IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-473

NORMAN PARKER, JR.,

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

Defendant was indicted for the first degree murder of Julio Ceazar Chavez, the armed robbery of Chavez, the armed robbery of Silvia Arana, the armed robbery of Luis Diaz, the armed robbery of David Ortigoza, the sexual battery of Arana, the possession of a weapon during a criminal offense and the possession of a weapon by a convicted felon. (DAR. 11-15a)[1] The charge of possession of a weapon by a convicted felon was severed, and the matter proceeded to trial on the remaining counts on September 9, 1981. (DAR. 16, 74-75A, 509-13) On September 18, 1981, the jury found Defendant guilty as charged on all counts. (DAR. 397-403) The trial court pronounced sentence on November 18, 1981. (DAR. 443-48) The trial court found five aggravating circumstances: under a sentence of imprisonment, prior violent felony, during the course of a sexual battery, for pecuniary

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[1] The symbol "DAR." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Florida Supreme Court Case No. 61,512. The symbol "PCR1." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of Defendant's first motion for post conviction relief, Florida Supreme Court case no. 73,935. The symbol "PCR2." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of Defendant's second motion for post conviction relief, Florida Supreme Court case no. 89,936. The symbol "PCR3." will refer to the record on appeal and transcript of proceedings in the appeal from the denial of Defendant's third motion for post conviction relief, Florida Supreme Court case no. SC04-52. The symbol "PCR4." will refer to the record on appeal and transcripts of proceedings in the appeal from the denial of Defendant's motion for DNA testing, Florida Supreme Court case no. SC06-1379.

gain, and cold, calculated and premeditated (CCP). *Id.* The trial court found no mitigating circumstances, statutory or nonstatutory, had been established. *Id.*

The facts as found by this Court are:

> The evidence at trial established that on July 18, 1978, defendant and his partner, Manson, were admitted to a Miami home in order to complete an illegal drug transaction with two male occupants of the home. Soon thereafter, defendant and Manson produced a sawed-off shotgun and a chrome-plated revolver, respectively, and demanded cocaine and money from the two victims. The two victims were forced to surrender jewelry, strip naked, and lie on a bed. Two other occupants, a female and her boyfriend (Chavez), were discovered in another room and also forced to strip naked and surrender jewelry. All four victims were then confined in the same room, on the same bed. Defendant and Manson exchanged weapons and defendant guarded the four victims while Manson searched the home for additional loot. Defendant threatened to kill the victims because he said he had escaped from jail and had nothing to lose. The victims pleaded with defendant and Manson to take what they wanted and leave. Chavez also pleaded with defendant and Manson to leave his girlfriend alone. After a period of time, defendant aimed the revolver at Chavez's back, whereupon Manson handed defendant a pillow. Defendant then shot Chavez through the pillow. The other three victims heard the muffled shot and nothing further from Chavez. Chavez died from a single gunshot wound to the chest. Defendant then committed a sexual battery on the female. Defendant and Manson fled, but were later identified by the surviving victims from a photographic lineup.
>
> On August 24, 1978, defendant shot a man in a Washington, D.C., bar. A bullet from this victim's body was matched with the bullet taken from Chavez's body. Jewelry found in possession of the defendant in D.C. was similar to jewelry taken from the Miami victims. Defendant testified that he had been in D.C. during the summer of 1978, including the day that the Miami murder was committed. Four other defense

> witnesses testified by deposition that defendant was in D.C. during the summer of 1978 but, on cross examination, were unable to swear defendant was in D.C. during the period, July 17-19, 1978.
>
> During the penalty phase, the evidence showed that defendant had been sentenced previously to life imprisonment in 1967 for a first-degree murder committed in Dade County, Florida, and that he was sentenced to life imprisonment for a second-degree murder committed in D.C. in August, 1978.

Parker v. State, 456 So. 2d 436, 439-40 (Fla. 1984).

Defendant appealed his conviction and sentences to this Court, raising 8 issues. This Court affirmed Defendant's convictions and sentences on September 6, 1984. *Parker*, 456 So. 2d at 439.

On January 2, 1987, Defendant filed his first motion for post conviction relief, raising 13 claims, including a claim that counsel had been ineffective for failing to investigate and present mitigation. (PCR1. 27-91) The trial court granted Defendant an evidentiary hearing on the issue of the effectiveness of his counsel at the penalty phase. (PCR1. 245) On December 23, 1988, Defendant supplemented his original motion for post conviction relief with 7 additional claims. (PCR1. 1384-1452) After the evidentiary hearing, the trial court denied the motion and supplement on February 7, 1989. (PCR1. 1453-56)

During the pendency of the motion for post conviction relief in the trial court, on May 23, 1988, Defendant filed a Petition for Extraordinary Relief, for a Writ of Habeas Corpus,

Request for Stay of Execution, and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari in this Court, raising 7 claims. On December 1, 1988, this Court denied the petition. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1988).

Defendant then appealed the denial of his motion for post conviction relief, raising 17 issues, including that the trial court had erred in denying the claim of ineffective assistance of counsel regarding the investigation and presentation of mitigation. This Court affirmed the denial of the first motion for post conviction relief on October 15, 1992. *Parker v. State*, 611 So. 2d 1224 (Fla. 1992). Regarding the claim of ineffective assistance in presenting mitigation, this Court held:

> After the December 1988 evidentiary hearing, the trial court denied relief on [Defendant's] claims that trial counsel was ineffective in the penalty phase. Here too we agree with the trial judge's conclusion that [Defendant] failed to meet the *Strickland* test. She found, in response to claims that family members should have been called in the penalty phase, that
>
>> in these postconviction proceedings, three cousins, a sister and an aunt were called. However, because [Defendant] had spent more than ten years in prison for a prior murder, these witnesses had had little contact with [him] in the years immediately before the crimes were committed. Their statements had little impact, and, at times, supported the view that [Defendant] appeared normal, rather than brain-damaged and impaired.

The trial court also rejected the claim that counsel was ineffective for failing to present the testimony of Dr. Stillman, a psychiatrist, in the penalty phase. The court explained:

> Dr. Stillman's testimony is wholly unpersuasive. His conclusion that [Defendant] is brain-damaged rests on the relatives' postsentencing report of [Defendant's] brief loss of consciousness in two childhood accidents. Significantly, [Defendant] himself denied any accidents in his 1980 interview with Dr. Stillman and [Defendant] presents no medical record of any kind to substantiate these alleged injuries. In fact, his IQ, as tested by Dr. Stillman, is slightly higher than average, and there is no objective indication of [Defendant's] compromised intellectual functioning. Dr. Stillman's opinion is simply that brain damage invariably results from loss of consciousness, no matter how brief the period of unconsciousness.
>
> Moreover, Dr. Stillman's conclusions that [Defendant] was incompetent to stand trial and insane at the time of the offense-neither conclusion being urged by [Defendant] in these proceedings, and both conclusions being contradicted by the overwhelming evidence in the case-undermine the credibility of his further opinion that [Defendant's] capacity to conform his conduct to law was impaired.
>
> The court cannot conclude that the jury likely would have been persuaded by such testimony to recommend a sentence other than death, especially in light of the compelling aggravating circumstance that [Defendant] had been convicted of murder on two prior and separate occasions.

We find no error in the trial court's conclusions.

Id. at 1227-28.

On June 7, 1993, Defendant filed a second motion for post conviction relief, raising 6 claims regarding the propriety of the jury instructions on aggravation and the rejection of mitigation. (PCR2. 28-78) The trial court denied this motion, finding all of the claims to be procedurally barred. (PCR2. 345-48) Defendant appealed the denial of this motion to this Court, which found that the claims were barred on May 28, 1998. *Parker v. State*, 718 So. 2d 744 (Fla. 1998). Defendant sought certiorari review, which was denied on May 3, 1999. *Parker v. Florida*, 526 U.S. 1101 (1999).

On September 4, 2002, Defendant filed his third motion for post conviction relief, claiming that his sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR3. 19-44) The trial court summarily denied this motion. (PCR3. 89-92) Defendant appealed the denial of his *Ring* claim to this Court, which affirmed in an unpublished order. *Parker v. State*, 908 So. 2d 1058 (Fla. 2005).

While the appeal of the third motion for post conviction relief was pending rehearing, Defendant filed a motion for DNA testing. (PCR4. 2-12) The State responded that the motion was insufficient but also noted that the evidence about which Defendant sought testing no longer existed and suggested that the trial court hold an evidentiary hearing regarding the

existence of the evidence. (PCR4. 13-22, 51-52) Defendant replied that he wanted the trial court to rule on the sufficiency of the motion without holding an evidentiary hearing on the existence of the evidence. (PCR4. 52-53) Consistent with Defendant's request, the trial court considered the sufficiency of the motion and denied it as insufficient. (PCR4. 29-31)

Defendant appealed the denial of the motion for DNA testing to this Court, arguing that his motion was sufficient and that the trial court should have held an evidentiary hearing on the existence of the evidence. This Court affirmed the denial of the motion for DNA testing. *Parker v. State*, 966 So. 2d 213 (Fla. 2007).

On November 23, 2010, Defendant filed a fifth motion for post conviction relief, raising one claim:

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

(PCR5. 7-45)[2] 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,

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[2] The symbol "PCR5." will refer to the record in the instant appeal.

this alleged change was significant with regard to the denial of the claim of ineffective assistance of counsel regarding the investigation and presentation of mitigation. *Id.*

At the *Huff* hearing, Defendant argued that little mitigation had been presented at the penalty phase and that a substantial amount of mitigation had been presented and rejected during post conviction, which was affirmed in a brief opinion by this Court. (PCR5. 97) He the averred that the brevity of the opinion was improper under *Porter* and that Porter had changed the law regarding how prejudice was reviewed. (PCR5. 97-98) Defendant admitted that a trial court's findings in rejecting an ineffective assistance claim was entitled to deference but suggested this Court's post conviction opinion showed too much deference. (PCR5. 99-101)

The State responded that Defendant was simply rearguing his rejected claim of ineffective assistance of counsel at the penalty phase, which he was barred from doing. (PCR5. 101) It asserted that Defendant needed to show something had changed, which he had not done. (PCR5. 101-02) Defendant replied that *Porter* had rejected the procedure this Court used in evaluating prejudice. (PCR5. 102)

The lower court indicated that it saw nothing in the *Porter* decision that indicated the Court had found any systematic

problem with Florida law. (PCR5. 102-03) Defendant acknowledged that there was nothing explicit in the *Porter* opinion that suggested a systematic problem and that *Porter* had not altered the *Strickland* as a matter of federal law. (PCR5. 103-04) However, he insisted that *Porter* had changed Florida law regarding review of ineffective assistance claims. (PCR5. 103-04)

The State responded that Defendant had still not identified an alleged change in law and that without such a change, the claim was barred. (PCR5. 104-05) It asserted that Defendant seemed to be suggesting that the standard of appellate review had changed but that this was not true, as the standard of review was expressly dictated by *Strickland* and had not been overruled, or even mentioned, in *Porter*. (PCR5. 105-06)

On January 21, 2011, the lower court denied the fourth motion for post conviction relief. (PCR5. 73-77) 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, the claim would be meritless even if *Porter* had changed the law. Finally, Defendant's counsel was not even authorized to file this frivolous motion.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THIS CLAIM BECAUSE IT WAS BARRED.

Defendant first asserts that the lower court erred in rejecting his successive motion as barred. However, the lower court properly rejected this rejected this claim on procedural grounds.

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 convictions and sentences became final on December 5, 1984, when the time for seeking certiorari from direct appeal expired and no petition was filed. As Defendant did not file this motion until 2010, more than 26 years after his sentences 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 26; PCR5. 103-04. 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 21, 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 opposite conclusion from the United States Supreme Court on "materially indistinguishable" facts. *Id.* at 412-13. It further stated 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 21, 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 34-39. 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.**

Id. at 698 (emphasis added).[3] As this passage shows, the Court

[3] The references to 28 U.S.C. §2254(d) in *Strickland* concern the provisions of the statute before the adoption of the AEDPA in

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. 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 26; PCR5. 103-04. 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

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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).

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.[4] Since *Porter* did not change the law, the lower court

[4] 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.

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 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 at the *Huff* hearing. (PCR5. 8-14, 94-106) 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.* 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*, 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. However, Defendant never presented this argument below. As such, it is not properly before this Court. *See Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). The argument should be rejected.

Further, this argument 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, 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 error in *Espinosa* 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 whether 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 regarding mitigation that he raised in his first 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.

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 <u>repetitive or successive collateral challenges</u> 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.

II. THE LOWER COURT PROPERLY DENIED THIS CLAIM BECAUSE THE ALLEGED CHANGE IN LAW WOULD NOT AFFECT THE OUTCOME.

Defendant next asserts that the lower court erred in rejecting his motion because the error that he alleges was made in *Porter* was also made in this case. However, the lower court also properly rejected this argument.

Initially, the State would note that for the reasons given in response to Issue I, this issue is moot. *Porter* does not represent a change in law or one that would be retroactive. As such, there is no effect of "*Porter* error" to assess.

However, 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.

Here, the alleged change in law in *Porter* would not affect the determination that this claim is meritless. In arguing that it would, Defendant suggests that this Court affirmed the summary denial of his claim of ineffective assistance of counsel for failing to investigate and present mitigation because the

mitigation that counsel was allegedly deficient for failing to present was cumulative to the evidence that was presented. He then suggests that rejecting a claim of ineffective assistance of counsel on this basis is error. However, neither of these statements is true.

This Court did not affirm the summary denial of the claim of ineffective assistance of counsel regarding the investigation and presentation of mitigation. Instead, this Court affirmed the denial of claim after an evidentiary hearing based on a lack of prejudice. *Parker*, 611 So. 2d at 1227-28. In fact, in making this argument, Defendant quotes from a portion of this Court's decision in *Phillips v. State*, 894 So. 2d 28 (Fla. 2004), which does not concern Defendant at all. Moreover, the United States Supreme Court has reaffirmed that it is proper to reject a claim of ineffective assistance of counsel for failing to present evidence where the evidence that was not presented was cumulative to the evidence that was presented. *Belmontes*, 130 S. Ct. at 386-91; *Van Hook*, 130 S. Ct. at 19-20. Since neither of Defendant's statements regarding how *Porter* would apply to this case is correct, he has not shown that *Porter* would affect the outcome here even if it had changed the law and applied retroactively.

Moreover, the manner in which this Court actually rejected

his claim shows that *Porter* does not apply. Defendant seems to suggest that *Porter* requires a court to engage with the evidence and speculate about its effect on the jury. Here, this Court affirmed the lower court's decision after quoting from it extensively. *Parker*, 611 So. 2d at 1227-28. As those quotations show, the lower court had engaged with the evidence and speculated about its effect on the jury. *Id.* Given these circumstances, the lower court also properly found that *Porter* would not have affected the outcome here even if it had changed the law and was retroactive. It should be affirmed.

Finally, while Defendant suggests that all he is asking for is a *de novo* review of the rejection of this claim, he ignores that he had already received such a review. On federal habeas appeal, the Eleventh Circuit conducted a *de novo* review of this claim and found that Defendant had failed to establish either deficiency or prejudice. *Parker v. Sec'y for Dept. of Corrections*, 331 F.3d 764, 786-89 (11th Cir. 2003). Since Defendant has already received what he is asking for, the denial of the claim should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the fourth 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 Rachel Day, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 3rd day of August 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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