IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2707

GEORGE PORTER, JR.,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CLAIM I

MR. PORTER'S DEATH SENTENCE IS DISPROPORTIONAL, ARBITRARY, AND DISPARATE IN VIOLATION OF HIS RIGHTS UNDER THE FLORIDA CONSTITUTION, JUDICIAL AND STATUTORY LAW. AS A RESULT, MR. PORTER'S DEATH SENTENCE VIOLATES HIS EQUAL PROTECTION RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1. This claim is properly raised.

Respondent fails to address the crux of this issue and, instead, asserts procedural bars to claims that are not raised and are not, under this Court's law, properly before this Court. Respondent asserts this claim is, "in reality an attempt to raise and litigate another specification of ineffective assistance of trial counsel" (Response at 7-8). Respondent is mistaken. As respondent asserts, that claim was raised and decided adversely to Mr. Porter on Mr. Porter's 3.850 appeal. Porter v. State, 788 So.2d 917, 919 (Fla.2001). That appeal resolved the issue whether "counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment". Strickland v. Washington, 466 U.S. 668, 687 (1984). The issue Mr. Porter presents in this petition for writ of habeas corpus is whether the Florida capital

sentencing scheme was unconstitutional as applied in Mr. Porter's case and therefore, violated his Equal Protection rights. Though this claim does not challenge the constitutional adequacy of penalty phase counsel's representation, the result of counsel's penalty phase representation is an integral aspect of this claim.

Respondent argues, "Porter argues that his death sentence is disproportionate. This claim is procedurally barred because it was raised and addressed on direct appeal, and is not subject to being litigated for a second time in a petition for writ of habeas corpus." (Response at 5). Respondent's arguments illustrate the claim at issue. The procedural bar Respondent asserts and the unfortunate circumstances of Mr. Porter's case are the facts that violate his rights to equal protection of the laws.[1]

2. The Florida death sentencing scheme was unconstitutional as applied in Mr. Porter's case, as a result, his death sentence is disproportional and violates his rights to equal protection of the laws.[2]

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[1]Even if this Court does not recognize the validity of this Claim, it is appropriately raised herein because it is premised on new law, Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Bush v. Gore, 531 U.S. 98, 104 (2000), and exhaustion of state remedies is prerequisite to federal habeas corpus redress. 28 U.S.C. § 2254(b)(c); Rose v. Lundy, 455 U.S. 509 (1982).

[2]Respondent failed to address or contest the merits of this claim–the unconstitutional application of the Florida capital sentencing scheme as it was applied, the disproportionate sentence, and the equal protection violation (Response 5-8).

The Fourteenth Amendment of the United States Constitution provides:

> **Nor shall any state** deprive any person of life liberty or property without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws**.

U.S. Const. amend. 14. Florida's capital sentencing scheme, as applied in Mr. Porter's case, has denied Mr. Porter equal protection of the laws. Whether or not this Court considers penalty phase counsel's representation effective assistance under the test announced in Strickland v. Washington, 466 U.S. 668 (1984), the fact remains that, as a result of penalty phase counsel's representation, "[t]he trial court found no mitigating circumstances". Porter, 564 So.2d at 1062 n.2. Because "[t]he trial court found no mitigating circumstances", when this Court "engage[d] in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in [this] case, and to compare it with other capital cases", this Court held "the death penalty is not disproportionate to other cases decided by this Court". Id. at 1062 n.2, 1064-65.

It is also a fact that, in this case, there was substantial mitigation that penalty phase counsel could have presented. Postconviction proceedings revealed uncontroverted and substantial mitigation that Mr. Porter suffered from post traumatic stress disorder and brain damage; Mr. Porter is a war hero, whose actions in the Korean Conflict helped to save the lives of thousands of American soldiers; his

courageous service for three years, two months, and twenty-one days is reflected in his **honorable** discharge; the Army awarded him the National Defense Service Medal for enlisting in time of conflict, the United Nations Service Medal for serving with United Nations forces in the Korean conflict, the Korean Service Medal with three (3) Bronze Service Stars, the Combat Infantryman's Badge Purple Heart (with first cluster), he was favorably considered for the Good Conduct Medal, and he is "entitled to award of (the) Korean Presidential Unit Citation"; Mr. Porter was severely abused as a child; he was an alcoholic; and he did not advance beyond the third grade in school (R. 1493, 1521, 1554, 1575); (T. 134-35, 138-39, 150-53, 211, 220, 234, 328); (Wireman Depo p. 7; J. Porter Depo p. 12). (J. Porter Depo, pp. 22-24).[3] This Court

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[3]Though all of this mitigation was proven by the greater weight of the evidence at the evidentiary hearing, the circuit court never addressed the post traumatic stress disorder and brain damage and the fact that Mr. Porter did not advance beyond the third grade in school. The circuit court determined that Mr. Porter's service during the Korean Conflict, alcoholism, and childhood abuse "standing alone [would] not have made a difference to the sentencing outcome of this case, but even if all three had been presented, their "mitigating effect [would] not begin to tip the balance of aggravating and mitigating factors in favor of [the] petitioner". Porter,788 So.2d at 925 (internal citations omitted). This Court affirmed the Court's conclusion, also not addressing the post traumatic stress disorder, brain damage, and the fact that Mr. Porter did not advance beyond the third grade in school, "[f]inally, following a full evidentiary hearing, the trial judge determined that the additional mitigators [military service, alcoholism, and childhood abuse] were outweighed by the weighty aggravators of a prior violent felony and a cold, calculated, and premeditated murder. We agree." Id. This Court did not, in accordance with its prior case law, conduct another proportionality analysis in the opinion. See Williams v. State, 503 So.2d 890, 891 (1987); Adams

has never considered this evidence in a proportionality analysis, and, for that reason, Mr. Porter's death sentence is constitutionally invalid and he is denied equal protection.

This Court has explained that the Florida capital sentencing scheme has five steps that provide "concrete safeguards beyond those of the trial system to protect [a person convicted of first degree murder] from death where a less harsh punishment might be sufficient". State v. Dixon, 283 So.2d 1, 6-10 (1973). First, the question of punishment is reserved for a postconviction hearing, at which evidence that might have been barred in the guilt/innocence proceeding may be presented. Id. at 7. Second, the jury must hear the new evidence presented and recommend a life or death sentence. Id. at 8. Third, the trial judge actually determines the sentence to be imposed, *guided* by the jury's recommendation. Id. Fourth, the trial judge justifies his sentence in writing, to provide this Court the opportunity for meaningful review. Id. Fifth, "[r]eview by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . .. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the

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v. State, 484 So.2d 1211, 1213 (Fla.1986); Messer v. State, 439 So.2d 875 879 (Fla.1983).

discretion charged in Furman v. Georgia, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." Id. (internal citations omitted). In upholding the constitutionality of the Florida capital sentencing scheme, the United States Supreme Court was reassured by this Court's assurance that a meaningful appellate review would "ensure that [each death sentence] [is] consistent with other death sentences imposed in similar circumstances". Proffitt v. Florida, 428 U.S. 242 at 253.

> Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each sentence is made possible and the Supreme Court of Florida, like its Georgia counterpart considers its function to "guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great""

Proffitt v. Florida, 428 U.S. 242, 251 (1976) (quoting State v. Dixon, 283 So.2d 1, 10 (1973)).

Implicit both in this Court's opinion upholding Florida Statute 921.141 and the United States Supreme Court's decisions affirming this Court's conclusions that the Florida capital sentencing scheme is constitutional, is the assumption that available mitigating circumstances are presented in step one–the postconviction sentencing

hearing. If, as in this case, available mitigating circumstances are not presented, the remaining four steps are flawed, and the resulting death sentence is a result of the very type of standardless sentencing condemned by Furman v. Georgia, 408 U.S. 238 (1972).

Though they existed and were available for presentation, "no mitigating circumstances" were available for proportionality review in Mr. Porter's direct appeal, rendering the proportionality review this Court conducted invalid. Porter, 564 So.2d at 1062 n.2. As a result, Mr. Porter has been sentenced to death while other similarly situated people convicted of first degree murder have received life sentences after this Court conducted proportionality review in their cases. See Jones v. State, 705 So.2d 1364, 1366 (Fla.1998); Klokoc v. State, 589 So.2d 219, 219-222 (Fla. 1991); Farinas v. State, 569 So.2d 425 (Fla.1990); Ross v. State, 474 So.2d 1170 (Fla.1985); Wilson v. State, 493 So.2d 1019 (Fla.1986); White v. State, 616 So.2d 21, (Fla.1993); Jorgenson v. State, 714 So.2d 423 (Fla.1998); Robertson v. State, 699 So.2d 1343, 1347 (Fla. 1997); Nibert v. State, 574 So.2d 1059 (Fla.1990); Chaky v. State, 651 So.2d 1169, 1170-71, 1073 (Fla. 1995); Maulden v. State, 617 So.2d 298, 299, 302-3 (Fla. 1993); Cannady v. State, 620 So.2d 165, 170 (Fla. 1993).

Given the substantial and extensive mitigation in this case and the aggravation that is made less aggravating due to the circumstances of this case (see Petition at 7-

17), Mr. Porter's death sentence clearly is not proportional. Because this Court has never conducted a proportionality review that involved a concentrated analysis "of the underlying basis for each aggravator and mitigator", considering "the totality of the circumstances in a case and to compare the case with other capital cases", Mr. Porter has been denied equal protection of the laws. Terry v. State, 668 So.2d 954, 965 (Fla.1996); Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Voorhees v. State, 699 So.2d 602, 614 (Fla.1997); Bush v. Gore, 531 U.S. 98, 104 (2000). "Under the Florida Constitution, all persons have a right to equal protection off the laws, particularly in matters affecting life and liberty. Art. I, § 2. Fla. Const." Haag v. State, 591 So.2d 614, 617 (Fla.1992). To remedy this equal protection violation, this Court must conduct a proportionality review at this point.[4] "While the doctrine of stare decisis normally would require a greater deference to this prior precedent, we find that the demands of justice and the principles of constitutional law cited above require an alteration in the precedent. As is self-evident, even the common law must

[4]"See Dowd v. United States ex rel. Cook, 340 U.S. 206, 208 (1951)("[A] discriminatory denial of the statutory right of [proportionality review] is a violation of the Equal Protection Clause of the Fourteenth Amendment" Dowd v. United States ex rel. Cook, 340 U.S. 206, 208 (1951) (citing Cochran v. Kansas, 316 U.S. 255). "Under the peculiar circumstances of this case, nothing short of an actual appellate determination of the merits of the [death sentence]–according to the procedure prevailing in ordinary cases–would cure the original denial of equal protection of the law." Id. at 209.

bend before the dictates of the Constitution. Not even the hoariest precedent is permitted to violate the guarantees of habeas relief, equal protection, and equal access to the courts, or any of the fundamental rights set forth in the Declaration of Rights. Art. I, Fla. Const." Id. at 18.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. PORTER'S CONVICTIONS AND SENTENCES.

In denying Mr. Porter 3.850 relief, this Court held that certain claims were procedurally barred because they were not raised on appeal. Porter, 788 So.2d at 921. For that reason, they were raised as ineffective assistance of appellate counsel claims in Claim II, subparts 2, 3, and 4, to preserve the issues for federal review. Additionally, subparts 5 and 6 were necessarily ruled upon in the 3.850 appeal, so they were also raised to preserve the issues, as ineffective assistance of appellate counsel, for federal review.

The first full paragraph on page 30 of Mr. Porter's petition is factually incorrect.[5] Mr. Porter's counsel apologizes for any misunderstanding or

[5]"The record on appeal that appellate counsel used contained clear indications that it was inadequate. Substantial pre-trial and trial proceedings were made off the record. Mr. Porter was arrested on August 11, 1989, and his trial commenced on May 1, 1990. Except for two motions for continuances in late

inconvenience this has caused. An accurate description of the facts follows.

Mr. Porter was charged by indictment dated October 28, 1986, for the first degree murders of his ex-lover, Evelyn Williams, her boyfriend and other related offenses (R. 2578-79).

The only pretrial hearing contained in the record are hearings conducted February 25, 1987 (R. 2473), March 13, 1987 (R. 2495), November 20, 1987 (R. 2506), November 24, 1987 (R. 1544), and November 30, 1987 (R. 1569). At the February and March hearings, Mr. Porter was represented by Assistant Public Defender Brian Onek; at the November hearings, Mr. Porter appeared pro se.

Mr. Porter was initially represented by the Public Defender's Office, whose motion to withdraw as counsel was granted on March 17, 1987 (R. 2642). On June 1, 1987, Mr. Porter filed several pro se motions (R. 2645-59).

On June 17, 1987, Sam Bardwell entered an appearance as Mr. Porter's counsel (R. 2660). On June 22, 1987, Mr. Bardwell, the State, and Judge Antoon signed a "stipulation" that Mr. Bardwell was "full counsel" for Mr. Porter (R. 2661). The record reflects no other action regarding Mr. Porter's counsel until the November 20,

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April of 1990, the record on appeal is devoid of proceedings occurring before the start of trial. This record clearly indicated that prior proceedings had taken place, motions filed and argued and issues otherwise litigated, including ex-parte communications between the state and the trial court."

1987, hearing at which Mr. Porter appeared pro se.

CLAIM IV

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Respondent argues this Claim is procedurally barred because it was not raised on direct appeal or in Mr. Porter's 3.850 motion (Response at 18). Respondent's alleged procedural bar does not exist. Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), was decided in the year 2000, years after Mr. Porter's direct appeal and 3.850 motion were filed. As such, it is new law and not procedurally barred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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