IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-182

LEONARDO FRANQUI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On February 14, 1992, Defendant, Pablo San Martin, Ricardo Gonzalez, Pablo Abreu and Fernando Fernandez were charged by indictment with committing, on January 3, 1992: (1) first degree murder of a law enforcement officer, North Miami police officer Steven Bauer, (2) armed robbery, (3) aggravated assault, (4) two counts of grand theft and (5) two counts of burglary.[1] (R. 1-5)[2]

The matter proceeded to trial on May 23, 1994. (R. 24) After considering the evidence presented, the jury found Defendant guilty as charged on all counts. (T. 2324-25) The trial court adjudicated Defendant in accordance with the verdicts. (T. 2333) After a penalty phase, the jury recommended a sentence of death for the murder of Off. Bauer by a vote of 9 to 3. (R. 480) The trial court followed the jury's recommendation and sentenced Defendant to death. (R. 588-601)

Defendant appealed his conviction and sentences to this Court, raising 5 issues, including a claim that the trial court improperly permitted the presentation of his codefendants'

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[1] Defendant was also charged with possession of a firearm during a criminal offense and an additional count of aggravated assault. (R. 1-4) However, the State entered a nolle prosequi to these charges after opening statement at Defendant's original trial. *Franqui v. State*, 699 So. 2d 1332, 1333 n.1 (Fla. 1997).

[2] The symbol "R." will refer to the record on direct appeal from the first trial, FSC Case No. SC84,701. The symbol "T." will refer to the transcript of the original trial. The parties will be referred to as they stood in the lower court proceedings.

confessions at a joint trial. This Court affirmed Defendant's convictions but reversed Defendant's death sentence. *Franqui v. State*, 699 So. 2d 1332 (1997). It found that the trial court had erred in admitting the other codefendants' confession at the joint trial, that such error was harmless in the guilt phase but that the error was harmful in the penalty phase. In issuing its opinion, this Court found the following historical facts:

> The defendant, [], along with codefendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm while engaged in a criminal offense, grand theft third degree, and burglary. [FN1] [Defendant], Gonzalez, and San Martin were tried together before a jury in May, 1994.
>
> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.
>
> Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that [Defendant] had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that [Defendant] had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that [Defendant] was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot

low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how [Defendant] had shouted at the victim not to move before shooting him. [FN2]

[Defendant] was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, [Defendant] initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. [Defendant] stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to [Defendant], San Martin, Fernandez and Abreu had stolen the vehicles. [Defendant] did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to “freeze” when they saw him pulling out his gun. [Defendant] denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of [Defendant], the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to [Defendant], upon the trial court's finding that their confessions “interlocked” with [Defendant’s] own confession. In addition, an eyewitness identified [Defendant] as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that [Defendant] had shot the victim in the leg with his .9 mm handgun.

[Defendant] was convicted on all counts, and

> after a penalty phase trial the jury recommended death by a vote of nine to three. The trial court followed the jury's recommendation and sentenced [Defendant] to death.

Franqui, 699 So. 2d at 1333-34. Both parties sought certiorari review in the United States Supreme Court, which was denied. *Franqui v. Florida*, 523 U.S. 1097 (1998); *Florida v. Franqui*, 523 U.S. 1040 (1998).

On remand, the matter proceeded to the new penalty phase on August 24, 1998. (RST. 1)[3] After considering all of the evidence, the jury recommended that Defendant be sentenced to death by a vote of 10 to 2. (RSR. 155, RST. 1172) The trial court followed the jury's recommendation and sentenced Defendant to death. (RSR. 158-75, 225-47) The trial court found three aggravating factors: (1) prior violent or capital felonies, including a prior attempted armed robbery and aggravated assault of Pedro Santos, a prior first degree murder of Raul Lopez and attempted armed robbery of the Cabanases, and a prior armed robbery and armed kidnapping of Craig Van Ness, as well as the contemporaneous armed robbery and aggravated assault in this case; (2) during the commission of an armed robbery and for pecuniary gain, merged; and (3) avoid arrest, hinder a governmental function and murder of a law enforcement officer,

[3] The symbols "RSR." and "RST." will refer to the record on appeal and transcript of proceedings from the resentencing, FSC Case No. SC94,269.

merged. (RSR. 158-65, 226-37) The trial court accorded great weight to each of these factors. (RSR. 158-65, 226-37) The trial court found as nonstatutory mitigating circumstances: (1) Defendant was a good father - little weight, (2) he cooperated with authorities - little weight, (3) Abreu and San Martin received life sentences - little weight, and (4) Defendant had sought self improvement and found faith in custody - some weight. (RSR. 166-72, 237-45) The trial court considered and rejected Defendant's age as mitigation because of his maturity. (RSR. 167, 238-39) The trial court also rejected Defendant's family history as mitigation because he was never abused and was able to maintain relationships. (RSR. 167-69, 239-42) Finally, the trial court rejected the fact that Defendant did not fire the fatal bullet as mitigation. (RSR. 172, 244-45)

Defendant again appealed his sentence to this Court, raising six issues. This Court affirmed Defendant's sentence on October 18, 2001. *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001).

On January 8, 2003, Defendant filed a shell motion for post conviction relief. (PCR-SR. 762-77)[4] The State moved to strike the shell motion, as filed in violation of Fla. R. Crim. P.

[4] The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in Florida Supreme Court case no. SC04-2380.

3.851. (PCR-SR. 778-84) Defendant then withdrew the shell motion. (PCR-SR. 785-86)

On April 7, 2003, Defendant filed a proper motion for post conviction relief. (PCR. 100-61) The motion contained a list of 18 issues, none of which concerned ineffective assistance of counsel for failing to investigate and present mitigation. (PCR. 110-12) After conducting an evidentiary hearing on claims of ineffective assistance of counsel related to litigating issues regarding his confession, the trial court denied the motion for post conviction relief on November 9, 2004. (PCR. 290-329)

Defendant appealed the denial of his motion for post conviction relief to this Court and also filed a state habeas petition. Even though Defendant had not raised a claim of ineffective assistance of counsel regarding mitigation in the trial court, Defendant raised the argument that such a claim had been improperly denied on appeal. On May 3, 2007, this Court affirmed the denial of post conviction relief and denied state habeas relief. *Franqui v. State*, 965 So. 2d 22 (Fla. 2007). Regarding the argument about counsel being ineffective for failing to investigate and present mitigation, this Court held:

> [Defendant] also alleges that trial counsel was ineffective for failing to present Dr. Toomer's letter to the resentencing court. However, this claim was not raised in the trial court, nor was there any type of

similar claim in which [Defendant] alleged error for failing to present the Toomer letter to the resentencing jury or judge as a means of establishing mental health mitigation. Accordingly, this claim is procedurally barred as an argument raised for the first time on appeal to this Court. *See Griffin v. State*, 866 So. 2d 1, 11 n. 5 (Fla. 2003)(finding that postconviction claim raised for the first time on appeal was procedurally barred).

In addition, the record from [Defendant's] resentencing indicates that, regardless of any procedural bar, he is entitled to no relief. First, trial counsel Cohen testified at the evidentiary hearing that, while the primary reason he had Dr. Toomer evaluate [Defendant] was in preparation for the penalty phase, Cohen and [Defendant] jointly agreed to not present the letter at resentencing. The resentencing record reflects a specific discussion about Dr. Toomer's letter report:

> THE COURT: All right. I'll allow you to make arguments later. Any other evidence or testimony on the behalf of [Defendant]?
>
> MR. COHEN: No, your Honor.
>
> THE COURT: All right. You had indicated the last time you were considering presenting the former testimony of one of the doctors, you and [Defendant] have agreed not to present that?
>
> MR. COHEN: Unfortunately, Judge, the situation is that we have not been able to find a report. But based on our conversations previously, I don't think that there's anything in that report that we would be submitting to the Court.
>
> THE COURT: I just want to make sure there's not a claim later that not finding the report in some way-
>
> MR. COHEN: No.
>
> THE COURT:-prevented you from making an effective presentation or prevents me from making an appropriate sentence. Does the State have a copy of the report?
>
> MR. COHEN: We don't have the report present now but obviously we reviewed the report previously and the doctor did testify at the sentencing hearing of what we refer

> to as the Hialeah case. So we're well aware of contents and the findings of the doctor. And it's our decision not to present that evidence to the jury and I don't see any reason why that decision would change in presenting any evidence to the Court.
>
> THE COURT: All right. Have you spoken to [Defendant] with about [sic] that?
>
> MR. COHEN: We mentioned it briefly the other day. I don't think he has any different feelings about that.
>
> THE COURT: [Defendant], do you agree with Mr. Cohen's decision not to have me consider the testimony or the report of that doctor?
>
> [Defendant]: Yes, your honor.
>
> THE COURT: Is there anything [Defendant] would like to say?
>
> MR. COHEN: I don't believe so, Your Honor.
>
> [Defendant]: No, your Honor.

> Thus, the record reflects that Cohen and [Defendant] made a joint, strategic decision not to present this evidence at resentencing. [FN8] We find no error in the trial court's conclusion that [Defendant] is not entitled to relief on this claim. *See Occhicone*, 768 So. 2d at 1048.
>
> [FN8] We have already discussed the fact that the trial court had both considered and rejected Dr. Toomer's opinion testimony as presented at sentencing in the Hialeah murder.

Id. at 32-33.

On November 29, 2010, Defendant filed a successive motion for post conviction relief, raising three claims:

> I.
>
> [DEFENDANT'S] SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*.
>
> II.
>
> [DEFENDANT'S] SENTENCE VIOLATES THE EIGHTH AMENDMENTS

UNDER *ATKINS V. VIRGINIA*.

III.

NEWLY DISCOVERED EVIDENCE REQUIRES THIS COURT TO VACATE [DEFENDANT'S] SENTENCE AND THAT MANIFEST INJUSTICE WARRANTS THE INVOCATION OF THIS COURT'S EQUITABLE POWER AND THE ISSUANCE OF RULE 3.851 RELIEF.

(PCR2. 47-77)[5] In support of Claim I, Defendant argued that *Porter v. McCollum*, 130 S. Ct. 447 (2009), had somehow changed the manner in which the rejection of claims of ineffective assistance of counsel were reviewed and that the alleged change should be applied retroactively. (PCR2. 48-68) According to Defendant, this alleged change was significant with regard to the denial of the claim of ineffective assistance of counsel regarding the investigation and presentation of mitigation. *Id.*

In Claim II, Defendant asserted that he was retarded based on Dr. Toomer's testimony from the penalty phase in Defendant's other capital case. (PCR2. 68-69) Claim III was based on an affidavit from Abreu that had been presented in the other capital case. (PCR2. 69-75) Defendant made no attempt to explain when this affidavit was discovered or could have been discovered through an exercise of due diligence. *Id.* However, he did argue that Abreu's testimony at the evidentiary hearing in the other case "conclusively established" that there was no premeditation in the other case and that Defendant acted in

[5] The symbol "PCR2." will refer to the record in the instant appeal.

self-defense in that case. *Id.* He averred that the affidavit and testimony established that the State had withheld evidence and knowingly presented false testimony in the other case and that his sentence in this case was affected because the other convictions were used as aggravation in this case. *Id.*

On December 2, 2010, Martin McClain filed a motion to be appointed as counsel for Defendant. (PCR2. 81-84) In this motion, Mr. McClain noted that the registry attorney who had represented Defendant during his initial post conviction and his federal habeas proceedings had been discharged as federal habeas counsel during his federal habeas appeal, and he had been appointed to represent Defendant in that appeal. *Id.* He then suggested that Defendant was somehow without counsel to represent him in state court and sought to be appointed because he was familiar with the case. *Id.* At a hearing that day, Judge Trawick, who had not been assigned to hearing the case, denied the motion and appointed the Public Defender. (PCR2. 251-54) By order dated December 8, 2010, the Chief Judge of the Eleventh Judicial Circuit assigned Judge Blake to preside over this matter pursuant to Fla. R. Jud. Admin. 2.215. (PCR2. 87)

On December 13, 2010, the State filed its response to the successive motion. (PCR2. 122-84) Regarding Claim I, the State argued that *Porter* had not changed the law, that even if it had

changed the law, the alleged change would not be retroactive and that even if *Porter* had changed the law and was retroactive, the alleged change would be inapplicable to this matter. (PCR2. 129-38)

Regarding Claim II, the State asserted that the claim was untimely because it was filed more than a year after this Court determined *Atkins v. Virginia*, 536 U.S. 304 (2002), was retroactive and after the deadline for filing post conviction retardation claims this Court set when it adopted Fla. R. Crim. P. 3.203. (PCR2. 138-39) Further, the State argued that the claim was procedurally barred because *Atkins* had been decided before Defendant filed his initial motion for post conviction relief and was based on information that was available at the time the initial motion was filed. (PCR2. 139) It also averred that the motion was insufficiently plead because it did not allege the three elements of retardation, did not attach a copy of the report from the expert upon whom Defendant based his claim and did not attach the reports of the experts who had evaluated him in connection with his retardation claim in his other capital case. (PCR2. 139-41) Finally, the State provided the lower court with the reports that Defendant was required to attach and asserted that it appeared that Defendant's failure to attach the reports was deliberate, as the reports showed that

the retardation claim was meritless. (PCR2. 141)

Regarding Claim III, the State pointed out that any claim allegedly based on newly discovered evidence had to be raise within one year of when the evidence could have been discovered through an exercise of due diligence, that Defendant had failed to make sufficient allegations regarding the timeliness of his motion and that the fact the affidavit was execution on March 29, 2000, and was the subject of an evidentiary hearing in which Defendant participated in his other capital case showed the claim was untimely. (PCR2. 142-43) Moreover, it argued that claim was procedurally barred since Defendant was in possession of the affidavit and had participate in the evidentiary hearing before his initial post conviction motion was filed in this case. It also averred that the claim was insufficiently plead because Defendant had not attached the affidavit or the transcript of the evidentiary hearing on which he was rely and had not provided information regarding witnesses, as required by Fla. R. Crim. P. 3.851(e)(2)(C). (PCR2. 143-44) Finally, the State argued that since it had already been determined that the affidavit and testimony was not meritorious in the codefendant's post conviction appeal and Abreu had characterized the killing of Mr. Lopez as an act of self defense at the Hialeah trial, the claim was meritless. (PCR2. 144-45)

On December 21, 2010, Mr. McClain attempted to get Judge Trawick to enter an order appointing him as counsel even though he was aware the matter was assigned to Judge Blake. (PCR2. 256-60) However, Judge Trawick refused to hear the matter because the State was not present. (PCR2. 259-60)

The *Huff* hearing was originally set for January 10, 2011, along with the *Huff* hearings regarding other successive motions for post conviction relief based on *Porter*. (PCR2. 264-66) However, when he was asked to announce his appearance as counsel for this matter, Mr. McClain, who was present, claimed not to have notice. (PCR2. 266-67) Over the State's objection, the lower court agreed to continue the *Huff* hearing in this matter. (PCR2. 266-69) Mr. McClain also suggested that Defendant was without counsel, and he needed to be appointed. (PCR2. 266, 272) The State pointed out that Defendant's original post conviction counsel had not been discharge from her obligations in state court. (PCR2. 267-68, 272-73) Moreover, the State asserted that Mr. McClain did not meet the requirements to be appointed as he had to be able to certify that he did not already represent more than four capital post conviction defendants and could not do so. (PCR2. 273) Mr. McClain then insisted that the statute did not apply to him because he had been permitted to violate it in other cases and because it would

allegedly benefit judicial economy to appoint him. (PCR2. 273-76) Recognizing that Defendant's original post conviction counsel had not been discharged, the lower court then setting the matter for a hearing regarding who would represent Defendant. (PCR2. 277-81) At a hearing on January 13, 2011, the lower court permitted Defendant's original post conviction counsel to withdraw and appointed Mr. McClain to represent Defendant over the State's objection. (PCR2. 283-92)

When the lower court then attempted to reschedule the *Huff* hearing, Defendant insisted that he needed more time because he had raised a retardation issue and had no evaluation to support that claim. (PCR2. 292-93, 295) The State objected because the retardation claim was barred, and Fla. R. Crim. P. 3.203 required that any retardation evaluation conducted after a motion was filed be conducted by a court appointed expert with the State allowed to be present. (PCR2. 294, 296) Defendant insisted that he was entitled to have a private evaluation any time he wanted. (PCR2. 296) During this discussion, Judge Blake acknowledged on the record that he had been the judge who had presided over the evidentiary hearing regarding the retardation claim in Defendant's other capital case. (PCR2. 295-96) The lower court then refused to continue the proceedings while Defendant attempted to investigate his claims.

(PCR2. 296-97) As such, it scheduled the *Huff* hearing for January 19, 2012. (PCR2. 298)

On January 21, 2011, the lower court denied the second motion for post conviction relief. (PCR2. 187-91) Regarding Claim I, it found that *Porter* did not change the law and that any change in law that might have occurred would not be retroactive or applicable to Defendant. (PCR2. 186-91) Regarding Claim II, it found that claim was time barred and meritless, since Defendant had been found not to be retarded in his other case. (PCR2. 191) The order was filed with the clerk's office and rendered on January 27, 2011. (PCR2. 186)

On February 24, 2011, Defendant filed a motion seeking leave to file an amendment to his motion in the future. (PCR2. 193-200) In the motion, Defendant admitted that his motion had already been denied but claimed that he had new evidence to support a claim that Florida's lethal injection protocol was unconstitutional. *Id.* The new evidence consisted of a letter from several state Attorneys General to the United States Attorney General requesting assistance in obtaining sodium thiopental. (PCR2. 196, 199-200) On February 22, 2011, the State responded to this motion, asserting that it did not comply with the requirements of Fla. R. Crim. P. 3.851(f)(4) and that the lower court lacked jurisdiction to consider the motion since

the time for seeking rehearing of the order denying the successive motion for post conviction relief had already expired. (PCR2. 201-05) On February 23, 2011, the lower court denied the motion because it did not comply with the rule and it lacked jurisdiction. (PCR2. 214)

On February 24, 2011, Defendant filed a motion for rehearing. (PCR2. 206-10) In this motion, Defendant claimed that the motion was timely because it was served within 18 days of when he alleged he was served with the order denying the motion for post conviction relief and argued that the lower court should have found that *Porter* changed the law. *Id.* On February 22, 2011, the State responded to this motion, pointing out that under Fla. R. Crim. P. 3.851(f)(7), the time for rehearing runs from rendition of an order; not service. (PCR2. 211-13) As such, the State asserted that the motion was untimely, that the trial court had no jurisdiction to consider it and that the motion merely impermissibly reargued an issue. *Id.* On March 7, 2011, the lower court denied the motion as untimely and improper. (PCR2. 215)

On April 15, 2011, Defendant filed a notice of appeal regarding the denial of post conviction relief. (PCR2. 216-17) On July 12, 2011, this Court dismissed this appeal as untimely. (PCR2. 229) It denied rehearing of that order on September 13,

2011. (PCR2. 229) On October 18, 2011, Defendant petitioned this Court for a belated appeal. (PCR2. 233) On January 31, 2012, this Court granted a belated appeal, noting that Mr. McClain had been ineffective in filing an untimely notice of appeal "due to [his] failure to properly comprehend the provisions of the rules of criminal procedure and rules of appellate procedure." (PCR2. 234) This appeal follows.

SUMMARY OF THE ARGUMENT

This Court reviews the summary denial of post conviction claims *de novo*. *Gore v. State*, 91 So. 3d 769, 774 (Fla. 2012). Applying that standard of review, the lower court properly summarily denied this successive motion for post conviction relief.

Since this Court has already determined that *Porter v. McCollum*, 130 S. Ct. 447 (2009), is not a fundamental change in constitutional law that applies retroactive, the lower court properly found that Defendant's claim to the contrary was meritless. Defendant has provided no valid basis to reconsider that ruling. His claim that the refusal to apply any alleged change in law retroactively renders Florida's capital sentencing scheme unconstitutional is not properly before this Court and meritless.

The lower court also properly denied Defendant's insufficiently plead, untimely, procedurally barred and meritless claim that an affidavit from Pablo Abreu is newly discovered evidence. It also properly denied Defendant's untimely, procedurally barred, insufficiently plead and meritless claim that he is retarded.

ARGUMENT

I. THE *PORTER* CLAIM WAS PROPERLY DENIED.

Defendant first asserts that the lower court erred in denying his claim that he is entitled to relief based on a retroactive application of *Porter v. McCollum*, 130 S. Ct. 447 (2009). Recognizing that this Court has already determined that *Porter* does not represent a fundamental change in law that applied retroactively, Petitioner asks this Court to reconsider its decision in *Walton v. State*, 77 So. 3d 639 (Fla. 2011), because this Court did not explain to his satisfaction why the alleged change in law in *Porter* did not meet the *Witt* standard. He then asserts that even if *Walton* is not revisited, he is entitled to relief because he believes that the refusal to apply any alleged change in law retroactively in a capital case results in a violation of *Furman v. Georgia*, 408 U.S. 238 (1972). He then suggests that retroactive application of *Porter* to his claim of ineffective assistance of counsel in failing to present Dr. Toomer's report at resentencing could effect this Court's decision regarding prejudice. However, the lower court properly denied the *Porter* claim, and it should be affirmed.

As Defendant admits, this Court has already determined that *Porter* does not constitute a fundamental change in law that applies retroactively and that successive motions based on the

assertion that *Porter* does constitute a fundamental, retroactive change in law are untimely. *Walton v. State*, 77 So. 3d 639, 644 (Fla. 2011); *see also Griffin v. State*, 2012 WL 3732864 (Fla. Aug. 30, 2012); *Raleigh v. State*, 2012 WL 2848892 (Fla. Jul. 12, 2012); *Sochor v. State*, 2012 WL 2849087 (Fla. Jul. 12, 2012); *Hartley v. State*, 91 So. 3d 848 (Fla. 2012); *Banks v. State*, 2012 WL 1947883 (Fla. May 31, 2012); *Willacy v. State*, 90 So. 3d 822 (Fla. 2012); *Finney v. State*, 91 So. 3d 781 (Fla. 2012); *Arbelaez v. State*, 88 So. 3d 146 (Fla. 2012); *Parker v. State*, 88 So. 3d 145 (Fla. 2012); *Pace v. State*, 91 So. 3d 783 (Fla. 2012); *Ponticelli v. State*, 90 So. 3d 823 (Fla. 2012); *Jones v. State*, 2012 WL 1431844 (Fla. Apr. 26, 2012); *Davis v. State*, 2012 WL 1431846 (Fla. Apr. 26, 2012); *Stein v. State*, 91 So. 3d 784 (Fla. 2012); *Hildwin v. State*, 88 So. 3d 146 (Fla. 2012); *Peede v. State*, 2012 WL 1431852 (Fla. Apr. 26, 2012); *Phillips v. State*, 91 So. 3d 783 (Fla. 2012); *Peterka v. State*, 2012 WL 1431894 (Fla. Apr. 26, 2012); *Jones v. State*, 2012 WL 1431992 (Fla. Apr. 26, 2012); *Thompson v. State*, 2012 WL 1432047 (Fla. Apr. 26, 2012); *Reaves v. State*, 91 So. 3d 782 (Fla. 2012); *Marshall v. State*, 89 So. 3d 872 (Fla. 2012); *Bell v. State*, 91 So. 3d 782 (Fla. 2012); *Randolph v. State*, 91 So. 3d 782 (Fla. 2012); *Hodges v. State*, 2012 WL 1432063 (Fla. Apr. 26, 2012); *Hannon v. State*, 2012 WL 1432065 (Fla. Apr. 26, 2012);

Lightbourne v. State, 2012 WL 1432078 (Fla. Apr. 26, 2012); *Turner v. State*, 91 So. 3d 784 (Fla. 2012); *Pietri v. State*, 2012 WL 1432082 (Fla. Apr. 26, 2012); *Melton v. State*, 88 So. 3d 146 (Fla. 2012). Here, Defendant's convictions and sentences were final on April 8, 2002, when the time for filing a petition for writ of certiorari after resentencing expired and no petition was filed. Defendant sought to avoid the untimeliness of this claim by asserting that *Porter* was a fundamental change in law that applied retroactively. (PCR2. 48-68) Given *Walton* and its progeny, the lower court properly rejected this argument and denied the claim as untimely. It should be affirmed.

In an attempt to avoid this result, Defendant asks this Court to reconsider these decisions. However, Defendant has provided no sufficient basis to do so. First, Defendant suggests that because this Court labeled *Porter* as an "evolutionary refinement," its decision not to apply *Porter* retroactive was standardless. However, this is not true. In *Walton*, this Court defined the term "evolutionary refinement," as those alleged changes in law that did not satisfy the standard for retroactivity set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Walton*, 77 So. 3d at 643. Moreover, this Court then enunciated the test for retroactivity under *Witt*. *Id.* Given these circumstances, this Court's reference to an

"evolutionary refinement" does not show that this Court made a standardless decision. Instead, it shows that this Court considered whether the change in law that Defendant alleged occurred because of *Porter* met the *Witt* standard and found that it did not. As such, this argument is meritless and provides no basis to consider *Walton*. The denial of this claim should be affirmed.

Defendant next complains that this Court did not explain the differences regarding the decision that the change in law Defendant alleged occurred in *Porter* and the changes in law rendered by *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, Defendant offers no explanation of how this Court's decision not to write about *Hitchcock* and *Espinosa* provides any basis to reconsider the decision in *Walton*. In fact, he does not now, nor has he ever, argued how *Porter*, *Hitchcock* and *Espinosa* are alike with regard to "(1) the purpose of the new rule, (2) the extent of previous reliance on the old rule, and (3) the purported effect that the retroactive application of the new rule would have on the administration of justice," the elements that are considered in determining whether a change in law is retroactive under *Witt*. *Walton*, 77 So. 3d at 643 (citing *Witt*, 387 So. 2d at 926). Given these circumstances, the fact that this Court did

not discuss *Hitchcock* and *Espinosa* provides no basis to reconsider *Walton*. The lower court should be affirmed.

This is all the more true, as neither *Hitchcock* nor *Espinosa* is remotely like the alleged change in law from *Porter* in regard to these issues. Both *Hitckcock* and *Espinosa* involved errors in the penalty phase jury instructions. *Espinosa*, 505 U.S. at 1080-81; *Hitchcock*, 481 U.S. at 398-99. As such, determining whether either of these errors occurred required simply examining the jury instructions to determine if the offending instruction had been given. Moreover, since these instructions were only given in the penalty phase and only harmed a defendant if he was sentenced to death, the number of cases that needed to be reviewed and the errors corrected were limited. As such, the extent of reliance on the old rule and the effect on the administration of justice of retroactive application were small. Moreover, the errors in the jury instruction involved limiting the class of death eligible defendants and allowing individualized consideration of mitigation, the only requirements the Court has held that Constitution imposes on capital sentencing. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Thus, the purpose served by the new rules was great.

In contrast, the Court, in *Porter*, found nothing more than

that this Court had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), to the facts of the case. *Porter*, 130 S. Ct. at 453-56. As the United States Supreme Court has explained, a state court decision fits within the "unreasonable application" provision of 28 U.S.C. §2254(d)(1) when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). When a state court made an error in the legal standard, its decision is defined as "contrary to" under 28 U.S.C. §2254(d)(1). *Id.* at 412-13. Thus, by finding that this Court's decision was an unreasonable application of *Strickland*, the Court found that the legal standard this Court applied was correct. It simply found this Court unreasonably applied that correct standard to the facts of a particular case. As such, the purpose of *Porter* was merely to correct this Court's application of the correct *Strickland* standard to the facts of a particular case. That purpose does not even merit finding a change in law, much less one that merits retroactive application.

Moreover, while Defendant does not now, nor has he ever explained how he believes that *Porter* changed the law, he does contend that the alleged change affect the denial of the claim

of penalty phase ineffective assistance in this case. However, this Court denied the claim of penalty phase ineffective assistance as barred because it was not properly asserted in the lower court and meritless because counsel had made a strategic decision not to present mental health mitigation. *Franqui*, 965 So. 2d at 32-33. Given these circumstances, it appears that Defendant is contending that the change in law he alleges *Porter* made would apply to the denial of any claim of ineffective assistance of counsel. Given the number of claims of ineffective assistance of counsel that are denied by the Florida Courts, the extent of reliance on the alleged old rule and the effect on the administration of justice would be vast. The courts of this state would come to a screeching halt as courts combed through stale records looking for errors. *See State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990)(refusing to apply *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), retroactively). Given these differences, Defendant's assertion that this Court should reconsider *Walton* to explain why *Hitchcock* and *Espinosa* created retroactive changes of law and *Porter* did not should be rejected. The lower court should be affirmed.

Defendant next suggests that even if this Court did properly determine that the alleged change in law in *Porter* did not satisfy *Witt* and is not retroactive, he still should be

entitled to relief. He seems to base this argument on the assertion that any change in law must be applied retroactively or *Furman* is violated. However, this argument is not properly before this Court. Defendant did not argue below that every change in law had to be applied retroactively. Instead, he merely argued that he was entitled to relief because the alleged change in law in *Porter* satisfied *Witt.* (PCR2. 48-68) Thus, this issue is being presented for the first time on appeal. This Court has repeatedly held that issues and arguments not properly presented in the lower court cannot be presented for the first time on appeal. *Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As such, this issue is not properly before this Court and should be rejected as such. The lower court should be affirmed.

Moreover, the claim is meritless. While Defendant suggests that *Furman* compels the retroactive application of any alleged change in law, this is not true. As the United States Supreme Court has explained:

> Together, our decisions in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (per curiam), and *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), establish that a state capital sentencing system must: 1) rationally narrow

> the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. *See id.*, at 189, 96 S. Ct. 2909. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. *See Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality opinion) (citing *Zant v. Stephens*, 462 U.S. 862, 875–876, n.13, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)).

Marsh, 548 U.S. at 173-74. Thus, the United States Supreme Court has directly explained the two requirements that *Furman* actually imposes and neither of them is retroactive application of any alleged change in law. Defendant's claim to the contrary is meritless and should be rejected.

Additionally, the United States Supreme Court has repeatedly held that the retroactivity of changes in law is not even a constitutional issue at all. *Solem v. Stumes*, 465 U.S. 638, 642 (1984); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932); *see also Griffith v. Kentucky*, 479 U.S. 314, 320 (1987); *United States v. Johnson*, 457 U.S. 537, 542 (1982). Moreover, the United States Supreme Court has held that its own decisions are not retroactive unless certain exceptions are met. *Teague v. Lane*, 489 U.S. 288 (1989). In fact, the Court has gone so far as to hold that even a change in law that occurs before a conviction is final will

not entitle a defendant to federal habeas relief if the change occurs after the state court has resolved an issue. *Greene v. Fisher*, 132 S. Ct. 38 (2011). Thus, Defendant's claim that it is unconstitutional not to apply any alleged change in law retroactively is meritless. The denial of the claim concerning *Porter* should be affirmed.

Defendant further suggests that he is being denied the same opportunity to pursue his claim of ineffective assistance of counsel that others were given. However, Defendant was permitted to attempt to show the federal courts that this Court's decision in his case met the federal habeas standard. The federal district court simply determined that the argument that this Court unreasonably applied *Strickland* in his case was meritless. *Franqui v. Florida*, 2008 WL 2747093, *20 (S.D. Fla. Jul. 10, 2008. The Eleventh Circuit found Defendant's arguments so frivolous that it refused to allow Defendant to appeal, and the United States Supreme Court denied certiorari. *Franqui v. Florida*, 131 S.Ct. 1018 (2011); Order Denying Certificate of Appealability, *Franqui v. Florida*, Case No. 08-16389-P (11th Cir. May 18, 2010). The mere fact that Defendant was not successful does not indicate that he did not receive the same process as other. The denial of the *Porter* claim should be affirmed.

II. THE UNTIMELY, INSUFFICIENTLY PLEAD, PROCEDURALLY BARRED AND MERITLESS CLAIM REGARDING THE ABREU AFFIDAVIT WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred in denying his claim that an affidavit from Pablo Abreu regarding his testimony during the sentencing hearing in the Hialeah case constituted newly discovered evidence showing that the State withheld material evidence or presented false testimony regarding his culpability in the Hialeah case. However, the lower court properly denied this claim because it was untimely, procedurally barred, insufficiently plead and meritless.

As this Court has held, for a claim to be properly asserted in an untimely and successive motion for post conviction relief, a defendant must allege and prove that the claim was based on newly discovered evidence and that the claim is being presented within one year of when that evidence could have been discovered through an exercise of due diligence. *Jimenez v. State*, 997 So. 2d 1056, 1063-64 (Fla. 2008). Moreover, this Court has held that a claim that is allegedly based on newly discovered evidence is not even sufficiently plead unless a defendant alleges how and when he learned of the information. *Geralds v. State*, 37 Fla. L. Weekly S71, S77 (Fla. Sept. 16, 2010); *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008); *Hunter v. State*, 29 So. 3d 256, 267 (Fla. 2008).

Here, Defendant made no attempt to explain how or when the evidence was discovered. Instead, he merely noted that Abreu had executed an affidavit at some point and that Abreu had testified at an evidentiary hearing in the Hialeah case about the affidavit. (PCR2. 71-75) In fact, he did not even attach the affidavit or the transcript of the evidentiary hearing testimony from the Hialeah case, even though he was required to do so by Fla. R. Crim. P. 3.851(e)(2)(C)(iii). Since Defendant failed to plead the timeliness of his motion sufficiently, the lower court properly summarily denied this claim. *Geralds*, 37 Fla. L. Weekly at S77. It should be affirmed.

Moreover, Defendant's failure to plead these facts and attach these documents does not appear to be a matter of mere oversight. Instead, it appears to have been a blatant attempt to mislead the courts about the fact that this claim was timely barred. As this Court has already found, the Abreu affidavit was executed on March 29, 2000. *San Martin v. State*, 995 So. 2d 247 (Fla. 2008). As this Court has also previously found, the *Huff* hearing regarding the claim based on this affidavit was held on January 8, 2001, Defendant was granted permission to participate in the evidentiary hearing regarding the claim based on the affidavit on January 7, 2002, and Abreu testified regarding this claim on December 18, 2002. *Franqui v. State*, 59

So. 3d 82, 89, 90 (Fla. 2011). Given these circumstances, it is clear that Defendant had known of the affidavit for more than eight years before he filed the instant successive motion on November 29, 2010. As such, the lower court also properly summarily denied this claim as untimely. *Jimenez v. State*, 997 So. 2d at 1063-64. It should be affirmed.

Further, the lower court also properly denied the claim because it is procedurally barred. As this Court had held, a claim brought in a successive motion for post conviction relief is procedurally barred when the basis for the claim was available at the time the defendant filed an earlier motion for post conviction relief. *Johnson v. Singletary*, 647 So. 2d 106, 109 (Fla. 1994)("Successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed."); *see also Phillips v. State*, 894 So. 2d 28, 42 (Fla. 2004); *Wright v. State*, 857 So. 2d 861, 869 (Fla. 2003); *King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002); *Foster v. State*, 614 So. 2d 455, 458 (Fla. 1992); *Card v. State*, 512 So. 2d 829, 830-31 (Fla. 1987); *Christopher v. State*, 489 So. 2d 22, 24 (Fla. 1986). In fact, this Court has held that it is proper to refuse to allow a claim to be added to an initial

motion for post conviction that is still pending when the basis for the claim was available when the original version of the motion for post conviction relief was filed. *Lugo v. State*, 2 So. 3d 1, 19-20 (Fla. 2003).

Here, Defendant filed his initial motion for post conviction relief on April 7, 2003. (PCR. 100-61) By that time, the Abreu affidavit had been executed, Defendant had been granted permission to participate in an evidentiary hearing regarding that affidavit and the evidentiary hearing at which Abreu testified regarding the affidavit had been held. *Franqui*, 59 So. 3d at 89, 90. Thus, Defendant clearly knew of the affidavit and any claim based on it was clearly available when Defendant filed his initial motion for post conviction. As such, this claim was also procedurally barred. *Johnson*, 647 So. 2d at 109; *see also Phillips*, 894 So. 2d at 42; *Wright*, 857 So. 2d at 869; *King*, 808 So. 2d at 1246; *Foster*, 614 So. 2d at 458; *Card*, 512 So. 2d at 830-31; *Christopher*, 489 So. 2d at 24. The denial of the claim should be affirmed.

Moreover, the lower court properly denied the claim because it is also meritless. Defendant's assertion regarding how the affidavit is relevant to this proceeding is that it somehow reduced Defendant's culpability in the Hialeah case. However, this Court has already rejected that claim in the Hialeah case

itself:

C. *Brady* and *Giglio* Claims Relating to the Testimony of Pablo Abreu

1. Standards of Review for *Brady* and *Giglio* Claims

[Defendant] next contends that the State withheld favorable, material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and knowingly presented false testimony in violation of *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), concerning witness Pablo Abreu. *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. *Mordenti v. State*, 894 So. 2d 161, 168 (Fla. 2004). [FN16] To demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *see also Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). To meet the materiality prong of *Brady*, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280, 119 S. Ct. 1936 (quoting *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985)). "As with prejudice under *Strickland*, materiality under *Brady* requires a probability sufficient to undermine confidence in the outcome." *Duest v. State*, 12 So. 3d 734, 744 (Fla. 2009). The materiality inquiry is not satisfied by simply discounting the inculpatory evidence in light of the undisclosed evidence and determining if the remaining evidence is sufficient. "Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290, 119 S. Ct. 1936 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)); *see also Rivera v. State*, 995 So. 2d 191, 203 (Fla. 2008) (same); *Way*, 760 So. 2d at 913 (same). "It is the net effect of the

evidence that must be assessed." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). "Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review." *Way*, 760 So. 2d at 913.

In *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the Supreme Court held that the prosecutor is prohibited from knowingly presenting false testimony against the defendant. In order to prove a *Giglio* violation, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Tompkins v. State*, 994 So. 2d 1072, 1091 (Fla. 2008)(quoting *Rhodes v. State*, 986 So. 2d 501, 508–09 (Fla.2008)); *accord Hurst v. State*, 18 So. 3d 975, 991 (Fla. 2009). If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. *Tompkins*, 994 So. 2d at 1091. The State must then "prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." *Id.* (quoting *Rhodes*, 986 So. 2d at 509). Under the harmless error test, the State must prove "'there is no reasonable possibility that the error contributed to the conviction.'" *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006) (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986)).

Both *Giglio* and *Brady* claims present mixed questions of law and fact. *See Sochor v. State*, 883 So. 2d 766, 785 (Fla. 2004). Thus, as to findings of fact, we will defer to the lower court's findings if they are supported by competent, substantial evidence. *See id.* "[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." *Hurst*, 18 So. 3d at 988 (quoting *Lowe v. State*, 2 So. 3d 21, 30 (Fla. 2008)). We review the trial court's application of the law to the facts *de*

novo. *Hurst*, 18 So. 3d at 988. It is within this framework that we now analyze [Defendant's] *Brady* and *Giglio* claims pertaining to the testimony of Pablo Abreu.

2. Discussion

[Defendant] was granted an evidentiary hearing on his claims that the State withheld favorable evidence concerning codefendant Pablo Abreu's penalty phase testimony in violation of *Brady*, and that the State knowingly presented Abreu's false testimony in violation of *Giglio* during the penalty phase to support the cold, calculated, and premeditated aggravator. We turn first to [Defendant's] *Brady* claim.

During the penalty phase of trial, Abreu testified through an interpreter that a couple of days before the shooting, a discussion among [Defendant], Abreu, and San Martin occurred in which [Defendant] explained the plan to rob the Cabanases and the need to steal two cars to facilitate that plan. When asked what [Defendant] said at that time about Lopez, the Cabanases' unofficial bodyguard, Abreu testified: "First he was going to crash against him and throw him down the curb side, and then he would shoot at him, but he didn't do it that way." When asked if the shooting of Lopez was planned before the incident, Abreu stated, "Yes, when we went around," referring to the discussion that ensued when the three codefendants went out before the day of the robbery to steal two vehicles. The trial court found in the sentencing order that the murder was cold, calculated, and premeditated in part because the robbery was carefully planned in advance and because, sometime before the robbery took place, the defendants decided that [Defendant] would have to shoot Lopez.

At the evidentiary hearing, Abreu testified in response to questions by codefendent San Martin's counsel that he reached a plea agreement with the State in which he would avoid a possible death sentence in exchange for testifying against both [Defendant] and San Martin. Abreu reiterated that he, [Defendant], and San Martin made a plan to steal two

cars and rob the Cabanases. The vehicles were stolen the day before the robbery and parked for use the next day. Abreu testified that the day the Suburbans were stolen, there was a discussion of the robbery but not about killing anyone. Abreu testified that sometime before the robbery took place (from thirty minutes up to several hours), while riding around in his van with [Defendant] and San Martin to scout out possible escape routes, Abreu heard [Defendant] say that he would "take care of" the bodyguard (Lopez) by running his car off the road, and that Abreu and San Martin would take the money. Abreu also testified at the evidentiary hearing that [Defendant] said the bodyguard was going to shoot at him and he was going to shoot back. According to Abreu, [Defendant] added, "I know that he's going to fire at me because he's the bodyguard and I'm going to shoot also." However, when asked if the bodyguard shot at [Defendant], Abreu said, "Well, I would imagine, right." [FN17] The postconviction court denied [Defendant's] *Brady* claim as follows:

> San Martin claims that a *Brady* violation occurred because exculpatory evidence favorable to San Martin (and the Defendant) was suppressed by the State and the State presented false or misleading evidence to the jury. . . .
>
> Based on the record and the testimony of the witnesses during the evidentiary hearing, this Court finds that San Martin (and the Defendant) [have] failed to establish any of the *Brady* elements. As discussed above, Pablo Abreu testified that he was always truthful and that no one told him how to testify. The difference between Mr. Abreu's testimony during the penalty phase and the evidentiary hearing was slight, a mere inconsistency. No evidence was presented that the State suppressed or failed to disclose any evidence to San Martin or the Defendant. Because San Martin's motion and the Defendant's motion and the evidence failed to establish a *Brady* violation, this claim is denied. This claim is also denied for the Defendant for the

same reasons.

We agree with the postconviction court that no evidence supports the allegation that the State suppressed or withheld favorable evidence. We also find that even if this testimony could be considered to conflict with Abreu's trial testimony—in which Abreu said that [Defendant] planned the day before the attempted robbery to kill Lopez—there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 527 U.S. at 280, 119 S. Ct. 1936 (quoting *Bagley*, 473 U.S. at 676, 105 S. Ct. 3375). Regardless of whether [Defendant's] plan to kill Lopez was made in the days before the shooting or in the hours before the shooting, the evidence is sufficient to establish the CCP aggravator. Even without the CCP aggravator, the trial court had before it competent, substantial evidence of other aggravating circumstances: prior violent felony conviction for aggravated assault and armed robbery, and the merged aggravators of murder while engaged in the commission of an attempted robbery and for pecuniary gain, weighed against only two nonstatutory mitigators.

Under the circumstances, even if Abreu had testified at the penalty phase as he did in the evidentiary hearing, there is no reasonable probability that the proceeding would have resulted in a life sentence—that is, our confidence in the outcome is not undermined by Abreu's evidentiary hearing testimony. See *Duest*, 12 So. 3d at 744 (reiterating that *Brady* requires a reasonable probability of a different result sufficient to undermine confidence in the outcome). Thus, we affirm the circuit court's denial of [Defendant's] *Brady* claim.

We turn now to [Defendant's] *Giglio* claim, in which he contends that the State knowingly presented false, material testimony by Abreu during the penalty phase. Although there were some inconsistencies in Abreu's testimony about when the discussion of killing Lopez occurred, the postconviction court found them not to be material and denied [Defendant's] *Giglio* claim as follows:

Mr. Abreu testified during the penalty phase that a meeting regarding stealing cars to be used during the robbery took place a couple of days before the shooting. When asked about what the Defendant [FN18] was going to do about the bodyguard (the victim, Raul Lopez), Mr. Abreu responded, “First he was going to crash against him and throw him down the curb side, and then he would shoot him, but he didn’t do it that way.” Trial Transcript, pp. 2717–2718. Later in his testimony, Mr. Abreu was asked about the discussion he had with the Defendant and San Martin about killing the bodyguard that occurred before the cars were stolen. Mr. Abreu indicated that [Defendant] told him that he was going to run the bodyguard off the road then shoot him. Trial Transcript, pp. 2727–2728.

During the evidentiary hearing, Mr. Abreu stated that the killing was discussed the day of the robbery while he, the Defendant and San Martin were driving around in his van before the robbery took place. Mr. Abreu testified on direct that this discussion occurred thirty minutes before the robbery. On cross-exam, he testified that this discussion could have taken place several hours before the robbery. Mr. Abreu testified that his testimony on this subject had always been consistent and truthful. Trial Transcript, p. 60, 66–68, 102–104.

....

Based on the record and the testimony of the witnesses at the evidentiary hearing, this Court finds that San Martin has failed to establish that the state forced Pablo Abreu to present perjurious testimony to the jury. During the penalty phase, the question asked about what [Defendant] was going to do with the bodyguard did not actually have a time frame. San Martin’s claim assumes that

the discussion regarding stealing the cars which occurred several days before the robbery included the interchange about killing the bodyguard. Mr. Abreu's testimony during the penalty phase does seem to indicate that the discussion about killing the bodyguard took place before the cars to be used in the crime were stolen. The testimony elicited from Abreu during the evidentiary hearing indicates that the discussion about the killing took place between thirty minutes and several hours before the robbery and the killing of the bodyguard. San Martin, at most, has shown that the difference between Mr. Abreu's trial testimony and the testimony during the evidentiary hearing was an arguable inconsistency. This Court finds that San Martin and the Defendant did not prove that Mr. Abreu's testimony was false. Inconsistencies are insufficient to show that testimony is false. *Maharaj v. State*, 778 So. 2d 944 (Fla. 2000).

Marilyn Milian, the trial prosecutor testified during the evidentiary hearing that she only asked witnesses to truthfully relate what they knew. She stated, "Under no circumstances in this case or any other case would I ever tell a defendant who is flipping what to testify to or suggest to him that if he doesn't say it my way he won't have a plea agreement or force anybody to testify contrary to what it is truthfully happened." Transcript, p. 171. She further stated, "That is all we did and anything else would not only be unethical but suborning perjury. I never did that in my career and certainly not on this case either." Transcript, p. 172. . . . This Court finds that San Martin and the Defendant failed to prove that the State knew any testimony was false or that the State knowingly presented perjurious testimony.

> The inconsistency in Pablo Abreu's testimony regarded the time that the plan to kill the bodyguard was discussed. During the penalty phase, Mr. Abreu testified that the discussion took place before the cars were stolen and perhaps several days before the robbery. During the evidentiary hearing, Mr. Abreu testified that the discussion took place thirty minutes to several hours before the robbery, after the cars had been stolen. In either event, the time was sufficient to support the CCP aggravating circumstance. . . . This Court finds that San Martin (and the Defendant) [have] failed to prove that Mr. Abreu's statement was material.

We agree that competent, substantial evidence supports the court's finding that the prosecutor did not knowingly present false, material testimony by Abreu. Abreu testified at the evidentiary hearing that he told the truth at trial, and that no one threatened him, forced him, or told him how to testify. The prosecutor testified at the evidentiary hearing that she did not knowingly present any false testimony. The inconsistencies shown between Abreu's testimony in the penalty phase and his testimony at the evidentiary hearing do not prove that the penalty phase testimony was false. *See Maharaj*, 778 So. 2d at 956 ("To demonstrate perjury, Maharaj must also show more than mere inconsistencies.").

Moreover, the inconsistencies are not material. "In order to find the CCP aggravating factor, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification." *Franklin v. State*, 965 So. 2d 79, 98 (Fla. 2007). Both versions of Abreu's testimony meet these requirements. Both versions of Abreu's testimony show that [Defendant] had a plan in place substantially in advance of the attempted robbery to shoot Lopez and

that he took a weapon with him for that purpose.

The last element of CCP is the lack of any pretense of moral or legal justification. Nothing in Abreu's evidentiary hearing testimony, had it been presented by the State at trial, would have supported a finding of a pretense of moral or legal justification. Abreu's testimony at the evidentiary hearing that [Defendant] said the bodyguard would be shooting at him so he would shoot back does not suggest a moral or legal justification for the shooting. Abreu's evidentiary hearing testimony concerning when he heard [Defendant's] shot did not conflict with his trial testimony or with the uncontradicted trial testimony of the expert that Lopez did not fire his weapon. Even if the prosecutor should have presented the latter version of Abreu's testimony at trial, we find that that there is no reasonable possibility that the error contributed to the imposition of the death sentence. *See Guzman*, 941 So. 2d at 1050 (quoting *DiGuilio*, 491 So. 2d at 1138). Thus, relief is also denied on [Defendant's] *Giglio* claim.

* * * *

[FN16] "[T]he duty to disclose such evidence is applicable even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)).

[FN17] Abreu testified at trial that immediately upon stopping his own vehicle in front of the Cabanases, he heard [Defendant's] shot. Firearms identification expert Robert Kennington testified at trial that Lopez's weapon had not been fired. Abreu admitted at trial that when he initially told police Lopez fired his gun first, that was not true. Abreu also testified at the penalty phase that on the day of the attempted robbery, [Defendant] supplied the handguns. The testimony Abreu gave at the evidentiary hearing did not directly conflict with his trial testimony or that of the expert on these points.

> [FN18] The order was entered in the instant case and applies to [Defendant's] claims even though there are references in the order to claims of the codefendant San Martin. References in the order to "the Defendant" are to [Defendant] and appear in the original court order.

Franqui, 59 So. 3d at 101-06. Since this Court has already determined that Abreu's affidavit did not affect Defendant's culpability in the case that it actually concerned, the lower court properly determined that this claim did not show any effect on the consideration of the weight to be assigned to consideration of the Hialeah convictions as part of the prior violent felony aggravator. It should be affirmed.

Moreover, reliance on the rejection of this claim in the case to which the affidavit referred was entirely proper. Both this Court and the United States Supreme Court have recognized that a defendant is not permitted to attack the validity of a prior conviction during a sentencing proceeding where the prior conviction is being used to aggravate the sentence for a new crime. *Custis v. United States*, 511 U.S. 485 (1994); *Finney v. State*, 660 So. 2d 674, 684 (Fla. 1995)("[I]t is not appropriate to go behind the jury's verdict in the prior case and attempt to retry those convictions."); *see also Lukehart v. State*, 70 So. 3d 503, 513 (Fla. 2011). Instead, both this Court and the United States Supreme Court have required a defendant to obtain a ruling regarding the propriety of the prior conviction in the

case in which that conviction was obtained and then seek post conviction relief based on that ruling in the case in which the prior conviction was used to enhance the sentence.[6] *Johnson v. United States*, 544 U.S. 295, 305 (2005); *Daniels v. United States*, 532 U.S. 374, 382 (2001); *Custis*, 511 U.S. at 497; *Taylor v. State*, 3 So. 3d 986, 999-1000 (Fla. 2009); *Phillips v. State*, 894 So. 2d 28, 36 (Fla. 2004). In fact, the United States Supreme Court has held that, absent a denial of counsel in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963), a defendant cannot obtain collateral relief based on a challenge to a prior conviction used to enhance a sentence "once [the prior] conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully)."). *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 403 (2001); *Daniels*, 532 U.S. at 382-83. In fact, in *Blanco v. Sec'y, Florida Dept. of Corrections*, 2012 WL 3081313 (11th Cir. Jul. 31, 2012), the case Defendant relies upon to assert that this claim can be brought in this proceeding, the Eleventh Circuit ultimately denied because the record of the proceedings regarding the prior

[6] The Eleventh Circuit had long ago recognized this same requirement. *See Stano v. Butterworth*, 51 F.3d 942, 947 (11th Cir. 1995).

conviction showed the claim was meritless.[7] *Id.* at *24-*26. Given these circumstances, the fact that the claim regarding the Abreu affidavit has already been determined to be meritless in the Hialeah case shows that it is also meritless here. The lower court properly denied this claim and should be affirmed.

Further, the lack of merit of the claim is all the more clear when one considers the evidence regarding the Hialeah case that was actually presented at resentencing in this case. While Defendant acts as if Abreu's testimony or its content were presented at resentencing, this is not true. Instead, the evidence the State presented regarding the Hialeah case consisted only of a stipulation that Defendant had been convicted of the first degree murder of Mr. Lopez and the attempted armed robbery and the testimony of Det. Albert Nabut. (T. 779-810) Det. Nabut's testimony regarding this case was limited to the basic facts of the crime and the content of Defendant's confession. (T. 784-804)

Regarding the facts of the crime, Det. Nabut related that the Cabanases had left the bank after making a routine trip to get money for their check cashing business when they ambushed by

[7] The State would noted that the propriety of the statements in the *Blanco* opinion regarding the ability to challenge the validity of a prior conviction that had not been invalidated during a sentencing hearing is the subject of a rehearing the State filed in the Eleventh Circuit.

individuals in two suburbans, that a gun fight ensued, that Mr. Lopez, who was following the Cabanases in his own truck, was killed by a bullet from the same gun that killed Off. Bauer and that the suburbans were subsequently found with damaged ignitions. (T. 784-92) Regarding the content of Defendant's confession, Det. Nabut related Defendant's statements regarding the planning of the robbery of the Cabanases, the stealing of the suburbans, Defendant's actions in placing the getaway car before the robbery, his observation of the Cabanases as they went to the bank and left, his actions in cutoff the Cabanases, his claim that the Cabanases started the gunfight, his claim that Mr. Lopez fired at him, his claim that he returned fire in Mr. Lopez's direction while ducking and his actions in returning to the getaway car after running out of bullets. (T. 796-802)

On cross, Defendant elicited that Defendant had never admitted to killing Mr. Lopez and had stated that he did not believe he had hit anybody in firing his gun. (T. 811) He also elicited that Defendant had said that the plan to rob the Cabanases did not include shooting at all, that the shooting occurred because the robbery did not go according to plan and that Defendant claimed to have fired while ducking. (T. 813-14)

As such, the resentencing jury never heard Abreu's testimony about the plan and instead heard Defendant's claim

that he never intend to shoot and only did so because Mr. Lopez fired at him. Thus, the evidence Defendant claims the jury should have heard regarding the Hialeah case was consistent with the evidence the jury actually heard. As such, the lower court properly denied this claim because this Court's prior determination that this claim was meritless in the Hialeah case made the claim meritless in this case. It should be affirmed.

Additionally, it should be remembered that the prior violent felony aggravator in this matter was not supported merely by Defendant's conviction for the murder of Mr. Lopez. Instead, it was also supported by Defendant's convictions for the armed robbery of Ms. Watson, the aggravated assault of Ms. Hadley, the attempted armed robbery of Mr. Santos, the aggravated assault of Mr. Santos, the armed kidnapping of Mr. Van Ness, the armed robbery of Mr. Van Ness and the attempted armed robbery of the Cabanases. (RSR. 158-62) This Court has refused to grant relief even when an improper conviction was considered in support of the prior violent felony aggravator when there were other valid convictions supporting that aggravator. *Franqui v. State*, 699 So. 2d 1312, 1323, 1328 (Fla. 1997)(finding consideration of convictions for attempted felony murder that this Court had determined was not a crime and vacated was harmless error); *Sims v. State*, 602 So. 2d 1253,

1257-58 (Fla. 1992)(no prejudice from trial counsel's failure to challenge consideration of "unsubstantiated common law robbery conviction").

Here, Defendant acknowledges that the information he claims should have been presented did not even invalidate his conviction for the murder of Mr. Lopez. Instead, he merely asserted that it would have demonstrated that Defendant did not plan to kill Mr. Lopez during the planned robbery and that his reason for deciding to shot Mr. Lopez was to prevent him from inferring in his plan to rob the Cabanases.[8] Given all of these circumstances, the lower court properly denied this untimely, insufficiently plead, procedurally barred and meritless claim. It should be affirmed.

[8] While Defendant and Abreu characterize these actions as "self-defense," that characterization is legally incorrect as Defendant was attempting to commit an armed robbery and could not legally act in self defense. §776.041(1), Fla. Stat.; §776.08, Fla. Stat.; *see Holland v. State*, 916 So. 2d 750, 761 (Fla. 2005)

III. THE LOWER COURT PROPERLY DENIED DEFENDANT'S UNTIMELY, BARRED, INSUFFICIENTLY PLEAD AND MERITLESS RETARDATION CLAIM.

Finally, Defendant contends that the lower court erred in summarily denying his claim that he is mentally retarded. In support of this argument, Defendant cites to Dr. Toomer's pretrial report as "establish[ing] he suffers from substantial limitations of present functioning and/or has significant subaverage general intellectual functioning." Initial Brief at 55. He alleges that Defendant had obtained an IQ score of less than 60 on a Revised Beta IQ test Dr. Toomer had administered. *Id.* He then suggests that because this Court had found these assertions sufficient to merit an evidentiary hearing in the Hialeah case, they should have been considered sufficient hearing. Recognizing that the claim of retardation was denied after the evidentiary hearing in the Hialeah case, Defendant then suggests that the holding in the Hialeah case should be ignored. However, the lower court properly denied this claim because it is untimely, procedurally barred, insufficiently plead and meritless.

As this Court has held, a claim cannot be raised in an untimely, successive motion for post conviction relief unless it is based on newly discovered evidence or a fundamental, retroactive change in law. *Jimenez*, 997 So. 2d at 1063-64.

When the claim is based on a fundamental, retroactive change in law, the claim is still untimely if it is not filed within one year of when mandate issued in the case that held the change in law to be retroactive. *Dixon v. State*, 730 So. 2d 265 (Fla. 1999). Here, Defendant's claim that his sentence is unconstitutional is based on *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court determined that *Atkins* applied retroactively in *Phillips v. State*, 894 So. 2d 28 (Fla. 2004). Mandate in that case issued on February 14, 2005. Defendant did not file his present motion until November 29, 2010. As this is more than five years after the issuance of mandate in *Phillips*, the lower court properly determined that this claim was untimely under Fla. R. Crim. P. 3.851. It should be affirmed.

Moreover, the claim is also time barred under Fla. R. Crim. P. 3.203. When this Court adopted Fla. R. Crim. P. 3.203, it gave all defendants who had already been sentenced to death until 60 days after October 1, 2004, to raise an *Atkins* claim pursuant to that rule. *Amendments to Florida Rules of Criminal Procedure and Florida Rules*, 875 So. 2d 563, 570 (Fla. 2004). Here, Defendant did not raise his claim within that time period. As such, the lower court also properly determined that the claim was untimely under that rule. *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006). It should be affirmed.

Moreover, the claim is also procedurally barred. As noted above, a claim brought in a successive motion for post conviction relief is procedurally barred when the basis for the claim was available at the time the defendant filed an earlier motion for post conviction relief. *Johnson*, 647 So. 2d at 109; *see also Phillips*, 894 So. 2d at 42; *Wright*, 857 So. 2d at 869; *King*, 808 So. 2d at 1246; *Foster*, 614 So. 2d at 458; *Card*, 512 So. 2d at 830-31; *Christopher*, 489 So. 2d at 24. Here, *Atkins* was decided on June 30, 2002. *Atkins*, 536 U.S. at 304. Defendant did not file his initial motion for post conviction relief April 7, 2003. (PCR. 100-61) As such, Defendant could have raised any claim based on *Atkins* in that motion and was procedurally barred from doing so in a successive motion.[9] The lower court properly denied this claim and should be affirmed.

In fact, this Court has previously found an *Atkins* claim barred under similar circumstances. In *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006), the defendant had filed a successive motion for post conviction relief in 2003, that did not raise an *Atkins* claim. When the defendant's death warrant was signed in 2005, the defendant filed another successive motion for post

[9] In fact, Defendant actually cited to *Atkins* in that motion. (PCR. 110 n.2) However, Defendant subsequently disclaimed any intention of raising a retardation claim in his reply to the State's response, at the *Huff* hearing on the initial motion and during the evidentiary hearing regarding the initial motion. (PCR. 165, PCR-SR. 178, 525-28)

conviction relief that did include an *Atkins* claim. *Id.* at 582, 584. The claim was based primary on a report from 1989. *Id.* at 584. This Court determined that the claim was procedurally barred under Fla. R. Crim. P. 3.851(e)(2)(B). *Id.* Since Defendant here filed his initial motion for post conviction relief after *Atkins* was decided and his claim is based entirely on a report from 1993, the lower court also properly denied this claim as procedurally barred under *Hill*. It should be affirmed.

Additionally, the lower court properly denied this claim because it was insufficiently plead. As this Court has repeated held, a claim of retardation has three elements: (1) significantly subaverage general intellectual functioning as demonstrated by an adult IQ score of 70 or below, (2) concurrent deficits in adaptive functioning and (3) manifestation before the age of 18. *Franqui*, 59 So. 3d at 91; *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007); *see also Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009); *Phillips v. State*, 984 So. 2d 503, 509 (Fla. 2008); *Jones v. State*, 966 So. 2d 319, 325 (Fla. 2007); *Johnston v. State*, 960 So. 2d 757, 761 (Fla. 2006); *Brown v. State*, 959 So. 2d 146, 148-49 (Fla. 2007); *Burns v. State*, 944 So. 2d 234, 245 (Fla. 2006); *Rodgers v. State*, 948 So. 2d 655, 666-67 (Fla. 2006); *Trotter v. State*, 932 So. 2d 1045, 1049 (Fla. 2006). A claim of retardation fails unless all three

elements are shown. *Franqui*, 59 So. 3d at 91. Further, in adopting a definition of retardation, both this Court and the Legislature required that the IQ score used to claim retardation be obtained on a designated IQ test. §921.137(1), Fla. Stat.; Fla. R. Crim. P. 3.203(b). The only IQ tests that have been designated are the Weschler Intelligence Scale and the Stanford-Binet Intelligence Scale. Fla. Admin. Code 65G-4.011.

Here, Defendant did not allege that he could satisfy all of the elements of retardation. Instead, he alleged that he could meet either of the first two elements (PCR2. 68-69) While he cited an IQ score of less than 60, Defendant admits that IQ score was obtained on a Revised Beta IQ test. Initial Brief at 55. The Revised Beta IQ test is not a qualified IQ test to determine retardation. Fla. Admin. Code 65G-4.011. Given these circumstances, the claim was insufficiently plead and properly denied. The lower court should be affirmed.

Defendant's only attempt to show that he did sufficiently plead his claim is to note that this Court granted him an evidentiary hearing regarding a retardation claim in the Hialeah case. However, this Court granted the evidentiary hearing in the Hialeah case because Defendant had brought the claim pursuant to Fla. R. Crim. P. 3.203. *Franqui v. State*, 14 So. 3d 238, 238 (Fla. 2009). Pursuant to Fla. R. Crim. P. 3.203(e), an

evidentiary hearing is required on every motion filed pursuant to that rule. Here, not only is Defendant's motion untimely pursuant to Fla. R. Crim. P. 3.203 but also Defendant made no attempt to comply with that rule. Pursuant to Fla. R. Crim. P. 3.203(c)(2), a defendant who had been evaluated is required to name the experts who evaluated him and attach copies of the experts' reports.[10] Moreover, any expert appointed after the filing of the motion is required to be a court-appointed expert and both parties are entitled to attend any evaluation the court-appointed expert conducts. Fla. R. Crim. P. 3.203(c)(2)-(4).

Here, Defendant did not attach the report of Dr. Toomer or the two experts who had evaluated him for retardation in connection with the Hialeah case. (PCR2. 44-77) Moreover, Defendant did not seek the appointment of court-appointed experts pursuant to Fla. R. Crim. P. 3.203, and instead, proposed that he was entitled to hire his own expert to conduct an evaluation without allowing the State to participate. (PCR2. 294-96) Given these circumstances, the lower court properly denied this claim because it was insufficiently plead. It should be affirmed.

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[10] This Court has previously interpreted this provision as requiring the attachment of all reports from experts who had evaluated the defendant's mental state in an unpublished order. *Haliburton v. State*, 935 So. 2d 1219 (Fla. 2006).

Moreover, consideration of what occurred in the Hialeah case shows the importance of requiring that retardation claims be sufficiently plead before ordering an evidentiary hearing. After this Court relinquished jurisdiction, Defendant was forced to disclose that he had been evaluated for retardation by Dr. Block-Garfield before he chose to appeal the denial of post conviction relief without obtaining an order regarding his retardation claim. *Franqui*, 59 So. 3d at 90-91. In her report, Dr. Block-Garfield found that Defendant was not retarded because his IQ scores on two qualifying IQ tests she had administered were too high and because Defendant did not have significant deficits in his adaptive behavior as an adult. (PCR2. 179-84) Defendant was then evaluated by Dr. Suarez, who also found that Defendant was not retarded because he did not satisfy any of the three elements of retardation. (PCR2. 152-78) Since Defendant had no evidence to support a single element of retardation, the evidentiary hearing ended up consisting of nothing more than the parties stipulating to the lower court's consideration of the reports of Dr. Block-Garfield and Dr. Suarez.[11] *Franqui*, 59 So. 3d at 90. Given these circumstances, the conduct of the Hialeah case demonstrates the need for requiring a defendant

[11] Given the content of the evidentiary hearing, Defendant's present suggestion that "ample evidence of retardation" was presented at the evidentiary hearing, Initial Brief at 38 n.36, is simply false.

sufficiently plead his retardation claim. Since Defendant did not do so here, the claim was properly denied, and its denial should be affirmed.

Additionally, the lower court properly determined that the finding that Defendant was not retarded in the Hialeah case barred this claim. This Court has held that collateral estoppel applies to criminal cases in post conviction litigation even where the rule of procedure under which the post conviction claim is brought does not contain an independent bar. *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003). This Court has explained that collateral estoppel bars a claim "when 'the identical issue has been litigated between the same parties or their privies.' *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998). In addition, the particular matter must be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction. *See* [*Dept. of Health & Rehabilitative Services v.*] *B.J.M.*, 656 So. 2d [906,] 910 [(Fla. 1995)]." *McBride*, 848 So. 2d at 291.

Here, the requirements of application of collateral estoppel are met. Defendant in the Hialeah case is the same Defendant in this case, and the State of Florida is the same State of Florida in both cases. The issue in the Hialeah case was whether Defendant was retarded within the meaning of *Atkins*

such that imposition of the death penalty upon him was unconstitutional. *Franqui*, 59 So. 3d at 89-94. Further, to be retarded, a defendant must show that the condition manifested before he was 18. *Id.* at 91. The United States Supreme Court has recognized that it is unconstitutional to impose a death sentence for a crime committed before the defendant was 18, *Roper v. Simmons*, 543 U.S. 551 (2005). Further, this Court has recognized that the condition must then continue to exist until the time of the post conviction hearing. *Jones*, 966 So. 2d at 326-28. Thus, the issue of whether Defendant was retarded within the meaning of *Atkins* is the identical issue in both cases. Moreover, the claim was fully litigated and resulted in a final judgment. *Franqui*, 59 So. 3d at 89-94. Since the elements of collateral estoppel were met, the lower court properly determined that the decision that Defendant was not retarded in the Hialeah case barred Defendant from attempting to relitigate that issue in this matter. It should be affirmed.

In attempting to avoid the application of collateral estoppel, Defendant suggests that he should be able to relitigate the claim because he has a different attorney and a different judge would determine the issue. However, this Court has already determined that the fact that a defendant has a new attorney provides no basis for avoiding procedural bars to

litigating post conviction claims. *See Brown v. State*, 894 So. 2d 137, 153-54 (Fla. 2004). Moreover, one of the reason for the doctrine of collateral estoppel is to prevent a party from seeking inconsistent judgments for different judges on an issue. *See Allen v. McCurry*, 449 U.S. 90, 94, 95-96 (1980). Given these circumstances, Defendant's suggestion that collateral estoppel should not apply because he hopes that a different judge would be more favorably inclined to his position should be rejected.

These principles should apply with all the more force here. Defendant does not suggest that his other attorney's litigation of this claim was infirmed. He also did not suggest below that he had any new information that was not considered during the Hialeah case. Further, contrary to Defendant's suggestion, Judge Blake ruled both on the denial of the claim in this case and in the Hialeah case. (PCR2. 187-91, 295-96) Given these circumstances, the lower court properly determined that the rejection of this claim in the Hialeah case precluded Defendant from attempting to relitigate this issue in this case. It should be affirmed.

Defendant also suggests that collateral estoppel should not apply because the fact that Defendant was sentenced to death in the Hialeah case did not result in application of collateral

estoppel to impose a death sentence against him in this case. However, Defendant ignores that the requirements of collateral estoppel would not be met in determining whether a defendant should be sentenced to death for different crimes. As noted above, identity of issues is necessary for collateral estoppel to apply. *McBride*, 848 So. 2d at 291. As this Court has recognized, the determination of whether a defendant should be sentenced to death is based on "a reasoned judgment as to what the appropriate sentence should be in light of the nature of the aggravating and mitigating circumstances found to exist." *Franqui v. State*, 804 So. 2d 1185, 1193 (Fla. 2003). The existence of many of the aggravating circumstances depends on the facts of the crime. *See* §921.141(5)(c)-(m), Fla. Stat. Thus, whether a death sentence was appropriate on the facts of one crime and whether a death sentence was appropriate on the facts of a different crime is not the identical issue. However, whether a defendant is retarded within the meaning of *Atkins* is the same issue. Given these circumstances, Defendant's comparison of the issue regarding the applicability of the death penalty to two cases to the issue of retardation does not show that collateral estoppel does not apply. As such, the lower court properly applied collateral estoppel and should be affirmed.

CONCLUSION

For the foregoing reasons, the denial of the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email to **Martin J. McClain**, at martymcclain@earthlink.net, this 14th day of September 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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