IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1631

LOWER TRIBUNAL No. 1983-CF-001682

ROBERT IRA PEEDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

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

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

"PCR2" -- record on appeal from the denial of relief after an evidentiary hearing;

"PCR3" -- record on appeal from the summary denial of relief of successive motion for postconviction relief.

REQUEST FOR ORAL ARGUMENT

Mr. Peede has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Peede, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

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

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT ... i

REQUEST FOR ORAL ARGUMENT ... ii

STANDARD OF REVIEW ... ii

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... iv

INTRODUCTION ... 1

STATEMENT OF THE CASE ... 5

STATEMENT OF THE FACTS ... 7

SUMMARY OF ARGUMENT ... 34

ARGUMENT ... 35

MR. PEEDE'S SENTENCE OF DEATH VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. McCOLLUM* ... 35

A. INTRODUCTION ... 35

B. *PORTER* QUALIFIES UNDER *WITT* AS A DECISION FROM THE UNITED STATES SUPREME COURT WHICH WARRANTS THIS COURT REHEARING MR. PPEDE'S INEFFECTIVENESS CLAIMS ... 37

1. Retroactivity under *Witt* ... 37

2. *Porter v. McCollum* and review of ineffective assistance of counsel claims under *Strickland* ... 47

C. MR. PEEDE'S CASE ... 56

CONCLUSION ... 69

CERTIFICATE OF SERVICE 70

CERTIFICATION OF FONT 70

TABLE OF AUTHORITIES

Page

Armstrong v. Dugger,
833 F.2d 1430 (11th Cir. 1987) 44

Bertolotti v. State,
534 So. 2d 386 (Fla. 1988) 52

Booker v. Singletary,
90 F.3d 440 (11th Cir. 1996) 44

Cherry v. State,
781 So. 2d 1040 (Fla. 2001) 50

Christmas v. State,
632 So. 2d 1368 (Fla. 1994) 10

Delap v. Dugger,
513 So. 2d 659 (Fla. 1987) 41, 43

Delap v. Dugger,
890 F.2d 285 (11th Cir. 1989) 44

Demps v. Dugger,
514 So. 2d 1092 (Fla. 1987) 41

Diaz v. Dugger,
719 So. 2d 865 (Fla. 1998) 52

Downs v. Dugger,
514 So. 2d 1069 (Fla. 1987) 41, 42, 43

Espinosa v. Florida,
505 U.S. 1079 (1992) 2

Furman v. Georgia,
408 U.S. 238 (1972) 47

Grossman v. Dugger,

708 So. 2d 249 (Fla. 1997)....................51

Hall v. State,

541 So. 2d 1125 (Fla. 1989).................... 36

Hitchcock v. Dugger,

481 U.S. 393 (1987) 2, 40, 43-44

Hudson v. State,

614 So. 2d 482 (Fla. 1993).................... 52

James v. State,

615 So. 2d 668 (Fla. 1993) 3, 36, 47

Kennedy v. State,

547 So. 2d 912 (Fla. 1989) 52

Koon v. Dugger,

619 So. 2d 246 (Fla. 1993).................... 52

Kyles v. Whitley,

514 U.S. 419 (1995).................... 38

Linkletter v. Walker,

381 U.S. 618 (1965) 40

Lockett v. Ohio,

438 U.S. 586 (1978) 2, 41, 42

Marek v. Dugger,

547 So. 2d 109 (Fla. 1989) 52

Maynard v. Cartwright,

486 U.S. 356 (1988).................... 2

Peede v. State,

474 So. 2d 808 (Fla. 1985) 5, 14

Peede v. State,
748 So. 2d 253 (Fla. 1999) 6

Peede v. State,
955 So. 2d 480 (Fla. 2007) 6, 50-51

Penry v. Lynaugh,
492 U.S. 302, 319 (1989) 49

Phillips v. State,
608 So. 2d 778 (Fla. 1992) 52

Porter v. McCollum,
130 S.Ct. 447 (2009) .... ii, 1, 34, 35, 38, 48-49, 53

Porter v. State,
788 So. 2d 917 (Fla. 2001) 1, 47-48, 53

Riley v. Wainwright,
517 So. 2d 656 (Fla. 1987) 41

Rose v. State,
675 So. 2d 567 (Fla. 1996) 51-2

Sears v. Upton,
130 S.Ct. 3529 (2010) 45, 54-55

Smalley v. State,
546 So. 2d 720 (Fla. 1989) 46

Sochor v. State,
883 So. 2d 766 (Fla. 2004) .... ii, 49

Stephens v. State,
748 So. 2d 1028 (Fla. 1999) 51, 52-53

Stovall v. Denno,

388 U.S. 293 (1967).. 40

Strickland v. Washington,
466 U.S. 668 (1984).. 1, 34, 35

Teague v. Lane,
489 U.S. 288 (1989).. 44

Thompson v. Dugger,
515 So. 2d 173 (Fla. 1987).. 3, 36, 41, 42

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977).. 38

Witt v. State,
387 So. 2d 922 (Fla. 1980).. 34, 36, 38-39, 40

INTRODUCTION

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

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

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

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

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

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

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

issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

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

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

STATEMENT OF THE CASE

Mr. Peede was indicted on May 25, 1983, with one count of first-degree murder in the death of his wife, Darla Peede (R. 1008). Mr. Peede pled not guilty to the charge.

A capital jury found Mr. Peede guilty on February 17, 1984 (R. 1235). The jury recommended death by a vote of eleven (11) to one (1) (R. 1247). On August 27, 1984, the trial court imposed a sentence of death on the count of first-degree murder (R. 1251-2).

On direct appeal, this Court affirmed Mr. Peede's conviction and sentence, but overturned the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense or moral justification. This Court found that there was no heightened premeditation proven which would substantiate the aggravating circumstance. *Peede v. State,* 474 So. 2d 808 (Fla. 1985).

In response to a death warrant signed on May 6, 1988, Mr. Peede filed his initial Rule 3.850 motion on June 6, 1988 (PC-R1. 4). Postconviction counsel for Mr. Peede filed an amended 3.850 motion of February 21, 1995 (PC-R1. 448-612).

On June 21, 1996, the state court issued an order summarily denying Mr. Peede's 3.850 claims (PC-R1. 632). Mr. Peede appealed the summary denial of his 3.850 motion to this Court (PC-R1. 1690).

This Court remanded Mr. Peede's case to the circuit court for an evidentiary hearing. *Peede v. State*, 748 So. 2d 253 (Fla. 1999).

On November 10 and 12, 2003, and January 12 through 14, 2004, an evidentiary hearing was held. After the hearing, the circuit court denied all relief (PC-R2. 1774-86).

Mr. Peede appealed that order to this Court and simultaneously filed a petition for writ of habeas corpus on October 6, 2005. This Court denied relief. *Peede v. State*, 955 So. 2d 480 (2007).

On May 5, 2008, Mr. Peede filed a petition for writ of habeas corpus before the federal district court. That petition is still pending.

On or about November 16, 2010, Mr. Peede filed a successive Rule 3.851 in the circuit court (PC-R3. 17-45). The State filed an answer to the motion on December 17, 2010 (PC-R3. 46-69).

The circuit court held a case management conference on March 14, 2011.

On May 2, 2011, the circuit court denied Mr. Peede's successive Rule 3.851 motion (PC-R3. 87-92).

Mr. Peede timely filed a notice of appeal (PC-R3. 100-101).

STATEMENT OF THE FACTS

THE TRIAL

Shortly after Mr. Peede's extradition back to Florida, the Orange County Public Defender's Office was appointed to represent him. Theotis Bronson was first assigned to represent Mr. Peede. Just before trial commenced, Joseph DeRoucher, the Public Defender for Orange County, joined the defense as penalty phase counsel. A motion for a psychiatric examination was requested by trial counsel on June 2, 1983 (R. 1015-6). Dr. Robert Kirkland was appointed to evaluate Mr. Peede. That evaluation occurred on October 11, 1983, at the Orange County Jail, for the purposes of determining if Mr. Peede was competent to stand trial or insane at the time of the offense (R. 1239). Dr. Kirkland evaluated Mr. Peede for a total of an hour and a half (R. 935). He conducted no psychological testing, received no medical records, and spoke with no collateral witnesses (R. 953-5).

In his report, Dr. Kirkland stated that Mr. Peede's behavior was "highly suggestive of a paranoid disorder", but he did not find him insane or incompetent to stand trial.[5] (R. 1239). Dr. Kirkland also stated that he did not feel he could be of any assistance to the defense at that time (R. 1239). No further contact was had with Dr. Kirkland and defense counsel until shortly before the penalty phase of Mr. Peede's trial (PC-R2. 176).

Prior to Mr. Peede's trial, he requested that he be allowed to represent himself. The trial court inquired about Mr. Peede's background and in doing so, Mr. Peede indicated that he had seen mental health professionals in his past, though he did not think that he ever saw a psychiatrist (R. 1435). At the conclusion of the court's inquiry, the court denied Mr. Peede's request to represent himself (R. 1439).

During the State's opening argument, the prosecutor informed the jury that Mr. Peede had murdered his wife and that the murder was premeditated. The prosecutor also told the jury that the victim, Darla Peede "was afraid that [Mr. Peede] was going to kill [her]." (R.

[5]Dr. Kirkland's conclusions were not presented to the jury (R. 1241-2).

503). So, Darla had moved to Miami and "did all the things you do when you're about to set up a life on your own away from your husband . . ." (R. 503-4).

Indeed, the State presented the testimony of Darla Peede's daughters, Tanya Bullis and Rebecca Keniston. Ms. Bullis testified that on the day her mother went to meet Mr. Peede at the airport, that her mother told her that she "was afraid of being taken to North Carolina." (R. 599-600). Additionally, Ms. Bullis' mom told her that she was afraid of being put with the other people that Mr. Peede had threatened to kill on Easter (R. 600).

Trial counsel countered the prosecutions factual scenario during his opening statement when he told the jury that Darla Peede's death occurred at the hands of Mr. Peede, but that it occurred while Mr. Peede was in a "fit of rage" (R. 508). Trial counsel also told the jury that Mr. Peede was described as having two distinct personalities: calm and serene and at "[o]ther times things would set him off, drive him into a rage . . ." (R. 508). Despite, trial counsel's comments to the jury about Mr. Peede's mental state, at Mr. Peede's capital trial, no expert testimony or evidence was presented to the jury in this regard at the guilt phase.

At trial, the jury learned that Mr. Peede confessed to the killing his wife shortly after he was arrested in North Carolina. In his confession, he admitted killing his wife, Darla Peede, during their trip from Florida to North Carolina (S-Ex. 14). However, during the confession, he repeatedly stated that he could not remember the actual killing, but that he just "nutted up." (S-Ex. 14 p. 227).

Mr. Peede also told law enforcement that during the drive to North Carolina, he and Darla began to discuss the fact that Mr. Peede had seen her picture in some magazines containing naked females (R. 721). Mr. Peede was angry and upset about her posing for these magazines (R. 749). Mr. Peede told law enforcement that he never intended to kill his wife (R. 730). Mr. Peede also believed that his wife had posed for some photos with his ex-wife and a man named, Calvin Wagner (R. 722).

Throughout the course of his trial, Mr. Peede's behavior was extremely bizarre. During the course of the trial, Mr. Peede would appear with paperclips in his ear and a hand drawn "x" between his eyes. Also, he refused to wear the civilian clothes brought by his attorneys and insisted upon wearing his jail jumpsuit (R. 1207, 1209).

At several points he demanded that no cross examination be conducted of several key witnesses in the State's case. These witnesses included Darla Peede's daughter, Tanya Bullis and Mr. Peede's ex-wife, Geraldine Peede (PC-R1. 1248-9, 1274-6). Mr. Peede told the jury that his attorneys were acting against his wishes in cross-examining these witness (PC-R1. 1275-6). Soon afterwards, Mr. Peede requested that he be allowed to absent himself from the remainder of the trial (PC-R1. 1305). After the trial court and counsel met with him at the jail, the decision was made to waive Mr. Peede's presence at his trial (PC-R1. 1306-21). Thereafter, the jury, who received no explanation as to Mr. Peede's disruptive conduct, soon convicted him of first degree murder (PC-R1. 1234-5).

After the guilt phase, trial counsel requested that another mental health examination be conducted for the purposes of the penalty phase. The trial court ordered Dr. Kirkland to re-evaluate Mr. Peede on February 24, 1984 (R. 1240). The report from that examination was filed with the trial court on March 2, 1984 (R. 1241-2). The evaluation lasted only forty minutes (D-Ex. 10).

After explaining Mr. Peede's account of how the murder took place, Dr. Kirkland concluded that the entire event was a "mitigating circumstance", but that Mr. Peede was not insane at the time of the offense. However, he did "feel that the capital felony was committed while the defendant was under the influence of extreme mental and emotional disturbance." (R. 1241). This report was not provided to the jury during the penalty phase.

In preparation for the penalty phase, trial counsel contacted Percy Brown, a cousin of Mr. Peede's, who was still living in North Carolina. They requested that he gather letters on Mr. Peede's behalf from several family members to use during the penalty phase (S-Ex. 7; R. 954-6). The letters were sent to trial counsel and were the only exhibits introduced during the penalty phase on Mr. Peede's behalf.

The penalty phase took place on March 5, 1984. During the hearing, the State called two witnesses to testify about Mr. Peede's prior second degree murder conviction from California. One witness was a police officer who investigated the case, and the other was Austin Backus, who witnessed the shooting, while he was a young teenager.

In mitigation, trial counsel introduced the letters and called only Dr. Kirkland to testify (R. 948). During his testimony, Dr. Kirkland gave no specific diagnosis of what Mr. Peede's condition was, but stated that Mr. Peede's description of events showed "strong paranoid elements." (R. 952). He further stated that it was his opinion that Mr. Peede committed the murder while under the influence of extreme mental and emotional disturbance (R. 950).

The extent of Dr. Kirkland's testimony can be summarized in a single question and answer about Mr. Peede's mental state:

> Q: Were you able to identify in Mr. Peede any, any[sic] recognizable mental illness?
>
> A: I felt, and I continue to feel, that Mr. Peede has certain, certain type of character structure that he is maybe, in lay terms, he's sort of a tough guy, macho, explosive at times. But I was most impressed with certain rather strong paranoid elements that developed into a scenario involving the two wives, and which I think played a large part in Darla's death.

(R. 951-2). And, on cross-examination, the State impeached and minimized Dr. Kirkland's testimony based on the fact that his opinion was based solely on Mr. Peede's self-report and no medical or other background information; not even the letters provided by his family (R. 954-6).

The jury recommended death by a vote of eleven to one (R. 1247).

The trial court sentenced Mr. Peede to death on March 23, 1984, finding that the aggravating circumstances of a prior violent felony and the offense being committed in a cold, calculated, and premeditated manner had been established and were not outweighed by the sole mitigating factor that Mr. Peede was under the influence of extreme mental or emotion disturbance at the time of the offense (R. 1263-5). In weighing the mental health mitigation, the trial court minimized the import of the statutory mitigator: "Viewing the testimony of Dr. Robert Kirkland that the Defendant experienced a specific paranoia that the victim and his ex-wife, Geraldine Peede, were posing in nude

magazines, the Court, **giving the Defendant the benefit of the doubt**, will consider it a mitigating circumstance.[6]" (R. 1264). Thus, the court also minimized Dr. Kirkland's testimony because it was based solely on self-report. In terms of other mitigation, the trial court gave no weight to the letters sent by Mr. Peede's family (R. 1265). No other mitigation was found by the trial court (Id.).

DIRECT APPEAL

On direct appeal, this Court struck the aggravating circumstance that the murder had been committed in a cold, calculated an premeditated manner:

> Although we find that the evidence of premeditation is sufficient to support a finding of premeditated murder, there was no showing of the heightened premeditation, calculation, or planning that must be proven to support a finding of the aggravating factor that Darla's murder was cold, calculated, and premeditated. The record supports the conclusion that Peede intended to take Darla back to North Carolina as a lure to get Geraldine and Calvin to come to a location where he could kill them. It does not establish that he planned from the beginning to murder her once he had completed his plan in North Carolina. By prematurely murdering her at the time he did, he eliminated his bait.

Peede v. State, 474 So. 2d 808, 817 (Fla. 1985). However, this Court concluded that the remaining two aggravating factors: prior violent felony conviction and committed in the course of a kidnapping, outweigned "the one marginal mitigating circumstance" found by the trial court. *Id.* at 818.

POSTCONVICTION PROCEEDINGS

[6] During the trial, Geraldine Peede denied ever taking nude photographs or posing in any "Swinger" type magazines (R. 1268-9, 1272-3).

After this Court remanded Mr. Peede's case for an evidentiary hearing, postconviction counsel requested that the circuit court determine if Mr. Peede was competent to proceed. Experts were appointed and hearings were held on March 24, 2000, and May 24, 2000.[7] During the hearings, four doctors testified regarding Mr. Peede's competency. Two doctors found Mr. Peede to be incompetent due to his inability to assist postconviction counsel. The other two doctors could not make a diagnosis because Mr. Peede refused to see them. However, those doctors could not rule out the possibility of Mr. Peede being unable to assist his counsel. The court determined that Mr. Peede was competent to proceed on June 22, 2000.

After the hearing, the circuit court granted Mr. Peede's counsel's motion to withdraw. New counsel was appointed to represent Mr. Peede.

Mr. Peede's new counsel also believed Mr. Peede was incompetent to proceed. Postconviction counsel related information to the court regarding their contacts with Mr. Peede: New counsel explained to Mr. Peede that they required input from him in order to prepare for his evidentiary hearing, during a telephone conversation on November 6, 2001. Mr. Peede's response to counsel was, "there is nothing wrong with me and I'm not going to talk to anybody. I'm not crazy.". Subsequently, Mr. Peede's counsel met with Mr. Peede in person at Union Correctional Institution on November 13, 2001. Mr. Peede informed counsel that it was very difficult for him to talk about himself and began to weep. Counsel's attempts to calm Mr. Peede failed and he became increasingly emotional. Mr. Peede related that there are "things that I don't like about myself.". Suddenly, Mr. Peede's facial expression altered and he began yelling "it's a lie, it's a lie" and began hyperventilating. His face reddened and he told counsel, "if Darla loved me, then she would have never posed for pornographic pictures.". As Mr. Peede talked, he began shaking. When he finished his explanation, he began crying uncontrollably. For the next ten minutes, Mr.

[7]At the hearing Mr. Peede requested that new counsel be appointed to represent him.

Peede stood in a corner facing the wall with his back toward counsel. He continued to shake. Mr. Peede did not respond to attempts to comfort him. After several minutes, he sat down. He was silent. Then he began crying again and got up and went to the corner.

Additionally, postconviction counsel was aware that Mr. Peede had a history of bizarre behavior when discussing his life. For example, during a meeting with Dr. Teich, the defense's mental health expert, Mr. Peede became so upset that he repeatedly banged his head against the table. Dr. Teich had to restrain Mr. Peede from hurting himself by cradling Mr. Peede's head in Dr. Teich's hand.

The court ordered a competency evaluation and appointed Dr. Berns to conduct the evaluation. The court ordered Mr. Peede moved to the Transitional Care Unit (TCU) to better facilitate the competency proceedings. During his stay there, Mr. Peede was monitored by Department of Corrections employee, Dr. Frank. Dr. Frank was never instructed to perform a competency evaluation of Mr. Peede.

A second competency hearing was held on July 18, 2003. The only witness called to testify at the hearing was Dr. Frank. Dr. Frank explained that he evaluated and monitored Mr. Peede for signs of mental illness and to determine if Mr. Peede could maintain the activities of daily living. Dr. Frank considered Mr. Peede to be competent even though he did not consider the factors related to competency to proceed in postconviction proceedings. Additionally, in response to the court's questioning Mr. Peede's ability to assist postconviction counsel, Mr. Peede stated: "Truth is, it hurts too much. So I'm not thinking about it, and I don't want to talk about it . . . I don't think about it and I don't talk about it. That's the end of it. If you want to kill me, kill me. That's it. I'm through with it.".

The circuit court found Mr. Peede competent. Mr. Peede appealed the circuit's finding of competency on September 2, 2003, prior to his evidentiary hearing. This Court dismissed Mr. Peede's appeal as prematurely filed.

An evidentiary hearing was held on November 10 and 12, 2003 and January 12 through 14, 2004, on Mr. Peede's claims of ineffective assistance of counsel in both the guilt and penalty phases, a *Brady v. Maryland*, that Mr. Peede was incompetent at the time of his trial, and was deprived of a meaningful mental health expert in violation of *Ake v. Oklahoma*.

At the evidentiary hearing, evidence was presented regarding two key pieces of exculpatory evidence which were never disclosed to trial counsel. Additionally, evidence was presented establishing substantial mitigation which was available at the time of trial but never investigated or presented to the jury or the judge who sentenced Mr. Peede to death.

The evidence in mitigation establishes that: Robert Ira Peede was born on June 30, 1944 to Florentina (Tina) Brown Peede and John Ira Peede (PC-R2. 6). They lived in North Carolina, and he had no other siblings (PC-R2. 6). While his family appeared stable and well-to-do, that was only their public face. John Peede was known to have numerous affairs during his marriage to Tina. Because of this public humiliation, Tina began to drink. She also retaliated by having affairs of her own. As Robert grew up, he was constantly surrounded by his parents' lack of fidelity and sexual improprieties which had a profound impact on his own relationships.

Mr. Peede's relationship with his mother was especially contentious because she took most of her frustration out on her only child, Robert. Robert, as the only child, was under extreme pressure from his mother to excel in his education (PC-R2. 12-3). When he failed to learn at a fast enough pace or bring home the best grades, his mother would whip or spank him (PC-R2. 13-5). Tina's sister, Nancy, who lived with the Peedes most of Robert's childhood recalled several whippings Robert suffered because he could not learn as other children did (Id.). It seemed like the whippings had more to do with Tina's mood rather than misbehavior (PC-R2.15). Tina became so upset at Robert over his poor education, that she began to whip him several times a week for no reason (PC-R2. 13-5). The relationship between mother and son rapidly deteriorated.

Robert Peede also suffered extreme physical impairments during his teenage years through his early adulthood. He developed scoliosis and was hospitalized for six months in a body cast (PC-R2. 17). Outside of his Aunt Nancy, no other family members visited him. Mr. Peede also suffered from a rare skin condition which would cause his hands and feet to blister if any pressure was placed on them (PC-R2. 9-10, 64-5; D-Exs 15 & 16). Due to this, he was unable to walk without extreme pain (Id.). In most instances, he had to be carried around

in a wagon to prevent his skin from blistering and peeling off. (Id.). When not traveling in the wagon, he was physically carried by his mother (D-Ex. 15). Mr. Peede also required speech therapy to assist in his problems speaking (PC-R2. 11).

These disabilities had a profound impact on Robert Peede's adolescence. While he was close with his two cousins, Michael and Lynwood Brown, he was unable to play with them in any meaningful way (PC-R2. 85-8). While they played baseball and participated in other activities, he was relegated to his wagon watching from afar (PC-R2. 66, 88). In an effort to compensate for his physical handicaps, Mr. Peede was very generous with his money and possessions (PC-R2. 15). He would often give his friends cash or buy them whatever they wanted in an effort to feel included (PC-R2. 66).

When Mr. Peede's generosity failed to gain the friends he so desperately wanted, he began taking the blame when his cousins misbehaved (PC-R2. 15). Even when it was obvious the Mr. Peede could not be involved with certain actions, he still accepted responsibility for other's conduct. This would often result in further whippings from his mother who saw this as his continuing failure to live up to expectations (PC-R2. 12). For example, once, his cousin Michael broke an expensive toy and Mr. Peede told everyone he did it so that he would take the whipping over his cousin (PC-R2. 15). When Nancy confronted him because she saw Michael break the toy, he continued to state that it was he who broke it (Id.).

Many of Mr. Peede's family members recognized that he suffered from mental problems. Robert Peede was easily manipulated, very moody, and would keep things bottled up inside until he would often explode in loud rants (PC-R2. 69). Often family members would never know what to expect from one moment to the next with Mr. Peede's behavior. These episodes caused Tina to take him to a psychiatrist when he was eight or nine years old. Robert would be treated by this doctor twice a week for several years. And, it was learned that some of Mr. Peede's childhood trauma resulted from his witnessing his father skin minks after they hunted (PC-R2. 16). Mr. Peede explained that he could not understand why his father was hurting such beautiful animals. However, the treatment sessions did not curtail the extreme mood swings in Mr. Peede's experienced.

Mr. Peede also had a difficult time interacting with women. While his cousins, with whom he was very close, were socializing and dating, Mr. Peede was extremely awkward around women (PC-R2. 67). He constantly questioned his own sexual adequacy in his romantic relationships (PC-R2. 67, 89-90). However, he felt things were changing when he met Kay Albright. Although she was eighteen and he, only sixteen, they soon began to date (PC-R2. 68). Soon afterwards they married. Mr. Peede stayed in school while they were married. The couple lived with Mr. Peede's parents (PC-R2. 18-9).

Life began to stabilize for Mr. Peede after his marriage. Mr. Peede became a father on April 1, 1962 when his son, Michael Peede, was born. A new father, Mr. Peede was not even eighteen years of age. However, his joy was short lived because Kay left Mr. Peede a few years after Michael's birth to reunite with a former boyfriend (PC-R2. 19). She soon moved to California, with their son. Mr. Peede did not see his son for a long time afterwards. He took the collapse of his marriage very hard (Id.). His relationship with his first wife caused him to further question his sexuality (PC-R2. 89). Because he had seen his parents consistent infidelity, and then his own wife left him for another man, Mr. Peede doubted the loyalty of women. While he greatly wanted to be in a relationship, he was unable to trust any woman to be faithful to him. Mr. Peede's conflict with women caused him to attempt suicide by shooting himself in the stomach; he believed he was saving his girlfriend the trouble (PC-R2. 101).

However, Mr. Peede did marry again. This time to a woman named Geraldine. However, their relationship was far from harmonious. Geraldine would often insist that Mr. Peede spend all his time outside of work with her (PC-R2. 69). His cousins and many of his friends did not get along with Geraldine which, once again, alienated Mr. Peede from his social circle (Id.). Mr. Peede's friends were not allowed to come to his house while his wife was there. His friends nicknamed his wife "Death Ray." (Id.).

Another reason that Mr. Peede's friends ceased interacting with him was that he began accusing them of sleeping with is wife (PC-R2. 70-1, 94). Even though they constantly told Mr. Peede that they did not like his wife and would never betray him in such a way, he still believed they were having affairs with his wife (Id.). On some occasions, these confrontations with his friends became violent and caused Mr.

Peede to further isolate himself. During the evidentiary hearing, Mr. Peede could not resist screaming at John Logan Bell because Mr. Peede believed Bell had slept with Geraldine and fathered one of Mr. Peede's children, even though that was not true and impossible (PC-R2. 47-52).

As an adult, Mr. Peede's life took a drastic turn with the death of his mother. Because of the stresses in her own marriage, Tina Peede began drinking even more heavily and taking Valium (PC-R2. 21-2). Her sister, Nancy often found bourbon and whiskey bottles laying around the house (Id.). Mr. Peede was very concerned about his mother's increased alcoholism (PC-R2. 23). In an attempt to force her to stop drinking, he refused to allow his children to visit her (Id.). Tina saw this as another failure in her own life. After a fight between Geraldine and Tina, in which Mr. Peede interjected and refused to allow his mother to see her grandchildren, Tina shot herself in the head with a shotgun (PC-R2. 23). Mr. Peede's aunt, Nancy, cleaned up Tina's home afterwards. She found empty vodka and bourbon bottles along with Valium pills all over the floor (PC-R2. 23).

After his mother's death, Mr. Peede could no longer cope and he set off for California (PC-R2. 24).

While in California, Mr. Peede visited with his son. However, Mr. Peede soon found that he could not cope with being around his first wife and he set off again. While at a bar in Eureka, California, he got into a fight with the bartender when the bartender tried to kick out an underage woman. Mr. Peede shot two men who chased him out of the bar. He was charged with homicide and assault and pled guilty. He was sentenced to eight years in prison.

While in prison, Mr. Peede's mental health problems escalated. He was diagnosed with schizophrenia and reported delusions involving his ex-wives (PC-R2. 1221-8). He explained that Geraldine was posing in "swinger" magazines. Although the magazine photos show no faces, he insisted that it was her because of the number of bricks in the fireplace behind the woman in the picture (PC-R2. 46-7). When his aunt, Nancy, visited him in prison, she could not believe Mr. Peede's mental state (PC-R2. 26). He insisted that she leave at once before the "people" get her (Id.).

After being released from prison, Mr. Peede met Darla. They married ten days later. Darla soon realized that Mr. Peede had serious psychological problems (D-Ex. 7). Darla wanted Mr. Peede to obtain psychiatric help as soon as he returned to North Carolina (D-Ex. 7). However, that help never came. Darla went to live with her daughters in Miami, Florida soon after Mr. Peede returned to North Carolina. Mr. Peede hoped to reconcile with her, but his delusional beliefs about her infidelity clouded his thinking about his wife. On the trip from Miami to North Carolina, Mr. Peede stabbed his wife, killing her. Mr. Peede expressed his overwhelming remorse about killing Darla.

Also, during the evidentiary hearing, several experts were called to give their assessment of Mr. Peede's mental condition. Dr. Faye Sultan, a psychologist, not only interviewed Mr. Peede on several occasions, but met with several family members and reviewed extensive medical records detailing Mr. Peede's physical and psychological impairments. After reviewing this information, she opined that Mr. Peede "met[] all of the diagnostic criteria for Delusional Disorder, Jealous Type, which is one of the psychotic disorders." This Axis I disorder is described as "a presence of one or more nonbizarre delusions that persist for at least a month, a delusional belief that is simply not true. Apart from the direct impact of the particular delusions, psychosocial functioning may not be markedly impaired and the behavior of the person might not be obviously odd or bizarre.". Mr. Peede was also diagnosed with an Axis II, Paranoid Personality Disorder (PC-R2. 91).

Dr. Brad Fisher, who also evaluated Mr. Peede, agreed with Dr. Sultan's diagnosis (PC-R2. 217-8, 222). Dr. Fisher testified about the pervasiveness of Mr. Peede's psychosis over time (PC-R2. 217-8, 222). As to the delusional disorder diagnosis, Dr. Fisher testified:

> [H]e's paranoid generally but he has Delusional Disorder, 297.1, in particular areas, which his are in the area of paranoia that are related to jealously. So you say he's got a problem generally, this paranoia. But he has a delusional disorder, a more pronounced mental disorder when it gets into the area of jealously and paranoia.

(PC-R2. 224). Dr. Fisher explained that Mr. Peede's paranoia was identified by previous doctors who evaluated Mr. Peede during competency evaluations, and from the statements of friends and family throughout his life (PC-R2. 226).[8] And, based on Dr. Fisher's assessment, Mr. Peede's paranoid personality and delusional disorder were well established prior to the murder of his wife (PC-R2. 227-23).

Dr. Fisher testified further regarding the thoroughness of Dr. Kirkland's evaluation prior to and during Mr. Peede's trial[9]:

> He speaks in his reports to the same – this same delusional system. He had delusional problems and paranoia. But when it comes to the testimony, the testimony did not speak to these delusional systems, the delusion itself or the delusional systems. Neither did it speak to how this delusional process and the paranoia might have related to the crime. So that whereas he had them in the report, or at least he spoke to the delusional issue and to the paranoia, it didn't come out and neither was it connected with a crime in the actual testimony that he gave.

(PC-R2. 231).

Dr. Fisher also testified to the norms, back in 1983 for conducting psychological evaluations, since he also evaluated patients in that time period. This included going beyond just the information obtained from a patient. "[L]ook beyond just self-report, especially in these forensic cases where the possibility of malingering is there. And this is almost always done through records that are there." (PC-R2. 232).

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[8]Both Drs. Berns and Krop diagnosed Mr. Peede as suffering from a paranoid disorder during their evaluations (PC-R2. 1221-8). Addtionally, Dr. Fisher reviewed statements from Mr. Peede's family and friends regarding past manifestations of paranoid behavior. Also, his analysis of past medical records supported his findings (PC-R2. 220).

[9]Dr. Fisher reviewed Dr. Kirkland's two reports and his trial testimony (PC-R2. 230).

Dr. Frank, who was employed by the Florida Department of Corrections, Transitional Care Unit, at the time he evaluated Mr. Peede, and called to testify by the State, also agreed that Mr. Peede suffered from Delusional Disorder of the Jealous Type[10] (PC-R2. 407).

Even the State's other expert, Dr. Sidney Merin, diagnosed Mr. Peede as a paranoid personality disorder. And while Dr. Merin disagreed with the other experts about the diagnosis of delusional disorder, he testified that they performed thorough and "good" evaluations. Further, Dr. Merin did not have the opportunity to meet with Mr. Peede and only relied on background information for his assessment (PC-R2. 323-8).

[10]Dr. Frank monitored Mr. Peede for a period of three months during his stay at the Transitional Care Unit. During that time, he had three formal evaluations with him (PC-R2. 398-399).

As to statutory mental health mitigation, three of the four experts who testified at the evidentiary hearing, found that Mr. Peede qualified for the statutory mitigator that he was under the influence of an extreme mental or emotional impairment at the time of the offense.[11] Unlike, Dr. Kirkland's opinion at trial, the mental health experts who testified at the postocnviction hearing based their opinions on a comprehensive evaluation of Mr. Peede, including interviewing him, testing, background materials and collateral information.

Additionally, both Drs. Fisher and Sultan opined that Mr. Peede also qualified for the statutory mitigating circumstance that due to his mental impairment, he was unable to conform his conduct to the law. They opined that the pervasiveness of his delusional disorder fully manifested itself during the time that Mr. Peede stabbed his wife.

Drs. Sultan and Fisher explained how Mr. Peede believed that Darla Peede and his ex-wife, Geraldine Peede, had been grossly unfaithful to him by not only having affairs with his family and friends, and also posing in "Swinger" magazines. And, how Darla Peede's constant denials of such behavior enraged Mr. Peede to the point where he suffered a psychotic break. Both experts, reviewing the extensive documentary and testimonial evidence, found ample proof of Mr. Peede's delusional system which played a key part in his violent behavior.

At the evidentiary hearing, Joseph DeRocher, former Public Defender for Orange County, testified that he ultimately assigned himself to assist Theotis Bronson in representing Mr. Peede. Initially, Mr. DuRocher did not believe Mr. Peede's case would be prosecuted as a death penalty case and thus, only one attorney, as opposed to the standard two attorneys, was assigned to represent Mr. Peede (PC-R2. 154). Mr. DuRocher explained that he became involved about a month before the trial, when Mr. Peede had been offered a plea deal for life in prison if he pleaded guilty (PC-R2. 157).

Theotis Bronson was an assistant public defender when he represented Mr. Peede. This was his first capital case (PC-R2. 138, 155).

[11]This was the opinion of Drs. Sultan, Fisher and Frank.

Trial counsel testified about their investigation into the case, in general, and Mr. Peede's background, specifically. As to background information, a request was made for the records about Mr. Peede's prior convictions in California (PC-R2. 159). Trial counsel received a response indicating that the file was "voluminous" and listed several additional state agencies who would have records on Mr. Peede (PC-R2. 214; [S-Ex. 3]). While the trial investigator did obtain signed releases from Mr. Peede, no further action was taken to obtain the records from California (PC-R2. 215). Thus, Mr. DuRocher, penalty phase counsel admitted that he never saw the files from California (PC-R2. 181). The trial investigator also contacted friends and family members of Mr. Peede. Notes in trial counsel's files document telephone conversations between he and Percy Brown, Nancy Wagoner, and several other people in North Carolina (S-Ex. 4-5).[12] However, after trial counsel's initial contacts with some of Mr. Peede's family members and friends, counsel never spoke to the witnesses again or requested that any testify on behalf of Mr. Peede (PC-R2. 204).[13] This was so despite trial counsel's admission that he would have liked to have presented live witness testimony at the penalty phase (PC-R2. 221). And, none of the information was provided to a mental health expert (PC-R2. 176-7).

Indeed, trial counsel learned that Delmar Brown, Mr. Peede's uncle, had information about his nephew:

> Q: Mr. Brown was telling, was he not, Mr. Deprizio the fact that Mr. Peede had been sent out to California, **that he may have some mental problems, but that he hadn't received any treatment**, and the extent to which he saw him as being mentally involved is that correct?
>
> A: Correct?

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[12]Even though trial counsel traveled to North Carolina to speak to witnesses listed by the State, he met with none of Mr. Peede's family and friends to discuss mitigation or background information (PC-R2. 245).

[13]Nancy Wagoner, Mr. Peede's aunt, called trial counsel asking if she could help her nephew (S-Ex. 6). Ms. Wagoner was Mr. Peede's aunt and lived with he and his parents when Mr. Peede was young. She had informed trial counsel about Mr. Peede's mother's suicide and the profound affect it had on his mental stability (PC-R2. 217; 247-8; S-Ex. 6). She explained his bizarre behavior after the suicide and her belief that Mr. Peede needed psychological help (S-Ex. 6). She also stated her willingness to come and testify on Mr. Peede's behalf as character witness (PC-R2. 248). Trial counsel did not ask her to testify for Mr. Peede.

(PC-R2. 256)(emphasis added). See also S-Ex. 10. The information concerning Mr. Peede's mental health problems was not investigated further or relayed to a mental health expert.

Likewise, Mr. Peede informed trial counsel that he believed he had a "split personality", but this information was not conveyed to a mental health expert (PC-R2. 265). Mr. Peede also told his attorney about his belief about the extensive infidelities of his wives. He explained, in detail, that their pictures were found in swinger magazines and the swinger clubs they went to (S-Ex. 11). Mr. Peede also told the defense investigator that he killed his wife because "she made him crazy and he stabbed her." (S-Ex. 10). Mr. Peede went on to state that "he couldn't remember when or where he actually killed her. He just pointed out an area that looked good." (S-Ex. 10). Again, none of this information was discussed with a mental health expert.

Even Mr. Peede's jail records indicated mental health problems; he had been prescribed Elavil by medical personnel at the jail. Trial counsel never obtained Mr. Peede's jail records and were unaware that he had been taking medication (PC-R2. 178, 243).

After the guilt phase, trial counsel did request that Dr. Kirkland be appointed to conduct an evaluation of Mr. Peede for mitigation purposes (PC-R2. 175-6). The order appointing Dr. Kirkland was signed ten days before penalty phase commenced. No background information or collateral information was provided to Dr. Kirkland and Dr. Kirkland conducted no testing (PC-R2. 176-7).

As to Mr. Peede's *Brady* claim, he introduced evidence that Darla's diary and files from his conviction in California had been suppressed by the prosecutors in his case.

Darla Peede's diary contained entries that made clear that she wanted to reconcile with her husband and assist him in obtaining mental health help (D-Ex. 7). Neither Mr. Bronson nor Mr. DuRocher believed that he had seen the diary until just before the evidentiary hearing (PC-R2. 162, 229). Mr. Bronson denied that he had been told about the diary (PC-R2. 230). Mr. DuRocher testified that he wished

he'd had the diary because it looked helpful and was consistent with the defense's theory and argument that Darla had willingly agreed to leave Miami with Mr. Peede (PC-R2. 164, 222). Mr. Bronson agreed with Mr. DuRocher's assessment of value of the diary (PC-R2. 230-1).

As to the documents regarding Mr. Peede's convictions in California, the documents concerned the Eureka Police Department's investigation of the shooting that occurred and with which Mr. Peede was charged. The Eureka Police Department conducted an extensive investigation, which included sending personnel to North Carolina to interview Mr. Peede's family member and friends. John Logan Bell, Jr., provided a statement to law enforcement in which he explained Mr. Peede's behavior after his mother's suicide. He told law enforcement:

> After his mother committed suicide, Robert took it very hard, due to the fact that they were very close. **And he blamed himself I think for it, and . . . got extremely paranoid. And blamed himself for the . . . thought that he was directly responsible for her shooting herself. And took it very hard.**

(D-Ex. 17)(emphasis added). The reports contained in the police file concerned background information about Mr. Peede, his mental health and the circumstances of the crimes committed in California. They contain classic mitigating evidence.

Both trial counsel testified that they did not recall receiving the statements made by Mr. Bell or others (PC-R2. 182-3, 231-2).

SUMMARY OF ARGUMENT

Mr. Peede was deprived of the effective assistance of trial counsel at the penalty phase of his case, in violation of *Porter v. McCollum*, 130 S.Ct. 447 (2009). The decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Peede's ineffective assistance of counsel claim was premised upon the Florida Supreme Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein, which renders Mr. Peede's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

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

A. INTRODUCTION

Mr. Peede was deprived of the effective assistance of trial counsel at the penalty phase of his case. Mr. Peede presented his ineffective assistance of counsel claims in a Rule 3.851. Following an evidentiary hearing, the circuit court erroneously denied Mr. Peede's ineffective assistance of counsel claim. When this Court heard Mr. Peede's appeal of that decision, it failed to conduct a *de novo* review of legal questions contained within an ineffectiveness analysis and instead employed a standard of review that was highly deferential to the circuit court's erroneous legal conclusions in violation of *Porter v. McCollum*, 130 S.Ct. 447 (2009).

The decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Peede's ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* was a repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein,[14] which renders Mr. Peede's *Porter* claim cognizable in collateral proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d at 669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

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[14] As explained herein, *Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance of counsel claim in *Porter v. State*. Thus, Mr. Peede does not argue that *Porter v. McCollum* announced new federal law. Instead, it announced a failure by this Court to properly understand, follow and apply the clearly established federal law. Thus, the decision is new Florida law because it is a rejection of this Court's jurisprudence. *Porter v. McCollum* was an announcement that this Court's precedential decision in *Porter v. State* was wrong, and in doing so announced new Florida law. This is identical to the rulings in *Hitchcock v. Dugger* and *Espinosa v. Florida*, in which the United States Supreme Court found that this Court had failed to properly understand, follow and apply federal constitutional law.

Mr. Peede presented his claim under *Porter v. McCollum* to the circuit court in a Rule 3.851 motion in light of this Court's ruling in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, should be raised in Rule 3.850 motions). At the State's urging, the circuit court refused to find that fairness principles dictated that *Porter v. McCollum* should be treated just like *Hitchcock v. Dugger* and *Espinosa v. Florida*, as new Florida law within the meaning of *Witt v. State*. Accordingly, Mr. Peede seeks a determination by this Court that he is entitled to have his previously presented ineffective assistance of counsel claims judged by the same standard that the United States Supreme Court employed when finding George Porter's ineffectiveness claim was meritorious and warranted habeas relief.

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

1. Retroactivity under *Witt*.

It is Mr. Peede's position that whether *Porter* qualifies as new law is a question of law. Therefore, initially, this Court must independently review that aspect of Mr. Peede's claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law. Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Peede's ineffective assistance of counsel claim at the penalty phase, giving only deference to historical facts. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations are questions of law to which no deference is to be accorded to the judge who presided at evidentiary hearing. As *Porter* also makes clear, an evaluation of the evidence presented to establish prejudice under the prejudice prong of the *Strickland* standard must also be evaluated without according any deference to the presiding judge's findings as to that evidence. Absolute *de novo* review is required of evidence offered to establish prejudice under *Strickland*. The issue is not what impact the evidence of prejudice had on the judge presiding at a collateral evidentiary hearing, but what impact such

evidence may have had upon the jury who heard the case had it been presented. *See Porter v. McCollum*, 130 S. Ct. at 454-55.[15]

In *Witt*, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictated. Specifically, this Court held that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. The Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id.* "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* (quotations omitted).

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

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

[15]As the United States Supreme Court noted in *Kyles v. Whitley*, 514 U.S. 419 (1995), the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute her credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the state. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." *Id.* at 929. This Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id.* at 926.

This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id.* at 931. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock,* a death sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt,* this Court agreed and ruled that *Hitchcock* constituted a change in Florida law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).[16]

[16]The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon thereafter called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. Therein, this Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*,

438 U.S. 586 (1978). Then on September 9, 1987, this Court issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, this Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default." In *Downs*, this Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, this Court issued its opinion in *Demps*, and thereto addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. *See Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the United States Supreme Court held that this Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. at 1071.

Following *Hitchcock*, this Court found that *Hitckcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs,* this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[17] Clearly, this Court read the opinion in *Hitchcock* and saw

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[17]The United States Supreme Court did not indicate in its opinion that it was addressing any other case or line of cases other than Mr. Hitchcock's case. Indeed, the United States Supreme Court expressly stated:

> Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e. g., Cooper v. State, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141,

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.[18]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Lockett*, a prior decision from the United States Supreme Court, here in *Porter* the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of

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> Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . ."), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in Songer v. State, 365 So. 2d 696 (1978) (per curiam), which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

Hitchcock, 481 U.S. at 396-97.

[18]Because the result in *Hitchcock* was dictated by *Lockett* as the United States Supreme Court made clear in its opinion, there really can be no argument that the decision was new law within the meaning of *Teague v. Lane,* 489 U.S. 288 (1989). Since the decision was not a break with prior United States Supreme Court precedent, *Hitchcock* was to be applied to every Florida death sentence that became final following the issuance of *Lockett*. Certainly, no federal court found that *Hitchcock* should not be given retroactive application. *See Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

Strickland, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears v. Upton*, 130 S.Ct. 3529 (2010). As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received. And just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, this Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

Another decision from the United States Supreme Court finding that this Court had failed to properly apply Eighth Amendment jurisprudence was *Espinosa v. Florida*. At issue in *Espinosa* was this Court determination in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), that the United States Supreme Court decision in *Maynard v. Cartwright*, a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

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

Smalley v. State, 546 So. 2d at 722. In *Espinosa*, the United States Supreme Court determined that *Maynard v. Cartwright* did apply in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in *Maynard*.

Following the decision in *Espinosa*, this Court found that the decision qualified under *Witt v. State* as new Florida law which warranted revisiting previously rejected challenges to the "heinous, atrocious or cruel aggravating circumstance. *James v. State*, 615 So. 2d

668, 669 (Fla. 1993)(*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

This Court should for exactly the same reasons that it treated *Hitchcock* and *Maynard* as qualifying as new law under *Witt*, find that *Porter v. McCollum* qualifies under *Witt* and warrants reconsidering previously denied ineffective assistance of counsel claims under the proper and correct *Strickland* standard which was applied to George Porter's ineffectiveness claim and resulted in collateral relief in his case and ultimately a life sentence. Refusing to reconsider Mr. Peede's ineffectiveness claims and apply the now recognized proper standard of review would arbitrarily deny him the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would itself establish that Mr. Peede's death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

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

In *Porter v. McCollum*, the United States Supreme Court found this Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S.Ct. at 455. In *Porter v. State*, this Court explained:

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. **Based upon our case law**, it was then for the trial court to resolve the conflict by the weight the trial court afforded one expert's opinion as compared to the other. The trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the States's expert. We accept this finding by the trial court because it was based upon competent, substantial evidence.

Porter v. State, 788 So. 2d at 923 (emphasis added). The United States Supreme Court rejected this analysis (and implicitly this Court's case law on which it was premised) as an unreasonable application of *Strickland*:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. * * * Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the

sentencing judge.

Porter v. McCollum, 130 S. Ct. at 454-55.

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id.* at 451, and "either did not consider or unreasonably discounted" that evidence. *Id.* at 454. The United States Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Id.* at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id.* at 454, even though Mr. Porter's personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id.* (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court, just as this Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that Court relied upon the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001). And in Mr. Peede's case, this Court relied on *Cherry* to conduct its analysis of Mr. Peede's claims.[19]

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[19]This Court stated:

> The circuit court denied all of Peede's claims regarding his counsel's ineffectiv-ness. The court primarily found that Peede refused to provide his counsel with names of witnesses who could present mitigating evidence. Second, the court found that trial counsel's actions in attempting to locate and interview background witnesses were adequate, especially in the face of Peede's lack of cooperation. Third, the court held that the testimony of three postconviction defense mitigation witnesses established that Peede had always been an angry and suspicious person and this evidence would not have been helpful to Peede. Finally, the court found that Dr. Kirkland's testimony would not have been enhanced even if he had been provided more background information.

Peede v. State, 955 So. 2d 480, 492 (Fla. 2007).

Citing to *Cherry v. State,* 781 So. 2d 1040 (Fla. 2001), this Court went on to reason that Mr. Peede himself was to blame for his penalty phase counsel's deficient investigation of Mr. Peede's background "[b]ecause Mr. Peede would not assist his counsel in providing any mitigating evidence or circumstances." *Id.* at 493. Because defense counsel had made some effort in spite of what this Court termed, Mr. Peede's "recalcitrance"- this Court refused to find *Strickland* error. *Id.* The opinion went on to state:

> The mitigating evidence Peede presented during the evidentiary hearing was his mother's suicide, his blistering skin condition as a child, his paranoid behavior regarding his wives' alleged sexual exploits, and his feelings of inadequacy. While this evidence could indeed be seen as mitigating, this mitigation would have been offset by the testimony of Peede's aggressive and impulsive behavior towards women, including his hitting Nancy Wagoner prior to killing Darla, and his bizarre accusations to various friends and family of sleeping with his second wife, Geraldine. It appears that Peede's aggression has not subsided in the years since the murder either. This is illustrated by Peede's reaction when his counsel put his childhood friend John Bell on the stand during the evidentiary hearing; Peede accused him of fathering his youngest child and threatened that he would shoot Bell if he had a gun. With this background of bizarre behavior and hostility, and because of Peede's refusal to allow his counsel to cross-examine Darla's daughters wile they were on the stand during the guilt phase of his trial, reasonable defense counsel would hesitate before putting any of Peede's friends and family on the stand during the penalty phase.
>
> Even if deficient performance had been established, it is apparent that prejudice was not. As noted above, in order for a defendant to meet the prejudice prong of *Strickland*, 'the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.' *Maxwell,* 490 So. 2d at 932. Here, the record reflects that the proffered mitigation developed in the evidentiary hearing would have been countered by the substantial negative aspects of Peede's character and past brought out by the mitigation witnesses and by the established aggravators in this case.

Id. at 493-494.

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where the Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings.[20] 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.[21] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the Court made clear that even under this less deferential standard:

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

Stephens, 748 So. 2d at 1034. Indeed in *Porter v. State*, the Court relied upon this very language in *Stephens* as requiring it to discount and

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

[21] This Court acknowledged that there were numerous cases in which it had applied the deferential standard employed in *Grossman.* As examples, the court cited *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998); *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993); *Hudson v. State*, 614 So. 2d 482, 483 (Fla. 1993); *Phillips v. State*, 608 So. 2d 778, 782 (Fla. 1992); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). However, the list included in *Stephens* was hardly exhaustive in this regard. *See Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter*, 788 So. 2d at 923.

From an examination of this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to the United States Supreme Court, the *Stephens* standard which was employed in *Porter v. State* and used to justify this Court's decision to discount and discard Dr. Dee's testimony was "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455.

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

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

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a

superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.

We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. ... And, in Porter, we recently explained:

> "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).

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

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

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

C. MR. PEEDE'S CASE

Porter error was committed in Mr. Peede's case. Following the denial of Mr. Peede's claim of ineffective assistance of counsel by the trial court, this Court affirmed the denial of relief. As to the penalty phase ineffective assistance, this Court erroneously deferred to the legal ruling that counsel's failure to investigate further and his resulting strategic decisions were reasonable. The reasonableness of counsel's decisions are questions of law as was recognized in *Porter v. McCollum*. Both the trial court's findings and the cursory acceptance of those findings by this Court violate *Porter*, as a probing inquiry into the facts of this case and leads only to the conclusion that counsel prejudiced Mr. Peede by performing deficiently.

Mr. Peede's trial counsel failed to conduct an adequate investigation for the penalty phase and failed to follow up on leads Mr. Peede himself provided. Mr. Peede, paranoid, delusional, diagnosed schizophrenic and consumed by remorse- actually did assist trial counsel in developing mitigation as well as providing much information about his own background. For example, shortly after trial counsel was appointed, a member of the defense team interviewed Mr. Peede and prepared an "Interview Sheet", dated May 31, 1983. The interview with Mr. Peede reflects that he was asked about his medical history to which Mr. Peede informed trial counsel of his "spine curvature" and "skin blistering" (S-Ex. 9).

Also, interview notes reflect that Chief Investigator Bill McNeely met with Mr. Peede on July 7, 1983 and Mr. Peede provided extensive information about his background:

> The defendant started off by relating that his parents were dead and that he had three (3) children ages 21, 12, and 14 from his ex-wife Geraldine Peede.
>
> He related he had an Uncle Delmar Brown who lived at 221 Caine St., Hillsborough, N.C.
>
> The defendant began by relating he had served some prison time in California for 2nd degree murder. He was released in October of 1981. In Oct. 82 he left California and went to N.C. and stayed a couple of weeks with his Ex-wife Geraldine. (It should be added here, that the def. Was divorced from Geraldine while serving time in Cal. prison. He related he saw some nude photos of Geraldine in some girlie magazine.)

(S-Ex. 10 at p 157).

A few weeks later, on July 26, 1983, trial counsel Bronson met with Mr. Peede. The interview notes from the meeting reflect that Mr. Peede provided trial counsel with information about Mr. Peede's ex-wives and children (See S-Ex. 11 at p. 179). During the interview, when trial counsel asked Mr. Peede if he suffered from any mental illness, Mr. Peede stated that he thought he had a "split personality." (See id. at p. 180). Mr. Peede also explained the circumstances surrounding his conviction for second-degree murder in California. And, most importantly, Mr. Peede candidly described the delusional thinking, which caused him to kill his wife, Darla (See id. at p. 181) (noting that Mr. Peede described the perceived sexual promiscuity of his ex-wives with his friends and family members).

The mitigation presented at Mr. Peede's postconviction evidentiary hearing was qualitatively and quantitatively different from that presented at trial. During the postconviction evidentiary hearing, Mr. Peede established strong evidence of mitigation: Robert Ira Peede was born on June 30, 1944 to Florentina (Tina) Brown Peede and John Ira Peede. They lived in North Carolina, and he had no other siblings. While his family appeared stable and well-to-do, that was only their public face. John Peede was known to have numerous affairs during his marriage to Tina. Because of this public humiliation, Tina began to drink. She also retaliated by having affairs of her own. As Robert grew up, he was constantly surrounded by his parents' lack of fidelity and sexual improprieties which had a profound impact on his own relationships.

Mr. Peede's relationship with his mother was especially contentious because she took most of her frustration out on her only child, Robert. Robert was under extreme pressure from his mother to excel in his education. When he failed to learn at a fast enough pace or bring home the best grades, his mother would whip or spank him. Tina's sister, Nancy, who lived with the Peedes most of Robert's childhood recalled several whippings Robert suffered because he could not learn as other children did. It seemed like the whippings had more to do with Tina's mood rather than misbehavior. Tina became so upset at Robert over his poor education, that she began to whip him several times a week for no reason. The relationship between mother and son rapidly deteriorated.

Robert Peede also suffered extreme physical impairments during his teenage years through his early adulthood. He developed scoliosis and was hospitalized for six months in a body cast. Outside of his Aunt Nancy, no other family members visited him. Mr. Peede also suffered from a rare skin condition which would cause his hands and feet to blister if any pressure was placed on them. Due to this, he was unable to walk without extreme pain. In most instances, he had to be carried around in a wagon to prevent his skin from blistering and peeling off. When not traveling in the wagon, he was physically carried by his mother. Mr. Peede also required speech therapy to assist in his problems speaking.

These disabilities had a profound impact on Robert Peede's adolescence. While he was close with his two cousins, Michael and Lynwood Brown, he was unable to play with them in any meaningful way. While they played baseball and participated in other activities, he was relegated to his wagon watching from afar. In an effort to compensate for his physical handicaps, Mr. Peede was very generous with his money and possessions. He would often give his friends cash or buy them whatever they wanted in an effort to feel included.

When Mr. Peede's generosity failed to gain the friends he so desperately wanted, he began taking the blame when his cousins misbehaved. Even when it was obvious the Mr. Peede could not be involved with certain actions, he still accepted responsibility for other's conduct. This would often result in further whippings from his mother who saw this as his continuing failure to live up to expectations. For example, once, his cousin Michael broke an expensive toy and Mr. Peede told everyone he did it so that he would take the whipping over his cousin. When Nancy confronted him because she saw Michael break the toy, he continued to state that it was he who broke it.

Many of Mr. Peede's family members recognized the he suffered from mental problems. Robert Peede was easily manipulated, very moody, and would keep things bottled up inside until he would often explode in loud rants. Often family members would never know what to expect from one moment to the next with Mr. Peede's behavior. These episodes caused Tina to take him to a psychiatrist when he was eight or nine years old. Robert would be treated by this doctor twice a week for several years. And, it was learned that some of Mr. Peede's childhood trauma resulted from his witnessing his father skin minks after they hunted. Mr. Peede explained that he could not

understand why his father was hurting such beautiful animals. However, the treatment sessions did not curtail the extreme mood swings in Mr. Peede's experienced.

Mr. Peede also had a difficult time interacting with women. While his cousins, with whom he was very close, were socializing and dating, Mr. Peede was extremely awkward around women. He constantly questioned his own sexual adequacy in his romantic relationships. However, he felt things were changing when he met Kay Albright. Although she was eighteen and he, only sixteen, they soon began to date. Soon afterwards they married. Mr. Peede stayed in school while they were married. The couple lived with Mr. Peede's parents.

Life began to stabilize for Mr. Peede after his marriage. Mr. Peede became a father on April 1, 1962 when his son, Michael Peede, was born. A new father, Mr. Peede was not even eighteen years of age. However, his joy was short lived because Kay left Mr. Peede a few years after Michael's birth to reunite with a former boyfriend. She soon moved to California, with their son. Mr. Peede did not see his son for a long time afterwards. He took the collapse of his marriage very hard. His relationship with his first wife caused him to further question his sexuality. Because he had seen his parents consistent infidelity, and then his own wife left him for another man, Mr. Peede doubted the loyalty of women. While he greatly wanted to be in a relationship, he was unable to trust any woman to be faithful to him. Mr. Peede's conflict with women caused him to attempt suicide by shooting himself in the stomach; he believed he was saving his girlfriend the trouble.

However, Mr. Peede did marry again. This time to a woman named Geraldine. However, their relationship was far from harmonious. Geraldine would often insist that Mr. Peede spend all his time outside of work with her. His cousins and many of his friends did not get along with Geraldine which, once again, alienated Mr. Peede from his social circle. Mr. Peede's friends were not allowed to come to his house while his wife was there. His friends nicknamed his wife "Death Ray.".

Another reason that Mr. Peede's friends ceased interacting with him was that he began accusing them of sleeping with is wife. Even though they constantly told Mr. Peede that they did not like his wife and would never betray him in such a way, he still believed they

were having affairs with his wife. On some occasions, these confrontations with his friends became violent and caused Mr. Peede to further isolate himself.

As an adult, Mr. Peede's life took a drastic turn with the death of his mother. Because of the stresses in her own marriage, Tina Peede began drinking even more heavily and taking Valium. Her sister, Nancy often found bourbon and whiskey bottles laying around the house. Mr. Peede was very concerned about his mother's increased alcoholism. In an attempt to force her to stop drinking, he refused to allow his children to visit her. Tina saw this as another failure in her own life. After a fight between Geraldine and Tina, in which Mr. Peede interjected and refused to allow his mother to see her grandchildren, Tina shot herself in the head with a shotgun. Mr. Peede's aunt, Nancy, cleaned up Tina's home afterwards. She found empty vodka and bourbon bottles along with Valium pills all over the floor.

After his mother's death, Mr. Peede could no longer cope and he set off for California.

While in California, Mr. Peede visited with his son. However, Mr. Peede soon found that he could not cope with being around his first wife and he set off again. While at a bar in Eureka, California, he got into a fight with the bartender when the bartender tried to kick out an underage woman. Mr. Peede shot two men who chased him out of the bar. He was charged with homicide and assault and pled guilty. He was sentenced to eight years in prison.

While in prison, Mr. Peede's mental health problems escalated. He was diagnosed with schizophrenia and reported delusions involving his ex-wives. He explained that Geraldine was posing in "swinger" magazines. Although the magazine photos show no faces, he insisted that it was her because of the number of bricks in the fireplace behind the woman in the picture. When his aunt, Nancy, visited him in prison, she could not believe Mr. Peede's mental state. He insisted that she leave at once before the "people" get her.

After being released from prison, Mr. Peede met Darla. They married ten days later. Darla soon realized that Mr. Peede had serious psychological problems. Darla wanted Mr. Peede to obtain psychiatric help as soon as he returned to North Carolina. However, that help never came. Darla went to live with her daughters in Miami, Florida soon after Mr. Peede returned to North Carolina. Mr. Peede hoped

to reconcile with her, but his delusional beliefs about her infidelity clouded his thinking about his wife. On the trip from Miami to North Carolina, Mr. Peede stabbed his wife, killing her. Mr. Peede expressed his overwhelming remorse about killing Darla.

Also, during the evidentiary hearing, several experts were called to give their assessment of Mr. Peede's mental condition. Dr. Faye Sultan, a psychologist, not only interviewed Mr. Peede on several occasions, but met with several family members and reviewed extensive medical records detailing Mr. Peede's physical and psychological impairments. After reviewing this information, she opined that Mr. Peede "met[] all of the diagnostic criteria for Delusional Disorder, Jealous Type, which is one of the psychotic disorders." This Axis I disorder is described as "a presence of one or more nonbizarre delusions that persist for at least a month, a delusional belief that is simply not true. Apart from the direct impact of the particular delusions, psychosocial functioning may not be markedly impaired and the behavior of the person might not be obviously odd or bizarre.". Mr. Peede was also diagnosed with an Axis II, Paranoid Personality Disorder.

Dr. Brad Fisher, who also evaluated Mr. Peede, agreed with Dr. Sultan's diagnosis. Dr. Fisher testified about the pervasiveness of Mr. Peede's psychosis over time. As to the delusional disorder diagnosis, Dr. Fisher testified:

> [H]e's paranoid generally but he has Delusional Disorder, 297.1, in particular areas, which his are in the area of paranoia that are related to jealously. So you say he's got a problem generally, this paranoia. But he has a delusional disorder, a more pronounced mental disorder when it gets into the area of jealously and paranoia.

Dr. Fisher explained that Mr. Peede's paranoia was identified by previous doctors who evaluated Mr. Peede during competency evaluations, and from the statements of friends and family throughout his life.[22] And, based on Dr. Fisher's assessment, Mr. Peede's paranoid personality and delusional disorder were well established prior to the murder of his wife.

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[22]Both Drs. Berns and Krop diagnosed Mr. Peede as suffering from a paranoid disorder during their evaluations. Addtionally, Dr. Fisher reviewed statements from Mr. Peede's family and friends regarding past manifestations of paranoid behavior. Also, his analysis of past medical records supported his findings.

Dr. Frank, who was employed by the Florida Department of Corrections, Transitional Care Unit, at the time he evaluated Mr. Peede, and called to testify by the State, also agreed that Mr. Peede suffered from Delusional Disorder of the Jealous Type.[23]

As to statutory mental health mitigation, three of the four experts who testified at the evidentiary hearing, found that Mr. Peede qualified for the statutory mitigator that he was under the influence of an extreme mental or emotional impairment at the time of the offense.

Additionally, both Drs. Fisher and Sultan opined that Mr. Peede also qualified for the statutory mitigating circumstance that due to his mental impairment, he was unable to conform his conduct to the law. They opined that the pervasiveness of his delusional disorder fully manifested itself during the time that Mr. Peede stabbed his wife.

Drs. Sultan and Fisher explained how Mr. Peede believed that Darla Peede and his ex-wife, Geraldine Peede, had been grossly unfaithful to him by not only having affairs with his family and friends, and also posing in "Swinger" magazines. And, how Darla Peede's constant denials of such behavior enraged Mr. Peede to the point where he suffered a psychotic break. Both experts, reviewing the extensive documentary and testimonial evidence, found ample proof of Mr. Peede's delusional system which played a key part in his violent behavior.

As to the documents regarding Mr. Peede's convictions in California, the documents concerned the Eureka Police Department's investigation of the shooting that occurred and with which Mr. Peede was charged. The Eureka Police Department conducted an extensive investigation, which included sending personnel to North Carolina to interview Mr. Peede's family member and friends. John Logan Bell, Jr., provided a statement to law enforcement in which he explained Mr. Peede's behavior after his mother's suicide. He told law enforcement:

> After his mother committed suicide, Robert took it very hard, due to the fact that they were very close. **And he blamed himself I think for it, and . . . got extremely paranoid. And blamed himself for the . . . thought that he was directly responsible for her shooting herself. And took it very hard.**

[23] Dr. Frank monitored Mr. Peede for a period of three months during his stay at the Transitional Care Unit. During that time, he had three formal evaluations with him.

It is inconceivable that Mr. Peede's case is less egregious than *Porter*, in which relief was granted due to this Courts' failure, as in this case, to properly apply *Strickland*. The mitigation evidence brought out in postconviction was riveting and compelling and would have resulted in a life recommendation. Without a tactical or strategic reason, defense counsel failed to investigate, prepare, and present the wealth of statutory and non-statutory mitigating evidence that was available. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different. Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Peede had a vast amount of mitigation. Counsel's performance was clearly deficient, and Mr. Peede was prejudiced. The findings in this case violate *Porter*.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claims. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court failed to do under its current analysis.

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

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Rd., Suite 200, Tampa, FL 33607-7013, on this ____ day of November, 2011.

CERTIFICATE OF FONT

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