IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1417

PAUL CHRISTOPHER HILDWIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

REPLY TO STATEMENT OF THE CASE

In its Statement of the Case, the State asserts that Mr. Hildwin's Statement of the Case as set forth in his Initial Brief "is argumentative and, in addition, improperly argues matters that have no relevance at all to the issue before this

Court." (Answer Brief at 1).[1] The State then proceeds to engage in argumentative rhetoric in its own Statement of the Case.

For example, the State in bold highlight says that the lay witnesses that Dr. Berland wished to speak with prior to the 1996 re-sentencing "did not provide any significant information that would have changed Dr. Berland's 1996 testimony." (Answer

[1]Apparently, the State believes evidence of innocence is irrelevant and is upset that Mr. Hildwin included a discussion of the evidence presented at his trial in 1986 and at the 1992 evidentiary hearing. The State apparently does not want Mr. Hildwin pointing out that at the 1992 evidentiary hearing, evidence was presented establishing that police reports documented observations of and conversations with the victim at least 12 hours after the State contended that Mr. Hildwin had murdered her. The State's case was that Mr. Hildwin killed Vronzettie Cox sometime before noon on September 9, 1985. The jury that convicted Mr. Hildwin of the murder was unaware that the victim's nephew had seen the victim alive on the evening of September 9, 1985 (Exhibits 18 and 21 from the February 24, 1992, evidentiary hearing). In an interview with law enforcement, the victim's nephew, Terry Moore, was "sure" he had seen the victim at a bar about 11:15 p.m. on September 9, 1985 (Exhibit 18 from the February 24, 1992, evidentiary hearing), more than twelve hours after the time period in which the State contended that the victim had been murdered by Mr. Hildwin. Moore told law enforcement that he had spoken with the victim for 3 or 4 hours at the bar, and then the victim left in her car with her boyfriend. During his conversation with the victim, Moore observed that her boyfriend "appeared not to be too happy" (Exhibit 18 from the February 24, 1992, evidentiary hearing). A few days earlier before their conversation late at night on September 9, 1985, the victim had asked Moore "to fix a unknown enemy's car so that it didn't run" (Exhibit 18 from the February 24, 1992, evidentiary hearing). According to Moore, the "unknown enemy" was someone who had lived with the victim. Yet, the jury that convicted Mr. Hildwin was entirely unaware of this

Brief at 9)(emphasis omitted). The State then sets forth in a footnote: “Hildwin concedes this. Initial Brief, at 22. That concession established that Hildwin can never satisfy the prejudice prong of *Strickland v. Washington, 466 U.S. 668 (1984)*.” (Answer Brief at 9, n. 5).

Not only does this demonstrate the State’s hypocrisy in deriding Mr. Hildwin’s Statement of the Case as improperly argumentative, the State’s contention is false and reveals the State’s ignorance of recent United States Supreme Court case law regarding this Court’s misreading of *Strickland v. Washington*. First as Mr. Hildwin asserted in his Initial Brief:

> the sentencing judge in 1996 described the testimony of the mental health experts offered at the 1996 penalty phase proceeding as "based on extrapolation, speculation, and conjecture." (R2. 477). According to this sentencing order reimposing a death sentence in 1996, the psychological mitigating evidence was not "particularly compelling." In the sentencing order, the sentencing judge said that the two statutory mitigators and five nonstatutory mitigatory proposed by the defense did in fact exist. However, the judge then critiqued the expert testimony supporting them and gave each of the mitigators only "some weight."

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evidence that the victim was alive long after Mr. Hildwin supposedly killed her.

(Initial Brief at 49-50). Thus, the ineffectiveness claim raised by Mr. Hildwin arises in the context of two mental health experts who were attacked by the State during cross-examination for having inadequate bases for their opinions and engaging in speculation and conjecture.[2] While the bottom line conclusions reached by the experts did not change when called at the 2009 evidentiary hearing, the testimony they provided did change.[3]

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[2]In this regard, Dr. Berland testified at the 1996 penalty phase that he was not provided access to the records:

> Q. [Y]ou did not rely upon any records or institutional records that predated this murder in coming to your conclusion?

A. That's correct. I believe that I had the opportunity to look at some prison records after his incarceration, but nothing before.

(R2. Vol. IV, 162). Indeed, the State relied on the fact that Dr. Berland had not reviewed these records in its sentencing memorandum to attack his testimony:

> The final reason to reject the testimony of the Doctors is the fact that the record contains numerous records reflecting psychiatric examinations of the defendant over a 14 year period, concluding only 17 months before the murder ... The fact that Dr. Berland did not even examine the reports of those doctors, did not interview those doctors and that those experts saw the defendant during the relevant times, severely undermines his

opinion.

(R2. Vol. II, 353).

[3]Overall, Dr. Berland said that he had been rushed (PC-R3. 2479). He said that his exclusive contact with the defense team

Both experts were provided access to a wealth of background records that anchored their opinions and made their testimony withstand cross-examination. In the eyes of the jury that had returned a 8-4 death recommendation in 1996, their testimony would certainly have been seen as more reliable and more weighty.

Thus, the State's argument in its Statement of the Case is false when asserting that the testimony would not have changed. The testimony did change when the mental health experts were provided access to background materials which could be cited and relied upon as supporting their bottom line conclusions.[4] And, the State seeks to obscure the fact that the testimony at the re-sentencing by the experts was specifically found to be not

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was through attorney Ric Howard and to a lesser extent through the defense investigator, Everett Dick. He never met Mr. Hallman.

[4]In its Answer Brief, the State sets forth in boldfaced type: "These witnesses [lay witness not interviewed by Dr. Berland prior to his 1996 re-sentencing testimony] did not provide significant information that would have changed Dr. Berland's testimony." (Answer Brief at 9)(boldface omitted). However, it was the failure to interview these witness and review other material that the State brought out in cross-examination and argued successfully to the judge and the jury that rendered Dr. Berland's opinions regarding Mr. Hildwin unsupported and not credible. After interviewing the witnesses, Dr. Berland's testimony did change because he was able to answer the State's questions on cross differently. And as a result, the State's line of attack on the support Dr. Berland had for

"particularly compelling" and not accorded much weight. Since a capital defendant carries a burden to establish the mitigating circumstances, a *pro forma* and unconvincing presentation of mitigating circumstances constitutes deficient performance by counsel when a means of presenting a compelling presentation of the mitigating circumstances was readily available and not utilized.

Second, the State's argument that Mr. Hildwin can never establish prejudice under *Strickland* because trial counsel did present some mitigating evidence ignores the recent decisions by the United States Supreme Court in *Porter v. McCollum, 130 S. Ct. 447 (2009),* and *Sears v. Upton, 130 S. Ct. 3259 (2010)*.

In *Porter v. McCollum, 130 S. Ct. at 453-54,* the United States Supreme Court specifically explained:

> To assess that probability, we consider "the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding" and "reweig[h] it against the evidence in aggravation." *Williams, supra,* at 397-398, 120 S.Ct. 1495.

And in *Sears v. Upton, 130 S. Ct. at 3266*, the United States Supreme Court specifically explained:

> We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an

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his opinion and on his credibility as an expert would have been thwarted.

> inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.

The State also makes the following argument within its Statement of the Case:

> The discussion of this issue found on pages 30-32 of Hildwin's brief is an improper attempt for present counsel to present evidence that is not subject to cross-examination and which is in contravention of the advocate witness rule. Current counsel can be an advocate or a witness, but not both. This portion of the Initial Brief should be stricken.

(Answer Brief at 12, n. 8). This request that a portion of the Initial Brief be stricken references the discussion of the trial attorney's testimony that undersigned counsel was present and involved at the 1996 re-sentencing. This topic was first raised by the State when it opposed the motion to withdraw filed by counsel with the Office of the Capital Collateral Regional Counsel for Middle Region in January of 2010. The motion to withdraw asked for the appointment of undersigned counsel as registry counsel for Mr. Hildwin. The State opposed the motion on the basis of the trial attorney's 2009 testimony that undersigned counsel had been present for the 1996 re-sentencing and had acted as part of the defense team.

At this Court's request, undersigned counsel filed a reply in which he explained his circumstances in September of 1996 and that he was not only not present for the 1996 re-sentencing, he would not have been permitted to be present by his employer, the Capital Collateral Representative at the time. These representations were presented by undersigned counsel as an officer of the court after he was directed by this Court to respond to the State's assertion that he had a conflict and could not represent Mr. Hildwin. These representations are now part of the record before this Court. The State has not challenged the representations or asked for an opportunity to cross-examine undersigned counsel regarding the matter.[5]

"Truth is critical in the operation of our judicial system." *Florida Bar v. Feinberg, 760 So. 2d 933, 939 (Fla. 2001)*. "[S]ociety's search for the truth is the polestar that guides all judiciary inquiry". *Johnson v. State, – So. 3d –, 2010 WL 121248, at *1 (2010).* The State's request that this Court strike the portion of the Initial Brief discussing Mr. Hildwin's trial counsel's testimony that undersigned counsel was part of the defense team at the 1996 re-sentencing demonstrates

[5]The State could certainly have asked for a relinquishment for an evidentiary hearing on the matter if it wished to contest undersigned counsel's reply to this Court's directive.

a cavalier disregard for the truth. Indeed, it demonstrates the State's view that the adversarial process is simply a board game in which winning trumps the search for the truth.

As for the legal basis for the request that the discussion regarding trial counsel's assertion that undersigned counsel was present at the 1996 re-sentencing should be stricken, the State contends that it was included in the Initial Brief "in contravention of the advocate witness rule." (Answer Brief at 12, n. 8). However, the State's argument ignores this Court's case law in post conviction cases. In *Scott v. State, 717 So. 2d 908, 910 (Fla. 1998),* this Court ruled against an argument that it violated the advocate witness rule for a trial prosecutor who was accused of failing to fulfill his obligation under *Brady v. Maryland* to represent the State in Rule 3.850 proceedings on such a *Brady* claim. Following the decision in *Scott v. State*, it has become routine in capital collateral proceedings for both the prosecutor representing the State and the collateral defense attorney to take the witness stand. For example, most recently in *Johnson v. State, 2010 WL 121248*, the collateral defense attorneys and the assigned assistant attorney general all testified in the Rule 3.851 proceedings. Indeed, this Court in granting Rule 3.851 relief relied upon the

testimony of the defense attorneys regarding how the *Giglio* claim was discovered. *Johnson v. State, Slip Op. at 41* ("The fact that defense counsel had to send the notes to counsel in another part of the state to be deciphered attests to the notes' inscrutability and to defense counsel's diligence.").[6]

REPLY TO THE STANDARD OF REVIEW

In its recitation of the standard of review, the State completely overlooks the decision in *Porter v. McCollum* in which the United States Supreme Court found that this Court's standard of review employed when reviewing a circuit court's finding that prejudice had not been shown as to an ineffective assistance of counsel claim was an unreasonable application of clearly established federal law. Indeed, the State relies upon this Court's enunciation of the standard of review set forth in *Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)*, and *Stephens v. State, 748 So. 2d 1028 (Fla. 1999)* as controlling, ignoring that the standard employed in *Blanco* and *Stephens* is the standard employed in *Porter v. State, 788 So. 2d at 923*, which

[6]During the oral argument before this Court in *Johnson v. State*, Assistant Attorney General Sabella represented the State and was questioned by justices of this Court specifically about the testimony that she had given at the Rule 3.851 evidentiary hearing.

the United States Supreme Court found to be contrary to clearly established federal law.[7]

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court. This can be seen from this Court's decision in *Sochor v. State, 883 So. 2d 766, 782-83 (Fla. 2004)*, where the Court relied upon the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State, 781 So. 2d 1040, 1049-51 (Fla. 2001)*.

Indeed in *Porter v. State*, this Court referenced its decision in *Stephens v. State, 748 So. 2d 1028 (Fla. 1999)*,

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[7]Undersigned counsel does acknowledge that when he prepared the Initial Brief in early June of 2010, he inadvertently failed to correct his statement of the standard of review contained therein in light of the United States Supreme Court decision in *Porter v. McCollum*. Indeed, undersigned counsel left in a citation to the discredited standard of review appearing in *Blanco v. State* (Initial Brief at 40). This was an oversight on his part, for which counsel apologizes. However, undersigned counsel did include reliance on *Porter v. McCollum* in his Argument as demonstrating that "the Supreme Court [had] concluded that this Court and the Eleventh Circuit had failed to understand and properly apply the governing precedent." (Initial Brief at 48).

where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings.[8] In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997)* and *Rose v. State, 675 So. 2d 567 (Fla. 1996)* were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision.[9] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged

[8]It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the Second District Court of Appeals was in conflict with *Grossman* as to the appellate standard of review to be employed.

[9]This Court acknowledged that there were numerous cases in which it had applied the deferential standard employed in *Grossman.* As examples, this Court cited *Diaz v. Dugger, 719 So. 2d 865, 868 (Fla. 1998)*; *Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993)*; *Hudson v. State, 614 So. 2d 482, 483 (Fla. 1993)*; *Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992)*; *Kennedy v. State, 547 So. 2d 912 (Fla. 1989)*. However, the list included in *Stephens* was hardly exhaustive in this regard. *See*, *e.g*,

ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*.[10] However, this Court made clear that even under this less deferential standard

> [w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is in an important principle of appellate review.

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, this Court relied upon this very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State, 788 So. 2d at 923*.

Marek v. Dugger, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State, 534 So. 2d 386 (Fla. 1988)*.

[10]The majority opinion in *Stephens* receding from *Grossman* prompted Justice Overton, joined by Justice Wells, to write: "I emphatically dissent from the analysis because I believe the majority opinion substantially confuses the responsibility of trial courts and fails to emphasize a major factor of discretionary authority the trial courts have in determining whether defective conduct adversely affects the jury." *Stephens v. State*, *748 So. 2d at 1035.* Justice Overton explained: "My very deep concern is that the majority of this Court in overruling *Grossman v. Dugger*, *708 So. 2d 249 (Fla. 1997)*, has determined that it no longer trusts trial judges to exercise proper judgment in weighing conflicting evidence and applying existing legal principles." *Id. at 1036.*

From an examination of this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard set forth in *Blanco* and in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Blanco* and *Stephens* standard which was employed in *Porter v. State* and used to justify the Florida Supreme Court's decision to discount and discard Dr. Dee's testimony was "an unreasonable application of our clearly established law." *Porter v. McCollum*, *130 S. Ct. at 455.*

Moreover, the prejudice analysis that the United States Supreme court adopted in *Strickland v. Washington, 466 U.S. 668 (1984)*, employs the same standard that the United States Supreme Court used for measuring the materiality of undisclosed exculpatory evidence and/or information within the meaning of *Brady v. Maryland, 373 U.S. 83 (1963)*. *See United States v. Bagley, 473 U.S. 667 (1985).* Accordingly, the holding in *Porter v. McCollum* applies with equal force to the materiality analysis employed by this Court when reviewing *Brady* claims. Indeed, as the United States Supreme Court noted in *Kyles*, the issue presented by *Brady* and *Strickland* claims concerns the potential

impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute her credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the state. *See United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977)*. The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

Here, the State has failed to apply the logic of *Porter v. McCollum* and revise its statement of the standard of review.[11]

REPLY TO ARGUMENT

INTRODUCTORY ISSUE RAISED BY THE STATE IN ITS ANSWER BRIEF

In its Answer Brief, the State first argues that the circuit court erred in ordering an evidentiary hearing on Mr.

[11]Any argument made by the State that *Porter v. McCollum* only applies in capital cases involving a war veteran were laid to rest by the United States Supreme Court in *Sears v. Upton, 130 S. Ct. at 3266*. There, the analysis set forth in *Porter v.*

Hildwin's ineffective assistance of counsel claim. At the outset, it should be observed that the State did not file a notice of appeal or a notice of cross-appeal challenging the circuit court's decision to hear Mr. Hildwin's ineffective assistance of counsel claim and grant an evidentiary hearing on the claim.

Second, it should be observed that the State's argument is that by filing a premature notice of appeal on January 16, 2004, from a circuit court order which did not dispose of all of his claims for relief, Mr. Hildwin "abandoned" his ineffective assistance of counsel claim. The State tries to disguise the fact that the January 16, 2004, notice of appeal was premature by focusing on Mr. Hildwin's counsel's failure to address the unresolved ineffective assistance of counsel claim in its brief as an abandonment. But, that disguise does not change the fact that the notice of appeal was premature within the meaning of Rule 9.110(l), Fla. R. App. Pro.[12]

McCollum was applied in a capital case in which the defendant was not a war veteran.

[12]At no time does the State address its failure to challenge the circuit court's decision in 2001 that an evidentiary hearing was required on Mr. Hildwin's penalty phase ineffective assistance of counsel claim. The State did not cross-appeal when Mr. Hildwin filed a notice of appeal in 2004 or seek to dismiss the appeal as premature because the circuit court's order was non-final. Because the State does not address these

Third, the State did not bring the non-final nature of the order that was appealed by the January 16, 2004, notice of appeal to this Court's attention. The State could have filed a motion to dismiss the appeal as premature under Rule 9.110(l), but it did not do so.

Finally, the circumstances presented in a case where a non-final order is appealed and counsel neglects to obtain a ruling on an ineffective assistance of counsel claim is most closely analogous to those circumstances presented when this Court has authorized belated appeals because counsel failed to file a timely notice of appeal despite the defendant's request that a timely appeal be filed. Rule 3.850(g), Fla. R. Crim. Pro.[13]

The State in making its argument that the circuit court erred in considering Mr. Hildwin's ineffective assistance of counsel claim fails to discuss the circuit court's order that determined that the claim should be heard. This order was signed by the presiding judge on August 18, 2008, and explained:

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matters, it never explains why it has not abandoned any challenge to the circuit court's determination that an evidentiary hearing was required or this Court's failure to dismiss the previous appeal as premature.

[13]At no time was a hearing conducted in which Mr. Hildwin was asked whether he waived his right to the evidentiary hearing that the circuit court had granted on his ineffective assistance of penalty phase counsel claim or his right to be present at such an evidentiary hearing.

> This Court's Order on the August 1, 2001 Huff Hearing granted Defendant an evidentiary hearing with regard to the claim of ineffective assistance of counsel raised in his January 16, 2001 motion. Neither Defendant nor the State appealed the Order on the August 1, 2001 Huff Hearing. Defendant appealed this Court's denial of his Amended Successive Motion to Vacate Judgment and Sentence based upon the then potentially exculpatory DNA evidence. As such, this court's determination that an evidentiary hearing is warranted with regard to Defendant's claim of ineffective assistance of penalty phase counsel, as raised in the January 16, 2001, motion, remains valid and binding. Defendant never factually or legally abandoned or waived the evidentiary hearing this court granted him. To the contrary, Defense Counsel expressly disavowed any waiver or abandonment of Defendant's claim of ineffective assistance of counsel. (*See* Transcript, February 4, 2003 Status Conference, 25:6 through 26:11). While an appeal of Defendant's Amended Successive Motion to Vacate Judgment and Sentence based upon the potentially exculpatory DNA evidence proceeded, it appears that the presently pending Motion fell by the wayside, notwithstanding the Court's expressed preference that any valid postconviction claims raised be heard and addressed simultaneously. Thus, the issue raised in Defendant's January 16, 2001 motion with regard to ineffective assistance of penalty phase counsel remains pending before this Court.

Order of August 18, 2008, at 3-4.

As a matter of fact, the circuit court concluded that Mr. Hildwin had not abandoned the claim. The circuit court reached this conclusion after ordering the parties to submit memoranda and after reviewing the record. The circuit court also noted that the State had not appealed its ruling in 2001 that the ineffective assistance claim required an evidentiary hearing.

Indeed, it is clear that after the DNA results were obtained in 2003 the focus was on the guilt phase portion of Mr. Hildwin's trial, and it was believed that if a new trial was granted that the need for an evidentiary hearing on the penalty phase ineffective assistance of counsel claim would be moot. The State never attempts to explain the error in the circuit court's factual and/or legal reasoning.

To the extent that this Court finds any merit to the State's argument, Mr. Hildwin would appeal to this Court's equitable powers. Recently, the United States Supreme Court explained a court's equitable powers in *Holland v. Florida, 130 S. Ct. –, 2010 WL 2346549 (June 14, 2010).* There, the Supreme Court explained that the equitable principles upon which equitable tolling is premised apply well beyond just equitable tolling:

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. bullitt, 377 U.S. 360, 375 (1964)*. In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht, 327 U.S. 360, 375 (1946)*, we have followed a tradition in which courts of equity

> have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel-Atlas Glass Co. V. Hartford-Empire Co., 322 U.S. 238, 248 (1944)*. The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid.*

*Holland v. Florida, 130 S. Ct. –, 2010 WL 2346549 (June 14, 2010), at *12.*[14] Given the circuit court's order finding that it had ordered an evidentiary hearing in 2001, and that Mr. Hildwin had not ever abandoned his ineffective assistance of penalty phase counsel or his right to an evidentiary hearing, the circumstances as found by the circuit court "demand equitable

[14]The State chooses to ignore the United States Supreme Court's most recent decision in *Holland v. Florida* wherein attorney error was recognized as a potential basis for equitable tolling in favor of a decision that is nearly 19 years old, *i.e. Coleman v. Thompson, 501 U.S. 722 (1991).* Interestingly, *Coleman v. Thompson* was cited by the State of Florida in *Holland v. Florida* as precluding the availability of equitable tolling because of attorney error in a capital habeas case. However, the United States Supreme Court rejected the State's argument premised upon *Coleman* and found that a court's equitable powers may be invoked in such circumstances.

intervention." The circuit court was right to hear the claim, and it is properly before this Court in this appeal.

REPLY TO STATE'S ARGUMENT AS TO INEFFECTIVE ASSISTANCE CLAIM

In its Answer Brief, the State recasts Argument I of the Initial Brief as "II. THE 'PRESENTATION OF MITIGATING EVIDENCE' CLAIM." (Answer Brief at 23). In this section of the Answer Brief, the State addresses Mr. Hildwin's claim that the 1996 re-sentencing attorney provided ineffective assistance of counsel. The State begins by quoting the circuit court's order denying the ineffective assistance claim at length (Answer Brief at 23-27). In the five page quotation from the circuit court's order, the circuit court describes trial counsel's decision not to call Dr. Carbonell as "strategic" (Answer Brief at 25). However, the order does not address the failure to present Dr. Carbonell's prior testimony, nor does it address trial counsel's failure to provide the mental health experts that he did call the readily available institutional records that they requested or provide access to the readily available witnesses that the experts had asked to be able to interview. Instead, the circuit court's order ultimately rests on a finding that Mr. Hildwin had not demonstrated prejudice under the standard set forth in *Strickland v. Washington, 466 U.S. 668 (1984)*. (Answer Brief at

27)("Dr. Berland testified that even if he had been able to locate and interview the witnesses prior to the re-sentencing his opinions and conclusions would not have changed. Thus, the defendant has failed to demonstrate any prejudice.").

After setting forth the five page quotation from the circuit court's order, the State makes no real argument regarding the deficient performance prong of *Strickland* (Answer Brief at 28-36).[15] In arguing that Mr. Hildwin has not shown prejudice, the State includes citation to a series of decisions by this Court that are not on point. The decisions cited by the State do not address the situation here, *i.e.* the failure to

[15]At one point, the State has a dependent clause in one sentence which asserts that Mr. Hildwin had insufficiently pled deficient performance (Answer Brief at 30). At another point, the State argues that the "decision not to call Carbonell was wholly reasonable" (Answer Brief at 34). However, no real argument is made as to deficient performance as to the failure to provide the expert's who testified with the requested materials and the requested access to the witnesses. The State's failure to make any argument as to the deficient performance prong is understandable. The institutional records existed and in fact were introduced into evidence at the 1992 evidentiary hearing. Given that Dr. Berland specifically testified that he requested the records and asked to interview available witnesses, and given that trial counsel had no explanation for why the records were not provided to the experts nor arrangements made to permit the requested interviews in 1996, counsel's performance was deficient. *Porter v. McCollum, 130 S. Ct. at 453* (counsel's performance was deficient because "[h]e did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family").

provide mental health experts with the available records requested by the experts and with access to the available witnesses the experts asked to speak with which lead to the sentencing judge finding as a result that the experts' opinions were "based on extrapolation, speculation, and conjecture" (R2. 477), that the expert testimony was not "particularly compelling." Moreover, unlike the cases cited by the State, the record in Mr. Hildwin's case includes a finding by the circuit court adopted by this Court on appeal when finding ineffective assistance in 1995 that the mental health testimony from Dr. Carbonell in 1992 was "most persuasive and convincing" because she had been given access to the available records and witnesses that the 1996 mental health experts did not have access to because trial counsel simply failed to provide the records to the experts and arrange interviews with the witnesses.

The State also argues that "Hildwin makes the erroneous assertion that Carbonell's 1992 post-conviction testimony factors into the 'prejudice analysis' even though Carbonell did not testify in 2009 hearing. Hildwin's argument makes no sense." (Answer Brief at 32). The State's contention in this regard is perplexing.

Dr. Carbonell testified in 1992 at Mr. Hildwin's post conviction evidentiary hearing. That testimony was found by the presiding judge to be "most persuasive and convincing." This Court on appeal agreed with the description and in light of that testimony vacated Mr. Hildwin's death sentence and order a re-sentencing before a new jury. *Hildwin v. Dugger, 654 So. 2d at 110, n.8.* Thus, Dr. Carbonell's testimony is part of the record in this case. It existed at the time that re-sentencing counsel were assigned to the case, along with the presiding judge's description of the testimony and this Court's reliance upon the testimony when the re-sentencing was ordered. Thus, re-sentencing counsel had possession of that testimony and this Court's reliance upon that testimony when preparing for the re-sentencing in 1996. Not only does Dr. Carbonell's testimony provided a guide for re-sentencing counsel as to how to proceed, it also provides a benchmark for the weightiness and quality of the available mental health mitigation.

When re-sentencing counsel chose to contract with different mental health experts for the re-sentencing, he bore the burden of at least providing those experts with what Dr. Carbonell had received that made her testimony "most persuasive and convincing." Thus contrary to the State's empty rhetoric, Dr.

Carbonell's testimony must be considered when analyzing his ineffective assistance of counsel claim. Indeed, in *Porter v. McCollum, 130 S. Ct. at 453-54,* the United States Supreme Court made it clear that the prejudice analysis requires consideration of all mitigating evidence in the record. *See Upton v. Sears, 130 S. Ct. at 3266-67* (relying upon *Porter v. McCollum*, and then explaining: "That same standard applies-and will necessarily require a court to 'speculate' as to the effect of the new evidence-regardless of how much or how little mitigation evidence was presented during the initial penalty phase.").

Though the circuit court's order indicated that Dr. Berland's "opinions and conclusions would not have changed" (Answer Brief at 27), the State argues that "the expert's testimony did not change at all" (Answer Brief at 34). However, neither the circuit court nor the State acknowledged the change that did occur in the mental health expert's testimony. The hole in the 1996 testimony that the sentencing judge relied upon in concluding that it was not "particular compelling" was plugged. In 1996 after the State's wilting cross concerning the expert's failure to review the institutional records or interview the available witnesses, the sentencing judge said the

expert's testimony was "based on extrapolation, speculation, and conjecture." (R2. 477).

Contrary to the State's argument, this Court must look at the expert's testimony *de novo* and consider how the strengthened testimony which would have been accorded more weight may have impacted upon the jury's 8-4 death recommendation. In *Sears v. Upton*, the United States Supreme Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.... And, in Porter, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h]

> it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, requires in all cases a "probing and fact-specific analysis" of prejudice. *Id. at 3266.* A truncated, cursory analysis of prejudice will not satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Hildwin's ineffective assistance of counsel claim must be reassessed with a full-throated and probing prejudice analysis.

Sears teaches that postconviction courts must speculate as to the effect of non-presented evidence in order to make a *Strickland* prejudice determination not only when little or no mitigation evidence was presented at trial but in all instances, including the circumstances present in Mr. Hildwin's case. As *Sears* points to *Porter* as the recent articulation of *Strickland* prejudice correcting a misconception in state courts, the failure to conduct a probing, fact-specific prejudice analysis can be characterized as "*Porter* error." When such an analysis

is finally conducted in Mr. Hildwin's case, its clear that converting the 1996 expert testimony from not "particularly compelling" because it was based upon "extrapolation, speculation, and conjecture" (R2. 477), to "most persuasive and convincing" would cast the case in a new light and create a reasonable probability of a different sentencing decision by the jury that was already split 8 to 4. Rule 3.851 relief is warranted.

CONCLUSION

Based upon the record and the arguments presented herein and in the Initial Brief, Mr. Hildwin respectfully urges the Court to reverse the lower court and vacate the denial of Rule 3.851 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on October 15, 2010.

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This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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