IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-474

VICTOR TONY JONES,

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 charged, in an indictment filed on January 11, 1991, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number F90-50143, with committing: (1) the first degree murder of Matilda Nestor, (2) the first degree murder of Jacob Nestor, (3) the armed robbery of Matilda Nestor, (4) the armed robbery of Jacob Nestor, and (5) the possession of a firearm by a convicted felon. (DAR. 13-16)[1] The crimes were alleged to have been committed on December 19, 1990. *Id.*

After the trial court granted Defendant's motion to sever the charge of possession of a firearm by a convicted felon, the matter proceeded to trial on the remaining counts on January 26, 1996. (DAT. 932) The jury found Defendant guilty as charged on the four remaining counts, and the trial court adjudicated Defendant guilty in accordance with the verdicts. (DAR. 319-22, 323) After a penalty phase proceeding, the jury recommended a

[1] The symbols "DAR" and "DAT" will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Florida Supreme Court Case No. 81,482, respectively. The symbols "PCR1." and "PCR1-SR." will referred to the record on appeal and supplemental record on appeal in appeal from the denial of the first motion for post conviction relief, respectively. The symbols "PCR2.," "PCR2-SR.," "PCR2-SR2." and "PCR2-ST." will refer to the record on appeal, supplemental record on appeal, second supplemental record on appeal and transcripts of proceedings in the appeal from the denial of the second motion for post conviction relief.

sentence of death for the murder of Mrs. Nestor by a vote of 10 to 2, and recommended a sentence of death unanimously for the murder of Mr. Nestor. (DAR. 353-54) The trial court followed the jury's recommendations and imposed death sentences for both murders. (DAR. 325-27) The trial court also sentenced Defendant to life imprisonment for each of the robbery counts and ordered that all of the sentences be served consecutively. *Id.*

Defendant appealed his convictions and sentences to this Court, raising 5 issues:

> 1) the trial court erred by denying his motion for judgment of acquittal on the two armed robbery counts; 2) the trial court erred by failing to instruct the jury that if it found both the aggravating factor of "during the course of a robbery" and the aggravating factor of "for pecuniary gain" that it had to consider the two factors as one; 3) the trial court erroneously rejected [Defendant's] mental or emotional disturbance at the time of the offense as a statutory mitigating factor and failed to properly instruct the jury on the factor; 4) a new sentencing proceeding is required because the mental health experts who testified failed to bring the possibility that [Defendant] suffered from fetal alcohol syndrome/fetal alcohol effect to the court's attention and because the court refused to consider [Defendant's] abandonment by his mother as a mitigating circumstance; and 5) the trial court erred by failing to grant [Defendant's] motion for mistrial based upon various alleged improper comments made by the prosecutor during penalty phase closing argument.

Jones v. State, 652 So. 2d 346, 349 (Fla. 1995). This Court affirmed Defendant's convictions and sentences on January 12, 1995. *Jones v. State*, 652 So. 2d 346 (Fla. 1995). In doing so,

this Court found the following facts:

> According to the evidence presented at the trial, on December 19, 1990, the bodies of sixty-six-year-old Matilda Nestor and sixty-seven-year-old Jacob Nestor were discovered in their place of business. Mr. Nestor's body was found in the main office. He had been stabbed once in the chest. An empty holster was found on Mr. Nestor's waistband. Mrs. Nestor's body was discovered in the bathroom. She had been stabbed once in the back. The Nestors' new employee, [Defendant], was found slumped over on the couch in the main office not far from Mr. Nestor's body. The butt of a .22 caliber automatic pistol was protruding from under [Defendant's] arm.
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> According to the evidence, December 19 was [Defendant's] second day of work for the Nestors. It appears that as Mrs. Nestor was entering the bathroom in the rear of the building [Defendant] came up behind her and stabbed her once in the back. As Mr. Nestor came toward the bathroom from the main office, [Defendant] stabbed him once in the chest. The medical examiner testified that Mrs. Nestor died as result of a stab wound to the base of her neck which severed the aorta that carries blood and oxygen to the brain and Mr. Nestor died as a result of the stab wound to his chest which entered his heart.
>
> There was evidence that after being stabbed, Mr. Nestor retreated into the office, where he pulled the knife from his chest, attempted to call for help, drew his .22 caliber automatic pistol and shot five times, striking [Defendant] once in the forehead. No money or valuables were found on either victim or in Mrs. Nestor's purse which was found on the couch in the main office next to the defendant. The evidence also was consistent with Mr. Nestor's body having been rolled over after he collapsed so that personal property could be removed from his pockets.
>
> After the couple was murdered, [Defendant] was locked inside the building where he remained until police knocked down the door after being called to the scene by a neighbor. Money, keys, cigarette lighters and a small change purse that was later identified as

> belonging to Mrs. Nestor were found in [Defendant's] front pocket. The Nestors' wallets were later found in the defendant's pants pockets. It was not immediately apparent to the police that [Defendant] had been shot. However, after [Defendant] was handcuffed and escorted from the building, he complained of a headache. When an officer noticed blood on [Defendant's] forehead, and asked what happened, [Defendant] responded, "The old man shot me." Rescue workers were called and [Defendant] was taken to the hospital. While in the intensive care unit, [Defendant] told a nurse that he had to leave because he had "killed those people." When asked why, [Defendant] told the nurse, "They owed me money and I had to kill them."
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> * * * *
>
> As to each murder, the court found in aggravation: 1) [Defendant] was under a sentence of imprisonment at the time of the murder, 2) [Defendant] was convicted of a prior violent felony, 3) the murder was committed during the course of a robbery, and 4) the murder was committed for pecuniary gain, which the court merged with the "during the course of a robbery" aggravating factor. Although [Defendant] presented evidence that he had been abandoned at an early age by his mother and that he suffered from extreme emotional or mental disturbance throughout his life, the court found nothing in mitigation.

Id. at 348-49. Defendant then sought certiorari review in the United States Supreme Court, which was denied on October 2, 1995. *Jones v. Florida*, 516 U.S. 875 (1995).

After Defendant was determined to be competent to proceed with post conviction litigation, he filed an amended motion for post conviction relief raising 22 claims:

> (1) postconviction counsel was ineffective because of the lack of sufficient funding fully to investigate and prepare the postconviction motion; (2) [Defendant] was denied due process and equal protection because

records were withheld by state agencies; (3) no adversarial testing occurred at trial due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment material, newly discovered evidence, and improper rulings of the court; (4) trial counsel was ineffective for (a) failing adequately to investigate and prepare mitigating evidence, (b) failing to provide this mitigation to mental health experts, and (c) failing adequately to challenge the State's case; (5) trial counsel was burdened by an actual conflict of interest adversely affecting counsel's representation; (6) [Defendant] was denied due process because he was incompetent, and trial counsel failed to request a competency evaluation; (7) [Defendant] was denied a fair trial because of improper prosecutorial argument, and trial counsel was ineffective for failing to object; (8) [Defendant's] convictions are constitutionally unreliable based on newly discovered evidence; (9) [Defendant] was denied due process because the state withheld exculpatory evidence; (10) [Defendant's] death sentence is unconstitutional because the penalty phase jury instructions shifted the burden to [Defendant] to prove death was inappropriate; (11) the jury instructions on aggravating circumstances were inadequate, facially vague, and overbroad, and trial counsel was ineffective for failing to object; (12) [Defendant's] death sentence is unconstitutional because the State introduced nonstatutory aggravating factors, and counsel was ineffective for failing to object; (13) jury instructions unconstitutionally diluted the jury's sense of responsibility in sentencing, and trial counsel was ineffective for not objecting; (14) [Defendant] was denied his constitutional rights in pursuing postconviction relief because he was prohibited from interviewing jurors; (15) [Defendant] is innocent; (16) execution by electrocution is unconstitutional; (17) Florida's capital sentencing statute is unconstitutional facially and as applied; (18) [Defendant's] conviction and sentence are unconstitutional because the judge and jury relied on misinformation of constitutional magnitude; (19) [Defendant's] death sentence is unconstitutional because it is predicated on an automatic aggravating circumstance, and counsel was

> ineffective for failing to object; (20) [Defendant] "is insane to be executed"; (21) because of juror misconduct, [Defendant's] rights were violated; and (22) cumulative errors deprived [Defendant] of a fair trial.

Jones v. State, 855 So. 2d 611, 614 n.2 (Fla. 2003).

The lower court ordered an evidentiary hearing on "Claim III-Voluntary Intoxication;" "Claim IV-Mental Health and Family History Mitigation;" and "Claim VI-Competency Prior to Trial." (PCR1. 365) After the evidentiary hearing, the lower court denied all of the claims. (PCR1. 379-96)

Defendant appealed the denial of his first motion for post conviction relief, raising 5 issues:

> (1) "that trial counsel was constitutionally ineffective for failing to investigate a voluntary intoxication defense, failing to present other evidence consistent with the defense at trial, failing to challenge several jurors for cause, and failing to ensure [Defendant's] presence at all critical stages of trial, and that no reliable adversarial testing occurred at the guilt phase as a result of the combined effects of trial counsel's deficient performance;" (2) "that defense counsel had a conflict of interest that denied [Defendant] the effective assistance of counsel;" (3) "that no adequate adversarial testing occurred at the penalty phase because trial counsel failed properly to investigate and present available mitigation, failed to present evidence to support the unconstitutionality of [Defendant's] prior convictions, and failed to object to constitutional error with regard to jury instructions;" (4) "that the lower court erred in determining that public documents were exempt from disclosure;" (5) "that he is 'insane to be executed' but admits that this issue is not ripe for review."

Jones, 855 So. 2d at 615 n.4. Defendant also filed a petition

for writ of habeas corpus. This Court affirmed the denial of the motion for post conviction relief and denied habeas relief. *Jones v. State*, 855 So. 2d 611 (Fla. 2003). Regarding the claim of ineffective assistance of counsel regarding mitigation, the Florida Supreme Court held:

> The second claim we address concerns the penalty phase of [Defendant's] trial. During this phase, Dr. Toomer, a psychologist, testified to the jury regarding mental mitigating factors. In addition, Dr. Eisenstein, a neuropsychologist, testified to the court, as did Ms. Long, the aunt who raised [Defendant]. Following the penalty phase, the court found three aggravating factors, but nothing in mitigation, as follows:
>
> > As to each murder, the court found in aggravation: 1) [Defendant] was under a sentence of imprisonment at the time of the murder, 2) [Defendant] was convicted of a prior violent felony, 3) the murder was committed during the course of a robbery, and 4) the murder was committed for pecuniary gain, which the court merged with the "during the course of a robbery" aggravating factor. Although [Defendant] presented evidence that he had been abandoned at an early age by his mother and that he suffered from extreme emotional or mental disturbance throughout his life, the court found nothing in mitigation.
>
> 652 So.2d at 348-49 (footnote omitted).
>
> Although it is clear that evidence of mitigation was presented at trial, [Defendant] now contends that his counsel provided ineffective assistance by failing adequately to investigate and present mitigation during the penalty phase. In support of this claim, at the evidentiary hearing [Defendant] presented the testimony of two of his relatives regarding his childhood and of several expert witnesses who had

evaluated [Defendant] before his trial but did not testify. The trial court concluded that counsel's investigation was reasonable and that [Defendant] failed to establish prejudice. Competent, substantial evidence supports this determination.

An attorney has a duty to conduct a reasonable investigation for possible mitigating evidence. *See Rose v. State*, 675 So. 2d 567, 571 (Fla. 1996). The evidence demonstrates that [Defendant's] trial counsel fulfilled that duty. [Defendant's] trial counsel testified that [Defendant] told him that he was frequently beaten during his childhood, and counsel interviewed several people. The aunt who raised [Defendant] contradicted [Defendant's] claims. She described [Defendant's] childhood as largely "idyllic," as did another of [Defendant's] close relatives. In addition, one of [Defendant's] teachers described [Defendant] as a good student, and school records obtained by counsel bore this out. She also said she never saw any evidence of abuse. At the evidentiary hearing, [Defendant] presented the testimony of his sister and cousin to corroborate his claim. Although [Defendant's] sister Pamela, who lived in New York, arguably corroborated [Defendant's] claim, she testified that she did not know how to contact anyone in her family until 1997 and that no one in her family knew how to contact her during this time, either. The evidence therefore supports the court's finding that she was unavailable. In addition, the court found both her testimony and that of [Defendant's] cousin was not credible and was contradicted by the evidence [Defendant's] trial counsel was actually able to obtain at the time of trial. Thus, there is no credible evidence that additional investigation by [Defendant's] trial counsel for family mitigation would have been fruitful.

[Defendant's] related contention that trial counsel failed to conduct a reasonable investigation into mental health mitigation fails as well. [Defendant's] trial counsel testified that he had [Defendant] evaluated by six different experts: a neuropsychologist, a neurologist, and four psychologists. He then specifically chose to rely on

> Dr. Toomer and Dr. Eisenstein based on the quality and quantity of their work. Accordingly, as the trial court found, defense counsel's decisions regarding which experts should testify was both reasonable and strategic in nature, and he cannot now be deemed ineffective for failing to call additional mental health witnesses to testify. *See Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997). Further, the evidence supports the trial court's conclusion that the testimony of [Defendant's] experts at the evidentiary hearing conflicted with regard to diagnosis, the interpretation of the information provided them, and the applicability of mitigators, and defense counsel cannot be deemed ineffective for not presenting these conflicting opinions. *See Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000) ("[T]he trial court correctly found that trial counsel conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert.").
>
> [Defendant] also claimed that counsel failed to provide the experts with additional information. As the lower court found, this claim fails as well. Dr. Toomer testified that all the "new information" [Defendant] provided him before the evidentiary hearing merely reinforced, but left unchanged, his conclusions presented at trial.

Id. at 617-19.

While the appeal from the denial of the first motion for post conviction was still pending, Defendant filed a second motion for post conviction relief, raising a claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and a claim of cumulative error. (PCR2. 28-102) The motion was dismissed for lack of jurisdiction. (PCR2. 138) After the appeal of the denial of the first motion for post conviction relief concluded,

Defendant refiled his second motion for post conviction relief. (PCR2-SR. 1-85) The trial court summarily denied the motion, finding the claims barred, insufficiently plead and refuted by the record. (PCR2. 246-49)

Defendant appealed the denial of the second motion. On March 5, 2005, this Court relinquished jurisdiction so that the trial court could hold an evidentiary hearing on the claim that Defendant was mentally retarded. (PCR2-SR2. 47) After conducting that hearing, the trial court again denied Defendant's motion, finding no credible evidence that Defendant was mentally retarded. (PCR2-SR2. 495-506) Defendant again appealed the denial of his motion. On May 24, 2007, this Court affirmed the denial of the second motion for post conviction relief. *Jones v. State*, 966 So. 2d 319 (Fla. 2007).

On November 29, 2010, Defendant filed a third motion for post conviction relief, raising one claim:

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

(PCR3. 36-79)[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 was reviewed and that the alleged change

[2] The symbol "PCR3." will refer to the record on appeal in the instant appeal.

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.* The motion was unverified but stated that Defendant had reviewed and approved of the motion and that the written verification would be filed shortly. (PCR3. 60 n.14)

At the beginning of the *Huff* hearing, Defendant filed a motion claiming that he was incompetent to proceed with the motion for post conviction relief and requesting a stay of the proceedings pending a competency evaluation. (PCR3. 84-89, 159) In the motion, Defendant's counsel averred that Defendant had refused to verify the motion. The motion stated that during a meeting to sign the verification, Defendant had made statements regarding his attorneys, the Department of Corrections, the Office of the Attorney General and the State Attorney's Office, and that Defendant had written to the federal court presiding over his federal habeas petition complaining about his attorneys and his treatment by the Department of Corrections. (PCR3. 84-89)

In arguing the motion, Defendant's counsel acknowledged that Defendant had been found competent at the time of the first motion for post conviction relief but asserted that Defendant's

refusal to sign the successive motion and his writing of letters to the federal court showed that he had decompensated. (PCR3. 159-61) The State responded that the issue of competence was not properly raised because there was no issue that required Defendant's factual input since Defendant's claim of ineffective assistance of counsel had already been heard and Defendant was merely claiming that an allegedly incorrect standard of review was applied to the facts presented. (PCR3. 161)

When the lower court inquired if the State was agreeing that the allegations about Defendant's alleged incompetence were sufficient to show an issue regarding competence, the State responded that it was not doing so. Instead, the State asserted that Defendant's unhappiness without counsel was caused by Defendant's counsel having engaged in an *ex parte* communication with the federal court concerning a possible evidentiary hearing, which resulted in Defendant believing that he would be allowed to return to South Florida and that Defendant's displeasure was also a result of counsel's inability to file civil rights suits on Defendant's behalf about prison conditions. (PCR3. 162-63) The State also pointed out that because Defendant had waited until the parties were in court to serve the motion, it had been precluded from presenting the letters written to the federal court to show that they did not

support a claim of incompetence. (PCR3. 162-63)

After considering these arguments, the lower court found that Defendant's factual input was not necessary to address whether there had been a change in law that would apply retroactively. (PCR3. 163) As such, the lower court denied the competency motion without prejudice to being raised again if Defendant's factual input became necessary. (PCR3. 163-64)

Regarding the merits of the claim, 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. (PCR3. 164-72) 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. (PCR3. 174-76) The State also noted that the problem the Court had found with the analysis in *Porter* did not concern giving deference to factual finding. (PCR3. 175) Instead, the problem the Court identified concerned the failure to make factual findings. (PCR3. 175-76)

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. (PCR3. 176-78) 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). (PCR3. 177) Defendant acknowledged that he had not considered these factors but suggested that they might allow retroactivity depending on what the alleged change in law was. (PCR3. 178-79)

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. (PCR3. 180) He acknowledged that the problem in *Porter* had been the failure to make factual findings. (PCR3. 180-82)

Defendant asserted that the alleged change in law in *Porter* applied to his case because the post conviction court had rejected the opinions of his experts after the evidentiary hearing on his first motion for post conviction relief. (PCR3. 185-86) The State responded that *Porter* would not be applicable

to Defendant even if it had changed the law because his counsel had been found not to be deficient and because the findings regarding the experts were factual findings. (PCR3. 197-98)

On February 2, 2011, the lower court denied the motion. (PCR3. 118-23) 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. 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 prove 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 convictions and sentences became final on October 2, 1995, when the United States Supreme Court denied certiorari after direct review. *Jones v. Florida*, 516 U.S. 875 (1995). As Defendant did not file this motion until 2010, more than ten years after his convictions and 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 28-29. 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 "full scale repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 1, 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 "full scale repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 1, 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 25-26, 28-30. 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).[3] 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. State*, 833 So. 2d 766, 781 (Fla. 2004), and this case, *Jones v. State*, 855 So. 2d 611, 616 (Fla. 2003). Thus, to find that

[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 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).

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 27-28. 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.[4] 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 significance. *Id.* at 929-30. To meet the third element of this test, the change in law must (1) "place beyond the authority of

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

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, while Defendant admits that a change in law is not retroactive under *Witt* unless this standard is met, he makes no attempt to show how the change in law that he alleges occurred meets this standard. In fact, he never clearly identifies what change in law *Porter* allegedly made, offers no purpose behind that alleged change in law and does not mention how extensive the reliance on the allegedly old law was or what the effect on the administration of justice would be. He does not even challenge the lower court's findings regarding these issues. Given these circumstances, the lower court properly found that Defendant failed to establish that the change in law he alleges occurred would be retroactive under *Witt*. It should be affirmed.

Instead of attempting to show that the change in law he

alleges occurred meets *Witt*, Defendant notes that this Court found that *Hitchcock v. Dugger*, 481 U.S. 393 (1987), constituted a retroactive change in law. He then suggests that because both cases involved findings of error in Florida cases, the change in law he asserts occurred in *Porter* should be too. However, the mere fact that this Court found a change in law based on a determination that this Court had made an error to meet the *Witt* standard in one case does not dictate that the *Witt* standard is satisfied by a finding that this Court committed a different error in a different case. This is particularly true when one considers the difference in the errors found in *Hitchcock* and *Porter* and the relationship between those errors and the *Witt* standard.

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 a determination 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.

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 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.

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.

Here, the claim of ineffective assistance of counsel for failing to investigate and present mitigation was denied not only on a finding that Defendant did not prove prejudice but also on a finding that Defendant did not prove deficiency. *Jones*, 855 So. 2d at 617-19. The lack of deficiency was based on the fact that counsel had investigated mitigation through speaking to Defendant and his family members and having Defendant evaluated by six mental health professionals. *Jones*, 855 So. 2d at 617-19. Defendant does not even suggest how *Porter* would have affected this determination. In fact, he ignores the evidence presented at the evidentiary hearing that supported that finding. 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.

Porter does not compel a different result. There, counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records about the defendant and never requested any mental health evaluation for mitigation at

all. *Porter*, 130 S. Ct. at 453. In contrast here, counsel here testified he spoke to Defendant about mitigation, had a social worker speak to Defendant about mitigation, attempted to contact every witness who was claimed to have information about Defendant, spoke to the witnesses who could be located, obtained Defendant's school and prison records, attempted to locate records about prior hospitalizations and had Defendant evaluated by six different mental health experts. (PCR1. 470-624) Given these circumstances, the lower court properly determined the claim was barred. It 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 successive 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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