

IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL,

Appellant,

v.

CASE NO. SC11-694

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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 WHETHER THE UNITED STATES SUPREME COURT’S DECISION IN
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PRELIMINARY STATEMENT

Appellant, MICHAEL BERNARD BELL, raises one issue in this appeal from the summary denial of his successive motion for post-conviction relief. References to the appellant will be to "Bell" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The one volume record on appeal in the instant case will be referenced as "SPCR" followed by the appropriate page number. The one volume supplemental record on appeal will be referred to as "SPCR Supp" followed by the appropriate page number.

References to Bell's initial post-conviction proceedings will be referred to as "PCR" followed by the appropriate volume and page number. References from Bell's direct appeal will be referred to as "TR" followed by the appropriate volume and page number. References to Bell's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Michael Bell, born November 24, 1970, was 23 years old when he murdered Jimmy West and Tamecka Smith. The relevant facts surrounding the December 9, 1993 murders are set forth in this court's opinion on direct appeal as follows:

...On December 9, 1993, appellant Michael Bell shot to death Jimmy West and Tamecka Smith as they entered a car outside a liquor lounge in Jacksonville. Three eyewitnesses testified regarding the murders, which the trial court described in the sentencing order as follows. In June 1993, Theodore Wright killed Lamar Bell in a shoot-out which was found to be justifiable homicide committed in self-defense.

Michael Bell then swore to get revenge for the murder of his brother, Lamar Bell. During the five months following Lamar Bell's death, Michael Bell repeatedly told friends and relatives he planned to kill Wright. On December 8, 1993, Michael Bell, through a girlfriend, purchased an AK-47 assault rifle, a thirty-round magazine, and 160 bullets. The next night, Bell saw Theodore Wright's car, a yellow Plymouth. Bell left the area and shortly returned with two friends and his rifle loaded with thirty bullets.

After a short search, he saw the yellow car in the parking lot of a liquor lounge. Bell did not know that Wright had sold the car to Wright's half-brother, Jimmy West, and that West had parked it and had gone into the lounge. Bell waited in the parking lot until West left the lounge with Tamecka Smith and another female. Bell picked up the loaded AK-47 and approached the car as West got into the driver's seat and Smith began to enter on the passenger's side. Bell approached the open door on the driver's side and at point-blank range fired twelve bullets into West and four into Smith. The other female ducked and escaped injury. After shooting West and Smith, Bell riddled with bullets the front of the lounge where about a

dozen people were waiting to go inside. Bell then drove to his aunt's house and said to her, "Theodore got my brother and now I got his brother."

Bell v. State, 699 So.2d 674 (Fla. 1997).

Bell was charged by indictment with two counts of first-degree murder. (TR Vol. I 8, 28). Bell pled not guilty and was represented at trial by Richard Nichols (now deceased).

Contrary to his pleas, Bell was convicted of the first-degree murders of Smith and West. (TR Vol. I 76). During the penalty phase, a lounge security guard testified that he and seven or eight other people were in the line of fire and hit the ground when appellant sprayed bullets in the parking lot of the lounge. He also testified that appellant shot four or five bullets into a house next door in which three children were residing at the time. The State also introduced a copy of a record showing that appellant was convicted of armed robbery in 1990.

Bell called one witness at the penalty phase, his mother. Mrs. Bell testified that, prior to the murders, both she and her son had received death threats from Wright and West. She testified that appellant was in good mental health and was gainfully employed. She did not believe that her son murdered West and Smith. Bell v. State, 699 So.2d at 675-676.

The jury unanimously recommended Bell be sentenced to death for both murders. (TR Vol. I 90-91). The trial judge found three aggravating factors: (1) Bell had been previously convicted of a violent felony, (2) Bell knowingly created a great risk of death to many persons; and (3) the murders were committed in cold, calculated, and premeditated manner. The trial judge found in marginal mitigation, that at the time of the murder, Bell was acting under an extreme mental or emotional disturbance because of the death of his brother five months prior to the murders. The trial judge followed the recommendation of the jury and sentenced Bell to death for both murders. (TR Vol. I 100-115).

Appellant raised four issues in his direct appeal. Bell claimed the trial court erred: (1) in failing to conduct proper inquiries under Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973) and Faretta v. California, 422 U.S. 806 (1975); (2) in finding the murders were CCP; (3) in instructing the jury on the CCP aggravator; (4) in failing to properly consider and find mitigating circumstances.

On July 17, 1997, the Florida Supreme Court affirmed Bell's convictions and sentences to death. Bell v. State, 699 So.2d 674, 679 (Fla. 1997). Bell's motion for rehearing was denied on

September 17, 1997 and mandate issued on October 17, 1997. The United States Supreme Court denied review on February 23, 1998, in Bell v. Florida, 521 U.S. 1123 (1998).

On June 1, 1999, Bell filed his first motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The trial court summarily denied the motion on January 13, 2000. Bell appealed and on April 26, 2001, the Florida Supreme Court reversed and remanded with instructions to allow Bell to file an amended motion. Bell v. State, 790 So.2d 1101 (Fla. 2001). Bell sought and was granted permission to represent himself during post-conviction proceedings. Collateral court judge, Charles Arnold, appointed Bell stand-by counsel for the "purpose of assisting the defendant in the subpoenaing of witnesses and the filing of papers with the Court. (PCR Vol. I 108-110).

On October 3, 2001, Bell filed a *pro se* amended motion for post-conviction relief. (PCR Vol. I 111-200, PCR Vol. II 201-232). Bell raised numerous claims and sub-claims in his motion. The State filed a response. The collateral court granted Bell an evidentiary hearing on thirteen sub-claims within Issue I and on issues II, XI, and XII. The evidentiary hearing was held from April 8-10, 2002. Over thirty (30) witnesses testified.

On May 31, 2002, the collateral court denied Bell's motion for post-conviction relief. Bell appealed. Bell raised twenty-four (24) claims: (1) trial counsel was ineffective for failing to object to the State's comments that Dale George pled guilty to being an accessory to this crime; (2) counsel was ineffective for improperly questioning Margo Bell at the penalty phase regarding the defendant's prior conviction for robbery; (3) counsel was ineffective for advising Bell not to testify; (4) counsel was ineffective in connection with the prosecutor's comments that the State does not seek the death penalty in every first-degree murder case; (5) counsel was ineffective for failing to adequately investigate and obtain the recorded statement of Ericka Williams; (6) counsel was ineffective for failing to produce Andre Mayes as a defense witness; (7) counsel was ineffective for failing to investigate and present a credible defense; (8) counsel was ineffective for making improper closing arguments; (9) counsel was ineffective for allowing the defendant to be shackled in front of jurors; (10) counsel was ineffective in connection with the mental health experts' failure to address all mental competency considerations required by the Florida Rules of Criminal Procedure and in connection with the lack of expert assistance

with mental health mitigation issues; (11) counsel was ineffective for conceding guilt and CCP; (12) counsel was ineffective for failing to object to the prosecutor's improper remarks to jurors; (13) counsel was ineffective for failing to object and request a curative jury instruction for the State's incorrect statement of the advisory sentencing procedure; (14) counsel was ineffective for failing to object to comments that diminished the jury's sentencing responsibility, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (15) counsel was ineffective for failing to object to the prosecutor's peremptory strike of a prospective juror who had conscientious objections to the death penalty; (16) the State violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by not disclosing prison and law enforcement records of the victim; (17) counsel was ineffective for failing to investigate and prepare for the testimony of Mark Richardson; (18) counsel was ineffective for failing to investigate and prepare for the testimony of Charles Jones; (19) counsel was ineffective for failing to call Andre Mayes to impeach the testimony of Charles Jones; (20) counsel was ineffective for failing to prepare for the testimony of Dale George and Ericka Williams; (21) counsel was ineffective for

failing to present any penalty-phase evidence other than the testimony of defendant's mother; (22) counsel was ineffective for failing to ensure that the prospective jurors were sworn; (23) counsel was ineffective for a number of cumulative errors; and (24) the circuit court erred in finding a number of issues to be procedurally barred. Bell v. State, 965 So.2d 48, 54 n.5 (Fla. 2007).

Bell also filed a petition for writ of habeas corpus. Bell raised eight claims: (1) appellate counsel was ineffective for improperly arguing Bell's claim on direct appeal that Bell should have been permitted to represent himself at trial; (2) appellate counsel was ineffective for failing to raise on direct appeal the erroneous excusal for cause of a prospective juror by the trial court; (3) appellate counsel was ineffective for failing to raise on direct appeal the trial court's error in permitting Bell to wear his jail uniform in front of the jury; (4) appellate counsel had a conflict of interest which rendered his assistance ineffective; (5) appellate counsel was ineffective for failing to raise on direct appeal the issue of the trial court's jury instructions; (6) appellate counsel was ineffective for failing to argue on direct appeal that comments made in *voir dire* were reversible error; (7) Bell's death

sentence is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and (8) the trial court gave unconstitutional jury instructions. Bell v. State, 965 So.2d 48, 54 n.6 (Fla. 2007).

The Florida Supreme Court discussed in detail Bell's claims of ineffective assistance of counsel. Relevant to this appeal, Bell claimed that trial counsel was ineffective for failing to investigate and present mitigating factors. Bell v. State, 965 So.2d 48, 73-75 (Fla. 2007). This Court rejected his claim, ruling that:

Next, Bell asserts that trial counsel was ineffective for failing to adequately investigate and present evidence that would have mitigated his offenses such that the jury reasonably could have returned a life sentence recommendation. In the context of counsel's failure to investigate and present mitigating evidence, we have held:

As this Court has said, "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." State v. Lewis, 838 So.2d 1102, 1113 (Fla.2002). In determining whether the penalty phase proceedings were reliable, "[t]he failure [of counsel] to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." Asay v. State, 769 So.2d 974, 985 (Fla.2000) (quoting Rose v. State, 675 So.2d 567, 571 (Fla.1996)) (alterations in original). Thus, when evaluating claims that counsel was ineffective for failing to present mitigating evidence, the defendant must show that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." Id. (quoting Rutherford,

727 So.2d at 223). Orme v. State, 896 So.2d 725, 731 (Fla.2005).

At the penalty phase in Bell's trial, the State called John Lipsey, a security guard at the lounge, who testified that during the crime, the masked gunman also shot at the lounge building and into a house next door to the lounge. The State then introduced a copy of Bell's judgment and sentence for a prior armed robbery from May 7, 1990. The State rested, and the defense then called Margo Bell, the defendant's mother. Margo Bell testified that she was aware of a feud between her son and Theodore Wright. She testified that as a result of the feud, there were threats on her life that required her to remain in her home. She stated that these threats lasted for a year. She also testified that West and Wright had threatened to kill the defendant and that at one point, they had shot at Bell but had killed someone else by accident. On cross-examination, Margo Bell stated that her son was a good, mature, and responsible person, but was a victim of circumstance. She also stated that he was of good mental health and had never been treated for mental or psychiatric problems.

The defense rested, and Bell responded affirmatively on the record when the trial judge asked whether Bell agreed that the defense would not call any other witnesses and that he would not testify at the penalty phase.

Bell argues that there was substantial mitigation evidence presented at the evidentiary hearing that should have been presented at the trial. The circuit court denied this claim, holding that Bell could not "go behind" his sworn representations at trial.

First, regarding the claim based on non-mental health mitigation evidence, Bell presented at the evidentiary hearing testimony by Dale George and Maurice Jones regarding West's prior attempt to shoot Bell. Bell asserts that this evidence would have supported his claim that he feared West. However, it is clear that his mother testified to this information at trial.

Thus, Bell's claim based on this testimony was properly denied by the circuit court since it was presented at trial.

Next, Bell asserts that there were several witnesses who testified at the evidentiary hearing about positive aspects of Bell's character. Essentially, each of the witnesses testified that they thought Bell was a nice, helpful, and good person who had made a bad decision. However, Bell's mother also testified to this same information and opinion in her trial testimony. Moreover, while evidence of good character is certainly helpful, this evidence that Bell was considered nice could not have countered the quantity and quality of evidence of aggravating factors presented by the State. Thus, we do not find error in the circuit court's determination that Bell failed to establish the necessary prejudice to be entitled to relief.

Bell also claims that counsel should have presented evidence of mental health mitigation. On this claim, we again find no error in the circuit court's denial of Bell's claim of ineffective assistance of counsel as to the analysis of the prejudice prong of the Strickland test. Bell did not present evidence at the post-conviction evidentiary hearing that demonstrated that any mitigating evidence existed that would have outweighed the State's evidence in aggravation. Accordingly, our confidence in the outcome is not undermined.

Bell v. State, 965 So.2d at 73-74.

On June 7, 2007, the Florida Supreme Court rejected the remainder of Bell's claims on appeal and denied Bell's petition for writ of habeas corpus. Bell v. State, 965 So.2d 48, 79 (Fla. 2007). On June 22, 2007, Bell filed a motion for rehearing, *pro se*, although Bell was represented on appeal by appointed

collateral counsel. On August 29, 2007, the Florida Supreme Court struck his *pro se* pleading as unauthorized.¹

On September 5, 2007, Bell filed a petition for writ of certiorari in the United States Supreme Court. On November 5, 2007, the United States Supreme Court denied his petition. Bell v. Florida, 552 U.S. 1011, 128 S.Ct. 535 (2007).

On November 30, 2010, Bell filed a *pro se* successive motion for post-conviction relief. (SPCR 1-9) As have about 40 other capital defendants in Florida, Bell alleged he was entitled to re-litigate his claims of ineffective assistance of trial counsel pursuant to the United States Supreme Court's decision in Porter v. McCollum, 130 S.Ct. 447 (2009). On January 14, 2011, the State filed a response. (SPCR 18-38)

On March 7, 2011, the collateral court summarily denied Bell's motion. (SPCR 41-58). An amended order was entered on March 17, 2011. (SPCR 59-77).

The court first denied the motion as untimely. (SPCR 11-13). The Court found that Bell's motion, filed some twelve years after Bell's convictions and sentences to death became final, did not fit with any exception to the one year filing period set forth in Rule 3. 851(d)(1), Florida Rules of Criminal

¹ Mandate issued on September 17, 2007.

Procedure. The court found that although Bell's successive motion was purportedly filed pursuant Rule 3.851(d)(2)(B), Florida Rules of Criminal Procedure, Bell's motion did not actually fall within that exception because Porter was not new law. The collateral court concluded that in Porter, the United States Supreme Court simply applied its 1984 decision in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to the unique facts of Porter's case. (SPCR 69-71)). The collateral court also found that, even if Porter were new law, Bell's successive motion would still be untimely because Porter had not already been declared retroactive at the time Bell filed his successive motion. (SCPR 71).

Alternatively, the collateral court denied Bell's claim on the merits. (SPCR 72). The collateral court found that the decision in Porter turned on the very powerful mitigation evidence that trial counsel failed to uncover and present during the penalty phase of Porter's capital trial, in particular Porter's heroic combat service and significant mental mitigation. The collateral court found that Bell's mitigation was far, far, less compelling. (SPCR 75).

The court pointed out that Bell had no military service, let alone heroic combat service. The collateral court noted, as

well, that instead of the battlefields of Korea, Bell had served time in prison before the murders for armed robbery. Indeed, the court observed that Bell had only been out of prison a few months before he committed the murders for which he was sentenced to death. (SPCR 75).

The collateral court also found, that unlike Porter, Bell offered no mental mitigation evidence at his post-conviction evidentiary hearing, and what evidence Bell did present amounted to little more than evidence that Bell was a nice, helpful, and good person who had made a bad decision. The collateral court concluded that Bell's mitigation evidence at the evidentiary hearing did not even come close to the compelling evidence that Porter presented at his own evidentiary hearing. The court found that "even if Bell's motion were not time barred, the United States Supreme Court's decision in Porter does not compel, or even suggest, a different result in Mr. Bell's case." (SPCR 75-76).

Bell appealed. On August 18, 2011, Bell filed his initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

The collateral court correctly found that Bell's successive motion is time barred. The successive motion, filed some 12 years after Bell's convictions and sentences became final did not fall within any exception to the one year limitation period set forth in Rule 3.851(d)(1), Florida Rules of Criminal Procedure. Although Bell purports to rely on an exception to the one year limitation period that would allow a successive motion to be filed if it were based on new constitutional law that had already been declared retroactive at the time Bell filed his motion, Bell met neither prerequisite. The United States Supreme Court's decision in Porter v. McCollum, 130 S.Ct. 447 (2009) is not new law. Instead, Porter is a case in which the United States Supreme Court applied its 1984 decision in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to the unique facts of Mr. Porter's case. Even if it were new law, it had not already been declared retroactive at the time Bell filed his motion. Accordingly, it is not appropriately or timely brought in a successive motion for post-conviction relief.

The collateral court also correctly found Bell's motion was without merit. The United States Supreme Court's decision in

Porter turned on two powerful pieces of evidence that Porter presented at a post-conviction evidentiary hearing; significant mental mitigation and Porter's heroic combat service during the Korean War. Bell had neither. Indeed, the only uniform that Bell wore before the murder was a prison uniform. Bell had been out of prison only a few months when he murdered Jimmy West and Tamecka Smith. The collateral court committed no error in finding that the United States Supreme Court's decision in Porter did not compel, or even suggest, a different result in Bell's case.

ARGUMENT

ISSUE

WHETHER THE UNITED STATES SUPREME COURT'S DECISION IN PORTER V. McCOLLUM ALLOWS BELL TO RE-LITIGATE, IN A SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF, A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL THAT HAS ALREADY BEEN REJECTED BY THIS COURT ON THE MERITS.²

In this claim, Bell seeks to re-litigate his claim that trial counsel was ineffective during the penalty phase of his capital trial. Some four years ago, this Court rejected this same claim in Bell v. State, 965 So.2d 48, 73-75 (Fla. 2007). Bell suggests he is, nevertheless, allowed to raise this same claim again because the United States Supreme Court determined in Porter v. McCollum, 130 S.Ct. 447 (2009), that the Florida Supreme Court has, "in a long line of Florida cases," improperly applied Strickland's prejudice prong in rejecting claims of ineffective assistance of counsel. (IB at 44).³

² Bell also claims, as sub-issue, that the collateral court erred by preventing him from utilizing a mental health expert. This claim was properly raised in Bell's appeal from the denial of his initial motion for post-conviction relief. Bell is not entitled to re-litigate this claim in a successive motion for post-conviction relief.

³ In his brief, Bell compares his case with that of Ronnie Ferrell, a case in which this Court affirmed the collateral court's order granting Ferrell a new penalty phase. While Bell claims this Court has consistently applied Strickland incorrectly in every other capital case, Bell avers this Court

The collateral court properly denied Bell's successive motion for post-conviction relief. This is so for several reasons.

First, Bell's motion was untimely. Bell chose to raise this claim in a successive motion for post-conviction relief pursuant to Rule 3.851, Florida Rules of Criminal Procedure.⁴ Having chosen that avenue, Bell is required to comply with the rule.

Rule 3.851, Florida Rules of Criminal Procedure sets forth a one year limitation period in which a capital defendant may file a motion for post-conviction relief. The period begins to run on the day a defendant's conviction becomes final. Rule

got it right in Ferrell. Bell asks this Court to rule consistently with its decision in Ferrell. There are many distinguishing factors that sets Bell's case apart from the Ferrell case. Ferrell was not the shooter, Bell was the lone gunman, Ferrell's vote was 7-5, Bell's 12-0, Bell killed two people, Ferrell was found guilty of murdering one. Mr. Nichols was alive and testified at Bell's evidentiary hearing but was dead by the time of Ferrell's evidentiary hearing. Accordingly, Mr. Nichols was unable to testify at Ferrell's hearing that he fully discussed mitigation evidence with Ferrell but he freely and voluntarily waived it. In Ferrell's case, the collateral court granted his post-conviction motion as to the penalty phase in Bell's case, the collateral court denied it. Given the many factors distinguishing Bell from Ferrell, the Ferrell case is not a comparator.

⁴ Bell's latest motion is successive because Bell already had litigated one full round of post-conviction claims that were denied on the merits and then affirmed on appeal.

3.851(d)(1)(A), *Florida Rules of Criminal Procedure*. In Bell's case, Bell's conviction became final on February 23, 1998, when the United States Supreme Court denied certiorari review from his direct appeal. Bell v. Florida, 521 U.S. 1123 (1998).

Rule 3.851(d) provides that no (emphasis mine) motion for post-conviction relief may be filed or considered if it is filed outside the one year time limitation unless it falls within one of three narrow exceptions. One of these, and the one which Bell purported to invoke before the collateral court below, is found in Rule 3.851(d)(2)(B), *Florida Rules of Criminal Procedure*.

This exception provides that a defendant may file an out of time motion for post-conviction relief if the claim is based on a new retroactive fundamental constitutional right that was not established within the one year limitation period set forth in Rule 3.851(d)(1).⁵ On the face of the rule, there are two essential prerequisites to filing an out of time motion for post-conviction relief: (1) a new fundamental constitutional right has been established and (2) the new fundamental

⁵ For the most part, a new fundamental constitutional right for the purposes of Rule 3.851(d)(2)(B), comes as a result of new case law from the United States Supreme Court. (e.g. Roper v. Simmons, 543 U.S. 551 (2005), the case in which the United States Supreme Court determined that a person who commits a murder before the age of 18 cannot be executed).

constitutional right has already been held to be retroactive to cases on collateral review.

Bell's Porter claim is untimely because Bell can meet neither pre-requisite of Rule 3.851(d)(2)(B) to overcome the one year limitation period imposed by Rule 3.851. First, Porter is not a case that establishes a new fundamental constitutional right. The "constitutional right" at issue in Porter is a defendant's right to effective assistance of counsel. Long before Porter, the fundamental constitutional right to effective assistance of counsel was established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Likewise, in Strickland, the United States Supreme Court outlined a two-pronged test to be applied in analyzing such claims. On its face Porter does not, and does not even purport to, establish a new constitutional right.

In Porter, the United States Supreme Court, *per curiam*, reversed the Eleventh Circuit Court of Appeals. Citing to Strickland v. Washington, the United States Supreme Court found it was objectively unreasonable for the Florida Supreme Court to conclude there was no reasonable probability Porter's death sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's

counsel neither uncovered nor presented; most importantly Porter's compelling combat service in Korea during the Korean conflict for which he was decorated. See Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010) (noting that "the crux of counsel's deficient performance in Porter was the failure to investigate and present Porter's compelling military history.").

Before Porter, claims of ineffective assistance of counsel claims were governed by a two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). After Porter, a claim that counsel was ineffective in violation of the Sixth Amendment right to counsel remains governed by a two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Even a cursory reading of Porter reveals that the United States Supreme Court changed nothing about Strickland. Nor did Porter establish the Florida Supreme Court's analysis of Bell's claims was incorrect. Instead, the United States Supreme Court ruled, simply, that both the collateral court and this Court got it wrong in Porter's individual case.

Even if Bell could show Porter was "new law", which he cannot, Bell's motion would still be untimely because Bell

cannot show that Porter had already been held retroactive to cases already final at the time Porter was decided. As noted above, Rule 3.851(d)(2)(B) provides an exception to the one year limitation period when "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively."

The use of the term "has been held" is significant. This language means that in order to file an out of time successive motion for post-conviction relief, the new law upon which the defendant stakes his claim must have already been declared retroactive. Chandler v. Crosby, 916 So.2d 728 (Fla. 2005) (Wells, J. concurring specially) (noting that an untimely motion filed pursuant to Rule 3.851(d)(2)(B) must assert the new constitutional right upon which he relies has been held to apply retroactively in a case decided before [emphasis mine] the motion was filed in order for the motion to be considered timely filed); Sims v. State, 753 So.2d 66, 70 (Fla. 2000)(rules use of past tense in a rule is not happenstance, instead use of the past tense means something has already happened). See also Tyler v. Cain, 533 U.S. 656 (2001)(holding that use of past tense in federal statute regarding successive federal habeas

petitions requires Court to hold new rule retroactive before it can be relied upon).⁶

Bell has not alleged, nor can he show that, Porter had already been declared to be retroactive by either the United States Supreme Court, the Florida Supreme Court or indeed any Court, at the time he filed his motion. As such, Bell's motion is facially untimely.⁷

⁶ A defendant whose litigation is already in successive post-conviction land is not without remedy if his claim is truly premised on a new constitutional right that was not established until after his first round of post-conviction litigation was completed. If the new law is declared retroactive, a defendant can then file a successive motion for post-conviction relief within one year and the collateral court may properly consider his claim. Retroactivity is only properly litigated in a post-conviction motion filed within the one year period set forth in Rule 3.851(d), Florida Rules of Criminal Procedure.

⁷ Bell attempts to persuade this Court to apply this Court's decision in Witt v. State, 387 So.2d 922 (Fla. 1980) and declare Porter retroactive. (IB 37-42). However, a Witt analysis is not appropriate when considering a successive motion for post-conviction relief filed outside the one year time limitations. This is so because to file a post-conviction motion outside the one year limitation period of Rule 3.851(d)(1), the new right has to already been declared retroactive to cases on collateral review at the time the motion is filed. *Rule 3.851(d)(2)(B), Florida Rules of Criminal Procedure*. Even if this were not the case, Witt does not help Bell in his cause because a Witt analysis is only appropriate when new law has been established. Porter is not new law. Porter merely applied Strickland to the facts of Porter's case. See e.g. Marek v. State, 8 So. 3d 1123, 1128 (Fla. 2009) (rejecting a similar claim of retroactivity and concluding that the United States Supreme Court in Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456 (2005), Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), and Williams v. Taylor,

Bell's post-conviction motion is also procedurally barred because Bell raised, and this Court rejected, this claim in his initial post-conviction proceedings. Marek v. State, 8 So.3d 1123, 1129 (Fla. 2009). Bell is seeking to re-litigate the exact same claim of ineffective assistance of penalty phase counsel that he raised in his initial motion for post-conviction relief. Both the collateral court and this Court, on appeal, rejected Bell's claim. Bell v. State, 965 So.2d 48 (Fla. 2007). Bell avers he may re-litigate this claim in light of the Porter decision. Bell is mistaken. This Court has already rejected a similar argument in another case. Marek v. State, 8 So.3d at 1129 (ruling that Marek's attempt to re-litigate his ineffective assistance of counsel claim was procedurally barred because Marek had already raised, and the Florida Supreme Court rejected, this claim in an earlier post-conviction proceeding and additionally rejecting Marek's suggestion he could re-litigate the claim in light of several recent decisions from the United States Supreme Court). As it did in Marek, this Court should conclude Bell's ineffective assistance of penalty phase counsel claim is procedurally barred.

529 U.S. 362, 120 S. Ct. 1495 (2000) did not change the standard of review for claims of ineffective assistance of counsel under Strickland).

Finally, this Court should deny Bell's Porter claim, because Bell's case is singularly without merit. The United States Supreme Court's decision in Porter is a narrow one. Porter's case turned on the very powerful mitigation evidence that trial counsel failed to uncover and present during the penalty phase of Porter's capital trial. See Reed v. Secretary, Florida Dept. of Corrections, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010) (noting that "the crux of counsel's deficient performance in Porter was the failure to investigate and present Porter's compelling military history.").

At the evidentiary hearing, Porter presented evidence, through the depositions of his brother and sister, that Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead. According to his brother, Porter attended classes for slow learners and left school when he was 12 or 13.

Porter also presented evidence that to escape his horrible family life, Porter enlisted in the Army at age 17. Porter fought in the Korean War. His company commander, Lieutenant Colonel Sherman Pratt, testified at Porter's post-conviction hearing. Porter was with the 2d Division, which had advanced above the 38th parallel to Kunu-ri when it was attacked by Chinese forces. Porter suffered a gunshot wound to the leg during the advance but was with the unit for the battle at Kunu-ri. While the Eighth Army was withdrawing, the 2d Division was ordered to hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day. As Colonel Pratt described it, the unit "went into position there in bitter cold night, terribly worn out, terribly weary, almost like zombies because we had been in constant-for five days we had been in constant contact with the enemy fighting our way to the rear, little or no sleep, little or no food, literally as I say zombies." The next morning, the unit engaged in a "fierce hand-to-hand fight with the Chinese" and later that day received permission to withdraw, making Porter's regiment the last unit of the Eighth Army to withdraw.

Less than three months later, Porter fought in a second battle, at Chip'yong-ni. His regiment was cut off from the rest

of the Eighth Army and defended itself for two days and two nights under constant fire. After the enemy broke through the perimeter and overtook defensive positions on high ground, Porter's company was charged with retaking those positions. In the charge up the hill, the soldiers "were under direct open fire of the enemy forces on top of the hill. They immediately came under mortar, artillery, machine gun, and every other kind of fire you can imagine and they were just dropping like flies as they went along." Porter's company lost all three of its platoon sergeants, and almost all of the officers were wounded. Porter was again wounded and his company sustained the heaviest losses of any troops in the battle, with more than 50% casualties. Lieutenant Colonel Pratt testified that these battles were "very trying, horrifying experiences," particularly for Porter's company at Chip'yong-ni. Porter's unit was awarded the Presidential Unit Citation for the engagement at Chip'yong-ni, and Porter individually received two Purple Hearts and the Combat Infantryman Badge, along with other decorations.

Porter also presented evidence that after he was discharged, he suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night. Porter's family eventually removed all of the knives from the house. According

to Porter's brother, Porter developed a serious drinking problem and began drinking so heavily that he would get into fights and not remember them at all. According to one expert that Porter called to testify, Porter's symptoms would "easily" warrant a diagnosis of posttraumatic stress disorder (PTSD).

In addition to this testimony regarding his life history, Porter presented an expert in neuropsychology, Dr. Dee, who had examined Porter and administered a number of psychological assessments. Dr. Dee concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior. Dr. Dee testified that at the time of the murder, Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances. Porter v. McCollum, 130 S.Ct. 447, 449-451 (2009).

In comparison to Mr. Porter, Bell has no military service. His only time in uniform, prior to the murder, was in a prison uniform. Indeed, prior to this murder, Bell served time in prison for robbery, drug possession, and grand theft auto (GTA). Starting in 1987, Bell was in and out of prison several times before he murdered Jimmy West and Tamecka Smith and had been out of prison less than seven months on the day of the murder.

Moreover, as noted by this Court on appeal from Bell's initial post-conviction proceedings, Bell's mitigation evidence, presented at the evidentiary hearing, amounted to a belief by several witnesses that Bell was "nice." Indeed, this Court noted that the fact "Bell was considered nice could not have countered the quantity and quality of evidence of aggravating factors presented by the State." Bell v. State, 965 So.2d 48, 74 (Fla. 2007).

Bell's case in mitigation is not in the slightest bit like the mitigation present in the Porter case. The collateral court's order denying Bell's Porter claim should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the summary denial of Bell's successive motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Frank Tassone, 1833 Atlantic Boulevard, Jacksonville, Florida 32207, this 19th day of September, 2011.

MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

MEREDITH CHARBULA
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