IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1400

LOWER TRIBUNAL No. 91-CF-001505

STEVEN EDWARD STEIN,

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. Stein's 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 proceedings

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

"PCR2" -- record on appeal from denial of successive motion for postconviction relief.

REQUEST FOR ORAL ARGUMENT

Mr. Stein 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. Stein, 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. Stein's case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Stein's 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. Stein's 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. Stein, whose ineffective assistance of counsel claims were heard and decided by this Court before *Porter v. McCollum* was rendered, seeks in this appeal what George Porter received. Mr. Stein seeks to have his ineffectiveness claims 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. Stein seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Stein seeks the proper application of the *Strickland* standard. Mr. Stein seeks to be treated equally and fairly.

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

STATEMENT OF THE CASE

Mr. Stein was indicted and charged with two counts of first-degree murder and related offenses (R. 11). Mr. Stein pleaded not guilty.

Mr. Stein's trial was held in June, 1991. The jury returned a verdict of guilty on each count (R. 317-21). That same day, after a brief penalty phase, the jury, by 10 - 2 votes, recommended death sentences and the trial court imposed death (R. 354-68).

This Court affirmed Mr. Stein's convictions and sentences on direct appeal. *Stein v. State*, 632 So. 2d 1361 (1994), *cert. denied* 513 U.S. 834.

In November, 1995, Mr. Stein filed a Rule 3.850 motion. Thereafter, Mr. Stein filed two amended Rule 3.850 motions. An evidentiary hearing began in October, 2002. After the hearing, the circuit court entered an order denying relief.

Mr. Stein appealed to this Court. This Court denied all relief. *Stein v. State*, 995 So. 2d 329 (Fla. 2008).

On November 30, 2009, Mr. Stein filed a federal petition for writ of habeas corpus in the United States District Court, Middle District of Florida. That petition is currently pending.

On or about October 22, 2010, Mr. Stein filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009)(PC-R2. 3-49). On that same date, he filed a motion for appointment of registry counsel as his previous counsel had withdrawn from his case (PC-R2. 1-2).

On November 15, 2010, the State moved to strike the motion and prohibit the appearance of counsel on behalf of Mr. Stein (PC-R2. 51-55). On that same date, the State filed an answer to Mr. Stein's motion (PC-R2. 56-81).

The circuit court held a hearing on the State's motion to strike and prohibit the appointment of counsel on January 12, 2011. The parties argued the issue of whether Mr. Stein was entitled to registry counsel and whether he was entitled to file a successive Rule 3.851 motion. The circuit court took the matter of the appointment of counsel under advisement.

The parties did not argue the merits of Mr. Stein's *Porter* claim.

On June 1, 2011, without warning or an opportunity to be heard on the claim, the circuit court denied Mr. Stein's successive Rule 3.851 motion (PC-R2. 99-110). The circuit court did not address the issue of whether Mr. Stein was entitled to registry counsel.

Mr. Stein timely filed a notice of appeal.

On appeal, Mr. Stein requested that this Court relinquish jurisdictions so that the issue of whether Mr. Stein was entitled to counsel could be addressed. This Court granted Mr. Stein's request.

The circuit court appointed undersigned to represent Mr. Stein as registry counsel.

STATEMENT OF THE FACTS

The underlying facts of the crime in this case are set forth in this Court's opinion on direct appeal:

> The record reflects the following facts regarding this case. Stein, Marc Christmas, and Kyle White were roommates. Stein was employed as a cook at a Lem Turner Road Pizza Hut in Jacksonville, Florida. Christmas was unemployed, but was a previous employee of an Edgewood Avenue Pizza Hut in Jacksonville, Florida. White testified that, about a week before the murders, Stein and Christmas had a conversation about how to rob a Pizza Hut restaurant. During the conversation, Stein mentioned the Pizza Hut on Edgewood Avenue, and both Stein and Christmas stated that there could be no witnesses to the robbery. On the day of the murders, Christmas, Stein, Stein's girlfriend, and White were home together. About 9:30 p.m. Stein and Christmas left, taking with them Stein's .22 caliber rifle. They stated that they were going to see Christmas' father about selling him the rifle. They returned home around 11:30 to 11:45 p.m.
>
> The next morning, Dennis Saunders and Bobby Hood were found shot to death at the Edgewood Avenue Pizza Hut and the sum of $980 was missing from the restaurant. The victims were shift supervisors of the restaurant and their bodies were found in the men's restroom. Bullet fragments and cartridge casings were recovered from the restroom area. Hood had suffered five gunshot wounds — four to the head and one to the chest. The medical examiner testified that the shots had been fired from four to six inches away and that Hood was sitting at the time he was shot. Saunders had suffered four gunshot wounds — one through the neck, one in the right shoulder, one in the chest, and one in the right thigh. The medical examiner testified that Saunders was sitting on the floor at the time the shots began and, given the position of the bullet wounds, that he was moving around during the shooting.
>
> Ronald Burroughs was an employee of the Edgewood Avenue Pizza Hut. He testified that on the night of the murders, he left the restaurant at 11:15 p.m. When he left, Hood and Saunders were still inside the restaurant and only two customers remained at the restaurant. Burroughs later identified those two customers as Stein and Christmas. Additionally, an unpaid guest check on a table in the restaurant contained a fingerprint belonging to Christmas.
>
> Additional testimony revealed that three expended .22 caliber casings were found at the residence of Stein and Christmas. A ballistics expert testified that the casings found at the scene and the casings found at the residence were fired from the same firearm. Additionally, Christmas's father testified that Stein and Christmas did not come to his house on the night of the murders.

Stein v. State, 632 So. 2d 1361, 1363 (Fla. 1994).

At Mr. Stein's penalty phase, scant evidence was presented about his background. Sandra Griffin, Mr. Stein's sister, testified to the following: She is eight years older than her brother; they were both adopted; Steve was two months old when he was adopted; Steve and her son played together and he was good to the child; she had a good relationship with her brother; Steve was 22 years old when he moved away

from the family; he dropped out of school and later obtained his GED; and he went to automotive mechanical trade school for one year (T. 856-61).

Mr. Stein's girlfriend, Christine Moss, testified at the penalty phase that Steve was like a father figure to her son, Tyler; Steve regularly carried a .38 caliber pistol; during the time they were dating, Steve was working at the Pizza Hut; and Steve was 23 years old (T. 862-68).

The jury recommended the death sentence for both of the murders. The trial court sentenced Mr. Stein to death.

Following Mr. Stein's conviction and sentence of death, his co-defendant, Marc Christmas, went to trial and was found guilty as charged. Subsequent to Christmas' penalty phase proceeding, the jury recommended a life sentence as to the two counts of first-degree murder (CT. 1558). At the sentencing hearing, the trial court found that the jury's recommendation of life was unreasonable (CT. 1626). In sentencing Christmas to death, the court held that virtually no reasonable person could differ on the appropriateness of the death penalty and that to follow the recommendation of the jury would result in an unwarranted disparity in the sentences of the two co-defendants:

> The Court finds that under the circumstances, the jury's recommendation of life imprisonment is unreasonable. **Marc Anthony Christmas planned the Pizza Hut robbery with his co-defendant. He initiated the plan to eliminate the witnesses, the witnesses would know Christmas and not Stein, and Christmas held a gun on the victims in the bathroom as they were shot by Stein.**
>
> Further, the co-defendant, Steven Stein, was sentenced to death for these murders. Based on the totality of the circumstances in this case, virtually no reasonable person could differ on the appropriateness of the death penalty for Marc Anthony Christmas, and **following the recommendation of the jury would result in an unwarranted disparity in sentences**.

(CR. 557)(emphasis added). On direct appeal, this Court reversed Christmas' death sentences and instead imposed life sentences for the murders of Bobby Hood and Dennis Saunders. *Christmas v. State*, 632 So. 2d 1368 (Fla. So. 2d 1994) .

The life sentence of Mr. Stein's co-defendant, who the trial court found to be at least equally culpable, was never known by

Mr. Stein's judge or jury at the time of his penalty phase and sentencing.

In addition, at Mr. Stein's Rule 3.851 evidentiary hearing, much evidence was introduced that the jury and trial court that sentenced Mr. Stein to death did not know. The evidence revealed:

Trial counsel testified and agreed with the fact that in preparation for the penalty phase, one of the things you need to do is to go to the place where your client is from (PC-R. Vol. III 34). Here, Mr. Stein was raised in Phoenix, Arizona. Yet, Morrow didn't travel there, which he acknowledged was deficient:

> Q Well, but isn't it true that one of the things you need to do is to go to the place where that person is from?
>
> A **Yes. That is true. I did not do that and that's - - I'm sorry I did not do that and maybe I should have, but I did not go to where he was from personally and, you know, basically talk to everybody and see - -**
>
> Q And did anybody do that?
>
> A Well, I hired Ken Moncrief to investigate his background and that's all I can remember really.[5]

Q Well, you were aware that Mr. Stein had only been in Jacksonville for four or five, six months at the most?

A Well, yeah. I knew he was here a short time. I can't remember the exact amount.

Q And he was not from here, right?

[5] In preparation for the penalty phase, Morrow stated that he had an investigator, Rick Powell, but that only lasted a few weeks (PC-R. Vol. III 18). Subsequently, Morrow had an individual named Ken Montcrief who helped him locate witnesses (PC-R. Vol. III 18).

A Right. I knew that.

Q And you did talk to his sister and you knew that he grew up in Phoenix?

A In Phoenix, that's correct.

Q But neither you nor Mr. Moncrief nor anybody else went to Phoenix to investigate.

A That's correct.

Q **And you - - if you were doing this case now with the experience you have now you would do that?**

A **Absolutely. I would camp out there.**

Q **And in your estimation that's something that you should have done in this case.**

A **Probably should have.**

Q **And if there were people there they could present testimony about problems he had growing up, possible problems with drugs or injuries, things that shaped him as a person and may - - you know, that shaped him as a human being, those are the sorts of things that you'd like to present to a jury to make him human.**

A **Clearly. Clearly. You're right. I mean that's - - that's what you're supposed to do.**

Q So I mean I'm not asking you exactly to fall on the sword or anything, but in your fair estimation in this case those are things that you probably looking back that you should have done in this case, don't you thing?

A Right.

(PC-R. Vol. III 34-36)(emphasis added).[6]

Not surprisingly, in light of his failure to conduct an adequate investigation, trial counsel testified that he didn't really locate any mitigation witnesses (PC-R. Vol. III 18). There was a sister and Mr. Stein's girlfriend who came to the penalty phase and they testified

[6]Trial counsel stated that Mr. Stein's case was the first death penalty case that he handled by himself (PC-R. Vol. III 16). In fact, trial counsel had never done a penalty phase prior to Mr. Stein's case (PC-R. Vol. III 17).

(PC-R. Vol. III 18).[7] However, consistent with his recollection that he had not prepared a life story or a life history of Mr. Stein, trial counsel's primary recollection of the substance of the penalty phase is that other than these two witnesses, he did not have any mitigation to present (PC-R. Vol. III 37). Trial counsel acknowledged having discussions with another attorney over his concern that he didn't have any mitigation, especially mental health mitigation (PC-R. Vol. III 33).

> Under this backdrop, trial counsel testified as to his penalty-phase strategy:
>
> The strategy was to try to save his life by humanizing him before the jury and by trying to argue that Christmas was the person who killed the people and that my client was not, that my client was part of the robbery and that was it, so I was hoping that that would blend over into the penalty phase so that a death sentence would not be recommended to the trial Judge, and the way I did that is through the sister and through the girlfriend.

(PC-R. Vol. III 31-32).

[7] Trial counsel recalled talking to Mr. Stein's sister on several occasions well before the trial (PC-R. Vol. III 18).

The mitigation presented at Mr. Stein's postconviction evidentiary hearing was qualitatively and quantitatively different from that presented at trial. During the postconviction evidentiary hearing, Mr. Stein presented the testimony of family members and friends to establish numerous mitigating factors. Mr. Stein's sister, Sandra Griffin Bates (formerly Griffin), testified that she is approximately eight years older than Mr. Stein (PC-R. Vol. III 106). In fact, she recalled the happy day when she and her parents drove to the orphanage to bring Steve home (PC-R. Vol. III 106). Sandra recalled that she was the first of the family to hold him (PC-R. Vol. III 106). Her parents, she testified, waited thirteen years to have children, first adopting her and then Steve (PC-R. Vol. III 106).[8] The Steins were older when they adopted her, and much older when they adopted Steve (PC-R. Vol. III 106).

The Stein family, now four, lived in a small house in Maywood, New Jersey (PC-R. Vol. III 107). Sandra simply adored Steve (PC-R. Vol. III 107). Every year they took a special family vacation (PC-R. Vol. III 107). Sandra babysat for Steve after school, and her parents and Steve had a loving relationship (PC-R. Vol. III 107). Mrs. Stein loved her son immensely (PC-R. Vol. III 109). She "adored him." (PC-R. Vol. III 109). Mrs. Stein and her husband had lost nine babies naturally; "They wanted children terribly and they opened their hearts" to Sandra and Steve (PC-R. Vol. III 109-10).

[8]Sandra had been adopted as a newborn, and, later, Steve was adopted at about eight months of age (PC-R. Vol. III 110).

In 1977, the family moved to Phoenix (PC-R. Vol. III 107-08).[9] Mrs. Stein was in ill health, with arthritis, and the family doctor recommended Arizona (PC-R. Vol. III 107). Mrs. Stein's arthritis was relieved, but she suffered from other illnesses (PC-R. Vol. III 109). Sandra also recalled that the move was hard on their father, as he became unemployed (PC-R. Vol. III 111). Money was very tight (PC-R. Vol. III 111). Predictably, money pressures created stress in the house (PC-R. Vol. III 111).

Sandra got married when she was 18 and moved away for two years (PC-R. Vol. III 112). Her husband was stationed in Guam (PC-R. Vol. III 113). Steve would write her letters all the time, which was great because they couldn't afford to use the phone (PC-R. Vol. III 113). Sandra described Steve as a "sweet, young kid" who would draw pictures and mail them to her (PC-R. Vol. III 113). After Sandra returned, she was divorced in 1981 or 1982 (PC-R. Vol. III 114). Eventually, she remarried and had a baby, and Steve would come over to her house (PC-R. Vol. III 114). They would play board games and family games, and she entrusted her son to Steve (PC-R. Vol. III 114).

Sandra testified about the horrific automobile accident that Steve was in when he was approximately sixteen years old (PC-R. Vol. III 115, 128). One of the passengers died and Steve was in the hospital with bad injuries (PC-R. Vol. III 115). Sandra saw him in the hospital with his jaw wired shut (PC-R. Vol. III 115). Steve seemed "heartbroken." (PC-R. Vol. III 116).

[9] Steve was in elementary school when the Steins moved to Phoenix, and Sandra was in high school (PC-R. Vol. III 110).

Meanwhile, Mrs. Stein's health had continued to deteriorate and she became diabetic and suffered renal failure, requiring dialysis (PC-R. Vol. III 116). Sandra's father also lost his health, suffering from emphysema (PC-R. Vol. III 116). Sandra recalled that her and Steve's parents were sick at the time of the trial (PC-R. Vol. III 119).[10]

[10]Sandra recalled that she testified at the sentencing of Steve's trial, but she didn't recall being prepared by counsel to testify (PC-R. Vol. III 118). Steve's attorney never came to Phoenix and, in fact, had called her on short notice, within a week of when she needed to be in Jacksonville (PC-R. Vol. III 119-20). Sandra testified that had she been asked at trial the questions which she was asked at the evidentiary hearing, she would have testified in the same way (PC-R. Vol. III 120).

Donna Nolz testified at the postconviction evidentiary hearing that she knew Steve from grade school in Phoenix (PC-R. Vol. III 133). Donna had known Steve for many years, and she recalled his kindness and the fact that he was laid-back (PC-R. Vol. III 134). Donna stated that Steve did not attend school regularly, as he was always sick (PC-R. Vol. III 135). In fact, Steve was teased about being pale by other kids; they would call him an "albino" (PC-R. Vol. III 136). Donna and Steve developed a strong friendship, and she recalled that he was "peaceful" – not the type of boy who picked fights (PC-R. Vol. III 136-37). She further testified that Steve didn't run with the popular crowd but he was not disliked (PC-R. Vol. III 137).[11]

Shandra Elaine Mann testified at the postconviction evidentiary hearing that she met Steve Stein when she was 15 through a mutual friend (PC-R. Vol. III 145). At that point in time, Steve had just been in a car accident, and he had been injured very badly (PC-R. Vol. III 145). Steve's jaw had been wired shut and he had a broken collarbone (PC-R. Vol. III 146). He was bedridden at the time (PC-R. Vol. III 146). Steve would go on to have scars and a lot of pain that lasted for the time that Shandra knew him (PC-R. Vol. III 153).

[11]Donna, who lost contact with Steve since high school, stated that no one from Steve's attorney's office ever came to Phoenix and talked to her at the time Steve was on trial; she would have told the jury what she knew had she been asked (PC-R. Vol. III 138-39).

Shandra testified that she began a dating relationship with Steve, and she fell madly in love with him (PC-R. Vol. III 146). Shandra admired the fact that Steve was intelligent and reckless (PC-R. Vol. III 147). He was also very nice to her (PC-R. Vol. III 147). Shandra basically moved into Steve's house for about a year (PC-R. Vol. III 147). His parents were there but they were much older and ill (PC-R. Vol. III 147). They didn't care what Steve and Shandra did, so they had a lot of freedom (PC-R. Vol. III 148). Eventually, Shandra got pregnant (PC-R. Vol. III 148).[12] After she found out, Shandra told Steve that she was going to give the baby up for adoption (PC-R. Vol. III 148). Steve became very upset and he wanted to keep the baby (PC-R. Vol. III 148). He told Shandra of the pain he had suffered because he had been adopted (PC-R. Vol. III 148).

[12]Shandra and Steve were married right before they found out she was pregnant (PC-R. Vol. III 149).

Shandra decided to give the baby up for adoption (PC-R. Vol. III 149). She was seventeen at the time (PC-R. Vol. III 150). Steve did not go along with this decision (PC-R. Vol. III 149). He was very against the idea, but she didn't give him any choice (PC-R. Vol. III 150). Shandra moved to another state and gave the baby up for adoption (PC-R. Vol. III 149). Shandra and Steve stopped talking when she moved away (PC-R. Vol. III 151). Steve was devastated over the adoption, "Because as a child of adoption he felt that he had been lonely, that he and his parents had no bond, that he had been hurt by the whole process and he didn't want to do that to anybody else" (PC-R. Vol. III 152). As a result of the adoption, Shandra and Steve divorced (PC-R. Vol. III 152).[13]

Phillip (Doug) Bacha testified at the postconviction evidentiary hearing that he met Steve Stein in grade school (PC-R. Vol. III 162). According to Doug, they were just acquaintances at first (PC-R. Vol. III 162). After Steve was involved in a pretty serious car accident, Doug started visiting him in the hospital (PC-R. Vol. III 162). Doug felt kind of bad because not may people were visiting him (PC-R. Vol. III 164). Steve had always had some kind of health issues when he was younger and was "kind of out of the picture on a lot of stuff." (PC-R. Vol. III 165). Doug didn't want Steve to feel so isolated, especially since they went to the same school and were neighbors (PC-R. Vol. III 165). Doug and Steve spent a lot of time talking and hanging out after that (PC-R. Vol. III 164). They did some drinking and drugs, and a lot of typically stupid teenager type stuff (PC-R. Vol. III 164). Doug felt that Steve was a highly intelligent person and they shared many of the same interests, such as music and reading (PC-R. Vol. III 165).

[13]Shandra stated that she was never contacted by Steve's attorneys (PC-R. Vol. III 153). Had she been contacted, she would have testified consistently with her testimony at the evidentiary hearing (PC-R. Vol. III 153).

After high school, Doug went into the Navy (PC-R. Vol. III 166). Steve was one of the few people that Doug kept an open line of communication with through correspondence and phone calls (PC-R. Vol. III 166). Doug would see Steve every time that he went home on leave (PC-R. Vol. III 169). During these visits, Doug noticed that Steve was developing an unhealthy lifestyle (PC-R. Vol. III 172). Steve had started hanging around with an individual who was doing a lot of powder drugs and shooting them up into his veins (PC-R. Vol. III 172-73). Doug believed that Steve seemed to have drifted into the use of harder drugs and that they had a negative effect on him (PC-R. Vol III 174).[14]

Shari Roinestad testified at the postconviction evidentiary hearing that Steve and her son, Michael, were the same age and were really good friends after meeting in high school (PC-R. Vol. III 185-86). Steve would often hang out at her house in Phoenix (PC-R. Vol. III 185-86). Shari thought that Steve was "deep" for his age, and they often discussed politics, poetry, and loyalties (PC-R. Vol. III 186). Steve had really good thoughts and opinions (PC-R. Vol. III 186). Since Shari was divorced and had trouble sleeping, Steve would sometimes sit up with her late at night and talk (PC-R. Vol. III 186). Steve would write songs which she thought were "depressing" – "about canyons and crying, and all that." (PC-R. Vol. III 187). "Hauntingly sad" is how she described Steve's music – "it was just tears." (PC-R. Vol. III 198).

[14]Doug stated that he was not contacted by Steve's lawyer when the trial took place (PC-R. Vol. III 167). Had the Navy cleared him to testify, he would have testified as he did at the evidentiary hearing (PC-R. Vol. III 167-68).

Shari saw Steve and her son, Michael, as "fatherless boys", "[t]hey - - just needed somebody to make them stop and I just - - I couldn't make them do it, but they were just restless and always on the go, like they couldn't sit still" (PC-R. Vol. III 187). Shari felt that the boys were lacking a masculine influence, so they may have been hypercharged (PC-R. Vol. III 187). She felt as though they were looking for a father figure (PC-R. Vol. III 187-88).[15]

[15]Shari testified that Steve's father was very uninvolved and was sick a lot (PC-R. Vol. III 188). He had emphysema or some kind of lung disease (PC-R. Vol. III 188).

After the auto accident, Shari saw Steve in the hospital (PC-R. Vol. III 189). She noted that Steve seemed to start self-destructing after that (PC-R. Vol. III 189). Shari suspected that, perhaps, he felt guilt over the girl's death (PC-R. Vol. III 189). Steve told her that he would see the girl fly through the windshield over and over again (PC-R. Vol. III 190). Shari felt that Steve was going through posttraumatic stress (PC-R. Vol. III 190). She heard that after the girl was killed in the accident that Steve "just started really losing it and that he was doing drugs kind of to stop the scene from playing over and over in his mind . . ." (PC-R. Vol. IV 207).[16]

Michael Roinestad, Shari's son, testified at the postconviction evidentiary hearing that he and Steve met in school (PC-R. Vol. IV 209-10). They were acquaintances for a long time and then became very good friends (PC-R. Vol. IV 210). Michael observed that Steve connected with people well but was very guarded with himself, as if he had an emotional wall (PC-R. Vol. IV 212). Michael felt he was the only one who actually breached that wall (PC-R. Vol. IV 212).

[16]Shari stated that she was not contacted by Steve's trial lawyer, and that had she been able, she would have testified (PC-R. Vol. III 191).

Regarding the automobile accident, Michael explained that it was his former girlfriend who was killed (PC-R. Vol. IV 212). Both Steve and the girl were passengers and Michael and the girl had recently broken up (PC-R. Vol. IV 214).[17] Steve had a lot of injuries from the accident (PC-R. Vol. IV 216). His jaw was shattered on one side, his collarbone was messed up, and Michael noticed that Steve's eyes seemed to have darkened from light blue to a deep purple (PC-R. Vol. IV 216). Steve had "a ton of injuries" and "was messed up for a long time after that accident." (PC-R. Vol. IV 216). Michael stated that Steve was given painkillers in the hospital, and he started "jonesing really bad for those nurses to come in and give him the Demerol." (PC-R. Vol. IV 217). Michael also testified that Steve was using marijuana at 14 or 15, and he drank alcohol (PC-R. Vol. IV 225). After the painkillers, Steve went on to snorting crystal meth (PC-R. Vol. IV 227). He got pretty heavily involved in that (PC-R. Vol. IV 227).

Summarizing their friendship, Michael testified that Steve would do anything to help you with any problem you had (PC-R. Vol. IV 217). He was personable and Michael would often be surprised by the unlikely people Steve would engage in conversation (PC-R. Vol. IV 217). Steve was interested in people, but at a distance (PC-R. Vol. IV 217). Michael found this aspect of Steve's personality to be a paradox (PC-R. Vol. IV 217-18).

Michael described Steve's dad, who was older and ill, as not really a father figure (PC-R. Vol. IV 219). However, Michael stated that there was no question Steve's father genuinely loved him (PC-R. Vol. IV 219). Steve also loved his parents and cared for them (PC-R. Vol. IV 220). When they were sick, it would devastate Steve (PC-R. Vol. IV 220).[18]

[17]The girl, Diane, was not Steve's girlfriend, but Steve and she were "working on that." (PC-R. Vol. IV 215).

[18]Michael testified that he had not been contacted by Steve's attorneys at the time of trial (PC-R. Vol. IV 220). Michael would have testified had he been contacted; "I'd do anything I could for Steve to this day" (PC-R. Vol. IV 221).

SUMMARY OF ARGUMENT

Mr. Stein 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. Stein's 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. Stein's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

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

A. INTRODUCTION

Mr. Stein was deprived of the effective assistance of trial counsel at the penalty phase of his case. Mr. Stein presented his ineffective assistance of counsel claims in a Rule 3.851. Following an evidentiary hearing, the circuit court erroneously denied Mr. Stein's ineffective assistance of counsel claim. When this Court heard Mr. Stein's 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. Stein's 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,[19] which renders Mr. Stein's *Porter* claim cognizable in collateral proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d at 669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

[19] 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. Stein 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. Stein 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. Stein seeks a determination by this Court that he is entitled to have his previously presented ineffective assistance of counsel claims judged by the same standard that the 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. STEIN'S INEFFECTIVENESS CLAIM

1. Retroactivity under *Witt*.

It is Mr. Stein's position that whether *Porter* qualifies as new law is a question of law. Therefore, initially, this Court must independently review that aspect of Mr. Stein's claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law. Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Stein's ineffective assistance of counsel claim at the penalty phase, giving only deference to historical facts. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations are questions of law to which no deference is to be accorded to the judge who presided at evidentiary hearing. As *Porter* also makes clear, an evaluation of the evidence presented to establish prejudice under the prejudice prong of the *Strickland* standard 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 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.[20]

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

[20]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).[21]

[21]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.[22] Clearly, this Court read the opinion in *Hitchcock* and saw

[22]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.[23]

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

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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.

[23]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).

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 *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. Stein's ineffectiveness claims and apply the now recognized proper standard of review would arbitrarily deny him the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would itself establish that Mr. Stein's 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). And in Mr. Stein's case, this Court relied on *Sochor* to conduct its analysis of Mr. Stein's claims.[24]

[24]This Court stated: "Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771-72 (Fla.2004)." *Stein*, 995 So. 2d at 335.

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.[25] 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.[26] 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.

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

[26]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).

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.

In Mr. Stein's case, as in *Porter*, this 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 this Court's analysis used in this case to be in error, Mr. Stein's 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. Stein's ineffective assistance of counsel claims must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate 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. STEIN'S CASE

Porter error was committed in Mr. Stein's case. Following the denial of Mr. Stein's claim of ineffective assistance of counsel by the trial court, this Court affirmed the denial of relief. As to the penalty phase ineffective assistance, this Court erroneously deferred to the legal

ruling that counsel's failure to investigate further and his resulting strategic decisions were reasonable. The reasonableness of counsel's decisions are questions of law as was recognized in *Porter v. McCollum*. Both the trial court's findings and the cursory 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. Stein by performing deficiently.

Trial counsel testified at the evidentiary hearing and agreed with the fact that in preparation for the penalty phase, one of the things you need to do is to go to the place where your client is from (PC-R. Vol. III 34). Here, Mr. Stein was raised in Phoenix, Arizona. Yet, Morrow didn't travel there, which he acknowledged was deficient:

> Q Well, but isn't it true that one of the things you need to do is to go to the place where that person is from?
>
> A **Yes. That is true. I did not do that and that's - - I'm sorry I did not do that and maybe I should have, but I did not go to where he was from personally and, you know, basically talk to everybody and see - -**
>
> Q And did anybody do that?
>
> A Well, I hired Ken Moncrief to investigate his background and that's all I can remember really.[27]

Q Well, you were aware that Mr. Stein had only been in Jacksonville for four or five, six months at the most?

A Well, yeah. I knew he was here a short time. I can't remember the exact amount.

[27] In preparation for the penalty phase, Morrow stated that he had an investigator, Rick Powell, but that only lasted a few weeks (PC-R. Vol. III 18). Subsequently, Morrow had an individual named Ken Montcrief who helped him locate witnesses (PC-R. Vol. III 18).

Q And he was not from here, right?

A Right. I knew that.

Q And you did talk to his sister and you knew that he grew up in Phoenix?

A In Phoenix, that's correct.

Q But neither you nor Mr. Moncrief nor anybody else went to Phoenix to investigate.

A That's correct.

Q **And you - - if you were doing this case now with the experience you have now you would do that?**

A **Absolutely. I would camp out there.**

Q **And in your estimation that's something that you should have done in this case.**

A **Probably should have.**

Q **And if there were people there they could present testimony about problems he had growing up, possible problems with drugs or injuries, things that shaped him as a person and may - - you know, that shaped him as a human being, those are the sorts of things that you'd like to present to a jury to make him human.**

A **Clearly. Clearly. You're right. I mean that's - - that's what you're supposed to do.**

Q So I mean I'm not asking you exactly to fall on the sword or anything, but in your fair estimation in this case those are things that you probably looking back that you should have done in this case, don't you thing?

A Right.

(PC-R. Vol. III 34-36)(emphasis added).[28]

[28]Trial counsel stated that Mr. Stein's case was the first death penalty case that he handled by himself (PC-R. Vol. III 16). In fact, trial counsel had never done a penalty phase prior to Mr. Stein's case (PC-R. Vol. III 17).

Not surprisingly, in light of his failure to conduct an adequate investigation, trial counsel testified that he didn't really locate any mitigation witnesses (PC-R. Vol. III 18). There was a sister and Mr. Stein's girlfriend who came to the penalty phase and they testified (PC-R. Vol. III 18).[29] However, consistent with his recollection that he had not prepared a life story or a life history of Mr. Stein, trial counsel's primary recollection of the substance of the penalty phase is that other than these two witnesses, he did not have any mitigation to present (PC-R. Vol. III 37). Trial counsel acknowledged having discussions with another attorney over his concern that he didn't have any mitigation, especially mental health mitigation (PC-R. Vol. III 33).

Under this backdrop, trial counsel testified as to his penalty-phase strategy:

> The strategy was to try to save his life by humanizing him before the jury and by trying to argue that Christmas was the person who killed the people and that my client was not, that my client was part of the robbery and that was it, so I was hoping that that would blend over into the penalty phase so that a death sentence would not be recommended to the trial Judge, and the way I did that is through the sister and through the girlfriend.

(PC-R. Vol. III 31-32).

[29] Trial counsel recalled talking to Mr. Stein's sister on several occasions well before the trial (PC-R. Vol. III 18).

The mitigation presented at Mr. Stein's postconviction evidentiary hearing was qualitatively and quantitatively different from that presented at trial. During the postconviction evidentiary hearing, Mr. Stein presented the testimony of family members and friends to establish numerous mitigating factors. Mr. Stein's sister, Sandra Griffin Bates (formerly Griffin), testified that she is approximately eight years older than Mr. Stein (PC-R. Vol. III 106). In fact, she recalled the happy day when she and her parents drove to the orphanage to bring Steve home (PC-R. Vol. III 106). Sandra recalled that she was the first of the family to hold him (PC-R. Vol. III 106). Her parents, she testified, waited thirteen years to have children, first adopting her and then Steve (PC-R. Vol. III 106).[30] The Steins were older when they adopted her, and much older when they adopted Steve (PC-R. Vol. III 106).

The Stein family, now four, lived in a small house in Maywood, New Jersey (PC-R. Vol. III 107). Sandra simply adored Steve (PC-R. Vol. III 107). Every year they took a special family vacation (PC-R. Vol. III 107). Sandra babysat for Steve after school, and her parents and Steve had a loving relationship (PC-R. Vol. III 107). Mrs. Stein loved her son immensely (PC-R. Vol. III 109). She "adored him." (PC-R. Vol. III 109). Mrs. Stein and her husband had lost nine babies naturally; "They wanted children terribly and they opened their hearts" to Sandra and Steve (PC-R. Vol. III 109-10).

[30]Sandra had been adopted as a newborn, and, later, Steve was adopted at about eight months of age (PC-R. Vol. III 110).

In 1977, the family moved to Phoenix (PC-R. Vol. III 107-08).[31] Mrs. Stein was in ill health, with arthritis, and the family doctor recommended Arizona (PC-R. Vol. III 107). Mrs. Stein's arthritis was relieved, but she suffered from other illnesses (PC-R. Vol. III 109). Sandra also recalled that the move was hard on their father, as he became unemployed (PC-R. Vol. III 111). Money was very tight (PC-R. Vol. III 111). Predictably, money pressures created stress in the house (PC-R. Vol. III 111).

Sandra got married when she was 18 and moved away for two years (PC-R. Vol. III 112). Her husband was stationed in Guam (PC-R. Vol. III 113). Steve would write her letters all the time, which was great because they couldn't afford to use the phone (PC-R. Vol. III 113). Sandra described Steve as a "sweet, young kid" who would draw pictures and mail them to her (PC-R. Vol. III 113). After Sandra returned, she was divorced in 1981 or 1982 (PC-R. Vol. III 114). Eventually, she remarried and had a baby, and Steve would come over to her house (PC-R. Vol. III 114). They would play board games and family games, and she entrusted her son to Steve (PC-R. Vol. III 114).

Sandra testified about the horrific automobile accident that Steve was in when he was approximately sixteen years old (PC-R. Vol. III 115, 128). One of the passengers died and Steve was in the hospital with bad injuries (PC-R. Vol. III 115). Sandra saw him in the hospital with his jaw wired shut (PC-R. Vol. III 115). Steve seemed "heartbroken." (PC-R. Vol. III 116).

[31] Steve was in elementary school when the Steins moved to Phoenix, and Sandra was in high school (PC-R. Vol. III 110).

Meanwhile, Mrs. Stein's health had continued to deteriorate and she became diabetic and suffered renal failure, requiring dialysis (PC-R. Vol. III 116). Sandra's father also lost his health, suffering from emphysema (PC-R. Vol. III 116). Sandra recalled that her and Steve's parents were sick at the time of the trial (PC-R. Vol. III 119).[32]

Donna Nolz testified at the postconviction evidentiary hearing that she knew Steve from grade school in Phoenix (PC-R. Vol. III 133). Donna had known Steve for many years, and she recalled his kindness and the fact that he was laid-back (PC-R. Vol. III 134). Donna stated that Steve did not attend school regularly, as he was always sick (PC-R. Vol. III 135). In fact, Steve was teased about being pale by other kids; they would call him an "albino" (PC-R. Vol. III 136). Donna and Steve developed a strong friendship, and she recalled that he was "peaceful" – not the type of boy who picked fights (PC-R. Vol. III 136-37). She further testified that Steve didn't run with the popular crowd but he was not disliked (PC-R. Vol. III 137).[33]

Shandra Elaine Mann testified at the postconviction evidentiary hearing that she met Steve Stein when she was 15 through a mutual friend (PC-R. Vol. III 145). At that point in time, Steve had just been in a car accident, and he had been injured very badly (PC-R. Vol. III 145). Steve's jaw had been wired shut and he had a broken collarbone (PC-R. Vol. III 146). He was bedridden at the time (PC-R. Vol. III 146). Steve would go on to have scars and a lot of pain that lasted for the time that Shandra knew him (PC-R. Vol. III 153).

[32]Sandra recalled that she testified at the sentencing of Steve's trial, but she didn't recall being prepared by counsel to testify (PC-R. Vol. III 118). Steve's attorney never came to Phoenix and, in fact, had called her on short notice, within a week of when she needed to be in Jacksonville (PC-R. Vol. III 119-20). Sandra testified that had she been asked at trial the questions which she was asked at the evidentiary hearing, she would have testified in the same way (PC-R. Vol. III 120).

[33]Donna, who lost contact with Steve since high school, stated that no one from Steve's attorney's office ever came to Phoenix and talked to her at the time Steve was on trial; she would have told the jury what she knew had she been asked (PC-R. Vol. III 138-39).

Shandra testified that she began a dating relationship with Steve, and she fell madly in love with him (PC-R. Vol. III 146). Shandra admired the fact that Steve was intelligent and reckless (PC-R. Vol. III 147). He was also very nice to her (PC-R. Vol. III 147). Shandra basically moved into Steve's house for about a year (PC-R. Vol. III 147). His parents were there but they were much older and ill (PC-R. Vol. III 147). They didn't care what Steve and Shandra did, so they had a lot of freedom (PC-R. Vol. III 148). Eventually, Shandra got pregnant (PC-R. Vol. III 148).[34] After she found out, Shandra told Steve that she was going to give the baby up for adoption (PC-R. Vol. III 148). Steve became very upset and he wanted to keep the baby (PC-R. Vol. III 148). He told Shandra of the pain he had suffered because he had been adopted (PC-R. Vol. III 148).

[34]Shandra and Steve were married right before they found out she was pregnant (PC-R. Vol. III 149).

Shandra decided to give the baby up for adoption (PC-R. Vol. III 149). She was seventeen at the time (PC-R. Vol. III 150). Steve did not go along with this decision (PC-R. Vol. III 149). He was very against the idea, but she didn't give him any choice (PC-R. Vol. III 150). Shandra moved to another state and gave the baby up for adoption (PC-R. Vol. III 149). Shandra and Steve stopped talking when she moved away (PC-R. Vol. III 151). Steve was devastated over the adoption, "Because as a child of adoption he felt that he had been lonely, that he and his parents had no bond, that he had been hurt by the whole process and he didn't want to do that to anybody else" (PC-R. Vol. III 152). As a result of the adoption, Shandra and Steve divorced (PC-R. Vol. III 152).[35]

Phillip (Doug) Bacha testified at the postconviction evidentiary hearing that he met Steve Stein in grade school (PC-R. Vol. III 162). According to Doug, they were just acquaintances at first (PC-R. Vol. III 162). After Steve was involved in a pretty serious car accident, Doug started visiting him in the hospital (PC-R. Vol. III 162). Doug felt kind of bad because not may people were visiting him (PC-R. Vol. III 164). Steve had always had some kind of health issues when he was younger and was "kind of out of the picture on a lot of stuff." (PC-R. Vol. III 165). Doug didn't want Steve to feel so isolated, especially since they went to the same school and were neighbors (PC-R. Vol. III 165). Doug and Steve spent a lot of time talking and hanging out after that (PC-R. Vol. III 164). They did some drinking and drugs, and a lot of typically stupid teenager type stuff (PC-R. Vol. III 164). Doug felt that Steve was a highly intelligent person and they shared many of the same interests, such as music and reading (PC-R. Vol. III 165).

[35]Shandra stated that she was never contacted by Steve's attorneys (PC-R. Vol. III 153). Had she been contacted, she would have testified consistently with her testimony at the evidentiary hearing (PC-R. Vol. III 153).

After high school, Doug went into the Navy (PC-R. Vol. III 166). Steve was one of the few people that Doug kept an open line of communication with through correspondence and phone calls (PC-R. Vol. III 166). Doug would see Steve every time that he went home on leave (PC-R. Vol. III 169). During these visits, Doug noticed that Steve was developing an unhealthy lifestyle (PC-R. Vol. III 172). Steve had started hanging around with an individual who was doing a lot of powder drugs and shooting them up into his veins (PC-R. Vol. III 172-73). Doug believed that Steve seemed to have drifted into the use of harder drugs and that they had a negative effect on him (PC-R. Vol III 174).[36]

Shari Roinestad testified at the postconviction evidentiary hearing that Steve and her son, Michael, were the same age and were really good friends after meeting in high school (PC-R. Vol. III 185-86). Steve would often hang out at her house in Phoenix (PC-R. Vol. III 185-86). Shari thought that Steve was "deep" for his age, and they often discussed politics, poetry, and loyalties (PC-R. Vol. III 186). Steve had really good thoughts and opinions (PC-R. Vol. III 186). Since Shari was divorced and had trouble sleeping, Steve would sometimes sit up with her late at night and talk (PC-R. Vol. III 186). Steve would write songs which she thought were "depressing" – "about canyons and crying, and all that." (PC-R. Vol. III 187). "Hauntingly sad" is how she described Steve's music – "it was just tears." (PC-R. Vol. III 198).

[36]Doug stated that he was not contacted by Steve's lawyer when the trial took place (PC-R. Vol. III 167). Had the Navy cleared him to testify, he would have testified as he did at the evidentiary hearing (PC-R. Vol. III 167-68).

Shari saw Steve and her son, Michael, as "fatherless boys", "[t]hey - - just needed somebody to make them stop and I just - - I couldn't make them do it, but they were just restless and always on the go, like they couldn't sit still" (PC-R. Vol. III 187). Shari felt that the boys were lacking a masculine influence, so they may have been hypercharged (PC-R. Vol. III 187). She felt as though they were looking for a father figure (PC-R. Vol. III 187-88).[37]

[37]Shari testified that Steve's father was very uninvolved and was sick a lot (PC-R. Vol. III 188). He had emphysema or some kind of lung disease (PC-R. Vol. III 188).

After the auto accident, Shari saw Steve in the hospital (PC-R. Vol. III 189). She noted that Steve seemed to start self-destructing after that (PC-R. Vol. III 189). Shari suspected that, perhaps, he felt guilt over the girl's death (PC-R. Vol. III 189). Steve told her that he would see the girl fly through the windshield over and over again (PC-R. Vol. III 190). Shari felt that Steve was going through posttraumatic stress (PC-R. Vol. III 190). She heard that after the girl was killed in the accident that Steve "just started really losing it and that he was doing drugs kind of to stop the scene from playing over and over in his mind . . ." (PC-R. Vol. IV 207).[38]

Michael Roinestad, Shari's son, testified at the postconviction evidentiary hearing that he and Steve met in school (PC-R. Vol. IV 209-10). They were acquaintances for a long time and then became very good friends (PC-R. Vol. IV 210). Michael observed that Steve connected with people well but was very guarded with himself, as if he had an emotional wall (PC-R. Vol. IV 212). Michael felt he was the only one who actually breached that wall (PC-R. Vol. IV 212).

[38]Shari stated that she was not contacted by Steve's trial lawyer, and that had she been able, she would have testified (PC-R. Vol. III 191).

Regarding the automobile accident, Michael explained that it was his former girlfriend who was killed (PC-R. Vol. IV 212). Both Steve and the girl were passengers and Michael and the girl had recently broken up (PC-R. Vol. IV 214).[39] Steve had a lot of injuries from the accident (PC-R. Vol. IV 216). His jaw was shattered on one side, his collarbone was messed up, and Michael noticed that Steve's eyes seemed to have darkened from light blue to a deep purple (PC-R. Vol. IV 216). Steve had "a ton of injuries" and "was messed up for a long time after that accident." (PC-R. Vol. IV 216). Michael stated that Steve was given painkillers in the hospital, and he started "jonesing really bad for those nurses to come in and give him the Demerol." (PC-R. Vol. IV 217). Michael also testified that Steve was using marijuana at 14 or 15, and he drank alcohol (PC-R. Vol. IV 225). After the painkillers, Steve went on to snorting crystal meth (PC-R. Vol. IV 227). He got pretty heavily involved in that (PC-R. Vol. IV 227).

Summarizing their friendship, Michael testified that Steve would do anything to help you with any problem you had (PC-R. Vol. IV 217). He was personable and Michael would often be surprised by the unlikely people Steve would engage in conversation (PC-R. Vol. IV 217). Steve was interested in people, but at a distance (PC-R. Vol. IV 217). Michael found this aspect of Steve's personality to be a paradox (PC-R. Vol. IV 217-18).

[39]The girl, Diane, was not Steve's girlfriend, but Steve and she were "working on that." (PC-R. Vol. IV 215).

Michael described Steve's dad, who was older and ill, as not really a father figure (PC-R. Vol. IV 219). However, Michael stated that there was no question Steve's father genuinely loved him (PC-R. Vol. IV 219). Steve also loved his parents and cared for them (PC-R. Vol. IV 220). When they were sick, it would devastate Steve (PC-R. Vol. IV 220).[40]

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Stein had a vast amount of mitigation. Counsel's performance was clearly deficient, and Mr. Stein was prejudiced.

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. Stein was not prejudiced by trial counsel's deficient performance. The findings in this case violate *Porter*.

[40]Michael testified that he had not been contacted by Steve's attorneys at the time of trial (PC-R. Vol. IV 220). Michael would have testified had he been contacted; "I'd do anything I could for Steve to this day" (PC-R. Vol. IV 221).

It is inconceivable that Mr. Stein's 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*.[41] 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 mitigating evidence that was available. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

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. Stein's substantial claims of ineffective assistance of counsel have not been given serious consideration as required by *Porter*. Mr. Stein 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. Stein requests that this Court grant him a new trial and/or penalty phase.

[41] As in *Porter v. State*, this Court dismissed much of Stein's mitigation on the basis that it could have been viewed negatively by the jury. *See e.g, Stein*, 995 So. 2d at 340 ("Bacha and Michael and Shari Roinestad testified that Stein abused drugs, which the jury could have viewed in a negative light."). Such an analysis is contrary to *Porter*, where the United States Supreme Court found that this Court failed to recognize that Porter was prejudiced by trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *Porter*, 130 S.Ct. 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)).

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 Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 9th day of November, 2011.

CERTIFICATE OF FONT

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