IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1385

LOWER TRIBUNAL No. 91-CF-1932

HARRY JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summarily denial of Mr. Jones' successive motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850 and 3.851.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R" -- record on direct appeal to this Court;

"T" – transcript of trial on direct appeal to this Court;

"PCR" -- record on appeal from initial denial of postconviction relief;

"PCR2" –- record on appeal from denial of motion for postconviction relief regarding *Brady* and newly discovered evidence;

"PCR3" –- record on appeal from denial of successive motion For postconviction relief.

REQUEST FOR ORAL ARGUMENT

Mr. Jones has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural 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. Mr. Jones, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

The issues presented in this appeal consist of two parts: the first is the determination of whether *Porter* must be applied retroactively. That issue is a question of law and must be reviewed *de novo*. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). The second is the application of *Porter* to Mr. Jones' case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Jones' jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009).

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INTRODUCTION

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

Mr. Jones' current appeal requires this Court to engage in an introspective look at the import of the decision in *Porter v. McCollum* and consider whether its own unreasonable analysis in *Porter v. State* was merely an aberration or was it in fact indicative of a systemic failure by this Court to properly understanding and apply *Strickland*.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

In the relatively recent past, this Court has on two occasions assessed the effect to be accorded to a decision by the United States Supreme Court finding that this Court had misapprehended and misapplied United States Supreme Court precedent. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court granted federal habeas relief because this Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978), and find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances when returning an advisory verdict in a capital penalty phase proceeding.[2] In *Espinosa v. Florida*, 505 U.S. 1079 (1992), the United States Supreme Court summarily reversed a decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.[3]

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

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[2]The AEDPA was not in effect at the time of the decision in *Hitchcock v. Dugger*, so there was no need for the United States Supreme Court to determine that this Court's decision was clearly or unreasonably wrong. The United States Supreme Court's review in *Hitchcock* was *de novo*.

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

Mr. Jones, whose ineffective assistance of counsel atthe penalty phase claim was heard and decided by this Court before *Porter v. McCollum* was rendered, seeks in this appeal what George Porter received. Mr. Jones seeks to have his ineffectiveness claim reheard and re-evaluated using the proper *Strickland* standard that the United States Supreme Court applied in Mr. Porter's case to find a re-sentencing was warranted.[4] Mr. Jones seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claim. Mr. Jones seeks the proper application of the *Strickland* standard. Mr. Jones seeks to be treated equally and fairly.

STATEMENT OF THE CASE

In 1991, Mr. Jones was indicted and charged with first-degree murder, robbery and grand theft (R. 1-2). Mr. Jones pleaded not guilty (R. 18-20).

Mr. Jones was tried by a jury in May, 1992. The jury was unable to reach a verdict and a mistrial was declared. Mr. Jones was tried again in November 1992 and the jury returned a guilty verdict on all counts (R. 786-90). After the penalty phase, the jury recommended a sentence of death by a vote of 10 - 2. Mr. Jones was sentenced to death on November 20, 1992 (R. 828-36).

This Court affirmed Mr. Jones' convictions and sentences on direct appeal. *Jones v. State*, 648 So. 2d 669 (Fla. 1994). The United States Supreme Court denied certiorari. *Jones v. Florida*, 515 U.S. 1147 (1995).

In March, 1997, Mr. Jones filed an incomplete Rule 3.851 motion. Thereafter, Mr. Jones filed an amended Rule 3.851 motion on March 19, 2003. An evidentiary hearing was held on a few of Mr. Jones' claims in April, 2004.

After the evidentiary hearing, Mr. Jones filed a Supplemental Rule 3.851 motion. However, the circuit court did not address the motion and instead denied Mr. Jones' amended Rule 3.851 on September 23, 2005. Mr. Jones filed a timely notice of appeal. Simultaneously, Mr. Jones filed a petition for writ of habeas corpus.

[4]When Mr. Porter's case was returned to the circuit court for a re-sentencing, a life sentence was imposed.

On June 18, 2007, Mr. Jones filed an amended supplemental Rule 3.851 motion, raising newly discovered evidence of prosecution witness Prim's recantation. This Court denied Mr. Jones' motion to relinquish jurisdiction.

This Court denied all relief on December 23, 2008. *Jones v. State*, 998 So. 2d 573 (Fla. 2008).

Following the affirmance of the denial of his amended Rule 3.850 motion, Mr. Jones sought to have the claims in his supplemental Rule 3.851 motions heard (2PC-R. 281-4).

On May 11, 2009, a *Huff* hearing was held (2PC-R. 366-91). At the conclusion of the hearing, the circuit court denied Mr. Jones' motions as untimely and in the alternative, on the merits (2PC-R. 388).

Mr. Jones appealed (2PC-R. 356-7). This Court denied relief in an order issued on October 15, 2010. *Jones v. State*, Florida Supreme Court Case No. SC09-1560.

On February 10, 2009, Mr. Jones filed a federal petition for writ of habeas corpus in the United States District Court, Northern District of Florida. That petition is currently pending.

On November 23, 2010, Mr. Jones filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009) (PC-R3. 1 - 44). On January 24, 2011, the State responded (PC-R3. 47-118).

The circuit court held a case management conference on February 22, 2011. Thereafter, on June 10, 2011, the circuit court denied Mr. Jones' motion (PC-R3. 152-189).

Mr. Jones timely filed a notice of appeal. This appeal follows.

STATEMENT OF THE FACTS

A. THE TRIAL RECORD

In the Spring of 1991, Harry Jones worked at the Catfish Pad, as a cook (T. 247). And, during a six-week time period, Mr. Jones made just short of $800.00 (T. 248). In the week prior to June 1st, Mr. Jones borrowed $50.00 from his boss (T. 249), which was not unusual for employees to do (T. 250). Mr. Jones' boss recalled that the money was to assist Mr. Jones to purchase a car (T. 251). Ronnie Hollis recalled looking at a car with Mr. Jones (T. 758-9). And, a few days before the accident, Lucille Murray recalled Mr. Jones asking her if he could give her $200.00 and the rest of the money later for a car she was selling (T. 769). Murray rejected Mr. Jones' offer but saw that he did have money with him that day (T. 768-9).

At this time, Mr. Jones lived with the Hollis family off of Jackson Bluff Road (T. 328). Mr. Jones paid Mrs. Hollis $25.00 a week to stay at her home and often bought her cigarettes (T. 337).

In that same timeframe, George Young, Jr., worked for the city (T. 264). Mr. Young dated Jessie O'Connor (*Id.*). Ms. O'Connor testified that during the year she had dated Mr. Young, he rarely loaned his truck to anyone, or let others drive it and he always carried a lot of cash (T. 266-7). Likewise, Mr. Young's son, confirmed that his father would not have loaned his truck to "somebody like Mr. Jones" (T. 586). Though he would also not have expected his father to drink with someone like Mr. Jones, either (*Id.*).[5]

On May 31, 1991, George Wilson Young, Jr., withdrew $300.00 from the bank (T. 261). The bank teller recalled providing Mr. Young his money as ten $20.00s and two $50.00s (T. 262). That evening he and Ms. O'Connor went out to dinner. Mr. Young paid for everything, including gas to fill Ms. O'Connor's tank when they left the restaurant.

[5]Paul Williams testified in the defense case that Mr. Young had driven through a beer and wine store in the mid-70s and he would come through with others in the car, both black and white individuals (T. 735-6). Mr. Williams also recalled a time when Mr. Young loaned his car to a couple of college kids for an hour (T. 737).

On June 1, 1991, Mr. Jones and Timothy Hollis started drinking around noon (T. 328). Hollis recalled that Mr. Jones had borrowed $10.00 from his mother to buy alcohol (T. 329). The two drank all day (T. 331-2).

Also, on June 1, 1991, Archie Hamilton and Fain Searcy worked at Market Street Liquors (T. 274, 295). At some point that day, Mr. Jones came to the store and bought a half a pint of gin (T. 296). Mr. Jones paid for the bottle with some small bills and coins (*Id.*). That evening, Mr. Jones, again, and his friend Timothy Hollis entered the store (T. 276). Hollis was very intoxicated and Mr. Jones helped him to the bathroom (T. 277). Shortly thereafter, Mr. Young, entered the store (*Id.*), at approximately 7:00 p.m. (T. 285). Mr. Jones came back to the counter, where Mr. Young spoke to Hamilton (*Id.*). Mr. Jones purchased another half pint of gin (T. 297). While Mr. Jones stood at the counter, Mr. Young paid for a half pint of gin with a $10.00 bill (*Id.*). But, it appeared that Mr. Young had a few hundred dollars on him (T. 278).

Mr. Jones returned to the bathroom to check on Hollis. Mr. Young offered to assist Mr. Jones (T. 279-80). They assisted Hollis out of the store where he fell down (T. 281). At that point, Mr. Jones requested Mr. Young to drive him (Hollis) home (*Id.*).

Though Hamilton advised against it, Mr. Young agreed to help Mr. Jones (T. 281). After Hollis was in the truck, Mr. Young re-entered the store and obtained a couple of cups of ice (T. 283). Hamilton believed that Mr. Young was in the store for fifteen minutes, or so (T. 286).

Mrs. Hollis testified that at some point that evening, she recalled Mr. Jones and a white man bring her son home in a red and white truck (T. 338). After they brought her son in the house, Mr. Jones left (T. 338).

Later, between 7:30 and 8:00 p.m., John Colson, who was working at the Suwanee Swifty saw Mr. Jones and Mr. Young (T. 347). The two came in the store, bought a six pack of beer and left (T. 348).

Deputy David Frimmel believed that on the evening of the crash, after 7:00 p.m., he saw Mr. Young's truck on Meridian Road.[6]

He recalled that the vehicle slowed down and pulled off to the middle of the road (T. 375-6). Deputy Frimmel passed the truck, but noticed that it appeared to back up and turn into a driveway that lead to a plantation (T. 376). When Deputy Frimmel looked inside the truck he saw only a black male (*Id.*).

At 8:10 p.m., Florida Highway Patrol Trooper Don Ross responded to an car accident on Meridian Road. Mr. Jones was lying on the road and several individuals were gathered around trying to assist him (T. 354). One of the individuals recalled that Mr. Jones was wearing dark blue jeans (T. 402). There was a conflict in the witnesses' recollections about whether or not Mr. Jones wore a shirt (T. 402, 415). Mr. Jones' pants looked wet (T. 403), however, the individuals who helped move Mr. Jones and touched his pants recalled that Mr. Jones' pants were dry with the exception of the blood on them (T. 411, 415). And, the paramedic who treated Mr. Jones testified that his pants were dry (T. 748).

It appeared that the truck was heading south when it ran off the road into a ditch and struck a tree (T. 360). When Trooper Ross examined the truck, there were 2 half pint gin bottles that appeared to be half empty, but no beer cans (T. 355, 362). Some Lotto tickets were also recovered from the truck (T. 463).

Mr. Jones was ultimately transported to the hospital (T. 358).

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[6]Deputy Frimmel's report noted that his receipt from Publix indicated that he checked out at 7:14 p.m. (T. 380-1). Thereafter, he met a friend in the parking lot, so he did not leave the Publix until approximately 7:45 p.m. (T. 382). It then took Deputy Frimmel about fifteen to twenty minutes before he saw Mr. Young's truck on Meridian (T. 382).

The following day, detective Mike Wood went to the hospital to interview Mr. Jones (T. 512). Det. Wood asked Mr. Jones if he had obtained the truck Mr. Jones had been driving from a white man (T. 514). Mr. Jones indicated that he had not (*Id.*). Mr. Jones indicated that he had obtained the truck from a black man (*Id.*). Mr. Jones wrote that he had obtained the truck in Frenchtown from an unknown individual for $20.00 (T. 515).[7] Following the initial interview, Det. Wood seized Mr. Jones' clothes and belongings, which included a Lotto ticket and some money (T. 519).

In the next few days, Joe Schuster, a soil scientist, was asked to examine the soil from Mr. Jones' shoes and clothes to determine where the soil came from (T. 597). Mr. Schuster was able to scrape approximately three to five grams of soil from Mr. Jones shoes (T. 603). Mr. Schuster recommended that the search for Mr. Young be directed to the east part of Leon County (T. 598).

[7] On June 17, 1991, Mr. Jones denied killing Mr. Young to Deputy Michael Halligan (T. 570). Mr. Jones maintained that he obtained the truck in the Frenchtown area (*Id.*).

On June 6, 1991, Ruth Mills was fishing on Horseshoe Plantation, at Boat Pond (T. 425-6). While fishing, she noticed a body floating in the water (T. 427). The body was identified as that of Mr. Young (T. 521). The cause of death was drowning (T. 665).[8]

Mr. Schuster examined the soil from the area and concluded it that it was similar to that he had examined from Mr. Jones' shoes (T. 599). Mr. Schuster also testified that the soil material near the place where Mr. Jones crashed the truck would have also had similar characteristics to that examined from Mr. Jones' shoes (T. 607).

Dr. Loran Anderson also testified that the pollens found in the minute samples of mud on Mr. Jones' jeans and shoes could have come from an environment like Boat Pond (T. 625). Though the types of pollen were also extremely common throughout Leon County (T. 630). And, there were no other identifying biological materials on Mr. Jones' clothes, though there were some in the samples obtained from Mr. Young (T. 635). Also, Mr. Jones clothes would have had to have been in contact with the bottom of the pond, i.e., they would have been wet (T. 640-1).

The next day, law enforcement went back to the plantation. There was an area where it looked like a car had spun around and sprayed some mud (T. 453). It also looked as if there was an area in the grass that had been disturbed (*Id.*). Little investigation was conducted as to the area, even though a crime scene technician took tire casts, photographs and measurements of the disturbed area.

During the investigation, law enforcement learned that Mr. Jones had previously fished at Horseshoe Plantation (T. 445). In addition, Det. Wood traveled from the liquor store to all of the stops Mr. Jones and Mr. Young made and believed it could be done between fifty-three and fifty-eight minutes, depending on the route traveled (T. 533). However, this estimate only considered the driving time, and not the time spent at any given stop (T. 556).

The Lotto tickets found in the truck and the ticket found with Mr. Jones' belongings at the hospital were purchased at the same time (T. 593).

[8]The pathologist could not say whether Mr. Young was conscious at the time of the drowning (T. 668-9).

The jury also heard that on September 9, 1991, Kevin Prim contacted Det. Wood about Mr. Jones' case (T. 533). Det. Wood told the jury about his contact with Prim:

> Q: Did you make him any kind of promise or offer or inducement or tell him you were going to do anything special for him if he talked to you?
>
> A: No, I did not.
>
> Q: Did you take a tape recorded statement from him regarding what knowledge he had or information he had about the case?
>
> A: Yes, sir.
>
> Q: I understand that subsequent to your interview with him where he provided information to you, that he was released from the Leon County Jail. Did you make any kind of determination on why he was in jail or what his release status was?
>
> A: The only information I had initially as far as his incarceration was that he faced a $500 bond and he needed $50 to make that bond.
>
> Q: Did you give him $50 for bond?
>
> A: No sir, I did not. No, sir. I didn't determine immediately what his charge was, but based on the bond amount, at that time I assumed it wasn't a real serious charge. As it turns out, he was charged with primarily theft charges.
>
> * * *
>
> Q: What do you know about his release? You did not effect his release?
>
> A: No, sir, I did not. I was actually contacted by Kevin and he indicated to me that after Mr. Jones had apparently had a session with some of his counsel at the time, he came back and they wound up in the same cell. They were in the same cell actually. And that Mr. Jones confronted him and there was a physical confrontation and he told Mr. Prim that he knew in fact (sic) talked to law enforcement. He had a physical confrontation. It was broken up. And I don't know – I can't give you verbatim, but my understanding was that Mr. Prim's counsel, who apparently was from the Public Defender's Office, filed some sort of a motion to obtain his release. I certainly didn't have anything to do with it.
>
> * * *

Q: This confrontation that was reported to have occurred, do you know if that was the same day that the Public Defender became aware that Kevin Prim had talked to law enforcement?

A: I believe it was, yes, sir.

Q: That same day that there was a confrontation after Mr. Jones somehow became aware as well?
A: Right.

Q: Were there some subsequent charges made against Kevin Prim, if you know?

A: Yes, sir.

* * *

Q: What kind of charges were they?

A: The charges I'm familiar with are petit theft charges.

Q: What kind of things were involved with being stolen?

A: Food items taken.

Q: Food?

A: The ones I'm familiar with were food items taken.

Q: Did you ever try to get him out of jail on any of these charges or ask anybody not to arrest him?

A: No, sir, I did not. I did have conversation (sic) with one incident I remember particularly, I did have a conversation with his arresting officer. And my only reason for doing that was, first of all, Kevin called me and the only thing that I sought to find out from the arresting officer was the nature of his arrest. I never tried to interfere. Encouraged him to do exactly what he felt necessary to do. My only concern was knowing what he was going to be charged with because I was concerned that it may be some kind of violent crime or something of that nature.

(T. 533-7). When Prim was released from jail, Det. Wood was there to pick him up (T. 559).

Prim also stuck to the story that he had been released from the jail because of an altercation with Mr. Jones (T. 678). As to what Mr. Jones told Prim, Prim testified:

A: As he would go over in his mind, he would ask me my opinion on certain things, how this would coincide with the story he was going to give and what actually happened.

Q: In other words, how various stories sounded?

A: Yes.

Q: How they would work if told?

A: Yes.

* * *

Q: In the course of doing that, did he reveal to you or discuss with you what in fact had happened?

A: He backtracked certain areas of the incident and asked me – it may not have been the whole incident itself, but he backtracked certain details and certain areas of the incident that took place.

* * *

Q: Mr. Prim, did he ever reveal to you whether or not he had in fact killed the deceased in this case, George Wilson Young, Jr.?

A: Yes. But his statement was it didn't start off that way, you know, but he did –

Q: Tell me what he indicated to you had happened during those periods of time that he talked about.

A: Well, he started off saying that he met the guy at some liquor store and he was down to his last little money and he observed the guy pull his money out to pay for his whatever he was paying for. And he talked the guy into giving him and his cousin a ride. His cousin was intoxicated at the time. So they took him home and from that point they took their route to Orchard Pond, where they both got out to take a leak, I guess. And from that point a struggle issued because the guy resisted when he went to take the guy's money.

Q: In other words, when he went to take the man's money, he resisted?

A: Yes, sir.

* * *

Q: What did he tell you about how he killed the man?

A: He said he broke – I believe he said he broke his arm. I never knew which one of them. At that point the struggle issued into the water.

Q: Pardon?

A: I said, from that point the struggle issued into the water and that's about as much as I can remember.

Q: What did he do to him in the water?

A: He said after he got his money – after he broke his arm, he held him down and he said the guy popped back up a couple of times and then after that he didn't.

(T. 680). Prim denied expecting or even hoping that his testimony would benefit him in any way (T. 688-9); he testified that he was simply doing his "civic duty" (T. 694).

Jay Watson testified that he had heard Prim ask Mr. Jones about his case and that Mr. Jones responded that he had killed a man and that was the reason why he was in jail (T. 701). Watson never heard Mr. Jones tell Prim any more about his case (T. 701-2). Watson had seen Prim go through Mr. Jones' legal papers when Mr. Jones was out of the cell (T. 715).

Watson did not reveal the information about hearing Mr. Jones' statement to Prim until after he had been convicted of trafficking cocaine (T. 820). His sentencing was postponed until he testified against Mr. Jones (*Id.*). Mr. Watson was facing a life sentence, as a habitual felony offender (T. 821), but received a ten year sentence (T. 826). The trial prosecutor in Mr. Jones' case attended Watson's sentencing hearing and spoke on his behalf. Watson was aware that his involvement in Mr. Jones' case could benefit him (T. 823).

Likewise, Ramone Roberts had been incarcerated with Mr. Jones, Prim and Watson. Prim had asked Roberts about his case, but Roberts would not speak to him (T. 726). Roberts confirmed that Prim had read Mr. Jones' legal documents when Mr. Jones was not in the cell (T. 727).

Gene Taylor, Mr. Jones' first attorney, testified that he had instructed Mr. Jones not to discuss his case with anyone at the jail (T. 808-9).

On November 13, 1992, the jury found Mr. Jones guilty as charged (R. 786).

That same day, a penalty phase proceeding was held. The State relied upon the evidence previously introduced during the guilt phase of the trial and entered into the record certified judgment and sentence reports of a 1977 conviction for two counts of armed robbery with a pistol, and a 1984 conviction for armed robbery with a firearm and kidnapping (R. 949-52).

Mr. Jones and his sister testified for the defense. Betty Jones Stuart explained that she was a police officer with the Metro Dade Police Department (R. 953). Mrs. Stuart told the jury that Mr. Jones' father was very abusive to his mother and beat her. Mr. Jones was very attached to his father, but when Mr. Jones was five, his father abandoned the family (R. 953-4). It was at this point that Mr. Jones became difficult to control (*Id.*).

Several years later, Mr. Jones' mother married his alcoholic step-father and his mother became an alcoholic (R. 954). One night, after drinking, Mr. Jones' step-father became abusive with his mother and Mr. Jones' mother ended up stabbing him to death. She was sent to prison for three years (R. 955). Mr. Jones seemed to become even more out of control after the stabbing (R. 955-6).

Mr. Jones told the jury that he was 33 years old and had went through the tenth grade, but later obtained his GED (R. 958). Mr. Jones recalled that when he was five, his father took him to the store and bought him a few things because he wasn't going to see him anymore (R. 958). He did not see his father after that day (R. 959).

Mr. Jones told the jury that on May 31, 1991, he and Timothy Hollis drank most of the night until about 5:00 a.m. (R. 961-2). He began drinking that same morning at about 8:00 a.m. and drank continuously throughout the day (R. 964-5). Following the accident, Mr. Jones blood alcohol was measured at .269 (R. 966).

The jury recommended death by a 10 - 2 vote (R. 785).

On November 20, 1992, the trial court sentenced Mr. Jones to death, finding three aggravating circumstances, though the jury was instructed as to five. The trial court found that Mr. Jones had committed a prior violent felony; that the murder was committed during the

course of a robbery; and that the murder was heinous, atrocious and cruel (R. 828-37). The trial court gave some weight to the statutory mitigator that at the time of the crime, Mr. Jones capacity to appreciate the criminality of his conduct was substantially impaired and some weight to the nonstatutory mitigators that Mr. Jones suffered from childhood trauma and was loved by his family (*Id.*).

B. THE INITIAL POSTCONVICTION PROCEEDINGS

As to counsel's failure to adequately investigate mitigation, trial counsel spent a mere morning with Mr. Jones' family to develop mitigation. At his evidentiary hearing, Mr. Jones presented the background and social history which established strong mitigation.

Indeed, as children, Mr. Jones and his cousins helped their family pick cotton and beans in South Carolina, where he was born. Others observed Mr. Jones as a quiet and respectful child.

Mr. Jones' father was a violent alcoholic that beat his mother regularly. As a young child, Mr. Jones often tried to intervene on his mother's behalf, to no avail. Mr. Jones' father was in and out of prison. The family ultimately moved to Miami where Mr. Jones' father's violence became more vicious and frequent. The family would often flee the house to avoid being abused. And, though they called the police on more than one occasion, nothing ever changed. Despite, his father's violence, Mr. Jones' was very attached to him. When Mr. Jones was five, his father permanently abandoned the family.

The cultural difference between South Carolina and Miami was overwhelming for Mr. Jones and his family. The other children teased the kids about their accents. When Mr. Jones' father left, the family was "very, very poor". Their mother was uneducated with no work skills. The children did without clothing and food and suffered traumatically.

Several years later, Mr. Jones' mother married his alcoholic step-father and his mother became an alcoholic. Mr. Jones' step-father was a heavy drinker and verbally and physically abusive to his step-son. He "was not a father" and seemed to have mental problems. Likewise, Mr. Jones' mother and step-father were often violent with each other around their children. Often their fights would lead to them both being taken to jail – leaving the children on their own to clean up the bloody mess that was left. One night, Mr. Jones' parents' violence

culminated in his mother's stabbing his step-father to death after he had become abusive with her. Mr. Jones' mother was sent to prison. When the police arrested Mr. Jones' mother, the kids were left all alone in the house after witnessing such a traumatic scene.

Mr. Jones' mother's incarceration was "very emotional" for Mr. Jones. Mr. Jones visited his mother in prison and the effect was obvious – "[E]verytime we would go there he would – you know – you could see the action in his face, and the moods, the mood swing he would be in ...". Mr. Jones felt like he had lost all of his parents. The Jones children were teased and taunted by their peers about their mother being in prison and being "crazy".

And once his mother had been taken from her children no one from social services stepped in to provide any aid. There was little financial assistance for the family. Mr. Jones' friend, Kay Underwood, believed that this was the point when Mr. Jones' problems began. Mr. Jones loved his mother very much and it was difficult, to say the least, when she was incarcerated.

Though Mr. Jones was a "fabulous football player", "a leader" and was respectful to his teammates and coaches, his talent could not spare him from his troubled home life. Indeed, Mr. Jones' football coach, Dr. Joseph Accurso testified that Mr. Jones was a kid he "loved to have babysit for his [Dr. Accurso's] kids." But, the traumatic events of his past soon took their toll on Mr. Jones.

Mr. Jones married his wife Bertha and was well-mannered and stayed out of trouble in the early part of their marriage. Bertha testified that Mr. Jones had once told her that he wanted to be sent to prison, like his father. Mr. Jones also had a daughter and was a good father to her.

Mr. Jones' traumatic childhood took its toll on his mental make-up. As this Court found, "[a]t the evidentiary hearing Jones established the existence of mental mitigation evidence." In 1991, Dr. Robert Berland met with Mr. Jones and conducted some testing. Mr. Jones' test score indicated a "chronic psychotic disturbance". Though Dr. Berland did not testify at Mr. Jones' capital trial proceedings, he explained at the postconviction evidentiary hearing that a psychotic disturbance is defined by three main symptoms: hallucination, delusion

and biologically based mood disturbance. Mr. Jones also exhibited a test profile associated with drug abusers. Dr. Berland opined that Mr. Jones' psychosis was likely influenced by a character disorder and biological mental illness.[9]

After conducting a more thorough examination of Mr. Jones in 2003, Dr. Berland testified that Mr. Jones met the criteria for application of the extreme mental or emotional disturbance statutory mitigating factor. Dr. Berland's opinion was based on his diagnosis of Mr. Jones with a major mental illness. Dr. Berland's diagnosis was substantiated by collateral information, i.e., test scores and witness interviews.

[9]Dr. Berland believed that though Mr. Jones exhibited traits associated with antisocial personality disorder, his "mental illness is a more salient, more persistent adverse influence on his behavior."

Dr. Berland also testified that the statutory mitigating factor that Mr. Jones ability to conform his conduct to the law was substantially impaired at the time of the crime. This was based on Mr. Jones' biological mental illness which resulted in involuntary choices, behavior and judgment. And, Mr. Jones was under the influence of alcohol and cocaine at the time of the alleged offense.[10] Mr. Jones' intoxication would have aggravated the underlying mental illness, making Mr. Jones more inclined toward criminal activity and violence. These influences were "biological and involuntary".

Dr. Berland's evaluation revealed a history of alcoholism by Mr. Jones, starting at age 12 or 13, and crack cocaine abuse, at least 6 months prior to the alleged offense. Finally, Dr. Berland diagnosed Mr. Jones with brain impairment based on previous testing.

Dr. Berland also emphasized the effect of the extreme violence and traumatic experiences that Mr. Jones suffered as a child. However, despite Mr. Jones' mental health issues, Dr. Berland noted that Mr. Jones had done well in structured environments – like prison, where he did well with work assignments.

[10] Mr. Jones blood alcohol level measured .263 with traces of cocaine being apparent, shortly after he was seen with the victim.

SUMMARY OF ARGUMENT

Mr. Jones was deprived of the effective assistance of trial counsel at the penalty phase of his case, 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. Jones' ineffective assistance of counsel claim was premised upon the Florida Supreme 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 this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein, which renders Mr. Jones' *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

MR. JONES' SENTENCE OF DEATH VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. McCOLLUM.*

A. INTRODUCTION

Mr. Jones was deprived of the effective assistance of trial counsel at the penalty phase of his case. Mr. Jones presented his ineffective assistance of counsel claim in a Rule 3.851 motion. Following an evidentiary hearing, the circuit court erroneously denied Mr. Jones' ineffective assistance of counsel claim. When this Court heard Mr. Jones' appeal of that decision, it failed to conduct a *de novo* review of legal questions contained within an ineffectiveness analysis and instead employed a standard of review that was highly deferential to the circuit court's erroneous legal conclusions 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. Jones' ineffective assistance of counsel claim 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* was a repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein,[11] which renders Mr. Jones' *Porter* claim cognizable in collateral proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d at 669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

[11] As explained herein, *Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance of counsel claim in *Porter v. State*. Thus, Mr. Jones 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. *Porter v. McCollum* was an announcement that this Court's precedential decision in *Porter v. State* was wrong, and in doing so announced new Florida law. This is identical to the rulings in *Hitchcock v. Dugger* and *Espinosa v. Florida*, in which the United States Supreme Court found that this Court had failed to properly understand, follow and apply federal constitutional law.

Mr. Jones presented his claim under *Porter v. McCollum* 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*, in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, should be raised in Rule 3.850 motions). At the State's urging, the 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. Jones seeks a determination by this Court that he is entitled to have his previously presented ineffective assistance of counsel claims judge by the same standard that the United States Supreme Court employed when finding George Porter's ineffectiveness claim was meritorious and warranted habeas relief.

B. *PORTER* QUALIFIES UNDER *WITT* AS A DECISION FROM THE UNITED STATES SUPREME COURT WHICH WARRANTS THIS COURT REHEARING MR. JONES' INEFFECTIVENESS CLAIM

1. Retroactivity under *Witt*.

It is Mr. Jones' position that as to whether *Porter* qualifies as new law, the question is one of law (PC-R2. 181). Therefore, initially, this Court must independently review that aspect of Mr. Jones' claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law.[12] Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Jones' ineffective assistance of counsel at the penalty phases claim, giving only deference to historical facts. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations at the penalty phase is a question 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 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*. The issue is not what impact the evidence of prejudice had on the judge presiding at a collateral

[12]Indeed, the State argued in Mr. Jones' case and in others cases in which *Porter v. McCollum* claims have been presented, that only this Court can determine whether a decision from the United States Supreme Court qualifies as new law under *Witt v. State*.

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.[13]

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 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 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), this 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

[13]As the United States 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.

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 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 Florida 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).[14]

[14]The decision from the United States 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.

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*, 514 So. 2d at 1071; *Thompson*, 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.

Following *Hitchcock*, this Court found that *Hitckcock* "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.[15] Clearly, this Court read the opinion in *Hitchcock* and saw

[15]The United States 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 United States 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

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.[16]

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 to *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. 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 v. Upton*, 130 S.Ct. 3529 (2010). 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

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> 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.

[16]Because the result in *Hitchcock* was dictated by *Lockett* as the United States 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 United States 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).

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

Another decision from the United States 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 United States Supreme Court decision in *Maynard v. Cartwright*, a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

Smalley v. State, 546 So. 2d at 722. In *Espinosa*, the United States 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").

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 claims under the

proper and correct *Strickland* standard which was applied to George Porter's ineffectiveness claim and resulted in collateral relief in his case and ultimately a life sentence. Refusing to reconsider Mr. Jones' ineffectiveness claim 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. Jones' death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *Porter v. McCollum* and review of ineffective assistance of counsel claims under *Strickland*.

In *Porter v. McCollum*, the United States 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 explained:

> 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 United States 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. The United States 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. 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 the Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings.[17] 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

[17]It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in

of counsel claim because "competent substantial evidence" supported the trial court's decision.[18] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the Court made clear that even under this less deferential standard:

> 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. *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 finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to the United States 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.

Stephens by the 2nd DCA was in conflict with *Grossman* as to the appellate standard of review to be employed.

[18] 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).

In Mr. Jones' case, as in *Porter*, the Florida Supreme Court erroneously deferred to the trial court's findings to justify its decision to unreasonably "discount to irrelevance" pertinent mitigating evidence. *Id.* at 455. *Porter* makes clear that the failure to present the kind of troubled history relevant for the jury in the penalty phase to assess moral culpability prejudices a defendant. Here, that prejudice is glaringly apparent. After *Porter*, it is necessary to conduct a new prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found the Florida Supreme Court's analysis used in this case to be in error, Mr. Jones' claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

In *Sears v. Upton*, the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears" and unable to "speculate as to what the effect of additional evidence would have been" because "Sears' counsel did present some mitigation evidence during Sears' penalty phase." *Id.* at 3261. The United States Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Id.* at 3264. The Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. ... And, in Porter, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).

> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, requires in all cases a "probing and fact-specific analysis" of prejudice. *Id.* at 3266. A truncated, cursory analysis of prejudice will not satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Jones' ineffective assistance of counsel claim must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate that the failure to present the sort of troubled past relevant to assessing moral culpability causes prejudice.

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

C. MR. JONES' CASE

Porter error was committed in Mr. Jones' case. Following the denial of Mr. Jones' claim of ineffective assistance of counsel by the trial court, this Court found that Mr. Jones' trial counsel was deficient in failing to conduct a reasonable investigation of Mr. Jones's mental health mitigation, but affirmed the denial of relief due to the fact that Mr. Jones had not established prejudice. *Jones*, 998 So. 2d at 583. However, the analysis conducted by this Court was not *de novo* and was not the sort of probing and fact-specific analysis which *Porter* and *Sears* require. Both the trial court's findings and the acceptance of those findings by this Court violate *Porter*, as a probing inquiry into the facts of this case and leads only to the conclusion that counsel prejudiced Mr. Jones by performing deficiently.

The mitigation presented at Mr. Jones' Rule 3.851 evidentiary hearing was qualitatively and quantitatively different from that presented at trial. During the evidentiary hearing, Mr. Jones presented lay witnesses and a mental health expert to establish numerous mitigating factors. The story of Mr. Jones' life was revealed:

As children, Mr. Jones and his cousins helped their family pick cotton and beans in South Carolina, where he was born. Others observed Mr. Jones as a quiet and respectful child.

Mr. Jones' father was a violent alcoholic that beat his mother regularly. As a young child, Mr. Jones often tried to intervene on his mother's behalf, to no avail. Mr. Jones' father was in and out of prison. The family ultimately moved to Miami where Mr. Jones' father's violence became more vicious and frequent. The family would often flee the house to avoid being abused. And, though they called the police on more than one occasion, nothing ever changed. Despite, his father's violence, Mr. Jones' was very attached to him, but when Mr. Jones was five, his father permanently abandoned the family.

The cultural difference between South Carolina and Miami was overwhelming for Mr. Jones and his family. The other children teased the kids about their accents. When Mr. Jones' father left, the family was "very, very poor". Their mother was uneducated with no work skills. The children did without clothing and food and suffered traumatically.

Several years later, Mr. Jones' mother married his alcoholic step-father and his mother became an alcoholic. Mr. Jones' step-father was a heavy drinker and verbally and physically abusive to his step-son. He "was not a father" and seemed to have mental problems. Likewise, Mr. Jones' mother and step-father were often violent with each other around their children. Often their fights would lead to them both being taken to jail leaving the children on their own to clean up the bloody mess that was left. One night, Mr. Jones' parents' violence culminated in his mother's stabbing his step-father to death after he had become abusive with her. Mr. Jones' mother was sent to prison. When the police arrested Mr. Jones' mother, the kids were left all alone in the house after witnessing such a traumatic scene.

Mr. Jones' mother's incarceration was "very emotional" for Mr. Jones. Mr. Jones visited his mother in prison and the effect was obvious – "[E]verytime we would go there he would – you know – you could see the action in his face, and the moods, the mood swing he would be in ...". Mr. Jones felt like he had lost all of his parents. The Jones children were teased and taunted by their peers about their mother being in prison and being "crazy".

And once his mother had been taken from her children no one from social services stepped in to provide any aid. There was little financial assistance for the family. Mr. Jones' friend, Kay Underwood, believed that this was the point when Mr. Jones' problems began. Mr. Jones loved his mother very much and it was difficult, to say the least, when she was incarcerated.

Though Mr. Jones was a "fabulous football player", "a leader" and was respectful to his teammates and coaches, his talent could not spare him from his troubled home life. Indeed, Mr. Jones' football coach, Dr. Joseph Accurso testified that Mr. Jones was a kid he "loved to have babysit for his [Dr. Accurso's] kids." But, the traumatic events of his past soon took their toll on Mr. Jones.

Mr. Jones married his wife Bertha and was well-mannered and stayed out of trouble in the early part of their marriage. Bertha testified that Mr. Jones had once told her that he wanted to be sent to prison, like his father. Mr. Jones also had a daughter and was a good father to her.

Mr. Jones' traumatic childhood took its toll on his mental make-up. As the Florida Supreme Court found, "[a]t the evidentiary hearing Jones established the existence of mental mitigation evidence." In 1991, Dr. Robert Berland met with Mr. Jones and conducted some testing. Mr. Jones' test score indicated a "chronic psychotic disturbance". Though Dr. Berland did not testify at Mr. Jones' capital trial proceedings, he explained at the postconviction evidentiary hearing that a psychotic disturbance is defined by three main symptoms: hallucination, delusion and biologically based mood disturbance. Mr. Jones also exhibited a test profile associated with drug abusers. Dr. Berland opined that Mr. Jones' psychosis was likely influenced by a character disorder and biological mental illness.[19]

[19]Dr. Berland believed that though Mr. Jones exhibited traits associated with antisocial personality disorder, his "mental illness is a more

After conducting a more thorough examination of Mr. Jones in 2003, Dr. Berland testified that Mr. Jones met the criteria for application of the extreme mental or emotional disturbance statutory mitigating factor. Dr. Berland's opinion was based on his diagnosis of Mr. Jones with a major mental illness. Dr. Berland's diagnosis was substantiated by collateral information, i.e., test scores and witness interviews.

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salient, more persistent adverse influence on his behavior."

Dr. Berland also testified that the statutory mitigating factor that Mr. Jones ability to conform his conduct to the law was substantially impaired at the time of the crime. This was based on Mr. Jones' biological mental illness which resulted in involuntary choices, behavior and judgment. And, Mr. Jones was under the influence of alcohol and cocaine at the time of the alleged offense.[20] Mr. Jones' intoxication would have aggravated the underlying mental illness, making Mr. Jones more inclined toward criminal activity and violence. These influences were "biological and involuntary".

Dr. Berland's evaluation revealed a history of alcoholism by Mr. Jones, starting at age 12 or 13, and crack cocaine abuse, at least 6 months prior to the alleged offense. Finally, Dr. Berland diagnosed Mr. Jones with brain impairment based on previous testing.

Dr. Berland also emphasized the effect of the extreme violence and traumatic experiences that Mr. Jones suffered as a child. However, despite Mr. Jones' mental health issues, Dr. Berland noted that Mr. Jones had done well in structured environments – like prison, where he did well with work assignments.

[20] Mr. Jones blood alcohol level measured .263 with traces of cocaine being apparent, shortly after he was seen with the victim.

The mitigation presented at Mr. Jones' postconviction evidentiary hearing was qualitatively and quantitatively different from that presented at trial. Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Jones had a vast amount of non-statutory mitigation as well as two statutory mental health mitigators. Counsel's performance was clearly deficient, and Mr. Jones was prejudiced. It is inconceivable that Mr. Jones' case is less egregious than *Porter*, in which relief was granted due to the Florida courts' failure, as in this case, to properly apply *Strickland*.[21] The mitigating evidence brought out in postconviction was riveting and compelling and would have resulted in a life recommendation. Without a tactical or strategic reason, defense counsel failed to investigate, prepare, and present the wealth of statutory and non-statutory mitigating evidence that was available. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

This Court's previous opinion merely accepts the circuit court's faulty determinations, which are not supported by the record. Neither the circuit court order nor this Court's opinion properly considered the record before it when finding that Mr. Jones was not prejudiced by trial counsel's deficient performance. The findings in this case violate *Porter*.

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[21] As in *Porter*, 130 S.Ct. at 454, this Court here either did not consider or unreasonably discounted the mitigating evidence adduced in the postconviction hearing. For example, with regard to mental health mitigation, the Florida Supreme Court recognized that: "[a]t the evidentiary hearing Jones established the existence of mental mitigation evidence". Yet, the Court went on to state: "here, the mental mitigation evidence presents a "double-edged sword" . . . [t]he mitigating evidence at issue would likely have proven more harmful than helpful. There was ample evidence in the record to impeach Jones's mental health mitigation. The only psychological diagnosis the experts could agree upon was that Jones suffered from anti social personality disorder." *Jones v. State*, 998 So. 2d 573, 585 (Fla. 2008). This is the same analysis which this Court applied in *Porter v. State* and which was subsequently rejected by the United States Supreme Court as unreasonable: "[N]either 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 that his testimony might have had on the jury or the sentencing judge." *Porter,* 130 S.Ct. at 455.

Additionally, in addressing trial counsel's failure to present evidence of Mr. Jones background, this Court failed to consider that trial counsel presented "almost nothing that would humanize [Jones] or allow [the jury] to accurately gauge his moral culpability," *id.* at 454, even though Mr. Jones' 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)).

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* claims. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court failed to do under its current analysis.

Mr. Jones' substantial claim of ineffective assistance of counsel has not been given serious consideration as required by *Porter*. Mr. Jones requests that this Court perform the analysis of his claims which has as of yet been lacking and examine the significant, exculpatory evidence and mitigating personal history that is present in this case but as yet unrecognized or unreasonably discounted.

CONCLUSION

In light of the foregoing arguments, Mr. Jones requests that this Court grant him a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Stephen R. White, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 5th day of October, 2011.

CERTIFICATE OF FONT

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