IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,562

GEORGE PORTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

AMENDED REPLY BRIEF OF APPELLANT

AMY C. SETTLEMIRE
Assistant CCRC
Florida Bar No. 0788724
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Tampa, Florida 33619
813-740-3544

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

ARGUMENT IN REPLY

ARGUMENT I

NOTICE OF APPEAL

CCR counsel filed a Notice of Appeal within thirty days of receipt of the Order denying the motion for rehearing. While the order was dated June 7, 1996, CCR did not receive it until June 12, 1996. The Notice of Appeal was filed on July 12, 1996.

The State failed to take any action toward Mr. Porter's alleged untimely Notice of Appeal. More than two years after the Notice, the State now attempts to claim a jurisdictional bar based upon its own inaction. The State could have moved to dismiss or strike the Notice of Appeal in a timely manner but chose not to do so.

Moreover, Mr. Porter has a right to counsel. Authority for appointing counsel for post-conviction relief stems from the Due Process Clause of the Fifth Amendment to the United States Constitution. State v. Weeks, 166 So.2d 892 (Fla. 1964), Graham v. State, 372 so.2d 1363 (Fla. 1979); Russo v. Akers, 23 Fla. L. Weekly S597. Mr. Porter's claims are based on due process and therefore are constitutional claims. This Court must allow the Notice of Appeal to stand.

The State relies on Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) wherein the Court determined that Coleman had no constitutional right to counsel in a state habeas appeal so counsel on that appeal could not have been constitutionally ineffective. Id at 755-57. Here, Mr. Porter is

entitled to counsel as his due process rights are at issue. More importantly, to deny Mr. Porter's Notice of Appeal would be a fundamental miscarriage of justice. The prejudice to Mr. Porter is the ultimate prejudice: death.

This Court should allow the Notice of Appeal to stand as timely.

ARGUMENT II

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellee argues that Mr. Mr. Porter made conclusory allegations in support of this claim. In his motion to vacate judgment and sentence, Mr. Porter claimed that counsel failed to investigate and present mitigating evidence on his behalf. To support that claim, Mr. Porter outlined several of counsel's omissions and provided facts that illustrated counsel's ineffectiveness.

Employing the seminal standard of Strickland v. Washington, 466 U.S. 68, (1984), the well-known two-prong standard has been met. Mr. Porter has demonstrated not only deficient performance, but also that he was prejudiced by such deficiency. Moreover, there is nothing in the record to suggest that counsel's failure to present relevant information was strategy or tactic.

On page 25 of Appellee's Answer brief, Appellee argues that Mr. Porter's childhood is "insignificant". The sentencing phase of a trial affords the defendant the opportunity to present, nearly without bounds, mitigating evidence to the jury. This is the defense's opportunity to humanize the defendant and explain why the

defendant is the person of today: life experiences. While the State might not like or agree with this procedure, it is inherent in each case where the death penalty is sought. To trivialize Mr. Porter's life history as "insignificant" is submitting one's judgment over what a juror might believe significant.

ARGUMENT III

THE HUFF HEARING CLAIM

At the Huff hearing on Mr. Porter's 3.850 motion, his counsel claimed that he could not argue the claims contained in claim 11 of the 3.850 motion. (R260). That was because counsel had not prepared the claim and did not know the particulars of the claim because it was a pro se claim. Mr. Porter prepared the claim and he alone knew what needed to be argued.

Additionally, Mr. Porter had previously filed a pro se motion to determine whether his collateral counsel was competent. (PC-R2. 199-255). This motion alleged specific allegations of incompetency of CCR counsel. Mr. Porter requested to be present for the Huff hearing because of his concerns about counsel's ability to represent him.

The trial court denied the pro se motion without conducting a Nelson inquiry. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1974). In finding CCR counsel competent, counsel should have adopted the pro se motion and discussed it with Mr. Porter before it was argued.

This cause should be remanded to the circuit court for a Huff

hearing.

ARGUMENT IV

DENIAL OF AN EVIDENTIARY HEARING

Mr. Porter should be given an evidentiary hearing on all of the sub-issues contained therein. As to the record, Mr. Porter doesn't claim that the inaccurate record caused him to enter a plea. The incomplete record claim is imperative because any court reviewing the record cannot give a proper ruling on a record which is inaccurate and incomplete. State v. Franklin, 618 So.2d 171 (Fla. 1993); Hamilton v. State, 573 So.2d 109 (Fla. 4th DCA 1991).

This claim is properly raised under newly discovered evidence because it was unknown to Mr. Porter and post-conviction counsel until after the direct appeal. Therefore, the lower court incorrectly ruled that this claim is procedurally barred. Ragsdale v. State, 720 So.2d 203 (Fla. 1998); Mordenti v. State, 711 So.2d 30 (Fla. 1998). Given a hearing on the issue, Mr. Porter will give overwhelming support for this claim.

For the reasons set forth in Appellant's Initial Brief, he should be given an evidentiary hearing.

CONCLUSION

The circuit court improperly denied Mr. Porter the relief to which he is entitled under Florida Rules of Criminal Procedure 3.850. This Court should overturn the circuit court's ruling and afford Mr. Porter an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Reply Brief, changing only the county and circuit on the cover pages of the Reply Brief originally filed February 4, 1999, which was generated in a Courier non-proportional 12 point font, and has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 18, 1999.

Amy C. Settlemire
Florida Bar No. 0788724
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
(813) 740-3544
Attorney for Appellant

Copies furnished to:

The Honorable Edward J. Richardson
Circuit Court Judge
2825 Judge Fran Jamieson Way
Fourth Floor
Viera, Florida 33940-8006

Kenneth Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, Florida 32118-3951

Christopher White
Assistant State Attorney
Office of the State Attorney
100 East First Street
Sanford, Florida 32771