IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1660

LOWER TRIBUNAL No. 89-CF-966

DANIEL JON PETERKA,

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. Peterka'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 initial denial of postconviction relief;

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

REQUEST FOR ORAL ARGUMENT

Mr. Peterka 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. Peterka, 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. Peterka's case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Peterka's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009).

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INTRODUCTION

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

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

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

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

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death sentenced individuals whose death sentences had also been affirmed by this Court due to the same misapprehension of federal law should arbitrarily be denied the benefit of the proper construction and application of federal constitutional law. On both occasions, this Court determined that fairness dictated that those, who had not received from this Court the benefit of the proper application of federal constitutional law, should be allowed to re-present their claims and have those claims judged under the proper constitutional standards. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987)("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

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

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

Mr. Peterka, 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. Peterka seeks to have his ineffectiveness of penalty phase counsel claim 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. Peterka seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claim. Mr. Peterka seeks the proper application of the *Strickland* standard. Mr. Peterka seeks to be treated equally and fairly.

STATEMENT OF THE CASE

On August 10, 1989, Mr. Peterka was indicted and charged with premeditated first-degree murder in Okaloosa County, Florida (R. 1947-8).

Trial began on February 26, 1990, and on March 2, 1990, the jury found Mr. Peterka guilty of first-degree murder (R. 2042).

The penalty phase was held the following day, on March 3, 1990, and on that same day the jury returned a recommendation of death (R. 2043). The jury recommended that Mr. Peterka be sentenced to death by an eight to four vote (R. 1930).

A sentencing hearing was held on April 25, 1990. The trial court sentenced Mr. Peterka to death (R. 2077-8).

Though identifying numerous errors, on direct appeal, this Court affirmed Mr. Peterka's conviction and sentence. *Peterka v. State*, 640 So. 2d 59 (Fla. 1994).

Following his direct appeal, Mr. Peterka filed a series of Rule 3.850 motions (PC-R. 1-148, 290-336, Supp. PC-R. 168-9). The circuit court ordered that an evidentiary hearing be held, but limited the claims to allegations of ineffective assistance of trial counsel (PC-R. 465-6).

On June 28-29 and July 16, 2001, an evidentiary hearing was held. On May 2, 2002, the circuit court denied Mr. Peterka's Rule 3.850 motion (PC-R. 569-92).

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

This Court affirmed the denial of relief. *Peterka v. State*, 890 So. 2d 219 (Fla. 2004). This Court also denied Mr. Peterka's petition for writ of habeas corpus. *Peterka v. State*, 890 So. 2d 219 (Fla. 2004).

Mr. Peterka filed a petition for writ of habeas corpus in federal district court. On March 29, 2007, the federal district court denied the petition.

Mr. Peterka's was granted a certificate of appealability as to one claim – whether trial counsel was ineffective at his capital penalty phase. The Eleventh Circuit Court of Appeals affirmed the denial of relief. *Peterka v. McNeil*, 532 F.3d 1199 (11th Cir. 2008). The United States Supreme Court denied certiorari on January 26, 2009. *Peterka v. McNeil*, 129 S.Ct. 1039 (2009).

In addition, Mr. Peterka filed a successive Rule 3.851 motion on or about March 10, 2008. On June 26, 2008, the circuit court summarily denied Mr. Peterka's motion.

Mr. Peterka appealed to this Court. On July 23, 2009, this Court denied relief in an order. *Peterka v. State*, Florida Supreme Court Case No. SC08-1413 (Fla. July 23, 2009).

On April 26, 2010, Mr. Peterka filed a *pro se* petition for writ of habeas corpus before this Court. On November 15, 2010, by court order, this Court denied relief. *Peterka v. McNeil*, Florida Supreme Court Case No. SC10-801 (Fla. Nov. 15, 2010).

On or about November 19, 2010, Mr. Peterka filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009)(PC-R2. 1-27). On December 1, 2010, the State responded and, in a separate pleading, moved to strike the motion (PC-R2. 28 - 54 and 55 - 59). The circuit denied relief without holding a case management conference on January 12, 2011 (PC-R2. 60-63).

Mr. Peterka filed a motion for rehearing (PC-R2. 64-68). The circuit court granted the motion (PC-R2. 69-70).

After a hearing was held on March 2, 2001 (PC-R2. 301-319), the circuit court permitted Mr. Peterka to amend his motion with a claim concerning the State's lethal injection protocol as constituting cruel and unusual punishment (PC-R2. 73-98).[5]

[5]Because the Florida Department of Corrections has now changed the lethal injections protocol, the circumstances set forth in Mr. Peterka's claim no longer exist. Thus, he does not raise his eighth amendment claim before this Court.

A case management conference was held on May 23, 2011 (PC-R2. 320-413).

Thereafter, on June 15, 2011, the circuit court denied Mr. Peterka's motion. Mr. Peterka timely filed a notice of appeal. This appeal follows.

STATEMENT OF THE FACTS

Mr. Peterka's capital penalty phase was conducted the day after the jury found Mr. Peterka guilty of first degree premeditated murder. Mark Harllee, Mr. Peterka's trial counsel at his capital penalty phase had been practicing criminal law for less than a year before he was assigned to represent Mr. Peterka (T. 223). In fact, shortly after he was assigned to the felony division he was assigned to represent Mr. Peterka (T. 224).[6]

Mr. Peterka's penalty phase was the second penalty phase in which he participated (T. 224). Trial counsel presented the testimony of his mother, his employer, a friend and girlfriend (R. 1870-1903). Mr. Peterka also testified in his own behalf (R. 1905).

Mrs. Peterka told the jury that her son, Dan, was the eldest of five children. Dan was a good athlete and older brother (R. 1890). When asked why the jury should recommend life, Mrs. Peterka made an emotional plea to the jury:

> Because he is a human being, because he is my son, because he is good, because God created him, because I love him, because his whole family loves him, because he's a friend, because he helps people. It's such a difficult question. It's everything I believe in. He is a child of God. He needs your help. You have my son's life in you hands. I'm not trying to justify anything. I'm trying to beg you to help him and not to destroy him. He has life. He has good to give; he has good to share; and I love him with all of my heart. My words come from my heart.

(R. 1896). Finally, Mrs. Peterka offered the jury a photo album that contained photographs of the Peterka family and Dan when he was younger (R. 1892).

On cross examination, the State asked Mrs. Peterka: "When he was a child he got into quite a bit of trouble with the law?" (R. 1897). The defense objected, but the trial court overruled the objection. The State proceeded to question Mrs. Peterka about her son's non-violent juvenile record (R. 1879-9, 1901-2).

Cindy Rush described Mr. Peterka and told the jury that he was a "caring and understanding" person (R. 1882).

Ruben Purvis testified that Mr. Peterka was a responsible, excellent employee (R. 1871).

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[6] Mr. Peterka was indicted on August 10, 1989, and his trial began six months later.

Connie LeCompte testified that Mr. Peterka was wonderful with her children and helped her and her husband a great deal while he lived with them (R. 1876). In fact, Mr. Peterka took care of her children when she was admitted in the hospital for emergency surgery (R. 1877).

Mr. Peterka told the jury: "I feel I have something, something that I can share with society and I would like to keep my life" (R. 1905). He also stated: "I would like to say to John's family and friends, if I thought I could bring him back, John, I would be glad to give you my life (R. 1905).

The jury recommended that Mr. Peterka be sentenced to death by a narrow eight to four vote (R. 1930).

At the evidentiary hearing, Mr. Peterka presented evidence of his service in the Minnesota National Guard: In February, 1988, when Mr. Peterka was twenty-one years old, he enlisted in the Minnesota National Guard and was sent to Fort Sill, Oklahoma for training (Def. Ex. 1). He agreed to serve in the military for a minimum of eight years. While at Fort Sill, Mr. Peterka was an outstanding serviceman and was chosen as the platoon leader over sixty individuals (T. 197). He received commendations for his performance, including one for his leadership skills (Def. Ex. 4; T. 197-8).

On February 10, 1989, Mr. Peterka was generally discharged from the National Guard under honorable conditions (Def. Ex. 1). His discharge resulted from his convictions in Nebraska (Def. Ex. 1).

At the evidentiary hearing, Mr. Peterka also testified that during his pretrial incarceration he never had any disciplinary problems at the jail (T. 193). In fact, Mr. Peterka was housed in population, which was rare for someone who was charged with a violent crime, particularly a first-degree murder where the State was seeking the death penalty (T.193). Mr. Peterka remained in population even after the jury recommended the death penalty (T. 193).

Mr. Peterka also testified that following the jury's recommendation that he be sentenced to death, his cellmates successfully escaped from the prison by creating a hole in the roof by which they could use as a tunnel to get outside of the jail (T. 195).

Lieutenant Alan Atkins testified at the evidentiary hearing about Mr. Peterka's pretrial incarceration. Lt. Atkins remembered Mr. Peterka as a former inmate (T. 491). He didn't recall any specifics about Mr. Peterka, but did not think that Mr. Peterka caused any problems (T. 492). He commented that Mr. Peterka's conduct "was a little better than normal" and he was more friendly and respectful to the staff (T. 494)

Had trial counsel investigated Mr. Peterka's pre-sentence incarceration, they would have found that Mr. Peterka was a model inmate who responded well to the structured environment and supervision of incarceration. Trial counsel would have been able to convincingly argue that Mr. Peterka should be sentenced to life in prison rather than death.

And, because the escape occurred prior to Mr. Peterka's sentencing, trial counsel certainly could have introduced the evidence before the judge who sentenced Mr. Peterka to death. Trial counsel did introduce evidence at the sentencing hearing (R. 2056-76).

Further, the evidence of the escape would have been persuasive evidence that Mr. Peterka had the capacity and was already rehabilitated, refused to be a fugitive from the law again and took responsibility for his actions. It also provided evidence to support the argument that Mr. Peterka respected the officers at the jail and could adapt to incarceration. Certainly, evidence of the escape and Mr. Peterka's unwillingness to participate or flee would have changed the outcome of his sentencing hearing.

At the evidentiary hearing, postconviction counsel also presented evidence of Mr. Peterka's relationship with his family, good, helpful nature and nonviolent past (T. 8-118). Trial counsel testified at the evidentiary hearing that they wanted to produce anecdotal evidence about Mr. Peterka's past.

Mr. Peterka's jury recommended a death sentence by an eight to four vote. Had only two more jurors voted for life, Mr. Peterka would have been sentenced to life in prison.

Furthermore, the lower court instructed Mr. Peterka's jury on aggravating factors that this Court found were inapplicable. The trial court did not tell the jury about the limiting instructions about each aggravator. Trial counsel had no strategic reason to fail to object to the aggravating circumstances as to both the applicability and the specific instruction.[7]

Likewise, trial counsel failed to prevent the jury from hearing about Mr. Peterka's prior nonviolent juvenile record. During the cross examination of Mr. Peterka's mother, the State questioned her about Mr. Peterka's juvenile record (R. 1897-9, 1901-3). The State argued that the defense had put Mr. Peterka's character at issue. This Court recognized the error on direct appeal. *Peterka v. State*, 640 So. 2d 59, 70 (Fla. 1994).

During its deliberations, the jury requested the documents regarding Mr. Peterka's prior juvenile record. The trial court did not allow the jury to examine the documents because they were not in evidence. Clearly, Mr. Peterka's prior nonviolent juvenile record affected the deliberations and caused some jurors to recommend death.

[7]Furthermore, on direct appeal, this Court found two of the aggravators that the jury heard and judge found had not been established. *Peterka*, 640 So. 2d at 71.

SUMMARY OF ARGUMENT

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

ARGUMENT

MR. PETERKA'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. Peterka was deprived of the effective assistance of trial counsel at the penalty phase of his case. Mr. Peterka presented his ineffective assistance of counsel claim in a Rule 3.851 motion that was initially filed in 1997. Following an evidentiary hearing, the circuit court erroneously denied Mr. Peterka's ineffective assistance of counsel claims. When this Court heard Mr. Peterka'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. Peterka'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,[8] which renders Mr. Peterka'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").

[8] 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. Peterka 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. Peterka 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. Peterka 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. PETERKA'S INEFFECTIVENESS CLAIM

1. Retroactivity under *Witt*.

It is Mr. Peterka's position that as to whether *Porter* qualifies as new law, the question is one of law. Therefore, initially, this Court must independently review that aspect of Mr. Peterka'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. Peterka's ineffective assistance of counsel claim, giving only deference to historical facts. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations as to both the guilt and penalty phases, 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.[9]

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

[9]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).[10]

[10]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.[11] Clearly, this Court read the opinion in *Hitchcock* and saw

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

> Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e. g., Cooper v. State, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and

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.[12]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Lockett*, a prior decision from the United States Supreme Court, here in *Porter* the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears v. Upton*, 130 S.Ct. 3529 (2010). As *Hitchcock* rejected this Court's

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> 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.

[12]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).

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. Peterka'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. Peterka'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).

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.[13] 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

[13]It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in

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.[14] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the Court made clear that even under this less deferential standard:

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

Stephens, 748 So. 2d at 1034. Indeed in *Porter v. State*, the Court relied upon this very language in *Stephens* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter*, 788 So. 2d at 923.

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.

Stephens by the 2nd DCA was in conflict with *Grossman* as to the appellate standard of review to be employed.

[14]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).

In Mr. Peterka'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.[15] *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. Peterka'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*,

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[15] The standard adopted in *Stephens* was also applied to Mr. Peterka's case:

> Both the performance and prejudice prongs of *Strickland* are mixed questions of law and fact, and the Court will give deference to the trial court's findings of fact that are supported by competent and substantial evidence. *See Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999).*

Peterka, 890 So. 2d at 228-9.

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. Peterka'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. PETERKA'S CASE

Porter error was committed in Mr. Peterka's case. Following the denial of Mr. Peterka's claim of ineffective assistance of counsel by the trial court, this Court affirmed the denial of postconviction relief. *Peterka v. State*, 890 So. 2d 219 (Fla. 2004). In finding that trial counsel's performance was not deficient, this Court stated:

> In denying Peterka's claim that trial counsel were ineffective for failing to investigate and present evidence of his military background, the trial court found that Assistant Public Defender Harlee, who was responsible for the presentation of the penalty phase defense at trial, made a reasoned tactical decision not to present Peterka's military background . . .

Peterka 890 So. 2d at 236. In addition, this Court found:

> There is also competent, substantial evidence to support the trial court's finding that trial counsel made a reasoned tactical decision not to present this evidence in mitigation. Harlee testified that in this case there was a "negative" side to the military service mitigation because Peterka's illegal conduct led to his discharge from the National Guard. Harlee believed that because the trial was being held in "a very heavy military area," Peterka's conduct could be viewed as "besmirching the name of the military." Fearing that the prosecutor would "come back and destroy" it if Peterka's military service was highlighted, Harlee decided not to pursue this mitigation. Thus, Harlee's tactical decision not to focus on Peterka's military service as a mitigating circumstance was not deficient performance.
>
> However, even if Harlee's performance could be considered deficient, we conclude that Peterka has failed to established prejudice. Military service is not strong mitigation, especially when weighed against the CCP, avoid arrest, and under sentence of imprisonment aggravators. We conclude that Peterka has failed to establish that he has been deprived of a reliable penalty phase.

Peterka, 890 So. 2d at 237.[16] This analysis is not the sort of probing and fact-specific analysis which *Porter* and *Sears* require. 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 leads only to the conclusion that counsel prejudiced Mr. Peterka by performing deficiently.

In Mr. Peterka's case, trial counsel failed in his duty to conduct a reasonable investigation, including an investigation of Mr. Peterka's background, for possible mitigating evidence. Mr. Peterka's capital penalty phase was conducted the day after the jury found Mr. Peterka guilty of first degree premeditated murder. Mark Harllee, Mr. Peterka's trial counsel at his capital penalty phase had been practicing

[16] *Porter v. McCollum*, 130 S. Ct. 447 (2009), also makes clear that military history is strong mitigation. Here, as in *Porter*, "the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's . . . military service." *Id.* at 455.

criminal law for less than a year before he was assigned to represent Mr. Peterka (T. 223). In fact, shortly after he was assigned to the felony division he was assigned to represent Mr. Peterka (T. 224).[17]

Mr. Peterka's penalty phase was the second penalty phase in which he participated (T. 224). Trial counsel presented the testimony of his mother, his employer, a friend and girlfriend (R. 1870-1903). Mr. Peterka also testified in his own behalf (R. 1905).

Mrs. Peterka told the jury that Dan, was the eldest of five children. Dan was a good athlete and older brother (R. 1890). When asked why the jury should recommend life, Mrs. Peterka made an emotional plea to the jury:

> Because he is a human being, because he is my son, because he is good, because God created him, because I love him, because his whole family loves him, because he's a friend, because he helps people. It's such a difficult question. It's everything I believe in. He is a child of God. He needs your help. You have my son's life in you hands. I'm not trying to justify anything. I"m trying to beg you to help him and not to destroy him. He has life. He has good to give; he has good to share; and I love him with all of my heart. My words come from my heart.

(R. 1896). Finally, Mrs. Peterka offered the jury a photo album that contained photographs of the Peterka family and Dan when he was younger (R. 1892).

On cross examination, the State asked Mrs. Peterka: "When he was a child he got into quite a bit of trouble with the law?" (R. 1897). The defense objected, but the trial court overruled the objection. The State proceeded to question Mrs. Peterka about her son's non-violent juvenile record (R. 1879-9, 1901-2).

Cindy Rush described Mr. Peterka and told the jury that he was a "caring and understanding" person (R. 1882).

Ruben Purvis testified that Mr. Peterka was a responsible, excellent employee (R. 1871).

Connie LeCompte testified that Mr. Peterka was wonderful with her children and helped her and her husband a great deal while he lived with them (R. 1876). In fact, Mr. Peterka took care of her children when she was admitted in the hospital for emergency surgery (R. 1877).

[17] Mr. Peterka was indicted on August 10, 1989, and his trial began six months later.

Mr. Peterka told the jury: "I feel I have something, something that I can share with society and I would like to keep my life" (R. 1905). He also stated: "I would like to say to John's family and friends, if I thought I could bring him back, John, I would be glad to give you my life (R. 1905).

The jury recommended that Mr. Peterka be sentenced to death by a narrow eight to four vote (R. 1930).

At the evidentiary hearing, Mr. Peterka presented evidence of his service in the Minnesota National Guard: In February, 1988, when Mr. Peterka was twenty-one years old, he enlisted in the Minnesota National Guard and was sent to Fort Sill, Oklahoma for training (Def. Ex. 1). He agreed to serve in the military for a minimum of eight years. While at Fort Sill, Mr. Peterka was an outstanding serviceman and was chosen as the platoon leader over sixty individuals (T. 197). He received commendations for his performance, including one for his leadership skills (Def. Ex. 4; T. 197-8).

On February 10, 1989, Mr. Peterka was generally discharged from the National Guard under honorable conditions (Def. Ex. 1). His discharge resulted from his convictions in Nebraska (Def. Ex. 1).

At the evidentiary hearing, Mr. Peterka also testified that during his pretrial incarceration he never had any disciplinary problems at the jail (T. 193). In fact, Mr. Peterka was housed in population, which was rare for someone who was charged with a violent crime, particularly a first-degree murder where the State was seeking the death penalty (T.193). Mr. Peterka remained in population even after the jury recommended the death penalty (T. 193).

Mr. Peterka also testified that following the jury's recommendation that he be sentenced to death, his cellmates successfully escaped from the prison by creating a hole in the roof by which they could use as a tunnel to get outside of the jail (T. 195).

Lieutenant Alan Atkins testified at the evidentiary hearing about Mr. Peterka's pretrial incarceration. Lt. Atkins remembered Mr. Peterka as a former inmate (T. 491). He didn't recall any specifics about Mr. Peterka, but did not think that Mr. Peterka caused any problems

(T. 492). He commented that Mr. Peterka's conduct "was a little better than normal" and he was more friendly and respectful to the staff (T. 494)

Had trial counsel investigated Mr. Peterka's pre-sentence incarceration, they would have found that Mr. Peterka was a model inmate who responded well to the structured environment and supervision of incarceration. Trial counsel would have been able to convincingly argue that Mr. Peterka should be sentenced to life in prison rather than death.

And, while the escape occurred prior to Mr. Peterka's sentencing, trial counsel certainly could have introduced the evidence before the judge who sentenced Mr. Peterka to death. Trial counsel did introduce evidence at the sentencing hearing (R. 2056-76).

Further, the evidence of the escape would have been persuasive evidence that Mr. Peterka had the capacity and was already rehabilitated, refused to be a fugitive from the law again and took responsibility for his actions. It also provided evidence to support the argument that Mr. Peterka respected the officers at the jail and could adapt to incarceration. Certainly, evidence of the escape and Mr. Peterka's unwillingness to participate or flee would have changed the outcome of his sentencing hearing.

At the evidentiary hearing, postconviction counsel also presented evidence of Mr. Peterka's relationship with his family, good, helpful nature and nonviolent past (T. 8-118). Trial counsel testified at the evidentiary hearing that they wanted to produce anecdotal evidence about Mr. Peterka's past.

Mr. Peterka's jury recommended a death sentence by an eight to four vote. Had only two more jurors voted for life, Mr. Peterka would have been sentenced to life in prison.

Furthermore, the lower court instructed Mr. Peterka's jury on aggravating factors that this Court found were inapplicable. The trial court did not tell the jury about the limiting instructions about each aggravator. Trial counsel had no strategic reason to fail to object to the aggravating circumstances as to both the applicability and the specific instruction.[18]

[18]Furthermore, on direct appeal, this Court found two of the aggravators that the jury heard and judge found had not been established.

Likewise, trial counsel failed to prevent the jury from hearing about Mr. Peterka's prior nonviolent juvenile record. During the cross examination of Mr. Peterka's mother, the State questioned her about Mr. Peterka's juvenile record (R. 1897-9, 1901-3). The State argued that the defense had put Mr. Peterka's character at issue. This Court recognized the error on direct appeal. *Peterka v. State*, 640 So. 2d 59, 70 (Fla. 1994).

During its deliberations, the jury requested the documents regarding Mr. Peterka's prior juvenile record. The trial court did not allow the jury to examine the documents because they were not in evidence. Clearly, Mr. Peterka's prior nonviolent juvenile record affected the deliberations and caused some jurors to recommend death.

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Peterka had a vast amount of non-statutory mitigation, including military service. Counsel's performance was clearly deficient, and Mr. Peterka was prejudiced. Without a tactical or strategic reason, defense counsel failed to investigate, prepare, and present the wealth of mitigating evidence that was available. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

This Court's ruling merely accepts the circuit court's faulty determinations, which are not supported by the record. Neither the circuit court order nor this Court's opinion properly considered the record before it when finding that Mr. Peterka was not prejudiced by trial counsel's deficient performance. The findings in this case are starkly in violation of *Porter*.

This Court's previous opinion merely accepts the circuit court's faulty determinations, which are not supported by the record. Neither the circuit court order nor this Court's opinion properly considered the record before it when finding that Mr. Peterka was not prejudiced by trial counsel's deficient performance. 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*

Peterka, 640 So. 2d at 71.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Charmaine M. Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, on this 25th day of October, 2011.

CERTIFICATE OF FONT

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

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