IN THE SUPREME COURT OF FLORIDA

CHADWICK WILLACY,

Appellant,

v. **Case No. SC11-99**

STATE OF FLORIDA,

Appellee.
_____ /

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a successive post-conviction proceeding. Willacy's first Rule 3.851 motion was denied after an evidentiary hearing. This Court affirmed that in 2007, summarizing the factual and procedural history as follows:

I. FACTUAL AND PROCEDURAL BACKGROUNDFN1

> FN1. *See Willacy v. State*, 640 So. 2d 1079 (Fla. 1994) (hereinafter *Willacy I*) and *Willacy v. State*, 696 So. 2d 693 (Fla. 1997) (hereinafter *Willacy II*).

> On September 5, 1990, Marlys Sather returned home unexpectedly to find Willacy, her next-door neighbor, burglarizing her house. Willacy bludgeoned Sather and bound her ankles with wire and duct tape. He choked and strangled her with a cord with a force so intense that a portion of her skull was dislodged. Willacy then obtained Sather's ATM pin number, her ATM card, and the keys to her car; drove to her bank; and withdrew money out of her account. Willacy hid Sather's car around the block while he made trips to and from the house. He placed stolen items on Sather's porch for later retrieval, took a significant amount of property from Sather's house to his house, and then drove the car to Lynbrook Plaza where he left it and jogged back to Sather's home. Upon his return, Willacy disabled the smoke detectors, doused Sather with gasoline he had taken from the garage, placed a fan from the guest room at her feet to provide more oxygen for the fire, and struck several matches as he set her on fire.
>
> When Sather failed to return to work after lunch, her employer notified the Sather family of her absence. Sather's son-in-law went to her home and found a shotgun and several electronic items lying on the back porch. Inside the home, he found Sather's body. Medical testimony established that her death was caused by inhalation of smoke from her burning body.
>
> Law enforcement officers conducted an investigation into Sather's

murder, uncovering a large amount of evidence linking Willacy to the murder. Willacy's fingerprints were found on the fan at Sather's feet, the gas can, and a tape rewinder at Sather's house. Witnesses reported seeing a man matching Willacy's description near Sather's house and driving Sather's car on the day of the murder. Further, Willacy's girlfriend, Marisa Walcott, telephoned law enforcement officers after discovering a woman's check register in Willacy's wastebasket. Law enforcement officers recognized the check register as belonging to Sather and subsequently arrested Willacy. While executing a search warrant on Willacy's home, law enforcement agents uncovered some of Sather's property, as well as several articles of clothing containing blood consistent with Sather's blood type.

Willacy was charged by indictment with first-degree premeditated murder, burglary, robbery, and arson. Judge Theron Yawn presided over the trial. On October 17, 1991, the jury convicted Willacy on all four counts. Following the penalty phase, the jury recommended death by a vote of nine to three, and Judge Yawn sentenced Willacy to death.FN2

> FN2. Judge Yawn found four aggravating factors: the murder was committed (1) while engaged in the commission of arson; (2) for pecuniary gain; (3) in an especially heinous, atrocious, or cruel manner; and (4) to avoid arrest. The sole statutory mitigating factor was Willacy's lack of prior criminal activity, and the two nonstatutory mitigating factors were Willacy's history of nonviolence and his attempts at self-improvement while in jail.

Willacy appealed to this Court but subsequently moved for temporary relinquishment of jurisdiction in order for the trial court to hold an evidentiary hearing on his motion for a new trial. In his motion for a new trial, Willacy claimed that juror Clark, the foreman of Willacy's trial in 1991, was under prosecution for grand theft. Jurisdiction was relinquished and on October 12, 1992, Judge Yawn conducted a hearing on Willacy's motion. Among the witnesses at the hearing, the court heard testimony from Willacy's trial counsel, the prosecutors in his case, and juror Clark. The prosecutors testified that they became aware of Clark's

status during Willacy's trial and immediately informed Willacy's trial counsel. Willacy's trial counsel denied receiving this information during trial. Following the hearing, Judge Yawn issued an order denying Willacy's motion for a new trial, finding that the State informed Willacy's trial counsel of Clark's status during trial.

During oral argument on direct appeal, the parties thoroughly debated the issue of juror Clark's eligibility.FN3 Willacy's counsel asserted that Clark was under prosecution and, therefore, statutorily ineligible to serve as a juror until he entered into a pretrial intervention (PTI) agreement. According to Willacy's counsel, because Clark did not sign a PTI contract until after Willacy's trial, Clark was disqualified. The State countered that Clark was eligible to serve because he was approved for PTI prior to Willacy's trial. Alternatively, the State argued that because Willacy's trial counsel failed to object to Clark during trial, the matter was waived. This Court affirmed the convictions but vacated the death sentence and remanded the case for a new penalty phase based on Willacy's claim that the trial court did not give defense counsel an opportunity to rehabilitate a juror who said she was opposed to the death penalty. *Willacy* I, 640 So. 2d at 1082. As to the controversy regarding juror Clark, this Court held:

> Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision. *Willacy I,* 640 So. 2d at 1083.
>
> FN3. The eight issues raised on direct appeal were: (1) the court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror; (2) a prospective juror [Juror Payne] was improperly challenged based on his race; (3) the jury foreman [Juror Clark] was ineligible to serve; (4) the court improperly found that Willacy's statements were voluntarily made; (5) the killing was not committed to avoid arrest; (6) the killing was not heinous, atrocious, or cruel; (7) the court improperly weighed the mitigating and aggravating factors; and

(8) death is an inappropriate penalty. *Willacy I*, 640 So. 2d at 1081 n. 2.

At resentencing, Willacy was represented by new counsel and Judge Yawn again presided. The State presented evidence of the crime and testimony of Sather's son and two daughters. Willacy presented the testimony of relatives and friends. The court followed the jury's eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating factors,FN4 no statutory mitigating factors, and thirty-one nonstatutory mitigating factors of little weight.FN5 On direct appeal after resentencing, Willacy raised eleven issues.FN6 This Court denied each of those claims and affirmed Willacy's death sentence. *Willacy II*, 696 So. 2d at 694.

FN4. The five aggravating factors were: (1) the murder was committed in the course of a felony; (2) the murder was committed to avoid lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner (CCP).

FN5. The nonstatutory mitigating factors were that Willacy (1)-(3) exhibited kindness, compassion, and concern for others; (4) enjoyed the love and affection of his family; (5)-(6) enjoyed the respect and admiration of his peers and his family; (7) demonstrated a desire and a willingness to help others; (8)-(9) was a leader and a role model to his peers; (10) maintained strong ties to his family; (11) exhibited appropriate demeanor and behavior during the resentencing hearing; (12) exhibited love for his family; (13)-(14) was a good and loyal friend and a good and obedient son; (15) was unselfish; (16) contributed to the lives of others; (17) showed the proper respect for his elders; (18)-(19) demonstrated honesty and responsibility; (20) was a hard worker; and (21) voluntarily sought help for his drug problem. While in school, Willacy (22) enjoyed the respect and confidence of his teachers and coaches; (23) did not experience any academic or disciplinary problems; (24) was a disciplined and dedicated

member of his high school track team; (25) demonstrated a willingness to help his teammates and otherwise be a team player; (26) was the captain of his high school track team and enjoyed numerous honors in connection with his talents as a runner; (27) had no history of previous violent conduct; and (28) had a good upbringing without serious disciplinary problems. Judge Yawn also considered (29)-(30) any other aspect of Willacy's character or background; and (31) any other factor deemed appropriate.

FN6. The eleven issues Willacy raised on direct appeal after resentencing were: (1) the denial of Willacy's motion for recusal of the judge; (2) the admission of inflammatory evidence; (3) the finding that the murder was heinous, atrocious, or cruel (HAC); (4) the finding that the murder was committed to evade arrest; (5) the finding that the murder was committed for pecuniary gain; (6) the finding that the murder was committed in a cold, calculated, and premeditated manner (CCP); (7) the proportionality of the death sentence; (8) the admission of victim impact evidence; (9) the refusal to strike jurors for cause; (10) cumulative error; and (11) the constitutionality of the death penalty statute.

On May 11, 1998, Willacy filed a motion to vacate judgment of conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850 with special request for leave to amend. On March 18, 2002, Willacy filed an amended motion for postconviction relief in which he raised thirty-one issues. Seventeen of Willacy's claims were summarily denied by order on September 24, 2003.FN7 An evidentiary hearing was granted on Willacy's remaining fourteen claims.FN8 The evidentiary hearing was held on December 3 through 5 and 19, 2003, and February 16, 2004. On November 23, 2004, the trial court issued an order denying the remaining fourteen claims. Willacy timely filed this appeal.

FN7. Willacy's claims that were summarily denied included: (3) Willacy was denied a fair trial due to the State's failure to inform the court of juror Clark's statutory ineligibility; (4) counsel was ineffective for waiving the appointment of independent counsel to litigate the facts and circumstances regarding juror Clark's

pending felony charges; (5) counsel was ineffective for failing to fully present to the trial court during the hearing on October 12, 1992, all aspects of the pretrial intervention program and juror Clark's status as pending prosecution at the time of his jury service; (6) counsel was ineffective for failing to object to juror Clark's ineligibility to serve as a juror; (8) the trial court applied an incorrect standard of review or law in denying Willacy's motion for a new trial; (9) Willacy was denied a fair trial due to juror misconduct; (11) counsel was ineffective for failing to timely move to disqualify Judge Yawn from presiding over the second penalty phase proceeding; (12) the trial court erred by failing to follow the procedure outlined in *Spencer v. State*, 615 So. 2d 688 (Fla.1993), in resentencing Willacy in 1995; (14) jurors were not sworn prior to voir dire in the original trial as required by Florida Rule of Criminal Procedure 3.300(a); (15) counsel was ineffective for failure to object to the trial court's failure to swear the jury prior to voir dire in the original trial; (16) the trial court erred in concluding that there was probable cause for Willacy's arrest and search of his home; (20) the trial court erred in failing to properly instruct the jury during the 1995 penalty phase proceeding on the distinction between regular premeditation and the higher standard of cold, calculated, and premeditated murder; (26) the indictment violated the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because it failed to include aggravating circumstances; (27) Florida's death penalty statute is unconstitutional under the Sixth Amendment and *Apprendi* because the jury was not instructed that they must unanimously find beyond a reasonable doubt any aggravating circumstance; (28) the trial court's failure to instruct the jury that they must unanimously find that the aggravating circumstances outweigh the mitigating circumstances in order to recommend a death sentence violated the Sixth Amendment and *Apprendi*; (29) the trial court's failure to require a unanimous binding jury verdict as to the death penalty was unconstitutional under *Apprendi;* (30) lethal injection and Florida's procedures implementing lethal injection constitute cruel or unusual punishment in violation of

the Eighth Amendment and article I, section 17 of the Florida Constitution.

FN8. These claims all pertained to the ineffectiveness of trial counsel: (1) failure to raise an independent act defense; (2) failure to investigate potentially exculpatory evidence; (7) failure to inquire of juror Clark during voir dire regarding his eligibility to serve; (10) failure to prepare fully and adequately for trial by retaining a fingerprint or crime scene expert; (13) failure to seek to disqualify the trial judge based on the trial court's use of a sentencing order which had been prepared prior to the *Spencer* hearing; (17) failure to object to evidence introduced at trial; (18) failure to request a jury instruction on felony murder and the law of principals; (19) failure to request an *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), jury instruction; (21) failure to present evidence of a statutory mitigating circumstance pursuant to section 921.141(6)(f), Florida Statutes (Supp.1990); (22) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(b), Florida Statutes (Supp.1990); (23) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(h), Florida Statutes (Supp.1990); (24) failure to present mental health testimony to rebut the State's claim that the murder was committed in a cold, calculated, and premeditated manner; (25) waiver of the presentencing investigation report; and (31) cumulative error.

II. 3.850 MOTION FOR POSTCONVICTION RELIEF

Willacy appeals the denial of his motion for postconviction relief, raising seven issues: (1) the trial court erred in denying an evidentiary hearing on claims 4, 6, and 15 of his motion for postconviction relief; (2) counsel was ineffective for failing to assert the independent act defense; (3) counsel was ineffective for failing to move to recuse the trial judge at the resentencing proceeding; (4) counsel was ineffective for failing to investigate and present evidence of statutory and nonstatutory mitigating factors; (5) counsel was ineffective for failing to inquire regarding juror Clark's status; (6) the trial court erred in failing to retroactively apply this

Court's decision in *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998); and (7) the trial court erred in denying Willacy's motion for postconviction DNA testing.

. . . .

III. PETITION FOR WRIT OF HABEAS CORPUS

In his petition for writ of habeas corpus, Willacy raises seven issues: (1) appellate counsel was ineffective for failing to raise on direct appeal lack of probable cause to arrest Willacy or to search Willacy's residence; (2) Willacy was denied his constitutional right to a fair trial by having a juror who was pending prosecution serve as the foreman on his jury; (3) appellate counsel was ineffective for failing to raise on direct appeal the fundamental error resulting from the trial court's failure to swear prospective jurors; (4) appellate counsel was ineffective for failing to argue that the jury was improperly instructed as to the aggravating circumstance of cold, calculated, and premeditated (CCP); (5) Willacy was sentenced to death in violation of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (6) death by lethal injection violates article I, section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution; and (7) Willacy's Eighth Amendment right against cruel and unusual punishment may be violated as he may be incompetent at the time of execution. Issues (2), (5), (6), and (7) are either without merit or not yet ripe for review and need not be discussed in detail.FN14

> FN14. Because this Court determined on direct appeal that juror Clark was eligible to serve on Willacy's jury, issue (2) is without merit. Issue (3) is essentially the same as claim 15 of Willacy's motion for postconviction relief and was already disposed of above. Willacy's *Ring* claim fails because Ring does not apply retroactively. See *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State*, 904 So.2d 400 (Fla.2005). Also without merit is Willacy's claim challenging Florida's procedure of execution by lethal injection. *See Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000). Finally, Willacy's claim that he may be incompetent at the time of execution is not yet ripe for review. *See Robinson v. State,* 913 So. 2d 514, 524 n. 9 (Fla. 2005). (Emphasis supplied)

Willacy v. State, 967 So. 2d 131, 135-138, 145-146 (Fla. 2007).

The only state court pleading filed subsequent to this decision was a successive state habeas petition filed September 29, 2009, which raised the following issues:

> 1A. The Florida Supreme Court failed to conduct an in-depth analysis of prosecutorial discriminatory purposes like it did in *State v. Nowell;*
>
> 1B. The prosecutor's peremptory challenge of Juror Payne;
>
> 1C. Prosecutors did not challenge Juror Clark;
>
> 1D(1) The Florida Supreme Court did not conduct the type of analysis on direct appeal that was conducted in *Nowell*;
>
> 1D(1)(i) The prosecutors injected race into *voir dire;*
>
> 1D(1)(ii) Comparison of prosecutors treatment of Mr. Payne to Juror Clark.

The petition was denied by the Florida Supreme Court on March 19, 2010, in an unpublished decision. *Willacy v. McNeil*, 33 So. 3d 36 (Table) (Fla. 2010).

Willacy filed a successive Rule 3.851 motion to vacate on November 1, 2010. (V1, R108-133). The State responded. (V1, R134-160). The case management conference was held December 9, 2010. (V1, R22-55). The trial judge denied the successive 3.851 motion on December 13, 2010. (V2, R180-379; V3, R380-406). The order was four (4) pages long: there were 220 pages of attachments supporting the order.

The trial judge held:

The Court determined that an evidentiary hearing does not need to be held on the subject motion and the Court heard argument on December 9, 2010, on the purely legal claims not based on disputed facts raised in the subject motion.

Based on a review of the Defendant's post-conviction motion, the State's Response, a review of the official Court file, legal argument made by counsel at the December 9, 2010 hearing, and being otherwise fully advised on the premises, the Court makes the following findings of fact and conclusions of law:

a. After a trial, the jury convicted the Defendant on October 17, 1991, of first-degree murder, burglary of a dwelling with an assault, robbery with a deadly weapon, and first-degree arson. (See Exhibit "1," Verdicts.) On October 18, 1991, a penalty phase was conducted and the jury recommended the death penalty. Willacy v. State, 696 So. 2d 693, 694 (Fla. 1997). Judge Yawn sentenced the Defendant to death. *Id.* On direct appeal, the Supreme Court of Florida affirmed the convictions and sentences, except the death sentence which the Court vacated and remanded for a new penalty proceeding before a jury. *Id.* During the new penalty phase, Judge Yawn again presided, and on November 20, 1995, the Court again sentenced the Defendant to death, following the jury's eleven-to-one recommendation. (See Exhibit "2," 11/20/1995 Sentencing Order) On July 7, 1997, the Supreme Court of Florida issued a Mandate effectuating a decision issued on April 24, 1997, affirming the Defendant's convictions and sentences imposed in the above-styled case. (See Exhibit "3," Mandate/Decision.) Willacy v. State, 696 So. 2d 693 (Fla. 1997).

b. On May 11, 1998, the Defendant filed his first post-conviction motion, and then filed an amended version of that motion on March 18, 2002, pursuant to rule 3.851, Florida Rules of Criminal Procedure. (See Exhibit "4") On September 24, 2003, the Court entered an order summarily denying seventeen of the post-conviction claims made by the Defendant (See Exhibit "5"), then on November 19, 2004, after an evidentiary

hearing, the Court entered a final order that denied the remaining fourteen claims raised in the Defendant's first postconviction motion, pursuant to rule 3.851, Florida Rules of Criminal Procedure. (See Exhibit "6," 11/19/2004 Order without exhibits except for Exhibit "A."). On October 26, 2007, the Supreme Court of Florida issued a Mandate effectuating a decision that affirmed the denial of the Defendant's first rule 3.851 postconviction motion on June 28, 2007. (See Exhibit "7," Mandate/Decision.) Willacy v. State, 967 So. 2d 131 (Fla. 2007).

c. On March 19, 2010, the Supreme Court of Florida denied a successive petition for writ of habeas corpus. Willacy v. McNeil, 33 So. 3d 36 (Fla. 2010).

d. Pursuant to Rule 3.851(f)(5)(B), a successive motion for postconviction relief may be denied "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief. **The Court finds that the subject motion is untimely, successive, procedurally barred, facially insufficient, and unauthorized under Rule 3.851(d)(1),(2), (e)(2),** Florida Rules of Criminal Procedure. (See Exhibit "8," 11/1/2010 Motion and Exhibits 3-7). **The Defendant's motion is not based on any newly established fundamental constitutional right that "has been held to apply retroactively."** The subject successive postconviction motion does not meet any exception to the time and successiveness bars. Porter v. McCollum, 130 S. Ct. 447 (2009) does not establish a new fundamental constitutional right to be applied retroactively. Porter is the United States Supreme Court's application of Strickland v. Washington, 466 U.S. 668 (1984) to the particular facts of that case. Furthermore, unlike Porter, **the undersigned judge and the Supreme Court of Florida specifically addressed that trial defense counsel's performance was not deficient,** and also conducted a full analysis of the prejudice prong under Strickland, applied the post-conviction testimony to mental health mitigation and found no prejudice under Strickland. (See Exhibit "6," pgs. 36-38 and Exhibit "7")(Emphasis supplied)

(V2, R180-184).

SUMMARY OF ARGUMENTS

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

The trial court held Willacy' motion untimely, successive, procedurally barred, facially insufficient, and unauthorized under Rule 3.851(d)(1),(2), (e)(2), Florida Rules of Criminal Procedure. These rulings should be affirmed.

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

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

STANDARDS OF REVIEW

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

In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Here, as in *Rose v. State*, 985 So. 2d 500 (Fla. 2008), the trial court entered a comprehensive written order disclosing the basis for the summary denial of Willacy's successive motion to vacate and providing for meaningful appellate review. *Id., citing Nixon*, 932 So. 2d at 1018.

ARGUMENT

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

Willacy raises several issues in this appeal,[1] and asserts an entitlement to relitigate his ineffective assistance of counsel claims on the ground that *Porter v. McCollum,* 558 U.S. ---, 130 S.Ct. 447 (2009) allegedly changed the *Strickland* prejudice analysis and should be retroactively applied. The only questions properly before this Court are: 1) Did *Porter* change the law and, 2) if so, has the alleged change in law been held to apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980)? Because the answer to both questions is no, further review of the issues presented is not warranted.

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[1] (1) Both the circuit court and this Court erred in denying Willacy's first postconviction motion (Brief at 37);
(2) *Porter v. McCollum,* 130 S.Ct. 447 (2009), is a change in law which requires the circuit court and this Court to re-hear Willacy's ineffectiveness claims (Brief at 38-39);
(3) This Court's analysis in Willacy's first postconviction case was as flawed as its analysis in *Porter v. State*, 788 So. 2d 923 (Fla. 2001) (Brief at 54);
(4) Willacy's ineffective assistance of counsel claims must be re-visited by this Court because *Porter* creates a new standard for conducting prejudice analyses (Brief at 54);
(5) This Court erroneously deferred to the trial court when it affirmed the denial of Willacy's postconviction motion (Brief at 57, 73);
(6) Evidence from the evidentiary hearing in the first postconviction motion shows that counsel was deficient (Brief at 58-60);
(7) Willacy's case is more egregious than *Porter*'s, and Willacy deserves reversal (Brief at 72);
(8) The United States Supreme Court in *Porter* made clear that this Court's prejudice

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. *Porter* does not, constitute a change in law cognizable in post-conviction under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). This Court's previous denial of Willacy's ineffectiveness claims was not premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U. S. 668 (1984).

The trial judge properly found the successive motion:

> -untimely, successive, procedurally barred, facially insufficient, and unauthorized under Rule 3.851(d)(1),(2),(e)(2);
>
> -not based on any newly established fundamental constitutional right that "has been held to apply retroactively;"
>
> - did not meet any exception to the time and successiveness bars.

The trial judge also found:

> - *Porter* is the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) to the particular facts of that case;
>
> -Unlike *Porter*, the undersigned judge and the Supreme Court of Florida specifically found that trial defense counsel's performance was not deficient;
>
> - Both the lower court and this Court also conducted a full analysis of the prejudice prong under *Strickland*,

(V2, R180-184). The trial court's order summarily denying Willacy's successive

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analysis is "insufficient to satisfy the mandate of *Strickland*" (Brief at 74).

motion to vacate should be affirmed.

Willacy's successive Rule 3.851 motion to vacate was time-barred and did not meet any exception under Rule 3.851(d)(2)(B). Florida Rule of Criminal Procedure 3.851(d)(2)(B) requires any motion to vacate judgment of conviction and death sentence to be filed within one year after the judgment and sentence become final, unless the motion alleges that a fundamental constitutional right was established after that period and "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).[2] Willacy's successive Rule 3.851 motion failed to satisfy both of the prongs required for this exception.

Willacy' judgment and sentence became final in 1997, when the Supreme Court denied certiorari. See, *Willacy v. Florida*, 522 U.S. 970, 118 S. Ct. 419, 139 L.Ed.2d 321 (1997); Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Willacy' successive Rule 3.851 motion, filed in 2010, is untimely filed – by 13 years.[3]

[2] 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). Thus, Willacy could not plausibly invoke the exception in Fla. R. Crim. P. 3.851(d)(2)(B). Instead, Willacy had to show that a new fundamental constitutional right was established and has been held retroactive for the exception to apply. See *Tyler v. Cain*, 533 U.S. 656 (2001) (holding that use of past tense in federal statute regarding successive federal habeas petitions requires Court to hold new rule retroactive before it can be relied upon).

[3]Willacy does not assert any claim of newly discovered evidence based on *Porter*. In

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

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

No court has held that *Porter* established a new fundamental constitutional right that is to be applied retroactively. Since *Porter* was decided, both this Court and the

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any event, the Florida Supreme Court has rejected *Porter* as the basis for a newly

federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of ineffective assistance of counsel.[4] *See, Harrington v. Richter*, 131 S.Ct. 770 (2011); *Premo v. Moore*, 131 S.Ct. 733 (2011); *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011); *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); *Renico v. Lett*, 130 S.Ct. 1855 (2010); *Sears v. Upton*, 130 S.Ct. 3259 (2010).

Applying Rule 3.851(d) to Willacy's dual burden under *Strickland*, Willacy would have to show that *Porter* established a new fundamental constitutional right on *both* prongs of *Strickland* and that this new right has been held to apply retroactively. In *Witt*, 387 So. 2d at 929-30, this Court set out the standard for determining whether retroactivity was warranted. Under this standard, a defendant can only obtain retroactive application of a new rule if he shows that the United States Supreme Court or Florida Supreme Court has made a significant change in constitutional law, which so drastically alters the underpinnings of a defendant's death sentence that "obvious

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discovered evidence claim. *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010).

[4] *Porter* is squarely based on *Strickland*. See *Porter*, 130 S. Ct. at 452. This Court has recognized that *Porter* does not change the application of the ineffective assistance of counsel analysis under *Strickland.* See, *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); *Troy v. State*, 57 So. 3d 828, 836 (Fla. 2011); *Franqui v. State*, 2011 WL 31379, 8 (Fla. 2011). The Eleventh Circuit has also applied, and distinguished, *Porter*. See, *Reed v. Secretary, Florida Dept. of Corrections*, 593 F. 3d 1217, 1243 n. 16, and 1246 (11th Cir. 2010); *Boyd v. Allen*, 592 F. 3d 1274, 1302 (11th Cir. 2010).

injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30.

A court considering retroactivity under *Witt* looks at three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. *See Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001) (applying retroactively *Carter v. State*, 706 So. 2d 873 (Fla. 1997) where this Court held that a judicial determination of competency is required in certain capital post-conviction cases); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), wherein this Court announced a revised standard of review for ineffectiveness claims); *Chandler v. Crosby*, 916 So.2d 728, 729-730 (Fla. 2005) (concluding that all three factors in the Witt analysis weighed against the retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) and emphasizing that the new rule did not present a more compelling objective that outweighs the importance of finality) *Id*. at 729-730, *citing State v. Glenn*, 558 So. 2d 4, 7 (Fla. 1990).

Even if *Porter* could be said to be a change in the law, it would still not be retroactive under *Witt.* Willacy recites these three factors but makes no attempt to

explain how the alleged change in law in *Porter* satisfies any of these factors.[5] It is not enough to assert a new case has issued. *Witt* is in reality a rule of non-retroactivity; cases are not presumed to apply retroactively. A litigant seeking retroactive application bears the burden of demonstrating how the *Witt* factors are satisfied. Because Willacy has failed to carry his burden, the request for retroactive application of *Porter* should be denied.

Moreover, Willacy ignores the fact that this Court found that the change of law in *Stephens* --the applicable standard of review of ineffectiveness claims**-- did not satisfy *Witt* and was not retroactive.** *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001).

In *Johnston* this Court applied the principles of *Witt* and concluded that *Stephens* was not a change in the law that should have retroactive application. As *Johnston* explained, "this Court in *Stephens* sought to clarify any confusion resulting from the use of different language in various opinions analyzing ineffective assistance of

[5] It appears that the purpose of "new" law, as construed by Willacy, would be to never give the findings of the trial court any deference, but only to have the appellate court "engage with the evidence" in the first instance. As for reliance on the "old" law, Willacy evidently contends that this Court has been misapplying *Strickland* for decades by giving deference to the trial court's findings of fact. Both of these apparent suggestions by the defense are patently incorrect. As noted, *infra*, by independently reviewing mixed questions of law and fact, the appellate court is engaging with the evidence. Giving deference to the trial court's findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Finally, the

counsel claims. In so doing, this Court reaffirmed its prior decision in *Rose v. State*, 675 So.2d 567 (Fla.1996), wherein this Court stated that an ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland." Id* at 267.

Since appellant is asserting that the same law has changed here, the alleged change would not be retroactive. The courts of this state have extensively relied upon the *Stephens* standard of review. And, the effect on the administration of justice would be overwhelming. If *Porter* is ruled retroactive, defendants will file untimely and successive motions for post conviction relief seeking to relitigate claims of ineffective assistance. The courts of this State would be required to review stale records to reconsider these claims. See *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively. As such, *Porter* would not satisfy *Witt* even if it had changed the law. Thus, the motion is untimely and should be denied as such.

Instead of actually presenting a *Witt* analysis of the alleged change in *Porter*, Appellant merely asserts that *Porter* should be retroactive because *Hitchcock v. Dugger*, 481 U.S. 393 (1987), was held to be retroactive. (Initial Brief at 42-43, citing *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987), *Delap v. Dugger*, 513 So. 2d

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effect on the administration of justice would be overwhelming.

659 (Fla. 1987), *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), *Thompson v. Dugger*, 5151 So. 2d 173 (Fla. 1987), *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987). However, in making this comparison, Appellant ignores the difference between the law the change in *Hitchcock* and the alleged change here. In *Hitchcock*, the Court invalidated a jury instruction finding that it unconstitutionally precluded consideration of mitigation. *Id.* at 398-99. As such, a determination of whether *Hitchcock* error had occurred was easily made by simply reviewing the jury instructions and was limited to only those cases in which a defendant had been sentenced to death. In contrast, the change in law that Appellant asserts occurred here involves reviewing fact-specific claims of ineffective assistance of counsel to determine if an error even occurred and doing so in all criminal cases. Given this difference in the application of the *Witt* factors, the mere fact that *Hitchcock* was found to be retroactive does not show that the alleged change in law here is. As such, Appellant's reliance on the retroactivity of *Hitchcock* is misplaced. Willacy has not identified any case in which *Porter* has been declared a change in law which is retroactive. Thus, Willacy's successive motion to vacate was unauthorized and facially insufficient.

The trial court rejected Willacy's arguments under *Witt*, stating:

> **The Defendant's motion is not based on any newly established fundamental constitutional right that "has been held to apply retroactively."** The subject successive postconviction motion does not

> meet any exception to the time and successiveness bars. *Porter v. McCollum*, 130 S. Ct. 447 (2009) does not establish a new fundamental constitutional right to be applied retroactively. *Porter* is the United States Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) to the particular facts of that case. Furthermore, unlike *Porter*, **the undersigned judge and the Supreme Court of Florida specifically addressed that trial defense counsel's performance was not deficient,** and also conducted a full analysis of the prejudice prong under *Strickland*, applied the post-conviction testimony to mental health mitigation and found no prejudice under *Strickland*. (See Exhibit "6," pgs. 36-38 and Exhibit "7")(Emphasis supplied)

(V2, R183-184).

The trial judge is correct. Nowhere in the *Porter* decision did the United States Supreme Court ever indicate or imply that *Porter* represents a significant change in law to be applied retroactively. Willacy has failed to meet any of the prongs of the retroactivity test. Neither the United States Supreme Court nor this Court deemed *Porter* a change of law. It is not new law and there is no miscarriage of justice. "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland* at 2069. *Porter* is very fact-specific and the Supreme Court certainly did not find every decision of this Court regarding ineffective assistance of counsel to be unreasonable.

As practical matter, there probably will always be some "newer" United States Supreme Court case addressing claims of ineffective assistance of counsel. Indeed, in

2009, the same year that *Porter* was decided, the United States Supreme Court also issued a series of other decisions addressing *Strickland* claims -- *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009), *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) and *Wong v. Belmontes*, 558 U.S. ——, 130 S.Ct. 383 (2009). However, a criminal defendant may not relitigate previously-denied *Strickland* claims simply because there are more recent decisions addressing claims of ineffective assistance of counsel. In *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), this Court rejected a similar attempt to relitigate a death-sentenced inmate's IAC/penalty phase claim under the guise of recently decided caselaw. In *Marek*, the defendant argued that his previously raised claim that trial counsel failed to conduct an adequate investigation of Marek's background for penalty phase mitigation should be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). Marek argued that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). This Court decisively rejected Marek's attempt to relitigate his previously-denied *Strickland* claims. *See Marek*, 8 So. 3d at 1128 (concluding that "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under *Strickland*").

Here, as in *Marek*, the existence of a "newer" case applying *Strickland* does not equate with a change in the law which is retroactive.

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

***Porter* is limited to the facts in that case.** In *Porter v. McCollum*, the state courts did not decide whether *Porter*'s counsel was deficient under *Strickland*. As a result, the United States Supreme Court assessed the first prong of *Porter*'s IAC/penalty phase claim *de novo*. *Porter*, 130 S.Ct. at 452. The United States Supreme Court found that trial counsel failed to uncover and present any evidence of *Porter*'s mental health or mental impairment, his family background, or his military service; and, "although Porter may have been fatalistic or uncooperative," that did not "obviate the need for defense counsel to conduct some sort of mitigation investigation." *Porter*, 130 S.Ct. at 453. The United States Supreme Court determined that trial counsel was deficient under the first prong of *Strickland* and emphasized that if *Porter*'s counsel had been effective, the judge and jury would have learned of "(1) Porter's heroic military service in two of the most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading

and writing, and limited schooling." *Porter*, 130 S.Ct. at 454.

In addressing this Court's adjudication of the second – prejudice - prong of *Strickland*, the United States Supreme Court reiterated that the test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. And, "[t]o assess that probability, [the Court] consider[s] the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - and reweigh[s] it against the evidence in aggravation." *Porter*, 130 S.Ct. 447, 453-54 (quotation marks and brackets omitted). The United States Supreme Court ruled that this Court's decision that *Porter* was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation was unreasonable because it "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 130 S.Ct. at 454-455. For example, the mental health evidence, which included Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects, was not considered in this Court's discussion of nonstatutory mitigation. *Porter*, 130 S.Ct. at 455, n. 7. In addition, the United States Supreme Court found that this Court unreasonably discounted evidence of *Porter*'s childhood abuse and combat military

service.[6]

The fundamental constitutional right at issue in *Porter* was the Sixth Amendment right to effective assistance of counsel, a constitutional right that had been established decades before in *Strickland* v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). *Porter* was merely an application of the *Strickland* standard to a particular case.

Willacy's claim is procedurally barred. No exception to the time bar exists. Willacy merely reargues the facts adduced in the prior postconviction proceeding. Those issues were decided by this Court in 2007 and are procedurally barred. Willacy previously raised the same claim of ineffective assistance of counsel that he seeks to relitigate here. 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, Willacy 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

[6] In *Reed v. Secretary, Florida Dept. of Corrections*, 593 F. 3d 1217 (11th Cir. 2009), the Eleventh Circuit distinguished *Porter* on the basis of the "uniquely strong" mitigating nature of Porter's military service in combat. *Reed*, 593 F. 3d at 1249, n. 21 (noting ". . . Paragraph after paragraph in the *Porter* opinion concerns Porter's combat experience in Korea, recounted in great detail. *Id*. at 449-51, 455. The diagnosis in *Porter* was post-traumatic stress disorder from combat, not antisocial personality disorder. *Id*. at 450 n. 4, 455 & n. 9. Porter's military service was critical to the

established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Willacy is attempting to do here, his IAC/penalty phase claim is barred and was correctly denied. *See Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of res judicata to claims previously litigated on the merits).

Reasonableness of strategic decisions. In an attempt to relitigate the deficiency prong of *Strickland*, Willacy argues that this Court's deference to the trial court's factual findings (which he labels "legal ruling") is error. (Initial Brief at 57). *Porter* did not address, much less change the appellate standard of review of factual findings. In fact, the United States Supreme Court never even mentioned the standard of review for factual findings in *Porter*. See *Porter*, 130 S. Ct. at 448-56. In *Strickland*, the United States Supreme Court stated that reviewing courts are required to give deference to factual findings made in resolving claims of ineffective assistance of counsel and then review the rejection of the claim *de novo*. *Strickland*, 466 U.S. at 698. The United States Supreme Court addressed the extent to which the appellate or federal courts review the findings of the trial court and explained:

> Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §

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holding in *Porter* .

> 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, 104 S.Ct. at 2070.

In this Court's decision in *Porter*, 788 So. 2d at 923, this Court cited *Stephens v. State*, 748 So. 2d 1028, n.2 (Fla. 1999) and stated that while the factual findings of the lower court should be given deference, the appellate court independently reviews mixed question of law and fact. This standard was repeated in *Willacy v. State*, 967 So.2d 131, 141 (Fla. 2007). The *Stephens* standard of review is expressly compelled by *Strickland*. This Court has not been misapplying *Strickland*'s standard of review. Giving deference to the lower court findings of fact and independently reviewing mixed questions of law and fact is consistent with *Strickland*. Since the standard utilized by this Court in *Porter* is the same standard the United States Supreme Court enunciated in *Strickland*, there is no change in law. Because there has been no change in law, Willacy failed to meet any exception under Fla. R. Crim. P. 3.851(d)(2)(B).

Willacy, nevertheless, suggests that because *Sochor v. State*, 883 So. 2d 766 (Fla. 2004) cited to *Porter*, this Court's analysis in *Sochor* must have been flawed. (Initial Brief at 51). *Sochor* cited to *Porter* as a case which also involved conflicting expert opinions and in connection with its finding "that the circuit court's decision to

credit the testimony of the State's mental health experts over the testimony of Sochor's new experts is supported by competent, substantial evidence. *Sochor*, 883 So. 2d at 783, citing *Porter*. Again, this finding is in accordance with the mixed standard of review applied in *Strickland*.

In addition, this Court has refused to allow relitigation of previously denied *Strickland* claims under the guise of more recent caselaw. *See, Marek*, 8 So. 3d at 1128. In other words, this Court has previously determined that the alleged "changes in law" suggested by Willacy do not satisfy *Witt.*

As previously noted, the revised standard of appellate review approved in *Stephens*, for claims of ineffective assistance of counsel was held to not be retroactive under *Witt* in *Johnston v. Moore*, 789 So. 2d 262, 267 (Fla. 2001). The courts of this state have extensively relied upon the *Stephens* standard of review and continue to do so today. *See Troy v. State*, 57 So. 3d 828, 834 (Fla. 2011) (stating, "[b]ecause ineffective assistance of counsel claims present mixed questions of fact and law, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004) (*citing Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999))." Thus, if *Porter*, as construed by Willacy, is deemed a retroactive "change" in the law, the effect on the

administration of justice would be overwhelming.

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

Willacy is not entitled to relief. Even if *Porter* arguably changed the law and the alleged change was retroactive and the claim was not procedurally barred, which the State emphatically disputes, Willacy still would not be entitled to any relief. As this Court recognized in *Witt*, a defendant is not entitled to relief based on a change in law, where the change would not affect the disposition of the claim. *Witt*, 387 So. 2d at 930-31. As the United States Supreme Court recognized in *Strickland*, there is no reason to address the prejudice prong if a defendant fails to show that his counsel was deficient. *Strickland*, 466 U.S. at 697.

Willacy's IAC/penalty phase claim – based on the alleged failure to investigate mitigation - was denied based on a lack of deficiency. Willacy generally argues that the circuit court's and this Court's analysis in the prior postconviction proceeding was flawed. Willacy re-argues the evidence presented in the first postconviction motion (Initial Brief at 62-72) and states that counsel was "clearly deficient." (Initial Brief at 72). He specifically argues only two issues: (1) inadequate *voir dire* on juror Clark; and (2) failure to investigate and present mitigation. (Brief at 58-73).

The juror Clark issue was not raised in the successive postconviction motion (V1, R108-133). The only claim of ineffective assistance of counsel was regarding the penalty phase. (V1, R110, 121-131). The juror Clark issue and any other issue Willacy may attempt to argue that was not properly raised in the lower court cannot be argued on appeal. *See Henyard v. State,* 992 So.2d 120, 126, n2 (Fla. 2008) (claim not raised below not properly raised for review by this Court); *Perez v. State*, 919 So.2d 347, 359 (Fla.2005) (to preserve for appeal, issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation"). Likewise, any issue generally alleged which is not specifically briefed on appeal is waived. *See Cooper v. State*, 856 So. 2d 969, 977 n. 7 (Fla. 2003) ("Cooper ... contend[s], without specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative,

unsupported argument of this type to be improper, and deny relief based thereon."); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues.").

Juror Clark. Even if Willacy had raised the juror Clark issue in the lower court, the issue has no merit, counsel was neither deficient nor was there prejudice, and argument on this issue is patently frivolous. In the prior postconviction proceedings this Court held discussed the juror Clark issue:

> Next, the record conclusively refutes Willacy's claim that the trial court improperly denied an evidentiary hearing on claim 6, that counsel was ineffective for failing to object to juror Clark's ineligibility to serve. As we have previously held, counsel is not ineffective for failing to make a futile objection. *See Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Here, the trial court had already conducted an evidentiary hearing with regard to the juror Clark issue when it was deciding Willacy's motion for a new trial. Judge Yawn found that the Erlenbachs were informed of Clark's status at some point during the trial, but failed to object. Therefore, Judge Yawn determined that Willacy waived objection on this matter. On direct appeal, the parties thoroughly explained to this Court the sequence of events leading up to Clark's entry into the pretrial intervention (PTI) program and his service on Willacy's jury. **We held on the merits that Clark was eligible to serve**.[7] Thus, even if the

[7] The complete findings of this Court on direct appeal regarding the Juror Clark issue are:

> In his final voir dire challenge, Willacy claims that Clark was under prosecution when selected as a juror and seating him violated section 40.013(1), Florida Statutes (1991).FN7 We disagree. Willacy mistakenly equates Clark's placement in the Pretrial Intervention Program with

> Erlenbachs had sought to have Clark disqualified, their objection ultimately would have failed. Therefore, because this claim is conclusively refuted by the record, we affirm the trial court's denial of an evidentiary hearing.
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> . . . . .
>
> B. Ineffective Assistance of Trial CounselFN9
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> > FN9. In addition to the ineffectiveness claims discussed below, Willacy argues that trial counsel was ineffective for failing to inquire into juror Clark's status during voir dire and that this Court's holding in Lowrey v. State, 705 So. 2d 1367 (Fla. 1998), should be applied retroactively to this case. **As stated above, because this Court determined on direct appeal that Clark was not under prosecution during Willacy's trial, these claims have no merit, are procedurally barred, and require no further discussion.**

Willacy v. State, 967 So. 2d 131, 140 (Fla. 2007). Willacy fails to explain how the *Porter* prejudice analysis applies to this claim where this Court held that the issue had no merit and counsel was not deficient.

Ineffective assistance of counsel – mitigation. Regarding the mitigation ineffectiveness claim, this Court held in the prior postconviction proceeding:

> prosecution. Pretrial intervention is "merely an alternative to prosecution." *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982). **Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied.** Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision.
>
> > FN7. "No person who is under prosecution for any crime ... shall be qualified to serve as a juror." § 40.013(1), Fla.Stat. (1991).

(3) Counsel's Failure to Investigate and Present Mitigating Evidence
Willacy next claims that trial counsel was ineffective for failing to investigate and present evidence of statutory and nonstatutory mitigating factors. In particular, Willacy claims that counsel failed to present evidence that (1) Willacy was suffering from Attention Deficit Hyperactivity Disorder (ADHD); FN12 (2) Willacy was under the influence of extreme mental or emotional disturbance; FN13 (3) Willacy was physically abused by his father during childhood and adolescence; and (4) Willacy was in a drug-induced psychosis at the time of the homicide. The postconviction trial court held (1) that Kontos was not ineffective in failing to present testimony of mental illness or ADHD; (2) that Kontos was not ineffective for failing to present evidence of physical abuse by Willacy's father; and (3) that Willacy presented no evidence that he was under the influence of cocaine at the time of the murder.

FN12. See § 921.141(6)(f), Fla. Stat. (2004).

FN13. See § 921.141(6)(b), Fla. Stat. (2004).

"Under *Strickland,* 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *Marshall v. State,* 854 So. 2d 1235, 1247 (Fla. 2003) (*quoting Strickland*, 466 U.S. at 691, 104 S.Ct. 2052*); see also Carroll v. State*, 815 So. 2d 601, 614 -615 (Fla. 2002) (same). This Court has stated:

> In evaluating claims that counsel was ineffective for failing to present mitigating evidence, ... [t]he principal concern ... is not whether a case was made for mitigation but whether the "investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable " from counsel's perspective at the time the decision was made.

Holland v. State, 916 So. 2d 750, 757 (Fla.2005) (*quoting Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)), *cert. denied*, 547 U.S. 1078, 126 S.Ct. 1790, 164 L.Ed.2d 531 (2006). "[S]trategic choices made after thorough investigation of law and facts

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Willacy v. State, 640 So. 2d 1079, 1082-1083 (Fla. 1994) (emphasis supplied).

relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (*quoting Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 521-22, 123 S.Ct. 2527 (*quoting Strickland*, 466 U.S. at 691, 104 S.Ct. 2052).

At resentencing, Willacy's counsel, James Kontos, sought to portray Willacy as a life worth saving and, therefore, avoided presenting evidence that Willacy was a sociopath. Kontos called a number of witnesses who testified to Willacy's good deeds. **The postconviction trial court found that this was sound strategy, noting that humanizing a defendant is an accepted strategy that falls within the broad range of reasonably competent performance under prevailing professional standards.** *See Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997); *Bryan v. Dugger*, 641 So. 2d 61, 64 (Fla. 1994). The postconviction trial court also stated that any mental mitigation evidence would have opened the door to aggravating facts, such as testimony about Willacy's threat to kill a teacher, setting a school bulletin board on fire, setting squirrels on fire, and running squirrels over with a lawnmower, and descriptions by a school principal of Willacy as incorrigible and needing counseling. The court further stated that the facts of the case show a deliberate, methodical process, not the activities of someone under the influence of an extreme emotional disturbance or cocaine intoxication, who is unable to conform his conduct to the requirements of the law. Also, the court noted that there was overwhelming evidence of Willacy's guilt of first-degree premeditated murder, and there was substantial, compelling aggravation found by the jury and the trial court. In addition, the postconviction trial court pointed out that, throughout the penalty phase in 1991 and the resentencing in 1995, Willacy and his family members, while under oath, repeatedly denied that Willacy was physical abused as a child.

The postconviction trial court's findings are supported by competent, substantial evidence. **Kontos conducted a reasonable investigation into Willacy's mental condition and family history and made a reasonable strategic choice to forego presentation of negative mitigation evidence.** First, Kontos consulted with psychologist Dr. William Riebsame prior to trial. Dr. Riebsame told Kontos that, based on preliminary testing, Willacy might be a sociopath or psychopath. As a result, Kontos decided not to employ Dr. Riebsame or allow him to proceed further to see if that diagnosis was accurate. Kontos believed that the jury would not be receptive to a depiction of Willacy as antisocial, sociopathic, or psychopathic. Dr. Riebsame testified at resentencing that Willacy met the diagnosis for ADHD, Antisocial Personality Disorder, and probably cocaine intoxication and cocaine withdrawal. However, Dr. Riebsame stated that Willacy's ability to appreciate the criminality of his conduct was not impaired, and that Willacy's ability to conform his conduct to the law was impaired but not substantially. Further, because Willacy and his family concealed his childhood abuse, Kontos was unable to discover it. **Thus, the postconviction trial court properly concluded that Kontos's performance was not deficient based on a failure to further investigate Willacy's family and mental health background.**

Also, Willacy has not shown prejudice because presenting this mitigating evidence "would likely have been more harmful than helpful." *Evans v. State*, 946 So. 2d 1, 13 (Fla. 2006); *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright*, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail); *see Griffin v. State*, 866 So. 2d 1, 9 (Fla. 2003) ("Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony."). In *Reed v. State*, 875 So. 2d 415 (Fla. 2004), we

stated:

> [E]ven if [defense] counsel had ... investigated further, the testimony that could have been presented was just as likely to have resulted in aggravation against rather than mitigation for [the defendant].
>
> An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.

Id. at 436-37. "Furthermore, this Court has acknowledged in the past that antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon.' " *Id.* at 437 (*quoting Freeman v. State*, 852 So. 2d 216, 224 (Fla. 2003)). Thus, there is no reasonable probability that the outcome of the proceeding would have been different if Kontos had chosen to focus on Willacy's abuse and mental health issues rather than on the positive aspects of Willacy's life. Accordingly, counsel was not ineffective for failing to present this evidence.

Willacy v. State, 967 So. 2d 131, 143-145 (Fla. 2007). (emphasis added)

Again, Willacy fails to explain how, since counsel was not deficient, any misapplication of the *Strickland* prejudice standard would impact his case. *Troy v. State*, 57 So.3d 828, 834 (Fla. 2011)("To successfully prove a claim of ineffective assistance of counsel, both prongs of the *Strickland* test must be satisfied."). In *Porter*, there was no finding by the state court's on the deficiency prong and the Supreme Court analyzed the deficiency prong *de novo*. Here, as outlined above, the state courts found no deficient performance of Willacy's counsel after a thorough analysis of the facts and law. Willacy cannot meet the deficiency prong of *Strickland*; thus, there is no

ineffectiveness and this appeal is patently frivolous.

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

Porter is clearly distinguishable from Willacy as the state courts addressed trial counsel's performance at the penalty phase, finding that counsel was not deficient in investigating mitigation. This Court explained:

> At resentencing, Willacy's counsel, James Kontos, sought to portray Willacy as a life worth saving and, therefore, avoided presenting evidence that Willacy was a sociopath. Kontos called a number of witnesses who testified to Willacy's good deeds. The postconviction trial court found that this was sound strategy, noting that humanizing a defendant is an accepted strategy that falls within the broad range of reasonably competent performance under prevailing professional standards. *See Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla.1997); *Bryan v. Dugger*, 641 So.2d 61, 64 (Fla.1994). The postconviction trial court also stated that any mental mitigation evidence would have opened the door to aggravating facts, such as testimony about Willacy's threat to kill a

> teacher, setting a school bulletin board on fire, setting squirrels on fire, and running squirrels over with a lawnmower, and descriptions by a school principal of Willacy as incorrigible and needing counseling. The court further stated that the facts of the case show a deliberate, methodical process, not the activities of someone under the influence of an extreme emotional disturbance or cocaine intoxication, who is unable to conform his conduct to the requirements of the law. Also, the court noted that there was overwhelming evidence of Willacy's guilt of first-degree premeditated murder, and there was substantial, compelling aggravation found by the jury and the trial court. In addition, the postconviction trial court pointed out that, throughout the penalty phase in 1991 and the resentencing in 1995, Willacy and his family members, while under oath, repeatedly denied that Willacy was physical abused as a child.
>
> The postconviction trial court's findings are supported by competent, substantial evidence. Kontos conducted a reasonable investigation into Willacy's mental condition and family history and made a reasonable strategic choice to forego presentation of negative mitigation evidence. First, Kontos consulted with psychologist Dr. William Riebsame prior to trial. Dr. Riebsame told Kontos that, based on preliminary testing, Willacy might be a sociopath or psychopath. As a result, Kontos decided not to employ Dr. Riebsame or allow him to proceed further to see if that diagnosis was accurate. Kontos believed that the jury would not be receptive to a depiction of Willacy as antisocial, sociopathic, or psychopathic. Dr. Riebsame testified at resentencing that Willacy met the diagnosis for ADHD, Antisocial Personality Disorder, and probably cocaine intoxication and cocaine withdrawal. However, Dr. Riebsame stated that Willacy's ability to appreciate the criminality of his conduct was not impaired, and that Willacy's ability to conform his conduct to the law was impaired but not substantially. Further, because Willacy and his family concealed his childhood abuse, Kontos was unable to discover it. Thus, the postconviction trial court properly concluded that Kontos's performance was not deficient based on a failure to further investigate Willacy's family and mental health background.

Willacy v. State, 967 So.2d 131, 143 -144 (Fla. 2007).

Collateral Counsel was not authorized to file this successive motion to vacate.

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

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

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

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

Willacy is not entitled to any relief because collateral counsel is not authorized to file the unauthorized successive motion to vacate, the motion is time-barred, *Porter* did not change the law, any alleged change in law would not apply retroactively and

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: Linda McDermott, McClain & McDermott, 20301 Grande

Oak Blvd. Suite 118-61, Estero, FL 33928 this ___ day of May, 2011.

_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

_____
BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL