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IN THE SUPREME COURT OF FLORIDA

JAMES AREN DUCKETT, **Appellant,** **v.** **STATE OF FLORIDA,** **Appellee.**	**Case No. SC13-719**

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The "statement of the case and facts" set out on pages 1-15 of Duckett's brief is argumentative and misleading. It is also incomplete, in that it makes only passing reference to the successive post-conviction relief motion that is the subject of this appeal.

THE FACTS AND THE PRIOR PROCEEDINGS

In its March 25, 2010 order denying Duckett's federal habeas corpus petition, the District Court summarized the facts, and the procedural history of the case, in the following way:

> The facts of the case are stated at length in the Florida Supreme Court's opinion denying the Petitioner's direct appeal. *See Duckett v. State*, 568 So.2d 891 (Fla. 1990) *("Duckett I"*).
>
>> Duckett, a police officer for the City of Mascotte, was the only officer on patrol from 7:00 p.m., May 11, 1987, to 7:00 a.m., May 12, 1987. Between 10:00 and 10:30 p.m. on May 11, Teresa McAbee, an eleven-year-old girl, walked a short distance from her home to a convenience store to purchase a pencil. Teresa left the store with a sixteen-year-old Mexican boy, who was doing laundry next door. The boy testified that they walked over to the convenience store's dumpster and talked for about twenty minutes before Duckett approached them. A clerk at the convenience store testified that Duckett entered the store and asked her the girl's name and age, at which time she advised him that Teresa was between ten and thirteen years old. After indicating that he was going to check on her, Duckett exited the store and walked toward the dumpster, where he located the two children. Duckett testified that he conversed with the children and subsequently, acting in his

capacity as a police officer, instructed Teresa to return home. The sixteen-year-old boy testified that, after speaking with Duckett, he went to the laundromat to wait for his uncle, who arrived soon thereafter; that Duckett and Teresa were standing near the patrol car; and that Duckett asked the uncle the nephew's age. Subsequently, Duckett suggested that the uncle talk to his nephew while he spoke to Teresa. According to the uncle and the boy, Duckett placed Teresa in the passenger's side of his patrol car and shut the door before proceeding to the driver's side. The uncle also testified that he never saw Teresa touch the hood of Duckett's car.

At approximately 11:00 p.m., Teresa's mother walked to the convenience store, searching for her daughter. Upon arrival, she was told by the store's clerk that Duckett may have taken her daughter to the police station. The mother then left the store and spent about an hour with her sister driving around Mascotte in search of Teresa. During this time, the mother did not see a police car. She next went to the Mascotte police station and, finding no one there, she drove a short distance to the Groveland police station. There, she told an officer that she wanted to report her daughter as missing. The officer told her that he would contact a Mascotte officer to meet her at the Mascotte police station. Teresa's mother returned to the Mascotte police station and waited for fifteen to twenty minutes before Duckett arrived. After arriving, Duckett told her that he had spoken with Teresa at the store; that she had been in his police car; and that he had directed her to return home. Before returning home, the mother also filed a missing person report with Duckett. Subsequently, Duckett went to the mother's residence to get a picture of her daughter, called the police chief to inform him of the missing person report, and advised the police chief that he had made a flyer and did not need any help in the matter. Duckett

then returned to the convenience store with a flyer but told the clerk not to post it since it was not a good picture. Although he told the clerk that he would return with a better one, he never did. Duckett did bring flyers to two other convenience stores. The clerk at one of these stores testified that, while the police usually drove by every forty-five minutes to an hour, Duckett came by at 9:30 p.m. but failed to return until he brought the flyer later that evening. A tape of Duckett's radio calls indicated none between 10:50 p.m. and 12:10 a.m. At 1:15 a.m., Duckett went to the uncle's house to question his nephew about Teresa, and Duckett returned to the mother's home around 3:00 a.m.

Later that morning, a man saw what he believed to be a body in a lake and went to find the police chief, who determined that it was Teresa's body. The lake is less than one mile from the convenience store where Teresa was last seen.

A medical examiner testified that the perpetrator had sexually assaulted the victim while she was alive, strangled her, and then drowned her, causing her death. Prior to this incident, the victim had not engaged in any sexual activity. Blood was found on her underpants but not in or about Duckett's patrol car. Semen was discovered on her jeans.

A technician for the sheriff's department examined the tire tracks at the murder scene and indicated that they were very unusual. While leaving the crime scene, he observed that the tracks of a Mascotte police car appeared to be similar. He stopped his vehicle, examined the tracks, and determined that they were consistent with the tracks at the crime scene. An expert at trial corroborated this evaluation. The tracks were made by Goodyear Eagle mud and snow tires, which are designed for northern driving. While the local tire center had not

sold any of those particular tires during its nine years of existence, it had received two sets by mistake and placed them on the two Mascotte police cars.

Evidence revealed that the vehicle which left the impressions had driven through a mudhole. However, no evidence was presented that Duckett cleaned his vehicle, and no debris from the scene was found in or on his vehicle. Evidence was also presented that Duckett was neat and clean later that night, as if he had just come on duty.

Both Duckett's and Teresa's fingerprints were discovered on the hood of Duckett's patrol car. Duckett's prints were commingled with the victim's, whose prints indicated that she had been sitting backwards on the hood and had scooted up the car.

A pubic hair was found in the victim's underpants. While other experts could not reach a conclusion by comparing that hair with Duckett's pubic hair, Michael Malone, an FBI special agent who had been qualified as an expert in hairs and fibers in forty-two states, examined the hair sample, concluding that there was a high degree of probability that the pubic hair found in her underpants was Duckett's pubic hair. Malone also testified that the pubic hair did not match the hairs of the sixteen-year-old boy, the uncle, or the others who were in contact with the victim that evening.

On June 15, 1987, before his arrest, Duckett gave a statement in which he denied driving his vehicle to the lake that evening. He further stated that the victim had not been on the hood of his patrol car and that he had stopped at the Jiffy store for coffee after the girl went home.

The state presented testimony of three young women who allegedly had sexual encounters with Duckett. Prior to the introduction of this testimony, the trial judge instructed

the jury that the testimony was for the limited purpose of showing motive, opportunity, plan, and identification. The first woman, a petite nineteen-year-old, testified that, in either January or February, 1987, she ran into Duckett while she was attempting to find her boyfriend. After indicating that he, too, was searching for her boyfriend, he drove her in his patrol car in search of her boyfriend. While in the car, Duckett placed his hand on her shoulder and attempted to kiss her. After she refused to kiss him, he desisted and she got out of the car. The second woman, a petite eighteen-year-old, stated that, on May 1, 1987, Duckett picked her up while she was walking along the highway. After Duckett drove her to a remote area in an orange grove, he parked the car, placed his hand on her breast, and attempted to kiss her. When she refused to kiss him, he desisted and drove her to where she requested. The third woman, a petite seventeen-year-old, testified that on two occasions, once in February or March, 1987, and again in April or May, 1987, she voluntarily met Duckett at a remote area while he was on patrol and performed oral sex on him.

At trial, Duckett testified that, on the night of the murder, while running stationary radar near the convenience store, he noticed a girl talking to three Mexicans at a laundromat. After he saw the girl and one of the boys walk over to an ice machine, he went into the store to ask the clerk some questions about the girl. He then left the store, asked the children their ages, requested that they walk to his car, and questioned the boy further. At this time, the boy's uncle arrived at the scene with some other men. Subsequently, Duckett placed the girl in his car while he spoke with the uncle about his nephew. After the boy's uncle left with the other men, Duckett obtained more information from Teresa and told her to go home. He did not see her again after she got out of the car and

> walked in front of the store.
>
> Duckett also stated that he then returned to the station for a short period of time, went to one of the convenience stores for coffee, and went on patrol. He subsequently responded to a call by a Groveland police officer and returned to the station in Mascotte, where he met the girl's mother. After visiting the uncle's home to ask some questions concerning the girl, he drove to the mother's home to get a picture. He then returned to city hall, called the police chief, and told him he was going to make a poster and contact all the stores.
>
> With regard to Teresa's fingerprints on the hood of his car, he explained that it was possible that she sat on the hood when he was at the convenience store. Duckett denied any involvement with the three women.

Duckett I, 568 So. 2d at 891–94.

Duckett was arrested and charged by indictment on October 27, 1987 with one count of first degree murder. On February 29, 1988, Duckett was charged by information with one count of attempt to commit sexual battery in violation of *Fla. Stat.* § 794.011(2). The charges were consolidated for trial by stipulation of both parties on April 4, 1988.

The case was tried on April 25, 1988 through May 10, 1988. The jury returned a verdict of guilty on all counts. The penalty phase began, and was completed, on the same day that the jury returned its guilty verdict. At the conclusion of the penalty phase, the jury recommended the death sentence for Duckett by a vote of eight to four.

On June 30, 1988, Judge Jerry T. Lockett imposed a sentence of death with regard to the first degree murder count, and a sentence of life with a 25-year minimum mandatory on the sexual battery count, to run consecutively. In rendering the sentence of death, the trial judge found two aggravating factors: (1) that the murder was committed during the commission of or immediately after a sexual battery; and (2) that the

murder was especially heinous, atrocious, or cruel. The trial judge found the existence of one statutory mitigating factor -- that Duckett had no significant history of prior criminal activity -- and several nonstatutory mitigating factors -- Duckett's family background and education -- and concluded that the aggravating circumstances outweighed the mitigating circumstances.

The conviction and death sentence were affirmed on direct appeal on November 14, 1990, *Duckett I*, 568 So. 2d 891, and the Court's mandate was issued on December 17, 1990. [FN3] A timely motion for post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.850 was filed on May 1, 1992. Duckett filed an amended Rule 3.850 motion on November 14, 1994. Both motions raised a total of fourteen claims and various sub-claims. The trial court held evidentiary hearings on January 7-8, 1997, October 28-30, 1997, December 17, 1997, October 26-27, 1998, and February 19, 1999, and permitted the parties to file additional post-hearing briefs. The trial court denied Duckett relief as to all of his claims on August 13, 2001.

> [FN3] It does not appear that Duckett filed a petition for certiorari with respect to this decision.

Duckett filed a timely appeal to the Florida Supreme Court on May 31, 2002. On June 5, 2002, Duckett also filed a state petition for a writ of habeas corpus. During oral argument, [FN4] counsel for both Duckett and the State explained that DNA testing might be possible on certain items of clothing previously introduced into evidence. The Florida Supreme Court took the unique approach of *sua sponte* remanding the case to the trial court to "determine whether clothing exists that can be tested for DNA."

> [FN4] The Florida Supreme Court consolidated both cases for purposes of oral argument.

On remand, the trial court determined that only one of the items could potentially produce any relevant evidence -- a slide which contained a smear from a 1987 vaginal swab. After determining that the slide would not produce any meaningful results and the sample would be consumed by the testing, Duckett chose

> not to have the slide tested. The trial court denied Duckett's attempt to have other, non-clothing items tested for DNA, on the grounds that such items were outside the Florida Supreme Court's mandate relinquishing jurisdiction, and because such testing would amount to nothing more than a "fishing expedition." Duckett's motion for compliance with *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) was also denied.
>
> The Florida Supreme Court denied Duckett's appeal of the trial court's ruling on his Rule 3.850 motions and the remand proceedings, as well as his state petition for a writ of habeas corpus on October 6, 2005. *Duckett v. State*, 918 So. 2d 224 (2005) ("*Duckett II*"). A timely filed motion for rehearing was denied on December 22, 2005, and the United States Supreme Court denied Duckett's petition for writ of certiorari on October 2, 2006. *Duckett v. Florida*, 549 U.S. 846, 127 S.Ct. 103, 166 L.Ed.2d 78 (2006).
>
> On January 8, 2007, Duckett filed the instant petition under 28 U.S.C. § 2254 (Doc. 1). [FN5] The petition is 212 pages in length and presents 16 claims of constitutional violations, many of which contain numerous sub-parts. On June 13, 2007, the State filed its consolidated response to each of Petitioner's claims (Doc. 18). Duckett moved to hold the proceedings in this Court in abeyance on May 5, 2008, in order to pursue a successive Rule 3.851 motion for postconviction relief (Doc. 22). The Court denied Duckett's motion on May 23, 2008 (Doc. 24), and the Parties were permitted to file additional briefs on September 23, 2008 and November 12, 2008 (Docs. 32, 35).
>
>> [FN5] It is undisputed that the petition was filed within the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1). See State's Response, p. 17 (Doc. 18).

Duckett v. McDonough, 701 F.Supp.2d 1245, 1250-1255 (M.D. Fla. 2010). Duckett's motion for a certificate of appealability was denied -- the District Court's order is the final federal

ruling on his case.

After the federal litigation concluded, Duckett filed a successive motion for post-conviction relief in the Circuit Court of Lake County. That is the proceeding under review in this appeal.

For purposes of this appeal, four claims are at issue.[1] The first claim is that Duckett is entitled to relief based on *Porter v. McCollum*, 558 U.S. 30 (2009). The circuit court denied relief on that claim, finding that it did not state a basis for relief under this Court's decision in *Walton v. State*, 77 So. 3d 639 (Fla. 2011). (V6, R947). The second claim was a combined claim about witness Gwen Gurley and her allegedly false testimony. The trial court found this claim procedurally barred because it is untimely, is refuted by the record, and is successive. (V6, R951). The final claim is related to the "hair evidence testimony" -- the trial court found that claim to be barred because it has already been litigated and decided, and, as to the "newly discovered evidence" component of that claim, meritless. (V6, R953-54).

The Circuit Court of Lake County issued a final order on March 15, 2013. Notice of appeal was given on April 10, 2013.

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[1] The Circuit Court order is discussed at length in the argument section of this brief.

SUMMARY OF ARGUMENT

Summary denial of the "hair evidence" claim was proper. That claim is procedurally barred because was raised and decided on direct appeal. Duckett's attempts to fabricate a "*Brady* claim" are unavailing -- such a claim does not lie when based on matters that did not exist until years after his trial. The "Robertson report" component of this claim is not a basis for relief because that report is so non-specific that it is not a basis for relief. Based upon the testimony from trial, it is clear that the evidence the jury heard about hair comparison was presented with a full explanation of the limitations on that sort of analysis.

The *Porter v. McCollum* claim is not a basis for relief because *Porter* is not retroactively applicable to final decisions, as the trial court properly found. Duckett's argument for application of *Porter* to his case is an argument for retroactivity, even though he tries to disguise his claim as something else. In any event, that "claim," whatever it is, is procedurally barred because it could have been but was not raised in the Circuit Court.

The "Gwen Gurley" claim is procedurally barred because it is untimely, and is successive. Duckett has already litigated this claim and lost. The component of that claim that challenges § 837.021 of the *Florida Statutes* is procedurally barred because

it is untimely in addition to being wholly meritless.

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 setting out the basis for the summary denial of Duckett's successive motion to vacate and providing for meaningful appellate review. *Id., citing Nixon*, 932 So. 2d at 1018.

ARGUMENT

I. SUMMARY DENIAL OF THE "HAIR EVIDENCE" CLAIM WAS PROPER

On pages 17-33 of his brief, Duckett says that he is entitled to relief based upon the claimed "defects" in the hair analysis evidence presented at his 1985 trial. Despite the length of the argument devoted to this issue, Duckett makes no mention of the Circuit Court's order, and does not explain why that order is in error. Florida law is settled that a trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings. *Diaz v. Dugger*, 7109 So. 2d 865, 868 (Fla. 1998).

This claim, as it was before the Circuit Court, was a combination of Claim 4 from Duckett's November 29, 2010 post-conviction relief motion, and Claim 5 from the January 24, 2012 amendment to that motion. What became Claim 7 subsumes and replaces prior Claims 4 and 5. In 2005, this Court resolved the "hair issue," saying:

> With respect to the hair evidence, Duckett claims that the State improperly engaged in expert shopping. **This claim is procedurally barred because it should have been raised on direct appeal**. *See, e.g., Sireci v. State*, 773 So. 2d 34, 40 n. 10 (Fla. 2000); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). Duckett also claims that the State's witness, FBI expert Michael Malone, was not credible. The circuit court concluded that "[t]he attack upon Agent Malone of the FBI is unfounded and without merit." This conclusion is supported by the record. At the evidentiary hearing it was established that Malone had received proficiency tests in the examination of hair and fiber and had never failed. Furthermore, Malone had

previously testified as an expert in the field of hair and fiber, and no court has refused to recognize him as an expert. On direct appeal, we discussed Malone's credibility: "Duckett's counsel extensively challenged Malone's credibility during the cross-examination of Malone and during the testimony of a Florida Department of Law Enforcement expert on hair analysis. **It is not our responsibility to reweigh that evidence. The expert's credibility was resolved by the jury.**" Duckett, 568 So. 2d at 895. [FN12]

> [FN12] Duckett also claims that a conviction cannot stand when based solely on hair comparison testimony. This claim is procedurally barred because it could have been raised on direct appeal.

Duckett also makes several *Brady* claims concerning the hair evidence. Three requirements must be met in order to establish a *Brady* claim:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *see Wright v. State*, 857 So. 2d 861, 869 (Fla. 2003) (*quoting Strickler*). Furthermore, "[t]he burden is on the defendant to demonstrate that the evidence he claims as *Brady* material satisfies each of these elements. Even where favorable evidence is suppressed, a new trial will not be necessary where it is determined that the favorable evidence did not result in prejudice." *Id.* at 870. None of Duckett's *Brady* claims satisfy these requirements. His conclusory claim that a second unknown hair was found on the victim but never presented to the jury is denied as insufficiently pled because it fails to identify the alleged hair as Brady material and fails to argue the effect the evidence would have had at trial. Duckett also asserts that the State failed to disclose information that could have been used to impeach agent Malone. Specifically, Duckett claims that the State should have disclosed

> information contained in a 1997 Department of Justice report indicating that Malone testified falsely in a court proceeding in 1985. However, this 1997 report did not exist when Duckett was tried in 1988 or when we affirmed his conviction and sentence in 1990. Duckett fails to establish that the State "either willfully or inadvertently" suppressed the information. *Strickler*, 527 U.S. at 282, 119 S.Ct. 1936.

Duckett v. State, 918 So. 2d 224, 234-235 (Fla. 2005). Duckett is not entitled to relitigate matters that have already been decided adversely to him.

When stripped of its hyperbole, Duckett's motion as amended is an attempt to relitigate the hair analysis issue based upon the "Robertson report"[2] and the testimony from an evidentiary hearing in the *Brett Bogle* case in Hillsborough County.[3] The circuit court denied relief in the *Bogle* case -- that order was attached to the State's Answer as Exhibit A. (V6, R873-934).

When the Robertson report is objectively considered, the most that it says is that Robertson would not, **in 2011**, write the

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[2] To the extent that Duckett says that this report "should have been disclosed" to him, he does not explain how the State could disclose something that did not come into being until years after his trial. That suggestion is absurd. Duckett does not have a *Brady* claim available to him under these facts.

[3] Duckett makes various additional attacks directed toward hair examiner Malone throughout the amendment to the motion. Those various claims are baseless and irrelevant. For example, whatever may have happened in "comparative bullet lead analysis" cases has no bearing here. Likewise, the news articles attached to the motion have no relevance to anything.

same sort of report that was standard in 1987/1988, when this case originated. Robertson never says that Malone testified untruthfully, and the transcript of Malone's testimony at trial reflects that the limitations of hair comparison were fully explored at that time. The evidence of guilt, and the significance of the hair comparison, is set out at pages 1-5, above. When that evidence, which is unchallenged, is considered against the non-specific "Robertson" claim, there is no basis for relief.[4]

In denying relief on this claim, the Circuit Court said:

> The FBI or Justice Department, with respect to Malone and the other cases, hired Mr. Robertson to review Malone's findings on other cases but not the Duckett case. The Defense then hired Robertson to review Malone's work and testimony in the Duckett case which took eight (8) hours and resulted in a document called "Independent Case Review Report." The five (5) page "Report" consists of five (5) questions posed by the Defense Attorney to Robertson and his answers. The Court will address each question and answer.
>
> Question #1. Did Malone follow accepted protocols? Robertson's answer was that he was unable to determine this question because no acceptable protocols for hair analysis existed until the mid-1990s. Obviously, there can be no need for an evidentiary hearing to determine Malone's compliance with a protocol that did not exist and would not exist for seven (7) to eight (8) years after the Malone examination.
>
> Question #2. Were Malone's examination results in his

[4] Much of the *Initial Brief* is devoted to a discussion of "Comparative Bullet Lead Analysis," a procedure that has nothing to do with this case.

> report consistent with his "bench notes?" Robertson's answer is no. When Robertson's answer is read, you would expect a finding or measurement in the report different than in the examination notes. This is not the case. Specifically, Robertson's complaints are 1) there is no date for screening or hair notes, and 2) small parts of notes are illegible and no abbreviation key. The report, however, is dated. Robertson gives no explanation as to why no date or no abbreviation key could result in a mistaken or unreliable conclusion by Malone and the Court sees no need for an evidentiary hearing to ascertain a date or abbreviation key. Further, Robertson does not state that he does not understand the abbreviations as seen in his assumption that Malone's findings were confirmed by examiner V.B.
>
> Questions #3, #4, #5. Did Malone's testimony agree with his report and notes and was his testimony within his area of expertise? Robertson answers no to all three (3) questions essentially for the same reason. Malone's testimony is that there is a "very high degree of probability" that the pubic hair on the victim was from the Defendant. Robertson believes this overstates or exaggerates the accuracy of hair analysis in general. This might require a hearing if it were not for the remainder of Malone's testimony and the Defense expert. Specifically, Malone testified before the jury that hair analysis is not as precise as a fingerprint and he could not say that the hair could only have come from the Defendant. Further, the jury heard from a Defense forensic examiner from FDLE who testified that she could not conclude the hair was from Duckett. There is no basis for relief.

(V6, R953-54). Those findings are supported by the record, and establish that no evidentiary hearing was necessary.[5] Duckett's claim that the jury "heard false, unreliable and misleading

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[5] Duckett does not challenge the findings of the trial court. While that court did not explicitly speak to it, Robertson's report is heavily biased in favor of Duckett, to the point of assigning error on grounds that appear frivolous.

testimony" is simply not true -- the "Robertson Report," when rationally considered, does not support that conclusion. The files and records of the case conclusively show that Duckett is not entitled to any relief, and the successive motion was properly denied without an evidentiary hearing.

II. THE "*PORTER V. MCCOLLUM*" CLAIM

On pages 34-57 of his brief, Duckett says that *Porter v. McCollum*, 558 U.S. 30 (2009) should somehow be applicable to his case, thereby supplying a basis for relief. This claim was denied by the Circuit Court, which found, as a matter of law, that *Porter* is not a basis for relief under this Court's decision in *Walton v. State*, 77 So. 3d 639 (Fla. 2011). (V5, R738-40; V6, R947). That result is correct in all respects, and should not be disturbed.

Duckett's claim that *Porter* is available to him was squarely rejected by this Court in *Walton*, where this Court held:

> The trial level postconviction court here properly denied Walton's second successive postconviction motion because the decision in *Porter* does not constitute a fundamental change in the law that mandates retroactive application under *Witt*. Walton filed his motion well after the one-year deadline for postconviction motions under rule 3.851. Walton's claim that *Porter* applies retroactively is incorrect and insufficient as a matter of law for a successive motion because the decision in *Porter* does not concern a major change in constitutional law of fundamental significance. Rather, *Porter* involved a mere application and evolutionary refinement and development of the *Strickland* analysis, *i.e.*, it addressed a misapplication of *Strickland*. *Porter*, therefore, does not satisfy the retroactivity

> requirements of *Witt. See generally Witt*, 387 So. 2d at 924–31.
>
> Further, in the proceedings below, collateral counsel essentially asked the postconviction trial court to reevaluate Walton's claims of ineffective assistance of counsel that had been litigated in his prior postconviction motion in light of the decision in *Porter.* This is not a permitted retroactive application as articulated in Witt, which allows a limited retroactive application only to changes in the law that are of fundamental constitutional significance.
>
> Therefore, we affirm the postconviction court's denial of Walton's second successive postconviction motion.

Walton v. State, 77 So. 3d 639 (Fla. 2011). *Walton* is dispositive, and there is no need or justification for the expenditure of any further resources on Duckett's *Porter* claim.

Duckett's claim is procedurally barred.

In addition to being foreclosed by binding precedent, Duckett's "*Porter* claim" is time barred, and no exception to the time bar exists. Duckett does no more than re-argue facts adduced in the prior postconviction proceedings -- those issues were decided by this Court in 2005 and are procedurally barred. *Duckett v. State*, 918 So. 2d 224 (Fla. 2005).

Duckett previously raised the same claim of ineffective assistance of counsel that he seeks to relitigate here, **and this Court decided that claim**. As this Court has held, attempts to relitigate claims that have previously been raised and rejected are procedurally barred. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003). Under the law of the case doctrine, Duckett

cannot relitigate a claim that has been denied by the trial court and affirmed by the appellate court. *State v. McBride*, 848 So. 2d 287, 289-290 (Fla. 2003). It is also well-established that piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. *Pope v. State*, 702 So. 2d 221, 223 (Fla. 1997); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996). Since this is precisely what Duckett is attempting to do here, his ineffectiveness 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).

Moreover, there is an additional, and independently adequate, procedural bar to the *Porter* claim as argued in the *Initial Brief.* Duckett says that the "*Porter* refinement" (which he never describes) should be available to him on an Eighth Amendment theory. The problem for Duckett is that he has never made that argument before, and never raised that claim in the Circuit Court. **That is a procedural bar, because it is well-settled that claims cannot be raised for the first time on appeal from the denial of post-conviction relief**. *Mendoza v. State*, 87 So. 3d 644, 661 (Fla. 2011); *Connor v. State*, 979 So. 2d 852, 866 (Fla. 2007); *Franqui v State/McDonough*, 965 So. 2d 22, 32 (Fla. 2007); *Griffin v. State*, 866 So. 2d 1, 11 n. 5 (Fla. 2003). And, despite the constitutional pretensions of Duckett's brief, his

argument is nothing more than a re-invented argument for retroactive application of *Porter.* An "evolutionary refinement" is, by definition, **not retroactively applicable to final cases**. Duckett's claim is no more than an attempt to obtain retroactive application of *Porter* through a back-door theory that has never been raised before, and is directly contrary to the very application of the non-retroactivity doctrine. His attempt to invoke a new constitutional theory has no traction because it is a false premise that is not preserved for review, anyway.

Duckett is not entitled to relief.

This Court's decision in *Walton* removed any doubt that *Porter* establishes any grounds for relief. The circuit court found that Duckett's successive motion did not state a basis for relief. (V5, R738; V6, R947). That result is correct in all respects.

III & IV. THE "GWEN GURLEY"/PERJURY CLAIM

Claims III and IV, found on pages 58-69 of Duckett's brief, both relate to trial witness Gwen Gurley and her alleged "recantation." Claim IV specifically attacks the validity of § 837.021 of the *Florida Statutes*. That claim, as the Circuit Court found, is procedurally barred because it is untimely. (V6, R947-48). That is an independently adequate basis for denial of relief. In any event, **no court has ever held that § 837.021 is defective in any fashion**, even if the claim were available to Duckett. Likewise, the "Gwen Gurley" claim is procedurally

barred because it is untimely, is refuted by the record, and is successive, as the Circuit Court properly found. (V6, R951).

In any event, there is no showing (or even suggestion) that the claimed affidavits of two of Gurley's children could not have been obtained, at the latest, at the time of the prior litigation in state court.[6] This claim is untimely, and is insufficiently pleaded under the provisions of *Florida Rule of Criminal Procedure* 3.851(e)(2)(C)(iv).

In any event, this Court has already considered and rejected the "recantation" testimony, stating:

> In claim 1(a), Duckett seeks a new trial because he claims the State's witness, Grace Gwendolyn Gurley, lied at trial about material facts. Gurley testified that on the night of the murder she walked to the Circle K accompanied by two other girls. She saw a Mascotte police officer, whom she later identified as Duckett, and the victim. According to Gurley, Duckett called her and her companions along with the victim and "some Spanish boys" to the police car and told them all to go home because it was past curfew. Instead of going home, Gurley left the store and hid on a path near the store. She then saw Duckett leave "about a minute" later alone. Gurley walked back towards the store to use the phone and saw a police car parked near the dumpster with its headlights off. The victim was still at the store, standing in between the ice machines and the door. Gurley testified that Duckett called the victim and "told her to come here." The victim walked toward the police car. Gurley retreated to the bushes so that the officer would not see her. She heard a door shut. When she looked out,

[6] The Federal District Court also considered a version of the "Gurley recantation" claim and denied relief. *Duckett v. McDonough*, 701 F.Supp.2d 1245, 1257-1258 (M.D. Fla. 2010).

she could not see the victim. The police car backed up and started to drive away. Gurley testified that she saw two people inside the car, "[o]ne was the driver, was the big man, and a small person." Gurley could not describe the small person with any more detail. When she heard about Duckett's arrest, she contacted police with this information.

Gurley testified that she did not receive any type of deal in exchange for her testimony. She also acknowledged that she had been convicted of three felonies. On cross-examination, she admitted that she had lied to the police about not knowing the name of one of the two girls who had accompanied her to the store and about the fact that the girl had gone home earlier in the night.

In various interviews with counsel and investigators after trial, Gurley recanted her testimony, saying that she was not at the Circle K on the night of the murder, that she was told by police what she should say at trial, and that she received special treatment in jail because of her cooperation. In another interview, she recanted portions of her recantation, stating that she was at the store on the night of the murder and did see a police car leave with a passenger. At the evidentiary hearing below, when asked about the night of the murder, Gurley responded, "Your Honor, I feel that I must respectfully invoke my privilege against self-incrimination and decline to answer that question under the Fifth Amendment of the U.S. Constitution, Article I of the Constitution of the State of Florida." When the judge asked her if that would be her response to any questions concerning the night of the murder, Gurley responded in the affirmative.

We previously have explained the factors relevant to deciding whether to grant a new trial based on recantation. In *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994), we said:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. *Brown v. State*, 381 So. 2d 690 (Fla.1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Bell v. State*, 90 So. 2d 704 (Fla.

> 1956). In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. Bell. *233 "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." *Id.* at 705 (*quoting Henderson v. State*, 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially)). Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted. *Id.*

The circumstances of Gurley's alleged recantation do not satisfy this standard. Based on her statements at the evidentiary hearing, it appears that she would not testify to anything new at a new trial. In fact, she would not testify at all. Therefore, the purported change in her testimony would be unlikely to result in a different verdict. Although the case against Duckett was circumstantial, strong evidence besides Gurley's testimony linked him to the murder. On direct appeal, we concluded "that the following facts satisfy the test in Davis:" [FN9]

> (1) the victim was last seen in Duckett's patrol car; (2) the tire tracks at the murder scene were consistent with those from Duckett's car; (3) no one saw Duckett, the only policeman on duty in Mascotte, from the time he was last seen with the victim until the time he met the victim's mother at the police station; (4) numerous prints of the victim were found on the hood of Duckett's patrol car, although he denied seeing her on the hood; (5) a pubic hair found in the victim's underpants was consistent with Duckett's pubic hair and inconsistent with the others in contact with the victim that evening; and, (6) during a five-month period, Duckett, contrary to department

> policy, had picked up three young women in his patrol car while on duty and engaged in sexual activity with one and made sexual advances toward the other two.
>
> [FN9] *Davis v. State,* 90 So. 2d 629, 631 (Fla. 1956), sets forth the standard to be applied in cases based on circumstantial evidence.

Duckett, 568 So. 2d at 894-95. Only one of these numbered facts concerns Gurley's testimony. Our confidence in the verdict is not undermined if Gurley's testimony is removed from this list. Sufficient additional circumstantial evidence exists in this case so that a new trial would not produce a different verdict. [FN10]

> [FN10] **Our recitation of the facts did not rely on, or even mention, Gurley's statement that she saw Duckett leave the store with a small person in his car.**

Duckett also asserts a related claim of ineffective assistance of counsel based on counsel's failure to present Gurley's previous admission to lying in a sexual harassment complaint against a Mascotte police officer and counsel's failure to impeach Gurley through her inconsistent pretrial statements.[FN11] The following standards apply to claims of ineffective assistance of counsel:

> An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness."

Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (*quoting Strickland v. Washington,* 466 U.S. 668, 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) (citation omitted). Therefore, to succeed on his various claims of ineffective assistance of counsel, Duckett must establish

deficient performance and resulting prejudice. Duckett fails to demonstrate either.

> [FN11] Duckett also broadly claims that the State failed to disclose information, but fails to identify the specific information the State failed to disclose. Therefore, that portion of his argument is unpreserved as insufficiently argued.

Duckett fails to demonstrate that his counsel performed deficiently. As to his cross-examination of Gurley, the jury heard of Gurley's prior felony convictions, and defense counsel impeached her with inconsistencies between her deposition and trial testimony. As to Gurley's false sexual harassment allegation, it was made to the Lake County Sheriff's Department, a wholly separate entity from the Mascotte Police Department. Duckett fails to establish how counsel reasonably could have discovered this information from a different case at a different police department.

Duckett also fails to establish prejudice. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. As explained above, even without Gurley's testimony, there was strong circumstantial evidence presented at trial.

Duckett v. State, 918 So. 2d 224, 232-234 (Fla. 2005). Duckett does not get to relitigate this issue under settled Florida law, and the denial of relief should be affirmed in all respects.

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by E-Filing to Mary Elizabeth Wells, Esquire, mewells27@comcast.net, on September 9th, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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