IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-512

WILLIAM REAVES

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, William Reaves, Defendant below, will be referred to as "Reaves" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate records will be as follows:

> Direct Appeal Record - case number SC60-79575[1]; Reaves v. State, 639 So.2d 1 (Fla. 1994) ("R" followed by volume and page number(s));
>
> Postconviction Appeal - case number SC00-840 Reaves v. State, 826 So.2d 932 (Fla. 2002) ("PCR-1" followed by volume and page number(s));
>
> State habeas corpus litigation - case number SC02-15 Reaves v. Crosby, 837 So.2d 396 (Fla. 2003) ("H" followed by brief and page number(s));
>
> Posconviction appeal following remand for evidentiary hearing FSC case number SC04-891 Reaves v. State, 942 So.2d 874 (Fla. 2006) ("PCR-2" followed by volume and page number(s));
>
> Successive Postconviction Appeal - case number SC08-1985 Reaves v. State, 27 So.3d 661 (Fla. 2009) (challenging lethal injection statute and request for public records) ("PCR-3" followed by volume and page number(s));
>
> Successive Postconviction Appeal - case number SC11-512 - instant appeal ("PCR-4") followed by volume and page number(s))

Supplemental materials will be designated by the symbol "S" preceding the type of record referenced. Reaves' initial brief will be notated as "IB" followed by the appropriate page number(s).

[1] New case numbering.

STATEMENT OF THE CASE AND FACTS

On October 8, 1986, an Indian River County, Florida grand jury indicted Reaves on one count of first-degree murder of Sheriff's Deputy Richard Raczkowski, one count of possession of a firearm by a convicted felon, and one count of trafficking in cocaine. Subsequently, all but the first-degree murder charge was dismissed by the State and Reaves was convicted of first-degree murder, sentenced to death, and such was affirmed on direct appeal.[2] See Reaves v. State, 639 So.2d 1 (Fla. 1994). During his 2006 postconviction review, this Court provided:

FACTUAL AND PROCEDURAL HISTORY

> Reaves was convicted and sentenced to death for the murder of Deputy Richard Raczkowski of the Indian River Sheriff's Department. On direct appeal we summarized the facts of the case as follows:
>
> > In the early morning hours of September 23, 1986, Deputy Richard Raczkowski of the Indian River Sheriff's Department was dispatched by the 911 operator to a convenience store in response to a call from the store's pay telephone. According to Reaves' confession, when the deputy arrived at the store he spoke to Reaves who explained he had made the 911 call because he had no money to call a taxi cab. The deputy then called the 911 operator and requested a cab be sent to the store.
> >
> > In his confession Reaves stated that while he and the deputy awaited the cab, a gun

[2] Reaves' initial conviction and sentence were overturned due to the fact that Reaves had been represented by Bruce Colton prior to Mr. Colton being elected and prosecuting Reaves for the 1986 murder. See Reaves v. State, 574 So.2d 105 (Fla. 1991).

> fell from the shorts Reaves was wearing. When Reaves tried to pick up the gun, the deputy prevented him from doing so by stepping on his hand. Reaves pushed the deputy's knee and then grabbed him by the throat. Reaves eventually got the gun and declared he would not give it to the deputy. The deputy backed away before turning to run. Reaves then shot the deputy in the back four times, claiming he was frightened because he had been using cocaine and because the deputy had reached for his own gun.
>
> It was later determined that the deputy's gun in fact had been fired three times.
>
> After the shooting Reaves went to the home of a friend named Hinton. According to Hinton, Reaves said he was able to retrieve the gun after pushing the deputy in the throat. Reaves pointed the gun in the deputy's face as the deputy attempted to draw his own weapon and stated, “I wouldn't do that if I were you.” The deputy began backing away, turned, and ran. Reaves then shot him as he ran away.

Reaves v. State, 574 So.2d 105, 106 (Fla.1991).

This Court reversed the judgment and sentence and remanded the case for a new trial. *See id.* at 107-108. This Court held where the prosecuting attorney had previously represented Reaves in a grand larceny case as a public defender and had actual access to privileged defense-related information, the trial court erred in denying the properly filed motion to disqualify the prosecutor filed before trial. *Id*.

On direct appeal after the retrial in 1992, this Court summarized the following additional facts:

> Witness Whitaker, who discovered the deputy, testified he saw a black man wearing red shorts and a white T-shirt running from the scene in a manner similar to men in Vietnam under fire. (William Reaves served in

> Vietnam.) Witness Hinton was ruled unavailable to testify, [pursuant to] section 90.804(1)(b), Florida Statutes (1991), and his testimony from the 1987 trial was read into the record.... [Hinton testified that he] had no trouble understanding Reaves; his speech was not slurred and he appeared to be in full control of his faculties.

Reaves v. State, 639 So.2d 1, 3 (Fla. 1994). The jury convicted Reaves of premeditated first-degree murder and recommended death by a vote of ten to two. The trial court found three aggravating circumstances (prior violent felony conviction, avoid arrest, and murder was especially heinous, atrocious, or cruel). Although no statutory mitigating circumstances were found, the trial court found three nonstatutory mitigating circumstances (honorable military discharge, good reputation in the community up to the age of sixteen, and he was a good family member). *Id.* at 3 & nn. 2-3.

On direct appeal, Reaves raised twelve issues concerning the guilt phase and four issues concerning the penalty phase of the trial. In particular, Reaves asserted that several statements by witness Hinton, under oath, prior to Hinton's 1987 trial testimony were inconsistent with his 1987 trial testimony and should have been admitted pursuant to section 90.806, Florida Statutes (1991). 639 So.2d at 3. In affirming the conviction and sentence, this Court rejected all of Reaves' claims on the guilt and penalty phase issues. This Court held while it “agree[d] that Hinton's prior inconsistent testimony should have been admitted,” it found the trial court's exclusion harmless error. *Reaves*, 639 So.2d at 4.

Reaves filed a petition for writ of certiorari to the United States Supreme Court which was denied. *See Reaves v. Florida*, 513 U.S. 990, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994). Reaves filed an initial motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.851 in February 1995. The motion was amended in February 1999. After a *Huff* hearing on May 28, 1999, the trial court entered an order on February 9, 2000, summarily denying the

> motion for postconviction relief without an evidentiary hearing. Reaves' motion for rehearing was denied on March 14, 2000.
>
> Reaves appealed to this Court and raised fourteen issues. While we found several of those claims were procedurally barred, insufficiently pled or premature, we concluded that the trial court erred in summarily denying Reaves' claim of ineffectiveness of trial counsel, Jay Kirschner. *See Reaves v. State*, 826 So.2d 932, 936 (Fla. 2002). The case was remanded to the trial court for an evidentiary hearing on the claims relating to whether counsel was ineffective for failing to raise a voluntary intoxication defense and related subclaims. *See id.* at 944.
>
> An evidentiary hearing was held on March 4-6, 2003. While awaiting the trial court's decision on the pending motion, Reaves filed a **successive 3.851 motion based on *Ring*** on June 24, 2003. Reaves also supplemented his 3.851 motion on December 10, 2003, by notifying the court of his eligibility to receive veteran's benefits based on a finding of 100% disability due to Post-Traumatic Stress Disorder (PTSD). On March 10, 2004, the trial court denied both the amended motion for postconviction relief and the successive motion for postconviction relief. After denying the motion for rehearing, the trial court signed final orders denying both motions on April 20, 2004.

Reaves v. State, 942 So.2d 874, 877-78 (Fla. 2006) (emphasis supplied). During the remand, this Court resolved the issues raised by Reaves in his state habeas corpus petition. Reaves v. Crosby, 837 So.2d 396, 397-98 (Fla. 2003). Subsequently, this Court affirmed the denial of postconviction relief following an evidentiary hearing. Reaves, 942 So.2d at 880-81.

Reaves filed his third motion for postconviction relief, his second successive motion, on or about December 26, 2006. In

it he sought a document he alleged was a public record and challenged Florida's lethal injection statute as unconstitutional. The public records request was denied based Kearse v. State, 969 So.2d 976, 988-89 (Fla. 2007) and the statute was found constitutional. Reaves appealed and by order dated February 4, 2010 in case number SC08-1985, this Court affirmed the summary denial of postconviction relief. See Reaves v. State, 27 So3d 661 (Fla. 2009) (Unpublished Tables).

On February 16, 2010, Reaves filed with the United States District Court for the Southern District of Florida a petition for writ of habeas corpus. That litigation remains unresolved.

While litigating his federal habeas case, on November 29, 2010, Reaves filed a third successive postconviction motion. There he claimed that Porter v. McCollum, 130 S.Ct. 447 (2009) repudiated this Court's Strickland v. Washington, 466 U.S. 668 (1984) prejudice analysis conducted on his previous ineffective of counsel claims. (PCR-4v1 1-73). It was Reaves' position that Porter had retroactive application, thus, his ineffectiveness claims should be revisited. On December 22, 2010, the State responded (PCR-4v1 77-108) and on February 1, 2011, a Case Management Hearing was held. (PCR-4v2 1-22). On February 9, 2011, the trial court entered an order denying the successive motion summarily. (PCR-4v1 145-57). This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I - The trial court correctly denied the untimely, successive postconviction relief motion as Reaves failed to meet the requirements of Rule 3.851(d)(2)(B) Fla. R. Crim. P. and failed to allege a bonafide exception to the one-year time limitation for a successive postconviction motion. Porter v. McCullom, 130 S.Ct. 447 (2009), upon which Reaves relies, did not change the law for a prejudice analysis under Strickland v. Washington, 466 U.S. 668 (1984) and even if Porter had changed the law, it does not have retroactive application. Moreover, Reaves is procedurally barred from re-litigating claims of ineffective assistance of counsel which had been denied previously in Reaves, 942 So.2d at 874. Furthermore, Reaves fails to show defense counsel rendered deficient performance and does not allege that the lack of deficiency was affected by Porter. Finally, Reaves' postconviction counsel was not authorized to file the successive motion. Postconviction relief was denied properly and this Court should affirm.

ARGUMENT

ISSUE I

PORTER V. MCCOLLUM DOES NOT PROVIDE AN AVENUE FOR REAVES TO OBTAIN RELIEF IN HIS THIRD SUCCESSIVE POSTCONVICTION REFILF MOTION AGAIN RAISING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL (restated)

Reaves points to Porter v. McCollum, 130 S.Ct. 447 (2009) and asserts that he is entitled postconviction relief on his claim of ineffective assistance of counsel as this Court's prior review was inadequate. He claims that Porter "represents a fundamental repudiation of this Court's Strickland jurisprudence," thus, it constitutes a change in the law which is retroactive under Witt v. State, 387 So.2d 922, 925 (Fla. 1980). Reaves further argues that Porter requires this Court re-evaluate his previously decided postconviction claims of ineffective assistance of counsel for not raising the intoxication defense and not using his substance abuse and mental health issues in mitigation. He suggests that Porter requires that in conducting a Strickland prejudice analysis, this Court must "try to find a constitutional violation" with "painstaking care." The state disagrees that Porter permits Reaves to obtain a second review of his Strickland claims. The trial court properly found that the postconviction motion was barred and that Porter was not a change in the law which had been held to be retroactive. Moreover, because this Court had

determined that counsel was not deficient under Strickland, irrespective of the prejudice analysis conducted, Reaves did not carry his burden under Strickland. Such was proper and should be affirmed.

The standard of review for the summary denial of a successive postconviction was set forth in Ventura v. State, 2 So.3d 194 (Fla. 2009), where this Court stated:

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See, e.g., Rose v. State*, 985 So.2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). The Court will uphold the summary denial of a newly-discovered-evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. *See McLin v. State*, 827 So.2d 948, 954 (Fla. 2002).

Ventura, 2 So.3d at 197-98. See Darling v. State, 45 So.3d 444, 447 (Fla. 2010); State v. Coney, 845 So.2d 120, 134-35 (Fla. 2003); Lucas v. State, 841 So.2d 380, 388 (Fla. 2003).

Rule 3.851(d)(1) Fla.R.Crim.P. bars a postconviction motion filed more than one year after a judgment and sentence are final. Reaves' judgment and sentence became final on November

7, 1994, with the denial of certiorari by the United States Supreme Court in Reaves v. Florida, 513 U.S. 990 (1994). See, Davis v. Florida, 510 U.S. 996 (1993); Rule 3.851(d)(1)(B) Fla.R.Crim.P. (holding judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Moreover, this litigation was Reaves' third successive postconviction case. While Rule 3.851(d)(2) provides that "No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1), an exception to this exists 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." Fla.R.Crim.P. 3.851(d)(2)(B). Reaves merely pointed to Porter to overcome the bar, but as explained more fully below, the trial court properly determined that the postconviction motion filed under Rule 3.851 in November, 2010, was untimely and that Reaves failed to meet any of the exceptions to the time limitations.

Reaves 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. (IB at 36-37). The fact that the Sixth Amendment right to counsel includes a requirement that counsel be effective has

been recognized for decades. Strickland, 466 U.S. at 688-89.

Further, Reaves does not suggest that Porter "has been held to apply retroactively." See Rule 3.851(d)(2)(B). In fact, no court has held that Porter is retroactive. 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).

Given that Porter neither recognized a new constitutional 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 denied properly. The trial court's summary denial of relief should be affirmed.

Instead of relying on a newly established constitutional

right that has been held to be retroactive to meet the requirements of Rule 3.851(d)(2)(B), Reaves asserts that he meets the exception because there has been 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 Rule 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." (emphasis supplied) 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 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). Reaves cannot use the assertion that the alleged change in law regarding an existing right should be held retroactive to have the exception in Rule 3.851(d)(2)(B) apply; he must show that a newly established right has been held retroactive for the exception to

apply. Reaves has not carried his burden in this respect, thus, the trial court properly denied relief. This Court should affirm that decision.

Furthermore, even if Reaves could satisfy the dictates of Rule 3.851(d)(2)(B) by showing there has been a change in the law regarding an existing right and asking this Court to find it retroactive, the trial court would still have denied the motion properly as time barred as Porter did not change the law. While Reaves insists that Porter represents a "fundamental repudiation of this Court's Strickland jurisprudence," (IB at 26), and not simply a determination that this Court misapplied the correct law to the facts of one case, his assertion is incorrect.

In making this argument, Reaves 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 because this determination was made under the deferential standard of review of 28 U.S.C. §2254 amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the United States Supreme 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 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 habeas relief based on a claim that the state court rejected on the merits which are: (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's decision fit within the "contrary to" provision when the state court got the legal standard for the claim wrong or reached a conclusion opposite 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 the holding in Williams, if the United States Supreme Court had determined that this Court had been applying an incorrect legal standard to Strickland, it would have found that Porter was entitled to relief because this Court's decision was "contrary to" Strickland. However, the United States Supreme Court did not make such a finding, instead, it found that this Court had "unreasonably applied" Strickland. Porter, 130 S.Ct.

at 448, 453, 454, 455. By finding this Court "unreasonably applied" Strickland in Porter, the United States Supreme Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions" Williams, 536 U.S. at 412, but simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." Id. at 412. As such, again, Reaves' suggestion that Porter represents a "fundamental repudiation of this Court's Strickland jurisprudence," (IB at 26), is incorrect.

This is all the more true when considered in light of how Reaves alleges Porter changed the law. Reaves 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). (IB at 33-34, 36-38). Yet, in making that assertion, Reaves ignores that the Stephens standard of review is directly and expressly mandated by Strickland:

> 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 from Strickland shows, the United States Supreme 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 this Court recognized and 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 in Reaves v. State, 826 So.2d 932 (Fla. 2002) (addressing ineffective assistance of penalty phase counsel) and Reaves v. State, 942 So.2d 874 (Fla. 2006)

[3] The references to 28 U.S.C. §2254(d) in Strickland concern the provisions of the statute before the adoption of AEDPA in 1996. Under the federal habeas statute as it existed at that time, a federal court was required to defer to a state court factual if it was made after a "full and fair" hearing and "fairly supported by the record." 28 U.S.C. §2254(d) (1984). After the enactment of AEDPA, the deference given to state court factual findings was heightened and moved. See 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).

(addressing ineffective assistance of guilt phase counsel). Thus, to find that Porter found that application of this standard of review to be 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.

Reaves does not contend that the United States Supreme Court overruled this portion of Strickland. This Court's precedent on the standard of review is entirely consistent with this portion of Strickland, and Reaves' attempt to argue a contrary position is without any support. The trial court's determination that Porter did not change the law and that the motion was barred as a result was proper and should be affirmed.

Although Reaves argues that the Court overruled Strickland's requirement of deference to factual findings made in the course of resolving claims of ineffectiveness claims, such an argument is meritless. (IB at 36-38). Porter makes no mention of this portion of Strickland. More importantly, Porter does not even suggest 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, the United States Supreme Court in Porter 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. Porter, 130 S.Ct. 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 determine that this Court's factual finding was not binding, the United States Supreme Court seems to have accepted those factual findings, but determined that 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 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 trial court properly determined that Porter did not change the law, that Rule 3.851(d)(2)(B) provide a basis for review of a time-barred claim. The denial of relief should be affirmed.

Also, Reaves' reliance on Sears v. Upton, 130 S. Ct. 3259 (2010) to bolster this position is misplaced. In Sears, the state postconviction court found constitutionally deficient

attorney performance under Strickland. Because Sears' counsel presented some, but not all of the significant mitigation evidence the court felt competent counsel should have uncovered, the state court mistakenly determined that it could not "speculate" as to what the effect of additional evidence would have been and denied relief. On appeal, the Georgia Supreme Court, without explanation, summarily affirmed the lower court's postconviction finding that it was unable to assess whether trial counsel's deficient performance and resulting inadequate investigation might have prejudiced Sears. Id. at 3261. In reversing, 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. Rather, the Court reversed because it did not believe that the lower courts had made findings about the evidence presented. Id. at 3261. Hence, Sears does not support the assertion that the making of findings or giving deference when reviewing those findings is inappropriate.

Reaves also seems to suggest that Porter requires a court to grant relief on an ineffective assistance of counsel claims based solely on a finding that some evidence to support prejudice was presented at a postconviction evidentiary 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, 536 U.S. at 397-98).

Furthermore, in Wong v. Belmontes, 130 S.Ct. 383, 386-91 (2009), the United States Supreme Court reversed the Ninth Circuit Court of Appeals 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 Supreme 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 Supreme Court reversed the Sixth Circuit Court of Appeals for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the evidence presented in postconviction,

and the aggravated nature of the crime.

Given what Porter says about proving prejudice and taken in conjunctions with Belmontes and Van Hook, Reaves' suggestion that Porter requires a finding of prejudice anytime a defendant presents some evidence at a postconviction hearing is simply false. Porter did not change the law announced in Strickland that requires that a defendant actually prove there is a reasonable probability of a different result.[4] Again, as Porter did not change the law, the finding that the motion was time barred was proper and the summary denial of relief should be affirmed.

Even if Rule 3.851(d)(2)(B) did apply to this situation and Porter had changed the law, the trial court still would have properly denied the motion because Porter would not apply retroactively. As Reaves admits, the determination of whether a change in law is retroactive is controlled by Witt v. State, 387 So.2d 922, 931 (Fla. 1980). Also, as Reaves has acknowledged, in order to obtain retroactive application of the law under Witt, Reaves was required to show: (1) the change in law

[4] Using Reaves' pennies and quarters analogy (IB at 42-44), the task of determining prejudice involves taking the cup 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 support 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 about of quarters. Porter, 130 S.Ct. at 453-54; Strickland, 466 U.S. at 695-96.

emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental significance. Id. at 929-30. To meet the third element of this test, the change in law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." Id. at 929. Application of this 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).

While here, Reaves admits that a change in law is not retroactive under Witt unless this standard is met, he makes no attempt to show how the alleged change in law meets this standard. In fact, he never clearly identifies what change Porter 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. Given these circumstances, the lower court properly found that Reaves failed to establish that the change in law he alleges occurred would be retroactive under Witt. The claim should be rejected and the summary denial affirmed.

Instead of attempting to show that the change in law he

alleges occurred meets Witt, Reaves points to the fact that this Court found Hitchcock v. Dugger, 481 U.S. 393 (1987) to be retroactive, and he implies that because both cases involved findings of error in Florida cases, the change in law he alleges 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 a finding that this Court committed a different error in a different case would constitute a change in law that satisfies Witt 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, 481 U.S. at 398-99, the United States Supreme 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 a reviewing court needed to do was consider 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 and as noted above, 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. Hence, the purpose of Porter was nothing more than to correct an error in the application of the law to facts of a particular case. Moreover, as the trial court found, there is nothing to show Porter changed the standard of review from Strickland and a review of this Court's jurisprudence shows that it has relied upon Strickland extensively as recognized in Stephens. Moreover, 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 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 changes in law in Porter and Hitchcock and their relationship to Witt factors, the trial court properly determined Reaves did not show that the alleged change in law from Porter would 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 concern 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 fact that Porter would fail the Witt test if it had changed the law and 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 trial court properly found that this motion was time barred and this Court should affirm.

Moreover, it should be remembered that Reaves instance claims of ineffective assistance of counsel are procedurally barred. He is seeking nothing more than to relitigate the claims of ineffective assistance for failing to investigate and present an intoxication defense and penalty phase mitigation that he had raised in his first motion for post conviction relief and lost. See Reaves, 826 So.2d 932 (Fla. 2002)

(addressing ineffective assistance of penalty phase counsel) and Reaves v. State, 942 So.2d 874 (Fla. 2006) (addressing ineffective assistance of guilt phase counsel after remand for evidentiary hearing) As this Court has held and as relied upon by the trial court, 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). (PCR-3v1 146). Under the law of the case doctrine, Reaves 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 Reaves is attempting to do here, his claim is barred and was denied correctly. 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 that under the AEDPA standard of review the state courts had improperly rejected these claims. Given these circumstance, the claim was procedurally barred and that determination should be affirmed.

Again, even if Rule 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, Reaves still would not be entitled to relief. As this Court recognized in Witt, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. Witt, 387 So.2d at 930-31. 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.

Porter does not compel relief in Reaves' case. In Porter, counsel only had one short meeting with the defendant about mitigation, never attempted to obtain any records about the defendant and never requested mental health evaluation for mitigation at all. Porter, 130 S. Ct. at 453. Such is not the case here. In Reaves' case, unlike in Porter, the state courts did address trial counsel's performance at the guilt and penalty phase and found counsel's performance was not deficient.

With respect to the first review of penalty phase counsel, this Court reasoned:

> Defense counsel presented numerous witnesses who discussed Reaves' childhood in detail and further testified as to his drug addiction when he returned home from Vietnam. Two men who served with Reaves also testified as to the conditions of fighting the war in Vietnam, including drug usage. A review of the record supports the trial court's finding that the evidence which he now seeks to introduce is cumulative.FN12 The only evidence identified in Reaves' postconviction motion which was not presented during the penalty phase includes the fact that Reaves suffered from a venereal disease, that one of his sisters died shortly after he returned from Vietnam, and that he helped a prison guard when two inmates attacked the guard. There is no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances.FN13 The only meaningful mitigation which was not introduced involved the fact that Reaves assisted a jail guard. As the trial court recognized, however, any benefit to be obtained by this evidence would have been negated by more recent evidence that while Reaves was in

> prison, he hit a deputy in the face and later entered a guilty plea to battery on a law enforcement officer. FN12. *See, e.g., Jennings v. State*, 583 So.2d 316, 321 (Fla. 1991) ("It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position.").
>
> FN13. *Occhicone v. State*, 768 So.2d 1037, 1049 (Fla. 2000) ("In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel at the penalty phase, [the defendant] must show 'both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.'").

Reaves, 826 So.2d at 941.

The issues addressed during the remand for an evidentiary hearing were ineffective assistance of guilt phase counsel for not presenting a voluntary intoxication defense and for not "retaining experts who could testify properly as to the effects of substance abuse combined with his mental defect" in support of voluntary intoxication" and ineffectiveness of penalty phase counsel for not presenting "various mitigating circumstances, like Reaves's impoverished childhood, his military background, his drug addiction, his sister's death which occurred shortly after he returned from Vietnam, and his giving assistance to a jail guard in 1973." Reaves, 826 So.2d at 939-41. On appeal,

this Court found that counsel was not deficient in rejecting the voluntary intoxication defense given the law at the time of the re-trial and the fact that Reaves, to date, failed to show he was intoxicated at the time of the crime sufficient to warrant the defense. The denial of relief was affirmed by this Court without ever reaching the prejudice prong. This Court concluded: "Reaves has not demonstrated that trial counsel's performance was deficient under Strickland. Because counsel's performance was not deficient, we need not address the prejudice prong. See Strickland, 466 U.S. at 697, 104 S.Ct. 2052." Reaves, 942 So.2d at 881.

With respect to the ineffectiveness of penalty phase counsel addressed on remand, this Court opined:

> A review of the record supports the trial court's finding that the evidence which he now seeks to introduce is cumulative. The only evidence identified in Reaves' postconviction motion which was not presented during the penalty phase includes the fact that Reaves suffered from a venereal disease, that one of his sisters died shortly after he returned from Vietnam, and that he helped a prison guard when two inmates attacked the guard. There is no reasonable probability that these additional factors would have affected the balance of aggravating and mitigating circumstances. The only meaningful mitigation which was not introduced involved the fact that Reaves assisted a jail guard. As the trial court recognized, however, any benefit to be obtained by this evidence would have been negated by more recent evidence that while Reaves was in prison, he hit a deputy in the face and later entered a guilty plea to battery on a law enforcement officer.

Reaves, 926 So.2d at 941 (footnotes omitted).

In the instant collateral litigation, it appears Reaves is claiming this Court erred in not analyzing penalty phase counsel's performance in light of alleged statutory mitigation presented in a collateral evidentiary hearing on ineffective assistance of guilt phase counsel for not raising a voluntary intoxication defense. However, this point was not raised in the prior litigation and Reaves may not raise claims of ineffectivenesss in piecemeal fashion, Pope v. State, 702 So. 2d 221, 223 (Fla. 1997).

The claim of ineffectiveness of guilt phase counsel did not involve a prejudice analysis, and as such, is not impacted in the least by Porter. While the claim of ineffectiveness of penalty phase counsel respecting non-statutory mitigation did address prejudice, as explained above, Porter is not a gateway for Reaves to obtain a second review of the matter. Moreover, to the extent that he is raising a new claim, combining the evidence presented at the evidentiary hearing on guilt phase issues to revive a penalty phase claim of ineffectiveness and add new allegations, Reaves is procedurally barred. See, Wright, 857 So.2d at 868; Pope, 702 So.2d at 223.

Reaves does not even suggest how Porter would have affected these determinations. In fact, he ignores the evidence presented at the evidentiary hearing which 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, Reaves' claim would be meritless even if Porter had changed the law and applied retroactively. The trial court properly denied this collateral motion and should be affirmed.

Finally, it must be noted that Reaves is represented by Capital Collateral Regional Counsel - South ("CCRC") and as such CCRC was not authorized to file the successive, time-barred postconviction motion. Section 27.702, Florida Statutes provides that "capital collateral regional counsel and the attorneys appointed pursuant to s.27.710 shall file only those postconviction or collateral actions authorized by statute." The Florida Supreme Court has recognized the legislative intent to limit collateral counsel's role in capital post-conviction proceedings. See State v. Kilgore, 976 So.2d 1066, 1068-1069 (Fla. 2007).

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

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

> the Supreme Court and undisturbed by any collateral litigation.

§ 27.711(1)(c), Fla. Stat. Accordingly, CCRC was not authorized to file a successive, untimely, facially insufficient, and procedurally barred collateral challenge.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the summary denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: William Hennis, Esq., Capital Collateral Regional Counsel - South, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 this 9th day of August, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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