IN THE SUPREME COURT OF FLORIDA

RICHARD RANDOLPH,

Appellant,

v. **Case No. SC11-725**

STATE OF FLORIDA,

Appellee.
_____ /

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

Barbara C. Davis
Assistant Attorney General
Florida Bar No. 0410519
444 Seabreeze Blvd., 5th Floor
Telephone: (386) 238-4990
Facsimile: (386) 226-0457

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 5

SUMMARY OF THE ARGUMENT 9

ARGUMENT

I. THE TRIAL JUDGE DID NOT ERR IN DENYING THE SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF 12

CONCLUSION 35

CERTIFICATE OF SERVICE 35

CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma,
470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).....17
Anderson v. State,
18 So.3d 501 (Fla. 2009) 32
Bobby v. Van Hook,
130 S.Ct. 13 (2009).....26, 33
Breedlove v. State,
692 So. 2d 874 (Fla.1997) 16
Carawan v. State,
515 So. 2d 161 (Fla. 1987) 31
Carter v. State,
706 So. 2d 873 (Fla. 1997) 21
Chandler v. Crosby,
916 So. 2d 728 (Fla. 2005) 22
Cooper v. State,
856 So. 2d 969 n. 7 (Fla. 2003) 13
Crawford v. Washington,
541 U.S. 36, 124 S.Ct. 1354 (2004).....22
Cullen v. Pinholster,
131 S.Ct. 1388 (2011).....21
Delap v. Dugger,
513 So. 2d 659 (Fla. 1987) 22
Demps v. Dugger,
514 So. 2d 1092 (Fla. 1987) 22
Downs v. Dugger,
514 So. 2d 1069 (Fla. 1987) 22
Duest v. Dugger,
555 So. 2d 849 (Fla.1990) 13
Ferguson v. State,
789 So. 2d 306 (Fla. 2001) 21
Grossman v. State,
29 So. 3d 1034 (Fla. 2010) 19
Hall v. State,
541 So. 2d 1125 (Fla. 1989) 23

Harrington v. Richter,
131 S.Ct. 770 (2011).....21
Hitchcock v. Dugger,
481 U.S. 393 (1987).....22, 24, 25
Johnston v. Moore,
789 So. 2d 262 (Fla. 2001) 22, 30
Johnston v. State,
63 So. 3d 730 (Fla. 2011) 13
Kilgore v. State,
55 So. 3d 487 (Fla. 2010) 32
Knowles v. Mirzayance,
129 S.Ct. 1411 (2009).....26
Lambrix v. State,
698 So. 2d 247 (Fla. 1996) 19
Marek v. State,
8 So. 3d 1123 (Fla. 2009) 26, 27, 30
Mendoza v. State,
2011 WL 2652193 (Fla. 2011) 33
Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....6
New v. State,
807 So. 2d 52 (Fla. 2001) 21
Nixon v. State,
932 So. 2d 1009 (Fla. 2006) 11
Padilla v. Kentucky,
130 S.Ct. 1473 (2010).....21
Pope v. State,
702 So. 2d 221 (Fla. 1997) 19
Porter v. McCollum,
130 S.Ct. 447 (2009).....passim
Premo v. Moore,
131 S.Ct. 733 (2011).....21
Randolph v. Florida,
498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990).....18, 30
Randolph v. McNeil,
590 F.3d 1273 (11th Cir. 2009) 3

Randolph v. State,
562 So. 2d 331 (Fla. 1990) 1, 9, 16
Randolph v. State,
853 So. 2d 1051 (Fla. 2003) 3, 17
Renico v. Lett,
130 S.Ct. 1855 (2010).....21
Riley v. Wainwright,
517 So. 2d 656 (Fla. 1987) 22
Robinson v. State,
707 So. 2d 688 (Fla. 1998) 16, 17
Rompilla v. Beard,
545 U.S. 374, 125 S.Ct. 2456 (2005).....26
Rose v. State,
675 So. 2d 567 (Fla. 1996) 14
Rose v. State,
985 So. 2d 500 (Fla. 2008) 11
Routly v. State,
590 So. 2d 397 (Fla. 1991) 17
Rutherford v. State,
727 So. 2d 216 (Fla. 1998) 14
Sears v. Upton,
130 S.Ct. 3259 (2010).....4, 21, 24, 31
Sochor v. State,
883 So. 2d 766 (Fla. 2004) 29, 30
State v. Coney,
845 So. 2d 120 (Fla. 2003) 10, 32
State v. Glenn,
558 So. 2d 4 (Fla. 1990) 22, 31
State v. Kilgore,
976 So. 2d 1066 (Fla. 2007) 33
State v. McBride,
848 So. 2d 287 (Fla. 2003) 19
Stephens v. State,
748 So. 2d 1028 (Fla. 1999) 22, 29, 30
Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....passim

Teffeteller v. Dugger,
734 So. 2d 1009 (Fla. 1999) 17
Thompson v. Dugger,
515 So. 2d 173 (Fla. 1987) 22
Tompkins v. Dugger,
549 So. 2d 1370 (Fla. 1989) 16
Topps v. State,
865 So. 2d 1253 (Fla. 2004) 19
Troy v. State,
57 So. 3d 828 (Fla. 2011) 18, 30
Victorino v. State,
23 So. 3d 87 (Fla. 2009) 13
Walton v. State,
3 So. 3d 1000 (Fla. 2009) 10
Wiggins v. Smith,
539 U.S. 510, 123 S.Ct. 2527 (2003).....26
Williams v. Taylor,
529 U.S. 362, 120 S.Ct. 1495 (2000).....26
Williamson v. State,
961 So. 2d 229 (Fla. 2007) 10
Wit v. State,
387 So. 2d 922 (Fla. 1980) 21, 22, 31, 32
Wong v. Belmontes,
558 U.S. ——, 130 S.Ct. 383 (2009).....26
Wright v. State,
857 So. 2d 861 (Fla. 2003) 19

Statutes

Fla. Stat § 27.702(1) and § 27.711(1)(c) 10
Fla. Stat §27.702 33
Fla. Stat §27.711(1)(c).....34
Fla. Stat 921.141(5)(d) (1987).....8
Fla. Stat 921.141(5)(e) (1987) 9
Fla. Stat 921.141(5)(f) (1987).....9
Fla. Stat 921.141(5)(h) (1987).....9

Rules

Fla. R. Crim. P. 3.851 .....10, 19
Fla. R. Crim. P. 3.851(d)(1)(B) 19
Fla. R. Crim. P. 3.851(d)(2)(B) 29
Fla. R. Crim. P. 3.851(f)(5)(B) 10
Fla. R. Crim. P. 3.851(d) (1).....23
Fla. R. Crim. P. 3.851(d) 21

STATEMENT OF THE CASE

This is an appeal from a successive post-conviction proceeding. This Court previously summarized the procedural history:

> In 1989, Randolph was convicted of first-degree murder, armed robbery, sexual battery with force likely to cause serious personal injury or with a deadly weapon, and grand theft of a motor vehicle in the killing of Minnie Ruth McCollum. The facts surrounding these crimes are discussed in detail in this Court's opinion affirming the convictions and sentences. *See Randolph v. State*, 562 So. 2d 331 (Fla.1990).FN1
>
> > FN1. The jury recommended a death sentence by a vote of eight to four. The trial judge found four aggravating circumstances (murder during commission or flight after commission of a sexual battery; murder committed to avoid or prevent lawful arrest; murder committed for pecuniary gain; and murder especially heinous, atrocious, or cruel), no statutory mitigating circumstances, and two nonstatutory mitigating circumstances (Randolph possesses an atypical personality disorder and expressed shame and remorse for his conduct.). The trial judge followed the jury's recommendation and imposed death. *See Randolph*, 562 So. 2d at 334.
>
> Randolph filed a second amended 3.850 motion on May 1, 1993, and a hearing was ultimately held on July 22, 23, and 24, 1997. At this time, the trial court also heard Randolph's motion to compel production of public records. The trial court granted Randolph sixty days from July 24, 1997, to depose three individuals and to file an amended 3.850 motion based on the public records produced at the hearing. Randolph then filed a motion to compel disclosure and a motion for extension of time to file an amended 3.850 motion, and the State filed an objection. The trial court heard these motions on December 4, 1997, and took testimony from four witnesses involved in Randolph's trial. The trial court granted Randolph until January 26, 1998, to file an amended 3.850 motion.

On January 26, 1998, Randolph filed a third amended 3.850 motion raising two additional grounds for relief. In total, Randolph presented twenty-one claims. The trial court issued an order on February 24, 1998, denying relief on claims one through nineteen and twenty-one, and granting an evidentiary hearing on claim twenty. That evidentiary hearing was held on April 24, 1998, and thereafter the trial court issued an order denying relief on claim twenty. Randolph now appeals the denial of his postconviction motion, raising seven claims.FN2

> FN2. In his brief Randolph raises seven claims, but claims one through four contain various subclaims. We have recast and renumbered Randolph's claims as follows: (1) denial of a neutral detached judge in violation of the rights to due process and a fair trial; **(2) ineffective assistance of counsel with respect to (a) the investigation and presentation of mitigation evidence,** (b) expert assistance, (c) closing argument, (d) prosecutorial misconduct, and (e) jury instructions; (3) denial of a full and fair postconviction evidentiary hearing with respect to (a) the trial court's denial of Randolph's discovery motion, (b) the trial court's failure to admit the affidavit of Timothy Calhoun into evidence, and (c) the trial court's failure to grant Randolph's motion for a continuance; (4) ineffective assistance of counsel in the guilt phase with respect to (a) concessions of guilt, (b) available voluntary intoxication evidence, (c) consultation and advice, (d) lack of a complete record, and (e) defendant's absence from a proceeding which took place before the penalty phase; (5) defense counsel harbored an undisclosed conflict of interest; (6) the trial judge harbored an undisclosed bias in violation of due process; and (7) the heinous, atrocious, or cruel aggravating factor and jury instruction violated the Eighth Amendment.

We find a number of Randolph's postconviction claims to be either procedurally barred, facially or legally insufficient, or clearly without merit as a matter of law.FN3 We decline to address these claims.

> FN3. Claims 2(c), (d), and (e) were insufficiently pled. Claims 4(a), (b), (c), and (d) were conclusory allegations that were also

> insufficiently pled. Claim 4(e) was legally and facially insufficient to warrant relief under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because Randolph failed to allege how he was prejudiced by counsel's failure to object to his absence at the proceeding.

Randolph v. State, 853 So. 2d 1051, 1054 -1055 (Fla. 2003).

Randolph next filed a petition for writ of habeas corpus in the United States Middle District Court on November 16, 2004. The Middle District Court denied relief on February 19, 2008. Randolph appealed to the Eleventh Circuit Court of Appeals, which affirmed the Middle District Court's denial of relief. *Randolph v. McNeil*, 590 F.3d 1273 (11th Cir. 2009). Randolph then filed a petition for writ of certiorari in the United States Supreme Court. Certiorari review was denied on November 1, 2010. *Randolph v. McNeil*, 131 S.Ct. 506 (2010).

On November 23, 2010, Defendant filed a successive motion for post conviction relief. (R1-26). The State responded. (R38-55). The trial judge held a case management hearing. (R175-213). The successive motion was denied. (R142-151).

In its denial of the successive postconviction motion, the trial judge held:

> After a review of the Motions, the Defendant's file, and arguments from both parties at the hearing, the Court agrees with the AGO / State that the Defendant's most recent Motion is untimely, successive, procedurally barred, and fails to present any new fundamental grounds or constitutional right that has been held to apply retroactively.
>
> At the hearing, the Attorney representing the Defendant cited *Porter v.*

McCollum, 130 S.Ct. 447 (2009) arguing that *Porter* represents "a fundamental repudiation of the Florida Supreme Court's reliance on *Strickland v. Washington*, 466 U.S. 668 (1984) jurisprudence and as such *Porter* constitutes a change in law which renders the Defendant's claim cognizable in the pending Post Conviction proceedings arguing retroactivity.

In order for a reversal to occur, the Defendant can show new evidence, or retroactivity (which is the argument here), or a *Brady* or *Giglio* claim. The AGO / State argued at the hearing that *Porter* just showed a misapplication of *Strickland* in a scenario related to in that case. As noted above, in order to reverse, a retroactive change in law must be shown. In *Porter*, Counsel was found to be deficient. No deficiency was found in the case at bar. The AGO / State argued at the hearing that nowhere in the *Porter* decision, did the U.S. Supreme Court indicate or imply that *Porter* represents a repudiation of *Strickland* jurisprudence or that *Porter* establishes a new fundamental right of retroactivity. After a review, the Court agrees.

Therefore, first, it is clear that Rule 3.851 (d) (1) bars a Post Conviction Motion filed more than one year after Judgment and Sentence are filed. The Court finds the Defendant's Judgment and Sentence became final in 1990 making the Defendant's latest Motion untimely by more than 20 years.

Second, as noted above, the Court agrees that the Defendant's claim that *Porter v. McCollum*, 130 S.Ct. 447 (2009), and *Sears v. Upton*, 130 S.Ct. 3259 (2010), somehow altered the requirement that deference be given to state factual findings, has no legal basis.

Third, the Defendant's Ineffective Assistance claims have been previously denied, are successive, and thus procedurally barred.

(R142-144). This appeal follows.

STATEMENT OF THE FACTS

This Court summarized the facts of this case on direct appeal:

Minnie Ruth McCollum managed a Handy-Way store in Palatka, and Randolph was a former employee of the same store. Shortly after 7 a.m. on August 15, 1988, Terry Sorrell, a regular customer, and Dorothy and Deborah Patilla, custodians of the store, observed Randolph, wearing a Handy-Way smock, locking the front door. When the Patillas inquired about Mrs. McCollum's whereabouts and why the store was locked, Randolph told them that Mrs. McCollum's car had broken down and that she had taken his car. He indicated that he had repaired her car and was leaving to pick her up. Randolph then drove away in Mrs. McCollum's car.

The women tried the door and, finding it locked, peered in through the window. They saw that the security camera in the ceiling was pulled down; wires were coming out of the trash can, which had been tipped over; the area behind the counter was in disarray; and the door to the back room, normally kept open, was almost completely closed. Thinking that something was awry, they called the sheriff's office.

After breaking into the store, a deputy found Mrs. McCollum lying on her back, naked from the waist down, with blood coming out of the back of her head and neck. She was breathing and moaning slightly. The deputy also observed a knife beside her head. Paramedics transported Mrs. McCollum to the hospital.

Dr. Kirby Bland, a general surgeon, testified that Mrs. McCollum arrived at the emergency room comatose, and with her head massively beaten and contused. She had multiple skin breaks and skin lacerations about the scalp, face, and neck and her left jawbone was fractured. Dr. Bland indicated that Mrs. McCollum had knife lacerations to the left side of her neck that caused a hematoma around the heart. There was also a stab wound in the area of the left eye. Dr. Albert Rhoten, Jr., a neurologist, testified that in twenty years of neurosurgical practice he had not seen brain swelling so diffuse, and he likened it to someone who had been

ejected out of a car or thrown from a motorcycle and received multiple hits on the head. Mrs. McCollum died at the hospital six days after the assault.

After leaving the Handy-Way, Randolph drove Mrs. McCollum's car to the home of Norma Janene Betts, Randolph's girlfriend and mother of their daughter. She testified that he admitted robbing the Handy-Way store and attacking Mrs. McCollum. He told her that he was going to Jacksonville to borrow money from the manager of a Sav-A-Lot grocery store and cash in lottery tickets. He promised to return to take Betts and their daughter to North Carolina.

Betts also testified that while they lived in North Carolina Randolph was a "nice young man" and was employed. After they moved to Palatka, he began socializing with the wrong crowd, became addicted to crack cocaine, and changed altogether. On the morning of the incident, she testified, Randolph did not appear to be under the influence of crack cocaine, but she did not know whether he had taken any cocaine between 11 p.m. the night before and 6 a.m. the morning of the incident.

Randolph was arrested in Jacksonville at a Sav-A-Lot store, while waiting for the manager to advance him some money. After waiving his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Randolph gave a statement to two Putnam County detectives. Detective William Hord testified that Randolph had said he had ridden his bicycle to the Handy-Way store with a toy gun, which he hid behind the store. He said he knew the routine at the store, having worked there, and knew there should be approximately $1,000 in the safe. He planned to enter the store unseen, open the safe, remove the money, and leave while the manager was outside checking the gas pumps. However, the manager returned and saw him. He rushed her, she panicked, and a struggle ensued. Randolph indicated that she was "a lot tougher than he had expected," but that finally he forced her into the back room where he hit her with his hands and fists until she "quieted down."

Randolph tried unsuccessfully to open the store safe. When Mrs. McCollum started moving again, he approached her. He said that she

pulled the draw string out of his hooded sweat shirt, which he then wrapped around her neck until she stopped struggling. Randolph then found a slip of paper with the combination of the safe. Unsuccessful in opening it, he took the store's lottery tickets.

At this point, the victim started screaming. Randolph again struck her until “she hushed.” Because she continued to make noises, Randolph grabbed a small knife and stabbed her. He again grabbed the string and “tried to cut her wind.” To make it appear as if “a maniac” had committed the crime, Randolph said he then raped her. He put on a Handy-Way uniform, grabbed the store video camera out of its mount and put it into the garbage. He took Mrs. McCollum's keys and locked the store before leaving in her car.

On the way to Jacksonville, Randolph stopped at several convenience stores where he cashed in winning lottery tickets and discarded the losing tickets, and at a McDonald's where he disposed of his bloodstained clothing and shoes. The sheriff's detectives recovered the lottery tickets and articles of clothing when they returned to Putnam County with Randolph.

During the penalty phase, the state called the medical examiner, who testified that Mrs. McCollum died as the result of severe brain injury. He also described the extensive bruises to Mrs. McCollum depicted by a series of photographs.

Randolph presented the testimony of Dr. Harry Krop, a psychologist who examined Randolph. He opined that none of the statutory mitigating circumstances existed, although several nonstatutory circumstances most likely contributed to the offense. He testified that Randolph, who was adopted when he was five months old, had problems getting along with people in school, and his behavior problems caused him to be referred to psychotherapy for a year in the third grade. His mother was emotionally unstable and was hospitalized for psychiatric reasons on a number of occasions, and his father was physically abusive, and administered discipline by tying him and beating him with his hands, a broomstick, and a belt.

Despite his emotional deficiencies, Randolph graduated from high school. He received an honorable discharge from the Army; however, he started using drugs during his service, including marijuana and cocaine. In 1984 he began using highly-addictive crack cocaine. Dr. Krop testified that, unlike alcohol intoxication, crack cocaine's effects are not readily apparent from merely looking at a person. When someone regularly uses crack cocaine, the effects of the drug stay in the blood; one's personality and behavior are affected, not necessarily by an immediate ingestion of the drug, but rather by its use over time. He believed that Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense.

Dr. Krop further testified that Randolph regretted what had happened; he was ashamed and embarrassed that he had lost control, and was remorseful about what he had done. The psychologist believed that Randolph had nothing against Mrs. McCollum, that he fully intended only to enter the store and steal the money while she was outside, but that things happened that caused him to panic. He concluded that Randolph's criminal behavior was influenced by his drug addiction.

The jury found Randolph guilty of first-degree murder, armed robbery, sexual battery with force likely to cause serious personal injury or with a deadly weapon, and grand theft of a motor vehicle.FN2 The jury recommended the death penalty by a vote of eight to four. The judge accepted the jury recommendation and imposed the death penalty, finding four aggravating circumstances,FN3 no statutory mitigating circumstances, and two nonstatutory mitigating circumstances.FN4

> FN2. The trial court imposed a sentence of nine years' incarceration on the armed robbery count, and twenty-seven years' incarceration on the sexual battery count, to run concurrent with the sexual battery term. No sentence was imposed on the conviction for grand theft.
>
> FN3. Murder during commission or flight after commission of a sexual battery, section 921.141(5)(d), Florida Statutes (1987);

> murder committed to avoid or prevent lawful arrest, section 921.141(5)(e), Florida Statutes (1987); murder committed for pecuniary gain, section 921.141(5)(f), Florida Statutes (1987); murder especially heinous, atrocious, or cruel, section 921.141(5)(h), Florida Statutes (1987).
>
> FN4. Randolph possesses an atypical personality disorder and expressed shame and remorse for his conduct.

Randolph v. State, 562 So. 2d 331, 332 -334 (Fla. 1990).

SUMMARY OF ARGUMENTS

Randolph's successive Rule 3.851 motion is time-barred and does not come within any exception to Rule 3.851(d)(2). The motion was an attempt to relitigate his previously-denied IAC/penalty phase counsel claims under the guise that *Porter v. McCollum*, 130 S. Ct. 447 (2009) constitutes an alleged "change in law" which should be applied retroactively. Despite Randolph' insistence to the contrary, *Porter* is no more than the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), to the particular facts of that case. The Supreme Court did not hold that the *Porter* decision established a new fundamental constitutional right that is to apply retroactively.

The trial court held Randolph' motion untimely, successive, procedurally barred, and unauthorized under Rule 3.85, Florida Rules of Criminal Procedure. These rulings should be affirmed.

The patently frivolous nature of the successive motion is further highlighted by the fact that *Porter* was reversed on the prejudice prong analysis. Whereas, Randolph's IAC/penalty phase claim – based on the allege failure to adequately investigate mitigation - was denied based on a lack of deficiency. Thus, any attempt to relitigate the prejudice prong is immaterial.

Last, collateral counsel is not authorized to file the instant successive motion. See, § 27.702(1) and § 27.711(1)(c), Fla. Stat.

STANDARDS OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for post-conviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009), *citing State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); Fla. R.Crim. P. 3.851(f)(5)(B).

In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the

claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Here, as in *Rose v. State*, 985 So. 2d 500 (Fla. 2008), the trial court entered a comprehensive written order disclosing the basis for the summary denial of Randolph's successive motion to vacate and providing for meaningful appellate review. *Id., citing Nixon,* 932 So. 2d at 1018.

ARGUMENT

THE TRIAL JUDGE DID NOT ERR IN DENYING THE SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

Randolph raises several issues in this appeal:

(1) Both the circuit court and this Court erred in denying Randolph's first postconviction motion (Brief at 15-16);

(2) *Porter v. McCollum*, 130 S.Ct. 447 (2009), is a change in law which requires the circuit court and this Court to re-hear Randolph's ineffectiveness claims (Brief at 16);

(3) Generally, this Court's *Strickland* analysis is flawed (Brief at 29-46);

(4) In the present case, this Court erred in it's application of *Strickland; Porter* requires re-analysis (Brief at 45-47).

Randolph's position is he is entitled to rehearing on his ineffective assistance of counsel claims because *Porter* changed the *Strickland* prejudice analysis and applies retroactively.

Randolph generally argues that the circuit court's and this Court's analysis in the prior postconviction proceeding was flawed. He specifically argues only one issue: "Dr. Eisenstein found that statutory mitigators were present, and Dr. Krop found that there no statutory mitigators present." (Brief at 47).

Arguments are waived. Because Randolph fails to specifically identify the alleged errors, describe the factual determination he believes was necessary, or even set

out the facts he believes are pertinent to the claim, Randolph has waived the argument. *See Cooper v. State*, 856 So. 2d 969, 977 n. 7 (Fla. 2003) ("Cooper ... contend[s], without specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative, unsupported argument of this type to be improper, and deny relief based thereon."); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla.1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues."). *See also Johnston v. State*, 63 So.3d 730 (Fla. 2011); *Victorino v. State*, 23 So.3d 87, 103 (Fla. 2009) ("We have previously stated that '[t]he purpose of an appellate brief is to present arguments in support of the points on appeal.' " (*quoting Duest v. Dugger*, 555 So. 2d 849, 852 (Fla.1990)).

Arguments have no merit. In denying postconviction relief in the original postconviction, this Court held:

> **Ineffective Assistance of Counsel During the Penalty Phase**
> Randolph claims defense counsel was ineffective in failing to adequately investigate and present crucial mitigating evidence and in failing to ensure Randolph received an adequate mental health examination. In order to prove an ineffective assistance of counsel claim, a defendant must establish two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

> serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State*, 727 So. 2d 216 (Fla.1998); *Rose v. State*, 675 So. 2d 567 (Fla.1996). Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. *See Rose v. State*, 675 So. 2d 567, 571 (Fla.1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. *See Riechmann*, 777 So. 2d at 350. We find Randolph has failed to establish ineffective assistance of counsel as to either of his claims.

First, Randolph claims defense counsel, Howard Pearl, was ineffective in failing to independently and adequately investigate crucial mitigating evidence. At the July 1997 evidentiary hearing, Pearl explained that his approach to the penalty phase was to employ psychologist Dr. Harry Krop as a mental health expert and leave it up to Dr. Krop to conduct an investigation into penalty phase mitigation and determine what was relevant. Pearl explained it would not have been his practice to call Randolph's relatives to testify at the penalty phase. Instead, Pearl preferred to present mitigation through Dr. Krop because "his testimony is a history of a patient, is an exception to the hearsay rule. So, I get it in through him and I don't have to worry about loose cannons on the deck." Randolph complains that Pearl's approach to the penalty phase fell outside the reasonable bounds of professional conduct and rendered the outcome of Randolph's penalty phase unreliable. Randolph also complains about Pearl's failure to obtain his school and military records.

At the evidentiary hearing, Randolph presented testimony from his father, mother, stepmother, and his girlfriend's mother as to mitigation he argues should have been presented during his penalty phase had defense counsel conducted a thorough background investigation. The postconviction court

summarized the evidence Randolph argues should have been presented:

> [He] was placed for adoption at birth, spent time in an orphanage; was adopted by Pearl and Timothy Randolph at six months of age; that Pearl Randolph was mentally unstable, was hospitalized for psychiatric care and was an alcoholic who rejected the idea of adoption and said she could never love an adopted child; that Timothy Randolph was abusive, over-demanding, hot-tempered, often absent and promiscuous; that [Randolph] never had a close relationship with his father; that [Randolph] suffered a lifetime of mental illness; that [Randolph] suffered a lifetime of drug addiction; that he suffered drastic mood changes and outbursts as a child often injuring himself; that he spent time in a day care center as a child while his parents worked; that he was under psychiatric care at age ten; that he grew up amid vicious battles between his parents; that he discovered his father's adulterous relationship; that his parents divorced when he was a child; and that he became addicted to drugs while in the military and continued to use drugs up until the time of the murder.

However, Dr. Krop's testimony at the penalty phase, as summarized by the postconviction court, revealed the following:

> [Randolph] was adopted by Timothy and Pearl Randolph at five months of age; that he had difficulty getting along with others in school; that he received psychiatric counseling in the third grade; that Pearl Randolph was emotionally unstable and was hospitalized on a couple of occasions for psychiatric reasons and was an ineffective parent; that [Randolph] was physically abused by his father when his father would tie him up and hit him with his hand, a broomstick or belt all over the body; that [Randolph] was overly sensitive about his small stature; that he graduated high school and served time in the Army before being honorably discharged; that he used drugs while in the Army; that his drug use progressed from marijuana to cocaine and then crack cocaine; that [Randolph] was more irritable, his mood changed, and he flew off the handle while using drugs; that he was a crack cocaine

> addict and his personality and lifestyle were affected by his drug use beginning in 1984 and particularly in 1988; that his behavior at the time of the murder was influenced by his drug use; that he suffers from a personality disorder; that he never felt close to anyone except his girlfriend; and that he perceived neither of his parents loved him.FN8
>
> > FN8. This Court also summarized Dr. Krop's penalty phase testimony in its opinion affirming Randolph's conviction and sentence. See Randolph, 562 So. 2d at 334.

After considering all of the evidence, **the postconviction court concluded that none of the witnesses at the evidentiary hearing offered any mitigation testimony in addition to that presented by Dr. Krop at the penalty phase. We find this conclusion is supported by competent, substantial evidence in the record.**

The instant case is remarkably similar to *Robinson v. State*, 707 So. 2d 688 (Fla.1998), and *Breedlove v. State*, 692 So. 2d 874 (Fla.1997). In both cases, the defendants claimed that defense counsel was ineffective for failing to investigate each defendant's background, failing to furnish mental health experts with relevant information which would have supported their testimony about mitigating factors, and failing to call family members and friends who would have testified about each defendant's childhood abuse, mental instability, and addiction to drugs and alcohol. *See Robinson*, 707 So. 2d at 695; *Breedlove*, 692 So. 2d at 877. However, we found that neither *Robinson* nor *Breedlove* demonstrated the prejudice necessary to mandate relief under *Strickland* because the mitigation overlooked by defense counsel would not have changed the outcome of the defendant's sentence in light of the evidence. *See Robinson*, 707 So. 2d at 697; *Breedlove*, 692 So. 2d at 878; *see also Tompkins v. Dugger*, 549 So. 2d 1370, 1373 (Fla.1989) (finding the mitigating evidence overlooked by defense counsel would not have changed the outcome and therefore did not demonstrate prejudice under the Strickland test). We reach the same conclusion in this case.

Even if Pearl's decision to solely rely on Dr. Krop's testimony was

deficient, Randolph has not demonstrated error in the postconviction court's conclusion that no prejudice resulted from Pearl's performance. Considering the four valid aggravators and the cumulative nature of the testimony from the evidentiary hearing,FN9 we find no error in the postconviction court's finding that Randolph has not demonstrated the prejudice necessary to mandate relief. *Robinson*, 707 So. 2d at 697; see also *Routly v. State*, 590 So. 2d 397, 401 (Fla.1991) (finding that defendant did not demonstrate reasonable probability that sentence would have been different had trial counsel presented proffered mitigating evidence where much of the evidence was already before the judge and jury in a different form).

> FN9. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1021 (Fla.1999) (finding much of the mitigating evidence that defendant faulted counsel for not presenting was cumulative to that presented by the mental health expert during the sentencing proceeding).

Randolph also claims defense counsel was ineffective for failing to ensure Randolph was provided an adequate mental health evaluation and for failing to provide the necessary background material to the mental health expert. A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Randolph had the assistance of a mental health expert in the form of Dr. Krop. **Randolph fails to allege with any specificity the prejudice he suffered as a result of counsel's or the expert's performance.** We affirm the trial court's denial of relief on the issue of ineffective assistance of counsel during the penalty phase.

Randolph v. State, 853 So. 2d 1051, 1059 -1061 (Fla. 2003).

Relief was denied for several reasons:

(1) Counsel was not deficient – the postconviction evidence presented was cumulative to that presented at the penalty phase;

(2) There was no prejudice because:

> (a) There are four valid aggravators and the testimony from the evidentiary hearing was cumulative nature; and
>
> (b) Randolph failed to allege with any specificity the prejudice he suffered as a result of counsel's or the expert's performance.

Randolph fails to explain how, since counsel was not deficient, any misapplication of the *Strickland* prejudice standard would impact his case. *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011)("To successfully prove a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied."). In *Porter*, counsel *was* deficient and the focus was the prejudice analysis conducted on the evidence presented in that case. Randolph cannot meet the deficiency prong of *Strickland*; thus, there is no ineffectiveness and this appeal is patently frivolous.

Even if counsel had been found deficient, Randolph's claim fails for lack of prejudice because

(1) The successive motion was untimely, successive, and procedurally barred;

(2) *Porter* not a retroactive change in the law; and

(3) This Court's *Strickland* analysis on prejudice is not flawed.

(R142-144).

Untimely, successive, procedurally barred. Randolph' judgment and sentence became final in 1990 when the Supreme Court denied certiorari. See, *Randolph v.*

Florida, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Randolph' successive Rule 3.851 motion, filed in 2010, is untimely filed – by twenty (20) years.[1]

No exception to the time bar exists. The ineffectiveness-of-counsel issues were decided by this Court in 2003 and are procedurally barred. As this Court has held, 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, Randolph 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 Randolph is attempting to do here, his IAC/penalty phase claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of res judicata to claims previously litigated on the merits).

1Randolph does not assert any claim of newly discovered evidence based on *Porter*. In any event, the Florida Supreme Court has rejected *Porter* as the basis for a newly discovered evidence claim. *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010).

Although there is an exception to the time limitation in 3.851(d)(2)(B), which would restart the clock for a new fundamental constitutional right that has been held to apply retroactively, *Porter* is not a new right.

***Porter* is not a retroactive change in law.** *Porter* is merely the application of *Strickland* to the facts of *Porter*'s case and does not provide any cognizable basis to relitigate Randolph's IAC/penalty phase claim anew. *Porter* did not change the application of the ineffective assistance of counsel analysis under *Strickland*. Moreover, this Court has not been misapplying *Strickland*'s standard of review – the standard of review announced in *Stephens* is expressly compelled by *Strickland*. In addition, even if Randolph arguably could demonstrate that *Porter* represents both a "change in law" and satisfies the requirements for retroactivity under *Witt*, which the State emphatically disputes, Randolph's attempt to relitigate the prejudice prong is immaterial because this Court previously denied Randolph's IAC/penalty phase claim – based on the alleged failure to adequately investigate mitigation - on the deficiency prong of *Strickland*.

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. Instead, since *Porter* was decided, 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, Harrington v. Richter, 131 S.Ct. 770 (2011); *Premo v. Moore*, 131 S.Ct. 733 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011); *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); *Renico v. Lett*, 130 S.Ct. 1855 (2010); *Sears v. Upton*, 130 S.Ct. 3259 (2010).

Applying Rule 3.851(d) to Randolph's dual burden under *Strickland*, Randolph would have to show that *Porter* established a new fundamental constitutional right on *both* prongs of *Strickland* and that this new right has been held to apply retroactively. In *Witt*, 387 So. 2d at 929-30, this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or Florida Supreme Court has made a significant change in constitutional law, which so drastically alters the underpinnings of a defendant's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30.

A court considering retroactivity under Witt looks at three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. *See Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001) (applying retroactively *Carter v. State*, 706 So.

2d 873 (Fla. 1997) where this Court held that a judicial determination of competency is required in certain capital post-conviction cases); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), wherein this Court announced a revised standard of review for ineffectiveness claims); *Chandler v. Crosby*, 916 So. 2d 728, 729-730 (Fla. 2005) (concluding that all three factors in the Witt analysis weighed against the retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and emphasizing that the new rule did not present a more compelling objective that outweighs the importance of finality) *Id*. at 729-730, *citing State v. Glenn*, 558 So. 2d 4, 7 (Fla. 1990).

Randolph fails to explain how his suggested "change" in law allegedly satisfies any of the three factors identified in *Witt*. Randolph fails to even identify the purpose served by the new case; the extent of the reliance on the "old law" statewide; and the sweeping impact on the administration of justice from retroactive application of his alleged "change in law."

Instead, Randolph asserts that *Porter* should be retroactive because *Hitchcock v. Dugger*, 481 U.S. 393 (1987) was held to be retroactive. (Initial Brief at 17-19, 24), citing *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987), *Delap v. Dugger*, 513 So. 2d 659 (Fla. 1987), *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).

Randolph also cites to *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), in which this Court held that *Hitchcock* claims should be presented to the trial court in a Rule 3.850 motion for post-conviction relief. (Initial Brief at 16). Unlike *Hall,* Randolph has not identified any case in which *Porter* has been declared a change in law which is retroactive. Thus, Randolph's successive motion to vacate was unauthorized and facially insufficient.

The trial court rejected Randolph's arguments on retroactivity and concluded:

> At the hearing, the Attorney representing the Defendant cited *Porter v. McCollum*, 130 S.Ct. 447 (2009) arguing that *Porter* represents "a fundamental repudiation of the Florida Supreme Court's reliance on *Strickland v. Washington*, 466 U.S. 668 (1984) jurisprudence and as such *Porter* constitutes a change in law which renders the Defendant's claim cognizable in the pending Post Conviction proceedings arguing retroactivity.
>
> In order for a reversal to occur, the Defendant can show new evidence, or retroactivity (which is the argument here), or a *Brady* or *Giglio* claim. The AGO / State argued at the hearing that *Porter* just showed a misapplication of *Strickland* in a scenario related to in that case. As noted above, in order to reverse, a retroactive change in law must be shown. In *Porter*, Counsel was found to be deficient. No deficiency was found in the case at bar. The AGO / State argued at the hearing that nowhere in the *Porter* decision, did the U.S. Supreme Court indicate or imply that that *Porter* represents a repudiation of *Strickland* jurisprudence or that *Porter* establishes a new fundamental right of retroactivity. After a review, the Court agrees.
>
> Therefore, first, it is clear that Rule 3.851 (d) (1) bars a Post Conviction Motion filed more than one - year after Judgment and Sentence are filed. The Court finds the Defendant's Judgment and Sentence became final in

> 1990 making the Defendant's latest Motion untimely by more than 20-years.
>
> Second, as noted above, the Court agrees that the Defendant's claim that *Porter v. McCollum*, 130 S.Ct. 447 (2009), and *Sears v. Upton*, 130 S.Ct. 3259 (2010), somehow altered the requirement that deference be given to state factual findings, has no legal basis.
>
> Third, the Defendant's Ineffective Assistance claims have been previously denied, are successive, and thus procedurally barred.

(R142-144).

The trial judge is correct. Nowhere in the *Porter* decision did the United States Supreme Court ever indicate or imply that *Porter* represents a significant change in law to be applied retroactively.

However, even if *Porter*, as construed by Randolph, arguably could be considered a "change" in the law, which the State categorically disputes, it would still not be retroactive under *Witt*. In making a comparison to *Hitchcock*, Randolph ignores the significant difference between the change in law in *Hitchcock* and the alleged change here. *Hitchcock* dealt with an invalid jury instruction at the penalty phase, 481 U.S. at 398-99; and, in *Hitchcock*, the United States Supreme Court found that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances. Randolph does not allege any violation of the principle at issue in *Hitchcock* -- the statewide use of a

standard jury instruction which unconstitutionally precluded consideration of mitigation at the penalty phase.

In *Hitchcock,* a determination of whether *Hitchcock* error had occurred was easily made by simply reviewing only those cases which involved the same penalty phase jury instruction. In contrast, the alleged change in law that Randolph argues occurred here requires re-litigating all post-conviction cases in which fact-specific claims of ineffective assistance of counsel were previously adjudicated under *Strickland*'s two-prong test in order to determine whether any possible prejudice prong error, based on *Porter,* either might – or might not - have occurred.

Given this difference in the application of the Witt factors, the mere fact that the standard jury instruction claim in *Hitchcock* was found to be retroactive does not establish that Randolph's alleged "change" in law is one which should be applied retroactively. Randolph's reliance on the retroactivity of *Hitchcock* is misplaced.

Randolph has failed to meet any of the prongs of the retroactivity test. Neither the United States Supreme Court nor this Court deemed *Porter* a change of law. It is not new law and there is no miscarriage of justice. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland* at 2069. *Porter* is very fact-specific and the Supreme Court certainly did not find every decision of this Court

regarding ineffective assistance of counsel to be unreasonable.

As a practical matter, there probably will always be some "newer" United States Supreme Court case addressing claims of ineffective assistance of counsel. Indeed, in 2009, the same year that *Porter* was decided, the United States Supreme Court also issued a series of other decisions addressing *Strickland* claims -- *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009), *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) and *Wong v. Belmontes*, 558 U.S. ——, 130 S.Ct. 383 (2009). However, a criminal defendant may not relitigate previously-denied *Strickland* claims simply because there are more recent decisions addressing claims of ineffective assistance of counsel. In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected a similar attempt to relitigate a death-sentenced inmate's IAC/penalty phase claim under the guise of recently decided caselaw. In *Marek*, the defendant argued that his previously raised claim that trial counsel failed to conduct an adequate investigation of Marek's background for penalty phase mitigation should be re-evaluated under the standards enunciated 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*, 529 U.S. 362, 120 S.Ct. 1495 (2000). Marek argued that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This Court decisively rejected Marek's attempt to

relitigate his previously-denied *Strickland* claims. *See Marek*, 8 So. 3d at 1128 (concluding that "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*"). Here, as in *Marek*, the existence of a "newer" case applying *Strickland* does not equate with a change in the law which is retroactive.

Porter did not change the standard of review and this Court has not been misapplying *Strickland*'s standard of review. Randolph's claim is legally insufficient and without merit.

***Porter* is limited to the facts in that case.** In *Porter v. McCollum*, the state courts did not decide whether *Porter*'s counsel was deficient under *Strickland*. As a result, the United States Supreme Court assessed the first prong of *Porter*'s IAC/penalty phase claim *de novo*. *Porter*, 130 S.Ct. at 452. The United States Supreme Court found that trial counsel failed to uncover and present any evidence of *Porter*'s mental health or mental impairment, his family background, or his military service; and, "although *Porter* may have been fatalistic or uncooperative," that did not "obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 S.Ct. at 453. The United States Supreme Court determined that trial counsel was deficient under the first prong of *Strickland* and emphasized that if *Porter*'s counsel had been effective, the judge and jury would have learned of "(1)

Porter's heroic military service in two of the most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." *Porter*, 130 S.Ct. at 454.

In addressing this Court's adjudication of the second – prejudice - prong of *Strickland*, the United States Supreme Court reiterated that the test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. And, "[t]o assess that probability, [the Court] consider[s] the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - and reweigh[s] it against the evidence in aggravation." *Porter*, 130 S.Ct. 447, 453-54 (quotation marks and brackets omitted). The United States Supreme Court ruled that this Court's decision that *Porter* was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation was unreasonable because it "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 130 S.Ct. at 454-455. For example, the mental health evidence, which included Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects, was not considered in this Court's discussion of nonstatutory mitigation. *Porter*, 130

S.Ct. at 455, n. 7. In addition, the United States Supreme Court found that this Court unreasonably discounted evidence of *Porter*'s childhood abuse and combat military service.

The fundamental constitutional right at issue in *Porter* was the Sixth Amendment right to effective assistance of counsel, a constitutional right that had been established decades before in *Strickland* v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). *Porter* was merely an application of the *Strickland* standard to a particular case. Because there has been no change in law, Randolph failed to meet any exception under Fla. R. Crim. P. 3.851(d)(2)(B).

This Court's *Strickland* analysis is not flawed. Randolph nevertheless suggests that because *Sochor v. State,* 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (Initial Brief at 31). *Sochor* cited to *Porter* as a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence. *Sochor,* 883 So. 2d at 783, citing *Porter*. Again, this finding is in accordance with the mixed standard of review applied in *Strickland*.

In *Stephens*, although this Court announced a revised standard of appellate review for claims of ineffective assistance of counsel, it expressly stated that a change

in the appellate standard of review for claims of ineffective assistance of does not satisfy *Witt*. *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001) (concluding that Stephens was not retroactive under *Witt)*. Since Randolph apparently concludes that the same law has changed here, he cannot show how *Witt* would be applicable to such a change when it was not in *Stephens*. *See Johnston*, 789 So. 2d at 267. Accordingly, any alleged change would not be retroactive. In addition, this Court has refused to allow relitigation of previously denied *Strickland* claims under the guise of more recent caselaw. *See*, *Marek*, 8 So. 3d at 1128. In other words, this Court has previously determined that the alleged "changes in law" suggested by Randolph do not satisfy *Witt.*

The courts of this state have extensively relied upon the *Stephens* standard of review and continue to do so today. *See Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011) (stating, "[b]ecause ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771–72 (Fla. 2004) (*citing Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999))." Thus, if *Porter*, as construed by Randolph, is deemed a retroactive "change" in the law, the effect on the administration of justice would be overwhelming. Criminal

defendants will file untimely and successive motions for post-conviction relief seeking to relitigate claims of ineffective assistance of counsel which have long been final. The courts of this State would be required to review stale records to reconsider these claims. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987) retroactively).

Randolph's reliance on *Sears v. Upton*, 130 S. Ct. 3259 (2010) also is misplaced. In *Sears*, the Georgia post-conviction court found trial counsel's performance deficient under *Strickland*, but then stated that it was unable to assess whether counsel's inadequate investigation might have prejudiced Sears. *Id*. at 3261. In *Sears*, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Instead, the Supreme Court reversed because it did not believe that the lower courts had made findings about the evidence presented. *Id*. at 3261. Sears does not support the assertion that the making of findings or giving deference in reviewing findings is inappropriate.

Randolph is not entitled to relief. Even if *Porter* arguably changed the law and the alleged change was retroactive and the claim was not procedurally barred, which the State emphatically disputes, Randolph still would not be entitled to any 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. As the United States Supreme 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.

Randolph's IAC/penalty phase claim – based on the alleged failure to investigate mitigation - was denied on two bases: failure to establish deficient performance and failure to establish prejudice. Randolph argues no specific facts aside from two experts disagreeing in statutory mitigators. (Brief at 47). Further, as this Court recently summarized:

> As often stated, the presentation of cumulative evidence in the postconviction proceedings does not provide a basis for determining that trial counsel's performance was deficient. *Kilgore v. State*, 55 So.3d 487, 504 (Fla. 2010). Rather than the failure to investigate and present mitigating evidence, Mendoza takes issue with the manner in which trial counsel presented the evidence at trial. This is not, however, a proper basis to establish deficient performance on the part of trial counsel. *See Everett*, 54 So.3d at 478 ("That there may have been more that trial counsel could have done or that new counsel in reviewing the record with hindsight would handle the case differently, does not mean that trial counsel's performance during the guilt phase was deficient.") (quoting *State v. Coney*, 845 So. 2d 120, 136 (Fla. 2003)). In addition, the fact that Mendoza later found an expert whose testimony may be more favorable as to the degree of his mental status impairment does not establish that trial counsel's investigation was deficient. *See Anderson v. State*, 18 So.3d 501, 512 (Fla. 2009) (stating that trial counsel is not required to continue searching for an expert who will give a more favorable mental status assessment). Indeed, Mendoza's own legal expert testified at the evidentiary hearing that at the time of Mendoza's trial, he also had used

Dr. Toomer as a mental health expert in a capital case.

Mendoza v. State, 2011 WL 2652193, 10 (Fla. 2011).

Finding no deficiency is in accordance with United States Supreme Court precedent. *See Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) (finding that, as in *Strickland*, defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments.") As a result, Randolph's claim would be meritless even if *Porter* somehow changed the law and applied retroactively.

Porter does not provide any basis to reconsider Randolph's post-conviction claims. In Randolph's case, unlike *Porter*, the state courts did address trial counsel's performance at the penalty phase, finding that the postconviction evidence was cumulative; thus, counsel was not deficient and there was no prejudice.

Collateral Counsel was not authorized to file this successive motion to vacate. Pursuant to §27.702, "[t]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by statute." The Florida Supreme Court has recognized the legislative intent to limit collateral counsel's role in capital post-conviction proceedings. *See State v. Kilgore*, 976 So. 2d 1066, 1068-1069 (Fla. 2007).

The term "postconviction capital collateral proceedings" is defined in

§27.711(1)(c), Fla. Stat., as follows:

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

§27.711(1)(c), Fla. Stat. Accordingly, CCRC-S was not authorized to file this patently frivolous, repetitive and successive motion.

Randolph is not entitled to any relief because collateral counsel is not authorized to file the unauthorized successive motion to vacate, the motion is time-barred, *Porter* did not change the law, any alleged change in law would not apply retroactively and the alleged "change in law" is based on the prejudice prong analysis in *Porter* and would not apply to this defendant because relief on Randolph's IAC/penalty phase claim - based on the alleged failure to adequately investigate and present mitigation - previously was denied under the deficient performance prong of *Strickland*. The trial court's order summarily denying Randolph's successive motion to vacate should be affirmed.

CONCLUSION

Based on the authorities and arguments herein, the State respectfully requests this Honorable Court affirm the order of the circuit court and deny all relief.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

_____
BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
Florida Bar #410519
444 Seabreeze Blvd., 5th Floor
Daytona Beach FL 32118
(386)238-4990
Fax - (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Rachel Day, CCRC-South, 101 N.E.3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this ____ day of August, 2011.

BY:_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

_____
BARBARA C. DAVIS