In the Supreme Court of Florida

ANTONIO LEBARON MELTON,

Appellant,

v. CASE NO. SC11-973

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, ANTONIO LEBARON MELTON, 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

Melton was convicted of first-degree felony murder and armed robbery of a pawn shop and sentenced to death. The facts of this crime are recited in this Court's direct appeal opinion. *Melton v. State*, 638 So.2d 927, 928-29 (Fla. 1994). The "Carter/pawn-shop" case is the capital case where the victim, George Carter, who was the owner of the pawn shop, was murdered. The "Saylor/taxi-cab" case is the non-capital case, where the victim, Ricky Saylor, was the driver of the taxi cab, was murdered. The "Saylor/taxi-cab" conviction was used as the prior violent felony aggravator in the "Carter/pawn-shop" case.

In the direct appeal of the capital case to the Florida Supreme Court, Melton raised four issues. *Melton v. State*, 638 So.2d 927, 929 n.1 (Fla. 1994)(listing issues). This Court affirmed the convictions of first-degree felony murder and armed robbery. This Court also affirmed the sentences of life for the armed robbery and death for the first-degree murder. *Melton v. State*, 638 So.2d 927 (Fla. 1994).

Melton filed a petition for writ of certiorari in the United States Supreme Court. On October 31, 1994, the United States Supreme Court denied certiorari review. *Melton v. Florida*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994). Melton's convictions and death sentence became final the day after the petition was denied.

On January 16, 1996, Melton filed a shell 3.850 motion in the capital case. (PCR Vol I74-200; II 201-248).[1] On July 5, 2001, state post-conviction counsel filed a first amended motion which raised 27 claims. (PCR VI 907-1083). On October 18, 2001, the trial court held a *Huff* hearing.[2] The state postconviction court held a three day evidentiary hearing in February of 2002. It was a consolidated evidentiary hearing covering both the capital and non-capital murder convictions. Both parties submitted written post-evidentiary hearing memorandums following the evidentiary hearing. The state post-conviction court issued its order denying relief on all claims in both the "Carter/pawn-shop" case and "Saylor/taxi-cab" case on March 23, 2004.

Melton appealed the denial of his postconviction motion in the "Saylor/taxi-cab" murder to the First District. On August 24, 2005, the First District per curiam affirmed the trial court's denial of postconviction relief in the "Saylor/taxi-cab" case. *Melton v. State*, 909 So.2d 865 (Fla. 1st DCA 2005).

Melton appealed the denial of postconviction relief in the "Carter/pawn-shop" capital case to the Florida Supreme Court. *Melton v. State*, 949 So.2d 994 (Fla. 2006). The Florida Supreme Court affirmed the denial of postconviction relief. *Melton v. State*, 949

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[1] On July 6, 1995, Melton filed a state 3.850 postconviction motion to vacate the judgment and sentence in the non-capital case. The capital and non-capital postconviction cases traveled together after this point.

[2] *Huff v. State*, 622 So.2d 982 (Fla. 1993)(setting out procedure for a motion hearing to determine which claims an evidentiary hearing should be held).

So.2d 994 (Fla. 2006). Melton also filed a state habeas petition in the Florida Supreme Court. The Florida Supreme Court denied the habeas petition as well. *Melton v. State*, 949 So.2d 994 (Fla. 2006).

Melton then filed a petition for writ of certiorari from his postconviction proceedings in the United States Supreme Court, arguing that (1) trial counsel's was ineffective as articulated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); (2) whether *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) extends to a juvenile conviction used as an aggravating circumstance; and (3) whether *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) extends to "mental age". The Supreme Court denied the petition on October 1, 2007. *Melton v. Florida*, 552 U.S. 843, 128 S.Ct. 88, 169 L.Ed.2d 67 (2007).

On September 8, 2006, Melton filed a federal habeas petition attacking the "Saylor/taxi-cab" felony murder conviction in the federal district Court. *Melton v. Sec'y, Fla. Dep't of Corr.*, case no. 3:06-cv-00384-RS (N.D. Fla.) That petition is still pending before Judge Smoak. On March 3, 2008, Melton filed a federal habeas petition attacking the "Carter/pawn-shop" capital murder in federal district court. Judge Smoak entered a stay in both federal habeas cases pending resolution of Melton's second successive motion in the non-capital case regarding a claim of newly discovered evidence in state court.

On November 29, 2010, registry counsel, Todd Doss, filed a third successive 3.851 motion in this capital case raising a claim that the Florida Supreme 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). Melton 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. The trial court summarily denied the successive *Porter* motion.

SUMMARY OF ARGUMENT

Melton asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present general background 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). Melton 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 sixteen 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, 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 is case not similar to the facts of *Porter*. In *Porter*, defense counsel failed to uncover and present the defendant's combat experience that resulted in PTSD. Here, in contrast, Melton was never in the military. Melton never

served his country. Nor was there any prejudice for the same reason. 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 GENERAL BACKGROUND AS MITIGATION BASED ON *PORTER V. MCCOLLUM*, 558 U.S. -, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)? (Restated)

Melton asserts that this Court's prejudice analysis of his claim of ineffectiveness for failing to present general background information 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 sixteen (16) 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. In *Porter*, defense counsel failed to uncover and present the defendant's combat experience in horrific battles that resulted in PTSD. Melton was never in the service, much less in any horrific combat. He did not serve his country in combat or otherwise. The vast majority of the *Porter* Court's reasoning simply does not apply to Melton. Thus, the successive *Porter* motion was properly summarily denied.

The trial court's ruling

On November 29, 2010, registry counsel, Todd Doss, filed a third 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 background as mitigation based on *Porter*. (R. Vol. 1 1-21). The State filed an answer to the third successive motion asserting that it was untimely, barred by the law of the case doctrine, and meritless because Melton was never in the military. (R. Vol. 1 22-55). On February 28, 2011, the trial court conducted a case management conference at which the trial court heard the arguments of counsel. (R. Vol. 1 63-84). On April 11, 2011, the trial court entered a written order denying the third successive motion. (R. Vol. 1 100-111).

The trial court summarily denied the successive motion. The trial court first concluded that *Porter* was not retroactive noting that *Porter* "has not been held to apply retroactively." (R. Vol. 1 103). Therefore, the trial court ruled that the motion was untimely. (R. Vol. 1 103). The trial court, alternatively, concluded that Melton would be entitled to no relief under *Porter* because in this case, the trial court had found no deficient performance unlike the situation in *Porter*. (R. Vol. 1 103-104).

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 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. For example, if there is controlling precedent from this Court that is directly on point, then a trial court may summarily deny the successive motion. 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).[3] Under the rule any post-conviction motion must

[3] 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

be filed within one year of Melton's convictions and sentence becoming final. Melton's convictions and sentence became final on November 1, 1994, the day after the United States Supreme Court denied his petition for writ of certiorari in the direct appeal. *Melton v. Florida*, 513 U.S. 971, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994). The third successive motion was filed in November of 2010. The successive motion was over sixteen 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

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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.

(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.

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.

Melton 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. Melton 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 Melton'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 by 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*. Melton 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.

Melton attempts to distinguish between "new federal law" and "new Florida law." IB at 42, n.46. There is no such distinction. When the Supreme Court disagrees with this Court in a *Strickland* case, that does not change the law of *Strickland*.

Melton's reliance on *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), is misplaced. In *Hitchcock*, the United States Supreme Court concluded that Florida's law regarding consideration of non-statutory mitigation was unconstitutional. The Court held that Florida practice violated established Eighth Amendment jurisprudence. In *Porter*, by contrast, the United States Supreme Court did not hold that Florida practice violated the Sixth Amendment. *Hitchcock* was systemic; *Porter* was not. *Porter* was case-specific. *Hitchcock* is simply not an analogous situation.

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. Melton does not cite or distinguish *Johnston*. As the trial court correctly determined, 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).

Melton is seeking to relitigate the exact same ineffectiveness claim in this successive post-conviction motion that he raised in his first post-conviction motion. Melton is once again claiming that his defense counsel, Chief Assistant Public defender Terry Terrell, failed to investigate and present general background information including his unusual and isolated social isolation which left him immature for his age. That same claim of ineffectiveness for failing to present this general background as mitigation was raised in the initial post-conviction motion. This court rejected that particular claim of ineffectiveness. *Melton v. State*, 949 So.2d 994, 1004-1005 (Fla. 2006). This court rejected a claim that defense counsel was ineffective for failing "to paint a complete picture of Melton's life" including "evidence of his unusual and isolated childhood" in the post-conviction appeal. This Court explained defense counsel Terrell "presented both of Melton's parents at the penalty phase, who offered testimony regarding Melton's lack of a father figure, the strict religious environment at home, Melton's abusive stepfather, and Melton's choice to leave home at the age of sixteen." This Court noted that "other witnesses testified as to Melton's sheltered childhood, the dangerous environment in which he was raised, and the fact that he lived basically on his own after leaving home." This Court found no prejudice because "while the additional evidence presented at the evidentiary hearing certainly could have been

offered at trial to paint a more complete picture of Melton's childhood," "the evidence presented below essentially mirrors the evidence presented by trial counsel during the penalty phase." *Melton v. State*, 949 So.2d at 1004-1005. Melton 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. Melton, like Marek, is not entitled to relitigate the previously denied claim. As the trial court correctly determined, the successive motion was 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 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*

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."). As the

Eleventh Circuit noted in *Reed*, the "the crux of counsel's deficient performance in *Porter* was the failure to investigate and present Porter's compelling military history." *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1243 n.16 (11th Cir. 2010). The Eleventh Circuit in *Reed*, explained that the case was "wholly different from *Porter*, where the Supreme Court found the defendant was prejudiced by his trial counsel's failure to present the uniquely strong mitigating nature of military service in combat situations." *Reed*, 593 F.3d at1217, 1249 n.21 citing *Porter*, 130 S.Ct. at 454-56. The Eleventh Circuit observed that Porter's counsel failed to present powerful mitigating evidence that: (1) Porter was "a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War"; (2) "his combat service unfortunately left him a traumatized, changed man"; and (3) he "struggled to regain normality upon his return from war." *Reed*, 593 F.3d at1217, 1249 n.21. The Eleventh Circuit noted that "[p]aragraph after paragraph in the *Porter* opinion concerns Porter's combat experience in Korea, recounted in great detail." The Eleventh Circuit reasoned that "Porter's military service was critical to the holding in *Porter*." The Eleventh Circuit rejected habeas counsel's reliance on *Porter* because Reed was not in the military.

Melton was never in uniform. Melton, like *Reed*, but unlike *Porter*, was never in the military. Melton never served his country, much less in combat. Indeed, Melton rejected his father's advice to enlist. The vast majority of the *Porter* Court's reasoning simply does not apply to Melton. As the trial court correctly determined,

Porter does not apply to a capital defendant who was never in the military.

Sears

Melton asserts that this court must reanalyze the prejudice prong with a "probing and fact-specific analysis" rather than a "truncated, cursory" prejudice analysis citing *Sears v. Upton*, - U.S. -, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010). IB at 56-58. *Sears* did not change the law of ineffectiveness any more than *Porter* did. *Strickland* was the law both before and after *Sears* (and this same is true of *Porter*). Moreover, *Sears* involved a state postconviction court that concluded that counsel performed deficiently in not presenting the mitigating evidence of significant brain damage but "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears." The state court determined it "could not speculate as to what the effect of additional evidence would have been." *Sears*, 130 S.Ct. at 3261. In other words, *Sears* was a case where the trial court refused to conduct any analysis of the prejudice prong.

Sears has no application to this case. The trial court here found no deficient performance in contrast to *Sears*. The trial court in this case concluded:

> Regardless of when the doctor was retained, the significant point is that he was retained and was provided with sufficient materials with which to do an evaluation of the Defendant. There was also enough time to allow for the appropriate testing to assist the doctor in reaching his opinions. Ultimately, at the evidentiary hearing it was not established that Dr. Gilgun was deprived of any significant information which would have changed or magnified the scope of his testimony during the penalty phase.

The trial court also noted:

> The record reflects evidence of the stepfather's abuse of the Defendant's mother was presented to the jury and to the court and indeed was commented upon by the trial court in his sentencing order. It is interesting to note that the Defendant's testimony in the penalty phase (CC 1048) where he testified that his stepfather, Mr. Booker, "wasn't really around enough to be recognized, you know, to make an influence or whatever. He wasn't, you know, around that much." This testimony is important considering the questioning of the defense attorney at the evidentiary hearing. When questioned whether he would have presented the information regarding the stepfather's alleged heroin abuse he responded "possibly, if it had an impact on Mr. Melton's development" (EH 186). It is apparent that the absence of a role model in the Defendant's life rather than the presence of a negative male role model was the salient factor in the Defendant's mitigation evidence. The evidence was clearly presented by the Defendant's attorney. As reflected in his sentencing order, the trial court found that the fact that the Defendant was raised with no male guidance and that his mother was abused by his stepfather was mitigating evidence.

Moreover, the Florida Supreme Court conducted a full analysis of the prejudice prong, also in contrast to the trial court in *Sears*. The Florida Supreme Court basically found no prejudice because the evidence was cumulative. *Melton*, 949 So.2d at 1004-1005. Melton does not explain how a "probing and fact-specific" prejudice analysis would change the conclusion that the background mitigation presented at the evidentiary hearing was cumulative to the background evidence presented at the penalty phase. Cumulative is still cumulative.

The other omitted mitigation in *Porter* was brain abnormality and childhood physical abuse. *Sears* involved the omitted mitigation of "significant" brain damage in the Supreme Court's words. Neither type of mitigation is present here. Melton's I.Q. is 90 or 98 which is normal. As the trial court noted in its order denying the initial

post-conviction motion, Dr. Dee's and Dr. Gilgun's findings were similar. Both concluded the Melton has "no major mental illness or evidence of brain damage" and there was "no evidence of any kind of significant impairment of cognitive function because of any cerebral disease, insult or injury." Therefore, neither *Porter* nor *Sears* applies.

Frivolous successive post-conviction motions

The capital defense bar has filed successive *Porter* motions in approximately 40 capital cases. Because there is controlling precedent from this Court in *Marek v. State*, 8 So.3d 1123 (Fla. 2009), rejecting the same claim as is being made in these *Porter* motions, these successive *Porter* motions are frivolous. This Court has cautioned registry counsel against filing such pleadings. *Olive v. Maas*, 811 So.2d 644, 654 (Fla. 2002)(rejecting a challenge to the registry contract noting "the rules themselves prohibit a lawyer from asserting frivolous or successive claims" citing R. Regulating Fla. Bar 4-3.1.). These successive *Porter* motions are totally frivolous yet they have consumed the time of numerous Assistant Attorneys General in the capital division answering them and will consume the limited funds of the Department of Financial Services paying for them, not to mention the time and resources of the courts, both trial courts and this Court. This Court's caselaw, the applicable statute and the registry contract all prohibit registry counsel from filing frivolous or successive motions. See § 27.711(1)(c)(defining the term "Postconviction capital collateral proceedings" as meaning "<u>one</u>

series of collateral litigation of an affirmed conviction and sentence of death" and noting the "term does not include repetitive or successive collateral challenges to a conviction and sentence of death . . ."). This Court should reiterate its prior warning against filing frivolous successive motions in capital cases and encourage trial courts to refuse to authorize payments for such pleadings.

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 D. Todd Doss, Esq. 725 SE Baya Avenue, Lake City, FL 32025 this 13th 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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