IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-493

WILLIAM LEE THOMPSON,

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

In its resentencing opinion,[1] this Court summarized the procedural history and facts of proceedings:

> The procedural history of this cause reflects that on April 14, 1976, [Defendant] and Rocco Surace were charged by indictment with the first-degree murder, kidnapping, and involuntary sexual battery of Sally Ivester. [Defendant] entered a plea of guilty in the trial court but, on appeal, this Court allowed him to withdraw his plea and remanded the case for further proceedings. *Thompson v. State*, 351 So. 2d 701 (Fla. 1977). [Defendant] entered a second plea of guilty and a penalty phase jury recommended the death penalty. The trial judge imposed the death penalty and this Court affirmed the trial judge's order in *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). [Defendant] then filed a Florida Rule of Criminal Procedure 3.850 motion, which this Court denied in *Thompson v. State*, 410 So. 2d 500 (Fla. 1982). After this Court denied the rule 3.850 motion, [Defendant] sought federal habeas corpus relief. Both the United States District Court and the Eleventh Circuit Court of Appeals denied [Defendant] relief. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986). [Defendant] then filed a second

[1] The symbols "R." will refer to the record on appeal and transcript of proceedings from Defendant's resentencing appeal, FSC Case No. 75,499. The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal from the third motion for post conviction relief, FSC Case No. SC87481. The symbol "PCR2." will refer to the record on appeal in case no. SC03-2129. The symbols "PCR3." and "PCR3-SR." will refer to the record on appeal and supplemental record on appeal in the FSC Case No. SC05-279. The symbols "PCR4." and "PCR4-SR." will refer to the record on appeal and supplemental record on appeal in FSC Case No. SC07-2000. Because the clerk did not consecutively paginate the transcripts contained in volumes 8, 9 and 10 of that record, these transcripts will be referred to as "PCR4-V[volume number]. [page number]." The symbol "PCR5." and "PCR5-SR." will refer to the record on appeal, which includes the transcripts of proceedings, and supplemental record on appeal in FSC case no. SC09-1085. The symbol "PCR6." will refer to the record in the instant appeal.

rule 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of nonstatutory mitigating circumstances in the penalty phase. The trial court denied relief, but this Court reversed under the authority of *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), and remanded for resentencing. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), *cert. denied*, 485 U.S. 960, 108 S. Ct. 1224, 99 L. Ed. 2d 424 (1988). This second sentencing proceeding is the subject of this appeal.

The pertinent facts, as articulated by this Court in *Thompson v. State*, 389 So. 2d 197, 198 (Fla. 1980), are as follows:

> [Defendant], Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which the appellant [Defendant] began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage,

who apparently feared equivalent treatment had she tried to leave the motel room.

In the second penalty phase proceeding, the State introduced into evidence the prior testimony of the eyewitness, Barbara Savage, whom the State was unable to locate to testify in person. The trial court found that the State had made a diligent effort to locate this witness prior to the resentencing proceeding. Next, the State introduced [Defendant's] prior testimony at the trial of his codefendant, Rocco Surace, in which [Defendant] admitted hitting the victim with a chain belt and battering her with a chair leg and a billy club. In this testimony, [Defendant] denied Surace's participation and confessed to the repeated beating of the victim.

[Defendant] presented numerous witnesses who testified in mitigation of his conviction, including a former church pastor, a church elder, a church member, an elementary school principal, and several family members. [Defendant's] former church pastor described [Defendant's] as a slow learner and a follower who did not exhibit any violent or aggressive behavior. A church elder described [Defendant] as someone needing to be led, while the elder's wife described him as very faithful. Testifying from school records, an elementary school principal stated that [Defendant] had an IQ of seventy-five, had been recommended for special educational placement, and had been a follower, not a leader. Family members testified regarding the filthy home and affectionless environment in which [Defendant] had been raised. [Defendant's] ex-wife and mother of his two children described [Defendant] as a loving and gentle husband who was never physically violent or abusive. She also described [Defendant] as mentally slow and a follower and that their marriage failed partly because of his alcoholism.

In an affidavit introduced by [Defendant], Barbara Savage characterized the codefendant, Rocco Surace, as the gang-leader, who knew how to manipulate people. She described [Defendant] as a gullible and easygoing person, who was easily manipulated. However, Savage's characterization of [Defendant] as a person

dominated by Surace was contradicted by her testimony at the original trial.

A psychologist who examined [Defendant] stated that [Defendant] was a battered child and characterized him as an extremely depressed person. The psychologist stated that [Defendant's] IQ was at the lowest possible level of low-average intelligence. The psychologist also found [Defendant] to be brain-damaged and that his touch with reality was so loose and fragile that she could not tell whether [Defendant] was aware of what he was doing during the assault.

A psychiatrist testified that he found [Defendant] to be retarded and easily led and threatened by Surace. He believed [Defendant] to have been brain-damaged since childhood, possibly since birth. He diagnosed [Defendant] as having organic brain disease and suffering from personality and stress disorders. A neurologist also testified that [Defendant] suffered from organic brain disease.

In rebuttal, the State called the codefendant, Rocco Surace. Surace blamed [Defendant] for the attack on the victim, while acknowledging that he had entered guilty pleas to the same offense. A psychiatrist presented by the State testified that he had evaluated [Defendant] after the incident in 1976. He found that [Defendant] could process information and that his memory was intact. The psychologist concluded that [Defendant] suffered from an inadequate personality disorder and a long-standing pattern of antisocial and impulsive behavior.

The State called another psychiatrist as an expert witness, who had seen [Defendant] in 1976, and, while he stated that "there was tremendous anger, rage, aggression, and diminished control with the involvement of alcohol and a number of drugs that were used," he did not feel that [Defendant's] conduct resulted from a mental disorder. He stated his belief that [Defendant] had the capacity to know what was right and what was wrong. A psychiatrist presented by the prosecution stated that he had examined [Defendant] in November of 1988 and had found no

> indication of organic brain disease or any serious deficiencies in [Defendant's] ability to reason, understand, or know right from wrong. He also stated that he did not believe that [Defendant] acted under the influence of extreme mental or emotional disturbance or that [Defendant's] capacity to appreciate the criminality of his conduct was substantially impaired. Furthermore, the psychiatrist stated that he did not believe [Defendant] acted under the substantial domination of another. Another psychologist presented by the State testified that [Defendant] had adequate communication skills and good general memory. He did not find [Defendant] to be overly susceptible to suggestion and found no evidence of major mental illness.
>
> The jury, by a vote of seven to five, recommended the imposition of the death penalty. The trial judge imposed the death sentence, finding four aggravating circumstances, specifically that: (1) the crime was committed while [Defendant] was engaged in the commission of the crime of sexual battery; (2) the crime was committed for financial gain; (3) the crime was especially heinous, atrocious, or cruel; and (4) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge expressly rejected, in detail, each of the mitigating circumstances, including that [Defendant] lacked the capacity to appreciate the criminality of his conduct. The trial judge noted in this regard that, although [Defendant's] IQ score was in the dull-normal range, there was evidence that [Defendant] functioned on a higher level. The trial judge concluded that "the aggravating factors in this case far outweighed any possible mitigating circumstances."

Thompson v. State, 619 So. 2d 261, 262-64 (Fla. 1993).

On resentencing appeal, Defendant raised 6 issues. This Court affirmed Defendant's death sentence. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993). Defendant sought certiorari review in the United States Supreme Court, which was denied on November

3, 1993. *Thompson v. Florida*, 510 U.S. 966 (1993).

On November 8, 1995, Defendant filed his third motion for post conviction relief, raising 45 claims. (PCR-SR. 62-233) On March 6, 1997, the trial court summarily denied the motion, finding that most of the claims were procedurally barred and that a claim of newly discovered evidence, a claim of ineffective assistance of counsel at the guilt phase, a claim of ineffective assistance of counsel regarding voir dire at resentencing and a claim of juror misconduct were insufficiently plead. (PCR-SR. 274-89)

Defendant appealed the denial of his third motion for post conviction relief to this Court, raising 18 issues:

> (1) the trial court erred in summarily denying his claim that the State denied public records in violation of chapter 119, Florida Statutes; (2) the trial judge presiding over the postconviction proceedings should have granted [Defendant's] motion to disqualify; (3) [Defendant] should have been granted an evidentiary hearing on his 3.850 claims; (4) the failure to have the full appellate record transcribed denied [Defendant] his Sixth, Eighth, and Fourteenth Amendment rights; (5) [Defendant's] Sixth Amendment rights were violated because his counsel had a conflict of interest; (6) the State withheld material, exculpatory evidence; (7) the admission of Barbara Savage's prior testimony during resentencing repeated the *Hitchcock* error that had caused this Court to previously vacate the death sentence; (8) the trial court improperly excluded mitigating evidence; (9) State misconduct and ineffectiveness of trial counsel denied [Defendant] a fair trial; (10) [Defendant's] death sentence rests on an unconstitutional aggravating circumstance: that the murder was committed in the course of a sexual

> battery; (11) the jury instructions unconstitutionally shifted to [Defendant] the burden of proving that death was not an appropriate sentence; (12) the jury instructions unconstitutionally diluted the jury's sense of sentencing responsibility; (13) the jury was improperly instructed on the cold, calculated, and premeditated aggravating circumstance and this Court conducted a constitutionally deficient harmless error analysis when it struck this aggravating circumstance on direct appeal; (14) [Defendant] was incompetent to make a knowing, intelligent and voluntary guilty plea; (15) the trial court erred in permitting the introduction of nonstatutory aggravating factors and considering the same acts to support different aggravating factors; (16) the rule prohibiting [Defendant] from contacting jurors to determine if misconduct occurred is unconstitutional; (17) [Defendant] is not competent to be executed; and (18) electrocution constitutes cruel and unusual punishment.

Thompson v. State, 759 So. 2d 650, 655 n.4 (Fla. 2000). He also filed a petition for writ of habeas corpus, raising 36 claims. *Id.* at 656 n.5. On April 13, 2000, this Court affirmed the denial of post conviction relief and denied state habeas relief. *Id.* at 654. In doing so, this Court found:

> In his fourth postconviction claim and his first and second habeas claims, [Defendant] contends that this Court was not provided with an adequate record during the direct appeal because some pretrial hearings and bench conferences were not transcribed and included in the appellate record. Because [Defendant] did not raise any inadequacy in the appellate record during direct appeal, his postconviction claim on this basis is procedurally barred. *See Torres-Arboleda v. Dugger,* 636 So. 2d 1321, 1323-24 (Fla. 1994) (finding claim that the charge conferences should have been transcribed was procedurally barred in postconviction motion).

* * * *

[Defendant's] sixth and seventh postconviction issues and thirteenth habeas claim, a portion of his twentieth habeas claim and his thirty-fourth habeas claim all center on the testimony of Barbara Savage. Savage was an eyewitness to the crime. During the resentencing proceeding, the trial court found Savage to be an unavailable witness. The State then introduced Savage's testimony from the second sentencing proceeding and [Defendant] introduced an affidavit in which Savage averred to the existence of mitigating circumstances. In these proceedings, [Defendant] makes several related claims, including that a *Hitchcock* error occurred during resentencing because he was unable to introduce mitigating evidence due to Savage's unavailability and that the State committed a *Brady* [FN7] violation by coercing Savage into not testifying.

During the direct appeal from this resentencing, we extensively examined the issue of Savage's unavailability and concluded that the use of Savage's prior testimony did not deny [Defendant's] rights to due process or confrontation. *See Thompson*, 619 So. 2d at 265. [Defendant's] claims that the introduction of Savage's prior testimony resulted in a *Hitchcock* error are procedurally barred because [Defendant] already raised this claim on direct appeal, [FN8] and we decided the issue against him. *See id.* "As we held in *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990), '[p]roceedings under rule 3.850 are not to be used as a second appeal.'" *Rutherford v. State*, 727 So. 2d 216, 218-19 n.2 (Fla. 1998). Further, we deny habeas claims twenty and thirty-four. Appellate counsel cannot be deemed ineffective because these claims were actually raised on direct appeal. *See, e.g., Groover*, 656 So. 2d at 425.

* * * *

In his ninth postconviction issue, [Defendant] raises a myriad of ineffective assistance of trial counsel claims, which the trial court summarily denied because the issues had either been fully litigated on direct appeal or the assertions did not meet the requirements of *Strickland v. Washington*, 466 U.S.

668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In portions of claim twenty of his habeas petition, [Defendant] reasserts many of these claims including a sentence that appellate counsel was ineffective for failing to raise the issues on direct appeal.

Under rule 3.850(d), postconviction defendants are entitled to an evidentiary hearing on an initial 3.850 motion unless the motion and record conclusively show that no relief is warranted. *See Gaskin*, 737 So. 2d at 516; Fla. R. Civ. Pro. 3.850(d). In the seminal case setting forth the standard under which courts should evaluate claims of ineffectiveness of counsel, the United States Supreme Court explained:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S. Ct. 2052 (emphasis supplied); *see Rutherford*, 727 So. 2d at 219 (quoting *Strickland*). An evidentiary hearing is required on a postconviction claim of ineffectiveness of trial counsel if the motion contains "specific 'facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant.'" *Gaskin*, 737 So. 2d at 516 (quoting *Roberts v. State*, 568 So. 2d 1255, 1259 (Fla. 1990)). When reviewing a trial court's summary denial, this Court must accept as true the defendant's factual allegations to the extent they are not rebutted by the record. *See Gaskin*, 737 So. 2d at 516. For the reasons expressed below, we affirm the trial court's denial of

postconviction relief and find the habeas claims to be meritless.

At the outset, we note that "allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." *Teffeteller*, 734 So. 2d at 1023. On direct appeal, this Court has already considered many of the substantive claims now recast as ineffectiveness of trial counsel and found them to be without merit. [FN9] We thus affirm the trial court's order denying relief on [Defendant's] claims that trial counsel had been ineffective in not objecting more "strenuously" to the admission of autopsy photographs, failing to request that the trial court conduct individual voir dire of the jurors, and failing to secure the admission of additional mitigating evidence during the resentencing proceedings.

[Defendant] asserts that defense counsel was ineffective for failing to object to several improper remarks by the prosecutor. Because none of these prosecutorial comments would have constituted reversible error had they been objected to at trial, we affirm the trial court ruling summarily denying this claim. *See Turner*, 614 So. 2d at 1079 (rejecting claim that counsel was ineffective for failing to object where improper prosecutorial comments did not have the effect of depriving the defendant of a fair trial). In addition, we deny the corresponding habeas claim seventeen as meritless because appellate counsel cannot be deemed ineffective for failing to raise improper comment on direct appeal that would not have constituted reversible error. *See, e.g., Teffeteller*, 734 So. 2d at 1027; *cf. Johnson v. Wainwright*, 498 So. 2d 938, 939 (Fla. 1986)(granting habeas relief after finding that appellate counsel was ineffective for failing to raise an issue that was properly preserved and would have constituted reversible error had it been raised on direct appeal).

[Defendant] argues that defense counsel's closing argument was deficient because counsel stated that the consideration of mitigating evidence should be limited to "a few enumerated examples" and conceded the

applicability of the HAC aggravator. As for arguments concerning mitigating factors, contrary to [Defendant's] allegations, the record reflects that defense counsel told the jury they could consider in mitigation "anything else" that the jury had heard. Defense counsel actually argued the applicability of many nonstatutory mitigating factors, including that [Defendant] consumed alcohol and drugs on the day of the crime, "mental debilitation," his troubled family background, [Defendant] was less culpable than Surace, potential for rehabilitation as shown by the fact that [Defendant] earned his G.E.D., brain damage, and remorse.

When discussing aggravating circumstances, defense counsel stated that out of ten statutory aggravating circumstances, the State had only argued that four were applicable and in the "light most favorable to the prosecutor" three may have been proven. When defense counsel's statements are taken in context, these statements do not constitute deficient performance.

[Defendant] argues that counsel was ineffective for failing to request an instruction explaining to the jury why [Defendant] was being resentenced twelve years after the crime, failing to object to questions from the State suggesting that [Defendant] might be released from prison in thirteen years, and failing to introduce evidence that he would not be eligible for parole. The record shows that defense counsel informed the jury that the reason the resentencing proceedings were being held was because this Court had twice reversed the death penalty. Thus, counsel's performance was not deficient for failing to also request a trial court instruction to this effect. We therefore also deny [Defendant's] habeas claim thirty-three, that appellate counsel was ineffective for failing to raise this issue.

In addition, counsel's failure to request instruction of the jury that [Defendant] would not be released from prison or eligible for parole does not constitute deficient performance under *Strickland* because the sentencing statute allowing juries to recommend a sentence of life without the opportunity

for parole only became effective in 1994, after the resentencing proceeding in this case. *See* §775.082(1) (Supp. 1994); *Bates v. State*, 750 So. 2d 6 (Fla. 1999). Further, the trial court instructed the jury that [Defendant] had received life sentences on the kidnapping and sexual battery charges. In addition, the jury heard the testimony of Surace, who also received life sentences on these charges, that he would not be eligible for parole for thirty years. Accordingly, [Defendant] has not shown deficient performance. We also deny habeas claim thirty-one as meritless because appellate counsel's performance was not deficient for failing to raise this issue on direct appeal.

[Defendant] also raises error in various standard jury instructions, asserting that trial counsel was ineffective for failing to object to these instructions and appellate counsel was ineffective for failing to raise these issues on direct appeal. [FN10] The substantive challenges to these jury instructions are procedurally barred because [Defendant] could have raised these claims on direct appeal. *See Valle*, 705 So. 2d at 1336; *Harvey v. Dugger*, 656 So. 2d 1253, 1255-56 (Fla. 1995).

As for [Defendant's] alternative ineffectiveness claims, we have previously stated that trial counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not render counsel's performance deficient. *See Downs*, 740 So.2d at 518. We find to be without merit [Defendant's] claims that counsel was ineffective for failing to object to instructions that failed to instruct the jurors on the definition of reasonable doubt, *see Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996)(finding no error when a jury is instructed on reasonable doubt but not given a definition of the term), that impermissibly shifted the burden of proof to the defendant to establish that death was not an appropriate sentence, *see, e.g., Downs*, 740 So. 2d at 517 n.5 (finding claim that counsel failed to object to instructions that allegedly shifted the burden of proving that death is not an appropriate penalty to the defendant to be without merit as a matter of law); *Demps v. Dugger*, 714 So. 2d 365, 368 & n.8 (Fla. 1998)

(noting that the Court had rejected this claim many times), and that diluted the jury's sense of sentencing responsibility, *see Teffeteller*, 734 So. 2d at 1023-24. We also affirm the trial court's denial of [Defendant's] claim that counsel was ineffective for failing to object to the standard instruction on expert witnesses, which has not been invalidated by this Court, because counsel's performance was not deficient for failing to object to these instructions. We also deny [Defendant's] corresponding habeas claims of ineffectiveness of appellate counsel for failing to raise these issues on direct appeal because counsel cannot be deemed ineffective for failing to object to meritless issues. *See Groover*, 656 So. 2d at 425.

[Defendant] also alleges that counsel was ineffective for failing to secure [Defendant's] right to the assistance of mental health professionals under *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), and in habeas issue twenty-one, he argues that appellate counsel was ineffective for failing to raise this issue on appeal. *Ake* requires that an indigent defendant be afforded the assistance of a psychiatrist when his or her mental state is at issue. *Id.* at 83, 105 S. Ct. 1087. However, [Defendant] had the assistance of a psychiatrist and two psychologists during the resentencing proceeding. [Defendant] makes no specific allegations as to how his counsel was deficient in failing to prepare the psychiatrists or how their evaluations would have changed had counsel performed effectively. Thus, these claims are insufficient.

[Defendant] also argues that counsel was ineffective for failing to secure his presence during a hearing concerning the sequestration of the victim's mother. However, this legal argument was reargued in [Defendant's] presence and decided in his presence. [Defendant] also points to his counsel's failure to secure his presence during a hearing to reimburse defense counsel's costs. However, a defendant only "has a constitutional right to be present at all crucial stages of his trial where his absence might frustrate the fairness of the proceedings." *Garcia v. State*, 492 So. 2d 360, 363 (Fla. 1986); *see Cole v. State*, 701 So. 2d 845, 850 (Fla. 1997), *cert. denied*,

523 U.S. 1051, 118 S. Ct. 1370, 140 L. Ed. 2d 519 (1998). Because of both the nature of the proceedings and the fact that [Defendant] would have been of no assistance to counsel in making these purely legal arguments, his absence at a hearing concerning the reimbursement of defense counsel's costs neither violated his constitutional rights nor frustrated the fairness of the proceedings. *See Cole*, 701 So. 2d at 850; *Garcia*, 492 So. 2d at 363. Thus, these ineffectiveness claims are without merit.

[Defendant] argues that the trial court should have granted defense counsel's motion to disqualify the Assistant State Attorney so that the defense could call him as a witness concerning the availability of witness Savage. However, the trial court is not required to grant a motion to disqualify just because the defense would like to call the State as a witness. *See Scott v. State*, 717 So. 2d 908 (Fla.), *cert. denied*, 525 U.S. 972, 119 S. Ct. 425, 142 L. Ed. 2d 346 (1998).

[Defendant] also claims that defense counsel was ineffective for failing to control persons in the courtroom observing the trial. However, the record reflects that the jury was removed immediately after unknown people "sighed" and said "oh my God." [Defendant] fails to allege how he was prejudiced by this. Finally, [Defendant's] claim that counsel was ineffective for failing to object to improper victim impact evidence has already been decided adversely to him. *See Jones v. State*, 748 So. 2d 1012 (Fla. 1999); *Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996).

In his tenth postconviction claim, [Defendant] alleges that his conviction rests on an unconstitutional automatic aggravating circumstance, that the murder was committed during the course of a felony (the sexual battery). This claim is procedurally barred because it could have been raised on direct appeal. To the extent that this claim also raised the ineffectiveness of trial counsel for the failure of counsel to properly preserve this issue for appellate review, we find the claim to be without merit. *See Banks v. State*, 700 So. 2d 363, 367 (Fla. 1997)(finding that instruction of aggravating

circumstance of committed while engaged in a sexual battery does not constitute an automatic aggravator), *cert. denied*, 523 U.S. 1026, 118 S. Ct. 1314, 140 L. Ed. 2d 477 (1998). Accordingly, counsel was not ineffective for failing to preserve this issue. Likewise, we also deny habeas claim nineteen because appellate counsel cannot be deemed ineffective for failing to raise meritless issues. *See Groover*, 656 So. 2d at 425.

* * * *

[FN7] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[FN8] *See* Initial Brief of Appellant William Thompson at 41, *Thompson v. State*, 619 So. 2d 261 (Fla. 1993) (No. 75,499).

[FN9] This Court has already concluded that although the trial court erred in admitting autopsy photographs, it was harmless in light of the other photographs admitted and the testimony of the witnesses, the medical examiner, and [Defendant] himself. *See Thompson*, 619 So. 2d at 266. Trial counsel objected to the admission of these photographs. We further concluded on direct appeal that the trial court did not err in excluding the testimony of the original trial judge that he would not have imposed the death penalty had this evidence been available. *See id.* Likewise, we rejected the claim that the admission of Barbara Savage's testimony from the previous trial violated [Defendant's] rights to due process and confrontation. *See id.* at 265. This Court also found no merit to [Defendant's] argument on direct appeal that the trial court failed to conduct individual voir dire after a juror expressed concern that [Defendant] could be released from jail in twelve years. *See id.* at 265. The trial court had instructed the jury that eligibility for parole was not a valid consideration. *See id.*

[FN10] In postconviction issue nine and habeas issue thirty-five, [Defendant] challenges the standard jury instructions on the weight to be accorded expert witnesses. In postconviction issue nine and habeas

> issue thirty, [Defendant] raises the failure of the standard penalty phase instructions to define reasonable doubt. In his eleventh postconviction claim and habeas claim fifteen, [Defendant] challenges standard jury instructions that he claims shifted the burden to the defendant to prove that death was not an appropriate sentence. In postconviction claim twelve and habeas claim twenty-two, [Defendant] asserts that standard jury instructions unconstitutionally diluted the jury's sense of sentencing responsibility.

Id. at 660, 661-62, 663-67.

On November 15, 2001, Defendant served the original version of this fourth motion for post conviction relief. However, Defendant never properly served this motion. Defendant took no action to remedy the improper service or to have the motion heard. On June 18, 2003, Defendant served an amended fourth motion for post conviction relief, which exceeded the page limits, without requesting leave to amend. (PCR2. 3-37) The State filed a response to the amended motion and moved to strike it on July 8, 2003. (PCR2. 38-65) Defendant did not file a response to the motion to strike and had never filed a notice of appearance in this matter.

The lower court held a hearing on the motion to strike on July 29, 2003, and noticed the last attorney to file a notice of appearance on Defendant's behalf for this hearing. At this hearing, the trial court granted the State's motion to strike without hearing argument. (PCR2. 66, 100-03)

Defendant then moved to disqualify the trial court,

asserting that the hearing was an *ex parte* communication. (PCR2. 67-82) The lower court denied the motion for disqualification in a written order rendered on September 4, 2003. (PCR2. 88) Defendant attempted to appeal the order striking his motion and the order denying the motion for disqualification. However, this Court dismissed the appeal on the order striking the motion, treated the appeal regarding disqualification as a petition for writ of prohibition and denied the petition on the merits. *Thompson v. State*, 880 So. 2d 1213 (Fla. 2004).

On August 9, 2004, Defendant served the second amended version of his fourth motion for post conviction relief. (PCR3. 6-25) The lower court denied this motion, finding the mental retardation claim barred and refuted by the record. (PCR3. 26-33) Defendant appealed the denial of this motion. On July 9, 2007, this Court reversed the summary denial of the motion and remanded the matter to give Defendant another opportunity to plead his claim again in compliance with *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), within 30 days. *Thompson v. State*, 962 So. 2d 340 (Fla. 2007).

On August 8, 2007, Defendant served a third amended version of his fourth motion for post conviction relief, which did not plead the mental retardation claim in accordance with *Cherry* but did attempt to add three new claims. (PCR4. 545-620) The lower

court struck the additional claims and denied the mental retardation claim as insufficiently plead. (PCR4-V9. 6-11, PCR4. 681-82) Defendant again appealed the denial of the motion. This Court affirmed the striking of the additional claims but ordered an evidentiary hearing on the mental retardation claim. *Thompson v. State*, 3 So. 3d 1237 (Fla. 2009).

The lower court conducted the evidentiary hearing regarding the mental retardation claim, at which Defendant did not present any evidence that would prove retardation under Florida law. After the evidentiary hearing concluded, Defendant filed another motion to disqualify the lower court, asserting that this Court's rulings demonstrated bias. (PCR5. 805-17) The lower court denied the motion for disqualification. (PCR5. 818) The lower court then denied the retardation claim as unproven. (PCR5. 823-37) Defendant again sought a writ of prohibition regarding the denial of the disqualification motion, which was dismissed. *Thompson v. State*, 15 So. 3d 581 (Fla. 2009). Defendant also appealed the denial of the fourth motion for post conviction relief. On May 6, 2010, this Court affirmed the denial of the fourth motion. *Thompson v. State*, 41 So. 3d 219 (Fla. 2010).

On November 29, 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*.

(PCR6. 46-74) In support of that claim, Defendant argued that *Porter v. McCollum*, 130 S. Ct. 447 (2009), had somehow changed the manner in which the rejection of claims of ineffective assistance of counsel were reviewed and that the alleged change should be applied retroactively. *Id.* According to Defendant, this alleged change was significant with regard to every claim in which he had used the phrase "ineffective assistance" to refer to the conduct of resentencing counsel in the third motion for post conviction relief. *Id.* The motion was not verified, and Defendant did not file a verification until December 28, 2010. (PCR6. 46-74, 94)

At the *Huff* hearing, Defendant admitted that if *Porter* did not change the law, his motion was untimely. (PCR6. 129-30) However, Defendant insisted that *Porter* did change the law regarding claims of ineffective assistance of counsel and that the change applied retroactively because *Hitchcock v. Dugger*, 481 U.S. 393 (1987), had been applied retroactively. (PCR6. 130-31) He suggested that *Porter* required that an appellate court not defer to the fact findings of a trial court in ruling on a claim of ineffective assistance of counsel. (PCR6. 131) He acknowledged that this Court reviewed the summary denial of

the claims in his third motion for post conviction relief *de novo*. (PCR6. 132) However, he insisted that the determination that his claims were meritless was affected by *Porter* because considering all of his claims cumulatively might have entitled him to relief since determining that counsel was not ineffective in failing to object to comments in closing somehow resulted in discounting mitigation. (PCR6. 132-34)

The State responded that *Porter* not only did not change the law but also that it could not have done so because of the standard of review in federal habeas proceedings. (PCR6. 134-35) It also asserted that the requirement that deference be given to factual findings made in rejecting ineffective assistance claims was directly mandated by *Strickland* itself, which the United States Supreme Court had not even mentioned in *Porter*. (PCR6. 135-36) It averred that the real problem the Court had with *Porter* was that factual findings had not been made. (PCR6. 136) It also noted that deference had not been given to any factual findings in rejecting the claims in third motion for post conviction relief, as the claims as been denied as barred and insufficiently plead. (PCR6. 136)

Defendant replied that *Porter* had not changed the law set forth in *Strickland*. (PCR6. 137) However, he insisted that since the Court had found that this Court's application of that

law to the fact in *Porter* was unreasonable, it had somehow found that the Florida Courts were acting unconstitutionally regarding all claims of ineffective assistance of counsel in Florida. (PCR6. 137)

When the lower court indicated that it believed that *Porter* represented nothing more than an application of established law to the facts presented, particularly given that the state courts in *Porter* had not addressed deficiency, Defendant admitted it was right but that *Porter* somehow still applied retroactively to him. (PCR6. 138) Defendant then suggested that the lower court should grant him relief by considering the evidence he presented in support of his retardation claims as evidence supporting a claim that counsel had been ineffective in investigating his mental health. (PCR6. 138-39) The State responded that the claim regarding ineffective assistance regarding the mental health investigation had been rejected because the record showed that counsel had investigated Defendant's mental health. (PCR6. 139) Defendant replied that he believed he was entitled to relief because the post conviction presentation had been "better" than the presentation at resentencing. (PCR6. 139)

When the lower court indicated that it did not believe that such a claim had been plead, Defendant admitted that he had not done so but suggested that since he was entitled to a new

consideration of his claims, the lower court should consider the unplead claim. (PCR6. 140) The State responded that since there was no change in law, Defendant was not entitled to have his claims reconsidered. (PCR6. 140)

On February 7, 2011, the lower court denied the fifth motion for post conviction relief. (PCR6. 102-13) 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 previously denied claims. 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. 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 sentence became final on November 3, 1993, when the United States Supreme Court denied certiorari after direct review. *Thompson v. Florida*, 510 U.S. 966 (1993). As Defendant did not file this motion until 2010, more than 17 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 25 & n.2; PCR6. 137. 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 19, and not simply a determination that this Court misapplied the correct law to the facts of one case, this is not true.

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

As the United States Supreme Court has explained, 28 U.S.C. §2254(d)(1), provides two separate and distinct circumstances under which a federal court may grant relief based on a claim that the state court rejected on the merits: (1) determining that the ruling was "contrary to" clearly established United States Supreme Court precedent; and (2) determining that the ruling was an "unreasonable application of" clearly established United States precedent. *Williams v. Taylor*, 529 U.S. 362, 404-

05 (2000) . The Court explained that a state court decision fits within the "contrary to" provision when the state court got the legal standard for the claim wrong or reached the opposition conclusion from the United States Supreme Court on "materially indistinguishable" facts. *Id.* at 412-13. It further states that a state court decision would fit within the "unreasonable application" provision when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Given this holding, if the United States Supreme Court had determined that this Court had been applying an incorrect legal standard to *Strickland* claims, it would have found that Porter was entitled to relief because this Court's decision was "contrary to" *Strickland*; it did not. Instead, it found that this Court had "unreasonably applied" *Strickland*. *Porter*, 130 S. Ct. at 448, 453, 454, 455. By finding that this Court "unreasonably applied" *Strickland* in *Porter*, the Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions." *Williams*, 529 U.S. at 412. It simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." *Id.* at 412. Thus, Defendant's suggestion that the *Porter*

decision represents a "fundamental repudiation of this Court's *Strickland* jurisprudence," Initial Brief at 19, 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 34-35, 36-39. 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).[2] 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 *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

[2] 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).

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 25 & n.2; PCR6. 137. 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.[3] 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 the state the power to regulate certain conduct or impose

[3] 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.

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. (PCR6. 54-76, 130-31) 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 v. Dugger*, 481 U.S. at 398-99, the Court found that the giving of a jury instruction that told the jury not to consider nonstatutory mitigation was improper. As such, the purpose of finding this error was to permit a jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phase and could only have harmed a defendant if he was sentenced to death, the number of cases in which there had been an error that would need retroactive correction was limited. Further, because the error was in a jury instruction, determining whether that error occurred in a particular case was simple. All one needed to do was review the jury instructions that had been given in a particular case to see if it was the offending instruction. Courts were not required to comb through stale records looking for errors. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). Thus, the purpose of the new rule, extent of reliance on the old

rule and effect on the administration of justice in *Hitchcock* militated in favor of retroactivity.

In contrast, *Porter* involved nothing more than determining that this Court had unreasonably applied a correctly stated rule of law to the facts of a particular case, as noted above. Thus, the purpose of *Porter* was nothing more than to correct an error in the application of the law to the facts of a particular case. Moreover, as the lower court found, Florida courts have extensively relied on the standard of review from *Strickland* that this Court recognized in *Stephens* and the effect on the administration of justice from applying the alleged change in law in *Porter* retroactively would be to bring the courts of Florida to a screeching halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida.

Given these stark difference in the analysis of the changes in law in *Porter* and *Hitchcock* and their relationship to the *Witt* factors, the lower court properly determined that the alleged change in law from *Porter* would not be retroactive under *Witt* even if it had occurred. In fact, the more apt analogy regarding a change in law would be the change in law that this Court recognized in *Stephens* itself, as both changes in law concerned the same legal issue. However, making that analogy

merely shows that the lower court was correct to deny this motion. In *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001), this Court held the change in law in *Stephens* was not retroactive under *Witt*. Given the facts that *Porter* would fail the *Witt* test if it had changed the law and that this Court has already determined that changing the law regarding the standard of review for ineffective assistance of counsel claims does not meet *Witt*, the lower court properly determined that any change in law that *Porter* might have made would not be retroactive. Thus, it properly found that this motion was time barred and should be affirmed.

In a belated attempt to show that he is entitled to retroactive application of the alleged error in *Porter*, Defendant suggests that he meets the *Witt* standard because the alleged purpose of the alleged change in law is to correct an error. He then asserts that neither the extent of reliance on the old rule nor the effect on the administration of justice can be known. 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, as Defendant's motion was, such that not all applications of the precedent would be reported. However, undertaking this task would merely show that the lower court was correct in finding that the extent of reliance was great and that the effect on the administration of justice would be vast. Given these circumstances, the lower court properly determined that the alleged change in law was not retroactive under *Witt*. It should be affirmed.

In an attempt to avoid this result, Defendant asserts that he is not claiming that *Porter* error was committed every time a Florida Court had ruled on an ineffective assistance claim. Initial Brief at 27 n.6. Not only does Defendant offer no explanation of how this could be true, but also it is fundamentally inconsistent with the position he has taken at every stage of this litigation and his assertion of how *Porter* applies to his case. In both his motion for post conviction relief and his brief to this Court, Defendant argues that *Porter* constitutes a "fundamental repudiation of this Court's

Strickland jurisprudence." Initial Brief at 19; PCR6. 48. Moreover, at the *Huff* hearing, Defendant argued that *Porter* showed a "general error" regarding the "general posture" that this Court had taken in analyzing ineffective assistance claims. (PCR6. 131-34) Thus, if Defendant were correct that the United States Supreme Court had fundamentally repudiated this Court's *Strickland* jurisprudence by finding that this Court had committed a general error based on the general posture in which this Court analyzes *Strickland* claims, the error would have to affect every ineffective assistance of counsel claim this Court has every decided. Moreover, because the lower state courts are bound to follow this Court's precedent, *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *see also Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980), all of their decisions about *Strickland* claims would be subject to this claim as well. Thus, despite Defendant's protestations to the contrary, the lower court was correct that the change in law that Defendant contends was made in *Porter* would affect every denial of a claim of ineffective assistance of counsel since *Strickland* was decided in 1984.

The fact that the alleged error would affect every case becomes all the more clear when one considered the effect Defendant is claiming the change in law had in this case. Neither in the lower court nor in this Court is Defendant

asserting that the alleged error in *Porter* affected this case by showing that this Court ignored new mitigation evidence presented at a post conviction evidentiary hearing. Instead, he is claiming that *Porter* affected this Court's summary rejection of claims of ineffective assistance of counsel for failing to object to jury instructions and comments and for failing to convince the trial court to rule in his favor on issues that trial counsel did raise. Initial Brief at 50-59; PCR6. 61-68. Moreover, the claims were rejected not on prejudice but because they were procedurally barred, did not show a deficiency or were insufficiently plead. *Thompson*, 759 So. 2d at 660, 661-62, 663-67. Given the manner in which Defendant is claiming *Porter* applies to his case, there is no claim of ineffective assistance of counsel that was ever previously raised to which the alleged error would not apply if Defendant was correct about *Porter* changing the law. Thus, the lower court was correct to find that retroactive application of *Porter* would affected ever claim of ineffective assistance of counsel ever denied in Florida. Defendant's contrary assertion should be rejected, and the lower court affirmed.

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

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

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

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 claims of ineffective assistance of counsel that he raised in his third motion for post conviction relief and

lost. As this Court has held, such attempts to relitigate claims that have previously been raised and rejected are procedurally barred. See *Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Defendant cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Defendant is attempting to do here, his claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004)(discussing application of res judicata to claims previously litigated on the merits).

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

545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), because they had changed the standard of review for claims of ineffective assistance of counsel under *Strickland*. This Court decisively rejected the claim, stating "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*." *Marek*, 8 So. 3d at 1128. This Court did so even though the United States Supreme Court had found under the AEDPA standard of review that state courts had improperly rejected these claims. Given these circumstance, the claim was barred and was properly denied. The lower court should be affirmed.

Even if Fla. R. Crim. P. 3.851(d)(2)(B) could apply to changes in law regarding existing rights that had yet to be held retroactive, *Porter* had changed the law, the alleged change in law was retroactive and the claim was not procedurally barred, Defendant would still be entitled to no relief. As the Court recognized in *Witt*, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. *Witt*, 387 So. 2d at 930-31. Moreover, as the Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at

697. Further, this Court has held that it does not apply the *Stephens* standard of review when a claim is summarily denied and instead reviews the denial of the claim *de novo*. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

Here, the claims of ineffective assistance of counsel whose rejection Defendant asserts constitutes error under *Porter* were summarily denied because they were barred, counsel was not deficient and the claims were insufficiently plead. *Thompson*, 759 So. 2d at 660, 661-62, 663-67. Given these circumstances, the *Stephens* standard of review was not applied and prejudice was not discussed. As such, the change in law that Defendant claims was made in *Porter* would not apply in this case, as the lower court properly found. 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 fifth motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Terri L. Backhus, Assistant CCRC-South, 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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