IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-616

MATTHEW MARSHALL,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the record in this brief are as follows:

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STATEMENT OF THE CASE AND FACTS

Trial and Direct Appeal:

In December 1989, Petitioner, Matthew Marshall ("Marshall"), an inmate at the Martin Correctional Institute, in Martin County, Florida, was convicted of the first-degree murder of a fellow inmate, Jeffrey Henry. The jury recommended a sentence of life in prison. The trial court overrode the jury's recommendation and imposed a death sentence, finding it "so clear and convincing" that the mitigating circumstances did not outweigh the aggravating circumstances "that no reasonable person could differ." Marshall v. State, 604 So. 2d 799, 802 (Fla. 1992). In aggravation, the trial judge found: (1) that the murder was committed by a person under sentence of imprisonment; (2) that Marshall was previously convicted of nine (9) violent felonies; (3) that the murder was committed while Marshall was engaged in the commission of or an attempt to commit a burglary; and (4) that the murder was especially heinous, atrocious, and cruel. In mitigation, the judge found that Marshall's behavior at trial was acceptable and that he entered prison at a young age. The judge specifically rejected as mitigation that Marshall's older brother influenced him and led him astray to run the streets and break the law, and that his mother caused him to believe he would suffer no negative consequences for his bad behavior.

The Florida Supreme Court affirmed the conviction and death sentence on direct appeal, outlining the facts of the murder as follows:

> Marshall and the victim, Jeffrey Henry, were both incarcerated at the Martin Correction Institute on November 1, 1988, when witnesses heard muffled screams and moans emanating from Henry's cell and observed Marshall exiting the cell with what appeared to be blood on his chest and arms. Within a few minutes, Marshall reentered the cell, and similar noises were heard. After the cell became quiet, Marshall again emerged with blood on his person. Henry was found dead, lying in his cell facedown with his hands bound behind his back and his sweat pants pulled down around his ankles to restrain his legs. Death was caused by blows to the back of his head.
>
> Marshall was charged with first-degree murder. His defense at trial was that he killed Henry in self-defense. Marshall claimed that Henry was a "muscle man" for several inmates who operated a football pool. When Marshall tried to collect his winnings from the inmates, they told him to get the money from Henry. Marshall claims he entered Henry's cell only to collect his winnings but that Henry refused to pay, and that Henry then attacked him, so he fought back.

Marshall, 604 So. 2d at 802.

This Court denied rehearing on September 28, 1992 and the United States Supreme Court denied certiorari review on May 17, 1993. Marshall v. Florida, 508 U.S. 915, 113 S. Ct. 2355, 124 L. Ed. 2d 263 (1993).

Postconviction Motion, Appeal, and Habeas Petition:

In August 1994, Marshall filed an initial 3.850 motion and, thereafter, on January 29, 1999, filed an amended motion raising twenty-seven claims. Marshall

v. State, 854 So. 2d 1235, 1239 (Fla. 2003). The trial court granted an evidentiary hearing on four (4) issues and summarily denied the remaining claims. After a three-day evidentiary hearing, held August 23-26, 1999, the trial court denied all relief. Marshall appealed the adverse ruling to the Florida Supreme Court, raising five (5) issues on appeal.

On June 12, 2003, the Florida Supreme Court affirmed the denial of all but one issue, the juror misconduct claim, which it remanded for a limited evidentiary hearing. Marshall, 854 So. 2d at 1253. Regarding the claim that counsel was ineffective, this Court stated:

> Marshall next argues that the trial court erred in denying his claim that trial counsel was ineffective for failing to adequately investigate, develop, and present available mitigating evidence regarding his family background and abusive childhood. Marshall contends that had such evidence been presented, there would have been a sufficient basis to support the jury's recommendation of life imprisonment.
>
> ...
>
> At the postconviction evidentiary hearing, Marshall called three of his brothers to testify, Brindley Marshall, Percival Marshall, Jr., and Marvin Marshall. Each of Marshall's brothers testified that their father was extremely abusive while they were growing up. In particular, Marshall's brothers testified that their father would beat them with extension cords, tree branches, and electrical wire. 9 Sometimes the beatings would last upward of thirty to forty-five minutes. In addition, Brindley and Percival each testified that their father would bind their hands and feet with duct tape, take off all of their clothes, and beat them. Brindley and Percival also testified that they, along with Marshall, would sometimes sleep in the toolshed in

the backyard, on the roof of the health clinic behind their house, or at their aunt's house to avoid the abuse. They also indicated that their father abused alcohol. Marshall's brothers further testified that their father abused their mother, and allegedly stabbed her on one occasion. However, the brothers acknowledged that they did not call the police to report the abuse. All three brothers testified that they were not contacted by trial counsel. Brindley and Marvin were in prison at the time of trial.

> 9. Marvin Marshall did not testify that he was beaten, although he stated that his father abused his brothers.

Marshall also presented testimony from five of his cousins at the evidentiary hearing, Medwer Moultrie, Samuel Whymns, Lisa Laing Forbes, Jacqueline Laing, and Philencia Dames. Samuel Whymns, Lisa Laing Forbes, Jacqueline Laing, and Philencia Dames lived in the Bahamas, but testified that they visited and stayed at Marshall's home for varying amounts of time while growing up. Medwer Moultrie, on the other hand, testified that he lived with Marshall's family for two years at the request of his mother, who asked him to keep an eye on his aunt (Marshall's mother) because his uncle (Marshall's father) was being abusive. Marshall's cousins each testified in varying degrees as to the physical abuse Marshall and his mother suffered. All of Marshall's five cousins indicated that they were not contacted by trial counsel. Marshall's four cousins who lived in the Bahamas at the time of the trial also indicated that their relatives in Miami knew how to contact them.

This Court has held that "an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Rose*, 675 So. 2d at 571; *see also State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000). This Court has also recognized that "the failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." *Rose*, 675 So. 2d at 571.

At the evidentiary hearing, trial counsel testified that he conducted a thorough interview with Marshall prior to trial during which he tried to obtain a life history. Trial counsel acknowledged

that his notes from this interview indicated that Marshall did not want to involve his brothers and sisters, although trial counsel said he would have disregarded this request due to his duty to investigate. During this interview, Marshall told trial counsel that he completed tenth grade and started eleventh, that he was very fortunate to have two parents who motivated and encouraged him to succeed, and that there was "so much love" in his family. Marshall also denied being neglected or abused. Marshall described discipline at home as 75% verbal and 25% physical, although he did not characterize the physical discipline as abusive. Marshall did not relate any physical or mental health problems to trial counsel, and denied having suffered any serious head injuries. Defense counsel also indicated that he reviewed Marshall's school, prison, and mental health records.

In addition to speaking with Marshall, trial counsel indicated that he made efforts to speak with family members. Marshall provided trial counsel with his aunt's name, and trial counsel indicated that he wrote two letters to her requesting that she contact him because Marshall had indicated that she could put him in touch with Marshall's father and other relatives. Marshall's aunt never responded to trial counsel's inquiries. Trial counsel, however, did eventually speak with Marshall's father. According to trial counsel, Marshall's father indicated that Marshall had a good upbringing, although he and his brothers were always getting into trouble.Although trial counsel acknowledged that Marshall's father's comments about him having good grades were at odds with Marshall's school records, he indicated that he would not have made a different proffer by editing what the father would have said had he testified. Marshall's father also provided trial counsel with the names and ages of Marshall's brothers, but claimed not to know where they were living because he had disowned them due to their behavior. Trial counsel conceded during the evidentiary hearing that he did not file a motion for an investigator, nor did he request the assistance of either of the investigators working with the public defender's office at the time. Trial counsel explained that he would not have sent a female investigator into urban Dade County looking for witnesses because it would not have been safe. He also indicated that he would not have sent the other investigator, an elderly man, into Dade County either.

Although trial counsel stated that he thought about driving into Liberty City himself, he chose not to do so. Trial counsel further explained that he had no information leading him to Liberty City. Trial counsel also testified that he would not have called Marshall's brother Brindley as a witness no matter what he had to offer, because he had previously tried to help Marshall escape. Trial counsel also noted that Marshall's father led him to believe that he was going to bring as many family members as possible with him to the penalty phase. Trial counsel acknowledged that had he possessed information concerning child abuse, he would have presented it at the penalty phase. However, trial counsel testified the problem in this case was that the information Marshall relayed to him coincided with what his father had said.

Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id*. While trial counsel has a duty to investigate, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.; see also Rose v. State*, 617 So. 2d 291, 294-95 (Fla. 1993) (trial counsel was not ineffective for failing to call family members where defendant told counsel that he had not had contact with his family for a number of years and that his family's testimony would not be helpful).

In *Stewart v. State*, 801 So. 2d 59 (Fla. 2001), this Court rejected a claim that trial counsel was deficient for failing to investigate and present evidence of the defendant's alleged childhood abuse by his stepfather. As in this case, Stewart generally described a happy childhood and never informed defense counsel, or the defense psychiatrist, about any abuse he suffered. Further, trial counsel indicated that he personally interviewed Stewart's stepsisters, but neither mentioned that Stewart was abused. Similarly, Stewart's stepfather never led trial counsel to believe anything other than that he was a loving and caring father to Stewart. Accordingly, this Court

> concluded, "by failing to communicate to defense counsel (or the defense psychiatrist) regarding any instances of childhood abuse, [the appellant] may not now complain that trial counsel's failure to pursue such mitigation was unreasonable." *Id*. at 67 (*citing Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000)). Stewart would appear to dictate the same result in this case.
>
> Marshall bears the burden of proving that trial counsel's representation was unreasonable under prevailing professional norms. *See Cherry*, 781 So. 2d at 1048. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Moreover, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Asay v. State*, 769 So. 2d 974, 984 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 689). As indicated above, trial counsel conducted a thorough pretrial interview of Marshall, who advised him that he was not abused as a child. Similarly, Marshall denied being abused when examined by Dr. Joel Klass, as well as when he was examined by one of the postconviction mental health experts (Dr. Woods). Marshall's version of his childhood was corroborated by his father, and trial counsel indicated that nothing in Marshall's prison or school records indicated abuse. Thus, it does not appear that the trial court erred in concluding that trial counsel conducted a reasonable investigation.

Marshall, 854 So. 2d at 1244-48. This Court then analyzed the *Brady/Giglio*[1] claims as follows:

> Marshall also argues that the trial court erred in denying his claim that the State withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and that the State presented false testimony in violation of

[1]Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). In particular, Marshall alleges that the State withheld evidence that inmates George Mendoza and David Marshall were promised to be housed together in the prison system in exchange for their testimony against Marshall. 10 Marshall contends that had the jury learned of this promise the credibility of Mendoza's testimony at trial would have been severely undermined. As such, Marshall argues that there is a reasonable probability that the jury would have found him not guilty, or guilty of a lesser offense than first- degree murder.

10. David Marshall did not testify at Marshall's trial.

To support this claim, Marshall called as witnesses at the postconviction evidentiary hearing inmates George Mendoza and David Marshall. 11 Mendoza and David Marshall both testified that they were promised by Inspectors Sobach and Riggins and Assistant State Attorney Spiller that they would be housed together in the prison system at an institution closer to home for their safety and protection in exchange for their testimony. According to Mendoza and David Marshall, the initial promise was made by investigator Riggins and later reiterated at a meeting following their grand jury testimony where Sobach, Riggins, and Spiller were present. Mendoza noted that they were informed their protection and safety were the reasons that they would continue to be housed together. Mendoza also indicated that Assistant State Attorney Spiller advised him that it was normal procedure in the courtroom to state that he was promised nothing in exchange for his testimony if asked by defense counsel. On cross-examination, however, both Mendoza and David Marshall acknowledged writing letters to Assistant State Attorney Spiller wherein they indicated that they understood no promises could be made. Mendoza and David Marshall also reiterated on cross-examination that their prior statements and testimony in the case were truthful.

11. Marshall also attached to his postconviction motion a copy of a civil rights action Mendoza filed against numerous correctional officials, in which Mendoza reiterated that an "oral contract/agreement" was made to

> house him and David Marshall together for their protection at an institution close to home for being State witnesses in Matthew Marshall's case.

Marshall also called Kerry Flack, formerly with the Department of Corrections, as a witness at the postconviction evidentiary hearing.12 Flack testified that she became involved when inspector Sobach requested that she review files concerning Mendoza and David Marshall. According to Flack, Sobach indicated that Mendoza and David Marshall had been transferred to different institutions and he did not know whether or not they should have been permitted to remain at the same location. After reviewing the files and speaking with the classifications office and Inspector Sobach, Flack testified that she decided that "they had agreed that the inmates could move together in order to watch out for each other." Accordingly, she stated that she requested a transfer back to the same institution for Mendoza and David Marshall. Ms. Flack acknowledged at the evidentiary hearing upon viewing a print-out of the prison housing history for Mendoza and David Marshall that it was unusual for inmates to be transferred twice to the same location at the same time.

> 12. Prior to being the director of information, communications and legislative planning for the Department of Corrections, Flack was the assistant to the secretary. She indicated that her job entailed primarily dealing with complaints registered by inmates and inmates' families, and legislative inquiries from the media, the public, and other state agencies.

In rebuttal, the State called Inspectors Sobach and Riggins and Assistant State Attorney Spiller as witnesses during the postconviction evidentiary hearing. Sobach, Riggins, and Spiller each denied making or having any knowledge of any promises being made to Mendoza and David Marshall in exchange for their testimony. Sobach indicated that initial transfers of inmate witnesses are for their protection, but noted that any kind of commitment to keep two individuals together forever is "totally impracticable." He also indicated that he would not

have the authority to keep Mendoza and David Marshall housed together. Inspector Riggins similarly testified that he did not have transfer authority. On cross-examination, Inspector Sobach acknowledged that it was kind of unique that Mendoza and David Marshall were able to stay together. However, he denied telling Kerry Flack that Mendoza and David Marshall were promised to be kept together. Rather, he testified that he contacted Flack because he was concerned as to whether or not the special review against Mendoza and David Marshall, causing their separation, was appropriate or whether it may have been retaliation of some sort.

Assistant State Attorney Spiller similarly testified that no promises were made to Mendoza and David Marshall in exchange for their testimony, although he and Inspector Riggins both acknowledged that Mendoza and David Marshall were reassured that everything possible would be done to protect them from retribution. Spiller stated that Mendoza and David Marshall on two occasions prior to trial requested that they be assured that they would be housed together. However, Spiller testified that he informed them on both occasions that he had no authority over housing and would not make any promises that could jeopardize the case. Although Spiller admitted writing a letter to the Department of Corrections denoting Mendoza's and David Marshall's cooperation in the case, he denied ever requesting that the department house the two inmates together. Lastly, Assistant State Attorney Spiller denied instructing Mendoza that it is normal procedure for witnesses to deny that promises were made in exchange for their testimony when asked at trial.

The trial court denied Marshall's claim, concluding that Marshall had failed to prove either a *Brady* or a *Giglio* violation. In so doing, the trial court noted that there was no knowing presentation of false testimony by the State since Mendoza himself acknowledged that he understood that the State could make no promises and had made no promises to induce his testimony. For the following reasons, it does not appear that the trial court erred in denying Marshall's *Brady/Giglio* claim.

The United States Supreme Court has recently provided the following three-prong analysis to be used when determining the merits of a *Brady* violation claim:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999). With regard to the third prong, the Court emphasized that prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Id*. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. *See State v. Riechmann*, 777 So. 2d 342, 362 (Fla. 2000); *Sireci v. State*, 773 So. 2d 34 (Fla. 2000); *Haliburton v. Singletary*, 691 So. 2d 466, 470 (Fla. 1997).

In the instant case, it is questionable whether the State made a promise to house Mendoza and David Marshall together in exchange for their testimony. As noted above, Inspectors Sobach and Riggins, and Assistant State Attorney Spiller each denied making or having any knowledge of such a promise. Further, there is nothing in the record documenting the existence of any such promise. To the contrary, both Mendoza and David Marshall acknowledged at the postconviction evidentiary hearing that they wrote letters to Assistant State Attorney Spiller wherein they indicated that they understood no promises could be made. However, in light of the unique prison housing history of both inmates, it is conceivable that some sort of understanding may have been reached.

Nonetheless, even assuming the State withheld evidence of the alleged promise, Marshall does not appear to have satisfied the prejudice prong of the three-part test for a *Brady* violation. First, evidence of the alleged promise would have had limited impeachment value in this case. At trial, defense counsel thoroughly cross-examined Mendoza and, in doing so, elicited testimony concerning Mendoza's desire to remained housed with David Marshall and a letter Mendoza had written to inspector Riggins thanking him for stopping a transfer.

The record reveals the following:

> [Q]: Okay. You wrote Inspector Riggins a letter one time and asked or thanked him for stopping a transfer between you and your roommate?
> [A]: No, for stopping a transfer for me going to Avon Park Correctional Institution.
> [Q]: You didn't - you and - you and your number twenty-eight [David Marshall] didn't want to be separated, did you?
> [A]: I didn't want to leave the institution?
> [Q]: You all were good friends, weren't you?
> [A]: Yes sir.

More importantly, Mendoza was not the sole witness to testify at trial that he observed Marshall leaving the victim's cell, nor the only witness to describe the sounds heard coming from the victim's cell. To the contrary, former inmate Frank Calabria also testified in detail as to events he observed on the morning of the murder. In addition to describing the sounds he heard emanating from the victim's cell, Calabria testified that he observed Marshall exiting from the victim's cell with blood on his chest, arms, and hands. Furthermore, Calabria's testimony established that Marshall entered the victim's cell a second time, during which Calabria again heard moaning noises coming from the victim's cell. Thus, it does not appear that evidence of the alleged "promise" would have "put the whole case in such a different light as to undermine confidence in the verdict." *Strickler*, 527 U.S. at 290. See *Rose v. State*, 774 So. 2d 629, 635 (Fla. 2000) (finding no *Brady* violation due to limited impeachment value of any alleged deal given witnesses in exchange for their testimony and the fact that additional independent witnesses identified defendant as the perpetrator).

For similar reasons, it does not appear that the trial court erred in denying Marshall's *Giglio* claim. In order to establish a *Giglio* violation, a defendant must show that (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *See Rose*, 774 So. 2d at 635; *Robinson v. State*, 707 So. 2d 688, 693 (Fla. 1998); *Routly v. State*,

590 So. 2d 397, 400 (Fla. 1991). False testimony is material if there is a reasonable likelihood that it could have affected the jury's verdict. *See Ventura v. State*, 794 So. 2d 553, 563 (Fla. 2001); *Rose*, 774 So. 2d at 635; *Routly*, 590 So. 2d at 400. This Court has recognized that "the thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." *Routly*, 590 So. 2d at 400 (quoting *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir. 1983)).

In the instant case, it is worth noting that Mendoza never expressly testified during Marshall's trial that no promises were made in exchange for his testimony. The trial transcript reveals the following:

> [Q]: Okay. And you're just - you just got involved in this case because - why because you're looking for some favors like most snitches?
> [A]: No sir, I got a life of a quarter mandatory. I can't get no favors as far as from that point. I just felt I was doing the right thing in coming forward and testifying to what I saw that morning.. . . .
> o o o o
> [Q]: You're not looking for any reward you just - just a peaceful person.
> [A]: Yes sir.
> [Q]: That's why you were - that's why you got involved in this.
> [A]: Yes sir.

Moreover, even assuming that the alleged promise was made, Marshall appears to have failed to satisfy the materiality prong of the three-part inquiry. As noted above, defense counsel impeached Mendoza during cross-examination regarding his desire to be housed with David Marshall and his letter thanking Inspector Riggins for stopping a transfer of him to another facility. Nor was Mendoza the sole witness to testify in regard to the events surrounding the murder. Thus, it appears that Marshall has failed to demonstrate a reasonable

> likelihood that the alleged false testimony could have affected the jury's verdict. *See Ventura*, 794 So. 2d at 565 (holding evidence of deal immaterial under *Giglio* based on ample impeachment and corroboration).

Marshall, 854 So. 2d at 1248-52.

While the appeal was pending, Marshall had also filed, on February 22, 2002, a Petition for Writ of Habeas Corpus, raising three claims, including the trial judge's override of the jury's life recommendation violated the Constitution pursuant to the United States Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and the standard for jury override cases announced in Tedder v. State, 322 So. 2d 908 (Fla. 1975) was arbitrarily applied in Marshall's case. This Court rejected Marshall's claim that Apprendi/Ring invalidated his override and that Tedder, was arbitrarily applied in this case . Marshall v. Crosby, 911 So. 2d 1129, 1134-36 (Fla. 2005).

On February 9, 2006 Marshall filed a Petition for Writ of Certiorari to the United States Supreme Court, raising the three issues he had in his state habeas petition. The Court denied the petition on May 15, 2006. Marshall v. McDonough, 547 U.S. 1143, 126 S. Ct. 2059, 164 L. Ed. 2d 807 (2006).

The trial court held a series of evidentiary hearings based on the remand

order from the Florida Supreme Court. On June 30, 2004 Marshall filed a successive 3.851 alleging "newly discovered evidence" of juror misconduct on the part of juror Coy Lee Thomason and a corresponding Motion to Interview him. Again, the trial court held a hearing to interview Thomason. On September 28, 2005 the trial court entered an order denying relief, finding no evidence of juror misconduct.

Marshall then appealed that denial to this Court which affirmed the trial court's denial of Marshall's 3.851 motions. Marshall v. State, 976 So. 2d 1071 (Fla. 2007). This Court also denied rehearing. Marshall v. State, 2008 Fla. LEXIS 381 (Fla. Feb. 29, 2008). The mandate issued on March 17, 2008.

Marshall filed a petition for writ of habeas corpus pursuant to 28 U.S.C.A. § 2254 (West) on February 27, 2009. The district court denied that petition on September 21, 2009. Marshall then filed a certificate of appealability ("COA"). That court granted the COA on the issue of whether Marshall's death sentence violates the Eighth and Fourteenth Amendments based on a jury override which was arbitrary and capricious in light of Tedder, 322 So. 2d 908. Marshall next filed a Motion to Expand the Certificate of Appealability on November 16, 2009 which was denied on February 5, 2010.

Marshall then appealed that denial to the Eleventh Circuit Court of Appeals.

On June 28, 2010 the Eleventh Circuit affirmed the denial of the petition. Marshall v. Sec'y, Florida Dept. of Corr., 610 F.3d 576 (11th Cir. 2010) cert. denied, 131 S. Ct. 1809, 179 L. Ed. 2d 659 (U.S. 2011). The U.S. Supreme Court denied Marshall's petition for certiorary on March 28, 2011.

Marshall filed another successive motion for post conviction relief under rule 3.851 on November 29, 2010 wherein he argued that Porter v. McCollum, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009), had somehow changed the manner in which the rejection of claims of ineffective assistance of counsel *and* claims of Brady/Giglio violations were reviewed and that the alleged change should be applied retroactively. According to Marshall, this alleged change was significant with regard to the prior rejection of the claims both that counsel had been ineffective regarding the investigation and presentation of mitigation and that there was a Brady/Giglio violation. The State responded. After holding a hearing on the motion, the trial court denied the motion on February 21, 2011, finding it procedurally barred and that Marshall had not shown that Porter was a change in the law or applied retroactively. It further found that the state courts had fully addressed the ineffectiveness claims and found that counsel's performance had not been deficient. This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied this untimely, successive motion for post conviction relief. Marshall's claim did not meet the requirements of Fla. R. Crim. P. 3.851(d)(2)(B). Porter, 130 S. Ct. 447 did not change the law for prejudice analysis under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) 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, Marshall failed to prove deficiency and does not even allege here that the lack of deficiency was affected by Porter. Finally, Porter did not involve claims of Brady/Giglio error and in no way affects this Court's previous denial of those. Finally, Marshall's counsel was not authorized to file the successive motion. Postconviction relief was denied properly and this Court should affirm.

ARGUMENT

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

Marshall asserts that he is entitled to postconviction relief on both his claims of ineffective assistance of counsel and Brady/Giglio error because this Court's prior review was inadequate under Porter, 130 S. Ct. 447, claiming that it constitutes a fundamental change in law that satisfies the Witt v. State, 387 So. 2d 922 (Fla. 1980) standard for retroactive application. He contends that it was proper for him to raise this claim in a successive, time barred motion for post conviction relief. He insists that if the alleged change in law from Porter was applied to this case, it would show that he was prejudiced by the alleged deficiency of counsel in failing to investigate and present mitigation. However, the lower court properly denied this motion because it was unauthorized, time barred, successive, procedurally barred, and meritless. Furthermore, since this Court previously determined that counsel was not deficient under Strickland, irrespective of the prejudice analysis conducted, Marshall did not carry his burden under Strickland. Finally, Porter only involved a Strickland claim and did not address the analysis required in reviewing possible errors under Brady or Giglio so this Court's previous denial of those claims must stand. The denial of relief 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) cert. denied, 129 S. Ct. 2839, 174 L. Ed. 2d 562 (U.S. 2009), where this Court stated:

> Fla. R. Crim. P. 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), reh'g denied (Sept. 15, 2010), ; State v. Coney, 845 So. 2d 120, 134-35 (Fla. 2003); Lucas v. State, 841 So. 2d 380, 388 (Fla. 2003).

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, Marshall's convictions and sentences became final on May 17, 1993, when the United States Supreme Court denied certiorari after direct review. Marshall, 508 U.S. 915. As Appellant did not file

this motion until 2010, this motion was time barred. See, Davis v. Florida, 510 U.S. 996 (1993); Fla. R. Crim. P. 3.851(d)(1)(B). (holding judgement becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Moreover, this litigation was Marshall's second successive postconviction case. While Fla. R. Crim. P. 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). Marshall 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 Fla. R. Crim. P. 3.851 in November, 2010, was untimely and that Marshall failed to meet any of the exceptions to the time limitations.

In recognition of the fact that the claim is time barred, Appellant attempts to avail himself of the exception for newly-recognized, retroactive constitutional rights. However, Appellant'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, Marshall 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 13, 17. 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, Marshall 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, 179 L. Ed. 2d 557 (2011) reh'g denied, 131 S. Ct. 2951, 180 L. Ed. 2d 239 (U.S. 2011); Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); Premo v. Moore, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011); Padilla v. Kentucky, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); Renico v. Lett, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010); Sears v. Upton, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010); Reed v. Sec'y, Florida Dept. of Corr., 593 F.3d 1217, 1243, 1246 (11th Cir. 2010) cert. denied, 131 S. Ct. 177, 178 L. Ed. 2d 106 (U.S. 2010); Boyd

v. Allen, 592 F.3d 1274, 1302 (11th Cir. 2010) cert. denied, 131 S. Ct. 645, 178 L. Ed. 2d 487 (U.S. 2010); Franqui v. State, 59 So. 3d 82, 95 (Fla. 2011), reh'g denied (Apr. 11, 2011), ; Troy v. State, 57 So. 3d 828, 836 (Fla. 2011), reh'g denied (Mar. 24, 2011), ; Everett v. State, 54 So. 3d 464, 472 (Fla. 2010), as revised on denial of reh'g (Feb. 10, 2011), ; Schoenwetter v. State, 46 So. 3d 535 (Fla. 2010), reh'g denied (Oct. 6, 2010), ; Stewart v. State, 37 So. 3d 243, 247 (Fla. 2010); Rodriguez v. State, 39 So. 3d 275, 285 (Fla. 2010), reh'g denied (July 9, 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), Marshall 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 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." (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, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (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). Marshall cannot use the assertion that the 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. Marshall did not meet that burden so the motion was time barred and the lower court properly denied it. The lower court should be affirmed.

Even if Marshall 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 Marshal insists that Porter represents a "full scale repudiation of this Court's Strickland jurisprudence" 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, Marshal relies 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.A. § 2254(d), as amended by the AEDPA.

As the United States Supreme Court has explained, 28 U.S.C.A. § 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: (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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The Court explained that a state court decision fit 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 412-413. 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. Contrary to Marshall's argument, if the United States Supreme Court in Porter 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; 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, simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." Id. at 412. Thus, Marshall's suggestion that the Porter decision represents a "full scale repudiation of this Court's Strickland jurisprudence," 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, it 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 properly denied.

This is all the more true when considered in light of how Marshall argues that Porter changed the law. He 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 28-30. However, in making the assertion he 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.A. § 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

[2]The references to 28 U.S.C.A. § 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

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), and Sochor v. State, 833 So. 2d 766, 781 (Fla. 2004). 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.

However, Marshall does not contend that the Court overruled this portion of Strickland. This Court's precedent on the standard of review is entirely consistent with this portion of Strickland and Marshall's attempt to argue a contrary position is without any support. 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.

Marshall asserts that the findings of fact by the trial court are not entitled to

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supported by the record." 28 U.S.C.A. § 2254(d). After the enactment of AEDPA, the deference given to state court factual findings was heightened and moved. See 28 U.S.C.A. § 2254(e)(1) (requiring a federal court to presume a state court factual finding correct unless the defendant presents clear and convincing evidence to

deference because they were tainted by legal error in the prejudice analysis. However, Strickland itself required deference to factual findings made in the course of resolving claims of ineffectiveness claims so such an argument is meritless. (IB at 11, 28-30). 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 454-456. Thus, to

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overcome the presumption).

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/Am. Exp., Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (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 Fla. R. Crim. P. 3.851(d)(2)(B) provide a basis for review of a time-barred claim. The denial of relief should be affirmed.

Similarly, Marshall's reliance on Sears v. Upton, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (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. Rather, 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.

Marshall 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).

Given what Porter actually says about proving prejudice, Appellant's suggestion that it 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 announced in Strickland that requires a defendant actually prove there is a reasonable probability of a different result. Since it 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 Appellant admits, the determination of whether a change in law is retroactive is controlled by Witt, 387 So. 2d, 931. As Appellant 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 929-930. 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 *Linklette*r." Id. at 929. Application of that three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001).

Here, while Appellant admits that a change in law is not retroactive under Witt unless this standard is met, he makes no attempt to show how the change in law that he alleges occurred meets this standard. In fact, he never clearly identifies

what change Porter made, offers no purpose behind that change in law, and does not mention how extensive the reliance on the allegedly old law was or what the effect on the administration of justice would be. He does not even challenge the lower court's findings regarding these issues. Given these circumstances, the lower court properly found that Appellant failed to establish that the change in law he alleges occurred would be retroactive under Witt. It should be affirmed.

Instead of attempting to show that the change in law he alleges occurred meets Witt, Marshall notes that this Court found Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987) to be retroactive and suggests 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 constituted 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 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 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 differences in the analysis of changes in law in Porter and Hitchcock and their relationship to 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 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 lower court properly determined that any change in law that Porter might have made would not be retroactive. Thus, it properly found that this motion was time barred and should be affirmed.

Moreover, it should be remembered that this claim, as well as the

Brady/Giglio clam, are procedurally barred. Marshall is seeking nothing more than to relitigate the claim of ineffective assistance of counsel for failing to investigate and present mitigation that he raised in his first motion for post conviction relief and lost; he does the same with the other claim. 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, Marshall 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 Marshall is attempting to do here, his claims are barred and were 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) cert. denied, 130 S. Ct. 40, 174 L. Ed. 2d

625 (U.S. 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, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and Williams, 529 U.S. 362 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 has found 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, Marshall would still 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 Marshall's 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. As detailed in the findings of the trial court, the situation in this case was clearly different with counsel getting records from many institutions and fully interviewing Marshall and his father. In Marshall's case, unlike in Porter, the state courts did address trial counsel's performance at the guilt and penalty phase and found, based on the evidence in the record and at the evidentiary hearing, counsel's performance was not deficient. Marshall does not even suggest how Porter would have affected this determination but, rather, attempts to just reargue the same evidence that this Court previously considered and rejected.

In rejecting this claim, this Court reasoned:

> At the evidentiary hearing, trial counsel testified that he conducted a thorough interview with Marshall prior to trial during which he tried to obtain a life history. Trial counsel acknowledged that his notes from this interview indicated that Marshall did not want to involve his brothers and sisters, although trial counsel said he

would have disregarded this request due to his duty to investigate. During this interview, Marshall told trial counsel that he completed tenth grade and started eleventh, that he was very fortunate to have two parents who motivated and encouraged him to succeed, and that there was "so much love" in his family. Marshall also denied being neglected or abused. Marshall described discipline at home as 75% verbal and 25% physical, although he did not characterize the physical discipline as abusive. Marshall did not relate any physical or mental health problems to trial counsel, and denied having suffered any serious head injuries. Defense counsel also indicated that he reviewed Marshall's school, prison, and mental health records.

In addition to speaking with Marshall, trial counsel indicated that he made efforts to speak with family members. Marshall provided trial counsel with his aunt's name, and trial counsel indicated that he wrote two letters to her requesting that she contact him because Marshall had indicated that she could put him in touch with Marshall's father and other relatives. Marshall's aunt never responded to trial counsel's inquiries. Trial counsel, however, did eventually speak with Marshall's father. According to trial counsel, Marshall's father indicated that Marshall had a good upbringing, although he and his brothers were always getting into trouble.Although trial counsel acknowledged that Marshall's father's comments about him having good grades were at odds with Marshall's school records, he indicated that he would not have made a different proffer by editing what the father would have said had he testified. Marshall's father also provided trial counsel with the names and ages of Marshall's brothers, but claimed not to know where they were living because he had disowned them due to their behavior. Trial counsel conceded during the evidentiary hearing that he did not file a motion for an investigator, nor did he request the assistance of either of the investigators working with the public defender's office at the time. Trial counsel explained that he would not have sent a female investigator into urban Dade County looking for witnesses because it would not have been safe. He also indicated that he would not have sent the other investigator, an elderly man, into Dade County either. Although trial counsel stated that he thought about driving into Liberty City himself, he chose not to do so. Trial counsel further

> explained that he had no information leading him to Liberty City. Trial counsel also testified that he would not have called Marshall's brother Brindley as a witness no matter what he had to offer, because he had previously tried to help Marshall escape. Trial counsel also noted that Marshall's father led him to believe that he was going to bring as many family members as possible with him to the penalty phase. Trial counsel acknowledged that had he possessed information concerning child abuse, he would have presented it at the penalty phase. However, trial counsel testified the problem in this case was that the information Marshall relayed to him coincided with what his father had said.
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> ...
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> ... As indicated above, trial counsel conducted a thorough pretrial interview of Marshall, who advised him that he was not abused as a child. Similarly, Marshall denied being abused when examined by Dr. Joel Klass, as well as when he was examined by one of the postconviction mental health experts (Dr. Woods). Marshall's version of his childhood was corroborated by his father, and trial counsel indicated that nothing in Marshall's prison or school records indicated abuse. Thus, it does not appear that the trial court erred in concluding that trial counsel conducted a reasonable investigation.

Marshall, 854 So. 2d at 1244-48.

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. 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, 175 L. Ed. 2d 255 (2009). As such, Appellant's claim that he was prejudiced by counsel's deficiency - a deficiency that has never been found by this court - would be

meritless even if Porter had changed the law and applied retroactively. The lower court properly denied this motion and should be affirmed.

As argued previously, Marshall's successive motion essentially reasserts his previously-denied claims under Brady and Giglio. See Marshall, 854 So. 2d 1235, 854 So. 2d at 1248-50. Claims raised in prior post-conviction proceedings cannot be relitigated in a successive post-conviction motion unless the movant can demonstrate that the grounds for relief were not known and could not have been known at the time of the earlier proceeding. See Wright, 857 So. 2d, 868. To the extent that Marshall seeks to relitigate his Brady/Giglio claims already decided and rejected by this Court, he does not provide any basis to revisit that claim. Porter is a case applicable to claims of ineffective assistance of counsel and does not address the legal analysis of other claims. The factual findings based on the evidentiary hearing supported this Court's finding of neither a Brady or Giglio violation. This Court should affirm the denial of relief.

Finally, it must be noted that Marshall is represented by Capital Collateral Regional Counsel - South ("CCRC") and as such CCRC was not authorized to file the successive, time-barred postconviction motion. Fla. Stat. Ann. § 27.702 (West) 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 Fla. Stat. Ann. § 27.711(1)(c) (West)., 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.

Fla. Stat. Ann. § 27.711(1)(c). 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: Melissa Minsk Donoho, CCRC, Attorney for Marshall, 101 N.E. 3rd Street, Suite 400, Ft. Lauderdale, FL 33301 this 16th day of August, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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