

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1271

MICHAEL ALLEN GRIFFIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

“R. ___” - Record on direct appeal to this Court from the 1986 trial;

“PC-R. ___” - Record on appeal to this Court from the Rule 3.851 proceedings in which an evidentiary hearing was conducted in 1992;

“PC-R2. ___” - Record on appeal to this Court from the Rule 3.851 proceedings in the instant appeal SC11-1271.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

Mr. Griffin has been sentenced to death. This appeal raises the issue of whether *Porter v. McCollum*, 130 S. Ct. 447 (2009), qualifies as new Florida law under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and whether it requires this Court to revisit Mr. Griffin's ineffective assistance of counsel claims from 2003. *Griffin v. State*, 866 So. 2d 1 (Fla. 2003). In instances in which the U.S. Supreme Court found that this Court had failed to properly understand, construe, and apply federal constitutional law in a Florida capital case, this Court has not only granted oral argument to consider whether the new U.S. Supreme Court decision qualified under *Witt*, but after hearing oral argument

has found that the decisions did qualify under *Witt* as new law. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987), which was found to qualify as new Florida law under *Witt* in *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987); and *Espinosa v. Florida*, 505 U.S. 1079 (1992), which was found to qualify as new Florida law under *Witt* in *James v. State*, 615 So. 2d 668 (Fla. 1993).

The resolution of the issues involved in this action will determine whether Mr. Griffin lives or dies, and whether his ineffective assistance of counsel claims were properly analyzed by this Court when it misconstrued the *Strickland* prejudice prong standard and gave too much deference to rulings made by the judge presiding at a post-conviction evidentiary hearing. This Court allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the stakes at issue. Mr. Griffin urges that the Court permit oral argument.

STANDARD OF REVIEW

This appeal consist of two parts: the first is the determination of whether *Porter* must be applied retroactively. That issue is a question of law and must be reviewed *de novo*. See *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) (“We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law”); *James v. State*, 615 So. 2d 668,

669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling"). The second is the application of *Porter* to Mr. Griffin's case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Griffin's jury would have viewed those facts. See *Porter v. McCollum*, 130 S.Ct. 447 (2009).

INTRODUCTION

On November 30, 2009, the U.S. Supreme Court issued its decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009);¹ and ruled that this Court's *Strickland*² analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455. Under the Anti-Terrorism Effective Death Penalty Act (AEDPA), the U.S. Supreme Court was required to give deference to this Court's application of *Strickland*. It could not grant habeas relief from a state court judgment merely because it disagreed with the state court's application of federal constitutional law. Specifically, habeas relief could only be issued to George Porter if this Court's *Strickland* analysis was not just wrong, but clearly and unreasonably wrong. It is in this context that the U.S. Supreme Court's ruling in *Porter v. McCollum* must be read.

Though *Porter v. McCollum* specifically dealt with an ineffective assistance of penalty phase counsel claim, the defect in this Court's *Strickland* analysis that was identified by the

¹On November 29, 2010, Mr. Griffin filed the Rule 3.851 that is the subject of this appeal (PC-R. 34-64). In that motion, Mr. Griffin relied upon *Porter v. McCollum* and argued that it qualified under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) as new law which warranted revisiting Mr. Griffin's previously presented *Strickland* claims.

²*Strickland v. Washington*, 466 U.S. 668 (1984).

U.S. Supreme Court is equally applicable to guilt phase ineffective assistance of counsel claims and the materiality prong of *Brady* claims.³ This Court has made clear that its prejudice prong analysis of a guilt phase ineffective assistance claim and its materiality prong analysis under *Brady* are indistinguishable from each other.

In *Rivera v. State*, 995 So. 2d 191, 205 (Fla. 2008), this Court recognized that “the materiality prong of *Brady* has been equated with the *Strickland* prejudice prong.” Accordingly, an analysis of the *Strickland* prejudice prong precluded the need to perform an identical analysis for the materiality prong of *Brady* and vice-a-versa. See *Derrick v. State*, 983 So. 2d 443 (Fla. 2008). In *United States v. Bagley*, 473 U.S. 667 (1985), the U.S. Supreme Court expressly adopted the *Strickland* prejudice prong standard, *i.e.* “reasonable probability of a different outcome”, as the standard to be used when conducting the materiality analysis of undisclosed favorable information in *Brady* cases. Thus, the U.S. Supreme Court’s rejection in *Porter* of this Court’s *Strickland* prejudice prong analysis as too deferential to the lower court considering a penalty phase ineffectiveness claim applies equally where this Court has been overly deferential to a lower’s court rejection of guilt phase ineffective assistance

³*Brady v. Maryland*, 373 U.S. 83 (1963).

claims.

Mr. Griffin's current appeal requires this Court to look at the importance of *Porter v. McCollum* in the context of his ineffective assistance of counsel claims. This Court must consider whether its own defective analysis in *Porter v. State* was merely an aberration limited solely to the penalty phase ineffectiveness claim in that case or whether it is indicative of this Court's systemic failure to properly understand and apply *Strickland*.⁴

In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the U.S. Supreme Court granted federal habeas relief because this Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978). It failed to find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances while deliberating the propriety of a death sentence.⁵ The other case finding that

⁴The question that must be addressed is whether the U.S. Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Griffin's *Porter* claim cognizable in Rule 3.851 proceedings. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance") *Id.* at 931.

⁵The AEDPA was not in effect at the time of the decision in *Hitchcock v. Dugger*, so there was no need for the U.S. Supreme Court to determine that this Court's decision was clearly or

this Court had failed to properly apply federal constitutional law was *Espinosa v. Florida*, 505 U.S. 1079 (1992). There, the U.S. Supreme Court summarily reversed a decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.⁶

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death-sentenced individuals whose death sentences had also been affirmed by this Court due to the same misapprehension of federal law should arbitrarily be denied the benefit of the proper construction and application of federal constitutional law. On both occasions, this Court determined that fairness dictated that those who had not received the benefit of the proper application of federal constitutional law, should be allowed to re-present their claims and have those claims judged under the proper constitutional standards. See *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We hold we are required by this *Hitchcock*

unreasonably wrong. The U.S. Supreme Court's review in *Hitchcock* was *de novo*.

⁶The decision by the U.S. Supreme Court in *Espinosa v. Florida* was in the course of direct review of this Court's decision affirming a death sentence on direct appeal. The U.S. Supreme Court's decision was not through the prism of federal habeas review, and thus the U.S. Supreme Court employed *de novo* review.

decision to re-examine this matter as a new issue of law”); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because “it would not be fair to deprive him of the *Espinosa* ruling”).

Mr. Griffin, whose ineffective assistance of counsel claims were heard and decided by this Court before *Porter v. McCollum*, seeks what George Porter received. Mr. Griffin seeks to have his ineffectiveness claims re-evaluated using the proper *Strickland* standard that U.S. Supreme Court applied in Mr. Porter’s case to find resentencing is warranted.⁷ Mr. Griffin seeks the benefit of the same rule of law that was applied to Mr. Porter’s ineffective assistance of counsel claims. Mr. Griffin seeks the proper application of the *Strickland* standard. Mr. Griffin seeks to be treated equally and fairly.

⁷When Mr. Porter’s case was returned to the circuit court for a resentencing, a life sentence was imposed.

STATEMENT OF THE CASE

On May 2, 1990, Mr. Griffin and co-defendants Nicholas Tarallo and Samuel Velez were charged with first-degree murder with a firearm, aggravated assault, armed burglary, two counts of grand theft and petit theft⁸ in Dade County. Andrew Kassier represented Mr. Griffin as the public defender had conflicted off the case. Though he had previously worked on first-degree murder cases in which death was sought during his time at the public defender's office, Mr. Griffin's case was the first where Kassier had personally handled a penalty phase proceeding (T. V. 4, 793-96; 854).⁹

On January 30, 1991, Mr. Griffin and Velez were tried jointly before separate juries.¹⁰ Kassier chose not to have co-counsel as another attorney would have cut into his fees and reduced the amount of money he would make on the case (PC-R. 854-855). Kassier retained Dr. Mary Haber as his mental health expert and investigator Al Fuentes with whom he'd never worked

⁸Mr. Griffin was also charged with felon in possession of a firearm. Subsequently, the State dismissed the aggravated assault charge and refiled it as an attempted first-degree murder.

⁹At the time of the September 2000 evidentiary hearing, Kassier had been suspended from the practice of law since 1997 (PC-R 833).

¹⁰Tarallo pled guilty to second-degree murder, attempted first-degree murder, burglary and two counts of grand theft and received a 30-year sentence to testify against Mr. Griffin.

(PC-R. 802; 856). Fuentes was instructed to gather materials for Dr. Haber to review for mitigation. He only gathered school records (PC-R. 804). He did not provide police reports or depositions or gather records other than school records (PC-R. 848-851). Dr. Haber conducted no family member interview except one brief conversation with Mr. Griffin's father. *Id.* Kassier only had one conversation with Dr. Haber regarding her testing and did not recall receiving any written reports from her (PC-R. 849-850).

On February 11, 1991, two days before sentencing, Dr. Haber provided a three-page summary of her conclusions that there was no mitigating evidence (RT. V. 4, 806). Kassier did not call Dr. Haber at sentencing.

After speaking with Mr. Griffin's father, Clarence Thomas "Tommy" Griffin, Kassier decided not to contact or interview any other potential mitigation witnesses because Thomas felt they would not be helpful. The only family member witness contacted or called at penalty phase was Tommy Griffin, Michael's father (PC-R. 4, 810-11). Tommy Griffin did not admit to the jury that he had physically and emotionally abused and neglected Michael.¹¹

¹¹Tommy Griffin's testimony consisted of one or two word answers with no detail and no acknowledgment of his responsibility for his son's problems. For example, he testified that when Michael was 6 or 8 months old he was hospitalized because he wasn't being taken care of properly (RT. 3642-43). In post-conviction, it was revealed that Michael had been hospitalized at 2 months because he had been a victim of severe

He did not admit that his father, Michael's grandfather, had sexually abused his grandchildren.

During the State's case, it introduced testimony from co-defendant Nicholas Tarallo that on April 27, 1990, the three men drove Griffin's father's Cadillac to the location of a white Chrysler LeBaron where they switched cars. Once in the LeBaron, they searched for an appropriate target for a burglary. They ended up at a Holiday Inn where they entered a hotel room and stole a cell phone and purse. While Tarallo drove, Velez and Griffin divided the proceeds.

As the three left the Holiday Inn and were returning to the Cadillac, a police car began following them. Griffin panicked and told Tarallo to speed up. After a failed attempt to evade the police, Tarallo pulled over. As he got out, Griffin began shooting, killing one officer. After an exchange of gunfire, Tarallo and Velez exited the vehicle and surrendered to the officer. Griffin fled in the LeBaron and was eventually apprehended. Cf. *Griffin v. McNeil*, 667 F. Supp. 2d 1340 (2009).

neglect by his father. Kassier later conceded in post-conviction that if he had evidence that the father had a drinking problem, sexually abused and hit Michael that information would have been helpful to the defense (PC-R. 4, 866).

On February 8, 1991, the jury found Mr. Griffin guilty of first-degree murder of a law enforcement officer; attempted first-degree murder of a law enforcement officer; armed burglary; and two counts of grand theft and petit theft.¹²

Five days later, the penalty phase began. The jury recommended a death sentence by a vote of 10 to 2 that same day.

On March 7, 1991, the judge imposed a death sentence for the murder charge, life imprisonment for the attempted murder; and five years for grand theft to run concurrently. The court found four aggravating circumstances: 1) a prior violent felony (for the contemporaneous attempted first-degree murder); 2) crime was committed during the commission of a burglary; 3) avoid arrest and 4) cold, calculated and premeditated. In mitigation, the trial court found Mr. Griffin was 20 at the time of the offense; that he had shown remorse; that he had a traumatic childhood; and had a learning disability.

On direct appeal, this Court affirmed even though the trial court had restricted the introduction of non-statutory mitigating evidence of remorse to the jury. *Griffin v. State*, 639 So. 2d 966 (Fla. 1994). Certiorari review was denied by the U.S. Supreme Court on March 6, 1995. *Griffin v. Florida*, 115 S. Ct. 13176 (1995).

¹²Co-defendant Samuel Velez received a life sentence. Tarallo pled guilty and received a 30-year sentence in exchange for testifying against his co-defendants.

Mr. Griffin filed a shell post-conviction motion on March 19, 1997. On October 29, 1998, Mr. Griffin filed an amended post-conviction motion and a second amended motion on December 10, 1999 raising 31 claims. On May 5, 2000, the trial court summarily denied all but two claims--ineffective assistance of counsel at penalty phase and allegations that the trial judge had failed to independently weigh the sentencing phase evidence by having the State prepare the sentencing order and trial counsel's ineffectiveness for failing to object to the State's preparation of the order. After a September, 2000 evidentiary hearing, the court denied those two claims.

On September 25, 2003, this Court affirmed the denial of Mr. Griffin's post-conviction motions. *Griffin v. State*, 866 So. 2d 1 (Fla. 2003). This Court conducted no prejudice analysis at all regarding Mr. Griffin's ineffective assistance of counsel claims other than citing to *Strickland* and *Stephens v. State*, 748 So. 2d 1028, 1033 (Fla. 1999). *Griffin v. State*, 866 So. 2d at 14. The mandate issued on March 1, 2004. Certiorari review was denied on November 1, 2004. *Griffin v. Florida*, 543 U.S. 962 (2004).

While the denial of the first post-conviction motion appeal was pending, Mr. Griffin's former state-appointed attorney filed a second post-conviction motion on June 20, 2003. The trial court dismissed the motion because it no longer had jurisdiction,

and that state-appointed counsel no longer represented Mr. Griffin on June 3, 2004 as he had retained counsel. Mr. Griffin filed a *pro se* notice of appeal on the denial of the second post-conviction motion on June 24, 2004.

This Court affirmed the dismissal of the motion, but granted Mr. Griffin leave to re-file the motion in circuit court with proper counsel.

Mr. Griffin re-filed his second post-conviction motion on February 21, 2005 in Dade County which contained two grounds for relief.

New counsel substituted in on March 7, 2005 and filed a third post-conviction motion raising three grounds for relief. The trial court struck the third claim which left the two original claims from the June 20, 2003 motion intact but granted leave to amend. A series of hearings were held but counsel was not properly noticed. In the absence of Mr. Griffin or his counsel, the trial court denied the claims.

On July 19, 2006, the trial court vacated its previous order finding that Mr. Griffin had not been properly noticed. On July 20, 2006, the trial court entered a new order denying the post-conviction claims. Mr. Griffin's motion for rehearing was denied on August 7, 2006 and rendered on August 9, 2006. On September 1, 2006, Mr. Griffin filed notice of appeal of the denial of his second post-conviction motion.

On May 8, 2006, Mr. Griffin filed a petition for belated appeal of the second post-conviction motion. This Court granted the petition and treated it as a December 1, 2006 notice of appeal. On June 2, 2008, this Court affirmed the denial of the second post-conviction motion. *Griffin v. State*, 992 So. 2d 819 (Fla. 2008). Rehearing was denied on September 3, 2008.

A Petition for Writ of Habeas Corpus was filed in federal district court on October 8, 2008 and an amended petition was filed on April 3, 2009. The petition was denied on October 15, 2009. A Petition for Certificate of Appealability was filed and denied in the Eleventh Circuit Court of Appeals. A Motion for Rehearing on the denial of the Certificate of Appealability was also denied. The time for filing a petition for certiorari review by the U.S. Supreme Court is currently pending.

During the pendency of Mr. Griffin's federal habeas proceeding, he filed a motion with this Court to invoke its "All Writs" jurisdiction raising four claims of ineffective assistance of appellate counsel. The petition was denied on November 2, 2009. *Griffin v. McCollum*, SC08-2179.

A third post-conviction motion based on claims pursuant to *Porter v. McCollum*, 130 S. Ct. 447 (2009) was filed on November 29, 2010 by Mr. Griffin's federal habeas counsel, Martin J. McClain. The State objected to the appointment of Mr. McClain for the state court proceedings and undersigned counsel was

appointed as registry counsel on February 7, 2011. Despite trial counsel's objections that she had not had sufficient time to learn Mr. Griffin's complex case, the trial court scheduled a *Huff* hearing on May 10, 2011 (PC-R3. 106). The trial court summarily denied Mr. Griffin's claims on May 20, 2011. *Id.*

Timely notice of appeal was filed to this Court on June 17, 2011.

SUMMARY OF THE ARGUMENT

A wealth of favorable mitigating evidence was not heard by Mr. Griffin's jury because defense counsel unreasonably failed to discover and present the evidence. This was the focus of his post-conviction motion.

On appeal, this Court deferred completely to the circuit court's rulings on every issue and conducted no prejudice analysis. *Griffin v. State*, 866 So. 2d at 14. This Court failed to engage in the proper cumulative analysis of the specific mitigating evidence not heard by the jury. This Court failed to consider how reasonably effective defense counsel would have used the evidence and how the jury may have viewed the evidence. In fact, the Court's analysis consisted of three sentences.

Porter v. McCollum, 130 S.Ct. 447 (2009) establishes that the previous denial of Mr. Griffin's ineffective assistance of counsel claims was premised upon this Court's misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984).

Porter represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law, which renders Mr. Griffin's *Porter* claim cognizable in these post-conviction proceedings. *Porter* also requires this Court to revisit Mr. Griffin's claims and conduct the proper cumulative analysis from either the unreasonable failure to discover or present mitigating evidence at Mr. Griffin's 1991 trial. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

MR. GRIFFIN'S CONVICTION VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. MCCOLLUM*.

A. INTRODUCTION

Mr. Griffin was deprived of the effective assistance of trial counsel when he failed to investigate and prepare a plethora of mitigating evidence available to him. Mr. Griffin presented his ineffective assistance of counsel claims in a Rule 3.850 motion that was initially filed in 1997. Following an evidentiary hearing in 2000, the circuit court denied Mr. Griffin's ineffective assistance of counsel claims.

The trial judge unreasonably "discounted to irrelevance" evidence of Mr. Griffin's abusive childhood. See, *Porter v. McCollum*, 130 S. Ct. at 455. Though the court found Mr. Griffin's "troubled" childhood to be mitigating, it gave the evidence little weight due to the scant evidence presented by an

inexperienced attorney who was more concerned about getting his entire fee than properly representing his client. The trial court deferred to the unreasonable decisions of trial counsel who had been suspended from the practice of law by the time he testified at the 2000 evidentiary hearing.¹³

Yet, the trial court adopted his explanations as reasonable when he blamed Mr. Griffin for not “giving” him mitigating evidence for penalty phase. The trial court did not analyze the claim from the proper perspective that it is trial counsel’s duty to investigate and prepare his client’s defense. It is not the client’s responsibility to know what mitigation is or how to get it. See, *Wiggins v. Smith*, 539 U.S. 510 (2003). The trial court wrongly ruled that trial counsel was not ineffective for failing to discover and present mitigating evidence because at the last

¹³On February 14, 1997, the Florida Bar issued an emergency suspension of Mr. Kassier’s bar license for failing to provide bank records to the Bar for a “multitude of worthless checks and abandoning his clients’ matters.” On May 18, 1998, Kassier was suspended for one year followed by three years probation as a result of shortages in his trust account, failure to respond to the Bar inquiries regarding client complaint and failure to keep a client reasonably informed about the status of his or her case. *The Florida Bar v. Kassier*, 711 So. 2d 515 (Fla. 1998). On November 25, 1998, Mr. Kassier received another one year suspension to run *nunc pro tunc* to March 16, 1997, for failing to comply with a Bar subpoena and for issuing checks with insufficient funds in Florida Bar File Nos. 1997-70,169(11A), 1997-70,231(11A), 1997-70, 342 (11A), 1997-70,469(11A),1997-70,609(11A),1997-70,631(11A),1997-71,042(11A),and 1997-71,076(11A). *The Florida Bar v. Kassier*, 730 So. 2d 1273 (Fla. 1998). On January 10, 2010, this Court granted Mr. Kassier’s reinstatement while also imposing three years probation. *The Florida Bar v. Kassier*, SC No. 09-742 (January 4, 2010).

minute he had Dr. Haber see his client.

The flaw in the trial court's reasoning was that Dr. Haber was not given any background information on the client other than school records. She was given no medical records, and did not speak with any family members other than a brief conversation with Tommy Griffin. Dr. Haber had no idea that Tommy Griffin, the only family member trial counsel had contacted, was Michael's abuser, an alcoholic, and the perpetrator of the "troubled" childhood of emotional and physical abuse. Because she did not speak with Michael's brother, Charles Griffin, she did not know that Tommy's father had sexually abused the boys. Moreover, Dr. Haber is not a neuropsychologist, and could not conduct any testing for organic brain damage. Once again, Dr. Haber had no idea about Michael's organic brain damage and discounted the existence of it. The trial court turned a blind eye to post-conviction evidence of organic brain damage stating that the evidence "conflicted" with the State's expert, and was therefore of no import. *Porter* forecloses such selective analysis and condemns deference to such misinterpretations of the *Strickland* deficient performance and prejudice prongs.

This Court in *Porter* discounted Dr. Dee's testimony as conflicting with other testimony at trial to deny relief. The U.S. Supreme Court specifically rejected the notion that all mitigation must be irrefutable, stating that it is the potential

impact on the jury of the doctor's testimony, whether conflicting or not, that is important. *Porter v. McCollum*, 130 S. Ct. 455.

On appeal, this Court affirmed the denial of Mr. Griffin's claims saying:

In light of this evidence presented at the evidentiary hearing, we agree with the circuit court's conclusion that Griffin cannot prevail on his claim of ineffective assistance of counsel in the investigation and presentation of mental health and other mitigating evidence. Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. See *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992) (finding counsel's decision not to put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); see also *State v. Bolender*, 502 So. 2d 1247, 1250 (Fla. 1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). Accordingly, we affirm the denial of relief on this claim.

Griffin v. State, 866 So. 2d at 9.

This Court ignored that trial counsel did not speak with anyone other than the defendant's father. According to long-standing jurisprudence, trial counsel's decisions can only be considered reasonable **after** a thorough and careful investigation into his client's background. See, *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005). That did not happen here. This Court's deference to a trial court decision based on such flawed analysis is no longer acceptable or

reasonable under *Porter*.

The *Porter* decision establishes that this Court's affirmance of the circuit court's denial of Mr. Griffin's ineffective assistance of counsel claims was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). *Porter* was a repudiation of this Court's *Strickland* jurisprudence, and as such, *Porter* constitutes a change in Florida law,¹⁴ which renders Mr. Griffin's *Porter* claim cognizable in collateral proceedings. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d at 669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

Mr. Griffin presented his *Porter v. McCollum* claim to the trial court in a Rule 3.851 motion in light of this Court's

¹⁴*Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance claim in *Porter v. State*. Thus, Mr. Griffin does not argue that *Porter v. McCollum* announced new federal law. Instead, it announced a failure by this Court to properly understand, follow and apply the clearly established federal law. Thus, the decision is new Florida law because it is a rejection of this Court's jurisprudence misconstruing *Strickland*. *Porter v. McCollum* was an announcement that this Court's precedential decision in *Porter v. State* was wrong, and in doing so announced new Florida law. This is identical to the rulings in *Hitchcock v. Dugger* and *Espinosa v. Florida*, which both found that this Court had failed to properly understand, follow and apply federal constitutional law.

ruling in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, in which the U.S. Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, should be raised in Rule 3.850 motions). At the State's urging, the trial court refused to find that fairness principles dictated that *Porter v. McCollum* should be treated just like *Hitchcock v. Dugger* and *Espinosa v. Florida*, as new Florida law within the meaning of *Witt v. State*. Accordingly, Mr. Griffin is entitled to have his previously presented ineffective assistance of counsel claims judged by the same standard that the U.S. Supreme Court employed when finding that this Court's *Strickland* analysis in *Porter v. State* was an unreasonable application of well-established federal constitutional law.

B. PORTER QUALIFIES UNDER WITT AS A DECISION FROM THE U.S. SUPREME COURT WHICH WARRANTS THIS COURT REHEARING MR. GRIFFIN'S INEFFECTIVENESS CLAIMS.

Whether *Porter* qualifies as new law is a question of law. Initially, this Court must independently review that aspect of Mr. Griffin's claims, and should give no deference to the trial court's refusal to find that *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law. Should this Court conclude that *Porter* applies retroactively, then this Court must review the merits of Mr. Griffin's ineffective assistance of counsel claims, giving only deference to specific findings of historical facts

supported by competent and substantive evidence.

As *Porter* made clear, the reasonableness of strategic decisions including decisions about the scope of investigations as to both the guilt and penalty phases, are questions of law to which no deference is to be accorded to the judge who presided at evidentiary hearing. An evaluation of the evidence presented to establish prejudice under the prejudice prong of the *Strickland* standard must also be evaluated without any deference to the presiding judge's findings as to that evidence. Absolute *de novo* review is required of evidence offered to establish prejudice under *Strickland* or materiality under *Brady*. The issue is not what impact the evidence of prejudice had on the judge presiding at a collateral evidentiary hearing, but what impact such evidence may have had upon the jury who heard the case had it been presented. See *Porter v. McCollum*, 130 S. Ct. at 454-55.¹⁵

¹⁵As the U.S. Supreme Court noted in *Kyles v. Whitley*, 514 U.S. 419 (1995), 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 post-conviction evidentiary hearing thought of the unrepresented 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.

In *Witt*, this Court held that changes in the law could be raised retroactively in post-conviction proceedings when the need for fairness and uniformity dictates. Specifically, this Court held that “[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications.” 387 So. 2d at 925. The Court recognized that “a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice.” *Id.* “Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.” *Id.* (quotations omitted).

While referring to the need for finality in capital cases on the one hand, the Court found conversely that capital punishment “[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death.” *Witt*, 387 So. 2d at 926 (citing Justice White’s dissent in *Godfrey v. Georgia* for the proposition that the U.S. Supreme Court in *Godfrey* endorsed the previously rejected argument that “government, created and run as it must be by humans, is inevitably incompetent to administer [the death

penalty],” 446 U.S. 420, 455 (1980)).

This Court in *Witt* recognized two “broad categories” of cases which will qualify as fundamentally significant changes in constitutional law: (1) “those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties” and (2) “those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*.” *Id.* at 929. This Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: “(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.” *Id.* at 926.

This Court summarized in *Witt* that a change in law can be raised in post-conviction if it: “(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance...” *Id.* at 931.

This Court showed how the *Witt* standard was to be applied after the U.S. Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the U.S. Supreme Court had issued a writ of certiorari to the Eleventh Circuit

Court of Appeals to review its decision denying federal habeas relief to Hitchcock, who had a death sentence in Florida. The U.S. Supreme Court found that Hitchcock's death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence violated the Eighth Amendment. Shortly after the U.S. Supreme Court issued its decision in *Hitchcock*, death-sentenced individuals with an active death warrants argued to this Court that they were entitled to the benefit of *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).¹⁶

¹⁶The *Hitchcock* decision issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. This Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). On September 9, 1987, this Court issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, this Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a

In *Lockett v. Ohio*, the U.S. Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering “any aspect of a defendant’s character or record and any of the circumstances of the offense.” 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. See *Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, the U.S. Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the U.S. Supreme Court held that this

class of petitioners, including Thompson, to defeat the claim of a procedural default.” In *Downs*, this Court explained: “We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in *Downs*’ prior collateral challenges.” On October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap’s *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. On October 30, 1987, this Court issued its opinion in *Demps*, and addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that

Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See Id.* at 1071.

was present was harmless.

This Court found that *Hitchcock* “represents a substantial change in the law” such that it was “constrained to readdress ... *Lockett* claim[s] on [their] merits.” *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, this Court found a post-conviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because “*Hitchcock* rejected a prior line of cases issued by this Court.” *Downs*, 514 So. 2d at 1071.¹⁷

¹⁷The U.S. Supreme Court did not indicate in its opinion that it was addressing any other case or line of cases other than Mr. Hitchcock’s case. Indeed, the U.S. Supreme Court expressly stated:

Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e. g., *Cooper v. State*, 336 So. 2d 1133, 1139 (1976) (“The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . .”), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued *Cooper*, pointing to the Florida Supreme Court’s subsequent decision in *Songer v. State*, 365 So. 2d 696 (1978) (per curiam), which expressed the view that *Cooper* had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

Hitchcock, 481 U.S. at 396-97.

This Court's decision at issue in *Hitchcock* was not some rogue decision, but reflected the erroneous construction of *Lockett* that had been applied by this Court consistently in virtually every case in which the *Lockett* issue had been raised.

In *Thompson* and *Downs*, this Court acknowledged that fairness and due process dictated that everyone who had raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.¹⁸

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so too *Porter* reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the U.S. Supreme Court found that this Court's decision affirming the death sentence was contrary to *Lockett*, a prior decision from the U.S. Supreme Court, here in *Porter* the U.S. Supreme Court found that this Court's decision affirming the death sentence was

¹⁸Because the result in *Hitchcock* was dictated by *Lockett* as the U.S. Supreme Court made clear in its opinion, there can be no argument that the decision was new law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). Since the decision was not a break with prior U.S. Supreme Court precedent, *Hitchcock* was to be applied to every Florida death sentence that became final following the issuance of *Lockett*. Certainly, no federal court found that *Hitchcock* should not be given retroactive application. See *Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

contrary to or an unreasonable application of *Strickland*, a prior decision from the U.S. Supreme Court. As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims.

Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis, so too those individuals who have raised the same *Strickland* issue that Mr. Porter had raised and have lost, should receive the same relief from that erroneous legal analysis that Mr. Porter did.

And just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, this Court's misreading of *Strickland* that the U.S. Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

This Court also failed to properly apply Eighth Amendment jurisprudence to *Espinosa v. Florida*. At issue in *Espinosa* was this Court determination in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), that the U.S. Supreme Court decision in *Maynard v. Cartwright*, a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme

and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

Smalley v. State, 546 So. 2d at 722.

In *Espinosa*, the U.S. Supreme Court determined that *Maynard v. Cartwright* applied in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment.

Following *Espinosa*, this Court found that the decision qualified under *Witt v. State* as new Florida law which warranted revisiting previously rejected challenges to the "heinous, atrocious or cruel aggravating circumstance. *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling"). As a result, *Espinosa* was found to qualify as new Florida law under *Witt*.

This Court should, for the same reasons that it treated *Hitchcock* and *Maynard* as qualifying as new law under *Witt*, find that *Porter v. McCollum* qualifies under *Witt* and warrants reconsidering previously denied ineffective assistance of counsel claims under the proper *Strickland* standard. Refusing to reconsider Mr. Griffin's ineffectiveness claims and apply the now recognized proper standard of review would arbitrarily deny him

the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would establish that Mr. Griffin's death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

C. PORTER V. MCCOLLUM AND THE PREJUDICE PRONG OF MR. GRIFFIN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

In *Porter v. McCollum*, the U.S. Supreme Court found this Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S.Ct. at 455. In *Porter v. State*, this Court had explained the *Strickland* analysis that it used:

At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. Based upon our case law, it was then for the trial court to resolve the conflict by the weight the trial court afforded one expert's opinion as compared to the other. The trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the States's expert. **We accept this finding by the trial court** because it was based upon competent, substantial evidence.

Porter v. State, 788 So. 2d at 923 (emphasis added). The U.S. Supreme Court rejected this analysis (and implicitly this Court's case law on which it was premised) as an unreasonable application of *Strickland*:

The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced

in the postconviction hearing. * * * Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

Porter v. McCollum, 130 S. Ct. at 454-55.

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a post-conviction hearing, see *id.* at 451, and "either did not consider or unreasonably discounted" that evidence. *Id.* at 454. This Court deferred to the post-conviction judge's findings without considering how the jury may have been affected by the unrepresented evidence. The U.S. Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable." *Id.* at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id.* at 454, even though Mr. Porter's personal history represented "the 'kind of troubled

history we have declared relevant to assessing a defendant's moral culpability.” *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court's jurisprudence shows that the *Strickland* analysis used in *Porter v. State* was not an aberration, but was in accord with a line of cases from this Court, just as this Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that 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 without considering how it may have affected the penalty phase jury. 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).

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted an “inconsistency” in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings.¹⁹ In *Stephens*, this Court observed that its

¹⁹It should be noted 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.

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 post-conviction 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.²⁰ 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 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*. However, the 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

²⁰This Court acknowledged that there were numerous cases in which it had applied the deferential standard employed in *Grossman*. As examples, the 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 *Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

principle of appellate review.

Stephens, 748 So. 2d at 1034.

In *Porter v. State*, the Court relied upon this very language in *Stephens* to discount and discard the testimony of Dr. Dee. Dr. Dee had been presented by Mr. Porter at the post-conviction evidentiary hearing and this Court, in deference to the trial judge's credibility determination, adopted his analysis wholesale without consideration for how the jury may have considered the unrepresented mitigating evidence. *Porter*, 788 So. 2d at 923.

Porter v. McCollum was a rejection of not just the deferential standard from *Grossman* that was explicitly discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to the U.S. Supreme Court, the *Stephens* standard which was employed in *Porter v. State* and used to justify this 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.

In Mr. Griffin's case, as in *Porter*, this Court erroneously deferred to the trial court's findings without engaging in its own analysis of the mitigating evidence and information that was readily available to trial counsel at the 2000 evidentiary hearing. As to the penalty phase *Strickland* claims, this Court wrote:

In light of this evidence presented at the evidentiary hearing, we agree with the circuit court's conclusion that Griffin cannot prevail on his claim of ineffective assistance of counsel in the investigation and presentation of mental health and other mitigating evidence. Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. See *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992) (finding counsel's decision not to put on mental health experts to be "reasonable strategy in light of the negative aspects of the expert testimony" where experts had indicated that defendant was malingering, a sociopath, and a very dangerous person); see also *State v. Bolender*, 502 So. 2d 1247, 1250 (Fla. 1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"). Accordingly, we affirm the denial of relief on this claim.

Griffin v. State, 866 So. 2d at 9.

This Court did not discuss the undiscovered mitigating evidence or information that the jury did not hear. There is absolutely no reference to the fact that trial counsel relied primarily on Mr. Griffin's father and his representation that no other witnesses would be cooperative. Trial attorney Kassier failed to contact other family members even though he knew Mr. Griffin had been abandoned when he was six months old. Instead, this Court adopted completely the trial court's finding that Mr. Griffin did not "give" trial counsel the mitigating evidence necessary for a reasonable defense at penalty phase. Cf. *Rompilla v. Beard*, 545 U.S. 374 (2005). There was no discussion anywhere in this Court or the trial court's decisions that it was not Mr.

Griffin's responsibility to investigate and prepare his own penalty phase defense. Nor does this Court discuss that trial counsel had been suspended from the practice of law for three years at the time of his post-conviction testimony. No one addressed the possibility that trial counsel's answers were colored by his desire to be reinstated with the Florida Bar. It most certainly was not in Kassier's best interest to admit failing to investigate and prepare his first penalty phase case when he otherwise faced permanent disbarment.

Kassier's responses were calculated to paint himself in a light most favorable for reinstatement to the Florida Bar. There was no discussion in this Court's order about trial counsel's decision not to hire co-counsel because he did not want to divide his attorney's fees with someone else (PC-R. 134-35). He hired an investigator he had never worked with before and who had never conducted a penalty phase investigation (PC-R. 136).

At the last minute before penalty phase, Kassier hired psychologist, Dr. Mary Haber, for mitigation but then gave her no documents other than school records (PC-R. 84). She had no police reports, depositions, or family member interviews other than a short phone call with Tommy Griffin (PC-R. 86). She had no social history from the mother's side of the family which contained evidence of manic depression and schizophrenia. She did not know that Mr. Griffin suffered from organic brain damage

because she was not a neuropsychologist and could not conduct those tests. Having failed to timely hire Dr. Haber or provide her with adequate background information, it was not surprising that she found no mental health issues and no mitigation. Based on this botched use of a mental health expert, Kassier decided not to call Dr. Haber to testify at penalty phase.

There was no discussion in this Court's decision about the fact that Kassier failed to gather basic records on his client other than school records. He did not speak with or seek information on the defendant's mother, Marianne, who had a history of serious mental health problems. He did not speak with the Michael's brother, Charles, who grew up in the same household. Neither Kassier nor his investigator gathered any medical records that would corroborate Michael's family history of mental illness.

This Court did not acknowledge, let alone discuss, the testimony of Michael's father, Clarence Thomas "Tommy" Griffin. He was Kassier's primary source of information on Michael. Yet, Kassier failed to know that it was Tommy Griffin's father who was Michael's abuser or that his grandfather was the one who had sexually assaulted the boys. Kassier failed to know that it was Tommy who had abandoned his son when he was six months old.

Before the jury, Tommy did not admit any physical or emotional abuse suffered by Michael. His only admission was that

Michael's mother was incapable of caring for him and he was sent to live with a babysitter's family until he was seven years old (R. 3645). Tommy painted a picture of Michael's life for the jury that was a bland, innocuous upbringing with a few minor school difficulties. This was far from an accurate portrayal of what occurred in the Griffin household Michael grew up in.

While Kassier presented some witnesses in penalty phase, he only spoke to them briefly and at the last minute before they were to testify. In its opinion, this Court focused on the few witnesses Kassier **did** present in penalty phase, while the Court failed to view the evidence from the proper perspective of the plethora of witnesses who **were not** spoken to or presented to the jury. See, *Porter, supra*. The jury did not know this information because of trial counsel's inexperience and failure to properly investigate.

Kassier never spoke with Michael's brother, Charles Griffin. At the 2000 post-conviction evidentiary hearing, Charles testified that their father Tommy was an alcoholic who ignored the sexual abuse of his children by their alcoholic grandfather (PC-R. 597-600). Later in life, Tommy would buy marijuana to give to his children to sell, introducing them to a life of crime and drug abuse.

According to Charles, his father and his father's girlfriend, Linda, frequently used drugs and drank in front of

the children (PC-R. 611). He drove drunk with the kids in the car (PC-R. 622). Charles said his father would take him and Michael to bars and leave them with a barmaid, so he could go to another place to continue drinking. Occasionally, Tommy would leave them at the bar and the barmaids would take the boys home with them to sleep (PC-R. 625).

Because he was frequently hung over, Tommy would not take Michael to school and he did not bother to provide clean clothes for the kids to wear when they did go to school (PC-R. 635).

Charles also testified that his mother, Marianne, and Tommy argued over whether Michael should be sent to the babysitter (the Montejos) when he was six months old because Marianne was unable to handle the baby (PC-R. 610). When Charles was 8, he remembered that he and Michael saw their mother expose herself to a man as she left the massage parlor where she worked. He recalled Michael showing strange behavior and talking to himself while claiming to be talking to his brother from the Montejos and moving his lips while not speaking aloud (PC-R. 612). Charles testified that he was not contacted by trial counsel or his investigator at the time of trial (PC-R. 629).

Michael's mother, Marianne, testified at the post-conviction hearing that she had a long history of mental illness from the age of 12 to the present. She admitted being disabled due to depression and other mental health issues, including manic

depression and schizophrenia (PC-R. 353, 370). She described severe depression after Michael was born and she provided a grim image of Michael's life in their home, including Tommy's alcoholism, drug use, gambling, and physical abuse of Michael at an early age (PC-R. 335-370). She described Tommy's constant verbal abuse of her in front of the children (PC-R. 363, 389). Marianne, the defendant's mother, was not contacted by trial counsel at the time of trial.²¹ *Id.*

Mario Montejo, patriarch of the Montejo family, corroborated the complete lack of affection in Michael's house and his parents' lack of concern over his welfare. Mr. Montejo refuted Tommy's testimony that Michael had never lived with his grandmother, as well as other details of his life. Though Mr. Montejo testified at the penalty phase, he felt he was not prepared by counsel and did not have an opportunity to fully explain or describe Michael's life.

Stephen Minnis, a friend, recalled that Michael did not like his home life and felt his father did not care about him. Minnis' testimony was not only important for the insight he

²¹The State has argued that trial counsel could not be faulted for failing to talk with Marianne Griffin because she was hospitalized during the time of Mr. Griffin's trial. However, her hospitalization did not preclude counsel from obtaining medical records on her family history of mental illness, or at the very least, attempting to talk with her or those around her and introducing that information to the jury through a mental health expert who could testify with hearsay.

provided into the Griffin home but to describe the atmosphere that surrounded trying to testify at Michael's penalty phase and trial counsel's incompetency. During trial, Minnis received a call from Kassier asking him to testify. When he arrived at the courthouse, he was told by Kassier to wait in the hall. While waiting, he was approached by several police officers who told him to "get the hell out of here right now or we'll make it a f-king living hell if you don't." Minnis never spoke to Kassier again and did not return to testify because he was not under subpoena and was not required to be there. He would have testified had he been served with a subpoena.

At the post-conviction hearing, mental health experts testified about what types of mental health testimony would have been available at the time of trial. Dr. Ernest Bordini, a neuropsychologist, testified from his 46 page report on the information that was available about Michael in 1991. Had Kassier made records requests, he could have gathered medical records, prison records, police reports, witness statements and depositions of Mr. Griffin's family members (PC-R. 281). All of these materials were provided to Dr. Bordini, as they should have been provided to Dr. Haber.

Unlike Kassier, collateral counsel directed Dr. Bordini to conduct an extensive clinical interview with Michael including a 24 page questionnaire about Michael's background and childhood

experiences as well as results from testing done by Dr. Hyman Eisenstein, another expert retained by counsel (PC-R. 288).

Dr. Bordini found evidence of right brain dysfunction. He said Michael had difficulty with left hand motor skills and visual memory impairment (PC-R. 287-291). He found Michael performed worse than 99 percent of the population on the construction of complex figures and executive planning. This deals with Michael's ability to plan, organize and control behavior (PC-r. 294-95). Michael's ability to perform abstract reasoning also was impaired (PC-R. 296-97). These test results were corroborated by Michael's school records, which showed these impairments in his poor performance in school (PC-R. 299). Dr. Haber had simply dismissed Michael's poor performance as learning disabilities when, in reality, the poor performance was attributable to brain damage.

In addition, Dr. Bordini found that his mother's mental disorders and his father's alcoholism, along with reports of Michael's head injuries, corroborated his neuropsychological testing results. He opined that anecdotal information about head injuries Michael suffered could have contributed to his brain deficits. He saw evidence that could have been interpreted as possible skull fractures as a small child such as shaken baby syndrome. He found evidence that Michael suffered from Attention Deficit Hyperactivity Disorder (ADHD) and was at one time

prescribed an anti-seizure medication, Dilantin. Michael's mother's history of severe psychiatric illness, coupled with his ADHD, placed him in a high risk category for bipolar disorder.

Further, Dr. Bordini opined that concerns about Michael's long-standing mental and emotional issues were evident in his school records. He saw repeated requests from the schools for further testing and counseling which appeared to be ignored by Michael's father. Nothing came of these requests and Michael was placed in a classroom for the emotionally handicapped, albeit without any psychological testing or counseling. Dr. Bordini's conclusions, like Dr. Dee's conclusions in Mr. Porter's case, were worthy of consideration by the trial court and this Court.²² Discounting his testimony to irrelevance is contrary to the dictates of *Porter*.

The Court ignored that deference cannot be given to trial counsel's strategic decisions when they are based on an incomplete investigation of his client's background or current mental status. See, *Williams v. Taylor*, 529 U.S. 362, 396

²²This Court deferred to the trial court in discounting Dr. Bordini's testimony because of conflicting testimony given by the State expert Dr. Ansley. Yet, this is the same factual scenario as *Porter* where Dr. Dee's testimony was discounted entirely because, this Court found, it conflicted with the State's expert's testimony. The standard is not what the trial court believed but what jurors may have believed from Dr. Bordini's testimony. Cf. *Porter v. McCollum*, 130 S. Ct. at 454-55 (while the State's expert had problems with Dr. Dee's testing, "it was not reasonable to discount entirely the effect his testimony might have had on the jury...").

(2000). Moreover, the jury was not told about this critical information, yet no court has conducted the proper prejudice analysis under *Porter*.

Not only did this Court fail to address how the post-conviction testimony could have affected a jury, this Court engaged in absolutely no cumulative analysis of the wealth of unrepresented mitigation evidence or its potential effect on the jury. See *Kyles v. Whitley*, 514 U.S. 419 (1995).²³ The Court's cumulative error analysis is a three sentence recitation of case law. It is not the probing, fact-specific analysis required by *Porter*.

Even though Mr. Griffin's jury may have had a hint of his rough upbringing from his father's self-serving trial testimony, this image is nothing like the reality described by Charles and Marianne Griffin as well as by Dr. Bordini. At trial, there was no evidence presented of Michael's child abuse, physical, sexual or emotional abuse. There was only a vague reference by Tommy Griffin of neglect by his mother. No evidence was presented of Mr. Griffin's daily life, or of the beatings he suffered, the drunken car rides with his father, trips to the bars and exposure to drugs. The jury was prevented from seeing the complete

²³The U.S. Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." *Kyles*, 514 U.S. at 436.

picture of Mr. Griffin's life by trial counsel's inexperience, ineffectiveness, and greed.

It is clear from this Court's 2003 analysis denying Mr. Griffin's ineffective assistance of counsel claims that it failed to conduct the rigorous prejudice prong analysis required by *Strickland* as explained in *Porter v. McCollum*. The failure to engage in rigorous analysis required by *Strickland* was prejudicial to Mr. Griffin.

In light of *Porter*, it is necessary to conduct a new, more rigorous prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Mr. Griffin's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

In *Sears v. Upton*, 130 S. Ct. 3259 (2010), the U.S. Supreme Court expounded on its *Porter* opinion and what the proper *Strickland* analysis required, finding that a Georgia post-conviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The U.S. Supreme Court found that “[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case.” *Id.* at 3264. The U.S. Supreme Court in *Sears*, as it did in *Porter*, held that *Strickland* 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*. That is precisely the sort of analysis that was conducted in this case. Mr. Griffin’s ineffective assistance of counsel claims must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate.

Sears teaches that post-conviction courts must speculate as to the effect of non-presented evidence in order to make a *Strickland* prejudice determination. 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.” Moreover, “[t]he question is not whether the defendant would more likely than not have received a different verdict with

the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. at 434. The issue presented by *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 and/or present it. Credibility findings by the judge presiding at the post-conviction hearing cannot be substituted for a jury’s findings anymore than the trial judge direct a verdict based on his or her credibility findings and weighing of the evidence. 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. It was Mr. Griffin’s constitutional right to a jury determination of his guilt following an adequate adversarial testing that was taken from him by this Court’s failure to conduct a proper *Strickland* analysis in its 2003 opinion denying Mr. Griffin’s ineffective assistance of counsel claims.

In its 2003 opinion, this Court failed to engage in a full and probing prejudice analysis of Mr. Griffin’s ineffective assistance of counsel claims as the U.S. Supreme Court in *Porter v. McCollum* and *Sears v. Upton* indicated was required by

Strickland.

Additionally, cumulative analysis is legally required where a *Brady* claim, an ineffective assistance claim, and/or a *Jones v. State*, 591 So. 2d 911 (Fla. 1991) claim are presented in a 3.850 motion. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). When the proper analysis is conducted of Mr. Griffin's claims, his conviction cannot stand. Rule 3.851 relief must issue.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the circuit court's order denying Mr. Griffin's Rule 3.851 motion, vacate his conviction, and remand for a new trial, new sentencing, or the entry of a judgment of acquittal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Assistant Attorney General, 444 Brickell Ave. Ste. 650, Miami, FL 33131, on November 11, 2011.

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

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