IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1272

BOBBY RALEIGH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA 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:

"T. ___" - Record on appeal to this Court in the 1997 direct appeal;

"FTR. ___" - Record from trial of co-defendant Domingo Figueroa;

"PC-T. ___" - Record on appeal to this Court from initial Rule 3.851 from the denial of post-conviction relief after an evidentiary hearing;

"PC-R2. ___" - Record on appeal to this Court in the appeal from the summary denial of post-conviction relief on Mr. Raleigh's second Rule 3.851 motion;

"PC-R3. ___" - Record on appeal to this Court in the current appeal from the summary denial of post-conviction relief;

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

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INTRODUCTION

At Mr. Raleigh's penalty phase proceeding before his jury, the State presented a statement made by Mr. Raleigh's co-defendant, Domingo Figueroa, to the police that blamed Mr. Raleigh for killing both victims.[1] In the statement introduced into evidence, Figueroa indicated that he "was outside" when "Bobby Allen Raleigh killed Mr. Cox and Mr. Eberlin" (T. 1129).

Based on this evidence, the presiding judge made the following finding as to heinous, atrocious or cruel when sentencing Mr. Raleigh to death:

> This aggravator was established by the evidence. Raleigh returned from killing Cox then shot a screaming Eberlin several times. Raleigh's gun jammed, and Eberlin kept screaming. Eberlin cowered in a corner trying to escape. Raleigh then savagely beat Eberlin in the head with the barrel of the 9MM (see State Exhibits 47-49). This beating occurred while Eberlin was still alive. The beating was so savage that the barrel penetrated Eberlin's skull (see State Exhibit 50). Timothy Eberlin's killing was pitiless, shockingly evil, and unnecessarily torturous.

Raleigh v. State, 705 So. 2d 1324, 1329-30 (Fla. 1997). Also

[1]During the cross-examination of Investigator Horzepa, Mr. Raleigh's trial counsel briefly questioned him about co-defendant Figueroa's taped statement to law enforcement. It was elicited that 1) Figueroa told Horzepa about a fight a Club Europe during which one of the victims, Douglas Cox, called his aunt a name, 2) Figueroa didn't provide any information as to where the guns were, and 3) Horzepa didn't recall asking Figueroa about the safe where the guns were kept (T. 1116-20). On redirect, the State introduced the entirety of Figueroa's taped statement without any objection by Mr. Raleigh's counsel (T. 1125). At no time did Mr. Raleigh's counsel seek to introduce Figueroa's contradictory statements to his uncle admitting that he committed one of the killings.

based upon this evidence, the judge rejected the statutory mitigator of substantial domination finding:

> The Court does not find this statutory mitigator to have been reasonably established. Looking to the murders, it was Raleigh and Raleigh alone who killed Cox in his sleep. **It was Raleigh who finished off Eberlin at close range.** It was also Raleigh, not Figueroa, who went to the trailer, the first time with a 9MM. **Raleigh was the principal perpetrator during the two murders**. Finally, the evidence indicated it was Raleigh, not Figueroa, who may have wanted a piece of Cox's drug trade.

Raleigh v. State, 705 So. 2d at 1330 (emphasis added). It was also based upon this evidence that Mr. Raleigh killed both victims that the life sentences that Figueroa received were rejected as mitigating:

> As previously pointed out, Raleigh was the principal perpetrator in these killings. Figueroa, while a participant, played a lesser role. So the distinction in the sentences is logical and warranted.

Raleigh v. State, 705 So. 2d at 1331.

However at Figueroa's trial which was subsequent in time to Mr. Raleigh's penalty phase, the evidence presented by the State painted an entirely different picture. The State presented evidence of Figueroa's confession to his uncle that he, Figueroa, killed one of the victims (FTR. 675-715). The prosecutor argued to Figueroa's jury that Figueroa "told his uncle the truth" (FTR. 1374). The prosecutor told Figueroa's jury that Figueroa was in charge, and that he shot and nicked Eberlin and then his gun jammed. So he ordered Mr. Raleigh to shoot Eberlin, but Mr.

Raleigh fired wildly due to his drunken state. Figueroa got his gun unjammed, and then shot Eberlin and killed him:

> Eberlin hearing the gunshots, bam, bam, bam, begins to scream. He tells you that in that statement that you heard. He's screaming. Why is he screaming? He knows that he's next. **And when he starts to scream, he tells you that Raleigh tells him to shoot him. But I'm going to change that around just a little bit and see if this might not work.** Bam, bam, bam, in the other Cox bedroom. Oh! Bam. (Witness gestures) Tried to cover yourself. You have your arms up. You see the guy point the gun at you and you try to cover yourself (Attorney gestures). Think about it. It would work for the elbow shot. The guy's about to shoot you, so you cover yourself. It's a normal reaction. Bam. Shot in the elbow. Does that explain the bullet to the window? I don't know. I wasn't there. It could. It might now.
>
> He's shot in the elbow and just like with the FDLE expert, Suzanne or Susan Komar, when she testified yesterday, she told you on her second shot with that very .380 what happened? It jammed. **He tries to fire a second shot. It jams. Instead of Bobby Raleigh saying shoot him, shoot him, now who's saying with the jammed gun shoot him, shoot him. Mr. Figueroa is telling him shoot him, shoot him, because he's nicked him. He's wounded him, but he hasn't put him away.**
>
> **Raleigh's in the other bedroom. He comes running when he's yelling at Raleigh to come in and shoot him and Raleigh obliges and fires away as many shots as he can get off. Of course, he's a drunken boob and a couple of bullets fly out of his gun to get some shots off and, finally, Figueroa is able to clear his gun and shoots a second time.**
>
> * * *
>
> If it's gone to the right or slightly back to the right, as these guns seem to have that process in doing, it would kind of put you here (Attorney indicated) and **if my scenario is correct, by the time that Figueroa is going to shoot his second bullet when he finally clears that gun, he would have to shoot it**

> **probably almost right through Raleigh or come pretty darn close if he stays right there in the doorway.**
>
> **So he walks over here, being the big brave guy he is because the guy's on the floor obviously wounded, and he shoots him again.** According to Ms. Komar, that would be consistent with how the gun or casing, the .380 casing, bounced off the wall and came to rest on top of that shirt as you've heard over there. **Is that how it happened? It's consistent.**

(FTR. 1364-67)(emphasis added).

The prosecutor's argument at Figueroa's trial was directly contrary to the finding that the "heinous, atrocious or cruel" aggravator had been established beyond a reasonable doubt in Mr. Raleigh's case. Again, the judge there had found beyond a reasonable doubt that Mr. Raleigh:

> returned from killing Cox then shot a screaming Eberlin several times. Raleigh's gun jammed, and Eberlin kept screaming. Eberlin cowered in a corner trying to escape. Raleigh then savagely beat Eberlin in the head with the barrel of the 9MM (see State Exhibits 47-49).

Raleigh v. State, 705 So. 2d at 1329-30.[2]

The prosecutor's argument at Figueroa's trial was also contrary to the trial judge's finding in support of the avoiding arrest aggravator. In finding that aggravator beyond a

[2]According to the prosecutor at Figueroa's trial, Mr. Raleigh was "a drunken boob" during the crime (FTR. 1366).

reasonable doubt, the trial judge found that:

> [t]he dominant motive for the murder of Eberlin was witness elimination (see Correll v. State, 523 So.2d 562 (Fla.1988)). He knew the Defendant was seeking out Cox, saw the Defendant go towards Cox, then heard the shots. He knew what happened and who did it. Additionally, there was no evidence Eberlin, unlike Cox, was involved in the drug trade or caused the earlier incident at the Club Europe. So the only reason for the murder of Eberlin was witness elimination.

Raleigh v. State, 705 So. 2d at 1329.[3]

It was also contrary to the basis for the judge's rejection of the statutory mitigator of substantial domination in Mr. Raleigh's case:

> The Court does not find this statutory mitigator to have been reasonably established. Looking to the murders, it was Raleigh and Raleigh alone who killed Cox in his sleep. **It was Raleigh who finished off Eberlin at close range.** It was also Raleigh, not Figueroa, who went to the trailer, the first time with a 9MM. **Raleigh was the principal perpetrator during the two murders**. Finally, the evidence indicated it was Raleigh, not Figueroa, who may have wanted a piece of Cox's drug trade.

Raleigh v. State, 705 So. 2d at 1330 (emphasis added).[4]

And, it was contrary to the finding justifying the rejection of the life sentences that Figueroa received as mitigating evidence as to Mr. Raleigh:

> As previously pointed out, Raleigh was the principal

[3]According to the prosecutor at Figueroa's trial, Mr. Raleigh was "a drunken boob" during the crime (FTR. 1366).

[4]Again, according to the prosecutor at Figueroa's trial, Mr. Raleigh was "a drunken boob" during the crime (FTR. 1366).

> perpetrator in these killings. Figueroa, while a participant, played a lesser role. So the distinction in the sentences is logical and warranted.

Raleigh v. State, 705 So. 2d at 1331.[5]

Finally, this Court on the basis of the record at Mr. Raleigh's trial rejected the statutory mitigator of "extreme mental or emotional disturbance" saying: "This Court cannot find, however, that his condition was 'extreme'. He acted too purposefully". Raleigh v. State, 705 So. 2d at 1330. While at Figueroa's trial based upon Figueroa's statement to his uncle, the prosecutor argued that Mr. Raleigh was "a drunken boob."[6]

[5]Again, according to the prosecutor at Figueroa's trial, Mr. Raleigh was "a drunken boob" during the crime (FTR. 1366).

[6]The prosecutor's description of Mr. Raleigh at Figueroa's trial as "a drunken boob" is also inconsistent with the judge's finding when sentencing Mr. Raleigh to death that the "cold, calculated and premeditated" aggravator applied.

Of course, Figueroa's statement to the police was inadmissible at Mr. Raleigh's trial under the Confrontation Clause. Yet, defense counsel did not object to its introduction. In fact, it was defense counsel's cross-examination of Investigator Horzepa that caused the State to introduce the statement into evidence. And then once the inadmissible evidence was introduced without objection, defense counsel failed to present available evidence of Figueroa's contradictory statement to his uncle admitting that not only was he present inside the trailer, but that he was responsible for killing Eberlin.[7] Trial counsel's performance when properly analyzed under Porter v. McCollum, 130 S. Ct. 447 (2009), was deficient and prejudicial.

Recently, the Sixth Circuit Court of Appeals addressed circumstances to those in Mr. Raleigh's case and found habeas relief was warranted. Stumpf v. Houk, 653 F.3d 426, 436 (6th Cir. 2011):

> In our earlier decision in this matter, we joined with other circuits "in finding that the use of

[7]During Mr. Raleigh's first post-conviction proceedings, an evidentiary hearing was conducted. At that hearing, the trial prosecutors testified that no additional evidence was developed between the time of Mr. Raleigh's trial in August of 1995 and Figueroa's trial in January of 1996 that changed the State's assessment of the defendants relative culpability (PCT. 302-03, 321). According to the prosecutors, all evidence favorable to Mr. Raleigh regarding his relative culpability was disclosed to his trial counsel (PCT. 302, 321). So, Mr. Raleigh's trial counsel should have been aware of Figueroa's statement to his uncle. Yet, this evidence was not presented to rebut Figueroa's statement to the police which was introduced by the State.

inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." Stumpf v. Mitchell, 367 F.3d at 611. In doing so, we cited with approval Smith v. Groose, 205 F.3d 1045 (8th Cir.2000), for the proposition that such inconsistencies "render[ ] convictions unreliable, given that '[the s]tate's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth.' " Stumpf v. Mitchell, 367 F.3d at 612 (quoting Smith, 205 F.3d at 1051). We also quoted the following portion of the Ninth Circuit's decision in Thompson v. Calderon, 120 F.3d 1045, 1059 (9th Cir.1997) (en banc), vacated on other grounds, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), which in turn quoted from a special concurring opinion by Judge Clark of the Eleventh Circuit in Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir.1985) (Clark, J., concurring):

[T]he prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip[-]flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice.... The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth.

The Supreme Court disagreed with our conclusion that the due process violation undermined Stumpf's conviction because, under Ohio law, "the precise identity of the triggerman was immaterial to Stumpf's conviction for aggravated murder." Bradshaw v. Stumpf, 545 U.S. at 187, 125 S.Ct. 2398. As a result, the conflicting theories presented to the Stumpf factfinders and to the Wesley factfinders regarding which of the two men shot and killed Mrs. Stout on that fateful May 1984 day in no way affected the reliability of the determination that Stumpf was guilty of aggravated murder in her death.

But, our constitutional duty to ensure the reliability of capital sentencing—to ensure that all individuals are accorded due process before our state and federal judicial institutions—is not relieved by the Supreme Court's limited ruling in Bradshaw v. Stumpf. Indeed,

> the Supreme Court itself recognized in its opinion that "[t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence ... for it is at least arguable that the sentencing panel's conclusion about Stumpf's role in the offense was material to its sentencing determination." Id.
>
> Our examination of the voluminous appellate record leads us to the inescapable conclusion that it is much more than "arguable" that Stumpf's sentencers were swayed by the ultimately-unreliable presentation by the representative of the State of Ohio. In fact, we are convinced that it would amount to nothing short of complete abdication of our sworn responsibilities to ensure the reliability of capital sentencing were we to presume that the state's later-recanted argument that the petitioner was the triggerman in Mrs. Stout's murder did not affect the panel's sentencing decision. Our confidence in our conclusion is buttressed not only by common sense, but also by the words of the various individuals actually involved in the sentencing decision.

In Mr. Raleigh's case, the findings of fact made by the judge in imposing a sentence of death which were premised upon inaccurate statements made by Figueroa to law enforcement were contradicted by Figueroa's statements to his uncle which the State introduced at Figueroa's trial. The difference in the evidence between the two proceedings here was due to trial counsel's failure to object to the inadmissible statement and/or his failure once it was introduced by the State to present the evidence of Figueroa's statements to his uncle rebutting the statement to the police. As a result, the proceeding was not the constitutionally guaranteed adequate adversarial testing in a "supposed search for the truth." Stumpf v. Houk, 653 F.3d at 436. Instead, the proceedings amounted to a board game in which

Mr. Raleigh's counsel failed to properly function. The findings made by the judge in imposing a death sentence on Mr. Raleigh were contradicted by the evidence the State presented at Figueroa's trial. The findings in support of Mr. Raleigh's death sentence were the result of trial counsel's failure to tell the rest of the story. The resulting death sentence stands in violation of due process and fundamental fairness. It can only continue to stand by willful ignoring the contradictory evidence presented by the State at Figueroa's trial which Mr. Raleigh's counsel failed to present on Mr. Raleigh's behalf.

STATEMENT OF THE CASE

A. Procedural History

Mr. Raleigh and his co-defendant, Domingo Figueroa, were charged by indictment in the Circuit Court of the Seventh Judicial Circuit, Volusia County, Florida, with two counts of first degree murder, one count of burglary, and one count of shooting into a building.

Mr. Raleigh pled guilty on June 6, 1995. Thereafter, a jury was selected for a penalty phase proceeding. The jury, by a vote of 12-0, recommended a sentence of death on August 15, 1995. On February 16, 1996, the trial judge sentenced Mr. Raleigh to death. In his sentencing order, the trial judge found the following aggravating circumstances: (1) prior violent felony (applied to both Cox and Eberlin); (2) that the murders were

committed while engaged in a burglary (applied to the murders of both Cox and Eberlin); (3) that the murder of Cox was cold, calculated, and premeditated (CCP); (4) that the murder of Eberlin was committed to avoid arrest or effect escape; and (5) that the murder of Eberlin was especially heinous, atrocious, or cruel (HAC). Raleigh, 705 So. 2d at 1327 n.1. The trial court found one statutory and fifteen nonstatutory mitigators. The statutory mitigator is Raleigh's age--he was nineteen at the time of the crime. Id. at 1327 n.2. The nonstatutory mitigators were that the defendant (1) was intoxicated; (2) was remorseful; (3) pled guilty; (4) offered to testify against codefendant Figueroa; (5) could probably adjust well to prison life; (6) was a good son and friend to his mother; (7) was a good brother; (8) was a good father figure to ex-girlfriend's daughter; (9) was born into dysfunctional family; (10) did not know who fathered him; (11) attempted suicide; (12) had low self-esteem; (13) suffered from an adjustment disorder and was antisocial; (14) used poor judgment and engaged in impulsive behavior; and (15) was a follower. Id. at 1327 n.3.

In his direct appeal, Mr. Raleigh argued the trial court erred in (1) failing to instruct the jury on the “no significant history of criminal activity” statutory mitigator; (2) instructing the jury on the “pecuniary gain” aggravator; (3) failing to give the requested instruction on the CCP aggravator;

(4) dismissing a juror over defense objection where there was no showing that the juror could not be fair; (5) finding the "during the course of a burglary" aggravator; (6) finding the "avoid arrest" aggravator; (7) finding the CCP aggravator for Cox's murder; (8) finding the HAC aggravator for Eberlin's murder; (9) rejecting the "under substantial domination of another" statutory mitigator; (10) rejecting the "no significant history of criminal activity" statutory mitigator; (11) giving only "some weight" to the "remorseful and cooperative with authorities" nonstatutory mitigator; (12) rejecting Figueroa's life sentences as a nonstatutory mitigator; (13) giving "little weight" to Raleigh's voluntary intoxication; and (14) sentencing Raleigh to death because death is disproportionate. Id. at 1327 n.4. For each of the fourteen issues, this Court found that either the trial court committed no error or that the claim lacked merit. Id. at 1327-31. As a result, Mr. Raleigh's convictions and sentences were affirmed by this Court on direct appeal. Raleigh v. State, 705 So. 2d 1324 (Fla. 1997).

On November 17, 1998, Mr. Raleigh filed a motion to vacate his convictions and sentences of death. This motion was amended January 19, 2001. The court granted an evidentiary hearing on the following claims: (1) penalty phase defense counsel was ineffective for failing to object to the admission of the codefendant's taped statement in violation of § 921.141(1), Fla.

Stat. (1995); (2) the State knowingly presented false evidence in violation of defendant's rights under the U.S. Constitution and the Florida Constitution; (3) defendant was deprived of his rights because the mental health expert who evaluated defendant did not render adequate mental assistance as required by Ake v. Oklahoma, 470 U.S. 68 (1985); (4) defense counsel was ineffective for failing to adequately investigate and present mitigation and to adequately challenge the State's case; (6) defense counsel was ineffective for recommending that the defendant plead guilty to first-degree murder; (9) defense counsel was ineffective for recommending that defendant accept the plea based on their prediction of a life sentence from the judge; and (11) defense counsel was ineffective for advising defendant that in exchange for his plea, he would receive a nonjury sentencing phase proceeding or a jury override. Following an evidentiary hearing, Mr. Raleigh's motion to vacate was denied.

Mr. Raleigh appealed the denial of relief to this Court.[8]

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[8]The circuit court appointed Ryan Truskoski as Mr. Raleigh's registry attorney during his Rule 3.851 appeal to this Court in January of 2005. Mr. Truskoski represented Mr. Raleigh before this Court and orally argued his case on September 30, 2005. After Mr. Truskoski's court-ordered representation of Mr. Raleigh in this Court, this Court took action against Mr. Truskoski citing his body of work before the Court in capital cases.

This Court's online docket shows that Mr. Raleigh's case was the first capital appeal. Soon thereafter, he received three more appointments. The third and fourth appointments occurred when he was appointed to represent Stephen Smith and Jerome Hunter in their capital direct appeals. *See* Smith v. State, FSC Case No. SC06-1903, and Hunter v. State, FSC Case No. SC06-1963,

When the decisions issued in both Smith v. State and Hunter v. State on September 25, 2008, Justice Anstead wrote:

> Because I find both the written and oral presentations of counsel for the appellant fundamentally lacking, I would strike the appellate briefs, discharge counsel, and direct the trial court to appoint new appellate counsel for the appellant. Capital cases represent the most serious category of case reviewed by this Court and such cases require diligent and competent advocacy by counsel. While this Court has inherent responsibility to assure such representation, the florida Legislature has explicitly called upon the courts to take responsibility for assuring such representation in capital litigation. We should honor that call here.
>
> By coincidence, the Clerk of this Court scheduled oral argument in this case and the case of *Hunter v. State*, No. SC06-1963 (Fla. Sept. 25, 2008), for the same date. In examining the briefs for appellants in those two cases, I was struck by the similarity in approach and the facially flawed advocacy contained in the briefs in both cases. The oral advocacy was similarly lacking in both cases. Of course, the appellants are represented by the same counsel in both cases, and I have come to the same conclusion in *Hunter* as I have here.

Smith v. State, 998 So. 2d 516, 530 (Fla. 2008) (Anstead, J., dissenting) (footnote omitted). In the omitted footnote, Justice Anstead noted that "the court, to its credit, has notified the Florida Bar and the Executive Director of the Legislature's Commission on Capital Cases of concerns about the performance of counsel in the *Smith* and *Hunter* cases **as well as other filings by counsel in this Court**." Id. (emphasis added). Clearly, Mr. Truskoski's representation of Mr. Raleigh before this Court contributed to the action that it took.

The Florida Bar on February 26, 2009, sent Mr. Truskoski a strongly worded "Notice of No Probable Cause and Letter of Advice to the Accused" letter which stated:

> The grievance committee has found no probable cause in the referenced matter against you and the complaint has been dismissed. The committee was greatly concerned with your failure to present the level of competence and professionalism required of a board certified attorney. Your conduct in two death penalty cases and

subsequent letter to the Court was carefully scrutinized as well as your petition filed against the Florida Department of Children and Families. The committee found your oral arguments to be unprepared and lacking in the quality expected and demanded of a board certified attorney. Nevertheless, the committee has concluded that a finding of no probable cause is appropriate at this time. You have advised the committee that your board certifications have been revoked in criminal and criminal appellate law. The committee feels that this is the appropriate disposition of this matter and that continued grievance proceedings are not appropriate at this time in view of that action.

While your conduct in this instance did not warrant formal discipline, the committee believes it was not consistent with the high standards of our profession. The committee hopes that this letter will make you aware of your obligations to uphold these professional standards and you will adjust your conduct accordingly. This letter of advice does not constitute a disciplinary record against you for any purpose and is not subject to appeal by you. R. Regulating Fla Bar 3-7.4(k). This complaint will be purged from the discipline records and the file destroyed one year from the date of the grievance committee action.

The committee hopes that as a result of this letter of advice you will improve the following aspects of your professional activity:

You are advised to strive to take the appropriate amount of time and effort necessary to prepare each and every case and be familiar with the particular facts of each case. It appears that at the time of these problems, you undertook a particularly large amount of intricate and difficult death penalty cases. These cases require more than just pro forma legal arguments and basic preparation. While it is acceptable to present good faith novel legal arguments, you are also expected to present any and all other legal arguments which would assist your client based upon the particular facts of each case. Further, it is never appropriate to make arguments which are not part of the legal record.

During his Rule 3.851 appeal, Mr. Raleigh raised a new claim premised upon the then new U.S. Supreme Court decision in Bradshaw v. Stumpf, 545 U.S. 175 (2005). This claim was raised during the oral argument and without any briefing. This Court understood Mr. Truskoski's incoherent oral argument regarding Bradshaw v. Stumpf as asserting on the basis of Bradshaw that the

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> Your letter to a justice of the Supreme Court of Florida, written shortly after your oral argument, was inappropriate and unprofessional. A letter of apology to the Court is expected, as appropriate for your poorly chosen action.

On November 23, 2009, this Court entered the following Administrative Order in In re: Ryan T. Truskoski Order to Show Cause, FSC Case No. AOSC09-48:

> Pursuant to the Court's inherent authority to monitor the representation by counsel of capital defendants to ensure that the defendants receive quality representation, *see* §§ 27.40(9) and 27.711(12), Fla. Stat. (2009), and its authority to issue sanctions pursuant to Florida Rule of Appellate Procedure 9.410, Ryan T. Truskoski is hereby directed to show cause, on or before December 14, 2009, why he should not be removed from both the direct appeal list of capital conflict attorneys and the registry for postconviction capital attorneys. Specifically, counsel is directed to address his performance at oral arguments, including but not limited to the failure to make rebuttal arguments, as well as the quality of his briefs.

After the issuance of that order, Mr. Truskoski was removed from the registry of postconviction capital attorneys.

Mr. Raleigh was burdened with an unqualified Mr. Truskoski in his appeal to this Court challenging the denial of Rule 3.851 relief. Mr. Raleigh was given no say in the matter. Mr. Truskoski was forced upon him. It was Mr. Truskoski's actions before this Court that led to the opinion in Raleigh v. State, 932 So. 2d 1054 (Fla. 2006), denying Mr. Raleigh's appeal.

State by taking inconsistent positions in Raleigh's and his co-defendant's trials, violated due process. Without the benefit of briefing or the presentation of cogent argument, this Court considered this claim as it understood it and denied it on the merits. Raleigh v. State, 932 So. 2d 1054, 1065 (Fla. 2006).

Meanwhile, Mr. Raleigh had also filed a petition for writ of habeas corpus on December 30, 2003, in this Court. This habeas petition was also denied. Raleigh, 932 So. 2d at 1054.

Thereafter, undersigned counsel was appointed to represent Mr. Raleigh in federal habeas proceedings challenging his state court conviction and sentence of death. Mr. Raleigh then filed a federal habeas petition in federal district court, which is currently still pending in federal district court as this brief is being written.

Meanwhile undersigned counsel was appointed to replace Mr. Truskoski as Mr. Raleigh's new registry counsel for purposes of pursuing postconviction relief in Florida state courts. Thereafter, Mr. Raleigh served a Rule 3.851 motion on May 10, 2007, that challenged lethal injection as the method of execution in light of the Angel Diaz execution. When the circuit court denied that motion, Mr. Raleigh appealed to this Court. *See* Raleigh v. State, Case No. SC09-568. On March 8, 2010, this Court issued an order affirming the denial of Rule 3.851 relief.

On November 27, 2010, Mr. Raleigh served a Rule 3.851 motion

in which he argued that the decision in Porter v. McCollum, 130 S. Ct 447 (2009), qualified under Witt v. State, 387 So. 2d 922 (Fla. 1980), as new Florida law which required revisiting the previous denial of Mr. Raleigh's Brady and ineffective assistance of counsel claims (PC-R3. 95). On January 5, 2011, a case management hearing was held on Mr. Raleigh's Rule 3.851 motion (PC-R3. 1). On March 23, 2011, an order denying was filed with the clerk of court (PC-R3. 266). In this order, the circuit court ruled that Porter v. McCollum did not qualify under Witt v. State as new Florida law (PC-R3. 266-67).

On April 12, 2011, Mr. Raleigh's was contacted telephonically by Judge Walsh's judicial assistant and first advised of the order denying the Rule 3.851 motion (PC-R3. 269). Apparently, the envelope containing a copy of the order sent to Mr. Raleigh's counsel was erroneously marked undeliverable by the U.S. Postal Service and returned to Judge Walsh's office. On April 26, 2011, Mr. Raleigh filed a pleading entitled: Notice of Non-Compliance with Fla. R. Crim. Pro. 3.851(f)(5)(D) or in the Alternative Motion for Rehearing (PC-R3. 269). On May 13, 2011, an order was filed directing the clerk to serve Mr. Raleigh's counsel was a copy of the order denying Rule 3.851 relief. This order also denied Mr. Raleigh's motion for rehearing (PC-R3. 281). However, the clerk's certificate of mailing shows that the clerk's office did not mail copies of the orders to Mr. Raleigh's

counsel until May 24, 2011 (PC-R3. 287-90). On June 16, 2011, Mr. Raleigh served his notice of appeal (PC-R3. 292). It was received by the clerk's office and filed on June 20, 2011 (PC-R3. 291).

B. Relevant Facts

During the penalty phase proceedings in Mr. Raleigh's case, the State introduced a taped statement given to law enforcement by Mr. Raleigh's co-defendant, Domingo Figueroa (T. 1125).[9] The statement pointed to Mr. Raleigh as the leader and primary perpetrator in the crimes. Moreover, according to Figueora's statement, Mr. Raleigh killed both victims:

> Q Why don't you tell me from the beginning, what you know about the deaths of these two men? **Do you know who killed these two men?**
>
> **A My cousin.**
>
> Q And your cousin's name?
>
> A Bobby.
>
> Q Bobby Allen Raleigh. Okay.

[9]In this taped statement, Figueroa indicated that, though he was driving his car to the victim's residence, it was Mr. Raleigh who was directing him because he didn't know where Cox lived (T. 1133-34). Then, when they arrived at the victim's residence the first time, Figueroa's taped statement portrayed himself as being reluctant and a non-participant, portraying that Mr. Raleigh was the first to show a gun while Figueroa just wanted to leave (T. 1137), Mr. Raleigh wanted to confront the victim (T. 1137-38), and Mr. Raleigh killed the two victims (T. 1128-29). Figueroa's recounting of the incident is inconsistent with and contrary to Mr. Raleigh's, and was argued by the State as demonstrating that Mr. Raleigh was not being truthful.

Were you present during the time that Bobby Allen Raleigh killed Mr. Cox and Mr. Eberlin?

A I was outside.

(T. 1128-29)(emphasis added). The State introduced into evidence Figueroa's taped statement and utilized the exhibit to argue in support of a jury recommendation of death as to Mr. Raleigh.[10]

However, subsequent to Mr. Raleigh's penalty phase proceedings before a jury, the State argued and introduced evidence in Figueroa's trial demonstrating that the State was aware that Figueroa's taped statement contained critical, material falsehoods. Contrary to Figueroa's taped statement in which he claimed Mr. Raleigh killed both victims while he, Figueroa was outside the residence (T. 1128-29), the prosecution presented evidence during Figueroa's trial that he admitted to being inside the residence and to killing one of the victims:

[10]Figueroa's taped statement conflicted with Mr. Raleigh's statement and testimony that Figueroa shot Mr. Eberlin.

> I don't know if I hit him. That's the statement that you heard when Lieutenant Hudson asked on the tape. I don't know if I hit him or not. I'm not really to sure. What did he tell his Uncle? Uncle Jose.[11] Hey, man tell me what you did. Tell me what you did, Jose said. Tell me. This is the next day, if you remember. Finally, he says, man, it was really bad. It was bad. **I killed one and Bobby killed one.** It doesn't sound like there is a whole lot of hesitation that I might have killed one or it's possible that I killed one or I am not sure if I killed one. **I mean, he told his uncle the truth.** I killed one and Bobby killed one.

(FTR. 1372-1374)(emphasis added).[12]

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[11]The prosecution is referring to Jose Figueroa, who testified as a witness against Domingo Figueroa and indicated that Domingo had killed one of the victims (FTR. 675-715).

[12]During Mr. Raleigh's postconviction evidentiary hearing, the trial prosecutors testified that no additional evidence was developed between the time of Mr. Raleigh's trial in August of 1995 and Figueroa's trial in January of 1996 that tended to change the State's assessment of the parties' relative culpability (PCT. 302-03, 321). According to the prosecutors, all favorable evidence regarding the relative culpability of Mr. Raleigh and his co-defendant was disclosed to trial counsel (PCT. 302, 321). If this is true, then the State disclosed Figueroa's statements indicating that he committed one of the murders to Mr. Raleigh's counsel. Yet, Mr. Raleigh's jury never heard that Figueroa had told anyone that he had committed one of the murders. All the jury heard was the statement introduced by the State in which Figueroa said Mr. Raleigh killed both victims.

This Court in its decision made no determination of whether to credit the prosecutors' testimony that everything favorable to Mr. Raleigh had been disclosed and that nothing new developed between the end of Mr. Raleigh's penalty phase and Figueroa's trial. This Court merely noted:

> At the end of the penalty phase, the jury unanimously recommended the death penalty for Raleigh on both counts of first-degree murder. However, before Raleigh was sentenced, he learned that Figueroa had made another statement about his involvement in the crime. The day following the murder, Figueroa told his uncle

> that he had killed one victim and Raleigh killed the other. The State had introduced this statement at Figueroa's trial; and, during closing argument, the State had argued that this statement demonstrated that Figueroa had formed the intent to kill Eberlin, regardless of whether Figueroa was the one who actually killed Eberlin. The State argued that this statement, coupled with the forensic evidence that two of the three shots which hit Eberlin may have been fired from Figueroa's gun, demonstrated that Figueroa had downplayed his role in the murders when he gave the statement to investigator Horzepa.

Raleigh v. State, 932 So. 2d at 1058.

Figueroa's admission to killing one of the victims was never introduced by the State during Mr. Raleigh's penalty phase. In fact, as acknowledged by the State during the postconviction evidentiary hearing, nowhere in its presentation against Mr. Raleigh did the State ever suggest the possibility that Figueroa may have killed one of the victims (PCT. 278). Rather, its position in Mr. Raleigh's case was that Mr. Raleigh killed both individuals (PCT. 277). In his closing, the prosecutor argued, "Two lives were ended by Mr. Raleigh" (T. 1957).[13]

Yet, in Figueroa's trial the prosecution presented evidence that Figueroa had admitted that he killed one of the victims. There, the prosecutor argued that Figueroa was in charge, and that he shot and nicked Eberlin and then his gun jammed. So he ordered Mr. Raleigh to shoot Eberlin, but Mr. Raleigh fired wildly due to his drunken state. Figueroa got his gun unjammed, and then shot Eberlin again:

> You can argue this evidence as far as how the shots took place to your heart's content. There's a zillion ways that could have happened. I would have to submit to you that it could have just as easily have happened that we hear the gunshots in the room over here that we know Cox is sleeping in (Attorney indicated on diagram.) Bam, bam, bam. Shoots him right across the

[13]The prosecutor also argued that as to any evidence "that implicate[d] him and show[ed] his true motivation, what he's all about, the real Bobby Raleigh, he doesn't remember or they're lying" (T. 1959). However, the prosecutor argued that Mr. Raleigh resorted to lying at every turn in the case (T. 1960). Accordingly, the State's position was that it was Mr. Raleigh who should not be believed.

forehead. Okay. Eberlin hearing the gunshots, bam, bam, bam, begins to scream. He tells you that in that statement that you heard. He's screaming. Why is he screaming? He knows that he's next. **And when he starts to scream, he tells you that Raleigh tells him to shoot him. But I'm going to change that around just a little bit and see if this might not work.** Bam, bam, bam, in the other Cox bedroom. Oh! Bam. (Witness gestures) Tried to cover yourself. You have your arms up. You see the guy point the gun at you and you try to cover yourself (Attorney gestures). Think about it. It would work for the elbow shot. The guy's about to shoot you, so you cover yourself. It's a normal reaction. Bam. Shot in the elbow. Does that explain the bullet to the window? I don't know. I wasn't there. It could. It might now.

He's shot in the elbow and just like with the FDLE expert, Suzanne or Susan Komar, when she testified yesterday, she told you on her second shot with that very .380 what happened? It jammed. **He tries to fire a second shot. It jams. Instead of Bobby Raleigh saying shoot him, shoot him, now who's saying with the jammed gun shoot him, shoot him. Mr. Figueroa is telling him shoot him, shoot him, because he's nicked him. He's wounded him, but he hasn't put him away.**

Raleigh's in the other bedroom. He comes running when he's yelling at Raleigh to come in and shoot him and Raleigh obliges and fires away as many shots as he can get off. Of course, he's a drunken boob and a couple of bullets fly out of his gun to get some shots off and, finally, Figueroa is able to clear his gun and shoots a second time.

Now, this is a legend of the east bedroom at 1500 Reynolds Road, which shows of course Eberlin where he was shot in this fetal position or where he ended up laying down in this fetal position. If we are able to believe that the nine millimeter is the gun that Raleigh had, you-all form your own conclusions as to how the spent projectile would have gone out after the shots. The fully formed bullet being a nine millimeter casing. The circle with the dot in the middle being live round. But, you know, it does seem to kind of place Raleigh somewhere in this area (Attorney indicated).

> If it's gone to the right or slightly back to the right, as these guns seem to have that process in doing, it would kind of put you here (Attorney indicated) and **if my scenario is correct, by the time that Figueroa is going to shoot his second bullet when he finally clears that gun, he would have to shoot it probably almost right through Raleigh or come pretty darn close if he stays right there in the doorway.**
>
> **So he walks over here, being the big brave guy he is because the guy's on the floor obviously wounded, and he shoots him again.** According to Ms. Komar, that would be consistent with how the gun or casing, the .380 casing, bounced off the wall and came to rest on top of that shirt as you've heard over there. **Is that how it happened? It's consistent.**

(FTR. 1364-67)(emphasis added).

Despite the State's position in Mr. Raleigh's case that Mr. Raleigh was lying and that he had killed both victims, in Figueroa's case the State refused to stipulate that Mr. Raleigh was the killer of both Cox and Eberlin and in fact argued that Mr. Raleigh was "a drunken boob" (PCT. 292-93). In fact, the State presented evidence and thereafter argued during Figueroa's trial that he in fact admitted to killing one of the victims (FTR. 693-95, 1372-74).

Unlike the State's position in Mr. Raleigh's proceedings where it introduced Figueroa's taped statement as the definitive account, the State at Figueroa's trial demonstrated and argued

that Figueroa's taped statement was not an accurate account and in fact was untruthful:

> How truthful was Figueroa when he talked to the police? When he talked to the Sheriff's deputies. **Lieutenant Hudson told you it took him four times to get to where he was making some statement implicating himself.** He gave four different versions. Is that being candid and frank and honest? Then what does he say? **I only fired once. Come on. We all know that he had to have at least fired twice.** Hey, the police didn't push it, so why admit to more than what you have to.
>
> Where are the guns, Domingo? I don't know where those darn guns are. Is he being honest and candid and straightforward with the police or is he still trying to cover his tracks a little bit? **I didn't really know what was going to happen. I knew that they were going to scare Cox. Oh yeah. Right. And, I guess, that's the reason that he had his gun out in prominent display when he hit the door because he had no idea what was going to happen.**
>
> We know all the blood splatter was on that bed or around that bed, so we know that Eberlin never got too close to him. He held him at bay. He didn't even aim at him. Didn't really have to. You-all went through that trailer. How much do you have to aim? I mean, that's just a little tiny cubical. You got your gun inside that door, fire it twice, I mean, come on. **I don't know if I hit him. That's the statement that you heard when Lieutenant Hudson asked on the tape. I don't know if I hit him or not**. I'm not really to sure. What did he tell his Uncle? Uncle Jose. Hey, man tell me what you did. Tell me what you did, Jose said. Tell me. This is the next day, if you remember. Finally, he says, man, it was really bad. It was bad. **I killed one and Bobby killed one.** It doesn't sound like there is a whole lot of hesitation that I might have killed one or it's possible that I killed one or I am not sure if I killed one. **I mean, he told his uncle the truth. I killed one and Bobby killed one.**

(FTR. 1372-1374)(emphasis added).

Thus, it is apparent that the State submitted Figueroa's taped statement against Mr. Raleigh and argued that Mr. Raleigh was lying in his account. The State chose to withhold from Mr. Raleigh's jury evidence of Figueroa's admission to his uncle that he was in the residence and committed one of the murders. Later at Figueroa's trial, the State argued that the Figueroa's taped statement not truthful and an effort to shift culpability to Mr. Raleigh.[14]

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[14]During the evidentiary hearing on Mr. Raleigh's initial Rule 3.851 motion, the prosecutor testified that he had no obligation beyond trying to win his cases for the State:

> A Well, you know, **it's not basically up to the attorneys to decide what the truth is.** I know I made that statement, I'm not going to run away from it, but the Judge gives basically an instruction at the conclusion of all the lawyers' arguments that tells the jury that they can decide which statements to believe and which statements not to believe and the credibility of the witnesses, you know, the credibility of witness instruction. **So, I mean, it's basically the trier of fact, which is the jury in this case, to decide who's telling the truth and who's not.** As far as I'm concerned, it was probably a poor choice of words on my part, but, nevertheless, I was advocating the case on behalf of the State and those are the words I apparently used.

(PCT. 322-323)(emphasis added). Unfortunately, Mr. Raleigh's jury never heard the conflicting evidence and never had the opportunity to consider whether Figueroa's admission to one of the killings was the truth as the prosecutor argued to Figueroa's jury. To the extent that the U.S. Constitution guarantees an adequate adversarial testing, it did not occur in Mr. Raleigh's case because the jury never heard about Figueroa's admission to one of the killings.

At the postconviction evidentiary hearing on Mr. Raleigh's ineffectiveness claim, trial counsel's stated explanation for allowing the taped statement to be utilized against Mr. Raleigh, made no sense. According to counsel Teal, he was seemingly of the belief that Figueroa was going to testify if the taped statement wasn't introduced and conversely, that Figueroa would not testify if the statement was introduced. Yet trial counsel Teel acknowledged that he obtained no agreement that in exchange for his waiver of an objection to the statement, the State would not call Figueroa (PCT. 229-32). Moreover, the State had never given any notice that Figueroa would testify. No plea agreement for his testimony was disclosed. It was simply not reasonable to allow the taped statement to be admitted and waive Mr. Raleigh's right of confrontation when the State was not going to call Figueroa as a witness.[15]

At Mr. Raleigh's evidentiary hearing, trial counsel advanced a second position justifying the failure to object to Figueroa's taped statement:

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[15]According to prosecutor Blackburn, there were no plans to have Figueroa testify at Mr. Raleigh's penalty phase (PCT. 279-280). The elected State Attorney Alexander, who personally prosecuted Figueroa with prosecutor Blackburn, confirmed this position. Alexander had communicated to Figueroa's counsel that there would be no pleas reached until after Mr. Raleigh's case was resolved (PCT. 306). Alexander didn't trust either defendant stated, "[t]o me their help would be zero for the State of Florida. I couldn't see how they could help, either one of them could help either one of us, or could help the State, I should say" (PCT. 306-07).

> Well, you're asking me to recall and I read their amended motion. But in my opinion, the taped statements that Figueroa made have enhanced our position again that he was the ringleader. I hate to use the word ringleader because it was really just the two of them. But I felt due to the age difference and the fact he was Bobby's uncle, I just felt he was more experienced, sophisticated, if you will. And I thought the tape helped us in that position.

(PCT. 335-336). Of course, such a position is simply not reasonable given the fact that Figueroa's statement clearly implicated Mr. Raleigh as the "ringleader," and Figueroa as a reluctant, frightened individual being directed by Mr. Raleigh. There was simply no objectively reasonable reason for trial counsel to use Figueroa's taped statement, given Figueroa's statement to his uncle which was much more favorable, but yet not presented to the jury.

As a result of trial counsel's actions, the jury heard what was objectionable evidence, which completely discredited Mr. Raleigh and destroyed his defense. Mr. Raleigh was prejudiced as a result of trial counsel's inexplicable decision, as is evidenced by the jury's unanimous death recommendation and the judge's sentencing findings. In sentencing Mr. Raleigh to death, the trial court relied on much of Figueroa's version of events in the taped statement to the police to support the aggravating factors and to minimize or negate any mitigating factors (R. 224-37).

During the penalty phase proceedings of Mr. Raleigh's case,

trial counsel presented the testimony of Dr. James Upton, a clinical neuropsychologist. Despite being aware that the State was seeking the death penalty from the outset (PCT. 180), Dr. Upson was not retained to determine mitigation until after the time of the plea (PCT. 181).[16] The defense retained Dr. Upson, and trial counsel Teal, despite never handling a penalty phase before (PCT. 181), conducted the direct examination (PCT. 184).[17] Waiting until after the entry of the guilt plea to retain a mental health expert to evaluate Mr. Raleigh in order to find mental health mitigation was not reasonable.[18]

The most glaring omission resulting from the failure to timely retain a mental health expert was the failure to apprise him of Figueroa's admission to his uncle that he had in fact killed one of the victim's. As a result, Dr. Upton was not prepared to testify as to the significance of Figueroa's statement to his uncle.

Dr. Upson's testimony included the fact that Mr. Raleigh's IQ

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[16]Mr. Raleigh pled guilty almost a year after he was arrested.

[17]Attorney Clayton wasn't involved in any mental health testimony (PCT. 350).

[18]At the time that counsel was advising Mr. Raleigh to enter a guilt plea, they had not conducted a penalty phase investigation and had not retained a mental health expert. Under such circumstances, counsel failure to conduct a penalty phase investigation rendered them unprepared to make a valid recommendation to enter a guilt plea.

test indicated that his verbal ability was in the low normal range while his visual spatial performance was in the high average range, with his overall abilities rated as average (T. 1643-44).[19] With regard to academics, Dr. Upson noted that Mr. Raleigh's early school grades were fairly good and declined slightly until the seventh grade when he experienced great difficulty and had to repeat the class (T. 1646). Mr. Raleigh did well in the eighth and ninth grades, but then in the tenth grade his performance level dropped again and he dropped out of school (T. 1646).

[19]On achievement tests Mr. Raleigh scored average in virtually all areas except in arithmetic; there were no signs of any learning deficit (T. 1645-46).

According to Dr. Upson, neuropsychological testing revealed all negative results, signifying there were no great problems with Mr. Raleigh (T. 1651). Dr. Upson also noted that Mr. Raleigh's impulsivity score increased with time, which indicated a tendency to get bored (T. 1653). Further, where judgments were called for, Mr. Raleigh did have deficiencies (T. 1654).[20]

Additional testing revealed that Mr. Raleigh was depressed, tense, nervous and had difficulty differentiating between fantasy and reality (T1659).[21] Moreover, Mr. Raleigh possessed chronic feelings of insecurity, inadequacy, and inferiority, and he is a passive dependent person who is unable to take the dominant role in interpersonal relationships (T. 1659-60). Mr. Raleigh is a follower, not a leader; he exhibits low self-esteem and is easily manipulated by others (T. 1660, 1664).

Dr. Upson expressed his opinion that, at the time of the shootings, Mr. Raleigh's judgment was impaired (T. 1740). Further, Dr. Upson believed that Mr. Raleigh could function adequately in a confined setting and could profit by educational and vocational programs that were available. (T. 1750).

However, additional mitigation was not discovered by Dr.

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[20]According to Dr. Upson, when faced with a complex situation, Mr. Raleigh gets overcome by situational stress and tends to fall apart (T. 1655).

[21]Mr. Raleigh also had a history of abusing alcohol and drugs (T. 1766-67).

Upson or trial counsel and was not presented until the evidentiary hearing on Mr. Raleigh's initial Rule 3.851 motion. Again, this is because counsel waited until after the guilt plea was entered to begin the penalty phase investigation and retain a mental health expert. Ample additional mitigation was not discovered and presented. By age 16, Mr. Raleigh was inhaling Freon on a nightly basis; his behavior was quite erratic (PCT. 29). Mr. Raleigh also used LSD, and he consumed alcohol as a teenager (PCT. 29-30). By the time Mr. Raleigh was arrested, he was drinking about 18 to 20 drinks in the evening (PCT. 30). Mr. Raleigh experienced almost nightly alcohol blackouts since April of 1994 (PCT. 30). Mr. Raleigh also engaged in physical self harm in his adolescence (PCT. 31). He started cutting on his wrists and arms in order to make them bleed (PCT. 31). Mr. Raleigh also attempted suicide which resulted in hospitalization (PCT. 32). Mr. Raleigh's mother, Janice Figueroa indicated that she used alcohol during her pregnancy and that she was in an abusive relationship at the time (PCT. 54). Mrs. Figueroa also relayed that there was a family psychiatric history of anxiety disorder, depression, substance abuse, and incestuous relationships (PCT. 55). Mrs. Figueroa described Mr. Raleigh as very naive and that it was "a family joke that you could essentially tell Bobby anything and he would believe it." (PCT. 56). Mr. Raleigh was easily influenced or manipulated (PCT. 57).

However, this mitigating evidence was not developed and presented during Mr. Raleigh's penalty phase proceedings.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Normally, where evidentiary development has been permitted in circuit court, rulings of law are reviewed *de novo* while deference to the trial court is given as to findings of fact. However, here the circuit court denied an evidentiary hearing, and therefore, the facts alleged by the Mr. Raleigh, the Appellant, must be accepted as true for purposes of this appeal in order to determine whether he was entitled to an opportunity to present evidence in support of his factual allegations. Peede v. State, 748 So. 2d 253 (Fla. 1999); Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The circuit court's legal analysis is subject to *de novo* review by the Court.

SUMMARY OF THE ARGUMENT

1. The circuit court erred in finding that Porter v. McCollum, 130 S.Ct. 447 (2009), did not qualify as new Florida law under Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). Mr. Raleigh was deprived of the effective assistance of trial counsel at the penalty phase of his case conducted before a jury that returned a death recommendation, in violation of Porter v. McCollum, 130 S.Ct. 447 (2009). The decision by the United States Supreme Court in Porter establishes that the previous denial of Mr. Raleigh'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). The United States Supreme Court's decision in Porter represents a fundamental repudiation of the Florida Supreme Court's Strickland jurisprudence, and as such Porter constitutes a change in law as explained herein, which renders Mr. Raleigh's Porter claim cognizable in these postconviction proceedings.

ARGUMENT

ARGUMENT

PORTER V. McCOLLUM QUALIFIES AS NEW FLORIDA LAW UNDER WITT V. STATE, AND MR. RALEIGH'S SENTENCE OF DEATH VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER STRICKLAND ANALYSIS FOR THE REASONS EXPLAINED IN PORTER V. McCOLLUM.

A. INTRODUCTION

The decision by the U.S. Supreme Court in Porter v. McCollum, 130 S. Ct. 447 (2009), establishes that this Court's affirmance of the circuit court's denial of Mr. Raleigh's penalty phase ineffective assistance of counsel and/or Brady claims was premised upon this Court's case law misreading and misapplying Strickland v. Washington, 466 U.S. 668 (1984). Following on the heels of its decision in Porter v. McCollum, the U.S. Supreme Court expounded on its Porter analysis in Sears v. Upton, 130 S. Ct. 3259 (2010), a case in which it found that a Georgia postconviction court failed to apply the proper prejudice inquiry under Strickland. The U.S. Supreme Court's decision in Porter was a repudiation of this Court's Strickland jurisprudence, and as such Porter constitutes a change in Florida law as explained herein,[22] which renders Mr. Raleigh's Porter claim cognizable in

[22]As explained herein, Porter v. McCollum held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance claim in

collateral proceedings. *See* Witt v. State, 387 So. 2d 922, 925 (Fla. 1980); 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").

Mr. Raleigh presented his Porter v. McCollum claim to the circuit court in a Rule 3.851 motion in light of this Court's ruling in Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under Hitchcock v. Dugger, 481 U.S. 393 (1987), in which the U.S. Supreme Court found that this Court had misread and misapplied Lockett v. Ohio, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions). At the State's urging, the circuit 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. Raleigh

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Porter v. State. Thus, Mr. Raleigh 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, 788 So. 2d 917 (Fla. 2001), was wrong, and in doing so announced new Florida law. This is identical to the rulings in Hitchcock v. Dugger, 481 U.S. 393 (1987), and Espinosa v. Florida, 505 U.S. 1079 (1992), which both found that this Court had failed to properly understand, follow and apply federal constitutional law.

seeks a determination by this Court that he 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. MR. RALEIGH'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Mr. Raleigh was advised by his trial attorneys to plead guilt without a deal with the State and agree to a jury penalty phase trial on whether a death sentence should be imposed. The trial attorneys made this recommendation without retaining a mental health expert and investigating mental health mitigation until after the guilty plea was entered. This was prejudicially deficient performance.

In addition during the penalty phase proceedings in Mr. Raleigh's case, the State without objection introduced a taped statement given to law enforcement by Mr. Raleigh's co-defendant, Domingo Figueroa (T. 1125). According to this statement, Mr. Raleigh was the leader and primary perpetrator in the crimes. Moreover, in this statement, Figueroa claimed that Mr. Raleigh killed both victims while Figueroa was outside the residence (T. 1128-29). The State utilized the taped statement to argue in support of a jury recommendation of death.[23] Mr. Raleigh's trial

[23]However, subsequent to Mr. Raleigh's penalty phase proceedings before a jury, the State

attorneys failed to object to the introduction and use of the statement despite Mr. Raleigh's right to confront and cross-examine witnesses against him, including Figueroa, his co-defendant.

While Figueroa made contradictory statements to his uncle admitting that he committed one of the killings, trial counsel neither sought to admit those contradictory statements nor insist on cross-examining Figueroa about those statements. Trial counsel was ineffective in how this was handled in that 1) he unreasonably opened the door to Figueroa's taped statement by mentioning it on cross and permitting the State to introduce it on redirect, and/or 2) he failed to object to the admission of Figueroa's taped statement, and/or 3) he erroneously believed that the State was going to call Figueroa as a witness, and/or 4) he failed to consider his alternatives such as presenting Figueroa's statement to his uncle and/or 5) he waived Mr. Raleigh's right to examine Figueroa about his admissions to his uncle. Mr. Raleigh was greatly prejudiced by the introduction of Figueroa's statement that Mr. Raleigh committed both killings and by the failure to apprise the jury that Figueroa admitted to his

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argued and introduced evidence in Figueroa's trial demonstrating that the State was aware that Figueroa's taped statement contained critical, material falsehoods. Contrary to Figueroa's taped statement in which he claimed Mr. Raleigh killed both victims (T. 1128-29), the prosecution presented evidence during Figueroa's trial that he admitted to killing one of the victims (FTR. 1372-74).

uncle that Mr. Raleigh was telling the truth when he indicated that Figueroa was in the residence and that he killed Eberlin. Not only did the statement cast the greater culpability on Mr. Raleigh, this unrebutted statement also cast doubt on Mr. Raleigh's veracity as a witness, painted Mr. Raleigh as the leader and aggressor, was used to find that the cold, calculated premeditated aggravator, the heinous, atrocious cruel aggravator, and the avoiding arrest aggravator all applied, and weakened the defense arguments concerning mental health mitigators, the substantial domination mitigator, and Figueroa's life sentence as a mitigator.

According to the taped statement he gave to law enforcement which minimized his role, Figueroa indicated that, thought he was driving his car to the victim's residence, it was Mr. Raleigh who was directing him because he, Figueroa allegedly didn't know where Cox lived (T. 1133-34). Subsequently, when they arrived at the victims' residence the first time, Figueroa's taped statement portrayed himself as being reluctant and a non-participant, while portraying Mr. Raleigh as the first to show a gun when Figueroa just wanted to leave (T. 1137). According to the taped statement to the police, Mr. Raleigh wanted to confront the victim (T. 1137-38), and Mr. Raleigh killed the two victims (T. 1128-29). Figueroa's recounting of the incident to the police was not only inconsistent with and contrary to Mr. Raleigh's account, it was

inconsistent with Figueroa's statement to his uncle which the State introduced against Figueroa at Figueroa's trial.

As a result of the introduction of Figueroa's devastating, inculpatory statement to law enforcement, one that was not subject to cross-examination, Mr. Raleigh's Sixth Amendment right of confrontation was waived without his consent. The statement was introduced by the State without the jury hearing that in direct contradiction to what he told the police, Figueroa told his uncle that he in fact killed one of the victims. Favorable and exculpatory evidence contradicting the evidence presented by the State was inexplicably not presented by Mr. Raleigh's trial attorneys.

Trial counsel's stated explanation for allowing the taped statement to be utilized against Mr. Raleigh, whether true or not, was simply not a reasonable decision. According to counsel Teal, he was seemingly of the belief that Figueroa was going to testify if the taped statement wasn't introduced and conversely, that Figueroa would not testify if the statement was introduced. Trial counsel's thinking was unreasonable in light of his acknowledgment that he obtained no agreement that in exchange for his waiver of an objection to the statement, the State would not call Figueroa (PCT. 229-32). And of course, none of this explains the failure to present Figueroa's admissions to his uncle that he was in the residence and that he killed Eberlin,

consistent with Mr. Raleigh's account.

Trial counsel's decision was shown to be even more unreasonable by the trial prosecutor's testimony. According to prosecutor Blackburn, there were no plans to have Figueroa testify at Mr. Raleigh's penalty phase (PCT. 279-280). The elected State Attorney Alexander, who personally prosecuted Figueroa with prosecutor Blackburn, confirmed this position. Alexander had communicated to Figueroa's counsel that there would be no pleas reached until after Mr. Raleigh's case was resolved (PCT. 306). Alexander didn't trust either defendant stated, "[t]o me their help would be zero for the State of Florida. I couldn't see how they could help, either one of them could help either one of us, or could help the State, I should say" (PCT. 306-07).

At Mr. Raleigh's postconviction evidentiary hearing, trial counsel advanced a second position as to why portions of Figueroa's taped statement would be beneficial to Mr. Raleigh:

> Well, you're asking me to recall and I read their amended motion. But in my opinion, the taped statements that Figueroa made have enhanced our position again that he was the ringleader. I hate to use the word ringleader because it was really just the two of them. But I felt due to the age difference and the fact he was Bobby's uncle, I just felt he was more experienced, sophisticated, if you will. And I thought the tape helped us in that position.

(PCT. 335-336). Of course, such a position is simply not reasonable given the fact that Figueroa's statement clearly implicated Mr. Raleigh as the "ringleader," and Figueroa as a

reluctant, frightened individual being directed by Mr. Raleigh. There was simply no objectively reasonable reason for trial counsel to use Figueroa's taped statement, given Figueroa's statement to his uncle which was much more favorable, but yet not presented to the jury. And there was no objectively reasonable reason for not presenting Figueroa's admissions to his uncle the was present in the residence and that he killed Eberlin.

As a result of trial counsel's deficient performance, the jury heard what should have been inadmissible testimony, which completely discredited Mr. Raleigh and destroyed his defense, and the jury did not hear evidence that corroborated Mr. Raleigh's account and demonstrated that Figueroa had admitted to one of the killings. Mr. Raleigh was prejudiced as a result of trial counsel's deficient performance, as is evidenced by the jury's death recommendation. Moreover, in sentencing Mr. Raleigh to death, the trial court relied on much of Figueroa's version of events in his self-serving statement to the police to find three aggravating factors beyond a reasonable doubt and to minimize or negate numerous mitigating factors argued by the defense (R. 224-37).

This Court when considering Mr. Raleigh's appeal of the denial of Rule 3.851 relief erroneously gave deference to the trial court's legal determination that counsel's strategic decision was reasonable: "defense counsel made an informed and

reasoned, strategic decision to introduce Figueroa's taped statement after considering the alternatives." Raleigh v. State, 932 So. 2d at 1064. However, it is hard to see how counsel's decision was either an "informed" or "reasoned" given the prosecutor's testimony that he had no intention of calling Figuero. This Court's analysis was simply not a full-throated and probing analysis, as the U.S. Supreme Court has held in Porter v. McCollum and Sears v. Upton is required. Indeed, this Court further noted:

> As summarized in the trial court's order, the testimony of defense counsel was that:
>
> > [Defense counsel] did not want [Figueroa] to testify personally at [Raleigh's] penalty phase proceeding because they would not have any control over what he testified to. They believed his live testimony may have been more damaging than his recorded statement. Instead, they preferred that the statement come in because parts of it could be used to support Defendant's case, *i.e.*, to show the control or influence [Figueroa] had over [Raleigh].

Raleigh v. State, 932 So. 2d at 1064. This was complete deference to the trial court without the requisite engaging analysis of the record. The reasonableness of a trial attorney's allegedly strategic decision is a question of law subject to *de novo* review by this Court. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991). Yet, this Court contrary to Porter and Strickland did not review the reasonableness of this allegedly strategic decision *de novo*. This Court simply conducted no

analysis of the reasonableness of counsel's alleged strategy. Instead, this Court deferred to the trial court's ruling. After giving total deference to the trial court, this Court opined that "Raleigh has not demonstrated that defense counsel's decision to introduce Figueroa's statement fell outside the norms of professional conduct. Therefore, we affirm the denial of this claim." Raleigh, 932 So. 2d at 1064.

This Court's reasoning is precisely the sort of superficial acceptance of the lower court's ruling that was found unconstitutionally unreasonable in Porter. First, as in Porter, the circuit court's findings are belied by the record. Trial counsel's stated explanation for allowing the taped statement to be utilized against Mr. Raleigh, whether true or not, was simply not a reasonable decision. According to counsel Teal, he was seemingly of the belief that Figueroa was going to testify if the taped statement wasn't introduced and conversely, that Figueroa would not testify if the statement was introduced. However, that was not the case; trial counsel was simply wrong. And any decision made upon this error in fact was made in ignorance. Again, counsel had obtained no agreement with the State to that effect (PCT. 229-32) and the trial prosecutor testified that there were no plans to have Figueroa testify at Mr. Raleigh's penalty phase (PCT. 279-80). The elected State Attorney Alexander, who personally prosecuted Figueroa with prosecutor

Blackburn, confirmed this position. Alexander had communicated to Figueroa's counsel that there would be no pleas reached until after Mr. Raleigh's case was resolved (PCT. 306).

As a result of trial counsel's deficient performance, the jury heard what should have been inadmissible testimony, which completely discredited Mr. Raleigh and destroyed his defense. Surely, the introduction of Figueroa's taped statement did not support trial counsel's "strategy" that he wanted to show that Mr. Raleigh lacked intent and that he was dominated by Figueroa. Additionally, under Florida law, discovery depositions of the State's witnesses are permitted. Since Figueroa was a co-defendant with a Fifth Amendment right to refuse to testify, some notice to Mr. Raleigh that Figueroa's Fifth Amendment privilege was being waived so that a discovery deposition could have been conducted would have been required. The failure to provide such notice would have been a discovery violation under Richardson v. State, 246 So. 2d 771 (1971), and would have been sanctionable since the first reference made to Figueroa's taped statement occurred after the penalty phase proceeding had commenced, and the State's first witness was on the stand. Under these circumstances, it was unreasonable to believe that the State was going to be calling Figueroa as a witness.

Even if it were reasonable to think that Figueroa would testify in lieu of the admission of his taped statement, this

Court's reasoning still violated Porter. Essentially, what this Court did in Mr. Raleigh's case was to attribute strategy to the failure to object to prejudicial inadmissible evidence because the alternative may have presented a problem, *i.e.*, Figueroa's live testimony may have been unmanageable and damaging (though it is hard to imagine how it could be more damaging than his statement, without cross-examination, making Mr. Raleigh the killer, the ringleader and more likely to get the death penalty. That particular reasoning was part of the misapplication of Strickland that was specifically identified by the U.S. Supreme Court as present in this Court's decision in Porter. The U.S. Supreme Court explained in Porter that the state court finding that Mr. Porter's military service would not have assisted his case because the fact that he went AWOL would turn that evidence against him was unreasonable. Porter, 130 S. Ct. at 455. As in Porter, this Court in Mr. Raleigh's case unreasonably approved a non-strategic and unreasonable decision by trial counsel based on a strained and tenuous conjecture that the alternative may have somehow made things worse.

In Strickland, "the Court recognized that merely invoking the word strategy to explain errors was insufficient since 'particular decisions must be directly assessed for reasonableness [in light of] all the circumstances'"[;] "so called 'strategic' decisions that are based on a mistaken understanding

of the law, or that are based on a misunderstanding of the facts are entitled to less deference." Hardwick v. Crosby, 320 F.3d 1127, 1185-86 (11th Cir. 2003). A tactical or strategic decision is unreasonable if it is based on a failure to understand the law. Horton v. Zant, 941 F.2d at 1462.

Moreover, counsel's advice to plead guilt was made without adequate investigation. Counsel failed to timely retain a mental health expert. Counsel failed to provide the mental health expert with Figueroa's admissions to his uncle. As a result, the readily available mitigating evidence that could have been used to rebut Figueroa's taped statement to the police was not heard by Mr. Raleigh's jury. Under Porter and Strickland, this was deficient performance that prejudiced Mr. Raleigh.

Here, the jury heard what should have been inadmissible testimony in violation of Mr. Raleigh's right to confront witnesses against him, which completely discredited Mr. Raleigh and destroyed his defense. The jury did not hear Figueroa's admission that he committed one of the killings. This jury did not hear Figueroa's admission to his uncle that amounted to an admission that Mr. Raleigh had, contrary to the State's argument, told the jury the truth. This Court's conclusion on this claim must be reevaluated in light of Porter.

Mr. Raleigh was sentenced to death by a judge and jury improperly and wrongly led to believe that Mr. Raleigh's role in

the crime was far greater than the evidence would suggest. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

This Court's prior ruling with respect to Mr. Raleigh's ineffective assistance of counsel claim merely accepted the circuit court's inexplicable finding that trial counsel's decision to complacently allow the admission of objectionable, damaging evidence was not prejudicial. The findings in this case are starkly in violation of Porter.

Further, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of a defense." Ake v. Oklahoma, 105 S. Ct. 1087, 1096 (1985). Mr. Raleigh was prejudiced as a result of trial counsel's deficient performance. This Court failed to perform the probing, fact-specific inquiry which Sears explains Strickland requires and that Porter made clear that this Court unreasonable failed to do when reviewing Mr. Porter's case. Indeed, the analysis that this Court employed in Mr. Raleigh's case is indistinguishable from the analysis it used in Porter v. State. At the heart of Porter error is "a failure to engage with [mitigating evidence]." Porter, 130 S. Ct. at 454. The U.S. Supreme Court found in Porter that this Court violated Strickland by "fail[ing] to engage with what Porter actually went through in Korea." Id. That admonition by the U.S. Supreme Court is the

new state of Strickland jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence will pass for a constitutionally adequate Strickland analysis. To engage is to embrace, connect with, internalize, glean and intuit from mitigating evidence the reality of the experiences and conditions that make up a defendant's humanity. Implicit in the requirement that trial counsel must present mitigating evidence to "humanize" capital defendants, id. at 454, is the requirement that courts in turn must engage with that evidence to form an image of each defendant's humanity. It stands to reason that nothing less than a profound appreciation for an individual's humanity would sufficiently inform a judge or jury deciding whether to end that individual's life. And it is that requirement–the requirement that Florida courts *engage with humanizing evidence*--that is at the heart of the Porter error inherent in this Court's erroneous prejudice analysis and erroneous deference extended under Stephens v. State, 748 So. 2d 1028 (Fla. 1999). The U.S. Supreme Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . ." Lockett v. Ohio, 438 U.S. at 603 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). Such information was simply not provided to the jury in this case.

Mr. Raleigh's substantial claim of ineffective assistance of

counsel has not been given the serious and probing consideration required by the U.S. Supreme Court in Porter and Sears. Mr. Raleigh asks that this Court either perform the proper analysis of this claim under Porter v. McCollum which has as of yet been lacking in this case, or remand to the circuit court to engage in the requisite analysis in the first instance.

C. PORTER QUALIFIES UNDER WITT AS A DECISION FROM THE U.S. SUPREME COURT WHICH WARRANTS REVISITING MR. RALEIGH'S PREVIOUSLY PRESENTED INEFFECTIVENESS CLAIMS

It is Mr. Raleigh's position that as to whether Porter qualifies as new law, the question is one of law. Therefore, initially, this Court must independently review that aspect of Mr. Raleigh's claim, giving no deference to the circuit court's refusal to find Porter v. McCollum qualifies under Witt v. State as new Florida law. Should this Court conclude that Porter apples retroactively, then, this Court must review the merits of Mr. Raleigh'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 concerning 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. As Porter also makes clear, an evaluation of the evidence presented to establish prejudice under the prejudice prong of the

Strickland standard or the materiality prong of the Brady standard must also be evaluated without according 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.[24]

In Witt, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictated. 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

[24]As 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 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.

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, 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), the Court found on the other hand 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.

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 its holding in Witt to be 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.

After enunciating the Witt standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the Witt standard was to be applied shortly 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 a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the U.S. Supreme Court found that the death sentence rested upon this Court's misreading of Lockett v. Ohio and that the death sentence stood in violation of 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 the decision in 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).[25]

In Lockett v. Ohio, the U.S. Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such

[25]The decision from the U.S. Supreme Court in Hitchcock issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon thereafter called upon to resolve the ramifications of Hitchcock. On September 3, 1987, the decision in Riley issued granting a resentencing. Therein, 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). Then 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 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." Then 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. And on October 30, 1987, this Court issued its opinion in Demps, and thereto addressed the merits of the Hitchcock claim, but concluded that the Hitchcock error that was present was harmless.

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 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. Down, 514 So. 2d at 1071.

Following Hitchcock, 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.[26]

[26]The 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.

Clearly, this Court read the opinion in Hitchcock and saw that the reasoning contained therein demonstrated that it had misread Lockett in a whole series of cases. This Court's decision at issue in Hitchcock was not some rogue decision, but in fact reflected the erroneous construction of Lockett that had been applied by this Court continuously and consistently in virtually every case in which the Lockett issue had been raised. And in Thompson and Downs, this Court saw this and 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.[27]

The same principles at issue in Delap, Downs, Thompson are at work here. Just as Hitchcock reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to 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

[27]Because the result in Hitchcock was dictated by Lockett as the U.S. Supreme Court made clear in its opinion, there really 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).

that this Court's decision affirming the death sentence was contrary to or an unreasonable application of Strickland, a prior decision from the U.S. Supreme Court. Just as Hitchcock rejected this Court's analysis of Lockett, Porter rejected 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 that Mr. Hitchcock received, so to those individuals that have raised a Strickland issue like the one Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received. And just as this Court's treatment of Mr. Hitchcock's Lockett claim was not simply an anomaly, this Court's misreading of Strickland which the U.S. Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of Strickland itself.

Another decision from the U.S. Supreme Court finding that this Court had failed to properly apply Eighth Amendment jurisprudence was 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, 486 U.S. 356 (1988), 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 did apply in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in Maynard.

Following the decision in 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 exactly 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 and/or Brady claims under the proper and correct Strickland standard which was applied by the U.S. Supreme Court to George Porter's penalty phase ineffectiveness claim and resulted in collateral relief in his case and ultimately a life sentence. Refusing to reconsider Mr. Raleigh's ineffective assistance of counsel 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 itself establish that Mr. Raleigh's death sentence was arbitrary and violated Furman v. Georgia, 408 U.S. 238 (1972).

D. PORTER V. MCCOLLUM AND THE PREJUDICE PRONG OF MR. RALEIGH'S PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

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 postconviction 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 unpresented 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 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, 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 inconsistency in its jurisprudence as to the standard by which it reviewed a Strickland claim presented in collateral proceedings.[28] In Stephens, this Court observed 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.[29] 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

[28]It should be noted that Stephens was a non-capital case in which this Court granted discretionary review because the decision in Stephens by the 2nd DCA was in conflict with Grossman as to the appellate standard of review to be employed.

[29]This 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).

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:

> We 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, 748 So. 2d at 1034. Indeed in Porter v. State, the Court relied upon this very language in Stephens as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing in deference to the presiding post-conviction judge's credibility determination without consideration of how the jury may have considered the unpresented evidence. Porter, 788 So. 2d at 923.

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 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. Raleigh's case, as in Porter, this Court erroneously deferred to the trial court's findings without engaging in its own analysis of the favorable evidence and information that was known or should have been known to counsel which was not presented to Mr. Raleigh's jury. This favorable evidence and information was introduced into evidence at the 1996 evidentiary hearing. When a proper Strickland analysis is conducted of Mr. Raleigh's ineffectiveness claim in compliance with Porter v. McCollum, it is clear that Mr. Raleigh did indeed received ineffective assistance of counsel in violation of the Sixth Amendment. Mr. Raleigh was sentenced to death by a judge and jury improperly and wrongly led to believe that Mr. Raleigh's role in the crime was far greater than the evidence would suggest. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the circuit court's order denying Mr. Raleigh's Rule 3.851 motion, find that Porter v. McCollum qualifies as new Florida law under Witt v. State and remanded for reconsideration of Mr. Raleigh's

ineffective assistance of counsel claim on the merits.

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 Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118, on November 4, 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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