numerically putting him in the "borderline" range, and that [Defendant] "is functioning at the level of many retarded people." She also testified that the type of closed head injury that [Defendant] allegedly sustained do "not

> infrequently cause brain damage." She later testified that [Defendant] "possibly had a head injury that could have in fact further damaged his level of functioning." On cross-examination, Carbonell was asked whether [Defendant] had brain damage, and she responded, "It's a probability. It's certainly a possibility."
>
> Finally, the mere fact that the defense experts' opinions were rejected does not demonstrate that counsel was ineffective. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1020 (Fla. 1999). Instead, the failure can be attributed to Drs. Haber and Miller's opinions that [Defendant's] intelligence was between average and borderline and that [Defendant] exhibited no evidence of brain damage. The fact that [Defendant] now has new experts does not indicate that his counsel was ineffective, where counsel did investigate and present evidence on these issues. *See Cherry v. State*, 781 So. 2d 1040, 1052 (Fla. 2000); *Rose v. State*, 617 So. 2d 291, 295 (Fla. 1993).
>
> In sum, given the significant mental health investigation and testimony in the record, we hold that the trial court did not err in denying [Defendant's] claim without an evidentiary hearing. Given that the record reflects that two mental health experts were appointed in [Defendant's] defense, and each performed a comprehensive mental health evaluation of [Defendant] and testified thereto, we also affirm the trial court's summary denial of [Defendant's] *Ake* claim.

Id. at 36-39.

On September 23, 2004, while the appeal of denial of the second motion for post conviction relief was pending, Defendant filed a third motion for post conviction relief, claiming that the trial court was biased against him at resentencing. (PCR3. 34-38) The lower court dismissed this motion because it lacked jurisdiction to consider it. (PCR3. 71)

Defendant appealed the dismissal of the third motion. After the appeal of the second motion was final, the State moved to relinquish jurisdiction in the appeal from the dismissal of the third motion so that the trial court could consider that motion. Defendant filed a pleading agreeing to the relinquishment of jurisdiction and indicating his intent to file a retardation claim if jurisdiction was relinquished. On March 28, 2005, Defendant actually filed a fourth motion for post conviction relief, claiming that he was retarded and that Fla. R. Crim. P. 3.203 was unconstitutional. (PCR4. 48-66)

After the appeal from the dismissal of the second motion for post conviction relief had been fully briefed,[2] this Court considered the "retardation claim made in the case" as an invocation of Fla. R. Crim. P. 3.203 and relinquished jurisdiction for an evidentiary hearing on retardation. After the evidentiary hearing had been conducted and the trial court had determined that Defendant was not mentally retarded (PCR4. 2209-53), jurisdiction returned to this Court, and the parties submitted supplement briefs on the retardation issue.

On June 21, 2007, this Court issued an order separating the issues regarding the third motion for post conviction relief

[2] Defendant filed a brief conceding that the trial court had properly dismissed the second motion for lack of jurisdiction. Initial Brief of Appellant, FSC Case No. SC04-2476.

from the issues regarding the fourth motion for post conviction and assigning a new case number to the pleadings concerning the fourth motion for post conviction relief, SC06-2554. *Phillips v. State*, 2007 Fla. Lexis 1221 (Fla. Jun. 21, 2007). It retained jurisdiction of the fourth motion for post conviction relief and affirmed the dismissal of the third motion for post conviction relief. *Id.* However, it granted Defendant leave to refile the third motion for post conviction relief within 60 days and permitted the trial court to exercise jurisdiction over the third motion.

On August 17, 2007, Defendant refiled the third motion for post conviction relief. (PCR5. 59-135) On September 24, 2007, the trial court denied the third motion for post conviction relief, finding the claim barred. (PCR5. 175)

Defendant appealed the denial of the third motion to this Court. On March 20, 2008, this Court affirmed the denial of the fourth motion for post conviction relief, finding that the state post conviction court had properly determined that Defendant was not retarded. *Phillips v. State*, 984 So. 2d 503 (Fla. 2008). On September 23, 2008, this Court issued an order affirming the denial of the third motion for post conviction relief. *Phillips v. State*, 996 So. 2d 859 (Fla. 2008).

On November 29, 2010, Defendant filed his fifth motion for

post conviction relief, raising one claim:

> [DEFENDANT'S] SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*.

(PCR6. 42-88)[3] In support of that claim, Defendant argued that *Porter v. McCollum*, 130 S. Ct. 447 (2009), had somehow changed the manner in which the rejection of claims of ineffective assistance of counsel were reviewed and that the alleged change should be applied retroactively. *Id.* According to Defendant, this alleged change was significant with regard to the prior rejection of the claim that counsel had been ineffective regarding the investigation and presentation of mitigation. *Id.*

At the *Huff* hearing, Defendant suggested that *Porter* showed that this Court had systematically erred in giving deference to trial court factual findings regarding claims of ineffective assistance of counsel without actually saying so and argued that *Porter* was retroactive because *Hitchcock v. Dugger*, 481 U.S. 393 (1987), had been applied retroactively and allegedly involved a similar systematic error. (PCR6. 148-56) The State responded that the requirement that factual findings be given deference was established in *Strickland* itself expressly and that the Court had not even mentioned that standard, much less overruled it, in *Porter* such that there was no change in law at all.

[3] The symbol "PCR6." will refer to the record in the instant appeal.

(PCR6. 157-60) The State also noted that the problem the Court had found with the analysis in *Porter* did not concern giving deference to factual finding. (PCR6. 159) Instead, the problem the Court identified concerned the failure to make factual findings. (PCR6. 159-60)

The State also pointed out that Defendant had not even done a *Witt* analysis of retroactivity and had failed to show that the change in law that he alleged met the three prong test to be of fundamental significance. (PCR6. 160-61) It asserted that any change in law regarding the standard of review would fail such an analysis given the number of cases that had applied the standard of review and the effect on the administration of justice of allowing every defendant to relitigate his ineffective assistance claims, as this Court recognized in *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). (PCR6. 161) Defendant acknowledged that he had not considered these factors but suggested that they might allow retroactivity depends on what the alleged change in law was. (PCR6. 161-62)

When pressed to identify what the change in law in *Porter* was, Defendant asserted that *Porter* required a court to consider the evidence presented in support of an ineffective assistance claim. (PCR6. 163-64) He acknowledged that the problem in *Porter* had been the failure to make factual findings. (PCR6.

164-66)

Defendant asserted that the rejection of his claim that counsel was ineffective for failing to investigate and present mitigation was affected by *Porter* but acknowledged the claim had been summarily denied as refuted by the record. (PCR6. 166-67) He claimed that this was true because a court had to consider the alleged effect of new evidence even where the evidence was cumulative to evidence that had been investigated and presented. (PCR6. 167-68)

On January 23, 2011, the lower court denied the fifth motion for post conviction relief. (PCR6. 121-27) It found that *Porter* did not change the law and that any change in law that might have occurred would not be retroactive or applicable to Defendant. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied this untimely, successive motion for post conviction relief. Defendant's claim did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B). *Porter* did not change the law, and even if it had, that change would not be retroactive. The claim in the motion was a procedurally barred attempt to relitigate a previously denied claim. Further, Defendant failed to establish deficiency and does not even allege that the lack of deficiency was affected by *Porter*. Finally, Defendant's counsel was not even authorized to file this frivolous motion.

ARGUMENT

THE LOWER COURT PROPERLY SUMMARILY DENIED DEFENDANT'S SUCCESSIVE MOTION FOR POST CONVICTION RELIEF.

Defendant asserts that the lower court should have granted his successive motion for post conviction relief by holding that *Porter v. McCollum*, 130 S. Ct. 447 (2009), constitutes a fundamental change in law that satisfies the *Witt v. State*, 387 So. 2d 922 (Fla. 1980), standard. He contends that it was proper for him to raise this claim in a successive, time barred motion for post conviction relief. He insists that if the alleged change in law from *Porter* was applied to this case, it would show that he was prejudiced by the alleged deficiency of counsel in failing to investigate and present mitigation. However, the lower court properly denied this motion because it was unauthorized, time barred, successive, procedurally barred and meritless.

Pursuant to Fla. R. Crim. P. 3.851(d), a defendant must present his post conviction claims within one year of when his conviction and sentence became final unless certain exceptions are met. Here, Defendant's conviction became final on January 23, 1986, when the period for seeking certiorari after direct appeal expired and no petition had been filed. Defendant's sentence became final on October 5, 1998, when the United States Supreme Court denied certiorari after resentencing. *Phillips v.*

Florida, 525 U.S. 880 (1998). As Defendant did not file this motion until 2010, more than ten years after his conviction and sentence became final, this motion was time barred.

In recognition of the fact that the claim is time barred, Defendant attempts to avail himself of the exception for newly-recognized, retroactive constitutional rights. However, Defendant's claim does not fit within this exception. Pursuant to Fla. R. Crim. P. 3.851(d)(2)(B), the time bar is lifted if "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

Here, Defendant does not assert a claim based on a fundamental constitutional right that was not established within a year of when his convictions and sentences became final. In fact, he acknowledges that *Porter* did not change constitutional law at all. Initial Brief at 22 & n.2. Moreover, the fact that the Sixth Amendment right to counsel includes a requirement that counsel be effective has been recognized for decades. *Strickland v. Washington*, 466 U.S. 668 (1984).

Further, Defendant does not suggest that *Porter* "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). In fact, no court has held that *Porter* is retroactive, and instead, 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. *See Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Premo v. Moore*, 131 S. Ct. 733 (2011); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Renico v. Lett*, 130 S. Ct. 1855 (2010); *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Reed v. Sec'y, Fla. Dept. of Corrections*, 593 F.3d 1217, 1243 n.16, 1246 (11th Cir. 2010); *Boyd v. Allen*, 592 F.3d 1274, 1302 (11th Cir. 2010); *Franqui v. State*, 59 So. 3d 82, 95 (Fla. 2011); *Troy v. State*, 57 So. 3d 828, 836 (Fla. 2011); *Everett v. State*, 54 So. 3d 464, 472 (Fla. 2010); *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).

Since *Porter* neither recognized a new right nor has been held to apply retroactively, it does not meet the exception to the time bar found in Fla. R. Crim. P. 3.851(d)(2)(B). The motion was time barred and properly denied as such. The lower court should be affirmed.

Instead of relying on a newly established right that has been held to be retroactive to meet Fla. R. Crim. P. 3.851(d)(2)(B), Defendant asserts that he met the exception by asserting a change in law regarding an existing right that he is

seeking to have held retroactive. However, as this Court has held, court rules are to be construed in accordance with their plain language. *Koile v. State*, 934 So. 2d 1226, 1230 (Fla. 2006); *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006). Moreover, as this Court has recognized, 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). Here, the plain language of Fla. R. Crim. P. 3.851(d)(2)(B) requires "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Thus, it requires a new constitutional right and a prior holding that the right is to be applied retroactively. *See Tyler v. Cain*, 533 U.S. 656 (2001)(holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). Defendant cannot use the assertion that an alleged change in law regarding an existing right should be held retroactive to have the exception in Fla. R. Crim. P. 3.851(d)(2)(B) apply; he must show that a newly established right that has been held retroactive for the exception to apply. The motion was time barred, and the lower court properly denied it as such. The lower court should be affirmed.

Even if Defendant could satisfy Fla. R. Crim. P. 3.851(d)(2)(B) by showing a change in law regarding an existing right and asking this Court to find it retroactive, the lower court would still have properly denied the motion as time barred because *Porter* did not change the law. While Defendant insists that *Porter* represents a "fundamental repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 17-18, and not simply a determination that this Court misapplied the correct law to the facts of one case, this is not true.

In making this argument, Defendant relies heavily on the fact that the United States Supreme Court granted relief in *Porter* after finding that this Court had unreasonably applied *Strickland*. He suggests that since this determination was made under the deferential AEDPA standard of review, the Court must have found a systematic problem with this Court's understanding of the law under *Strickland*. However, this argument misrepresents the meaning of the term "unreasonable application" under 28 U.S.C. §2254(d), as amended by the AEDPA.

As the United States Supreme Court has explained, 28 U.S.C. §2254(d): (1), provides two separate and distinct circumstances under which a federal court may grant relief based on a claim that the state court rejected on the merits: (1) determining that the ruling was "contrary to" clearly established United

States Supreme Court precedent; and (2) determining that the ruling was an "unreasonable application of" clearly established United States precedent. *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). The Court explained that a state court decision fits within the "contrary to" provision when the state court got the legal standard for the claim wrong or reached the opposition conclusion from the United States Supreme Court on "materially indistinguishable" facts. *Id.* at 412-13. It further states that a state court decision would fit within the "unreasonable application" provision when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Given this holding, if the United States Supreme Court had determined that this Court had been applying an incorrect legal standard to *Strickland* claims, it would have found that Porter was entitled to relief because this Court's decision was "contrary to" *Strickland*; it did not. Instead, it found that this Court had "unreasonably applied" *Strickland*. *Porter*, 130 S. Ct. at 448, 453, 454, 455. By finding that this Court "unreasonably applied" *Strickland* in *Porter*, the Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions." *Williams*, 529 U.S. at

412. It simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." *Id.* at 412. Thus, Defendant's suggestion that the *Porter* decision represents a "fundamental repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 17-18, is incorrect. Instead, as the lower court found, *Porter* represents nothing more than an isolated error in the application of the law to the facts of a particular case. Thus, *Porter* does not represent a change in law at all and does not make Fla. R. Crim. P. 3.851(d)(2)(B) applicable. The motion was time barred and properly denied as such. The lower court should be affirmed.

This is all the more true when one considers how Defendant seems to allege *Porter* changed the law. Although far from a model of clarity, Defendant seems to suggest that *Porter* held that it was improper to defer to the finding of fact that a trial court made in resolving an ineffective assistance claim pursuant to the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). Initial Brief at 31-32, 33-36. However, in making this assertion, Defendant ignores that the *Stephens* standard of review is directly and expressly mandated by *Strickland* itself:

> Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent

> stated by 28 U.S.C. §2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n.6, 83 S. Ct. 745, 755, n.6, 9 L. Ed. 2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. *See Cuyler v. Sullivan*, 446 U.S., at 342, 100 S. Ct., at 1714. **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.**

Strickland, 466 U.S. at 698 (emphasis added).[4] As this passage shows, the Court required deference not only to findings of historical fact but also deference to factual findings made in resolving claims of ineffective assistance while allowing *de novo* review of the application of the law to these factual findings. This is exactly the standard of review that this Court mandated in *Stephens*, 748 So. 2d at 1034, and applied in *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001), *Sochor v.*

[4] The references to 28 U.S.C. §2254(d) in *Strickland* concern the provisions of the statute before the adoption of the AEDPA in 1996. Under the federal habeas statute as it existed at the time, a federal court was required to defer to a state court factual finding if it was made after a "full and fair" hearing and was "fairly supported by the record." 28 U.S.C. §2254(d) (1984). After the enactment of the AEDPA, the deference required of state court factual findings has been heightened and moved. 28 U.S.C. §2254(e)(1)(requiring a federal court to presume a state court factual finding correct unless the defendant presents clear and convincing evidence to overcome the presumption).

State, 833 So. 2d 766, 781 (Fla. 2004), and *Cherry v. State*, 781 So. 2d 1040, 1048 (Fla. 2001). Thus, to find that *Porter* held that application of this standard of review was a legal error, this Court would have to find that the United States Supreme Court overruled this expressed and direct language from *Strickland* in *Porter*.

However, Defendant concedes that *Porter* did not overrule or alter any portion of *Strickland*. Initial Brief at 22 & n.2. By making this concession, Defendant has agreed that the Court did not overrule this portion of *Strickland*. Since this Court's precedent on the standard of review is entirely consistent with this portion of *Strickland*, Defendant has conceded that the Court did not overrule this Court's precedent. His attempt to argue to the contrary is specious. The lower court properly determined that *Porter* did not change the law and that the motion was time barred as a result. It should be affirmed.

Even if Defendant were to attempt to take back his concession and argue that the Court had overruled *Strickland*'s requirement of deference to factual findings made in the course of resolving claims of ineffective assistance of counsel, the lower court would still have properly found the law has not changed. In *Porter*, the Court never mentioned this portion of *Strickland* and made no suggestion that it was improper for a

reviewing court to defer to factual findings made in resolving an ineffective assistance claim. *Porter*, 130 S. Ct. at 448-56. Instead, it characterized the opinion of the state trial court and this Court as having found there was no statutory mitigation established and there was no prejudice from the failure to present nonstatutory mitigation. *Id.* at 451. Under the standard of review mandated by *Strickland* and followed by this Court, the first of these findings was a factual finding but the second was not. *Strickland*, 466 U.S. at 698. Rather than determining that this Court's factual finding was not binding, the Court seems to have accepted it and found this Court had acted unreasonably by not making factual findings about nonstatutory mental health mitigation and making an unreasonable conclusion on the mixed question of fact and law regarding prejudice. *Id.* at 454-56. Thus, to find that *Porter* overruled *Stephens* and its progeny, this Court would have to find that the United States Supreme Court overruled itself *sub silencio* in a case where the Court appears to have applied the allegedly overruled law. However, this Court is not even empowered to make such a finding, as this Court has itself recognized. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989); *Bottoson v. Moore*, 833 So. 2d 693, 694 (Fla. 2002). Thus, the lower court properly determined that *Porter* did not

change the law, that Fla. R. Crim. P. 3.851(d)(2)(B) did not apply and that the motion was time barred. It should be affirmed.

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

Defendant also seems to suggest that *Porter* requires a court to grant relief on an ineffective assistance of counsel based solely on a finding that some evidence to support prejudice was presented at a post conviction hearing regardless of what mitigation was presented at trial, how incredible the new evidence was, how much negative information the new evidence

would have caused to be presented at trial or how aggravated the case was. However, *Porter* itself states that this is not the standard for assessing prejudice. Instead, the Court stated that determining prejudice required a court to "consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding' - and "reweig[h] it against the evidence in aggravation." *Porter*, 130 S. Ct. at 453-54 (quoting *Williams*, 529 U.S. at 397-98).

Moreover, in *Wong v. Belmontes*, 130 S. Ct. 383, 386-91 (2009), the Court reversed the Ninth Circuit for finding prejudice by ignoring the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented and the aggravated nature of the crime. The Court noted that this error was probably caused by the Ninth Circuit's failure to require that the defendant meet his burden of affirmatively proving prejudice. *Id.* at 390-91. Similarly in *Bobby v. Van Hook*, 130 S. Ct. 13, 19-20 (2009), the Court reversed the Sixth Circuit for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the evidence presented in post conviction and the aggravated nature of the crime.

Given what *Porter* actually says about proving prejudice and

Belmontes and *Van Hook*, Defendant's suggestion that *Porter* requires a finding of prejudice anytime a defendant presents some evidence at a post conviction hearing is simply false. *Porter* did not change the law in requiring that a defendant actually prove there is a reasonable probability of a different result.[5] Since *Porter* did not change the law, the lower court properly determined that this motion was time barred and should be affirmed.

Even if Fla. R. Crim. P. 3.851(d)(2)(B) did apply to this situation and *Porter* had changed the law, the lower court would still have properly denied the motion because *Porter* would not apply retroactively. As Defendant admits, the determination of whether a change in law is retroactive is controlled by *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). As Defendant also properly acknowledges, to obtain retroactive application of the law under *Witt*, he was required to show: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental

[5] Using Defendant's analogy, the task of determining prejudice involves taking the bag of red and green apples as it existed from the time of trial, determining whether the new evidence actually adds any new red and green apples based on whether they are support by credible, non-cumulative evidence, adding both the new red and green apples and deciding whether the defendant has proven that the total amount of red apples outweigh the total amount of green apples. *Porter*, 130 S. Ct. at 453-54; *Strickland*, 466 U.S. at 695-96.

significance. *Id.* at 929-30. To meet the third element of this test, the change in law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. Application of that three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001).

Here, Defendant did not attempt to show that the change in law he alleged was made in *Porter* met the *Witt* standard in his motion for post conviction relief or during his initial argument at the *Huff* hearing. (PCR6. 42-88, 148-54) Instead, he simply suggested that because this Court had found that *Hitchcock v. Dugger*, 481 U.S. 393 (1987), constituted a retroactive change in law, the lower court should find that *Porter* was also retroactive. *Id.* After the State discussed the *Witt* analysis, Defendant merely stated that he was unable to discuss the extent of reliance on the old rule or the effect on the administration of justice because those factors depended on the nature of the change in law, which he did not clearly identify. (PCR6. 160-

63) He also suggested that even if the balance of the *Witt* factors was did not favor retroactivity, the lower court should ignore the standard. (PCR6. 162-63) Given Defendant's failure to address the *Witt* factors, the lower court properly determined that Defendant had not shown that he was entitled to retroactive application of the alleged change in law in *Porter*. It should be affirmed.

This is particularly true since Defendant did not suggest that *Hitchcock* and *Porter* were alike in ways that actually were relevant to a *Witt* analysis. Instead, he compared them based on the stage of the proceedings at which the error was found and the manner in which the United States Supreme Court issued its opinion. However, when one considers the difference in the errors found in those cases and the relationship between those errors and the *Witt* standard, the lower court was correct in rejecting this argument.

In *Hitchcock v. Dugger*, 481 U.S. at 398-99, the Court found that the giving of a jury instruction that told the jury not to consider nonstatutory mitigation was improper. As such, the purpose of finding this error was to permit a jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phase and could only have harmed a

defendant if he was sentenced to death, the number of cases in which there had been an error that would need retroactive correction was limited. Further, because the error was in a jury instruction, determining whether that error occurred in a particular case was simple. All one needed to do was review the jury instructions that had been given in a particular case to see if it was the offending instruction. Courts were not required to comb through stale records looking for errors. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). Thus, the purpose of the new rule, extent of reliance on the old rule and effect on the administration of justice in *Hitchcock* militated in favor of retroactivity.

In contrast, *Porter* involved nothing more than determining that this Court had unreasonably applied a correctly stated rule of law to the facts of a particular case, as noted above. Thus, the purpose of *Porter* was nothing more than to correct an error in the application of the law to the facts of a particular case. Moreover, as the lower court found, Florida courts have extensively relied on the standard of review from *Strickland* that this Court recognized in *Stephens* and the effect on the administration of justice from applying the alleged change in law in *Porter* retroactively would be to bring the courts of

Florida to a screeching halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida.

Given these stark difference in the analysis of the changes in law in *Porter* and *Hitchcock* and their relationship to the *Witt* factors, the lower court properly determined that the alleged change in law from *Porter* would not be retroactive under *Witt* even if it had occurred. In fact, the more apt analogy regarding a change in law would be the change in law that this Court recognized in *Stephens* itself, as both changes in law concerned the same legal issue. However, making that analogy merely shows that the lower court was correct to deny this motion. In *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001), this Court held the change in law in *Stephens* was not retroactive under *Witt*. Given the facts that *Porter* would fail the *Witt* test if it had changed the law and that this Court has already determined that changing the law regarding the standard of review for ineffective assistance of counsel claims does not meet *Witt*, the lower court properly determined that any change in law that *Porter* might have made would not be retroactive. Thus, it properly found that this motion was time barred and should be affirmed.

In a belated attempt to show that he is entitled to

retroactive application of the alleged error in *Porter*, Defendant suggests that he meets the *Witt* standard because the alleged purpose of the alleged change in law is to correct an error. He then asserts that neither the extent of reliance on the old rule nor the effect on the administration of justice can be known. Not only did Defendant not present this argument below but also it is nothing more than a call for this Court to abandon *Witt* in favor of a rule that all alleged changes in law are retroactive. Anytime a court changes the law, it does so because it believes the old law was erroneous. Thus, Defendant's suggested purpose would apply to any change in law. Moreover, Defendant's assertions about the other two prongs suggest that they are irrelevant. However, this Court held in *Witt* that only those changes in law about which the balance of the factors favored retroactivity would apply retroactively because of the devastating effect on the important interest in finality of decisions that would occur if all changes in law were determined to be retroactive. *Witt*, 387 So. 2d at 925-27. As such, Defendant's argument that this Court should apply *Witt* in a manner that abandons *Witt* in favor of a rule that all alleged changes in law are retroactive should be rejected. The lower court should be affirmed.

This is particularly true here since Defendant's arguments

are unsupportable. While it is true that *Porter* did involve correcting an error, that error concerned simply the unreasonable application of a properly stated rule of law to the facts of a particular case. *Williams*, 529 U.S. at 413. Given the limited nature of that error, the purpose of correcting that error would not extend beyond *Porter*. Further, while Defendant suggests that it is impossible to know the extent of reliance on the old law, this is not true. All one would need to do is sheppardize the cases that Defendant claims were overruled and remember that they represent only the tip of the iceberg, as Fla. R. App. P. 9.141(b)(2) provides for summary appeals in noncapital cases in which post conviction motions were summarily denied, as Defendant's motion was, such that not all applications of the precedent would be reported. However, undertaking this task would merely show that the lower court was correct in finding that the extent of reliance was great and that the effect on the administration of justice would be vast. Given these circumstances, the lower court properly determined that the alleged change in law was not retroactive under *Witt*. It should be affirmed.

In another belated attempt to show that the alleged change in law here meets *Witt*, Defendant compares the alleged change from *Porter* to the change in law in *Espinosa v. Florida*, 505

U.S. 1079 (1992). However, this comparison is even more flawed that the comparison to *Hitchcock*. As was true of *Hitchcock*, the alleged error concerned a jury instruction given at the penalty phase. *Espinosa*, 505 U.S. at 1080-81. As the United States Supreme Court has held, the constitution only imposes two requirements on a capital sentencing scheme: (1) that it limit the class of death-eligible individuals, and (2) that it allow individualized consideration of mitigation. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Thus, as was true in *Hitchcock*, the purpose of *Espinosa* was to correct an error in one of those requirements.

Further, the class of cases in which retroactive application of *Espinosa* was available was even more limited than in *Hitchcock*. In *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), this Court limited retroactive application of *Espinosa* to those cases in which the defendant had objected to the instruction at trial and raised the issue on direct appeal. Thus, the class of eligible cases was not only limited to those cases in which the offending jury instruction was given and the defendant was sentenced to death but also to those cases in which the issue had been pursue previously. Given this limitation on the class of eligible cases and the ease with which a determination of whether the error had occurred and the

defendant was eligible for correction could be made, the extent of reliance on the old rule and the effect on the administration of justice were limited and favored retroactivity.

Again, the purpose of *Porter* was nothing more than to correct an error in the application of the correct law to the facts of a particular case. Moreover, as the lower court found, Florida courts have extensively relied on the standard of review from *Strickland* that this Court recognized in *Stephens* and the effect on the administration of justice from applying the alleged change in law in *Porter* retroactively would be to bring the courts of Florida to a screeching halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida. Thus, Defendant's attempt to analogize the change in law that he alleges was made in *Porter* to the change of law in *Espinosa* is even less apt than his comparison to *Hitchcock*. The lower court properly determined that the *Witt* standard would not be met had *Porter* changed the law. It should be affirmed.

Moreover, it should be remembered that this claim is procedurally barred. Defendant is seeking nothing more than to relitigate the claim of ineffective assistance of counsel for failing to investigate and present mitigation that he raised in his second motion for post conviction relief and lost. As this

Court has held, such attempts to relitigate claims that have previously been raised and rejected are procedurally barred. See *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Defendant 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 Defendant is attempting to do here, his 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).

In fact, this Court has rejected attempts to relitigate ineffective assistance claims simply because the United States Supreme Court issued opinions indicating that state courts have erred in rejecting claims of ineffective assistance of counsel. *Marek v. State*, 8 So. 3d 1123 (Fla. 2009). There, the defendant argued that his previously rejected claim of ineffective assistance of counsel at the penalty phase had to be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and

Williams v. Taylor, 529 U.S. 362 (2000), because they had changed the standard of review for claims of ineffective assistance of counsel under *Strickland*. This Court decisively rejected the claim, stating "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. This Court did so even though the United States Supreme Court had found under the AEDPA standard of review that state courts had improperly rejected these claims. Given these circumstance, the claim was barred and was properly denied. The lower court should be affirmed.

Even if Fla. R. Crim. P. 3.851(d)(2)(B) could apply to changes in law regarding existing rights that had yet to be held retroactive, *Porter* had changed the law, the alleged change in law was retroactive and the claim was not procedurally barred, Defendant would still be entitled to no relief. As the 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. Moreover, as the 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. Further, this Court has held that it does not apply the

Stephens standard of review when a claim is summarily denied and instead reviews the denial of the claim *de novo*. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

Here, the claim of ineffective assistance of counsel for failing to investigate and present mitigation was denied not on a finding that Defendant did not prove prejudice after an evidentiary hearing; it was summarily denied based on a finding that counsel was not deficient because the record showed that counsel had investigated and presented the mitigation that Defendant claimed he had failed to investigate and presented. *Phillips*, 894 So. 2d at 36-39. Given these circumstances, the *Stephens* standard of review was not applied and prejudice was not discussed. Defendant does not even suggest how *Porter* would have affected this determination. Moreover, finding no deficiency in such a situation is in accordance with United States Supreme Court precedent. *Bobby v. Van Hook*, 130 S. Ct. 13 (2009). As such, Defendant's claim would be meritless even if *Porter* had changed the law and applied retroactively. The lower court properly denied this motion and should be affirmed.

In an attempt to avoid this result, Defendant mentions that this Court cited to its decision in *Valle v. State*, 778 So. 2d 960 (Fla. 2001), in its opinion affirming the denial of the second motion for post conviction relief, and claims that the

Valle opinion cites to this Court's decision rejecting Porter's ineffective assistance claim. However, these assertions do not show that Defendant is entitled to any relief.

While it is true that this Court cited to *Valle* in its opinion in this case, it did so only for its quotations to *Strickland* regarding the elements of a claim of ineffective assistance of counsel, the presumption that counsel was effective and the requirement that a defendant show that but for counsel's deficiency, there is a reasonable probability of a different result. *Phillips*, 894 So. 2d at 35-36. Defendant concedes that *Porter* did not alter the requirements of *Strickland*. Initial Brief at 22 & n.2. As such, the citation to *Valle* did not show that this Court applied an incorrect standard of review. This is particularly true, as contrary to Defendant's assertion, this Court did not cite to *Porter* in *Valle*. *Valle*, 778 So. 2d at 961-67. Given these circumstances, Defendant has not shown the "direct line" that he claims. Thus, *Porter* would not affect the decision in this case even if it did change the law and was retroactive. The denial of the motion should be affirmed.

Defendant's reliance on *Sears* is also misplaced. In *Sears*, the Court did not determine that it was improper to find that counsel was not deficient where the record showed that counsel

had investigated and presented the mitigation he was alleged not to have investigated and presented. Instead, in *Sears*, the state courts had found that counsel was deficient because he did not investigate the defendant's background before presenting a mitigation case based on the assertion that the defendant was a good child for a good home whose execution would devastate his family. *Sears*, 130 S. Ct. at 3261-62. Moreover, the evidence that was presented during the post conviction proceeding was completely different that the evidence offered at trial, showing that the defendant came from a violent, abusive family and had mental health issues. *Id.* at 3262-64. Here, this Court rejected the claim of ineffective assistance of counsel finding a lack of deficiency because the mitigation that Defendant alleged should have been present was in fact presented at the penalty phase. *Phillips*, 894 So. 2d at 35-36. Given these circumstances, *Sears* also does not compel a different result. The denial of the successive motion should be affirmed.

Finally, it should be remembered that Defendant's counsel was not even authorized to file this motion. Pursuant to §27.702, Fla. Stat., "[t]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by statute." This Court has recognized the legislative intent to

limit collateral counsel's role in capital post-conviction proceedings. *See State v. Kilgore*, 976 So. 2d 1066, 1068-69 (Fla. 2007).

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

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

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

CONCLUSION

For the foregoing reasons, the order denying the fifth motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to William M. Hennis, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this _____ day of June 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

_____
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