IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1400

LOWER TRIBUNAL No. 91-1505CF

STEVEN EDWARD STEIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, Florida 33928
(850) 322-2172
Fax (954) 564-5412

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ARGUMENT IN REPLY

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

A. Introduction

On December 1, 2011, this Court issued an opinion in *Walton v. State*, ___ So. 3d ___ (Fla. 2011). Mr. Stein, like Walton, has asserted that *Porter v. McCollum*, 130 S.Ct. 447 (2009), represented a fundamental repudiation of this Court's *Strickland* jurisprudence. Thus, based on *Witt v. State*, 387 So. 2d 922 (Fla. 1980), *Porter* should be retroactively applied to Mr. Stein's case.

This Court has now found that *Porter* "does not constitute a fundamental change in the law that mandates retroactive application under Witt." *Walton*, slip op. at 10.[1] However, this Court went on to state that *Porter* "involved a mere application and **evolutionary refinement and development of the Strickland analysis**" *Id* (emphasis added).[2] According to this Court's

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[1]While Mr. Stein recognizes the Court's recent opinion in *Walton* has adversely decided whether *Porter v. McCollum* qualifies as new Florida law under *Witt v. State*, Mr. Stein requests that this Court reconsider its *Witt* analysis for all the reasons set forth in the initial brief and this brief.

[2]Thus, this Court's decision in *Walton* has created a new issue as to Mr. Stein, i.e. whether the failure to give Mr.

analysis in *Walton*, the "evolutionary refinement and development" of the *Strickland* analysis that the United States Supreme Court announced in *Porter v. McCollum* did not constitute a substantial enough change in Florida law to qualify under *Witt* for retroactive application.[3] But of course, the United States Supreme Court chose to announce this "evolutionary refinement and development" of the *Strickland* standard in *Porter v. McCollum* and apply it to George Porter's 1986 capital sentencing proceeding.[4]

Stein, who was sentenced to death in 1991, the benefit of an evolutionary refinement that was applied to a 1986 capital sentencing and to George Porter's right to effective representation in that 1986 capital proceeding, is arbitrary within the meaning of the Eighth Amendment and within the meaning of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

[3]Mr. Stein recognizes that *Witt v. State* involves a question of state law. However, state law may not be applied in a fashion that violates the Eighth or Fourteenth Amendments. While this Court's decision in *Walton v. State* may have resolved the state law issue of how to apply *Witt v. State* to *Porter v. McCollum*, it did not resolve whether depriving Mr. Stein of the benefit of the decision in *Porter v. McCollum* violates his Eighth and/or Fourteenth Amendment rights.

[4]Within this Court's opinion in *Walton v. State*, there is no discussion or even recognition of the fact that the United States Supreme Court applied its "evolutionary refinement" to a 1986 capital sentencing proceeding in *Porter v. McCollum*. Indeed, this Court in its decision in *Walton v. State* never once even mentioned the fact that the United States Supreme Court applied its "evolutionary refinement" of *Strickland* to a 1986 capital sentencing proceeding in *Porter v. McCollum*.

Thus, the "evolutionary refinement and development" of the *Strickland* standard entitled Mr. Porter to obtain relief from his death sentence which had been imposed in 1986. While finding the "evolutionary refinement and development" was not substantial enough to qualify under *Witt* in its opinion *Walton*, this Court did not address Mr. Stein's Eighth and Fourteenth Amendment claims regarding his sentence of death which was returned during a capital sentencing proceeding in 1991, five years after George Porter's sentence of death. *See Porter v. State*, 564 So. 2d 1060 (Fla. 1990). By virtue of *Porter v. McCollum*, the "evolutionary refinement" of *Strickland* was thus part of George Porter's right to effective representation in a capital sentencing conducted in 1986.[5] To have such an "evolutionary refinement" apply in a 1986 capital proceeding, but not in a 1991 capital proceeding can only be described as

[5]This Court's decision denying George Porter's ineffective assistance claim issued in 2001. *See Porter v. State*, 788 So. 2d 917 (Fla. 2001). This was well before this Court's 2008 decision addressing Mr. Stein's ineffective assistance of counsel claims. And this Court's 2001 decision in *Porter v. State*, which was part of this Court's jurisprudence at the time of its decision to deny Mr. Stein's ineffectiveness claims, was found to be contrary to or an unreasonable application of federal law by virtue of the "evolutionary refinement" in *Porter v. McCollum*.

arbitrary.[6] It is arbitrary within in the meaning of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972). And, likewise, it is arbitrary within the meaning of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Due to this Court's recognition that *Porter* constituted an "evolutionary refinement and development" of the *Strickland* analysis, it violates Mr. Stein's right to equal protection and due process to deprive him of the same benefit that Mr. Porter received at a 1986 capital sentencing proceeding, i.e., the refinement and development of the *Strickland* analysis announced in *Porter v. McCollum*.[7] Under the Eighth Amendment, to deprive Mr. Stein of what Mr. Porter received for no apparent reason other than whether Mr. Stein's first Rule 3.851 motion had been denied by this Court when the decision in *Porter v. McCollum* was rendered is arbitrary and capricious and violates of *Furman v.*

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[6]It is equally arbitrary if one uses the date of this Court's decision denying a capital defendant's ineffective assistance of counsel claim. This Court issued *Porter v. State* in 2001, while *Stein v. State* issued in 2008.

[7]Mr. Stein recognizes that the United States Supreme Court did not call its decision in *Porter v. McCollum* an "evolutionary refinement." That is this Court's description of *Porter v. McCollum*. The United States Supreme Court in *Porter* indicated that this Court's decision in *Porter v. State* was contrary to or an unreasonable application of clearly established federal law, i.e. *Strickland v. Washington*.

Georgia, 408 U.S. 238 (1972).[8]

Therefore, while Mr. Stein recognizes the Court's recent opinion in *Walton* resolved the more generic issue of whether *Porter v. McCollum* constituted new Florida law within the meaning of *Witt v. State*, he argues that to deprive him of the benefit of the "evolutionary refinement," would violate his rights under the Eighth and/or Fourteenth Amendment.[9] The

[8]Chronology cannot be used to justify in any rational manner the application of the "evolutionary refinement" set forth in *Porter v. McCollum* to a 1986 capital sentencing proceeding and the capital defendant's right to effective representation during that proceeding, while depriving Mr. Stein of the benefit of the "evolutionary refinement" during his 1991 capital sentencing proceeding. Permitting the "evolutionary refinement" of the *Strickland* standard to apply to a 1986 capital sentencing, but not to a 1991 capital sentencing means the shape and the scope of the right to effective representation arbitrarily waxed and waned between 1986 and 1991.

[9]Since this Court has acknowledged that the *Strickland* standard evolved in *Porter*, it has also acknowledged that the present day *Strickland* analysis is something different than it was before *Porter*. We know that this Court's standard that came before was an unreasonable application of federal law, because that was the holing in *Porter*. We know that the present day standard can yield different results, because it yielded a different result for George Porter, preventing the State from executing him unconstitutionally. Knowing all that, it cannot be denied that the newly evolved and refined *Strickland* standard announced in *Porter* may require a different result for Mr. Stein. Knowing that, the decision now becomes whether, in order to avoid the expense of another proceeding, the State is constitutionally permitted to execute someone in the face of constitutional doubt. The question is whether this Court being found in a capital case to have reached a decision unreasonably applying a federal law that it applied in other cases is not

failure to give him the benefit of the "evolutionary refinement" would inject an arbitrary factor into his death sentence in violation of *Furman v. Georgia*. The failure to give him the benefit of the "evolutionary refinement" would arbitrarily distinguish his right to effective representation at a capital sentencing proceeding from the right to effective representation that was accorded to George Porter at his 1986 capital sentencing proceeding. Making such a distinction between Mr. Porter's right to effective representation in 1986 and Mr. Stein's right to effective representation in 1991 would constitute a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Mr. Stein's right to equal protection and due process must mean that at his 1991 sentencing proceeding, he was entitled to the same Sixth Amendment right to effective representation that was accorded to Mr. Porter. Accordingly, regardless of this Court's resolution of how *Witt v. State* applies to *Porter v. McCollum*, depriving Mr. Stein of the benefit of the "evolutionary refinement" found to have

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something that merits a second look in those other cases before those cases result in the State taking life. An unconstitutional execution was poised to happen in *Porter* based on an unreasonable *Strickland* analysis. This Court must reconsider Mr. Stein's case so that he is not at risk for an unconstitutional execution.

occurred by virtue of the decision in *Porter v. McCollum* violates his Eighth and/or Fourteenth Amendment rights.

B. Reply to Appellee's Arguments

The State argues *Porter* did not change the law, i.e., *Stickland v. Washington*, and, even if it did the alleged change is not retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* Answer Brief at 17, 19, 22, 23, 24,25 (hereinafter "AB at ___"). However, under *Witt* it is clear that *Porter* is a decision from the United States Supreme Court that changed **Florida** law.[10]

What the State steadfastly refuses to discuss in its brief is the precise question to be answered under *Witt*, *i.e.* whether the United States Supreme Court's holding in *Porter v. McCollum* changed Florida law, just as *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Espinosa v. Florida*, 505 U.S. 1079 (1992), changed Florida law. In *Espinosa v. Florida*, the United States Supreme Court explained the issue presented therein:

[10]The real question is: does *Porter v. McCollum* change Florida law? In neither *Hitchcock v. Dugger*, 481 U.S. 393 (1987), nor *Espinosa v. Florida*, 505 U.S. 1079 (1992), did the United States Supreme Court hold that those decisions established a new constitutional right. In fact, in both cases the United States Supreme Court found that this Court had failed to properly follow and/or apply already existing federal constitutional precedent. Yet, this Court subsequently determined that both *Hitchcock* and *Espinosa* were to be given

> Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. *See Stringer, supra*, at 235. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See *Shell v. Mississippi*, 498 U. S. 1 (1990); *Maynard v. Cartwright*, 486 U. S. 356 (1988); *Godfrey v. Georgia*, 446 U. S. 420 (1980).
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> The State here does not argue that the "especially wicked, evil, atrocious or cruel" instruction given in this case was any less vague than the instructions we found lacking in *Shell*, *Cartwright*, or *Godfrey*. Instead, echoing the State Supreme Court's reasoning *in Smalley v. State*, 546 So. 2d, at 722, the State argues that there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not "the sentencer" for Eighth Amendment purposes.

Espinosa v. Florida, 505 U.S. at 1081. The United States Supreme Court proceeded to reject this Court's decision in *Smalley v. State*, and held:

> We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

Id. at 1082.

No new federal constitutional principle was announced when the United States Supreme Court found the heinous, atrocious or cruel aggravating circumstance employed in Florida was

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retroactive application under *Witt v. State*.

unconstitutionally vague. Indeed, identical worded aggravators were found unconstitutionally vague in *Maynard v. Cartwright* and *Shell v. Mississippi*. What the United States Supreme Court announced in *Espinosa* was that this Court reached an erroneous decision in *Smalley v. State* when it refused to find the decision in *Maynard v. Cartwright* applicable in Florida. Thereafter, this Court ruled in *James v. State,* 615 So. 2d 668 (Fla. 1993), that the United States Supreme Court's decision in *Espinosa v. Florida* qualified under *Witt* as new Florida law.[11]

In its answer brief, the State completely ignores Mr. Stein's reliance upon this Court's decision in *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), in which this Court ruled that the decision in *Espinosa v. Florida* was new Florida law within the meaning of *Witt* and that it should be applied retroactively to Mr. James because "it would not be fair to deprive him of the

[11]Justice Grimes was the lone dissenter in *James v. State*. He premised his dissent on his view that the error identified in *Espinosa* was "much different from that pronounced in *Hitchcock []."* *James v. State*, 615 So. 2d at 670. Justice Grimes argued that *Hitchcock* warranted retroactive application because it was of "significant magnitude to require retroactive application," and of much greater significance than presented by the decision in *Espinosa*. He relied upon the fact that *Hitchcock* was about more than mere jury instructional error which was at issue in *Espinosa*. According to Justice Grimes, *Hitchcock* went to what mitigating evidence was admissible.

Espinosa ruling."[12] Of course, the State must ignore this Court's ruling in *James v. State* because it demonstrates, contrary to the State's argument, the question presented by Mr. Stein's claim is whether the new decision from the United States Supreme Court changed **Florida** law within the meaning of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* AB at 17, 19, 21, 22, 23, 24, 25.[13]

Similarly, the United States Supreme Court in *Hitchcock* did not create new federal constitutional law. Indeed, the specific holding there was:

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U. S. 1 (1986), *Eddings v. Oklahoma*, 455 U. S. 104 (1982), and *Lockett v. Ohio*, 438 U. S. 586 (1978) (plurality opinion).

Hitchcock, 481 U.S. at 398-99. Clearly, the United States

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[12]The State failed to discuss *James v. State*, *Espinosa v. Florida*, or *Maynard v. Cartwright*, 486 U.S. 356 (1988), in its Answer Brief.

[13]Again as the United States Supreme Court noted in *Espinosa*, it had already ruled that the jury instruction at issue there was unconstitutionally vague in *Maynard v. Cartwright*. What the United States Supreme Court held in *Espinosa* was that this Court erred in *Smalley v. State* when it refused to apply *Maynard v. Cartwright* to Florida capital sentencing proceedings. *Espinosa* was a change in Florida law.

Supreme Court broke no new federal constitutional ground; it merely found that the death sentence violated the Eighth Amendment principle set forth in *Lockett*, and followed in *Eddings* and *Skipper*. *Porter* should be applied to Mr. Stein's case under *Witt*.

Indeed, the State's argument that because Mr. Stein filed his motion in 2010, it is was time barred and no exception to Florida Rule of Criminal Procedure 3.851(d)(1)(B) applies (AB at 21-2), simply ignores the fact that this Court has long held that a new decision qualifying under *Witt v. State* as new law is an exception which defeats all procedural bars. *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987); *Cooper v. State*, 526 So. 2d 900 (Fla. 1988); *Hall v. State*, 541 So. 2d 1125 (Fla. 1989).

In addition, the State repeatedly argues that *Porter* did not change the analysis to be conducted for ineffective assistance of counsel claims as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (AB at 22, 23, 24, 25). While the legal standards for determining deficient performance and prejudice have not changed (just as *Hitchcock* did not change *Lockett* and *Espinosa* did not change *Maynard v. Cartwright*), the decision in *Porter v. McCollum* found this Court unreasonably applied *Strickland* (just as this Court had unreasonably applied

Lockett and had unreasonably found *Maynard v. Cartwright* did not apply in Florida).

As a result, this Court's case law on which it relied in rejecting Mr. Porter's ineffective assistance of counsel claim must be abandoned and Florida jurisprudence must change in conformity with *Porter v. McCollum*. The United States Supreme Court has determined that this Court applied an incorrect standard in reviewing the evidence presented to support Mr. Porter's ineffective assistance of counsel claim. The United States Supreme Court's rejection of this Court's jurisprudence is a change in Florida law. This Court used the exact same incorrect standard that had been used in *Porter v. State* when it reviewed Mr. Stein's ineffective assistance of counsel claims. Fairness dictates that Mr. Stein should be treated the same as Mr. Porter and receive the benefit of *Porter v. McCollum* and the change it has brought to Florida law as to how this Court conducts a *Strickland* analysis of the evidence presented in support of an ineffective assistance of counsel claim.

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. 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. In finding that both *Hitchcock* and *Espinosa* qualified as new Florida law under *Witt*, this Court noted that fairness dictated that others situated similarly to Mr. Hitchcock and Mr. Espinosa should receive the benefit of the decisions from the United States Supreme Court which found their sentences of death constitutionally defective.

In Mr. Stein's case the change in Florida law was identified by the United States Supreme Court in *Porter*. So, the first requirement is clearly met. Because the analysis of a ineffective assistance of counsel claim is based on the Sixth Amendment to the United States Constitution, the second criteria is also clearly met. As to the third criteria, there can be no doubt that the standard of review used to analyze an ineffective assistance of counsel claim is fundamentally significant, particularly as to the penalty phase in a capital case where the issue is literally a matter of life and death. The significance of the decision in *Porter v. McCollum* parallels the significance of the decision in *Hitchcock v. Dugger* as this Court's analysis of *Hitchcock* error in *Cooper v. State* and *Hall v. State* clearly

demonstrates.

The State also argues that *Porter* should not be held to be retroactive because when this Court changed the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), this Court declined to apply the new standard retroactively (AB at 25, *citing Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001). However, the State fails to acknowledge the obvious critical distinction between *Porter v. McCollum* and *Stephens v. State* - *Porter v. McCollum* was a decision by the United States Supreme Court finding that this Court was not properly applying *Strickland*, *Stephens v. State* was not a decision emanating from the United States Supreme Court. *Stephens* was a less significant decision from a lesser court. In *Stephens*, this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings and decided to clarify that standard.[14] However, in *Porter v. McCollum*, the highest court in the country and the final arbiter as to the requirements of the United States Constitution found that this Court's analysis of Mr. Porter's ineffective assistance of counsel claim, including the

[14]This Court's ruling in *Stephens* was much more akin to a refinement in the law which as explained by Justice Grimes' dissent in *James v. State,* 615 So. 2d at 670, would not qualify

standard of review employed, was contrary to and an unreasonable application of *Strickland*. Thus, the United States Supreme Court specifically identified a flaw in this court's reasoning in *Porter v. State*, which this Court had specifically stated in *Porter v. State* was dictated by Florida case law construing the requirements of *Strickland*.

The State's scatter shot arguments also includes the suggestion that *Porter* error only applies to the prejudice prong of the *Strickland* analysis (AB at 37-8). However, that is not the case. The same erroneous standard of review was applied to the deficient performance prong of Mr. Stein's ineffective assistance of counsel claim. Indeed, the United States Supreme Court in *Porter v. McCollum* found that Mr. Porter's trial attorney had rendered deficient performance. In doing so, consideration was given to the value of the mitigating evidence that had been denigrated by the judge presiding at the evidentiary hearing. The *Porter* error is not exclusive to cases where there was either a finding of deficient performance, or the Court did not reach the issue; this is particularly true where the failure to investigate is excused because the evidentiary hearing court discounted the value of the mitigation

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for retroactive application under *Witt v. State*

that had not been investigated and this Court deferred to the denigration of the unpresented mitigating evidence. The standard of review and analysis of evidence that is mandated in *Porter* applies to all of a postconviction defendant's claims where evidence has been presented to support the claims. Thus, based on *Porter*, Mr. Stein's claims of ineffective assistance of counsel require further review, using the standard set forth in *Porter*.

The State's reliance on *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), is also misplaced (AB at 27-8).[15] In *Marek*, Mr. Marek through counsel, raised a claim that the ABA report constituted newly discovered evidence that entitled Mr. Marek to relief. *Marek v. State*, 8 So. 3d at 1126 ("In his second claim, Marek argued generally that his death sentence was imposed arbitrarily and capriciously thus violating *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which held that the death penalty must be imposed fairly and consistently. Marek based this claim on the American Bar Association's

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[15]The opinion in *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), cannot preclude relief as law of the case, as the State suggests (AB at 18, 19). Law of the case means exactly what it says - law of Mr. Stein's case. An opinion in Mr. Marek's case is not law of the case in Mr. Stein's case. While an opinion certainly can provide authority for denial of a claim, the state's misunderstands the law of the case concept.

September 17, 2006, report, *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report* (ABA Report), which criticizes Florida's death penalty scheme and clemency process. Marek asserted that the ABA Report constitutes newly discovered evidence demonstrating that his death sentence is unconstitutionally arbitrary and capricious.”). Thus, Mr. Marek did not, as the State falsely asserts, argue “that his previously raised claim of ineffectiveness for failing to investigate mitigation should be reevaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 162 L.Ed.2d 360 (2005), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 l.Ed.2d 389 (2000)” (AB at 27).

The ABA report had criticized this Court’s failure to apply all capital decisions retroactively. Mr. Marek filed his claim relying on this criticism contained in the ABA report in May of 2007, which issued in the fall of 2006. In relying on the criticism set forth in the ABA report, Mr. Marek noted three decisions from the United States Supreme Court that he contended would have resulted in sentencing relief had they been applied retroactively as the ABA Report suggested they should. These

three decisions were *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005). Mr. Marek advanced no argument that these three decisions qualified under *Witt v. State* as new Florida law.[16] And the reason for that was that the United States Supreme Court in *Williams v. Taylor* addressed the Virginia Supreme Court's unreasonable application of *Strickland*, in *Wiggins v. Smith* it addressed the Maryland Court of Appeals' unreasonable application of *Strickland*, and in *Rompilla v. Beard* it addressed the Pennsylvania Supreme Court's unreasonable application of *Strickland*. In not one of the three cases did the United States Supreme Court purport to change the *Strickland* standard. In each instance, the United States Supreme Court found that the highest court of those three states had unreasonably applied well-established federal law. Thus, there was no basis to argue that any one of the three decisions changed Florida law.

It should go without saying that a decision from the United States Supreme Court finding that this Court, the Florida

[16]Nor did Mr. Marek argue that he was presenting a Rule 3.851 motion based upon those decision within one year of those decisions. Indeed, the Rule 3.851 motion was filed more than two years after *Rompilla*, more than four years after *Wiggins*, and more than seven years after *Williams.*

Supreme Court, has unreasonably applied federal law is qualitatively different and/or greater significance within the State of Florida than a United States Supreme Court decision finding that the highest court of some other state has unreasonably applied federal law. Yet, the State's argument that this Court's decision in *Marek* fails to recognize the obvious, *i.e. Williams v. Taylor*, *Wiggins v. Smith*, nor *Rompilla v. Beard* changed Florida law. The fact that Virginia Supreme Court, the Maryland Court of Appeals, and the Pennsylvania Supreme Court had failed to properly apply *Strickland* simply did not change Florida law.[17]

The State also sets forth a detailed account of the mitigation presented in Mr. Porter's case in an attempt to minimize the mitigation presented in Mr. Stein's case.[18] In furtherance of this argument, the State argues that *Porter* applies only to cases where a defendant is a combat veteran (AB

[17]The only truly analogous situations are those involving a decision by the United States Supreme Court that this Court, the Florida Supreme Court, has failed to reasonably apply federal law. And in those analogous situations, *i.e. Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court has recognized that United States Supreme Court's repudiation of this Court's jurisprudence constitutes a change in Florida law.

[18]Curiously, these are the same details that not even three years ago the State denigrated and ridiculed to the various courts, including this Court and the United States Supreme

at 19, 33). This is simply not true, as evidenced by the fact that the United States Supreme Court as well as other courts have relied on the principles set forth in *Porter* to find deficient performance and prejudice. *See Sears v. Upton*, 130 S. Ct. 3529 (2010); *Johnson v. Buss*, ("'The major requirement of the penalty phase of a trial is that the sentence be individualized by focusing on the particularized characteristics of the individual.' *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987). For that reason, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter*, ___ U.S. at ___, 130 S.Ct. at 455. '[E]vidence about the defendant's background and character is 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 than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989) (quotation marks omitted)".

Finally, the State argues that Mr. Stein is entitled to no relief even if *Porter* were to be applied retroactively (AB at 33-6). However, a review of the State's argument makes clear

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Court.

that the analysis that the State urges this court to adopt is exactly the analysis that the United States Supreme Court found contrary to and an unreasonable application of established federal law, i.e., *Strickland v. Washington*. For example, the State urges this court to consider Mr. Stein's mitigation as "negative" (AB at 35-6), and specifically states that: "the mitigation in this case borders on the trivial." (AB 34).[19]

However, in *Porter*, the United States Supreme Court specifically criticized the analysis urged by the State in reviewing mitigating evidence:

> 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. Here, the State is

[19] As counsel for Mr. Porter, the State's characterization of Mr. Stein's mitigation sounds familiar, as this is akin to what that State repeatedly argued to the various courts that reviewed Mr. Porter's case.

asking this Court to do exactly what the United States Supreme Court has said does not comply with *Strickland* – discount Mr. Stein's mitigation to irrelevance.

Furthermore, the State urges this Court to do exactly what the United States found to be an unreasonable application of *Strickland* in *Sears v. Upton*, 130 S.Ct. 3259 (2010) – the State asks this court to rely on trial counsel's theory in analyzing the prejudice (AB at 27-28). This is not the correct standard to be applied under *Strickland*.

CONCLUSION

In light of the foregoing arguments, Mr. Stein requests that this Court grant him a new 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 Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, on this 23rd day of January, 2012.

CERTIFICATE OF FONT

This is to certify that the Reply Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

____

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, Florida 33928
Telephone: (850) 322-2172
FAX: (954) 564-5412

Counsel for Appellant
STEVEN EDWARD STEIN