

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1290

Lower Tribunal No. 88-CF-689

BRUCE DOUGLAS PACE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Pace's successive motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R."—record on direct appeal to this Court;

"PCR."—record on 3.851 appeal to this Court following the postconviction evidentiary hearing;

"PCR2."—record on 3.851 appeal to this Court following the circuit court's denial of Mr. Pace's successive rule 3.851 motion;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Pace requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF CASE AND FACTS

The Circuit Court of the First Judicial Circuit, Santa Rosa County, entered the judgments of conviction and sentence under consideration.

On December 14, 1988, a Grand Jury in the Circuit Court of Santa Rosa County, Florida, indicted Mr. Pace for the first degree murder and armed robbery of Floyd Covington (R. 1132-33). Mr. Pace pleaded not guilty to the charges (R. 1252). Mr. Pace's guilt phase began on August 23, 1989 (R. 532). The jury found him guilty on all counts¹ (R. 1210).

A penalty phase proceeding was conducted on August 26, 1989 (R. 1030). The State presented the following evidence in aggravation: a 1981 judgment for strong armed robbery (R. 1037), and the testimony of Mr. Pace's parole officer, who stated that Mr. Pace was on parole for robbery at the time of the murder (R. 1038-9).

The defense presented several lay witnesses at the penalty phase. A correctional officer from the jail testified with regard to Mr. Pace's exemplary behavior while awaiting trial (R. 1039-41). Mr. Pace's high school football coach

¹ Mr. Pace's defense team consisted of three individuals: Samuel Hall, Randall Etheridge, and Jim Martin. Mr. Hall was the first chair attorney and was responsible for the penalty phase. Mr. Etheridge was the second chair attorney and was responsible for the guilt phase. Mr. Martin was the investigator who assisted Mr. Pace's attorneys (PCR. 2008, 2015).

testified that Mr. Pace was a good athlete, that he was never a discipline problem, and that he was generally quiet and hardworking (R. 1044-5).

The defense also presented the testimony of Robert Settles, Mr. Pace's vocational teacher in high school (R. 1051). Mr. Settles left his teaching position and started a truss manufacturing business (R. 1051). He hired Mr. Pace to work cutting trusses on a saw (R. 1051-2). Mr. Settles considered Mr. Pace to be naturally gifted at this work (R. 1052). He thought Mr. Pace had a lot of capabilities but did not always live up to his potential (R. 1052-4).

Eleanor Rich, Mr. Pace's aunt, testified that Mr. Pace was a loving, caring person (R. 1059). When Mr. Pace was around 14 years old, his stepfather, Harvey Rich, left the family for over a year (R. 1059-60). During that time, Mr. Pace assumed more responsibilities caring for his three younger siblings (R. 1060).

Mr. Pace's mother, Lillian Rich, testified that Mr. Pace never knew his real father, but that his stepfather treated him as he did his own children (R. 1065). When Mr. Pace's stepfather left the family, this may have had a negative effect on him, since he admired his stepfather and spent time with him when he ran a service station (R. 1066). Mr. Pace always tried to support his family including providing money when he began working (R. 1066-7).

The defense presented no expert testimony at Mr. Pace's penalty phase.

The trial judge instructed the jury on six aggravating factors: 1) the crime was committed while the defendant was under a sentence of imprisonment; 2) the defendant had a previous conviction for a violent felony (a robbery); 3) the homicide was committed during the course of a robbery; 4) the crime was committed for the purpose of avoiding arrest; 5) the crime was committed for financial gain; 6) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R. 1120-21). By a seven-to-five vote, the jury recommend a sentence of death for the murder of Mr. Covington (R. 1211).

On November 16, 1989, Circuit Judge Ben Gordon adjudged Mr. Pace guilty and sentenced him to death for the murder and 15 years imprisonment for the robbery (R. 1238-43). In support of the death sentence, the court found three aggravating circumstances: (1) Mr. Pace had a previous conviction for a violent felony, a robbery in 1982; (2) Mr. Pace was on parole at the time of the homicide; and (3) the homicide was committed during the course of a robbery (R. 1234-45). The court found no mitigating circumstances (R. 1236-37).

On direct appeal, this Court affirmed Mr. Pace's conviction and the death sentence. *Pace v. State*, 596 So. 2d 1034, 1036 (Fla. 1992). Justices Overton, Barkett, and Kogan concurred with the conviction but dissented, without an

opinion, as to the death sentence. *See id.* The United States Supreme Court denied certiorari on October 5, 1992. *Pace v. Florida*, 113 S. Ct. 244 (1992).

On October 11, 1993, Mr. Pace filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Mr. Pace amended his motion. After a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(c) (PCR. 1192), the circuit court ordered that an evidentiary hearing be held on several claims including Mr. Pace's claims that the State failed to disclose exculpatory or impeachment evidence and ineffective assistance of counsel for failure to perform an adequate investigation, failure to properly cross-examine certain witnesses; failure to call available witnesses, failure to object to improper prosecutorial comments in guilt and penalty phase closing arguments; and failure to investigate and present mitigating evidence of Mr. Pace's mental health and difficult childhood (PCR. 1192-1203). Following the evidentiary hearing, the court denied relief.

Mr. Pace appealed the denial of relief and simultaneously filed a petition for a writ of state habeas corpus. This Court affirmed the denial of postconviction relief and denied the habeas corpus petition, *Pace v. State*, 854 So. 2d 167 (Fla. 2003), and denied rehearing. Mr. Pace filed a writ of certiorari in the United States Supreme Court, which was denied. *Pace v. Florida*, 124 S. Ct. 1155 (2004).

On September 27, 2004, Mr. Pace filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida, Pensacola Division. The Honorable Robert L. Hinkle, Chief United States District Judge, denied Mr. Pace's Petition but granted a Certificate of Appealability with respect to whether Mr. Pace was denied effective assistance of counsel in connection with the failure to develop and present sentencing mitigation evidence (including lay and expert testimony) relating to substance abuse. The Eleventh Circuit Court of Appeals affirmed the district court's denial of habeas relief. *Pace v. McNeil*, 556 F.3d 1211 (11th Cir. 2009).

On November 26, 2010, Mr. Pace a successive motion to vacate premised on the United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) (PCR2. 1-37). The State responded (PCR2. 44-110). The circuit court conducted a case management conference by telephone on January 11, 2011 (PCR2. 138-157). The State prepared a proposed order denying relief, to which Mr. Pace objected (PCR2. 127-131). On March 23, 2011, the circuit court entered its order denying relief (PCR2. 133-136). This appeal follows.

SUMMARY OF THE ARGUMENT

The United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Pace's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). *Porter* establishes that the previous denial of Mr. Pace's claims that he did not receive a reliable trial and sentencing proceeding was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984) and *Brady v. Maryland*, 83 S. Ct. 1194 (1963).

STANDARD OF REVIEW

Mr. Pace presents several issues which involve mixed questions of law and fact. Thus, a de novo standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

ARGUMENT

THE U.S. SUPREME COURT’S DECISION IN *PORTER V. MCCOLLUM* DEMONSTRATES THAT THIS COURT FAILED TO CONDUCT A PROPER PREJUDICE ANALYSIS OF MR. PACE’S POSTCONVICTION CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND V. WASHINGTON* AND THE STATE’S WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE UNDER *BRADY V. MARYLAND*.

A. *Porter v. McCollum*

In *Porter v. McCollum*, the United States Supreme Court agreed with the district court’s grant of relief within the context of the strict standards of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which limits the circumstances under which a defendant may obtain relief in federal habeas proceedings.² Even in the context of strict AEDPA deference to state court findings, the Supreme Court determined that:

² Under the AEDPA, any claim that was adjudicated on the merits must be reviewed in accordance with certain limitations:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim-
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

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 either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.

Porter v. McCollum, 130 S. Ct. 447, 454-55 (2009). *Porter* was not simply a case in which the high court merely disagreed with the outcome or even a case where the Supreme Court decided that this Court’s decision was just wrong. Rather, the United States Supreme Court held that the decision was so unreasonable that the usual concerns of federalism, as codified by the AEDPA, were not sufficient to allow the death sentence to stand.

In *Strickland v. Washington*, the United States Supreme Court found that, in order to ensure a fair trial, the Sixth Amendment requires that defense counsel provide effective assistance to defendants by “bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” 466 U.S. 668, 685 (1984). Where defense counsel renders deficient performance, a new resentencing is required if that deficient performance prejudiced the defendant

determined by the Supreme Court of the United States; or

- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

such that confidence is undermined in the outcome. *Id.* at 694. To prove prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must “engage with [mitigating evidence],” *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a “[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.” *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must “‘speculate’ as to the effect” of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and

painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to *try to find a constitutional violation*. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must **search** for it carefully, not dismiss the possibility of it based on information that suggests it isn't there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non-presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

B. Mr. Pace's *Porter* claim is cognizable under *Witt* and rule 3.851

The *Porter* decision establishes that the previous denial of Mr. Pace's claims that he did not receive a reliable sentencing proceeding was premised upon this Court's case law which misread and misapplied *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such

Porter constitutes a change in law as explained herein, which renders Mr. Pace's *Porter* claim cognizable in these postconviction proceedings. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Pace's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States 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).

The circuit court denied Mr. Pace's *Porter* claim, finding the motion to be "untimely, successive, procedurally barred and unauthorized under Rule 3.851(d)(1), (2), (e)(2), Florida Rules of Criminal Procedure." (PCR2. 135). However, in *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding 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. This Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id.* "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no

longer considered acceptable and no longer applied to indistinguishable cases.” *Id.* (quotations omitted).

As “the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery,” *id.* at 928, this Court declined to follow the line of United States Supreme Court cases addressing the issue, which it characterized as a “relatively unsatisfactory body of law.” *Id.* at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

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 United States 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.

The *Witt* Court 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*.” *Witt*, 387 So. 2d at 929. The 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.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to this Court and the United States Supreme Court. *Id.* at 930. This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: “(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance” *Id.* at 931.

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 United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States 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 United States 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 United States Supreme Court issued its decision in *Hitchcock*, a death sentenced individual with an active death warrant argued to this Court that he was 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).

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did

not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. See *Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States 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 United States 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. See *id.* at 1071.

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 postconviction *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. 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 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.

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so too did *Porter*. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Lockett*, a prior decision from the United States Supreme Court, here in *Porter*, the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears*. As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive

the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received.

C. *Porter* is not limited to its facts

When denying relief on Mr. Pace's motion, the circuit court found that:

Porter is the United States Supreme Court's application of *Strickland v. Washington* to the particular facts of that case. Accordingly, Defendant's motion is not based on any newly established fundamental constitutional right that "has been held to apply retroactively," and does not meet any exception to the time and successiveness bars espoused in Rule 3.851.

(PCR2. 135). The lower court misconstrues Mr. Pace's argument. Mr. Pace has not argued or suggested that *Porter* represents a change in the evaluation of prejudice under federal law; rather, it represents a change in how *this Court* has approached that analysis under *Strickland*. In other words, the fact that this Court cited to *Strickland's* test does not mean that the required painstaking search for constitutional error has taken place. *See, e.g., Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). In *Sears v. Upton*, the United States Supreme Court noted that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Sears*, 130 S. Ct. at 3264 (emphasis added). The finding that Mr. Pace's

claim is procedurally barred was based on the lower court's misunderstanding of the claim.

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. In *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004) this Court relied upon the language in *Porter v. State* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

Indeed, in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings. In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision. In *Rose*, this

Court employed a less deferential standard. As explained in *Stephens*, the Court in *Rose* “independently reviewed the trial court’s legal conclusions as to the alleged ineffectiveness of the defendant’s counsel.” *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*’s very deferential standard in favor of the standard employed in *Rose*. However, this Court made clear that even under this less deferential standard,

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

Stephens v. State, 748 So. 2d at 1034. Indeed, in *Porter v. State*, this Court relied upon that very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923. *Porter v. State* was not an aberration; rather, it was based on this Court’s case law. *Id.* at 923.

D. *Porter* requires a re-evaluation of Mr. Pace’s penalty phase ineffective assistance of counsel claim

In his initial motion for postconviction relief, Mr. Pace alleged that trial counsel was ineffective for failing to investigate and present evidence concerning Mr. Pace’s long-term crack cocaine use. Because counsel failed to pursue, develop,

and present mitigation, confidence is undermined in the outcome of the sentencing proceeding and there is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

The postconviction evidentiary hearing testimony demonstrated that trial counsel received information from numerous witness statements to police and during depositions that should have alerted him to the fact that Mr. Pace had a history of drug problems, specifically a crack cocaine dependency. Upon hearing various individuals mention Mr. Pace's extensive crack cocaine use, trial counsel should have delved into this matter. Had they done so, these individuals could have explained that Mr. Pace regularly used excessive amounts of crack cocaine. Failing to explore these individuals' knowledge of Mr. Pace's drug use constitutes deficient performance. If trial counsel had investigated, they would have located additional witnesses who had information that would have benefited Mr. Pace and were available and willing to testify at the trial.³ To each of the people with whom

³ For example, Kenneth Bembo, who described Mr. Pace as "hooked" on crack and in debt due to his habit, out of control when he was on crack (PCR. 1651-55) and strung out on crack the night before the victim disappeared (PCR. 1661); Barry Copeland, who described Mr. Pace as being high on crack around the time of the offense because they were on a binge together (PCR. 1811) and the extreme effects crack had on Mr. Pace's behavior (PCR. 1807-09); Margaret Dixon, who testified to Mr. Pace's extensive crack use and how his behavior changed as his addiction grew (PCR. 1786-87); Ora Kay Jones, who testified to Mr. Pace's crack use and behavior changes (PCR. 1821-22); and Thomas Hill, who testified extensively as to Mr. Pace's crack use (PCR. 1843).

he discussed his case, including trial counsel, his investigator, and his mental health experts, Mr. Pace consistently reported a past including substantial use of crack cocaine. As the circuit court noted, even trial counsel “believed that Pace had a drug problem” (PCR. 1175).

Trial counsel testified at the postconviction evidentiary hearing that he did not feel an investigation was necessary because he did not believe that Mr. Pace’s crack cocaine use at the time of the crime was strong (PCR. 2072). For the same reason, he did not consider hiring a mental health expert who specialized in drug addiction (PCR. 2072).

Trial counsel was aware of certain available information concerning Mr. Pace’s crack use but failed to present it. Trial counsel’s investigator spoke to Paula King before the trial. Ms. King told him that she and Mr. Pace had been friends since 1980, they “had a long history together,” and that maybe she could help. Although Mr. Martin indicated that he would contact her, no one from Mr. Pace’s defense team ever got in touch with Ms. King again. If they had, she would have provided data about Mr. Pace’s history of drug use. When contacted by postconviction counsel, Ms. King provided an affidavit giving additional details about Mr. Pace’s drug problem.

Not only did counsel’s failure to investigate Mr. Pace’s crack use deprive Mr. Pace of valuable mitigation evidence, it prevented counsel from providing that

information to his mental health experts, Dr. Szmurlo and Dr. Larson, so that they could assess Mr. Pace's mental state at the time of the offense accurately and well-informed. A criminal defendant is entitled to competent expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985).

Dr. Peter A. Szmurlo, a psychiatrist, was contacted by trial counsel in June of 1989 to evaluate Mr. Pace. (PCR. 1873). At that time, he had never before served as an expert in a capital murder trial (PCR. 1875). Nonetheless, trial counsel did not provide him with an explanation or list of the statutory mitigators (PCR. 1876, 2029) so Dr. Szmurlo could not make determinations as to whether they applied. Regardless of possessing minimal background information, Dr. Szmurlo discovered that Mr. Pace had a history of serious cocaine use and abuse. Mr. Pace told Dr. Szmurlo that he had been using about \$150 of crack cocaine per day during the three months prior to the offense (PCR. 1690). Following his evaluation, Dr. Szmurlo concluded that "rather heavy use of cocaine prior to the offense" was the only psychiatric mitigating circumstance that he detected (PCR. 1690). Dr. Szmurlo was aware that Mr. Pace had a history of cocaine use, but he was unclear, if not unaware, of how this drug use constituted a mitigating circumstance in Mr. Pace's case. It was the responsibility of trial counsel to follow up with Dr. Szmurlo regarding this finding. Unfortunately for Mr. Pace, this never

occurred.

Dr. James D. Larson, a clinical psychologist, was appointed by the court in Mr. Pace's trial in 1989 to assist the defense (PCR. 1731). Dr. Larson reported that he had "no indication based on [the provided] information that [Mr. Pace] suffered from any emotional disturbance at the time of the incident." Furthermore, for the same reason, Dr. Larson did not find that Mr. Pace's ability to conform his conduct to the requirements of the law was impaired. Dr. Larson also noted that Mr. Pace earned "elevated scores" on the MacAndrew's Alcoholism Scale (PCR. 1690). Such scores "reflect either an alcoholic and/or drug abuse adjustment or the propensity of developing such a problem in the future" (PCR. 1690). Dr. Larson explained that Mr. Pace's elevated scores were "consistent with interview information" (PCR. 1690). Although all mental health experts have some exposure to drug and alcohol problems, Dr. Larson has no training specific to drug addiction (PCR. 1741-42). Nonetheless, from his evaluation and Mr. Pace's scores on the MacAndrew's Alcoholism Scale, Dr. Larson knew that Mr. Pace had abused cocaine. However, he did not have sufficient information to determine the extent of Mr. Pace's drug problem. While relying on Dr. Larson to determine the existence of statutory mitigation, trial counsel also relied on him to assess whether Mr. Pace suffered from brain damage. Relying on Dr. Larson to determine brain damage was problematic, since Dr. Larson is not a neuropsychologist (PCR. 1738).

Nevertheless, Dr. Larson's testing indicated an unspecified psychological disturbance (PCR. 1737). In addition to undergoing psychological testing, Mr. Pace was administered an EEG in 1989 to measure the electrical activity in his brain (PCR. 1628). However, thirty percent of the time an individual has brain damage, the damage will be detected by an EEG, while neuropsychological testing will detect brain damage in ninety percent of individuals who have such a condition (PCR. 1628-29). With the indications of a psychological disturbance, trial counsel should have obtained a neuropsychologist to evaluate Mr. Pace for the potential brain damage. Trial counsel's failure to have Mr. Pace receive neuropsychological testing constitutes deficient performance.

Had Mr. Pace's attorneys properly investigated and presented the information to their trial experts, the experts would have established for Mr. Pace's jury and judge that the statutory mitigating circumstances, as well as substantial nonstatutory mitigation, applied to his case. Had trial counsel presented this mitigation to Mr. Pace's jury, there is more than a reasonable likelihood that Mr. Pace would have received a life sentence. Trial counsel stated at the evidentiary hearing that if his experts found and could testify to the statutory mental health mitigators, he would have presented them to the jury (PCR. 2016, 2018). Unfortunately, his experts did not find these mitigating factors because trial counsel did not provide them with sufficient information. All of the mitigation

evidence Mr. Pace presented at his evidentiary hearing was undisputed and uncontradicted by the State. Mr. Pace's crack cocaine addiction was demonstrated by numerous lay witnesses and recognized by four mental health professionals. Given that Mr. Pace's jury recommended death by the narrowest of margins (seven to five), the available but unrepresented mitigation evidence that he suffered from chronic substance abuse may well have influenced the jury's appraisal of his moral culpability.

However, this Court, misapplying *Strickland* in the same manner it did in *Porter*, denied Mr. Pace's claim of ineffectiveness:

Regarding Pace's claim that Hall was ineffective for failing to present evidence of Pace's crack use, the postconviction court concluded that "given the unfavorable psychological opinions, counsel's tactical decision to humanize [Pace] and not present any evidence of his drug use was a reasonable strategy." Postconviction order at 20. The postconviction court's conclusion is supported by the testimony regarding Pace's representations to Hall and by the generally unfavorable expert opinions. . . . Thus, there is competent, substantial evidence to support the postconviction court's finding that Hall made a strategic decision to present Pace's positive attributes over evidence of his crack use. We find no legal error in the postconviction court's determination that Hall's decision was not deficient performance in light of the information that both the experts and Pace provided to Hall.

Pace v. State, 854 So. 2d 167, 173 (Fla. 2003). Essentially, what this Court did in Mr. Pace's case was take what could have been compelling mitigation evidence—

i.e., a history of severe drug addiction that had a history of contributing to Mr. Pace's unstable behavior—and propose how that evidence might have cut against Mr. Pace, without considering that had the totality of the available information concerning Mr. Pace's drug addiction been provided to the jury and the mental health experts a substantial mitigation case could have been developed. That particular reasoning was part of the misapplication of *Strickland* present in this Court's decision in *Porter*, as the United States Supreme Court explained 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. *See Porter*, 130 S. Ct. at 455. In both cases, this Court chose to speculate how the information might have resulted in a bad result for Mr. Pace in order to explain away the failure to utilize the information rather than to probe that information for its potential mitigating effects in a penalty phase proceeding. This Court's analysis in this case is not the sort of probing and fact-specific analysis which *Porter* and *Sears* require.

This Court's ruling with respect to Mr. Pace's ineffective assistance of counsel claim merely accepts the circuit court's inexplicable findings that trial counsel provided constitutionally sound and effective assistance to Mr. Pace in his penalty phase despite his failure to present overwhelming evidence of severe drug addiction and drug use around the time of the offense. The findings in this case are

starkly in violation of *Porter*.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case, as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis. At the heart of *Porter* error is "a failure to engage with [mitigating evidence]." *Porter*, 130 S. Ct. at 454. The United States Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually went through in Korea." *See id.* That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage is to embrace, connect with, internalize—to 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 prejudice analysis and *Stephens* deference. The United States 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. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). Such information was simply not provided to the jury in this case.

Counsel’s explanation that he chose to humanize Mr. Pace rather than present evidence of his drug use is shown by *Porter* to be an absurd position. Little could be more humanizing than the weaknesses of the human condition inherent in drug addiction. Few self-destructive conditions could more viscerally reflect the troubled life experience that Mr. Pace suffered. *Porter* requires such information to be presented, and it requires this Court to engage with that information meaningfully and perspicaciously.

E. *Porter* requires a re-evaluation of Mr. Pace’s *Brady v. Maryland* claim.

In his initial postconviction motion, Mr. Pace alleged that the State withheld material exculpatory evidence, including tests conducted at the instruction of the

State Attorney to determine if fingerprints on the window of the victim's vehicle would smudge if the window were opened or closed. Mr. Pace also alleged that the State withheld the fact that Investigator Shirah, who was involved in Mr. Pace's cases, had been reprimanded for knowingly giving false information in a deposition in an unrelated case. (*Id.*). The circuit court denied Mr. Pace's *Brady* claims and this Court affirmed. *Pace v. State*, 854 So. 2d 167 (2003).

In his successive postconviction, Mr. Pace alleged that this Court's materiality analysis under *Brady v. Maryland*, 83 S. Ct. 1194 (1963), is fungible with and indistinguishable from its analysis of prejudice under *Strickland*, and that this Court's affirmance of the denial of Mr. Pace's *Brady* claims violated *Porter*. The circuit court disposed of this issue in a footnote, finding:

To the extent Defendant attempts to rely on *Porter* to revisit other claims, such as his *Brady* claim, raised and disposed of previously in his appeal from the denial of this [*sic*] motion for postconviction relief, Defendant is not entitled to revisit these claims and they are denied as procedurally barred. *Porter* is a narrow holding touching only a claim of ineffective assistance of counsel at the penalty phase of a capital trial.

(PCR2. 135, n8). The circuit court's ruling is error.

In *Rivera v. State*, this Court recognized that "the materiality prong of *Brady* has been equated with the *Strickland* prejudice prong," and thus an analysis of one precludes the need to perform an identical analysis for the other. 995 So. 2d 191, 205 (Fla. 2008) (citing *Derrick v. State*, 983 So. 2d 443 (Fla. 2008) for the

proposition that *United States v. Bagley*, 473 U.S. 667 (1985) expressly applied the *Strickland* standard of “reasonable probability” to *Brady* cases). Thus, the United States Supreme Court’s rejection of this Court’s *Strickland* prejudice analysis implicates and applies to this Court’s *Brady* materiality analysis as well.

As with Mr. Pace’s *Strickland* claim, this Court’s ruling with respect to Mr. Pace’s *Brady* claim merely accepted the circuit court’s speculative findings that the information withheld by the State would not have mattered in the outcome.

This Court explained:

Pace asserts that the State suppressed a fingerprint smudge report and a written reprimand of Investigator Jean Shirah.

A. The Fingerprint Smudge Report

On the second day of Pace’s trial, prosecutor Kim Skievaski directed sheriff’s officers to conduct an experiment to determine whether a fingerprint on the window of the victim’s taxicab would smudge if the window was rolled down and up again. The officers determined in a written report that a fingerprint would not smudge. This report was not provided to Pace’s counsel.

The postconviction court held that Pace failed to demonstrate that the withheld smudge report was sufficiently exculpatory. The court cited the following facts to support its conclusion.

At the Defendant’s trial, the evidence revealed the existence of one latent print attributable to Pace on the exterior of the driver’s side window of Covington’s cab. Defense counsel diminished the evidentiary value of this

print by eliciting testimony that Pace occasionally worked for Covington and had often ridden in his cab. In addition, the State's expert conceded that there is no scientific method to determine the age of a print and a print can remain on a surface for an indefinite period of time under ideal conditions. Thus, the fingerprint evidence alone failed to establish a sufficient link between the Defendant and the murder of Covington.[n.] Given the weakness of the fingerprint evidence, a report that indicated that a print would not smudge if the window were rolled down is of little significance.

[n.] Examples of more substantial evidence linking Pace to the crime are the following: witnesses placed the Defendant in Covington's cab on the morning of the murder, Pace had possession of the shotgun believed to be the murder weapon, the Defendant had human blood that matched the victim's blood type on his clothing the day of the murder, and witnesses placed the Defendant near the location where the cab was dumped after the murder.

Postconviction order at 25-26 (record citations omitted). The record supports the postconviction court's factual findings, and we approve the postconviction court's denial of this claim. Pace has not demonstrated that the evidence is sufficiently exculpatory or that prejudice ensued. The information provided in the smudge report would have been cumulative to other evidence presented by Pace's counsel, and it was not favorable enough "to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555.

B. Reprimand of Investigator Jean Shirah

Investigator Jean Shirah was a deputy sheriff who testified during Pace's trial. Two months before Pace's trial, Shirah knowingly gave false information under oath

during a deposition for an unrelated case. Shirah had testified that she had collected a particular exhibit during a search, when in fact the item had been collected by another officer. The State Attorney's office subsequently reprimanded Shirah, issued her a written reprimand, and notified the Public Defender's office. Pace asserts that the failure to disclose the written reprimand issued to Shirah constitutes a *Brady* violation.

The postconviction court held that Pace failed to demonstrate that the State suppressed this evidence because the State Attorney's office communicated to Pace's counsel that Shirah gave false testimony, and Pace's counsel testified that he was probably aware that Shirah had been reprimanded. Additionally, the postconviction court held that Pace failed to establish that prejudice ensued. We find no error in the decision that there was no *Brady* violation. See *Stewart v. State*, 801 So. 2d 59, 70 (Fla. 2001).

These findings are starkly in violation of *Porter*. Rather than conduct its own fact-specific analysis, this Court merely adopted the findings of the lower court in reaching the conclusion that there was no merit to Mr. Pace's *Brady* claims. As in *Porter* "it was not reasonable to discount entirely the effect that [this withheld exculpatory evidence] might have had on the jury or the sentencing judge." *Porter v. McCollum*, 130 S. Ct. at 455. This Court's materiality analysis was sorely lacking and was an unreasonable application of *Brady*, in violation of *Porter*.

CONCLUSION

Based on the foregoing, Mr. Pace respectfully requests that this Court find that his *Porter* claims are properly before this Court, give Mr. Pace's substantial constitutional claims under *Strickland v. Washington* and *Brady v. Maryland* the serious consideration they require pursuant to *Porter* and, thereafter, grant a new trial and/or penalty phase.

Respectfully submitted,

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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 Meredith Charbula, Assistant Attorney General, Department of Legal Affairs, PL-01, The Capitol, Tallahassee, Florida 32399, this 29th day of August, 2011.

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CERTIFICATE OF FONT

Undersigned counsel further CERTIFIES that the foregoing Initial Brief was prepared using Times New Roman 14 Point font.

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