IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-947

NORBERTO PIETRI

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

> Direct Appeal Florida Supreme Court case number SC60-75844; Pietri v. State, 644 So.2d 1347 (Fla. 1994) - "ROA"
>
> Original Postconviction Appeal case number SC02-2314 Pietri v. State, 885 So.2d 245 (Fla. 2004) - "1PCR"
>
> Successive Postconviction Appeal case number SC11-947 - "2PCR-R" for the record documents and "2PCR-T" for the transcript.

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

STATEMENT OF THE CASE AND FACTS

On March 15, 1990, Pietri was convicted and sentenced to death for the first-degree murder of police officer, Brian Chappell. Pietri v. State, 644 So.2d 1347 (Fla. 1994). This Court, on September 29, 1994, affirmed Pietri's first-degree murder conviction and death sentence. Id. Certiorari was denied on June 19, 1995. Pietri v. Florida, 515 U.S. 1147 (1995). Subsequently, on March 14, 1997, Pietri filed a motion for

postconviction relief and was granted an evidentiary hearing on several claims. Following the hearing, collateral relief was denied and Pietri appealed to this Court. On August 26, 2004, the denial of postconviction relief was affirmed. Pietri v. State, 885 So.2d 245 (Fla. 2004). On December 23, 2004, Pietri filed a federal habeas corpus petition which subsequently was denied and that denial was affirmed by the United States Circuit Court of Appeals for the Eleventh Circuit. Pietri v. Fla. Dep't of Corr., 641 F.3d 1276, 1284 (11th Cir. 2011). While his federal habeas litigation was pending, on November 29, 2010, Pietri filed a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. (2PCR-R 70-110) A Case management/Huff[1] hearing was held on January 20, 2011, (2PCR-T 1-40) and on April 8, 2011, an order summarily denying relief was entered (2PCR-R 183-85), and Pietri appealed.

On direct appeal, this Court found:

> Pietri was convicted of fatally shooting West Palm Beach police officer Brian Chappell in August 1988. The killing occurred after Pietri walked away from a work release center, burglarized a home, and stole a pickup truck. Pietri shot Chappell once in the chest when the officer stopped him after a chase of the stolen truck.
>
> The jury convicted Pietri of first-degree murder and recommended death by a vote of eight to four. The trial judge followed the jury's recommendation and sentenced Pietri

[1] Huff v. State, 622 So.2d 982 (Fla. 1993)

> to death. In imposing the death penalty, the trial judge found four aggravating factors: (1) the murder was committed by someone under a sentence of imprisonment; (2) the murder was committed while Pietri was fleeing after committing a burglary; (3) the murder was a homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (4) the murder was committed to avoid arrest or to escape, the murder was committed to disrupt or hinder the lawful enforcement of laws, and the victim was a law enforcement officer performing his official duties. The trial judge found no statutory or nonstatutory mitigating factors.
>
> On August 18, 1988, Pietri walked away from the Lantana Community Correctional Work Release Center. At the time, he was restricted to the center's grounds while he awaited transfer to a more secure facility. After his escape, Pietri began a four-day binge of using cocaine.[2] He testified that during this time he committed burglaries to support his drug use. On August 22, he ran out of drugs.
>
> Driving a pickup truck he had stolen the day

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[2] Ralph Valdez, Pietri’s nephew, testified that when he saw Pietri on the morning of the shooting, Pietri appeared normal (ROA 2153-54). Denise King testified she saw Pietri at a convenience store on the night before the shooting and on the evening following the shooting and neither time did he appear to be under the influence of alcohol or drugs. King did see Pietri with cocaine (ROA 2189-91, 2196, 2199). Pietri’s attorney, Peter Birch, told the jury in opening statements that the case was all about Pietri’s cocaine addiction and that Pietri’s entire criminal life was centered on obtaining cocaine. Birch also offered that Pietri panicked when stopped by Chappell; Pietri’s intent was never to kill Chappell, but simply to get away. (ROA 1820-1824). In closing argument, Birch again explained that the evidence was consistent with Pietri’s testimony that he simply reacted in panic and he never intended to kill Chappell. (1PCR 6169-6170).

before, Pietri went to a house, broke in, and stole items including a 9-mm semiautomatic firearm and a .38-caliber revolver. After the burglary, a witness saw Officer Chappell sitting on his motorcycle, apparently watching for speeding motorists. The witness saw a man driving a silver pickup truck speed by Chappell, and the officer gave chase. The driver stopped after about a mile. Chappell motioned for the driver to move forward to avoid blocking traffic, and the driver complied.

Witnesses testified that as Chappell approached the truck, his gun was in its holster. When the officer was within two to four feet of the truck the driver shot him once in the chest. A forensics firearm examiner testified that Chappell was shot from a distance of three to eight feet. He testified that the casing of the bullet that killed Chappell matched the casings of 9-mm bullets provided by the burglary victim. Thus, the firearms examiner concluded, the bullets had been fired from a weapon taken in the burglary.

After firing the gun, the driver sped off, and Chappell radioed that he had been shot. The first officer who arrived at the scene testified that Chappell's gun was still in the holster. The holster had been unsnapped, however, indicating that Chappell may have tried to remove his weapon.

After leaving the scene of the shooting, the driver went to his nephew's house for help disposing of the truck. He dumped the truck in a canal off the Florida Turnpike, and a fingerprint found inside the driver's side window was later identified as Pietri's. Officer Chappell's death prompted an intense search, with Pietri identified as the prime suspect. Pietri stole another car on August 24 and was spotted by police officers near his sister's apartment and later by an off-duty officer at a church. Pietri threatened

to shoot the officer, who was not in uniform, and escaped.

Later that same evening, a couple and their five-year-old son were in their car in the driveway of their home. As they prepared to leave, the husband realized he had left something in the house. When he returned to the house, Pietri got in the car and told the wife, "We're leaving, we're leaving." He told the woman, who was in the driver's seat, "Drive, or I'll shoot you." When she hesitated, Pietri pushed her out of the car and began to drive away. He slowed down, however, and let the husband, who had emerged from the house, take their son from the back seat.

Another police officer spotted the couple's car. The driver stopped and waved the officer toward the car. As the officer approached the car with his gun drawn, the driver sped off. Two other officers picked up the chase, which proceeded at speeds of more than 100 miles per hour. Pietri eventually lost control of the car, then jumped out of the car and began running. As Pietri ran, he reached into his pants, pulled out a bag of cocaine, and put it into his mouth. Delray Beach officer Michael Swigert caught Pietri and arrested him.

Pietri testified in his own defense that he is blind in his right eye and that he developed a cocaine addiction which he financed with burglaries. He testified that Chappell stopped him while he was planning to sell stolen goods. Pietri admitted shooting Chappell, but said he had not planned to kill the officer and did not aim for his heart.[3]

[3] Pietri testified he spent the days after his escape abusing cocaine and committing burglaries to support his habit, and on the morning of the shooting, he was smoking crack (ROA 2339-67). On the morning of murder, Pietri burglarized the unoccupied Kutlick/Tronnes residence. He opened the doors of his truck,

Pietri, 644 So.2d at 1349-50 (footnotes omitted). Following the affirmance of the first-degree murder conviction and death sentence Id. at 1355, and the Supreme Court's denial of certiorari, Pietri, 515 U.S. at 1147.

Subsequently, Pietri moved for postconviction relief. Following an evidentiary hearing on his claims of ineffective assistance of counsel in both the guilt and penalty phases, relief was denied. On the ensuing appeal, this Court found that an extensive evidentiary hearing was held where "Pietri presented the testimony of five mental health experts, the two attorneys who served as his defense counsel at trial, an attorney presented to be a "Strickland[4] expert," three attorneys who worked for the public defender's office at the time of Pietri's trial, and six family members and friends of Pietri."

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put on loud music, and used a towel to pretend to clean the windows of the house. Upon breaking into the home, he wiped away his fingerprints and opened all of the doors to the house to provide for an easy escape if he were confronted. In the master bedroom, he found a sheriff's badge, and thought, "Law, I'm in big trouble" then took the nine millimeter Browning weapon he found checking to make sure it was loaded. Pietri placed the nine millimeter on the truck's dashboard and sought a place to sell the stolen jewelry/property for cash or cocaine (ROA 2373-84, 2386-87, 2504). He admitted that while being followed by Chappell, he was considering his options - flee or surrender. When he stopped, Pietri watched as Chappell, with gun holstered, approached. Pietri retrieved his gun, cocked it, turned, and shot Chappell. He claimed he had not thought about and did not intend to kill Chappell; he did not aim for Chappell's heart (ROA 2388-2392, 2506-10, 2511-2512).

[4] Strickland v. Washington, 466 U.S. 668 (1984).

Pietri, 885 So.2d at 251. This Court affirmed the denial of postconviction relief writing extensively on the claims of ineffective assistance of guilt and penalty counsel. Given that Pietri challenges this Court's analysis of his claim of ineffective assistance of penalty phase counsel, the following is provided. After setting forth the allegations of ineffective assistance of penalty phase counsel and giving a detailed account of the relevant facts, Pietri, 885 So.2d 258-63 this Court affirmed the denial of postconviction relief opining:

> As we have noted, to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986). The first inquiry requires the demonstration of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Under this analysis, we hold that Pietri has failed to demonstrate that counsel was deficient in securing a mental health expert. Although counsel was admittedly not focused on the penalty phase from the outset or in the months prior to the start of the guilt phase trial, the record clearly reflects that counsel began attempts to secure a mental health expert well before the penalty phase began. There was evidence of clear justification for not utilizing Dr. Krop as a witness, *see Asay v. State*, 769 So.2d 974, 984 (Fla. 2000) ("[T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was

not a matter of sound trial strategy."), and counsel subsequently contacted at least four experts before finally locating one who could offer assistance. In *Hodges v. State*, 28 Fla. L. Weekly S475, 2003 WL 21402484 (Fla. June 19, 2003), this Court held that trial counsel had conducted a reasonable background investigation where the "deficient results of that investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses." *Id.* at S476, 2003 WL 21402484. While there is no claim here that Pietri was uncooperative, the record does reflect that at least one of the mental health experts contacted by defense counsel, Dr. Haynes, was unwilling to testify. Here we do not even have deficient results because the evidence ultimately presented at trial encompassed the material for which Pietri now asserts fault with counsel.

Unquestionably, the best-case scenario would have been for Dr. Caddy to have been secured earlier to allow more time for his review of all matters related to Pietri. However, we do not agree that counsel's performance was constitutionally deficient here, where the record reflects that counsel attempted, for over two months prior to the penalty phase, to secure a mental health expert. Counsel contacted at least five experts, and ultimately produced Dr. Caddy and Jody Iodice at trial. Importantly, counsel also requested, both pre-trial and post-verdict, a continuance before the start of the penalty phase to allow additional time for preparation. The judge ultimately denied the request. This is not a situation in which defense counsel did nothing to secure a mental health expert to evaluate his client. Here defense counsel made a reasonable effort to secure a mental health expert and such efforts were successful. Additionally, the expert ultimately provided competent testimony on the defendant's behalf, which addressed the matters which Pietri now

claims were overlooked. We cannot say that defense counsel provided constitutionally deficient performance.

Even if we were to hold that defense counsel was deficient in the attempts to secure a mental health expert, based on the evidence presented at the evidentiary hearing, it is clear Pietri has failed to demonstrate that he suffered prejudice as a result. While defense counsel's performance can always be second-guessed and attacked on postconviction, Strickland mandates that we look at the evidence that was actually presented compared to that presented at the postconviction evidentiary hearing. Here, it is clear that Pietri has failed to actually provide any new evidence.

At the evidentiary hearing, five mental health experts testified on Pietri's behalf. The first was Dr. Krop, with whom defense counsel initially consulted but ultimately decided not to utilize. As we hold that defense counsel provided a valid justification for not utilizing Dr. Krop, it is unnecessary to review his testimony. However, we note that Dr. Krop conceded, and the record supports, that much of the information he provided during the evidentiary hearing was the same as that covered by Dr. Caddy during his penalty phase testimony.

The second mental health expert to testify was Dr. Lipman. As noted previously, Lipman's testimony would have been inadmissible during the guilt stage to support a voluntary intoxication defense. However, Lipman testified that had he been called during the penalty phase, he would have opined that Pietri was under the influence of an extreme mental or emotional disturbance at the time of the crime. In his opinion, Pietri could appreciate the criminality of his conduct, but his ability to conform his behavior to the requirements

of the law was impaired. Lipman's opinion was based upon his evaluation of Pietri and Pietri's extensive drug addiction. In his view, Pietri does not suffer from a psychosis, but he does have an organic mental disorder caused by his toxic condition at the time of the offense.

The third expert to testify was Dr. Caddy. Importantly, Caddy stated that his review of information provided by postconviction counsel had not fundamentally changed or affected the conclusions or opinions he previously provided during the penalty phase. Caddy simply believed that his conclusions offered during the postconviction proceeding were now more supported than those at the time of his penalty phase testimony. Notably, Caddy stated during the evidentiary hearing that he could not testify that Pietri's mental state at the time of the crime was extremely impaired or that Pietri was not able to appreciate the criminality of his conduct. He again stated that his testimony remains the same as it was in 1990.

The next expert to testify was Dr. Sultan. Sultan described, in detail, Pietri's recollections of being raped as a child. In her opinion, a person who has been sexually abused would more likely become an early abuser of drugs and alcohol, would have difficulty regulating his emotions, would be irritable, depressed, and angry, and would be more likely to experience the severe effects of any chemical he used. Sultan opined that Pietri suffers from a brain injury in the form of a diagnosable personality disorder resulting from the sexual abuse. On cross-examination, however, Sultan admitted that no member of Pietri's family could corroborate his sexual abuse, despite the fact that ten to twelve people were living in a small house at the time Pietri claims he was abused, and he told her that he screamed out in pain whenever he was

raped. Finally, Sultan conceded that the findings of Caddy were consistent with her opinions.

The final mental health expert to testify for Pietri was Dr. Goldberg. Goldberg conducted a battery of psychological tests on Pietri and concluded that Pietri's IQ is 76, which places him in the mildly impaired range. Goldberg detailed the tests he performed and the results produced. Notably, Goldberg concluded that Pietri's performance on many of the tests was normal, while on others he showed indications of being mildly or moderately impaired. Goldberg opined that Pietri's cognitive impairments were due to cerebral dysfunction. When asked if he felt Pietri satisfied any of the mitigating factors listed in the statute, he stated that Pietri satisfied only the "catchall criteria."

In *Jones v. State*, 732 So.2d 313 (Fla. 1999), we held that the record presented there did not establish a reasonable probability that absent the claimed errors, the sentencer would have concluded that the defendant should not have been sentenced to death. *See id.* at 321. We noted that the defendant had failed to demonstrate, at the postconviction hearing, an inadequacy in the penalty phase testimony of the defendant's mental health expert, and the defendant had simply presented additional mental health experts who came to different conclusions than the penalty phase expert. *See id.* at 320. There, we reasoned: "The evaluation by Dr. Anis is not rendered less than competent, however, simply because appellant has been able to provide testimony to conflict with that presented by Dr. Anis." *Id.* Further, we held that the defendant had failed to demonstrate that he suffered prejudice because "[a]lthough the court found no statutory or nonstatutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of

most of the nonstatutory mitigation regarding appellant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and excessive use of marijuana." *Id.* at 321; *see also Brown v. State*, 755 So.2d 616, 636 (Fla. 2000) (*Strickland* standard not satisfied where mental health expert testified during postconviction hearing that even if he had been provided with additional background information, his penalty phase testimony would have been the same); *Rose v. State*, 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."); *Provenzano v. Dugger*, 561 So.2d 541, 546 (Fla. 1990) (holding prejudice not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief).

None of the mental health experts presented during the evidentiary hearing below claimed any inadequacies in Dr. Caddy or Jody Iodice's penalty phase testimony. Additionally, both Dr. Krop and Dr. Sultan acknowledged that their testimony was consistent with Dr. Caddy's. Dr. Caddy testified that his opinions had not changed despite the additional background information he received. Arguably, the only "new" testimony presented at the evidentiary hearing came from Dr. Lipman, who explained his theory of "metabolic intoxication" and how Pietri's drug addiction affected his mental state. However, while Dr. Caddy did not refer explicitly to a state of "metabolic intoxication," the penalty phase record clearly reflects that he testified regarding the impact of Pietri's drug

addiction, and both Jody Iodice and Dr. Caddy testified with respect to what occurs when a person is withdrawing after excessively using cocaine. Based upon the evidence presented at the penalty phase, it is unquestionable that Dr. Lipman's theory would not have changed the result, as the jury was presented with identical evidence of the effects of Pietri's drug usage.

We have held that a new sentencing hearing is warranted "in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." *Rose*, 617 So.2d at 295 (quoting *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987)). Although a more limited examination of Pietri was conducted at the time of the penalty phase, the results of the examination conducted for the postconviction hearing showed Pietri has an IQ of 76 and that he performed normally or in the mild to moderately impaired range. Only Dr. Lipman opined that Pietri suffered from organic brain damage, although Goldberg also concluded that Pietri presented signs of some brain impairment. Importantly, the testimony of experts presented during the evidentiary hearing were not consistent among the experts, as they did not all agree that Pietri satisfied the two statutory mental health mitigators. The experts even contradicted themselves, as Dr. Lipman testified that Pietri did satisfy certain mitigating factors, while Drs. Caddy and Goldberg were of the opinion he did not. Notably, Pietri questioned, in his brief to this Court, why defense counsel did not inquire of Dr. Caddy during the penalty phase with regard to his opinion as to the presence of the two statutory mental health mitigators. Dr. Caddy's postconviction testimony directly answered that question-he was not questioned about them because in his opinion they were not satisfied. Based upon the evidence presented with respect to the

mental health experts during the evidentiary hearing, we conclude that Pietri failed to satisfy either prong of the *Strickland* test. Defense counsel was not deficient in their investigation and presentation of mental health evidence, and even if deficient, Pietri has totally failed to demonstrate any prejudice.

Pietri also posits that counsel was ineffective for failing to adequately investigate Pietri's drug history by interviewing family and friends, and for failing to adequately inform the jury concerning Pietri's horrible background, including the difficulties of his childhood and the full extent of his addiction history. To support this claim he presented six lay witnesses at the evidentiary hearing who testified with regard to Pietri's childhood and drug addiction. We likewise deny this claim, as the testimony provided during the evidentiary hearing was wholly cumulative to that provided during the penalty phase. *See Brown v. State*, 755 So.2d 616, 636-37 (Fla. 2000) ("We also conclude that the circuit court was correct in its conclusion that the failure to present additional lay witnesses to describe Brown's childhood abuse and low intelligence was not prejudicial to Brown in accord with the requirements of *Strickland*. Such evidence would have been cumulative in that substantially the same information had been presented by other witnesses and was potentially harmful to Brown's case."). Additionally, we noted in our opinion issued in connection with the direct appeal that there was competent substantial evidence to support the trial court's rejection of mitigation, and that "[e]ven if the trial court had found mitigators including a deprived childhood, we cannot say there is a reasonable likelihood that the trial court would have imposed a different sentence." *Pietri*, 644 So.2d at 1354 (emphasis supplied).

The first witness Pietri presented at the evidentiary hearing was Yoris Santana, who had also previously testified during the penalty phase. Santana's testimony at the evidentiary hearing was virtually identical to his penalty phase testimony. He stated that Pietri's drug use on the days before the murder was "uncontrollable," and that he was out of his mind during that time-he was constantly nervous and he was agitated by everything. The remaining five witnesses presented were three of Pietri's brothers, one sister, and one sister-in-law. As Pietri's brothers and sisters previously testified during the penalty phase, the brothers and sisters who testified at the evidentiary hearing related the poor family background and the alcoholism of a father who beat them and their mother and eventually abandoned the family. They also discussed when Pietri began using drugs and the impact of his addiction upon his personality. His sister, Virginia Morales, did add that in her opinion, Pietri was not a happy little boy-he was not "normal." However, she also noted that Pietri was only two or three when their father left, and that Pietri actually had a better existence than many of the other children because while there was very little food to eat when the father lived with the family, as an infant Pietri was able to breast feed. Notably, no one who testified during the evidentiary hearing was questioned regarding Pietri's alleged sexual abuse. Finally, while the lay witnesses at the evidentiary hearing did testify in somewhat greater detail with respect to the effect cocaine had on Pietri, we note that Pietri's sister testified during the penalty phase that cocaine use caused Pietri to be paranoid and scared. As the evidence presented during the evidentiary hearing was wholly cumulative with regard to a deprived childhood and drug addiction, as a result of Pietri's own guilt phase testimony and the lay witnesses

> presented during the penalty phase, we hold that defense counsel was not ineffective for failing to present additional lay witnesses during the trial proceedings.

Pietri, 885 So.2d at 263-67.

During the pendency of his federal habeas review, Pietri v. Florida Dept. of Corrections, 641 F.3d 1276 (11th Cir. 2011) (affirming denial of federal habeas petition), Pietri filed a successive postconviction motion pursuant to Rule 3.851 wherein he argued Porter v. McCullum, 130 S.Ct. 447 (2009) repudiated this Court's analysis of ineffective assistance of counsel cases under Stickland v. Washington, 466 U.S. 668 (1984), thus, his ineffective assistance of penalty phase counsel claim should be reassessed based on Porter. On April 7, 2011, the trial court summarily denied relief finding:

> In *Porter*, the United States Supreme Court did not announce a new standard for ineffective assistance of counsel proceedings. 130 S.Ct. at 454-55. Instead, *Porter* held that the Florida Supreme Court had unreasonably deferred to the trial court's determination regarding the prejudice prong of *Strickland* in the face of extensive mitigating evidence that should have been presented to the jury. *Id*. This does not create a new fundamental constitutional right and does not open the door for reconsideration of Pietri's previously denied post conviction arguments. Therefore, Pietri's Successive motion is untimely.

(2PCR-R 184-85). On May 6, 2011, Pietri filed his notice of appeal. (2PCR-R 188).

SUMMARY OF THE ARGUMENT

Issue I - The trial court correctly denied the untimely, successive postconviction relief motion as Pietri failed to meet the requirements of Rule 3.851(d)(2)(B) Fla. R. Crim. P. and failed to allege a bonafide exception to the one-year time limitation for a successive postconviction motion. Porter v. McCullom, 130 S.Ct. 447 (2009), upon which Pietri relies, did not change the law for a prejudice analysis under Strickland v. Washington, 466 U.S. 668 (1984) and even if Porter had changed the law, it does not have retroactive application. Moreover, Pietri is procedurally barred from re-litigating claims of ineffective assistance of counsel which had been denied previously in Pietri, 885 So.2d at 263-67. Furthermore, Pietri fails to show defense counsel rendered deficient performance and does not allege that the lack of deficiency was affected by Porter. Finally, Pietri' postconviction counsel was not authorized to file the successive motion. Postconviction relief was denied properly and this Court should affirm.

ARGUMENT

ISSUE I

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

Pietri points to Porter v. McCollum, 130 S.Ct. 447 (2009) and asserts it represents a repudiation of this Court's Strickland v. Washington, 466 U.S. 668 (1984) analysis. He claims that Porter constitutes a change in the law which should be applied retroactively under Witt v. State, 387 So.2d 922, 925 (Fla. 1980) to permit this Court to revisit his claim of ineffective assistance of penalty phase counsel rejected in Pietri, 885 So.2d at 276. When this claim was raised by Pietri in his successive postconviction relief motion, the trial court correctly found that Porter was not a fundamental change in the law and denied the motion as untimely. Moreover, because this Court had determined that counsel was not deficient under Strickland, irrespective of the prejudice analysis conducted, thus, Pietri has not carried his burden under Strickland. This Court should affirm.

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

> Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing

> “[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.” A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See, e.g., Rose v. State*, 985 So.2d 500, 505 (Fla. 2008). In reviewing a trial court's summary denial of postconviction relief, we must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record. *See Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). The Court will uphold the summary denial of a newly-discovered-evidence claim if the motion is legally insufficient or its allegations are conclusively refuted by the record. *See McLin v. State*, 827 So.2d 948, 954 (Fla. 2002).

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

Rule 3.851(d)(1) Fla.R.Crim.P. bars a postconviction motion filed more than one year after a judgment and sentence are final. Pietri’s judgment and sentence became final on June 19, 1995 with the denial of certiorari. Pietri v. Florida, 515 U.S. 1147 (1995). See, Davis v. Florida, 510 U.S. 996 (1993); Rule 3.851(d)(1)(B) Fla.R.Crim.P. (holding judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Moreover, this litigation is successive as Pietri previously litigated his claim of ineffective assistance of penalty phase counsel. While Rule 3.851(d)(2) provides that "No motion shall be filed or

considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1), an exception to this exists if "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Fla.R.Crim.P. 3.851(d)(2)(B). Pietri merely pointed to Porter to overcome the bar, but as explained more fully below, the trial court properly determined that the successive postconviction motion filed under Rule 3.851 on November 29, 2010, was untimely, and that Pietri failed to meet any of the exceptions to the time limitations.

Pietri does not assert a claim based on a fundamental constitutional right that was not established within a year of when his convictions and sentences became final. Instead, he posits that Porter did not change constitutional law set forth in Strickland, only that Porter found that this Court's analysis was "an unreasonable application of our clearly established law." (IB at 36). Pietri cannot assert that Porter created a new constitutional right as courts have recognized for decades that the Sixth Amendment right to counsel includes a requirement that counsel be effective. Strickland, 466 U.S. at 688-89.

Furthermore, Pietri does not suggest that Porter "has been held to apply retroactively." See Rule 3.851(d)(2)(B). In fact, no court has held that Porter is retroactive. Instead, both this Court and the federal courts, including the United

States Supreme Court, have uniformly reinforced the application of Strickland to claims of ineffective assistance of counsel. See Cullen v. Pinholster, 131 S.Ct. 1388 (2011); Harrington v. Richter, 131 S. Ct. 770 (2011); Premo v. Moore, 131 S.Ct. 733 (2011); Padilla v. Kentucky, 130 S.Ct. 1473 (2010); Renico v. Lett, 130 S.Ct. 1855 (2010); Sears v. Upton, 130 S.Ct. 3259 (2010); Reed v. Sec'y, Fla. Dept. of Corrections, 593 F.3d 1217, 1243 n.16, 1246 (11th Cir. 2010); Boyd v. Allen, 592 F.3d 1274, 1302 (11th Cir. 2010); Franqui v. State, 59 So.3d 82, 95 (Fla. 2011); Troy v. State, 57 So.3d 828, 836 (Fla. 2011); Everett v. State, 54 So.3d 464, 472 (Fla. 2010); Schoenwetter v. State, 46 So. 3d 535 (Fla. 2010); Stewart v. State, 37 So.3d 243, 247 (Fla. 2010); Rodriguez v. State, 39 So.3d 275, 285 (Fla. 2010).

Given that Porter neither recognized a new constitutional right nor has been held to apply retroactively, it does not meet the exception to the time bar found in Fla. R. Crim. P. 3.851(d)(2)(B). The motion was time barred and denied properly. The trial court's summary denial of relief should be affirmed.

Instead of relying on a newly established constitutional right that has been held to be retroactive to meet the requirements of Rule 3.851(d)(2)(B), Pietri asserts he meets the exception because there has been a change in law regarding an existing right that he is seeking to have held retroactive. However, as this Court has held, court rules are to be construed

in accordance with their plain language. Koile v. State, 934 So.2d 1226, 1230 (Fla. 2006); Saia Motor Freight Line, Inc. v. Reid, 930 So.2d 598, 599 (Fla. 2006). Moreover, as this Court has recognized, the use of the past tense in a rule conveys the meaning that an action has already occurred. Sims v. State, 753 So.2d 66, 70 (Fla. 2000). Here, the plain language of Rule 3.851(d)(2)(B) requires "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and **has been held** to apply retroactively." (emphasis supplied) Thus, it requires a new constitutional right and a prior holding that the right is to be applied retroactively. See Tyler v. Cain, 533 U.S. 656 (2001) (holding use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon). Pietri cannot use the assertion that the alleged change in law regarding an existing right should be held retroactive to have the exception in Rule 3.851(d)(2)(B) apply; he must show that a newly established right has been held retroactive for the exception to apply. Pietri has not carried his burden in this respect, thus, the trial court properly denied relief. This Court should affirm that decision.

Furthermore, even if Pietri could satisfy the dictates of Rule 3.851(d)(2)(B) by showing there has been a change in the

law regarding an existing right and asking this Court to find it retroactive, the trial court would still have denied the motion properly as time barred as Porter did not change the law. While Pietri insists that Porter represents a "fundamental repudiation of this Court's Strickland jurisprudence," (IB at 23), and not simply a determination that this Court misapplied the correct law to the facts of one case, his assertion is incorrect.

Pietri relies heavily on the fact that the United States Supreme Court granted relief in Porter after finding that this Court had unreasonably applied Strickland. He suggests that because this determination was made under the deferential standard of review of 28 U.S.C. §2254 amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the United States Supreme Court must have found a problem with this Court's understanding of the law under Strickland as Porter v. State, 788 So.2d 917 (Fla. 2001) which was just the latest in a long line of this Court's Strickland cases. However, this argument misrepresents the meaning of the term "unreasonable application" under 28 U.S.C. §2254(d), as amended by AEDPA.

As the United States Supreme Court has explained, 28 U.S.C. §2254(d)(1), provides two separate and distinct circumstances under which a federal court may grant habeas relief based on a claim that the state court rejected on the merits which are: (1) determining that the ruling was "contrary to" clearly

established United States Supreme Court precedent; and (2) determining that the ruling was an "unreasonable application of" clearly established United States precedent. Williams v. Taylor, 529 U.S. 362, 404-05 (2000). The Court explained that a state court's decision fit within the "contrary to" provision when the state court got the legal standard for the claim wrong or reached a conclusion opposite from the United States Supreme Court on "materially indistinguishable" facts. Id. at 412-13. It further states that a state court decision would fit within the "unreasonable application" provision when "the state court identifies the correct governing legal principle from this Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

Given the holding in Williams, if the United States Supreme Court had determined that this Court had been applying an incorrect legal standard to Strickland, it would have found that Porter was entitled to relief because this Court's decision was "contrary to" Strickland. However, the United States Supreme Court did not make such a finding, instead, it found that this Court had "unreasonably applied" Strickland. Porter, 130 S.Ct. at 448, 453, 454, 455. By finding this Court "unreasonably applied" Strickland in Porter, the United States Supreme Court found that this Court had identified "the correct governing legal principle from [the] Court's decisions" Williams, 536

U.S. at 412, but simply found that this Court had acted unreasonably in applying that correct law to "the facts of [Porter's] case." Id. at 412. As such, again, Pietri's suggestion that Porter represents a "fundamental repudiation of this Court's Strickland jurisprudence," (IB at 23), is incorrect.

This is all the more true when considered in light of how Pietri suggests that Porter changed the law. Pietri seems to suggest that Porter held that it was improper to defer to the finding of fact that a trial court made in resolving an ineffective assistance claim pursuant to the standard of review in Stephens v. State, 748 So.2d 1028 (Fla. 1999). (IB at 37-43). Yet, in making that assertion, Pietri ignores the fact that the Stephens standard of review is directly and expressly mandated by Strickland:

> Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. §2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n.6, 83 S. Ct. 745, 755, n.6, 9 L. Ed. 2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. *See Cuyler v. Sullivan*, 446 U.S., at 342, 100 S. Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d), and **although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil**

Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (emphasis added)[5] As this passage from Strickland shows, the United States Supreme Court required deference not only to findings of historical fact, but also deference to factual findings made in resolving claims of ineffective assistance while allowing *de novo* review of the application of the law to these factual findings. This is exactly the standard of review this Court recognized and mandated in Stephens, 748 So.2d at 1034, and applied in Porter v. State, 788 So.2d 917, 923 (Fla. 2001); Sochor v. State, 833 So. 2d 766, 781 (Fla. 2004), and Pietri v. State, 885 So.2d 245, 252-55, 258-67 (Fla. 2004) (addressing ineffective assistance of guilt and penalty phase counsel and thoroughly evaluating the evidence presented in the penalty phase and that offered in the collateral proceedings). Thus, to find that Porter found that application of this standard of review to be a legal error, this Court would have to find that the United States Supreme Court

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[5] The references to 28 U.S.C. §2254(d) in Strickland concern the provisions of the statute before the adoption of AEDPA in 1996. Under the federal habeas statute as it existed at that time, a federal court was required to defer to a state court factual if it was made after a "full and fair" hearing and "fairly supported by the record." 28 U.S.C. §2254(d) (1984). After the enactment of AEDPA, the deference given to state court factual findings was heightened and moved. See 28 U.S.C. §2254(e)(1) (requiring a federal court to presume a state court factual finding correct unless the defendant presents clear and convincing evidence to overcome the presumption).

overruled this expressed and direct language from Strickland in Porter.

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

Although Pietri argues that the Court overruled Strickland's requirement of deference to factual findings made in the course of resolving claims of ineffectiveness claims, such an argument is meritless. (IB at 39-41). Porter makes no mention of this portion of Strickland. More importantly, Porter does not even suggest that it was improper for a reviewing court to defer to factual findings made in resolving an ineffective assistance claim. Porter, 130 S.Ct. at 448-56.

Instead, the United States Supreme Court in Porter characterized the opinion of the state trial court and this Court as having found there was no statutory mitigation established and there was no prejudice from the failure to present nonstatutory mitigation. Porter, 130 S.Ct. at 451. Under the standard of review mandated by Strickland, and followed by this Court, the first of these findings was a factual finding

but the second was not. Strickland, 466 U.S. at 698. Rather than determine that this Court's factual finding was not binding, the United States Supreme Court seems to have accepted those factual findings, but determined that this Court had acted unreasonably by not making factual findings about nonstatutory mental health mitigation and making an unreasonable conclusion on the mixed question of fact and law regarding prejudice. Id. at 454-56. Hence, in order to find that Porter overruled Stephens and its progeny, this Court would have to find that the United States Supreme Court overruled itself *sub silencio* in a case where the Court appears to have applied the allegedly overruled law. However, this Court is not empowered to make such a finding, as this Court has itself recognized. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989); Bottoson v. Moore, 833 So.2d 693, 694 (Fla. 2002). Thus, the trial court properly determined that Porter did not change the law. Rule 3.851(d)(2)(B) does not provide a basis for review of a time-barred claim. The denial of relief should be affirmed.

Also, Pietri's reliance on Sears v. Upton, 130 S. Ct. 3259 (2010) to bolster this position is misplaced. In Sears, the state postconviction court found constitutionally deficient attorney performance under Strickland. Because Sears' counsel presented some, but not all of the significant mitigation evidence the court felt competent counsel should have uncovered,

the state court mistakenly determined that it could not "speculate" as to what the effect of additional evidence would have been and denied relief. On appeal, the Georgia Supreme Court, without explanation, summarily affirmed the lower court's postconviction finding that it was unable to assess whether trial counsel's deficient performance and resulting inadequate investigation might have prejudiced Sears. Id. at 3261. In reversing, the United States Supreme Court did not find that it was improper for a trial court to make factual findings in ruling on a claim of ineffective assistance of counsel or for a reviewing court to defer to those findings. Rather, the Court reversed because it did not believe that the lower courts had made findings about the evidence presented. Id. at 3261. Hence, Sears does not support the assertion that the making of findings or giving deference when reviewing those findings is inappropriate.

Pietri also seems to suggest that Porter requires a court to grant relief on an ineffective assistance of counsel claim based solely on a finding that some evidence to support prejudice was presented at a postconviction evidentiary hearing regardless of what mitigation was presented at trial, how incredible the new evidence is, how much negative information the new evidence would have caused to be presented at trial, or how aggravated the case was. However, Porter itself states that

this is not the standard for assessing prejudice. Instead, the United States Supreme Court stated that determining prejudice required a court to "consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding' - and reweig[h] it against the evidence in aggravation." Porter, 130 S.Ct. at 453-54 (quoting Williams, 536 U.S. at 397-98).

Furthermore, in Wong v. Belmontes, 130 S.Ct. 383, 386-91 (2009), the United States Supreme Court reversed the Ninth Circuit Court of Appeals for finding prejudice by ignoring the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented, and the aggravated nature of the crime. The Supreme Court noted that this error was probably caused by the Ninth Circuit's failure to require that the defendant meet his burden of affirmatively proving prejudice. Id. at 390-91. Similarly in Bobby v. Van Hook, 130 S.Ct. 13, 19-20 (2009), the Supreme Court reversed the Sixth Circuit Court of Appeals for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the evidence presented in postconviction, and the aggravated nature of the crime.

Given what Porter says about proving prejudice and taken in conjunctions with Belmontes and Van Hook, Pietri's suggestion

that Porter requires a finding of prejudice anytime a defendant presents some evidence at a postconviction hearing is simply false. Porter did not change the law announced in Strickland that requires that a defendant actually prove there is a reasonable probability of a different result.[6] Again, as Porter did not change the law, the finding that the motion was time barred was proper and the summary denial of relief should be affirmed.

Even if Rule 3.851(d)(2)(B) did apply to this situation and Porter had changed the law, the trial court still would have properly denied the motion because Porter would not apply retroactively. As Pietri admits, the determination of whether a change in law is retroactive is controlled by Witt v. State, 387 So.2d 922, 931 (Fla. 1980). Also, as Pietri acknowledges, in order to obtain retroactive application of the law under Witt, he was required to show: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental

[6] Using Pietri's batch of red and green apples analogy (IB at 43-48), the task of determining prejudice involves taking the red and green apples as they existed from the time of trial, determining whether the new evidence actually adds any new red or new green apples based on whether they are support by credible, non-cumulative evidence, adding both the new red apples and new green apples and deciding whether the defendant has proven that the total amount of red apples outweigh the total green apples. Porter, 130 S.Ct. at 453-54; Strickland, 466 U.S. at 695-96.

significance. Id. at 929-30. To meet the third element of this test, the change in the law must (1) "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." Id. at 929. Application of this three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So.2d 306, 311 (Fla. 2001).

While here, Pietri admits that a change in law is not retroactive under Witt unless this standard is met, he makes no attempt to show how the alleged change in law meets this standard. In fact, he never clearly identifies what change Porter made, offers no purpose behind that alleged change in law, and does not mention how extensive the reliance on the allegedly old law was or what the effect on the administration of justice would be. Given these circumstances, the lower court properly found that Pietri failed to establish that the change in law he alleges occurred would be retroactive under Witt. The claim should be rejected and the summary denial affirmed.

Instead of attempting to show that the change in law he alleges occurred meets Witt, Pietri points to the fact that this Court found Hitchcock v. Dugger, 481 U.S. 393 (1987) to be

retroactive, and he implies that because both cases involved findings of error in Florida cases, the change in law he alleges occurred in Porter should be too. However, the mere fact that this Court found a change in law based on a determination that this Court had made an error to meet the Witt standard in one case does not dictate that a finding that this Court committed a different error in a different case would constitute a change in law that satisfies Witt in a different case. This is particularly true when one considers the difference in the errors found in Hitchcock and Porter and the relationship between those errors and the Witt standard.

In Hitchcock, 481 U.S. at 398-99, the United States Supreme Court found that the giving of a jury instruction that told the jury not to consider nonstatutory mitigation was improper. As such, the purpose of finding this error was to permit a jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phase and could only have harmed a defendant if he was sentenced to death, the number of cases in which there had been an error that would need retroactive correction was limited. Further, because the error was in a jury instruction, determining whether that error occurred in a particular case was simple. All a reviewing court needed to do was consider the jury instructions that had been given in a

particular case to see if it was the offending instruction. Courts were not required to comb through stale records looking for errors. See, State v. Glenn, 558 So.2d 4, 8 (Fla. 1990) (refusing to apply Carawan v. State, 515 So.2d 161 (Fla. 1987), retroactively). Thus, the purpose of the new rule, extent of reliance on the old rule and effect on the administration of justice in Hitchcock militated in favor of retroactivity.

In contrast and as noted above, Porter involved nothing more than determining that this Court had unreasonably applied a correctly stated rule of law to the facts of a particular case, as noted above. Hence, the purpose of Porter was nothing more than to correct an error in the application of the law to facts of a particular case. Moreover, as the trial court found, there is nothing to show Porter changed the standard of review from Strickland and a review of this Court's jurisprudence shows that it has relied upon Strickland extensively as recognized in Stephens. Moreover, the effect on the administration of justice from applying the alleged change in law in Porter retroactively would be to bring the courts of Florida to a halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida.

Given the above noted stark differences in the analysis of changes in law in Porter and Hitchcock and their relationship to

Witt factors, the trial court properly determined Pietri did not show that the alleged change in law from Porter would be retroactive under Witt even if it had occurred. In fact, the more apt analogy regarding a change in law would be the change in law that this Court recognized in Stephens itself, as both changes in law concern the same legal issue. However, making that analogy merely shows that the lower court was correct to deny this motion. In Johnston v. Moore, 789 So.2d 262 (Fla. 2001), this Court held the change in law in Stephens was not retroactive under Witt. Given the fact that Porter would fail the Witt test if it had changed the law and this Court has already determined that changing the law regarding the standard of review for ineffective assistance of counsel claims does not meet Witt, the trial court properly found that this motion was time barred and this Court should affirm.

Moreover, it should be remembered that Pietri's claim of ineffective assistance of counsel is procedurally barred. He is seeking nothing more than to relitigate the claim of ineffective assistance of penalty phase counsel for not presenting mitigation that he had raised in his first motion for post conviction relief and lost. See Pietri, 885 So.2d at 258-67 (addressing ineffective assistance of penalty phase counsel). See also Pietri, 641 D.3d at 1284-88 (agreeing with Florida Supreme Court that "Pietri cannot show that his penalty-phase

counsel were unconstitutionally ineffective.”). As this Court has held, such attempts to relitigate claims that have previously been raised and rejected are procedurally barred. See Wright v. State, 857 So.2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Pietri 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). Given that this is precisely what Pietri is attempting to do here, his claim is barred and was denied correctly. See Topps v. State, 865 So.2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

In fact, this Court has rejected attempts to relitigate ineffective assistance claims simply because the United States Supreme Court issued opinions indicating that state courts have erred in rejecting claims of ineffective assistance of counsel. Marek v. State, 8 So.3d 1123 (Fla. 2009). There, the defendant argued that his previously rejected claim of ineffective assistance of counsel at the penalty phase had to be re-evaluated under the standards enunciated in Rompilla v. Beard, 545 U.S. 374 (2005), Wiggins v. Smith, 539 U.S. 510 (2003), and

Williams v. Taylor, 529 U.S. 362 (2000), because they had changed the standard of review for claims of ineffective assistance of counsel under Strickland. This Court decisively rejected the claim, stating "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under Strickland." Marek, 8 So.3d at 1128. This Court did so even though the United States Supreme Court had found that under the AEDPA standard of review the state courts had improperly rejected these claims. Given these circumstance, the claim was procedurally barred and that determination should be affirmed.

Again, even if Rule 3.851(d)(2)(B) could apply to changes in law regarding existing rights that had yet to be held retroactive, Porter had changed the law, the alleged change in law was retroactive, and the claim was not procedurally barred, Pietri still would not be entitled to relief. As this Court recognized in Witt, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. Witt, 387 So.2d at 930-31. Moreover, as the Court recognized in Strickland, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. Strickland, 466 U.S. at 697.

Porter does not compel relief in Pietri's case. In Porter, counsel only had one short meeting with the defendant about

mitigation, never attempted to obtain any records about the defendant, and never requested mental health evaluation for mitigation at all. Porter, 130 S. Ct. at 453. Such is not the case here. In Pietri's original postconviction case, unlike in Porter, the state courts did address trial counsel's performance at the penalty phase and found that performance was not deficient.

With respect to the first review of penalty phase counsel, this Court conducted a painstaking analysis of the evidence defense counsel presented and that which Pietri suggested in his postconviction motion should have been presented. Pietri, 885 So.2d at 258-63. This Court then reasoned:

> As we have noted, to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986). The first inquiry requires the demonstration of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. **Under this analysis, we hold that Pietri has failed to demonstrate that counsel was deficient in securing a mental health expert**. Although counsel was admittedly not focused on the penalty phase from the outset or in the months prior to the start of the guilt phase trial, the record clearly reflects that counsel began attempts to secure a mental health expert well before the penalty phase began. There was evidence of clear justification for not utilizing Dr. Krop as a witness, *see Asay v. State*, 769 So.2d 974, 984 (Fla. 2000) ("[T]he defendant bears the burden of proving that counsel's representation was unreasonable

under prevailing professional standards and was not a matter of sound trial strategy."), and counsel subsequently contacted at least four experts before finally locating one who could offer assistance. In *Hodges v. State*, 28 Fla. L. Weekly S475, 2003 WL 21402484 (Fla. June 19, 2003), this Court held that trial counsel had conducted a reasonable background investigation where the "deficient results of that investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses." *Id.* at S476, 2003 WL 21402484. While there is no claim here that Pietri was uncooperative, the record does reflect that at least one of the mental health experts contacted by defense counsel, Dr. Haynes, was unwilling to testify. Here we do not even have deficient results because the evidence ultimately presented at trial encompassed the material for which Pietri now asserts fault with counsel.

Unquestionably, the best-case scenario would have been for Dr. Caddy to have been secured earlier to allow more time for his review of all matters related to Pietri. However, we do not agree that counsel's performance was constitutionally deficient here, where the record reflects that counsel attempted, for over two months prior to the penalty phase, to secure a mental health expert. Counsel contacted at least five experts, and ultimately produced Dr. Caddy and Jody Iodice at trial. **Importantly, counsel also requested, both pre-trial and post-verdict, a continuance before the start of the penalty phase to allow additional time for preparation. The judge ultimately denied the request. This is not a situation in which defense counsel did nothing to secure a mental health expert to evaluate his client. Here defense counsel made a reasonable effort to secure a mental health expert and such efforts were successful. Additionally, the expert ultimately provided competent testimony on the defendant's behalf, which addressed the matters which Pietri now claims were overlooked. We cannot say that defense counsel provided constitutionally deficient performance.**

Even if we were to hold that defense counsel was deficient in the attempts to secure a mental health expert, based on the evidence presented at the evidentiary hearing, it is clear Pietri has failed to

demonstrate that he suffered prejudice as a result. While defense counsel's performance can always be second-guessed and attacked on postconviction, *Strickland* mandates that we look at the evidence that was actually presented compared to that presented at the postconviction evidentiary hearing**. Here, it is clear that Pietri has failed to actually provide any new evidence.**

At the evidentiary hearing, five mental health experts testified on Pietri's behalf. The first was Dr. Krop, with whom defense counsel initially consulted but ultimately decided not to utilize. As we hold that defense counsel provided a valid justification for not utilizing Dr. Krop, it is unnecessary to review his testimony. However, we note that Dr. Krop conceded, and the record supports, that much of the information he provided during the evidentiary hearing was the same as that covered by Dr. Caddy during his penalty phase testimony.

The second mental health expert to testify was Dr. Lipman. As noted previously, Lipman's testimony would have been inadmissible during the guilt stage to support a voluntary intoxication defense. However, Lipman testified that had he been called during the penalty phase, he would have opined that Pietri was under the influence of an extreme mental or emotional disturbance at the time of the crime. In his opinion, Pietri could appreciate the criminality of his conduct, but his ability to conform his behavior to the requirements of the law was impaired. Lipman's opinion was based upon his evaluation of Pietri and Pietri's extensive drug addiction. In his view, Pietri does not suffer from a psychosis, but he does have an organic mental disorder caused by his toxic condition at the time of the offense.

The third expert to testify was Dr. Caddy. Importantly, Caddy stated that his review of information provided by postconviction counsel had not fundamentally changed or affected the conclusions or opinions he previously provided during the penalty phase. Caddy simply believed that his conclusions offered during the postconviction proceeding were now more supported than those at the time of his penalty phase testimony. Notably, Caddy stated during the

evidentiary hearing that he could not testify that Pietri's mental state at the time of the crime was extremely impaired or that Pietri was not able to appreciate the criminality of his conduct. He again stated that his testimony remains the same as it was in 1990.

The next expert to testify was Dr. Sultan. Sultan described, in detail, Pietri's recollections of being raped as a child. In her opinion, a person who has been sexually abused would more likely become an early abuser of drugs and alcohol, would have difficulty regulating his emotions, would be irritable, depressed, and angry, and would be more likely to experience the severe effects of any chemical he used. Sultan opined that Pietri suffers from a brain injury in the form of a diagnosable personality disorder resulting from the sexual abuse. On cross-examination, however, Sultan admitted that no member of Pietri's family could corroborate his sexual abuse, despite the fact that ten to twelve people were living in a small house at the time Pietri claims he was abused, and he told her that he screamed out in pain whenever he was raped. Finally, Sultan conceded that the findings of Caddy were consistent with her opinions.

The final mental health expert to testify for Pietri was Dr. Goldberg. Goldberg conducted a battery of psychological tests on Pietri and concluded that Pietri's IQ is 76, which places him in the mildly impaired range. Goldberg detailed the tests he performed and the results produced. Notably, Goldberg concluded that Pietri's performance on many of the tests was normal, while on others he showed indications of being mildly or moderately impaired. Goldberg opined that Pietri's cognitive impairments were due to cerebral dysfunction. When asked if he felt Pietri satisfied any of the mitigating factors listed in the statute, he stated that Pietri satisfied only the "catchall criteria."

In *Jones v. State*, 732 So.2d 313 (Fla. 1999), we held that the record presented there did not establish a reasonable probability that absent the claimed errors, the sentencer would have concluded that the defendant should not have been sentenced to death. *See id.* at 321. We noted that the defendant had failed to

demonstrate, at the postconviction hearing, an inadequacy in the penalty phase testimony of the defendant's mental health expert, and the defendant had simply presented additional mental health experts who came to different conclusions than the penalty phase expert. *See id.* at 320. There, we reasoned: "The evaluation by Dr. Anis is not rendered less than competent, however, simply because appellant has been able to provide testimony to conflict with that presented by Dr. Anis." *Id.* Further, we held that the defendant had failed to demonstrate that he suffered prejudice because "[a]lthough the court found no statutory or nonstatutory mitigation, by virtue of the testimony of Dr. Anis, the sentencing jury was aware of most of the nonstatutory mitigation regarding appellant's impoverished and abusive childhood. The jury was also aware of appellant's abuse of alcohol and excessive use of marijuana." *Id.* at 321; *see also Brown v. State*, 755 So.2d 616, 636 (Fla. 2000) (*Strickland* standard not satisfied where mental health expert testified during postconviction hearing that even if he had been provided with additional background information, his penalty phase testimony would have been the same); *Rose v. State*, 617 So.2d 291, 295 (Fla. 1993) ("The fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."); *Provenzano v. Dugger*, 561 So.2d 541, 546 (Fla. 1990) (holding prejudice not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief).

None of the mental health experts presented during the evidentiary hearing below claimed any inadequacies in Dr. Caddy or Jody Iodice's penalty phase testimony. Additionally, both Dr. Krop and Dr. Sultan acknowledged that their testimony was consistent with Dr. Caddy's. Dr. Caddy testified that his opinions had not changed despite the additional background information he received. Arguably, the only "new" testimony presented at the evidentiary hearing came from Dr. Lipman, who explained his theory of

“metabolic intoxication” and how Pietri's drug addiction affected his mental state. However, while Dr. Caddy did not refer explicitly to a state of “metabolic intoxication,” the penalty phase record clearly reflects that he testified regarding the impact of Pietri's drug addiction, and both Jody Iodice and Dr. Caddy testified with respect to what occurs when a person is withdrawing after excessively using cocaine. Based upon the evidence presented at the penalty phase, it is unquestionable that Dr. Lipman's theory would not have changed the result, as the jury was presented with identical evidence of the effects of Pietri's drug usage.

We have held that a new sentencing hearing is warranted “in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage.” *Rose*, 617 So.2d at 295 (quoting *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987)). Although a more limited examination of Pietri was conducted at the time of the penalty phase, the results of the examination conducted for the postconviction hearing showed Pietri has an IQ of 76 and that he performed normally or in the mild to moderately impaired range. Only Dr. Lipman opined that Pietri suffered from organic brain damage, although Goldberg also concluded that Pietri presented signs of some brain impairment. Importantly, the testimony of experts presented during the evidentiary hearing were not consistent among the experts, as they did not all agree that Pietri satisfied the two statutory mental health mitigators. The experts even contradicted themselves, as Dr. Lipman testified that Pietri did satisfy certain mitigating factors, while Drs. Caddy and Goldberg were of the opinion he did not. Notably, Pietri questioned, in his brief to this Court, why defense counsel did not inquire of Dr. Caddy during the penalty phase with regard to his opinion as to the presence of the two statutory mental health mitigators. Dr. Caddy's postconviction testimony directly answered that question-he was not questioned about them because in his opinion they were not satisfied. **Based upon the evidence presented with respect to the mental health experts during the evidentiary hearing, we conclude that Pietri failed to satisfy either prong of the *Strickland* test. Defense**

counsel was not deficient in their investigation and presentation of mental health evidence, and even if deficient, Pietri has totally failed to demonstrate any prejudice.

Pietri also posits that counsel was ineffective for failing to adequately investigate Pietri's drug history by interviewing family and friends, and for failing to adequately inform the jury concerning Pietri's horrible background, including the difficulties of his childhood and the full extent of his addiction history. To support this claim he presented six lay witnesses at the evidentiary hearing who testified with regard to Pietri's childhood and drug addiction. We likewise deny this claim, as the testimony provided during the evidentiary hearing was wholly cumulative to that provided during the penalty phase. *See Brown v. State*, 755 So.2d 616, 636-37 (Fla. 2000) ("We also conclude that the circuit court was correct in its conclusion that the failure to present additional lay witnesses to describe Brown's childhood abuse and low intelligence was not prejudicial to Brown in accord with the requirements of *Strickland*. Such evidence would have been cumulative in that substantially the same information had been presented by other witnesses and was potentially harmful to Brown's case."). Additionally, we noted in our opinion issued in connection with the direct appeal that there was competent substantial evidence to support the trial court's rejection of mitigation, and that "[e]ven if the trial court had found mitigators *including a deprived childhood*, we cannot say there is a reasonable likelihood that the trial court would have imposed a different sentence." *Pietri*, 644 So.2d at 1354 (emphasis supplied).

The first witness Pietri presented at the evidentiary hearing was Yoris Santana, who had also previously testified during the penalty phase. **Santana's testimony at the evidentiary hearing was virtually identical to his penalty phase testimony**. He stated that Pietri's drug use on the days before the murder was "uncontrollable," and that he was out of his mind during that time-he was constantly nervous and he was agitated by everything. The remaining five witnesses presented were three of Pietri's brothers, one sister, and one sister-in-law. As Pietri's

> brothers and sisters previously testified during the penalty phase, the brothers and sisters who testified at the evidentiary hearing related the poor family background and the alcoholism of a father who beat them and their mother and eventually abandoned the family. They also discussed when Pietri began using drugs and the impact of his addiction upon his personality. His sister, Virginia Morales, did add that in her opinion, Pietri was not a happy little boy-he was not "normal." However, she also noted that Pietri was only two or three when their father left, and that Pietri actually had a better existence than many of the other children because while there was very little food to eat when the father lived with the family, as an infant Pietri was able to breast feed. Notably, no one who testified during the evidentiary hearing was questioned regarding Pietri's alleged sexual abuse. Finally, while the lay witnesses at the evidentiary hearing did testify in somewhat greater detail with respect to the effect cocaine had on Pietri, we note that Pietri's sister testified during the penalty phase that cocaine use caused Pietri to be paranoid and scared. **As the evidence presented during the evidentiary hearing was wholly cumulative with regard to a deprived childhood and drug addiction, as a result of Pietri's own guilt phase testimony and the lay witnesses presented during the penalty phase, we hold that defense counsel was not ineffective for failing to present additional lay witnesses during the trial proceedings**.

Pietri, 885 So.2d at 263-67 (emphasis supplied).

While the claim of ineffectiveness of penalty phase counsel respecting the mental health and lay witness testimony did address the Strickland prejudice prong, this Court also found there was no deficient performance. As explained above, Porter is not a gateway for Pietri to obtain a second review of the matter or for this Court to reassess the claim "with a full-throated and probing prejudice analysis, mindful of the facts

and the Porter mandate" as suggested by Pietri. (IB at 51-52).

Pietri does not even suggest how Porter would have affected the determinations of no deficiency under Strickland. In fact, he ignores the evidence presented at the evidentiary hearing which supported that finding. Moreover, finding no deficiency in such a situation is in accordance with United States Supreme Court precedent. Bobby v. Van Hook, 130 S.Ct. 13 (2009). As such, Pietri's claim would be meritless even if Porter had changed the law and applied retroactively. The trial court properly denied this collateral motion and should be affirmed.

Pietri also points to the fact that the trial court had adopted the State's post-hearing memorandum and suggests that the adoption of the State's memorandum "showed a lack of independent review and consideration." (IB at 53). However, that is not the finding of this Court. In fact, this Court rejected that contention finding that "the judge authored his own one-page order in which he 'incorporated by reference' the State's post-evidentiary hearing memorandum" that the "trial court considered both memos [the State's and Pietri's] for well over a month before entering its final order," and that "the State's memo demonstrates that it is not facially deficient and the conclusions therein are supported by the record." Pietri, 885 So.2d at 269-70. This Court found that the better practice in the future was to have the trial court compose the final

orders "in which the court reviews the testimony given and evaluates the credibility of the witnesses presented" so there would be no question regarding the trial court's independent review. Id. at 270. Hence, this Court properly relied upon the trial court's factual findings contained in the adopted State memorandum as this Court independently found that those findings were "not facially deficient and the conclusions therein are supported by the record." Id. The similarities Pietri attempts to draw between the rejection of the expert testimony in his case and that in Porter are unsupported. (IB at 53). As outlined above and as quoted from this Court's opinion, this Court reviewed the record, found the factual findings of the trial court supported by the evidence and independently assessed the mixed question of law and fact under Strickland, before concluding that counsel's performance was neither deficient nor prejudicial with respect to the investigation and presentation of the mental health experts and lay witnesses. Pietri has not set forth a legal basis to review that decision a second time. Relief was denied properly by the trial court and this Court should affirm.

Moreover, the challenges Pietri raises to the factual findings of this Court respecting the mental health experts' and lay witnesses' testimonies (IB at 53-57) is nothing more than improper re-litigation of issues resolved adversely to Pietri in

his original postconviction appeal. Pietri, 885 So.2d at 258-70. Pietri may not raise claims of ineffectiveness in piecemeal fashion. See Pope v. State, 702 So. 2d 221, 223 (Fla. 1997). This Court previously assessed the testimonies of the postconviction evidentiary hearing witnesses in light of the evidence at trial and such findings are supported by the record.[7] Pietri is not entitled to a second appeal.

Finally, it must be noted that Pietri is represented by Capital Collateral Regional Counsel - South ("CCRC") and as such CCRC was not authorized to file the successive, time-barred postconviction motion. Section 27.702, Florida Statutes provides that "capital collateral regional counsel and the attorneys appointed pursuant to s.27.710 shall file only those postconviction or collateral actions authorized by statute." The Florida Supreme Court has recognized the legislative intent

[7] The FSC properly assessed the penalty phase testimony of the lay and expert witnesses. (ROA 2827-2834, 2839-2846, 2849-71, 2888-2911, 2913-2925, 2932-2937, 2944-2945, 2955-68, 2987-95, 3010-11) It also correctly set forth the events surrounding counsel's investigation for a mental health doctor to build upon the guilt phase drug addiction defense and to offer Pietri's trouble childhood at mitigation. (PCR 5487, 5496, 6071-74, 6078-79, 6117-25, 6127-28, 6132-34, 6153-61, 6202, 6213, 6219, 6250-51, 6253, 6266, 6332-33, 6339). Likewise, the FSC's factual findings respecting the evidentiary hearing testimony are supported by the record, including the fact that Dr. Caddy stood by his earlier testimony. (PCR 5331, 5493-5494, 5501-02, 5542, 5545-46, 5554-56, 5564-73, 5591-93, 5617, 5659-90, 5699-5703, 5702-03, 5732-33, 5743, 5765, 5759, 5781, 5786, 5795, 5822, 5878, 6334-6337, 6391-6398, 6410-11, 6419, 6432, 6443-48, 6469-6474, 6485, 6616-17).

to limit collateral counsel's role in capital post-conviction proceedings. See State v. Kilgore, 976 So.2d 1066, 1068-1069 (Fla. 2007).

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

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

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

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the summary denial of Pietri's successive postconviction relief motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: William M. Hennis, III, Esq., Capital Collateral Regional Counsel - South, 101 NE 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 this 28th day of September, 2011.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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