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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY TO THE STATE'S REQUEST TO STRIKE INTRODUCTION

The State's Answer includes a "Notice of Similar Cases" noting that an "alleged change in law" based on *Porter v. McCollum*, 130 S. Ct. 447 (2009) has been asserted in at least 41 capital post-conviction cases in Florida including Mr. Walton's case. The State's Answer also included a "Response to Walton's Introduction" criticizing the "Introduction" in Mr. Walton's Initial Brief as "blatant argument" and thereafter requesting that this Court strike pages 2-5 of Mr. Walton's Introduction in the Initial Brief as a violation of Florida Rule of Appellate Procedure 9.210 and *Sabawi v. Carpenter*, 767 So. 2d 585 (Fla. 5th DCA 2000).

Mr. Walton never intended that the Introduction in question be regarded by this Court as argument. Rather it was intended as a direct legal explanation as to why Mr. Walton and forty others, as the State's Answer reports, had filed the instant proceedings now on appeal based on *Porter*. Although Mr. Walton acknowledges that Florida Rule of Appellate Procedure 9.210 (b) does not specifically provide for an Introduction in an Initial Brief, neither does Florida Rule of Appellate Procedure 9.210 (c) allow for a "Notice of Similar Cases" making the same "alleged change in law" claim in the Answer or require that the Answer must include a ten page statement of the case and facts that includes some seven pages of quotations from this Court's prior opinions in Mr. Walton's case.

In that regard, the case cited by the State in support of striking Mr. Walton's Introduction actually concerns an appellant's request to strike an appellee's argumentative restatement of the statement of the case and of the facts in an Answer brief:

> The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute. Moreover, a restatement of same is discouraged except when necessary to intelligibly specify the areas of disagreement in the statement of the case and facts set forth by the appellant.

Sabawi, 767 So. 2d at 586. Mr. Walton's statement of the case and facts can be found at pages 5-22 of his Initial Brief. It contains a detailed explanation of the penalty phase evidence at trial and the connected evidence supporting ineffective assistance of counsel that was developed in postconviction. Mr. Walton suggests that the State's statement of the case and facts does little "to intelligibly specify the areas of disagreement in the statement of the case and facts set forth by the appellant". Mr. Walton opposes the State's request to strike his Introduction.

REPLY TO STATE'S ARGUMENT IN THE ANSWER

Mr. Walton herein submits this Reply to the State's Answer Brief but will not reply to every argument raised by the State. Mr. Walton neither abandons nor concedes any issues or claims not specifically addressed in this Reply Brief.

Additionally, he expressly relies on the arguments made in his Initial Brief for any claims or issues that are only partially addressed or not addressed at all in this Reply.

The State's Answer restates the questions before this Court in the instant case as follows: "1) Did *Porter* "change" the law on ineffective assistance of counsel and 2) if so, has the alleged 'change in law" been held to apply retroactively under *Witt v. State*, 387 So. 2d 922 (Fla. 1980)?" The State's position is that the answer to both of these questions is no. As the Initial Brief set forth, Mr. Walton does not agree. The State's Answer quotes extensively from the trial court's order below denying *Porter* relief. (Brief at 14-18). Essentially, the lower court completely adopted the State's position that the *Porter* claim below was time-barred, unauthorized, successive, procedurally barred and without merit.

While it is true that "Walton admits that *Porter* did not establish any new fundamental constitutional right at all," (Answer at 24); for the State, that is the end of the inquiry. Mr. Walton's position is that in order to vindicate his rights under *Strickland* to effective assistance of trial counsel, this Court must undertake what it has previously failed to do: conduct a probing, fact-specific prejudice analysis to remedy the *Porter* error that is present in prior opinions.

The Answer also ignores the distinction between "old rule" 3.850 cases like Mr. Walton's which emerged into postconviction in 1990 and those cases being

adjudicated under Rule 3.851(d)(2) as amended from 2000 to the present. Regarding the comparison of retroactive application of *Hitchcock v. Dugger*, 481 U.S. 393 (1987) to *Porter* that Mr. Walton relies on in his Initial Brief at 28-30, the State simply rejects any comparison between *Hitchcock* and *Porter* stating "Walton's analysis is also irrelevant because the cases he cites were decided before the current rule was adopted in 2001. As now written, Rule 3.851(d)(2) makes no exception for the reconsideration of cases to be applied retroactively under *Witt*. Rather, the rule only permits consideration of a new constitutional right which "'has been held to apply retroactively.' Rule 3.851(d)(2)(B)." (Answer at 28). In fact, due process demands that Mr. Walton be entitled to the benefits of changes in the application of *Strickland* based on *Porter* error.

The State says that "This Court has stated that new cases that merely refine or apply the law do not qualify. *Witt*, 387 So. 2d at 929-30." (Answer at 25). That position was not upheld in *Porter*. "*Witt* is in reality a rule of non-retroactivity; cases are not presumed to apply retroactively." (Answer at 25). *Porter* is not a presumption but a reality. *See also Terrell Johnson v. Secretary, Dept. of Corrs.*, slip opinion, No. 09-15344 at 51 (11th Cir. June 14, 2011) ("The Supreme Court has held that based on standards applicable in 1980-the year of Johnson's trial-an attorney representing a capital defendant has an 'obligation to conduct a through investigation of the defendant's background.' *Williams v. Taylor*, 529 U.S. 362,

396 (2000); *cf. Porter v. McCollum*, __ U.S. __, 130 S.Ct. 447, 452 (2009) ("it is unquestioned that under the prevailing professional norms at the time of [defendant's 1988] trial, counsel had an obligation to conduct a through investigation of the defendant's background.")).

The State overreaches when it claims that giving effect to *Porter* error in Florida state law would have a overwhelming effect of the administration of justice and would require relitigation of all IAC cases decided since *Strickland*. (Answer at 25). As noted supra, the Answer specifically identifies only 41 litigants in state court pursuing *Porter* relief.

In *Porter* we see that in retrospect, this Court should not have deferred to the factual findings of the lower court, and the federal court in granting relief did not do so to the exclusion of other aspects of the standard of review. The Answer says that "[t]he standard of appellate review approved in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), for claims of ineffective assistance of counsel was held to not be retroactive under *Witt*. See, *Johnston*, 789 So. 2d at 267.[1] The courts of this state have extensively relied upon the *Stephens* standard of review and continue to do so today." (Answer at 35).

Johnston was an opinion denying state habeas relief to Mr. Johnston concerning his claim, relying on *Stephens*, that the Court applied an incorrect

[1] *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001).

standard of review in its 1991 opinion denying ineffective assistance of counsel at the penalty phase. He argued that "this Court improperly deferred to the trial court on mixed questions of law and fact, rather than conducting a de novo review." *Johnston v. Moore*, 789 So. 2d 262, 266 (Fla. 2001). The State apparently cites to *Johnston* for the proposition that the non-retroactivity of *Stephens* in *Johnston* is material to a similar analysis concerning *Porter*. This Court noted in *Johnston*:

> Applying the principles of *Witt*, we conclude that *Stephens* was not a change in the law that should have retroactive application. Rather, this Court in *Stephens* sought to clarify any confusion resulting from the use of different language in various opinions analyzing ineffective assistance of counsel claims. In doing so, this Court reaffirmed its prior decision in *Rose v. State*, 675 So.2d 567 (Fla. 1996), wherein this Court stated that an ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Stephens*, 748 So.2d at 1032; *see also Rose*, 675 So.2d at 571. "Thus, under *Strickland*, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings." *Stephens*, 748 So.2d at 1033.
>
> In fact, we find this same standard of review was applied when we affirmed the denial of Johnston's motion for postconviction relief in *Johnston v. Dugger*, 583 So.2d 657 (Fla. 1991). In *Johnston*, we independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of Johnston's trial counsel. *See id*. at 662. That being so, there is no legal basis to reconsider our prior decision.

Johnston, 789 So. 2d at 267. This Court's holding expressed a finding that *Stephens* was not of "fundamental significance" pursuant to *Witt* in circumstances where the standard of review articulated therein was the same standard that the Court had already employed in denying Mr. Johnston's penalty phase IAC claim in 1991.

As the Supreme Court explained in *Strickland*:

> Ineffectiveness is not a question of "basic, primary, or historical fac[t]." Rather like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement . . . both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. 466 U.S. at 698, 104 S.Ct. 2052 (citations omitted).

Id. at 267 n.3. This Court was simply reiterating what it had said in *Rose* and in *Stephens*: "The less deferential standard of review inescapably follows from *Strickland*, the seminal ineffective assistance of counsel case, as well as other decisions of the United States Supreme Court on the appropriate standard of appellate review for issues of constitutional magnitude." *Id.* at 1032.

The Answer again quoted at length a section of this Court's opinion in Mr. Walton's initial post-conviction appeal. (Answer at 39-41). The section quoted concerns the post-conviction testimony of trial counsel concerning his investigation as it applied to non-statutory mitigation. Trial counsel presented three

witnesses, Walton's mother, a childhood friend and a co-worker but no mental health experts. (Answer at 39). The direct examination of co-worker, Kimberly Ann Johnson, was approximately two pages, with one entire page of introductory questions (R2. 747-749). Mr. Walton's friend, Lynn Shamber, 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 (R2. 758- 772). Carolyn Walton testified that her son was a good child and soldier and only smoked marijuana (R2. 774-781). The entire defense case took up 35 pages of transcript, with much of that including the State's cross examination (R2. 746-781). This Court found that trial counsel had "performed an adequate and thorough investigation for mitigating evidence before trial." *Walton* IV, 847 So. 2d at 459.

The State's Brief concluded that "any defense suggestion that this Court routinely fails to consider mental health testimony as non-statutory mitigation under *Strickland's* prejudice analysis is patently incorrect" and cited to two cases in support of that proposition. (Answer at 41). (*Hurst v. State*, 18 So. 3d 975, 1014-15 (Fla. 2009) and *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010)).

In fact, Mr. Walton did not suggest that this Court "routinely fails to consider mental health testimony as non-statutory mitigation" but rather was saying that in Mr. Walton's case this Court had accepted as reasonable attorney performance trial counsel's choice to rely upon the limited information provided

by a handful of non-expert friend and family witnesses as part of a less than complete investigation. Trial counsel's failure to conduct a thorough investigation was validated by the 1991 evidentiary hearing testimony of trial counsel, Donald O'Leary, that he was unaware of significant amounts of mitigation evidence regarding his client including testimonial evidence and voluminous records he never investigated. (PC-R. 56). Trial counsel failed to follow up on leads into Mr. Walton's background which included documentation of Mr. Walton's dysfunctional family experience, his childhood drug use, and his SEED drug rehab placement (PC-R. 55-57, 78-79). Trial counsel overlooked references to these matters in the 1984 PSI, which he had in his possession (PC-R. 127). He also failed to obtain any of Mr. Walton's school records (PC-R. 76), to investigate whether Mr. Walton suffered from any head injuries or was involved in any car accidents (PC-R. 77), and to inquire if Mr. Walton was seen by a mental health expert or psychiatrist earlier in his life (PC-R. 77). The majority of the information trial counsel learned about his client came from Mr. Walton's self-reporting or his mother (PC-R. 77). No other verification was done by trial counsel. Trial counsel testified that there was no tactical or strategic reason for failing to retain or consult with a confidential defense mental health expert, in spite of Mr. Walton's extreme and unusual anxiety at the time of the trial (PC-R. 79-81, 84-85). It was trial counsel's first capital case as a defense lawyer (PC-R. 52).

The Answer says that since Mr. Walton's IAC/penalty phase claim – based on the alleged failure to investigate mitigation – was denied based on a lack of deficiency, *Porter* cannot impact this determination where Mr. Walton's trial counsel was found not to be deficient and the trial court considered non-statutory mitigation in accordance with United States Supreme Court precedent. *See Bobby v. van Hook*, 130 S. Ct. 13, 19 (2009)," (Answer at 38). However, in Mr. Walton's case, as in *Porter*:

> The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. [citation omitted]. Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Porter, 130 S. Ct. at 454-55. This Court erred where it ignored the expert testimony of post-conviction mental health expert witnesses Drs. Fleming and Sultan; it is "not reasonable to discount entirely the effect that [their] testimony might have had on the jury or the sentencing judge." *Id.*

The facts supporting this Court's grant of post-conviction relief in *Hurst v. State*, 18 So. 3d 975, 1014-15 (Fla. 2009), actually have much in common with the facts of Mr. Walton's case. In *Hurst* there was also no expert mental health

testimony at trial and as this Court noted that "it can be seen that failure to present the mental mitigation that was available had an identifiable detrimental effect on the process of weighing the aggravation and mitigation in this case". At the post-conviction hearing trial counsel testified "he was simply following the wishes of his client not to be examined" and "that he personally saw nothing that would have required a psychiatric or psychological examination." *Id.* at 1009-10. Likewise, as in Walton, in *Hurst* "counsel not only failed to investigate mental mitigation reasonably suggested by available evidence, he also failed to present the relevant features of Hurst's educational background and school records." *Id.* at 1011.

The State has argued below and in the Answer that Mr. Walton's *Porter* claim is an unauthorized pleading pursuant to Fla. Stat. § 27.702 and *State v. Kilgore*, 976 So. 2d 1066, 1068-69 (Fla. 2007). By truncating and restricting CCRC and registry counsel from investigating prior violent felonies and narrowly interpreting what is new law, Florida law creates a due process problem by improperly restricting attorney responsibilities to fully represent their clients in postconviction. The State relies on *Bobby v. Van Hook*, 130 S .Ct 13 (2009), for the proposition that trial counsel's performance was not deficient and that the ABA Guidelines are not applicable in any way. Yet in *Bobby* the United States Supreme Court recalls that in *Strickland* they held that the ABA Guidelines can play a role in determining whether trial counsel's actions were reasonable: "Restatements of

professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Id*. at 16. The ABA Standards for Criminal Justice, (2nd Edition 1980) were the standards in effect in 1985 when *Bobby* was originally tried and in 1986 when Mr. Walton was tried.

By 1990 when Mr. Walton entered postconviction, new 1989 ABA guidelines set forth that trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id*. at 2537. The 1989 Guidelines are far more extensive and detailed than the 1980 ABA Standards noted in *Bobby*.[2] They are also intended to be applicable to successor counsel on appeal and in postconviction.

Regarding the applicability of the ABA Guidelines the Court held that "[t]he

[2] "The ABA Standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms: "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction." 1 ABA Standards for Criminal Justice 4-4.1, p.4-53 (2d ed.1980) . The accompanying two page commentary noted that defense counsel have "a substantial and important role to perform in raising mitigating factors," and that "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." Id., at 4-55." *Bobby* at 17.

narrow ground for our opinion should not be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation. For that to be proper the Guidelines must reflect "[p]revailing norms of practice," *Strickland*, 466 U.S. at 688, 104 S.Ct 2052, and "standard practice," *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and must not be so detailed that they would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions," *Strickland*, *supra*, at 689, 104 S.Ct 2052. " *Bobby* at 17 f1. Thus there is support in federal caselaw for CCRC preserving federal claims under *Strickland*, *Porter*, and *Sears* despite the alleged state law restrictions on the performance of counsel.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Walton respectfully urges this Court to reverse the lower court order, grant a new penalty phase proceeding, and grant such other relief as the Court deems just and proper.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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 5th day of July, 2011.

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

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