IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-153

JASON DIRK WALTON,

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Walton's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

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

"RS" - resentencing record on direct appeal;

"PCR" & "PCR-2" -- records on prior 3.850 appeals to this Court;

"PCR-3" - record on first successive 3.851 appeal to this Court;

"PCR-4" - record on the instant appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Walton has been sentenced to death. 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. Walton, through counsel, accordingly urges that the Court permit oral argument.

INTRODUCTION

Jason Walton was deprived of a reliable sentencing proceeding due to the ineffective assistance of trial counsel at the penalty phase in violation of the Sixth Amendment to the U.S. Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Porter v. McCollum*, 130 S. Ct. 447 (2009), the United States Supreme Court found this Court's prejudice analysis 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 conducted the following prejudice analysis:

> 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 State'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.

The *Porter* decision establishes that the previous denial of Mr. Walton's claims that he did not receive a reliable sentencing proceeding was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984) . The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of **this** Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in state law as it has been routinely applied. Mr. Walton's *Porter* is claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

In *Sears v. Upton*, 130 s. Ct. 3266 (2010), 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 Georgia 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 United States Supreme Court explained the state court's reasoning as follows:

> Because Sears' counsel did present some mitigation evidence during his penalty phase, the court concluded that "[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." The court explained that "it is impossible to know what effect [a different mitigation theory] would have had on [the jury]." "Because counsel put forth a reasonable theory with supporting evidence," the court reasoned, "[Sears] . . . failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced.

Id.

After *Porter*, it is necessary to conduct a new analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's prejudice analysis to be in error, Mr. Walton's claims that he was deprived of an individualized and reliable sentencing proceeding must be readdressed in the light of *Porter*. The judge and jury at Mr. Walton's resentencing

hearing "heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." *Id.* at 454. A truncated, cursory analysis of prejudice does not satisfy *Strickland*. In Mr. Walton's case, that is precisely the sort of analysis that was conducted. *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."

STATEMENT OF THE CASE AND FACTS

A. Procedural History

Jason Dirk Walton was convicted of three counts of first-degree murder for his role in a Pinellas County triple-homicide, and on March 14, 1984, Circuit Court Judge William Walker, Sixth Judicial Circuit, imposed three death sentences. On appeal, this Court affirmed the convictions but vacated the death sentences because Mr. Walton was not afforded an opportunity to confront two co-defendants whose confessions and alleged statements were presented in the penalty phase. *Walton v. State*, 481 So. 2d 1197 (Fla. 1985).

Mr. Walton's second penalty phase was conducted on August 12-14, 1986 and the jury recommended that death sentences be imposed by a vote of 9 to 3. On August 29, 1986, Circuit Court Judge Mark McGarry of the Sixth Judicial Circuit followed the jury's recommendation and imposed three separate death sentences. This Court denied relief on Mr. Walton's direct appeal following his resentencing. *Walton v. State*, 547 So. 2d 622 (Fla. 1989) *cert. denied Walton v. Florida*, 110 S. Ct. 759 (1990). On September 24, 1990, Mr. Walton's petition for clemency was denied and a death warrant signed by Governor Bob Martinez. On October 24, 1990, this Court stayed his death warrant and ordered that postconviction motions be filed by December 15, 1990.

Mr. Walton filed his initial postconviction motion pursuant to Rule of Criminal Procedure 3.850 in 1990 and the trial court summarily denied all but two of the postconviction claims. Following a limited evidentiary hearing before Circuit Court Judge Brandt C. Downey III on February 25-26, 1991, relief was denied. An appeal was taken to this Court; jurisdiction was relinquished to the trial court for the resolution of Mr. Walton's public records requests before deciding the merits of the other issues raised. *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993). On remand, Mr. Walton amended the 3.850 motion due to previously suppressed information that was revealed in the public records and additional evidence was adduced in the trial court on his claims. On January 11, 2001, the trial court again

denied all of Mr. Walton's claims. (PCR-2. 2477-2478). Mr. Walton again appealed to this Court; relief was denied. *Walton v. State*, 847 So. 2d 438 (2003).

Mr. Walton's subsequent state Petition for Writ of Habeas Corpus, filed in this Court pursuant to *Ring v. Arizona*, 122 S. Ct. 2428 (2002) in June of 2003, was denied on October 3, 2003. *Walton v. Crosby*, 859 So. 2d 516 (Fla. 2003).

Mr. Walton filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida on September 30, 2004. Then, on February 10, 2006, Mr. Walton filed a successive rule 3.851 motion in the circuit court containing claims based upon *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005) due to the State's use of inconsistent and irreconcilable theories; newly discovered evidence concerning a jailhouse informant; a lethal injection claim; and a public records claim. The motion was later amended to include a claim based upon *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam) and the American Bar Association report recommending a moratorium on executions in Florida.[1] All the claims were summarily denied without an evidentiary hearing. An appeal followed and this Court denied relief. *Walton v. State*, 3 So. 3d 1000 (Fla. 2009).

The federal district court dismissed Mr. Walton's Petition for Writ of Habeas Corpus as time-barred under the Anti-Terrorism and Effective Death

[1] Retroactive effect was not given to the decision in *Espinosa v. Florida*, 112 S. Ct. 2926 (1992).

Penalty Act (AEDPA) on November 2, 2010. The application for Certificate of Appealability is pending in the Eleventh Circuit Court of Appeals.

On October 13, 2010, Mr. Walton filed his second successive motion for postconviction relief pursuant to 3.851 alleging that this Court failed to properly analyze prejudice based on clearly established federal law as set forth in *Porter v. McCollum* and *Strickland v. Washington*. (PCR-4. 1-30). A case management conference was held before Circuit Court Judge W. Douglas Baird on November 19, 2010. (PCR-4. 93-110). The circuit court entered an order denying relief on December 20, 2010. (PCR-4. 66-71). This appeal follows.

B. Trial and Resentencing.

Jason Dirk Walton was indicted in Pinellas County, Florida on March 2, 1983, with three counts of first-degree murder in the shooting deaths of Gary Peterson, Bobby Martindale, and Steven Fridella. (R. 1-2). The victims were found dead from shotgun wounds in 1982 but the crime went unsolved until Robin Fridella (Steven Fridella's wife) and another man contacted police. They had information that one of the men who shot the victims was co-defendant Terry Van Royal. Van Royal was subsequently arrested and gave information that led to the arrest of co-defendant Richard Cooper. It was a day later that Jason Walton and his younger brother, co-defendant Jeff McCoy, were arrested.

Jason Walton was tried and convicted in February 1984. (R. 2475-80). During the penalty phase, prosecutors Doug Crow and Allen Geesey introduced the written confessions of the actual killers (Richard Cooper and Terry Van Royal) in an effort to establish that Mr. Walton "ordered" the shootings. Assistant State Attorney Geesey presented the testimony of a regular jailhouse informant, Paul Skalnik, for the purpose of telling the jury what co-defendant Cooper had told him about Mr. Walton's alleged role in the crime. Cooper, who was housed in the same cell with Skalnik while awaiting trial, allegedly gave Skalnik information about Mr. Walton:

> SKALNIK: Mr. Cooper stated that he had been talking to a man by the name of J.D. Walton who he classified as the ringleader of the four men . . .
> During this time of discussion with Richard Cooper, Mr. Cooper told me that J.D. Walton had told him they were going to eliminate them.

(R. 2555). Following the jury recommendation, Circuit Court Judge William Walker sentenced Jason Walton to death on March 14, 1984. (R. 2117). On direct appeal, this Court reversed the death sentences and remanded Mr. Walton's case for a new penalty phase because the introduction of Paul Skalnik's hearsay testimony violated *Bruton v. United States*, 391 U.S. 123 (1968). *Walton v. State*, 481 So. 2d 1197, 1201 (Fla. 1985).

At the resentencing, Assistant State Attorney Crow came out of the gate pointing the finger at Jason Walton as the leader of the group:

> On June 18th, 1982, in the Highpoint area of Pinellas County, just a few yards away from this courthouse, Pinellas County Sheriff's Office was called to a scene of three terrible crimes. **An eight-year-old boy just hours earlier . . . . had called the hospital and then called the Clearwater Police Department with a frantic message, hysterically related that his daddy's dead.** The three robbers had come and killed them and ransacked the house. Terrified, he was transferred to the Sheriff's Office, and deputies arrived.
>
> . . .
>
> And there were four people responsible. Richard Cooper, Terry Royal, Jeff McCoy, **teenagers had come down with this man, 25-year-old man at the time J.D. Walton** robbed and pillaged and murdered the three individuals. The evidence will show, and you will hear from **Jeff McCoy, this man's younger brother who is serving a life sentence without parole for 25 years, as a result of being recruited by J.D. Walton in the crime**. . . .
>
> . . .
>
> And it was about two weeks before the murder that he began **recruiting his young friends** . . . He told them there will be drugs, there will be a lot of money, let's take guns and they did that. **Only one person had any information that there might be something there to steal and that was J.D. Walton.**
>
> . . .
>
> His gun misfired, and **then following his lead Terry Royal and Richard Cooper opened fire resulting in the death of these three young men.**

(RS. 493-496)(emphasis added) (State's opening argument).

The State presented evidence regarding the facts of the crime from the guilt phase in aggravation of the death sentence including Mr. Walton's pre-trial confession and a taped statement provided by his younger brother and co-defendant Jefferey McCoy. Additionally:

> Another state witness testified that Walton was experiencing problems in his relationship with the ex-wife of one of the victims and that Walton had once said that "the only way he could get [the victim] off his back was to waste him." The state presented a psychiatrist's testimony, indicating that the boy suffered a post-trauma stress reaction to the incident and that it would not be in the boy's best interest to appear in court and testify.

Walton v. State, 547 So. 2d 622, 623-24 (Fla. 1989).

At the resentencing hearing, defense counsel presented three witnesses on behalf of Mr. Walton: a co-worker, a childhood friend, and his mother. The direct examination of co-worker, Kimberly Ann Johnson, was approximately two pages, with one entire page of introductory questions (RS. 747-749). Mr. Walton's friend, Lynn Chamber, testified that she had known Mr. Walton for 13 years, but did not know that he was living with Robin Fridella or the people he hung out with (RS. 758- 772). Carolyn Walton testified that her son was a good child and soldier and only smoked marijuana (RS. 774-781). The entire defense case took up 35 pages of transcript, with much of that including the State's cross-examination (RS. 746-781). No mental health professional testified on Jason Walton's behalf.

After the defense presented that Mr. Walton had never been convicted of a crime, the State decided that it was necessary to rebut the mitigating evidence with two witnesses who testified that Jason Walton was involved in trafficking marijuana and theft. (RS. 783-94).

The jury was instructed that it "must" consider six aggravating circumstances and weigh them against the three mitigating circumstances conceded by the prosecuting attorney.[2] On August 29, 1986 the State provided the trial court with a memorandum in support of a death sentence. This memorandum contained a number of material “facts” that were never presented at the resentencing hearing. (RS. 150-162). The trial judge imposed a sentence of death. Subsequently, on October 16, 1986, the trial court entered written findings supporting the death sentence, adopting the State’s memorandum including facts that are not in the record.

Jason Walton raised the following issues on direct appeal: (1) the trial judge erred by allowing the prosecution to present an expert psychiatrist to testify concerning the crime’s impact upon the victim’s eight-year-old son; (2) the trial judge erred in admitting evidence of Walton’s actions after the homicides and

[2] On September 18, 1986, co-defendant Van Royal's conviction was affirmed but his death sentence overturned and a life sentence ordered by this Court based on the delay in entering written findings in support of death. *Van Royal v. State*, 497 So. 2d 625 (Fla. 1986). Jason Walton’s jury never heard that the shooter received a life sentence.

alleged lack of remorse; (3) the trial court erred in permitting, as rebuttal to the statutory mitigating circumstance of no prior criminal history, evidence of Walton's alleged prior drug offense not resulting in convictions; (4) the prosecutor made improper remarks during closing argument; (5) the trial judge improperly instructed the jury concerning the aggravating circumstances; and (6) the trial judge erred by failing to find applicable mitigating factors and erroneously finding several of the aggravating factors. This Court held that the State's use of psychiatric testimony concerning the trauma to Steven Fridella's child who was found hiding and unhurt at the murder scene was harmless error. The death sentence was upheld. *Walton v. State*, 547 So. 2d 622, 624-25 (Fla. 1989).

C. Collateral proceedings.

In the initial motion for postconviction relief, Mr. Walton alleged, *inter alia*, that he was deprived of the effective assistance of counsel at the resentencing. At the evidentiary hearing in 1991, the witnesses included Bruce Jenkins, Dr. Pat Fleming, Dr. Faye Sultan, Irving McCoy II, Lydia Musheff and Kimberly Fox, and Carolyn Walton. Trial counsel also testified concerning his investigation and preparation.

Carolyn Walton (Jason Walton's mother) testified that Jason Walton was the product of an unhappy bitter marriage that ended in a divorce. When the children were told about the divorce at dinner one evening, it came as a complete shock to

them. The divorce proceedings and child custody plans were the source of considerable pain for both Mr. Walton and his family (PCR. 315, 372-73). At the time, Jason Walton was named after his father, Irving McCoy III, and his mother unintentionally shunned him (PCR. 390). This resentment was apparent to Mr. Walton's siblings (PCR. 315). Mr. Walton's mother pressured him to change his name from McCoy to Walton (PCR. 346, 355).

Carolyn Walton's anger over her failed marriage and fear of raising children on her own led her into a marriage of convenience. Unfortunately, in her rush into marriage, Mrs. Walton failed to realize that her future husband, Porter Gates, was both an alcoholic and a prescription drug abuser (PCR. 374-76). Mr. Walton now had access to drugs and alcohol (PCR. 317-18, 374-76). Porter Gates was an unpleasant drunk. When he drank, he grabbed at women, including Mrs. Walton's daughters (PCR. 350). Mr. Walton witnessed much of this behavior. Mr. Gates encouraged Mr. Walton to drink and smoke pot and gave Mr. Walton the keys to the car, even though Mr. Walton was under the legal driving age at the time and had no license (PCR. 316-18). This marriage ended suddenly. One evening, Porter Gates sat in his favorite chair in the family room, drunk as usual, eating a steak dinner when he choked on a piece of meat (PCR. 318-19, 376-78). Jason Walton and his sister watched him choke, neither one of them knew what to do. They were

unable to be of any help. Mr. Gates never regained consciousness and died eight days later (PCR. 318-19).

After seeing Mr. Gates choke to death, Mr. Walton's drug use escalated (PCR. 380). Because of his drug use, Mr. Walton was admitted into a radical therapy program known as SEED. (PCR. 323). This program not only failed to assist Mr. Walton with his drug addiction, but had a profoundly negative impact on the rest of his life. Not only did Mr. Walton suffer through this experience, but his sister was also subjected to this harsh form of rehabilitation (PCR. 321). The purpose of the SEED program was to break a child down by stripping away their defenses (PCR. 320). When Mr. Walton and his sister were released from the SEED program, they did not talk about their experience (PC-R. 381). They were closely monitored by program officials, even after their release from the facility. Mr. Walton's other sister, Lydia, recalled that he seemed like a robot after his return. He was instructed not to talk to any of his friends that he had before the program (PCR. 351-52).

Mr. Walton finally dropped out of school in the eleventh grade before he received his diploma. He then joined the Army (PCR. 382). While in the Army, his drug use escalated. Mr. Walton graduated to heroin and then branched out to other drugs. He used, injected and snorted every known drug. Up until the time of the crime, he used marijuana on a regular basis, three times a day. He drank beer and

whiskey. But his drug of choice was LSD (PCR. 175). After he was honorably discharged, he returned home continuing his drug abuse. In the six months before his arrest, he smoked marijuana daily, before and after work, and snorted cocaine three to four times a week. Mr. Walton used LSD 20 to 30 times in a four-five month time period (PCR. 20, 31-32, 35-36). On the day of the homicides, Mr. Walton smoked marijuana and drank beer (PCR. 192-93).

Bruce Jenkins was a friend of Mr. Walton who testified in the 1984 trial that he heard Mr. Walton say before the offense that he must "waste" one of the murder victims. In spite of trial counsel's efforts to have him served in order to testify in 1986, authorities did not bring him under subpoena. Mr. Jenkins testified during post-conviction that he was living in the same place in 1986 and was willing to testify (PCR. 22-23), and that a representative of the public defender's office in Fort Pierce found him in 1989 (PCR. 23-24). Had he testified he would have said in the context of the conversation he did not understand "waste" to mean kill (PC-R. 20-22, 27, 45). He could also have testified to Mr. Walton's extensive drug and alcohol use (PCR. 19, 36-37, 39).

During the collateral proceedings, Mr. Walton was evaluated by Dr. Pat Fleming. She had the benefit of interviews with family members and friends, the opportunity to review extensive records, and conduct a substantial battery of testing (PCR. 144-48, 178-81). Dr. Fleming’s assessment of Mr. Walton’s

environment while growing up showed that the Walton family appeared stable on the outside, but in reality, was not stable at all (PCR. 159). Mrs. Walton was gone a great deal, and while on the surface she appeared to be a caring mother, in fact, she was not the primary caretaker, the eldest sister was. Dr. Fleming described Mrs. Walton as a dad basher, who told her children that their real father not only did not care about them, but abandoned them (PCR. 159-60). Dr. Fleming described this as significant in Mr. Walton's overall development (PCR. at 161-162). Dr. Fleming testified that Mr. Walton's life fell apart when he was twelve. His father left. His mother made him change his name (PCR. 312). His mother had to find work outside the home, and Lydia, his eldest sister, assumed more responsibility (PCR. 159-160). On his twelfth birthday, a neighbor gave Mr. Walton marijuana, which started his drug and alcohol abuse (PCR. 173). The stepfather supplied Mr. Walton with alcohol and access to drugs. While he was not physically abusive, he failed to establish any type of structure in the home. This was just as destructive for Mr. Walton. Dr. Fleming said there was a permissiveness about the family (PCR 172). Dr. Fleming characterized Mr. Gates' death as significant in Mr. Walton's life.

Dr. Fleming noted numerous red flags which should have alerted trial counsel to the need for mental health testing (PCR. 150-52). Mr. Walton suffered numerous head injuries before the homicide: he fell from a tree, had two bicycle accidents, one of which caused unconsciousness, and was in a serious car accident

(PCR. 149). Mr. Walton also suffered from a collapsed lung on two occasions. The fact that Mr. Walton had been in drug rehabilitation and had been administered psychoactive medicine while in jail was an indication of drug problems that needed to be investigated further (PCR. 151). Dr. Fleming said that records that showed that Mr. Walton had been to a psychologist or psychiatrist while in high school indicate that there might have been mental health problems (PCR. 151).

Dr. Fleming testified that she found two statutory mitigating factors: the defendant acted under the influence of extreme mental disturbance and the capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired (PCR 190-91). She also testified to many nonstatutory mitigating factors, including: Mr. Walton's mother was distant and unemotional towards him; his parents had a messy divorce when he was twelve; his stepfather gave him alcohol and drugs; his stepfather died in front of him; he started abusing drugs and alcohol at an early age; and he suffered from severe drug and alcohol abuse throughout his life (PCR. 283-84).

Dr. Faye Sultan also testified for Mr. Walton during the postconviction proceedings. She found that Mr. Walton was the product of a highly dysfunctional, chaotic, and neglectful family life (PCR. 4835). She testified that because he was abandoned by his parents, Mr. Walton perceived himself to be inadequate and inferior. He was shy and introverted. He had low self esteem and saw himself as

unappealing and undesirable. He never could understand why any woman would find him attractive. Dr. Sultan testified that these personality traits persisted into adulthood. Mr. Walton was dependent and passive in relationships, easily manipulated, susceptible to control by others and desperate for attention and approval (PCR. 4841). Dr. Sultan found that the quantity and type of drugs Mr. Walton used in the days and weeks leading to his arrest kept him in a chronic, inebriated state.

Trial counsel testified that had he known of Jason Walton's dysfunctional family experience, his childhood drug use, his SEED placement, he would have used them at the new penalty phase (PCR. 55-57, 78-79). He had no strategic or tactical reason for not contacting family members regarding this type of mitigation and there was no reason for his failing to ask the family members he did contact about these subjects (PCR. 129). He recalled Mr. Walton's father seeking him out during the penalty phase (PCR. 58), but he still failed to consider Mr. McCoy as a witness. He was only aware of one stepfather in Mr. Walton's life (PC-R. 125). Trial counsel had overlooked references to many of these matters in the 1984 PSI which he had in his possession (PCR. 127).

Further, he testified that there was no tactical or strategic reason for his failing to utilize a confidential defense mental health expert, in spite of Jason Walton's extreme and unusual anxiety at the time of the trial (PCR. 79-81, 84-85).

This was his first capital case as a defense lawyer (PCR. 52). In fact, trial counsel did not know that hearsay is admissible during the penalty phase. (PCR. 120). He testified there was no reason why he did not seek DOC records on Mr. Walton from 1984, the year of his first conviction, through his 1986 penalty phase, which reflected his good conduct in custody (PCR. 71-72, 121). Likewise, there was no tactical or strategic reason for his failure to utilize the 1984 PSI which indicated the avoiding lawful arrest aggravating factor was not present (PCR. 73-75).

Likewise, he became aware of the life sentence received by codefendant and shooter Terry Van Royal, but he had no strategic or tactical reason for failing to bring it to the sentencing judge's attention and argue the fact in Mr. Walton's behalf (PCR. 82).

Trial counsel also testified that he realized the significance of witness Bruce Jenkins 1984 testimony that Mr. Walton said he must "waste" one of the victims, and that he needed to use Mr. Jenkins to explain that the word did not mean kill, but that law enforcement told him they could not locate Mr. Jenkins to serve him (PCR. 60-61, 75-76). Trial counsel felt it was important for Mr. Walton's 1986 jury to hear Mr. Jenkins testify that he did not understand "waste" to mean kill in the context of the conversation (PCR. 116-18). Finally, trial counsel testified that had he known his introduction of Mr. Walton's rap sheet as evidence of his not having

prior convictions would have opened the door for state evidence of collateral misconduct (*See* R2. 782-94) he would not have done so (PCR. 66-70).

The State's only witness was Dr. Sidney J. Merin (PCR. 413-500). Dr. Merin had been retained as a confidential expert in the trial of Mr. Walton's co-defendant Richard Cooper; he evaluated Cooper for the defense and testified for him. (Cooper record at 32, 396-440). Dr. Merin was aware of the potential conflict and risk that his previous role might "contaminate my thinking" (PCR. 417), but the trial court would not allow him to answer whether he could ethically accept appointment to evaluate two co-defendants (PCR. 417-20). Postconviction counsel objected to Dr. Merin's testimony as to the presence of statutory aggravators in Mr. Walton's case because of his continuing interest in Cooper's welfare and consideration of facts represented to him by Cooper which Mr. Walton could not confront Mr. Cooper about (PCR. 469-75).

At the conclusion of the testimony Judge Downey denied Mr. Walton's claims. Mr. Walton's timely Motion for Rehearing (PCR. 941-54) was denied on May 3, 1991 (PCR. 957). Notice of appeal timely followed (PCR. 958-59). On appeal, this Court remanded the case to the circuit court because Mr. Walton had been denied access to public records. *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993).

Mr. Walton filed his "Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," on November 6, 1998 after receiving documents that had previously been withheld that suggested that Robin Fridella had been untruthful and may have been involved in instigating the murders. Robin Fridella was a key person in this case given her status as the wife of Steven Fridella, the brother of Gary Peterson, and ex-lover of Jason Walton. An evidentiary hearing was conducted on the new claims pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). Relief was denied, once again, and an appeal was taken to this Court. This Court affirmed the lower court's order. *Walton v. State*, 847 So. 2d 438 (2003). The instant appeal involves the faulty *Strickland* analysis employed in the 2003 case.

STANDARD OF REVIEW

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

SUMMARY OF THE ARGUMENT

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

ARGUMENT

THE U.S. SUPREME COURT'S DECISION IN *PORTER V. MCCOLLUM* DEMONSTRATES THAT THIS COURT FAILED TO CONDUCT A PROPER *STRICKLAND* ANALYSIS WHEN CONSIDERING MR. WALTON'S POSTCONVICTION CLAIMS

A. *Porter v. McCollum*.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limiting the circumstances under which a defendant may obtain relief in federal habeas proceedings. Under the AEDPA, any claim that was adjudicated on the merits must be reviewed in accordance with certain limitations:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). It was in the context of this strict standard that the U.S. Supreme Court agreed with the district court's grant of relief in *Porter v. McCollum:*

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.

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

In *Strickland v. Washington*, the U.S. Supreme Court found that, in order to ensure a fair trial, the Sixth Amendment requires that defense counsel provide effective assistance to defendants by "bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 685 (1984). Where defense counsel renders deficient performance, a new resentencing is required if that deficient performance prejudiced the defendant such that confidence is undermined in the outcome. *Id*. at 694. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

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

Id. at 695.

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

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

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

The *Porter* decision establishes that the previous denial of Mr. Walton's claims that he did not receive a reliable sentencing proceeding was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Walton 's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*,

387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Walton's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that the Florida Supreme Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

The circuit court denied Mr. Walton's *Porter* claim, finding the motion to be "untimely, successive., and procedurally barred." However, in *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. This Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* (quotations omitted).

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

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the United States Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926.

The *Witt* Court recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which

are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." Id. at 929. The Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Id. at 926.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to the Florida Supreme Court and the United States Supreme Court. *Id.* at 930. The Florida Supreme 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 the Florida Supreme Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).

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

nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. See *Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that the Florida Supreme 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 the Florida Supreme Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. See *Id.* at 1071.

This Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, inter alia, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, the Florida Supreme Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071. Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole

series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.

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

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

C. *Porter* is not limited to its facts.

The circuit court erred in finding that the opinion in "*Porter* is merely the application of *Strickland* to the particular facts of that case and does not provide a basis for this court to reconsider the Defendant's postconviction claims." (PCR-4. 69). Mr. Walton has not argued or suggested that *Porter* represents a change in the evaluation of prejudice under federal law; rather, it represents a change in how **this Court** has approached that analysis under *Strickland*. In other words, the fact that this Court cited to *Strickland's* test does not mean that the required painstaking search for constitutional error has taken place. *See e.g. Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). In *Sears v. Upton,* the U.S. Supreme Court noted that **"[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case.**" *Sears* at 3264 (emphasis added) . The finding that Mr. Walton's claim is procedurally barred was based on the lower court's misunderstanding of the claim. (PCR-4. 70).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court. In *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004) this Court relied upon the language in *Porter v. State* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

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

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

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

D. *Porter* requires a re-evaluation of Mr. Walton's postconviction claims.

In 2003, this Court upheld the circuit court's denial of Mr. Walton's Sixth Amendment claim that he was denied the effective assistance of counsel in his resentencing. *Walton v. State*, 847 So. 2d 438 (2003). In rejecting Mr. Walton's claims for postconviction relief, this Court employed the exact approach that was

rejected in *Porter* and *Sears*: the analysis consisted of looking for reasonable possibilities that the outcome would not change instead of conducting a "probing and fact-specific analysis" of prejudice. *Id*. at 3266. There were numerous errors in Mr. Walton's case, but each one of them was individually rejected as not having any impact on the outcome. On direct appeal, this Court recognized that the prosecutor exceeded his bounds during the penalty phase:

> In his first point, Walton contends that the trial court erred in allowing a psychiatrist to testify about the condition of the victim's eight-year-old son, who was in the house at the time of the murders. **He asserts that this testimony was presented solely to establish a nonstatutory aggravating factor. We agree.** Although this evidence established why the boy did not testify, it was erroneously admitted because it constituted a nonstatutory aggravating circumstance. *See Elledge v. State*, 346 So.2d 998 (Fla.1977). After examining the entire record, we find that this erroneous admission was harmless. (citations omitted).
>
> The boy's presence and involvement were already before the jury. The jurors knew that he was present at the scene when his father was killed, that he called the police, and that he was living with Walton at the time of Walton's arrest. Because of his substantial involvement, it would be normal to conclude that the incident substantially affected him. The psychiatrist's testimony merely stated the obvious conclusion. **Given the total circumstances, including the confessions and the fact that three execution-killings occurred, we find beyond a reasonable doubt that this testimony did not affect the jury's recommendation. It must be noted that we do not condone the prosecutor's conduct and this conduct could be reversible error under different circumstances.**

Walton v. State, 547 So. 2d 622, 624-25 (Fla. 1989) (emphasis added). We now have "different circumstances" in the form of evidence that Mr. Walton was denied the effective assistance of counsel. Yet, the psychiatrist's testimony did not factor into this Court's 2003 decision.

During the course of postconviction, Mr. Walton argued that trial counsel was ineffective in failing to object to the trial court's findings of fact based on information that is not contained in the record. The resentencing judge found facts that are not in evidence: facts which this Court had specifically found to be inadmissible; facts attributable only to co-defendant Richard Cooper and State informant Paul Skalnik. The trial court order states:

> The evidence indicates Jason D. Walton then grabbed one of the victims by the hair and attempted to fire the .357 at him; the gun misfired. Shortly afterward, Cooper and Royal opened fire . . . All of the victims in the ghastly incident died as a result of gunfire brought down upon them through the leadership of the defendant, Jason, D. Walton.

(RS. 198). These facts are simply not in evidence but the trial court found them important enough to put them in the sentencing order. There is no testimony that even resembles these facts. Without addressing whether counsel's performance was deficient in this regard on appeal following the denial of postconviction relief, this Court found:

> The State cannot identify any source for this information, and there is seemingly no record material from the resentencing proceedings which supports this statement by the trial court. While this presents questions, the inclusion of one errant phrase by the trial court in its sentencing order is not significant evidence that the trial court relied upon the original confessions of McCoy and Cooper in sentencing Walton to death. **Clearly, taken in conjunction with the presence of the overwhelming evidence before the court supporting its conclusions as to Walton's leadership role in the burglary planning, this mistaken statement by the trial court within its final order was harmless.**

Walton v. State, 847 So. 2d at 448. Thus, this Court accepted as true that Mr. Walton was a leader, and found this one error to be harmless without considering this along with the impact of the psychiatrist's testimony. This was an order written in support of a death sentence: it is difficult to imagine a trial court using superfluous language in such an important document.

This Court then summarized Mr. Walton's Sixth Amendment ineffective assistance of counsel claims:

> Walton contends, as part of both his initial and supplemental 3.850 motion filings, that his counsel failed to rebut the prosecution's assertions that he was the mastermind of the murders with evidence available through reasonable investigation, failed to object to the admission of evidence tending to prove Walton's involvement in drug transactions and use, mistakenly opened the door to the prosecution's admission of Walton's "rap sheet," failed to object to improper jury instructions, and failed to perform adequate investigation to obtain full materials to present as mitigating evidence.

Walton v. State, 847 So. 2d at 455. This Court also noted that it is not necessary to rule on deficient performance where "it is clear that the prejudice component is not satisfied." *Id.* at 455-56. "It is unquestioned that under the prevailing professional norms at the time of [Mr. Walton's] trial, counsel had an "obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum at* 453 (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Yet, this Court accepted as reasonable that defense counsel chose only to rely on the information provided by his close relatives: "Clearly, O'Leary was entitled to rely upon the veracity of his client and his client's family." *Walton v. State,* 847 So. 2d at 459. Had trial counsel conducted a thorough investigation, he would have learned about Mr. Walton's stay at the unconventional drug rehabilitation SEED program. As in *Porter,* Mr. Walton's lawyer failed to obtain school, medical, and military records. The U.S. Supreme Court noted that while "Porter may have been fatalistic or uncooperative," trial counsel was not relieved of his duty to conduct an independent mitigation investigation. *Porter* at 453. The decision not to investigate Mr. Walton's background did not reflect "prevailing professional standards" or reasonable professional judgment. *Walton v. State,* 847 So. 2d at 459; *Porter* at 243 (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

This Court first addressed trial counsel's failure to use information from co-defendant Cooper's trial to refute evidence that Mr. Walton was the ringleader.

Instead of evaluating trial counsel's performance as a whole, this Court simply considered this one aspect and concluded that the failure to use information from the other trial was not deficient. With respect to prejudice, this Court held on this individual issue: "In the face of this overwhelming evidence, it is clear that the introduction of two statements by a state attorney in a co-defendant's trial would not have been overly persuasive. **Certainly, non-introduction of this evidence does not undermine our confidence in the outcome.**" *Walton* at 448. (emphasis added). However, under *Porter/Kyles/Sears,* it is clear that this Court must search with painstaking care for a constitutional violation by engaging with mitigating evidence which includes considering the failure to challenge the State's assertion that Mr. Walton was a ringleader in conjunction with the other penalty phase errors.

Next, this Court considered Mr. Walton's claim that trial counsel was ineffective in attempting to show that he had not significant prior criminal history because it opened the door to the introduction of his prior drug charges.

> Regardless of whether trial counsel's performance violated the first prong of the *Strickland* standard, it is absolutely clear that the jury's exposure to evidence of Walton's drug-related criminal activity could not have prejudiced him. The entirety of Walton's guilt and sentencing proceedings revolved around a factual scenario in which it was proven and uncontested that Walton had organized a group robbery to obtain drugs and money obtained through the sale of drugs.

Walton at 457. The State must have thought that the evidence of prior drug charges would have an impact on the sentencing recommendation: otherwise, there would have been no reason to take the time to rebut the defense evidence at trial. Additionally, there was evidence introduced at co-defendant Cooper's trial that Walton was not the ringleader so this was, in fact, contested.

Trial counsel was deficient in failing to investigate and present mitigation. At the resentencing hearing, defense counsel presented three witnesses on behalf of Mr. Walton: a co-worker, a childhood friend, and his mother. Rather than effecting a coherent strategy for the use of the penalty phase witnesses, counsel questioned them vaguely and without strategy. Consequently, an incomplete picture of Mr. Walton was presented to the jury.

Dr. Fleming testified that there were numerous red flags that should have alerted competent counsel that he needed to investigate further. (PCR. 150-52). Trial counsel had no strategic reason for failing to explore Mr. Walton's drug abuse. (PCR. 129). The judge and jury at Mr. Walton's resentencing hearing "heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." *Id.* at 454. This Court recognized the importance of the mitigation that was never presented but failed to consider trial counsel's errors as a whole. *Walton v. State,* 847 So. 2d at 458.

The evidence that was never presented included statutory and non-statutory mitigation. Dr. Fleming summarized Jason Walton's traumatic upbringing which included rejection by his mother, divorced parents, and an alcoholic stepfather. After the stepfather chocked to death in front of Jason and his sister, he entered a controversial treatment center that focused on dehumanizing the patients as a form of rehabilitation. (PCR. 283-84). Had trial counsel conducted even a "cursory" interview or investigation, this information would have been revealed. Had this Court engaged with the mitigating evidence in a meaningful way, it would have been impossible to conclude that trial counsel performed a constitutionally adequate mitigation investigation. This Court must consider the mental health testimony of Drs. Fleming and Sultan that was never presented along with the other admitted errors that were found both on direct appeal and during collateral proceedings. When considering the ineffective assistance of counsel claims along with the error in presenting the highly inflammatory of the psychiatrist regarding the child-witness, confidence in the outcome is undermined. A new resentencing is required.

CONCLUSION

Based on the foregoing, Mr. Walton respectfully requests that this Honorable Court find that the *Porter* claim is properly before this Court and grant a new penalty phase based on the deprivation of the effective assistance of counsel.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Katherine V. Blanco, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33601 this 11th day of April, 2011.

The undersigned counsel further CERTIFIES that this INITIAL BRIEF was typed using Times New Roman 14 Point font.

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