In the Supreme Court of Florida

WILLIAM T. TURNER,

Appellant,

v. CASE NO. SC11-946

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, WILLIAM T. TURNER, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Turner was convicted of two counts of first-degree murder and sentenced to death for one of the murders. *Turner v. State*, 530 So.2d 45 (Fla. 1987). Turner stabbed his estranged wife to death in the presence of their seven-year old daughter. Turner then stabbed his estranged wife's roommate, Joyce Brown, over fifty times in front of Joyce's fifteen-year old daughter. *Turner v. Crosby*, 339 F.3d 1247, 1249-1251 (11th Cir. 2003)(recounting details of the murders). Turner was represented at trial by two attorneys, Henry M. Coxe III and Daniel Smith. *Turner*, 339 F.3d at 1251, n.4.

During the guilt phase, the defense presented numerous witnesses including Dr. Daniel Stinson, a licensed psychiatrist, who testified as to Turner's mental state during the crime, ultimately diagnosing Turner as suffering from a "dissociative reaction" and therefore, in his opinion, Turner was insane at the time of the murders. *Turner*, 339 F.3d at 1255-1256. Dr. Stinson also testified that Turner "was in the military, had served in Vietnam, had served in some combat, had at one time achieved the rank of sergeant, had gotten in some difficulty and lost a stripe and had an honorable discharge." *Turner*, 339 F.3d at 1255.

In rebuttal during the guilt phase, the State called Dr. George Barnard, a forensic psychiatrist, who testified that Turner was legally sane at the time of the murders. *Turner*, 339 F.3d at 1257-1258. Dr. Barnard also testified "extensively" about Turner's service in the armed forces. Turner told Dr. Barnard that "he went into the Air Force in May, 1965, was honorably discharged in November, 1968, that

his highest rank was a sergeant, he never had gone AWOL but received Article 15 [military discipline] for being off the post and lost a stripe. He was an MP and later [in] a Ranger outfit, was in combat, as a security policeman." *Turner*, 339 F.3d at 1257. Turner further told Dr. Barnard that "he was in Viet Nam for six months in combat security police, that he was in combat but never injured, that he did some killing with a gun as the enemy was trying to overrun the position, that he had some friends who were killed." Dr. Barnard testified that Turner's "only period of abusing alcohol as given by his history was he was drinking about a fifth a day for six months when he was in Viet Nam" but not since then. *Turner*, 339 F.3d at 1257.

The State also presented Dr. Ernest Miller, a psychiatrist at University Hospital in Jacksonville, who also conducted a court-ordered examination of Turner in rebuttal during the guilt phase. *Turner*, 339 F.3d at 1258. Dr. Ernest Miller also concluded that Turner was sane at the time of the murders. Dr. Miller also reported that Turner "served in the United States Armed Forces for a couple of years [and] received an honorable discharge." *Turner*, 339 F.3d at 1259. Dr. Miller recounted that Turner "was an Air Force enlisted man, attained a non-commissioned rank at one point in his career, served in Viet Nam, did have some combat experience, did have some problems in the service ... but did receive a good discharge." According to Dr. Miller, Turner related some of his combat experience, telling him that "[h]e fired in the direction of enemy troops, he saw no foe fall as a direct result of his fire. He was not involved in any atrocities." Turner was involved in "fire fights in terms of being

responsible for the machine gunning on the perimeter of the Air Force bases." Turner "described his responsibility as, the perimeter defense of the Air Force bases at night." Turner, however, "did not ... witness directly any of his buddies being killed." Dr. Miller further testified that Turner never mentioned any hand-to-hand combat in Vietnam and that Turner "never tried to make [him] think that government had trained him to kill." Turner informed Dr. Miller that, at the time of the murders, he was not using alcohol or controlled substances and did not "have a problem in habitual use of alcohol or drugs." Turner said that he drank in Vietnam and that "it was a problem for him in the service from time to time." *Turner*, 339 F.3d at 1259.

During the penalty phase, the State presented no additional evidence but the defense called six additional witnesses: (1) Gregory Turner, Turner's brother; (2) Joseph Johnson, one of Turner's high school teachers; (3) Frank Lee, an assistant maintenance engineer with the Florida DOT where Turner worked; (4) Mark Ballard, a maintenance electrician for the Florida DOT and Turner's immediate supervisor for two to three years; (5) Dr. Miller, one of the forensic psychologists who testified for the State during the guilt phase, who testified that both statutory mental mitigators applied to Turner; and (6) William L. Turner, Turner's father. *Turner*, 339 F.3d at 1261-1264 (detailing each defense witnesses' testimony at the penalty phase).

The jury recommended life for the murder of his estranged wife but recommended death for the murder of her roommate by a 7-to-5 vote. Prior to sentencing, defense counsel requested additional time to

obtain Turner's military records from the federal government to assist the defense in obtaining mitigating testimony from Turner's superior officers. *Turner*, 339 F.3d at 1265. Defense counsel submitted three sentencing memorandums. The first memo focused on Turner's non-statutory mental mitigation, recounting the trial testimony from the psychiatrists and Turner's family regarding the stress Turner felt from the break-up of his family. The second sentencing memorandum discussed Turner's military history, noting that Turner enlisted for duty in Vietnam. *Turner*, 339 F.3d at 1265.

The trial court addressed the statutory mental mitigation rejecting the extreme mental or emotional disturbance statutory mitigator while there was "ample evidence" the defendant was under the influence of mental or emotional disturbance it was not extreme and based on the trial testimony of the psychiatric experts, the trial court found "that the defendant suffered from no mental disease or defect." *Turner*, 339 F.3d at 1268. The trial court also rejected the substantially impaired statutory mitigator. *Turner*, 339 F.3d at 1268-1269. The trial court also addressed the non-statutory mitigating factors including military service finding: "while the defendant served his country honorably in time of war. The Court finds this factor to exist, but must consider the fact that the defendant was discharged in 1968. The Court attaches no significance to this fact." *Turner*, 339 F.3d at 1269.

On direct appeal to the Florida Supreme Court, Turner raised twelve issues. *Turner*, 339 F.3d at 1269, n.15 (listing the issues in the

direct appeal). The Florida Supreme Court affirmed the convictions and death sentence. *Turner v. State*, 530 So.2d 45 (Fla. 1987).

On October 15, 1990, Turner filed a 3.850 post-conviction motion. The initial post-conviction motion raised sixteen claims including a claim of ineffectiveness for failing to investigate and present mitigation. *Turner*, 339 F.3d at 1270, n.17 (listing the issues in the state initial post-conviction motion). The initial post-conviction motion had an appendix containing seventy-eight exhibits including: (1) fifty-two affidavits from family members, witnesses, psychologists, coworkers, and other people who knew Turner at varying points in his life; (2) military records and documents on Turner's service in Vietnam; and (3) articles and book excerpts about the circumstances surrounding Turner's tour of duty with the Air Force in Vietnam. On November 6, 1990, this Court summarily denied the initial post-conviction motion.

The Florida Supreme Court affirmed the trial court's summary denial of the initial post-conviction motion. *Turner v. Dugger*, 614 So.2d 1075 (Fla. 1992). The Florida Supreme Court stated:

> In claims 2 and 12, Turner alleges that trial counsel was ineffective in that he failed to investigate and present mitigating circumstances, he failed to argue for a finding of nonstatutory mitigation, and he failed to inform the jurors in closing argument that they could consider mitigating evidence during the guilt phase. In support of his claims that counsel was ill-prepared to present mitigation evidence, Turner points to his motion for continuance, which was denied just prior to sentencing. The trial court found no merit to these claims and we agree.

The Florida Supreme Court concluded that counsel presented evidence relating to Turner's good character, heroic effort in preventing a

rape, family background, intellectual ability, educational achievement, military service, employment, emotional anguish over the loss of his marriage and family, religious feelings, financial hardship, and health problems." *Turner*, 614 So.2d at 1078. The Florida Supreme Court further emphasized that "[t]he record also reveals that trial counsel presented evidence relating to Turner's mental state at the time of the offense through the testimony of three mental health experts, two during the guilt phase and one in the penalty phase." The Florida Supreme Court also pointed out that Turner's counsel "argued in a presentence memorandum that there was sufficient evidence to constitute nonstatutory mitigation." *Turner*, 614 So.2d at 1078. The Florida Supreme Court also noted that the trial court's jury instructions adequately informed the jurors that they could consider mitigation evidence presented in the guilt phase also during the sentencing phase. The Florida Supreme Court found that defense counsel's performance was not "outside the wide range of professionally competent assistance." *Turner*, 614 So.2d at 1078.

On July 15, 1993, Turner filed a petition for a writ of habeas corpus in federal district court. In his federal habeas petition, Turner raised the claim of ineffectiveness for failing to investigate and present mitigation including military service. On September 4, 2001, the federal district court denied the petition in a 291 page order which summarized the mitigating evidence at trial and reviewed all of the additional information submitted in Turner's Appendix. The district court concluded that the evidence in the Appendix largely was cumulative and that, therefore, Turner's counsel was not

ineffective. In so concluding, the district court determined that trial counsel's performance was neither deficient nor prejudicial. *Turner v. Crosby*, 339 F.3d 1247, 1273 (11th Cir. 2003).

Turner raised this claim of ineffectiveness in his appeal to the Eleventh Circuit. *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003). The Eleventh Circuit first determined that the district court did not err in not conducting an evidentiary hearing because no facts were in dispute. *Turner*, 339 F.3d at 1274-1275. The State did not contest any facts in "the affidavits, military records, book excerpts, and other materials contained in the seventy-eight exhibit Appendix." The Eleventh Circuit denied the claim of ineffectiveness of counsel for failing to investigate and to prepare mitigating evidence in four main areas: (1) severe mental illness at the time of the murders; (2) Vietnam combat duty; (3) exemplary citizenship; and (4) high potential for rehabilitation and good custodial conduct. *Turner*, 339 F.3d at 1276-1279. The Eleventh Circuit determined that the claim of ineffectiveness failed for two main reasons: (1) defense counsel presented "a wealth of mitigating evidence" and (2) the affidavits in the Appendix (forty-four of the seventy-eight exhibits) lends little, if any, support to Turner's ineffective assistance of counsel claim because they usually establish "at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *Turner*, 339 F.3d at 1277-1279. The Eleventh Circuit concluded that most of the mitigating evidence in the Appendix was

cumulative to the mitigation evidence actually presented. The Eleventh Circuit also noted that counsel filed three sentencing memorandum of law in support of a life sentence with the trial court. *Turner*, 339 F.3d at 1279. The Eleventh Circuit rejected the ineffectiveness for not presenting military service, reasoning:

> With respect to Turner's service in the Armed Forces during Vietnam, there likewise was substantial evidence presented during both the guilt and penalty phases of the trial. During the guilt phase, Dr. Stinson, Dr. Miller, and Dr. Barnard each testified that Turner had been in the Air Force in Vietnam and had engaged in varying degrees of combat situations, including seeing other soldiers wounded or killed. Furthermore, during the penalty phase, a photograph of Turner in the Air Force, his enlistment papers, a marksmanship medal, and his honorable discharge all were admitted into evidence. Turner's father also testified that Turner had served in Vietnam and discussed the military awards that Turner had earned. Given this abundance of evidence, it also is important to note that the trial court did not discount Turner's Vietnam service due to a lack of evidence. Rather, the trial court determined that Turner's Vietnam service was almost twenty years prior to the murders and too remote in time to act as persuasive mitigating evidence: "The Court finds this factor to exist, but must consider the fact that the defendant was discharged in 1968." Thus, the additional information in the Appendix about Turner's service in Vietnam is largely cumulative.

Turner, 339 F.3d at 1278. The Eleventh Circuit determined that counsel's performance was not deficient and explicitly declined to address the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Turner*, 339 F.3d at 1279.

On November 30, 2010, registry counsel, James C. Lohman, filed a successive 3.851 motion in this capital case raising a claim that this Court's prejudice analysis in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). Turner asserted that trial court's and the Florida Supreme Court's prejudice analysis in the initial

post-conviction motion was flawed based on *Porter*. The successive *Porter* motion sought to relitigate a claim of ineffectiveness for failing to present mitigation that had been raised in the initial post-conviction motion. The State filed an answer. After conducting a case management conference on the motion, the trial court denied the successive motion.

SUMMARY OF ARGUMENT

Turner asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present military service as mitigation in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). Turner claims in his successive *Porter* motion that the prejudice analysis conducted in the original motion has to be reassessed with a "full-throated and probing" analysis rather than the previous "truncated" analysis performed in the initial motion.

The successive motion was untimely. The motion was filed twenty years late and there is no exception to the time limitation in the rule that applies. *Porter* did not change the law governing ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984), was, is, and remains, the law regarding ineffectiveness.

Furthermore, the motion is barred by the law of the case doctrine. This Court rejected the same type of argument in *Marek v. State*, 8 So.3d 1123 (Fla. 2009), and prohibited relitigation. As this Court held in *Marek*, capital defendants may not relitigate previously denied claims of ineffectiveness every time a new Supreme Court case is decided applying *Strickland*.

Even if this Court were to allow relitigation of the claim, it should be rejected on the merits. This case is not similar to the facts of *Porter*. There was no deficient performance. Unlike *Porter*, where defense counsel failed to uncover and present the defendant's combat experience that resulted in PTSD; here, in

contrast, defense counsel discovered and presented Turner's military service. Nor was there any prejudice. Turner, while in the military, was not in any serious combat. Turner did not suffer PTSD as a result of intensive "horrific" combat like *Porter*.

Additionally, Turner's claim of error applies only to the prejudice prong but both prongs of *Strickland* must be met to grant relief. This claim of ineffectiveness was rejected in federal habeas based on the deficient performance prong; the prejudice prong was not even addressed by the Eleventh Circuit. Turner seeks to relitigate an aspect of the ineffectiveness claim, *i.e.*, the prejudice prong, that did not matter in the courts' rejection of this ineffectiveness claim in the first round of ligation. Thus, the successive *Porter* motion was properly summarily denied as untimely, barred by the law of the case doctrine, and meritless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE SUCCESSIVE 3.851 MOTION ATTEMPTING TO RELITIGATE A CLAIM OF INEFFECTIVENESS FOR FAILING TO PRESENT MILITARY SERVICE AS MITIGATION BASED ON *PORTER V. MCCOLLUM*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)? (Restated)

Turner asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present military service as mitigation in the initial post-conviction motion was flawed based on *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). First, the successive motion was untimely. The motion was filed twenty years late and there is no exception to the time limitation in the rule that applies. Furthermore, the motion is barred by the law of the case doctrine. As this Court held in *Marek*, capital defendants may not relitigate previously denied claims of ineffectiveness every time a new Supreme Court case is decided applying *Strickland*. Even if this Court were to allow relitigation of the claim, it should be rejected on the merits. This case is not similar to the facts of *Porter*. In *Porter*, defense counsel failed to uncover and present the defendant's extensive combat experience that resulted in PTSD. Here, in contrast, defense counsel discovered and presented Turner's military service. There was no deficient performance. Nor was there any prejudice. Turner, while in the military, was not in any major battle. Rather, Turner came under sniper fire one time. Turner did not suffer PTSD as a result of intensive combat like Porter. Thus, the successive *Porter* motion was

properly summarily denied as untimely, barred by the law of the case doctrine, and meritless.

The trial court's ruling

On November 30, 2010, Turner filed a successive 3.851 post-conviction motion in the trial court asserting that he should be permitted to relitigate a previously raised claim of ineffectiveness for failing to present military service as mitigation based on *Porter*. (PC Vol. I 1-38). On December 28, 2010, the State filed an answer to the successive motion. (PC Vol. I 80-117). On February 16, 2011, the trial court conducted a case management conference regarding the successive motion at which counsel for the defendant and counsel for the State presented arguments. The State submitted a proposed order summarily denying the successive motion. The defendant filed an objection to the State's proposed order. (PC Vol. I 148). On April 11, 2011, the trial court adopted the State's proposed order. (PC Vol. I 151-164).

The trial court summarily denied the successive motion as "untimely, barred by the law of the case doctrine, and meritless." (PC Vol. I 151). The trial court found the successive motion untimely and that 3.851(d)(1)(B) did not apply because *Porter* "did not establish a new constitutional right" and "did not alter the existing *Strickland* standard in any manner." (PC Vol. I 152-153). The trial court also found that the successive motion was barred by the law of the case doctrine citing *Marek v. State*, 8 So.3d 1123, 1126-1129 (Fla. 2009). (PC Vol. I 153-154). Additionally, the trial court found the

claim of ineffectiveness to be meritless. (PC Vol. I 156-159). The trial court concluded that there was no deficient performance because defense counsel, Hank Coxe, investigated and presented Turner's Vietnam military service as mitigation. (PC Vol. I 157). The trial court also found no prejudice from the failure to develop military service more fully because Turner did not see extensive combat in Vietnam. (PC Vol. I 158). Rather, Turner was under sniper fire only one time. (PC Vol. I 158). The trial court noted that even if Turner could establish prejudice from *Porter*, his failure to establish deficient performance was fatal to his claim of ineffectiveness because *Strickland* requires a showing of both prongs. (PC Vol. I 159). The trial court also rejected the additional claims of ineffectiveness. (PC Vol. I 159-161).

Standard of review

The standard of review of a trial court's summary denial of a successive 3.851 post-conviction motion is *de novo*. *Darling v. State*, 45 So.3d 444, 447 (Fla. 2010)(explaining that because a trial court's summary denial is based on the pleadings before it, its ruling is tantamount to a pure question of law and is subject to de novo review discussing *Ventura v. State*, 2 So.3d 194 (Fla. 2009)). Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." The phrase "conclusively show" is not limited to factual matters; the phrase also allows a summary denial as a matter of law.

If there is controlling precedent from this Court that is directly on point, then a trial court may summarily deny the successive motion. For example, this Court has routinely affirmed summary denials of lethal injection claims on this basis. *See e.g. Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008)(noting that this "Court has repeatedly rejected appeals from summary denials of Eighth Amendment challenges to Florida's August 2007 lethal injection protocol since the issuance of *Lightbourne*" citing cases). A trial court may decided as a matter of law that the movant is entitled to no relief as this trial court properly did.

Timeliness

The successive 3.851 post-conviction motion was untimely. The rule of criminal procedure governing collateral relief in capital cases contains a time limitation that requires any post-conviction motion be filed within one year. The motion is untimely pursuant to 3.851(d)(1)(B).[1] Under the rule any post-conviction motion must

[1] Specifically, rule 3.851(d)(1), provides:

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

be filed within one year of Turner's convictions and sentence becoming final. Turner's convictions and death sentence became final on February 22, 1989, the day after the United States Supreme Court denied his petition for writ of certiorari in the direct appeal. *Turner v. Florida*, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989)(NO. 88-6101). This successive motion was filed in November of 2010. The successive motion was over twenty years late.

The rule contains three exceptions to the time limitation, none of which apply. The Florida Supreme Court has held that *Porter* did not supply a basis for a newly discovered evidence claim and did not restart the clock. *Grossman v. State*, 29 So.3d 1034, 1042 (Fla. 2010)(finding a trial court's summary denial of a third successive motion to be proper and affirming that the motion was untimely because *Porter* did not change the law regarding consideration of non-statutory mitigation and was not newly discovered evidence). So, controlling precedent holds that the exception for new facts in 3.851(d)(1)(B) does not apply.

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Turner is attempting to use the exception in rule 3.851(d)(2)(B), which restarts the clock for a new fundamental constitutional right that has been held to apply retroactively. Turner asserts that *Porter* is a new fundamental constitutional right that applies retroactively. It is not.

In *Porter*, the Supreme Court per curiam reversed the Eleventh Circuit's finding that the Florida Supreme Court's determination there was no prejudice was a reasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Agreeing with the district court, the Supreme Court was persuaded that it was objectively unreasonable to conclude there was no reasonable probability the 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. *Porter* did not establish a new constitutional right. Rather, it is merely an application of *Strickland* to a particular case. The *Porter* Court merely found prejudice under the existing prejudice framework. Contrary to Turner's assertion, the Supreme Court in *Porter* did not change the prejudice analysis - dramatically or otherwise. A claim that counsel was ineffective in violation of the Sixth Amendment right to counsel was, is, and remains, governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) including the prejudice prong. *Porter* did not overrule *Strickland*. The *Porter* Court itself repeatedly referred to *Strickland* and therefore, reaffirmed the *Strickland* standard. *Porter* contains several paragraphs describing the *Strickland* standard which cited *Strickland*

repeatedly. *Porter*, 130 S.Ct. at 452-454. This section of the *Porter* opinion starts with the sentence: "To prevail under *Strickland*, Porter must show that his counsel's deficient performance prejudiced him" and then cites *Strickland* six times. *Porter*, 130 S.Ct. at 452. The *Porter* opinion ends by once again citing *Strickland*. *Porter*, 130 S.Ct. at 456. The *Porter* Court did not at any point change the prejudice prong of *Strickland*.

Moreover, the United States Supreme Court had repeatedly referred to the *Strickland* standard in numerous opinions since *Porter*. *Cullen v. Pinholster*, - U.S. -, -, 131 S.Ct. 1388, 1408, 179 L.Ed.2d 557 (2011)(observing that the "*Strickland* standard must be applied with scrupulous care."); *Harrington v. Richter*, - U.S. -, -, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011)(discussing the *Strickland* standard). Additionally, this Court has recently discussed the standard for ineffectiveness citing *Porter* in support of its discussion of the *Strickland* standard in numerous cases. *Hildwin v. State*, - So.3d -, -, 2011 WL 2149987 (Fla. 2011); *Franqui v. State*, 59 So.3d 82, 94-95 (Fla. 2011); *Troy v. State*, 57 So.3d 828, 836 (Fla. 2011). In one of those cases, this Court stated: "*Strickland* does not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome. *Porter v. McCollum*, - U.S. -, -, 130 S.Ct. 447, 455-56, 175 L.Ed.2d 398 (2009)(quoting *Strickland*, 466 U.S. at 693-94)." *Troy*, 57 So.3d at 836. The Florida Supreme Court obviously does not think that *Porter* overruled *Strickland*. Turner cites no appellate court

decision from any court as describing *Porter* as overruling or significantly altering *Strickland*. *Porter* did not alter the existing *Strickland* standard in any manner.

Furthermore, the Florida Supreme Court has directly held, in this context, the Sixth Amendment right to effective assistance of counsel context, that refinements or clarifications in *Strickland* jurisprudence are not retroactive. *Johnston v. Moore*, 789 So. 2d 262, 266-267 (Fla. 2001)(holding that *Stephens v. State*, 748 So.2d 1028, 1033-1034 (Fla. 1999), which clarified the standard to be used in reviewing ineffective assistance of counsel claims, was not retroactive under *Witt v. State*, 387 So.2d 922 (Fla. 1980)). In the earlier case of *Stephens v. State*, 748 So.2d 1028, 1033-1034 (Fla. 1999), this Court clarified the standard of review that applied to *Strickland* claims of ineffectiveness. But *Porter* did not even involve a clarification or refinement of the law like *Stephens*. Rather, *Porter* was a mere application of standard law to a particular case. The successive motion was untimely.

Law of the case

The claim of ineffectiveness raised in the successive 3.851 motion is barred by the law of the case doctrine. Under the law of the case doctrine, questions of law actually decided on appeal govern the case through all subsequent stages of the proceedings. *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001). A defendant cannot relitigate claims that have been denied by the trial court where that denial has been affirmed by an appellate court. *State v.*

McBride, 848 So.2d 287, 289-290 (Fla. 2003)(noting that the law of the case doctrine applies to post-conviction motions); *Tatum v. State,* 27 So.3d 700, 704 (Fla. 3rd DCA 2010)(finding the claims in a 3.800 motion to be barred by the law of the case doctrine because they were previously addressed by the Third District in an earlier appeal). As the Florida Supreme Court has explained, if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in any court. *Topps v. State*, 865 So.2d 1253 (Fla. 2004).

Turner is seeking to relitigate the exact same ineffectiveness claim in this successive post-conviction motion that he raised in his first post-conviction motion. Turner is once again claiming that his trial attorney, former Florida Bar president Hank Coxe and co-counsel, Daniel Smith, were ineffective at penalty phase for not presenting his military service as mitigation. That same claim of ineffectiveness for failing to present military service in greater detail was raised in the initial post-conviction motion. This court rejected that particular claim of ineffectiveness. Indeed, four courts have rejected this claim of ineffectiveness - the trial court, the Florida Supreme Court, a federal district court, and the Eleventh Circuit. *Turner v. Dugger*, 614 So.2d 1075 (Fla. 1992); *Turner v. Crosby,* No. 93-01057-CV-J-20 (Fla. M.D.); *Turner v. Crosby*, 339 F.3d 1247, 1278-1279 (11th Cir. 2003). Turner may not relitigate the same claim for a second time after this Court affirmed. The entire successive motion is barred by the law of the case doctrine.

A very similar argument was rejected by this court in *Marek v. State*, 8 So.3d 1123 (Fla. 2009). Marek filed a successive post-conviction motion attempting to relitigate the same claim of ineffectiveness in the successive motion that he had raised in the initial post-conviction motion. The trial court summarily denied the successive motion and the Florida Supreme Court affirmed. On appeal, Marek asserted that his previously raised claim of ineffectiveness for failing to investigate mitigation should be reevaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Marek argued that these cases modified the *Strickland* standard for claims of ineffective assistance of counsel. *Marek*, 8 So.3d at 1126. The Florida Supreme Court concluded the previously raised claim of ineffectiveness should not be reevaluated because "contrary to Marek's argument, the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*." *Marek*, 8 So.3d at 1128. The Florida Supreme Court explained that *Rompilla; Wiggins* and *Williams* were applications of *Strickland* to these various cases. The Florida Supreme Court observed that the *Wiggins* Court began its analysis discussing *Strickland*. *Marek*, 8 So.3d at 1129. The Florida Supreme Court noted that there were no reported decisions from any court "adopting the view that *Rompilla*, *Wiggins*, and *Williams* modified the standard of review governing ineffective assistance of counsel

claims." The Florida Supreme Court concluded that Marek was not entitled to relitigate the claim.

Marek controls here as well and precludes relitigation. *Porter*, like *Rompilla*, *Wiggins*, and *Williams,* is an application of *Strickland* to the particular case - nothing more. And, here, as in *Marek*, there is no reported decision holding, or even hinting, that *Porter* changed the *Strickland* standard. Basically, this court has already rejected the idea that any new Supreme Court case dealing with a claim of ineffectiveness "changes" the *Strickland* standard and entitles every defendant to relitigate their previously denied claims of ineffectiveness. Post-conviction litigation would never cease if registry counsel's view was adopted. Turner, like Marek, is not entitled to relitigate the previously denied claim. The *Porter* claim is barred by the law of the case doctrine.

Merits

The Sixth Amendment provides a criminal defendant the right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The constitutional right to counsel means the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In *Porter v. McCollum*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), the United States Supreme Court found counsel was ineffective for not presenting mitigation. Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend and her boyfriend and was sentenced to death. Porter represented himself

at the guilt phase but changed his mind and had counsel represent him at the penalty phase. Defense counsel was appointed a little over a month prior to the penalty phase. Defense counsel had "only one short meeting with Porter regarding the penalty phase." Defense counsel "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." Defense counsel put on only one witness, Porter's ex-wife, who testified that Porter had a good relationship with his son. Defense counsel asserted that Porter was not "mentally healthy," but he did not put on any evidence to support the assertion. While Porter was "fatalistic and uncooperative" and instructed his counsel not to speak with his ex-wife or son, Porter did not give counsel any other instructions limiting the other witnesses counsel could interview.

Porter filed a state postconviction motion asserting that his trial counsel was ineffective for failing to investigate and present mitigating evidence of his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity. Neither the state trial court nor the Florida Supreme Court addressed the deficient performance prong of *Strickland*. Both the state trial court and the Florida Supreme
Court, however, found no prejudice.

The *Porter* Court disagreed, finding deficient performance concluding that "the decision not to investigate did not reflect reasonable professional judgment." The *Porter* court found that defense counsel "ignored pertinent avenues for investigation of which

he should have been aware" such as the court-ordered competency evaluations, which reported Porter's military service; his wounds sustained in combat, and his father's "over-discipline." The Court stated that while Porter may have been fatalistic or uncooperative, "that does not obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 U.S. at 453 citing *Rompilla v. Beard*, 545 U.S. 374, 381-382, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

The United States Supreme Court also found prejudice because the jury did not hear about (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's father was abusive. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead. Porter attended classes for slow learners and left school when he was twelve or thirteen years old. As a result of his abusive father, Porter enlisted in the Army at age 17 and fought in the Korean War. Porter's company commander in Korea, Lt. Col. Pratt, testified at the postconviction hearing regarding the combat his unit had endured by the Chinese attacks. Lt. Col. Pratt testified that the unit was "ordered to hold off the Chinese advance, enabling the bulk of the Eighth Army to live to fight another day." Lt. Col. Pratt testified that 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" and that 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. 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 received an honorable discharge. Lt. Col. Pratt testified that these battles were "very trying, horrifying experiences," particularly Chip'yong-ni. In Lt. Col. Pratt's experience, an "awful lot of [veterans] come back nervous wrecks. Our [veterans'] hospitals today are filled with people mentally trying

to survive the perils and hardships [of] ... the Korean War," particularly those who fought in the battles he described.

Porter suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night. Porter also developed a serious drinking problem. Porter was diagnosed as suffering from posttraumatic stress disorder (PTSD). The *Porter* Court noted that PTSD is not uncommon among veterans returning from combat and quoted testimony from a Congressional hearing that approximately 23 percent of the Iraq and Afghanistan war veterans had been preliminarily diagnosed with PTSD. *Porter*, at n.4.

The *Porter* Court noted the uniquely mitigating nature of military service especially in combat situations. Indeed, the Supreme Court started its opinion by stating: "Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man." The Court then explained: "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did." *Porter*, at n.8 & n.9. In the footnotes, the Court cited a movement to pardon prisoners who were Civil War veterans; a 1922 study discussing "the greater leniency that may be shown to ex-service men in court" and noted that some states have statutes specifically providing for special sentencing hearing for veterans. *Porter*, at n.8 & n.9. The *Porter* Court explained that military service has two mitigating aspects to it. The *Porter* Court explained that "the relevance of Porter's extensive combat experience

is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter" and "[t]o conclude otherwise reflects a failure to engage with what Porter actually went through in Korea."

This case compared to *Porter*

There was no deficient performance in this case. In *Porter*, defense counsel failed to uncover and present the defendant's combat experience that resulted in PTSD. Here, in contrast, defense counsel discovered and presented Turner's military service. For this reason, the Eleventh Circuit rejected the claim of ineffectiveness for not presenting military service, determining that counsel's performance was not deficient. *Turner*, 339 F.3d at 1279. The three mental health experts discussed Turner's military service at some length at trial. In stark contrast to *Porter*, Defense counsel Hank Coxe in this case both discovered and presented Turner's military service in Vietnam to both the jury and the judge.

Defense counsel Coxe presented a mental health expert who discussed Turner's military service at trial. Coxe had Turner's military records. Defense counsel Coxe asked for additional time prior to sentencing so he could contact some of the officers Turner served under during Vietnam. Defense counsel Coxe used the fact that Turner enlisted for military service during Vietnam as mitigation in his sentencing memorandum.

Unlike defense counsel in *Porter*, defense counsel in this case both discovered and presented Turner's military service. Counsel cannot be ineffective for failing to do something that he, in fact, did do. *Bates v. State*, 3 So.3d 1091, 1106, n.20 (Fla. 2009)(observing that counsel cannot be held ineffective for what counsel actually did); *Lowe v. State*, 2 So.3d 21, 37, n.4 (Fla. 2008)(noting that because defense counsel did object based on relevancy, Lowe cannot now argue that counsel was ineffective for failing to object to the introduction into evidence of the PSI based on relevancy); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007)(explaining that counsel cannot be deemed ineffective for failing to object when, in fact, he did object.). On this basis alone, *Porter* does not apply.

Nor was there any prejudice. As the Eleventh Circuit observed, "Porter's military service was critical to the holding in *Porter*." *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1249, n.16 & n.21 (11th Cir. 2010)(characterizing mitigation of military service in combat situations as "uniquely strong" and rejecting any reliance on *Porter* because Reed had no military service); see also *Boyd v. Allen*, 592 F.3d 1274, 1302 n.7 (11th Cir. 2010)(finding the case "easily distinguishable" from *Porter* because Boyd never "served in the military, much less during the most critical-and horrific-battles of the Korean War"); *Keough v. State*, 2010 WL 2612937, 32 (Tenn. Crim. App. Ct. 2010)(rejecting any reliance on *Porter* because the defendant had never "served in the military, much less in combat."). While Turner was in the military, he was never in a serious combat situation, much less in any horrific battles.

While Turner was involved in a few "fire fights in terms of being responsible for the machine guns on the perimeter of the Air Force bases," Turner was not wounded and "did not ... witness directly any of his buddies being killed."

Turner asserts that his case and *Porter* are remarkably and strikingly similar. They are not. Turner, like Porter, was in the military. There the similarity ends. Turner, unlike Porter, was not wounded or decorated. Turner, unlike Porter, was not in any major battle of Vietnam. The defense expert, Dr. Stinson's written report included the observation that Turner was under sniper fire at one time. *Turner*, 339 F.3d at 1266. The combat, and therefore necessarily the prejudice as well, in *Porter* was of an entirely different magnitude than in this case.

And Turner's extremely limited combat service, unlike Porter's horrific combat service, did not leave him a "traumatized, changed man." Turner, unlike Porter, did not struggle "to regain normality upon his return from war." Turner, unlike Porter, did not suffer from PTSD as a result of intense and horrific combat duty.

None of the three mental health experts who testified at trial diagnosed Turner as suffering from PTSD, or any other mental defect, as a result of his military service in Vietnam. The defense expert, Dr. Stinson's written report included the observation, while in Vietnam, Turner was under sniper fire at one time, and after he returned to the United States, Turner, for a while, would hit the dirt when lightning flashed. *Turner*, 339 F.3d at 1266. Dr. Miller's written report included the observation that Turner received a Good

Conduct Medal and a Vietnam Campaign Medal for his service in the Air Force and that Turner had dreams of Vietnam for a year or so after his tour of duty. *Turner*, 339 F.3d at 1266. There was no prejudice in this case.

Both prongs

Moreover, even if Turner could show prejudice (which he cannot), he could not prevail on his claim of ineffectiveness because all four courts found there was no deficient performance. The Florida Supreme Court found that defense counsel's performance was not "outside the wide range of professionally competent assistance." *Turner*, 614 So.2d at 1078. Indeed, the Eleventh Circuit rejected this claim of ineffectiveness solely on the deficient performance prong and explicitly declined to address the prejudice prong of *Strickland. Turner*, 339 F.3d at 1279. Turner cannot establish a violation of his right to effective counsel regardless of prejudice because there was no deficient performance.

A defendant raising a claim of ineffectiveness must establish both prongs of *Strickland*. *Waterhouse v. State*, 792 So.2d 1176, 1182 (Fla. 2001)(explaining that because *Strickland* requires both prongs, it is not necessary to address prejudice when a deficient performance has not been shown). Because a petitioner's failure to show either deficient performance or prejudice is fatal to a *Strickland* claim, a court need not address both *Strickland* prongs if the petitioner fails to satisfy either of them. *Kokal v. Secretary, Dept. of Corrections*, 623 F.3d 1331, 1344 (11th Cir. 2010). Turner must show

deficient performance as well as prejudice. Given that all the courts in this case - the trial court, this Court, a federal district judge, and the Eleventh Circuit - found that counsel's performance regarding the mitigation was not deficient, this entire motion is merely a theoretical exercise in prejudice analysis and therefore, a waste of this Court's time. The finding of no deficient performance is fatal to Turner's *Strickland* claim regardless of prejudice.

Military service as mitigation

Turner is not actually complaining about his attorney's conduct; rather, he is actually complaining about the trial court's conduct in rejecting Turner's military service as mitigation. His real complaint is the trial court's conclusion that Turner's limited military service was of "no significance." IB at 3. He is actually attempting to use *Porter* to relitigate not his attorney's effectiveness in post-conviction but, rather, to relitigate the trial court's failure to find his military service as mitigation, which is a direct issue. Turner seeks for this Court to reopen the direct appeal and find that the trial court erred in rejecting his military service as mitigation. And no view of *Porter* supports that proposition.

Accordingly, the trial court's summary denial of the successive motion should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive 3.851 motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to James C. Lohman, 1806 East 39th Street, Austin TX 78722; Amber Lauren Rumancik, Foley & Lardner, L.L.P. One Independent Drive, Suite 1300, Jacksonville, FL 32202-5017; John Hamilton, Foley & Lardner, 111 North Orange Avenue, Suite 1800, Orlando, FL 32801-2386 this 10th day of October, 2011.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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