IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-359

LOWER TRIBUNAL No. 85-8933 CFANO

MARK ALLEN DAVIS,

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. Davis' second 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;

"PC-R." – record on appeal after an evidentiary hearing;

"Def. Ex." - defense exhibits introduced during the evidentiary hearing;

"Supp. PC-R." – supplemental record on appeal;

"PC-R2." - record on appeal following the summary denial of Mr. Davis' successive postconviction motion;

"PC-R3." - record on appeal following the summary denial of Mr. Davis' second successive postconviction motion.

REQUEST FOR ORAL ARGUMENT

Mr. Davis 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 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. Davis, 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. Davis' case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Davis' 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. Davis' 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").

[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. Davis, 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. Davis 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. Davis seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Davis seeks the proper application of the *Strickland* standard. Mr. Davis seeks to be treated equally and fairly.

STATEMENT OF THE CASE

On September 18, 1985, Mr. Davis was indicted and charged with premeditated first degree murder, armed robbery and grand theft (R. 8-10). Mr. Davis pleaded not guilty (R. 68).

Mr. Davis' trial was held in January, 1987. The jury returned a verdict of guilty on each count (R. 217-19). The following week the jury, by an 8 - 4 vote, recommended the death sentence and the trial court imposed death (R. 234, 265-73).

On June 1, 1990, during direct appeal, this Court remanded Mr. Davis' case for a hearing to determine whether Mr. Davis was absent from the courtroom during a critical stage of his trial, and if so, whether he waived his presence.

After a hearing, the court found that Mr. Davis did not make a valid waiver but that he was present during jury selection. This Court affirmed Mr. Davis' convictions and sentences on direct appeal. *Davis v. State*, 586 So. 2d 1038 (1991).

The United States Supreme Court granted certiorari, vacated judgement, and remanded to this Court for reconsideration in light of *Espinosa v. Florida*, 112 S.Ct. 2926 (1992). *Davis v. Florida*, 112 S.Ct. 3021 (1992).

This Court affirmed Mr. Davis' convictions and sentences on remand from the United States Supreme Court. *Davis v. State*, 620 So. 2d 152 (1993). The United States Supreme Court subsequently denied certiorari. *Davis v. Florida*, 114 S.Ct. 1205 (1994).

In July, 1995, Mr. Davis filed a Rule 3.850 motion (PC-R. 25-191). The motion was amended on May 3, 2000 (PC-R. 2044-2267). An evidentiary hearing was held on November 5-9, 2001.

On March 28, 2002, the lower court entered an order denying Mr. Davis' claims (PC-R. 2898-2928).

Mr. Davis appealed the lower court's ruling. Simultaneously, Mr. Davis filed a petition for writ of habeas corpus. On October 20, 2005, this Court denied relief. *Davis v. State*, 928 So. 2d 1089 (Fla. 2005). Mr. Davis filed a petition for certiorari in the United States Supreme Court, which was denied on October 2, 2006. *Davis v. Florida*, 127 S.Ct 206 (2006). On February 28, 2006, Mr. Davis filed a

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

successive petition for writ of habeas corpus, based on the United States Supreme Court's ruling in *Roper v. Simmons*, 543 U.S. 551 (2005). This Court denied relief on June 9, 2006. *Davis v. State*, Case No. SC06-394 (June 9, 2006).

On April 19, 2007, Mr. Davis filed a federal petition for writ of habeas corpus in the United States District Court, Middle District of Florida. That petition is currently pending.

On February 21, 2008, Mr. Davis filed a successive Rule 3.851 motion alleging newly discovered evidence (PC-R2. Vol. 1, 1-36).[5] Thereafter, on July 3, 2008, the circuit court entered an order denying Mr. Davis' motion without an evidentiary hearing (PC-R2. Vol. II, 200-309). This Court affirmed the circuit court's denial on January 11, 2010. *Davis v, State*, 26 So. 3d 519 (2009). The United States Supreme Court denied certiorari. *Davis v. Florida*, 130 S.Ct. 3509 (2010).

On October 25, 2010, Mr. Davis filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009). The State responded. The circuit court held a case management conference on December 13, 2010. Thereafter, on January 11, 2011, the circuit court summarily denied Mr. Davis' motion. Mr. Davis timely filed a notice of appeal. This appeal follows.

STATEMENT OF THE FACTS

A. THE TRIAL

Mr. Davis was charged with premeditated first-degree murder, armed robbery and grand theft (R. 8-10). Mr. Davis pleaded not guilty to all three counts (R. 68).

On October 26, 1985, the Office of the Public Defender was appointed to represent Mr. Davis (R. 12).

On July 17, 1986, the defense's Motion for Costs to Hire Confidential Psychiatrist/Psychologist was heard (R. 572), at which time the following exchange occurred:

> MR. McMILLEN: It may be for the guilt phase also. I would not want to officially, on the record, preclude the guilt phase.
>
> THE COURT: Right.
>
> * * *
>
> MR. McMILLEN: And the facts of this case --
>
> THE COURT: Yeah, this is really weird.
>
> MR. McMILLEN: There may be a psychological situation, not McNaughton, in guilt phase, but could arise, and as a result was recognized as a frenzy-type of action because of the number of stab wounds to this person.

[5] In addition, Mr. Davis challenged the current lethal injection protocol that was adopted on July 31, 2007.

THE COURT: I have no problem with moving for appointment of a confidential expert.

(R. 572). No expert was retained at this time.

On October 22, 1986, Mr. McMillen withdraw due to a conflict that arose because his office represented a witness who was expected to testify for the State (R. 579-80). The court appointed John Thor White as trial counsel.

Six days before trial, on January 7, 1987, Dr. David Diffendale, a psychologist, was appointed to evaluate Mr. Davis (R. 182). On July 12, 1987, he issued his report (Def. Ex. 1). In his report, Dr. Diffendale noted the following characteristics about Mr. Davis: "impulsivity, low frustration tolerance, lack of trust in others, and deep belief that he is his only protector". Dr. Diffendale went on to state:

> The defendant's mental state at the time of the offense was influenced by many factors.
>
> A. He admits to "drinking all day" and was reportedly seen drinking by witnesses. . . . The first factor then is he had some degree of alcohol intoxication.
>
> B. . . . The first is his explosive, impulsive anger. He has a history of over-responding with violent anger when sexually approached by males in jail. When asked, he reported continuing to beat others who had approached him long after they had ceased struggling. He reports "loosing (sic) it" when he feels threatened. This mode of behavior may explain the excessive stab wounds.
>
> C. His slight stature, lack of traditional male success, and alcoholic father all would tend to make him insecure in his role as a man. . . . His psychological test results also suggest severe anxiety over his sexuality. The above would combine to make sexual interaction with another male a threat to his core identity.
>
> D. The final set of factors likely to effect his mental state at the time of the offense is his feelings of inadequacy, anger against authority, and anger against older men. From the defendant's early childhood, the defendant's father was an alcoholic who regularly abused his wife and children. Children of such families grow up with lower self-esteem and feelings of inadequacy. Amphetamine and alcohol, his drugs of choice, both serve to enhance the user's feelings of power and effectiveness. . .
> His rage at authority and older men began with his alcoholic, abusive father and was nurtured by his spending nearly three quarters of his life past the age of 13, in penal institutions. Such institutions are controlled by males, older than he, who he saw as threatening him in abusive and arbitrary ways. As with his father, he was helpless to defend himself against them except possible by use of excessive force.
>
> * * *
>
> The above factors combined make it quite possible that the defendant did "loose it" (sic) once in a scuffle with the victim, especially if the victim picked up the larger knife as the defendant claims.

(Def. Ex. 1). Dr. Diffendale concluded: Mr. Davis' "response to the situation leading to the victim's death is understandable given the defendant's family history, jail experiences, psychological make-up and intoxication" (Def. Ex. 1).

Dr. Diffendale also stated: "He is smart enough to know that he would be blamed. He did nothing to cover himself or throw suspicion away from himself. **If this act had been premeditated, he is bright enough and has had enough criminal exposure to do a better job**" (Def. Ex. 1)(emphasis added).

On January 13, 1986, trial commenced. Over the course of 2 days, the State presented it's case to the jury: Raymond Hansbrough, the victim's son-in-law described the victim's background and his move to Florida (R. 1005-7). Mr. Hansbrough believed that Mr. Landis had approximately $500 in cash on July 1st (R. 1007).[6]

On the evening of July 2, 1985, the police and fire department were called to the Gandy Efficiency Apartments in St. Petersburg (R. 910, 914). When they arrived they found Orville Landis' body in one of the apartments (R. 910, 914). Mr. Landis had been stabbed (R. 910).

Kim Rieck and Beverly Castle had recently moved to Florida and lived at the apartment complex (R. 917, 953-4). Rieck explained that she lived in an apartment with her boyfriend, Carl Kearney, and her mother, Castle, lived in another apartment (R. 917-8). Kearney managed the apartments (R. 919).

Rieck also explained that she knew Mr. Davis from Pekin, Illinois, because he was friends with Kearney (R. 919). Mr. Davis arrived in Florida 4 days before the crime (R. 920). Mr. Davis spent those days around the apartment complex and slept in his car, empty apartments and at the Kearney's (R. 921).

On Monday, July 1st, Mr. Landis rented an apartment from Rieck (R. 923). Rieck testified that Mr. Davis was at the apartments on July 1st and met Mr. Landis because she had sent him to get her a match (R. 925-6). Thereafter, Rieck observed Mr. Davis in Mr. Landis' apartment where they were talking and drinking beers (R. 927).

Rieck testified that at some point in the day, Mr. Davis told her: "he was going to take the old man for what he could" (R. 927), and that "he said get him drunk and see what he could get out of him" (R. 928). Mr. Davis also expressed his belief that the victim was "queer" (R. 929).

As to Mr. Davis' level of intoxication, the State inquired:

> Q: Do you know how much either one of them had to drink during the day?
>
> A: No.
>
> Q: Did you have later contact with Mark Davis that day?
>
> A: Yep.
>
> Q: Can you tell us a little about that?
>
> A: It was around four-thirty or five o'clock. We had Mark take us to get Carl's car . . .

[6]Mr. Hansbrough was never cross examined by trial counsel. His statements to law enforcement are inconsistent with his testimony concerning the amount of money Mr. Landis obtained.

Q: Now, did Mark Davis do the driving at any point in time?

A: Yes, he took us there.

Q: Did he have any difficulty in driving the car when he took you there?

A: No, he didn't.

Q: During the course of the day when you had conversations with him, was his speech slurred or impaired in any fashion?

A: No, it wasn't.

Q: Was he staggering or unable to walk properly in your opinion on all other observations of the man?

A: No.

(R. 930-1).[7]

Rieck testified that at 11:30 p.m. or midnight, Mr. Davis came to her room and asked to borrow a pair of socks (R. 934). He also told them he would see them in a couple of years (R. 934). He did not appear intoxicated (R. 935).

Contrary to Rieck's testimony, Castle testified that she was present at the apartment complex the morning of July 1st (R. 925, 954, 957). She testified that she observed Mr. Davis assist Mr. Landis move into his apartment (R. 959). Castle also testified that Mr. Davis wanted Mr. Landis to get involved in his tattooing business (R. 960). Castle described Mr. Davis as "a nervous young man" (R. 974).

When asked if she had seen Mr. Davis drinking, Castle said: "I seen him with a can of beer in his hands." (R. 960).

Later in the evening, Castle saw Mr. Davis and the victim arguing about money (R. 961). Castle testified:

Q: What do you mean they were arguing about money? Can you tell us what that conversation was?

A: Okay. I was sitting out in front of my apartment. Like I had said it was hot. There was no air conditioning. That's the reason I was even out there. And Mark was calling Skip a queer and said he was going to rip the old man off.

* * *

Q: He use any other words to describe how he was going to take Mr. Landis and what he was going to take if he was going to take something?

A: Just said he was going to rip him off and do him in.

(R. 961-2). Later, Castle added her interpretation of what Mr. Davis said: "Well, that's young kids talk. I have a teenager you know. To do away with someone at least the way children I know talk, was to kill them, get rid of them" (R. 972).

---

[7] Rieck testified that Mr. Davis gave them a ride in his car. However, Mr. Davis' car had been previously impounded because it was reported stolen from Illinois.

Castle was again asked about Mr. Davis' intoxication. She testified that at approximately 8:00 p.m., "Mark didn't seem like he was drunk . . . He wasn't stumbling around like [the victim] was anyway. He seemed coherent. He knew what he was doing" (R. 965). She also testified that Mr. Davis stopped drinking in the evening (R. 991). On cross examination, defense counsel attempted to impeach Castle with her statement that was taken on July 2nd, wherein Castle told the police that Mark got drunker and drunker throughout the day (R. 977), and that Mr. Davis and Mr. Landis drank beer and vodka (R. 979). During the statement, Detective Rhodes specifically asked Castle if they were both drunk and Castle stated: "Oh, bad, very bad.". Additionally, Castle had told the police that at 10:30 p.m., "they were both real drunk." (R. 978).

Detectives Rhodes and Halliday testified that they interrogated Mr. Davis when he was arrested in Illinois (R. 1262). Initially, Mr. Davis denied having any knowledge about the victim's death (R. 1272). Det. Rhodes told the jury:

> At that point, Mark said, I guess I will tell you the truth. He started back and he told everything was true about meeting the victim earlier that day with the beer, that he had helped him unload his car, they had drank some, that he had borrowed $20 from the victim during the day and he pawned his tattoo equipment. He had a blue and white cooler with Tattoo equipment inside it and he had borrowed $20 from the equipment, gave him that as security.
>
> He then said that he and the victim drank and went to several bars, the Dave's Aqua Lounge and Golden Arrow Pub and he said about 11, somewhere around 11 o'clock, the victim went to bed.
>
> He went down – he went back over to the Golden Arrow Pub. You (sic) came back for a pair of socks from Carl Kearney, went back and knocked on the victim's door and said the victim was dressed in nothing but a pair of pants, no shirt, no shoes. He told the victim he needed to borrow – at this point Davis didn't remember whether it was $2 or $5 that he needed to borrow from him. The victim told him he would have to do something for it. He reached down and grabbed – Davis said, grabbed my nuts and I struck him at this time with my right hand somewhere around the neck or throat area, knocking him down on the floor.
>
> * * *
>
> Victim laid there grasping for breath and choking. In a little bit, he got back up and he struck him the second time. He didn't know where he struck him, whether right hand or his left hand. He hit him again. They began to fight. He walked back to the small room towards the kitchen area. Victim picked up a long butcher knife. He took the butcher knife away from the victim and began hitting him with it.
>
> Q: . . . At that point in time is he saying they were over by the bed?
>
> A: On the bed.
>
> * * *
>
> A: He said he hit him several times with the knife, with the big butcher knife. He got a smaller knife which is over in that area and that he cut his throat with the smaller knife and stabbed him several times with it.
>
> Then he said, he got up, washed the blood off the knives in the bathroom sink and washed his hands.
>
> * * *
>
> Said went through the victim's wallet. He got 80 or $85 out of the wallet and at this time, he was afraid so he took the victim's car and he went to Tampa.

(R. 1274-7).

Shannon Stevens met Mr. Davis at the Pinellas County Jail. Stevens testified that Mr. Davis made a statement to him:

> Mark told me that he had killed the man, that the man was queer and he was hustling him.

* * *

He told me that he met the man moving into a motel, like efficiency building, where he was staying and there was other people from his hometown staying there. He told me that the man had a six pack of beer, bought a six pack of beer. He helped the man move his stuff in the room. He said he later pawned his tattoo machine to the man for $20. Him and the man had went to the bar and had some drinks and later they come back from the bar and were at the room, were drinking some more, and he said he was hustling the man and the man woke up and caught him and a fight broke out and he killed him.

(R. 1205). Stevens also testified that Mr. Davis was "going to try for second degree murder" (R. 1206). The State, through Stevens, elicited testimony that suggested Mr. Davis manufactured his defense (R. 1208-10).

Stevens testified that when he asked Mr. Davis about all of the stab wounds, Mr. Davis told him that the "guy wouldn't go down" (R. 1212).

As to whether Stevens was receiving any benefit for his testimony, Stevens testified:

Q: Because of some information that you may have, have you been promised any leniency or any plea bargain, any special treatment, because of your coming in here and testifying?

A: No, ma'am.

Q: Have you asked for any leniency for any of your sentences as a result of your testimony in this case?

A: No, ma'am. Neither asked nor received.

(R. 1194).

The State also elicited testimony that the victim was found with semen in his anus (R. 1044). As to matching the semen sample to a source, FBI Agent Errera testified that he could neither include nor exclude Mr. Davis as the source (R. 1045).

Joan Wood, the medical examiner, testified that the time of death was between 10:30 p.m. on the night of the 1st and 4:30 a.m. the next morning (R. 1094). She identified fifteen stab wounds to Mr. Landis' chest, abdomen, neck and back (R. 1096-7, 1116). Dr. Wood testified that the stabbing and cutting wounds to the neck, chest and abdomen caused Mr. Landis' death (R. 1124).

After the State rested it's case, trial counsel indicated that he would be resting without putting on any evidence (R. 1312).

In it's closing argument the State capitalized on Stevens' testimony and argued that Mr. Davis manufactured his defense:

I didn't tell them what I told you. I am claiming self-defense. I have my theories. The facts you heard is from a jail house lawyer. Well, there sits one. He is busy on his defenses in this case, doing his legal research, listening to scuttle-butt at the jail to see what defenses work, what defenses didn't work, to decide what's going to be the best defense for him in this case. And what did he think the best defense was? The old man is a queer and made a sexual advance.

(R. 1420-1).

During closing arguments, trial counsel conceded that Mr. Davis was guilty of grand theft auto (R. 1362). Defense counsel also argued that Mr. Davis was intoxicated at the time of the crime (R. 1366-8). Trial counsel abandoned self defense by telling the jury that the case was not a self defense case and he was not presenting it as such (R. 1431).

The jury found Mr. Davis guilty as charged (R. 217-9).

The afternoon before the penalty phase was to begin, trial counsel informed the court that Dr. Diffendale, Mrs. Davis and Mr. Davis were all penalty phase witnesses (Jan. 22, 1987 transcript, p.6)[8].

Furthermore, throughout the penalty phase charge conference, the parties argued about the propriety of introducing a prior juvenile adjudication to support the prior violent felony aggravator (Jan. 22, 1987 transcript, p. 12-3, 22). The State agreed that Mr. Davis' attempted armed robbery was a juvenile adjudication and not an adult felony conviction (R. 1494), but argued that the law allowed the introduction of the juvenile offense (R. 1503).

At the start of the penalty phase, the State presented the testimony of Officer Craig Salmon. Ofc. Salmon testified that he was a police officer in Pekin, Illinois (R. 1511). Ofc. Salmon testified that Mr. Davis attempted to rob a 60 year old man who ran a grocery store (R. 1512). At the time of the attempted robbery, Mr. Davis had a kitchen knife (R. 1515). Additionally, the State introduced documents regarding Mr. Davis' parole status at the time of the crime (R. 1508-9).

The defense's only witness was Mark Davis. Mr. Davis testified that he was 23 years old and was from Pekin, Illinois (R. 1517-8). Mr. Davis told the jury that he had 2 brothers and 2 sisters (R. 1518), and that his mother and cousin were in the hall (R. 1519). Mr. Davis also testified:

> Q: Mr. Davis, looking back on the incident that has been the subject of this trial, have you reflected, and if so, can you express to the jury what your feelings are now looking back in time as to what happened, what your feelings are as it would relate to that homicide, that murder that took place?
>
> A: Just wish to hell it never happened, that's all.
>
> * * *
>
> Q: If it were your lot in life, if it were your fate in life to receive a life sentence as opposed to a death sentence do you have the will to live under those circumstances of confinement that would be the conditions of such a sentence?
>
> A: Yes, I do.
>
> Q: Mr. Davis throughout some of your formative years you have, in fact, spent a considerable amount of time in one kind of institution or another, and by that I mean a jail or youth home or prison, things of that nature; is that true?
>
> A: Yes, sir.

[8]While the transcript is included in the record on appeal, it is not numbered properly, and will be referred to by date.

* * *

Q: Do you believe that you've adjusted to that lifestyle of confinement? Do you feel as though you can live, if you're given a life sentence, without being disruptive and so on and so forth?

A: Yes, sir. It's something I've learned to accept.

* * *

Q: Mr. Davis, you and I together have made a conscious decision in this case, have we not?

A: Yes, sir.

Q: As it relates to your mother's testimony?

A: Yes, sir.

Q: And you've decided after discussing that matter with me that she will not be called as a witness in your case notwithstanding the fact that she's in the hall; is that correct, sir?

A: Yes, sir.

Q: Would you tell the jury why you made such a decision?

A: I just don't – she's been through a lot already and I don't want to see her go through this stuff.

(R. 1519-22).

On cross examination, the State questioned Mr. Davis about his involvement in escape attempts from the jail and his attempt to make home-made alcohol in jail (R. 1536-40).

In closing argument, the State argued that the prior violent felony aggravator was proven because of the contemporaneous robbery conviction and the juvenile adjudication for attempted armed robbery (R. 1552). The State also argued that Mr. Davis killed the victim to prevent a lawful arrest (R. 1554); that the crime was committed for pecuniary gain (R. 1556); that the murder was committed in the course of a robbery (R. 1553); that Mr. Davis was on parole at the time of the murder (R. 1551); that the crime was especially wicked, evil atrocious or cruel (R. 1557); and that the crime was committed in a cold, calculated and premeditated manner (R. 1559).[9]

The State told the jury that the defense had the burden to prove mitigating factors (R. 1550), and that Mr. Davis' testimony proved he could not abide by rules in prison (R. 1564).

Trial counsel argued that Mr. Davis was intoxicated throughout the day of the crime (R. 1569). Mr White told the jury: "maybe I'm wrong, but it strikes me that Mr. Mark Davis is not totally morally bankrupt. I think he has displayed the remnants of morality . . ." (R. 1571).

[9]The jury was instructed on these aggravators (R. 1578-9).

The jury recommended death by an 8-4 vote (R. 234).

The following week a sentencing hearing was held. The court sentenced Mr. Davis to death (R. 1641-2).

B. THE POSTCONVICTION EVIDENTIARY HEARING

At Mr. Davis' hearing, a significant portion of the testimonial evidence was devoted to illustrating the tragic childhood he suffered. To that effect, all of Mr. Davis' immediate family members testified, including, his father, John; his mother, Betty; his brothers Mike and Tracy and his sisters, Candace Lohnes and Shari Uhlman.[10] Additionally, Mark's friends, Meri Blinn and Rick Hall and his neighbor, Johnsie Haynes also testified, as well as Mary Jo Buchanan, Mark's cousin. The testimony of these witnesses provided a detailed picture of Mark Davis' childhood and adolescence:

Mark Davis was born in October, 1963, in Pekin, Illinois (PC-R. 4090). While his father did not know Mark's birthdate, or where he fell in the order of children (PC-R. 3802-3), Mark was the fourth of five children (PC-R. 4090).

Pekin was a poor town where "you had to be tough" and "had to have some type of name" (PC-R. 3814, 3964). Pekin was a haven for gangs, drug manufacturing and drug dealing (PC-R. 3815-6, 3788). Tracy testified that the town was known for manufacturing crystal meth, which is an amphetamine (PC-R. 3815-6).

Mark's father John admitted that he has been a heavy drinker and an alcoholic all of his life (PC-R. 3803, 4098). Most of the time when he came home at night he was drunk (PC-R. 3803, 3973). Mr. Haynes testified that unless you could find John early in the morning, you would find him drunk (PC-R. 3957). Shari testified that her father started drinking in the morning and drank throughout the day and night (PC-R. 3986).

John's alcoholism impacted every aspect of the Davis' environment: Money was spent on alcohol and gambling instead of food and rent; John physically, mentally and emotionally abused his wife and children when he was drunk; John would desert the family and have affairs with other women; and John was unpredictable and caused the family members to feel anxious and on edge about what would happen at any moment.

John worked as a roofer for many years, but could not make money due to the seasonal nature of his job (PC-R. 3804, 3965, 4095). Later he got a job at Caterpillar (PC-R. 3965, 4095). But, even when he had a dependable source of income, his money was still spent on gambling and drinking (PC-R. 3985, 4015).

[10] For purposes of clarity, Mr. Davis and his family members will be referred to by their first names in this section.

The little money there was, Mark's father drank away (PC-R. 3806, 3819, 3965-6). Mike remembers that on Fridays, when it was payday, he would get sent to the tavern to try to get money from his father so that the family could buy food (PC-R. 3966). The Davis' were considered the "low class poor people" (PC-R. 3814), and "didn't have much of anything" (PC-R. 3964, 4016).

There were times when the family did not have food (PC-R. 3819). The family relied on government commodities and tabs at local grocery stores for food (PC-R. 3966-7). The family's diet consisted of "potatoes and lots of Spam", beans and rice and for something sweet the kids would eat mayonnaise and sugar sandwiches (PC-R. 3984, 4016).

At times the family was homeless because they would be evicted for not paying rent (PC-R. 3951). During one of these periods the family moved into Betty's sister's house, where 9 to 11 people lived in a one bedroom house (PC-R. 3951). Needless to say the family moved several times (PC-R. 3955, 3967, 4016). Even when the family did have a roof over it's head, sometimes it would not have heat or gas (PC-R. 3985, 4016).

John's alcoholism forced Betty to try to work while still caring for her five children (PC-R. 3956). The family had very few clothes (PC-R. 3984), and Mike was forced to drop out of high school so that he could help support the family (PC-R. 3968).

To compound the financial problems, John would abandon the family at times, sometimes to have affairs (PC-R. 3805, 3819, 3971, 3975, 4109).

John was violent and abusive (PC-R. 3820, 3956, 3971). John beat his children and his wife (PC-R. 3820). The children would witness their mother's beatings (PC-R. 3971, 4021). Shari testified that she and Mark have: "witnesse[d] him throwing my mother down the hall" (PC-R. 3991). Even Mark's father admitted that he struck his children and wife when he was drunk (PC-R. 3804). The younger children, Mark and Shari, received the worst abuse (PC-R. 3974).

John was also verbally abusive with his wife and children (PC-R. 3821, 3957, 3971, 4023, 4102). Betty testified: "[Mark's father] put him down. I mean, he put him down and he made him feel like sometimes he was worthless, you know" (PC-R. 4106).

John's alcoholism caused him to be unpredictable (PC-R. 3987, 3989, 4017, 4099, 4110). Shari explained:

> Q: Okay. And how would your dad act when he was drinking?
>
> A: Depended. He went through stages. A little happy mood and then very violent.
>
> Q: What was his violent mood like?
>
> A: Very angry and he always got Mark first.
>
> Q: He got Mark first?

A: Yeah. Took more out on Mark than me.

Q: I know this will be hard for you to talk about. How did he treat Mark?

A: Very hostile. Very, very mean.

Q: Yeah.

A: He always felt like Mark was doing something wrong.

Q: Was Mark doing something wrong?

A: No, he would always just try to appease my dad and he never could.

Q: What kinds of things would your father say to Mark?

A: You son of a bitch, God damn, Mark. That God damn kid of mine.

Q: How old was Mark when he would say things like this to him?

A: As far as we can remember growing up.

* * *

A: He was always so angry at Mark. From the minute he walked in the door he wanted to know what Mark was doing.

Q: Yeah. And can you describe some of the times that you saw your father hit Mark when you weren't being taken out of the room? How would he hit Mark?

A: He liked to grab his shirt, grab it by the collar and hit against his head.

Q: How would Mark react to this treatment?

A: Try to apologize for something he didn't do. Just very apologetic and trying to so my dad wouldn't be more angry with him.

(PC-R. 3987-8). Betty added: "If J[ohn] didn't come directly home from work, it was like walking on eggs" (PC-R. 4110).

At one point, the State of Illinois forced Betty to choose between her husband and her children due to the abusive home environment (PC-R. 4017, 4107). John moved out of the house for approximately 1 year (PC-R. 4019). Candy testified:

> That was the best year I ever remember and the best part was – we didn't have any more money. Mom worked, but she stretched and we made it. But didn't have fear.
>
> I didn't have to go to bed and hear them hollering or screaming or hitting one of the others and it was a great time . . . . It was great until he came back later and –

(PC-R. 4019).

Tracy testified that in order to avoid the abuse "he got to the point to where I hung with my friends more than I did at home" (PC-R. 3820). Eventually, Mark began to stay away, too (PC-R. 3989). Shari stated: "his nervous system was just shot" (PC-R. 3989).

John also mistreated his children in other ways. Johnsie Haynes described John filling Mark's baby bottle with beer when Mark was still in diapers (PC-R. 3958). When Mark was 8, he was admitted to a hospital in St. Louis for treatment of a life threatening kidney disease (PC-R. 3970, 4096), and his father did not want to visit him (PC-R. 4013, 4097).

Mark idolized his brother Tracy who "had a big influence on Mark" (PC-R. 3922, 3795, 3959-60, 3992, 4012). Mark was a follower (PC-R. 4012). Tracy admitted that he was a founding member of a gang in town (PC-R 3817), and described himself as a drug addict who was in and out of jail (PC-R. 3823). Tracy has always felt responsible for Mark's crimes:

Q: Okay. Tracy, you said that you started rejecting Mark when you had raped him?

A: Yeah, uh-huh.

Q: But what else do you feel responsible in Mark's life for causing him to be in trouble and that kind of thing? What are the types of things that you feel responsible for, getting him into drugs, you know that type of thing?

A: Well, me not living a good life, trying to be somebody that I wasn't, trying to be somebody and my little brother idolized me a lot, wanted to be just like me, wanted to become a motorcyclist.

I was a tattooist. He wanted to be a tattooist. I draw. He wants to draw.

Ever since I seen Mark trying to be like me and I knew I didn't have my own life straightened out, that I wasn't on the right path and I didn't want to see him follow me because I felt like I wasn't on the right path.

Q: Uh-huh.

A: Because I kept going in and out of jail and in trouble.

Q: Uh-huh.

A: And then I blamed myself for getting him involved in a burglary.

Q: Uh-huh.

A: And then I set up a robbery once and that's when I really wanted to stay away from him because here I felt like I'm getting my little brother into trouble, into something that – that's not right.

Q: Uh-huh. So you pulled him into your crimes basically?

A: Yes.

Q: Okay.

A: My lifestyle.

Q: What about the drug use, you pull him into that?

A: I felt like I pulled him into my world and my world was filled with drugs, robbery crime, a fake life.

(PC-R. 3834-5).

Tracy also testified that he anally raped his little brother when he was 15 or 16 years old and Mark was 6 (PC-R. 3826). Tracy had been molested as a child by a neighbor (PC-R. 3826). Tracy testified that the rape occurred when he and Mark were taking a bath together (PC-R. 3825). Tracy testified:

> Q: When he was a child, did [Mark] ever come to you and ask you if you wanted him to do that again for you?
>
> A: It was shortly after that.
>
> Q: What did he say to you, Tracy?
>
> A: He said hey, would you like to try that again?
>
> Q: Okay. Did he tell you that he wanted to make you happy?
>
> A: Yes.
>
> * * *
>
> Q: Okay. Tracy, what happened during that exchange?
>
> A: Well, during that there, I knew that that was wrong and that's when I started rejecting my little brother. Avoiding him and staying away from him because I knew it was wrong.
>
> Q: Did you feel ashamed?
>
> A: Yes, I did. I felt real ashamed and real bad now.
>
> Q: Have you thought about that, what happened with Mark? Did you ever think about that in your later life?
>
> A: It's ate at me for years.
>
> Q: Uh-huh.
>
> A: Then when Mark got in trouble it ate at me more. The more I've learned about what happened the more it ate at me. It's ate at me so much that I believe that it ruined my first marriage, because I was so filled with guilt blaming myself thinking I got my little brother in trouble. I got him started in some field that's not right. . . .

(PC-R. 3833-4).

Mark's friend, Meri Blinn described Mark: "He was lots of fun to be around. He was real caring. He was just a good-natured person" (PC-R. 3921). Mark's siblings also described him as a "bubbly" "on the go" kid (PC-R. 3974). Candy told the court that her brother was always fun as a child (PC-R. 4011). As he got older, Mark was protective of his younger sister, Shari, and worried about her (PC-R. 3982). Mark was also a talented artist who mastered inks, oils, chalks and pastels (PC-R. 3982-3).

Mark's mother told the court that when Mark was 10 he saved a little boy from drowning in the lake (PC-R. 4112-3). Betty would not have known about the incident, but she saw a note that Mark received from the boy's mother (PC-R. 4113).

However, Marks' abusive, chaotic home environment soon took its toll. Mark started doing what Tracy had done and stayed away from home as much as he could (PC-R. 3959). Likewise, Mark's friends knew that Mark had a serious drug problem (PC-R. 3923). Mark used crystal meth, cocaine, crank, marijuana and pills (PC-R. 3923). He used drugs every day (PC-R. 3924). Mark also drank alcohol on a daily basis (PC-R. 3924-5). Marks' drug and alcohol use started when he was only 11 (PC-R. 3959).

Indeed, Rick Hall met Mark when they were about 13 years old (PC-R. 3789). Rick testified about Mark's drug habit and how he used drugs and alcohol daily (PC-R. 3790, 3792). He described Mark's habit as progressing to stronger drugs and more frequent use over the time Mr. Hall knew Mark (PC-R. 3791). At one point, Mark's habit was so bad that he had to wear long sleeve shirts to cover the track marks on his arms (PC-R. 3791).

Mr. Hall also described an incident when Mark "snapped" when someone implied that he had engaged in homosexual sex (PC-R. 3794).

None of the witnesses, other than Mark's mother was contacted by trial counsel or asked to testify at Mr. Davis' capital trial (PC-R. 3795, 3808, 3835, 3930, 3961, 3975, 3995, 4024, 4533). Candy testified: "I knew mom was down there for the trial I didn't know that she was going to testify. I didn't think we had an opportunity" (PC-R. 4027).

Betty Davis testified about her communications with trial counsel: She spoke to Mr. White to arrange travel to Florida because she was a potential character witness (PC-R. 4114). She arrived in Florida the day before the penalty phase (PC-R. 4114). Mr. White met Betty at the airport and spoke to her about Mark's background during the drive to his office (PC-R. 4115). They "didn't really discuss all that much", like the Davis' economic status, Mark's drug use or Mark's siblings (PC-R. 4137). Betty didn't even think that Mr. White asked about John's alcoholism (PC-R. 4139-40). Mr. White was ill that night (PC-R. 4141).

After arriving at his office Mr. White asked her to review some papers and asked her if she wanted to look at the "pictures" (PC-R. 4115). Mr. White then hurriedly transported Betty to the State Attorney's Office and she spoke to the trial prosecutor (PC-R. 4115). Later, Mr. White and Betty talked at the motel. All total Mr. White spent only an hour to an hour and a half with Betty discussing Mark's background (PC-R. 4150).

While Betty testified that: "I was nervous on how I would react and hold up. I mean this was my son, you know" (PC-R. 4117), she also stated: "I was willing to do anything that I could" (PC-R. 4118). Betty also testified that her niece traveled to Florida to be with her:

> No, I went by myself. He got me the ticket and I flew by myself, but then I have a niece, that she felt that I shouldn't be there by myself so, between her and my daughter and the church, everybody, they got money together and got her a ticket to come down.

(PC-R. 4117).

The morning of the penalty phase, Betty was told to wait in the hall because she was a witness (PC-R. 4143, 4151).

Mary Jo Buchanan also testified at the evidentiary hearing about her communications with Mr. White and her Aunt Betty. She traveled to Florida to be with her Aunt Betty at the time of Mr. Davis' penalty phase (PC-R. 4530). Mrs. Buchanan was aware of the circumstances under which Mark was raised (PC-R. 4531-2). Mr. White did not ask Mrs. Buchanan to testify (PC-R. 4533). Mrs. Buchanan testified that her Aunt Betty never told her that she did not want to testify (PC-R. 4533).

Dr. Michael Maher, M.D., testified at the evidentiary hearing. Dr. Maher conducted an evaluation of Mr. Davis in which he interviewed Mr. Davis, reviewed extensive background materials, including neuropsychological testing data and interviewed Tracy Davis (PC-R. 4162-3). Dr. Maher concluded that Mr. Davis suffers from chronic posttraumatic stress disorder (PTSD) and polysubstance abuse (PC-R. 4169). Dr. Maher believed that the PTSD primarily related to childhood trauma, including "a rape by his brother" (PC-R. 4169). Dr. Maher also found that Mr. Davis suffered from depression (PC-R. 4169). Dr. Maher testified that PTSD is a major mental illness and he explained:

> What it means is that he currently suffers from it, has suffered from it essentially his entire life. Certainly his entire adult life. Certain impairments in thinking, limitations in his capacity to emotionally appreciate his surroundings, his feelings or the feelings of others. He suffers from a vulnerability to utilize self destructive mechanisms to escape from bad feelings, memories, thoughts, reactions. And he is excessively vulnerable to self-destructive and destructive to others impulsive actions, particularly when faced with particular circumstances which are closely associated with the original traumatic experiences.
>
> * * *
>
> The history provided by the defendant and then corroborated by his brother that he lived in a household where there was a good deal of chaos and disorganization in terms of the parents and children's responsibility and behavior, where there was a chronic pattern of emotional and psychological abuse and a consistent, if not relentless, but nonetheless consistent pattern of physical abuse among family members and specifically that his brother anally raped him when he was approximately six or seven years old and then had another sexual contact with him soon after that.

(PC-R. 4171). Dr. Maher testified that his diagnosis:

> provides a great deal of insight and understanding into [Mr. Davis'] reactions, his motivation, his history, that pattern of his life, the vulnerability to alcohol and substance abuse or misuse. His inclination to behave impulsively and destructively under the influence of circumstances where alcohol and sexual tension are both present.

(PC-R. 4172). Specifically, Dr. Maher discussed PTSD:

> The primary symptom of posttraumatic stress disorder has to do with anxiety. Anxiety that is associated with fears, somewhat to some extent rational fears, to some extent irrational fears, particularly fears that are in some way associated with a prior trauma which a person has experienced. So that for example if the trauma is a sexual trauma, they may have heightened fears about situations where there is sexual tension or sexual behavior.
>
> * * *
>
> They have a tendency to both be obsessed, if you will, by those fears and concerns and at the same time wish to escape from and avoid thoughts of those fears and concerns. This is one of the reasons that substance abuse is quite common in these individuals. Sleep disturbances are common.

(PC-R. 4174-5).

Dr. Maher identified the primary trauma for Mr. Davis as the anal rape by his brother (PC-R. 4175). Additionally, Mr. Davis' abusive environment contributed to causing the mental illness (PC-R. 4176). Dr. Maher explained that the trauma of the anal rape was compounded and intensified by Tracy Davis' rejection of Mr. Davis following the event, particularly because Mr. Davis looked up to Tracy (PC-R. 4180-1). Dr. Maher also explained that Mr. Davis' fears were of homosexual issues and feelings (PC-R. 4183). Dr. Maher indicated that the background records supported his identification of Mr. Davis' fears.

The fact that Mr. Davis believed that the victim was homosexual "would have raised his general level of tension and anxiety" (PC-R. 4195). "It would have made him both disdain the victim and experience fear and concern that the victim might hurt him" (PC-R. 4195). Dr. Maher testified that Mr. Davis is exceptionally sensitive to issues of being seen as the target of homosexual interest (PC-R. 4198).

Dr. Maher also explained that polysubstance abuse meant that as a kid, Mr. Davis used a lot of different drugs and developed a psychological and physiological dependence on them, including alcohol (PC-R. 4172-3).

Dr. Maher concluded that Mr. Davis suffered from PTSD at the time of the crime (PC-R. 4187). He also believed that due to Mr. Davis' mental state, Mr. Davis was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-R. 4186). Dr. Maher also found that Mr. Davis' capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law was substantially impaired (PC-R. 4186).

Dr. Maher opined that Mr. Davis' childhood would be very relevant to the penalty phase in order to explain Mr. Davis' behavior on the day of the crime (PC-R. 4188). He stated: "His sexual history is specifically relevant with regard to the issues of his feelings about homosexual interactions. And the substance abuse problems, even independent of any connection to other issues I think are also relevant" (PC-R. 4188).

Dr. Maher did not believe that the cold, calculated and premeditated aggravator was established in this case because the PTSD and chronic substance dependence, "separately and independently had an affect to diminish and impair" his capacity to premeditate (PC-R. 4193-4). In fact, Dr. Maher testified that Mr. Davis did not have the capacity to premeditate the murder at all (PC-R. 4194). Dr. Maher stated that quite simply Mr. Davis could not ask himself, "do I want to kill this individual or not and then make a decision to do so" (PC-R. 4194).

Dr. Maher found that Dr. Diffendale's report contained valuable evidence (PC-R. 4234). Dr. Maher also testified that the Diffendale report supported his conclusions (PC-R. 4235).

John Thor White was Mr. Davis' trial attorney (PC-R. 4246). At the time he was appointed to represent Mr. Davis, in October 1986, he had just finished the capital trial of Kaysie Dudley (PC-R. 4254). The jury recommended death in Dudley, but the judge did not sentence her until the week that Mr. Davis was sentenced to death. Mr. White's billing statement reflected that he spent a total of 134 hours working on Mr. Davis' case – 63 of those hours in court. Thus, trial counsel spent only 71 hours, under two weeks, preparing and investigating Mr. Davis' case. Mr. White also believed that the only time assigned to penalty phase investigation occurred the night before the penalty phase (PC-R. 4274-5).

Mr. White testified that he focused most of his energies in Mr. Davis' case on the guilt phase (PC-R. 4263). His dominant strategy at the penalty phase was to "put before the jury the defendant's – the circumstances of his very troubled upbringing" (PC-R. 4364). Mr. White believed that he had an affirmative duty to provide mitigating evidence (PC-R. 4372-3).

Mr. White testified: "I can tell you the intention was to call the defendant's mother as our penalty phase witness. I don't recall any other individual being contemplated on behalf of the defendant" (PC-R. 4274). Mr. White also testified that he chose Mr. Davis' mother because he believed she had knowledge about his background (PC-R. 4280-1). Mr. White also stated that he believed that the jury would have been moved by Mrs. Davis' testimony; "whenever I thought of Mark Davis' mother I thought of apple pie" (PC-R. 4513).

Mr. White admitted, and his billing statement reflected that his interview with Mr. Davis' mother occurred after the jury returned a verdict of guilty, the day before the penalty phase was scheduled to begin (PC-R. 4276-7). Mr. White did not have an investigator assisting him (PC-R. 4279). Mr. White did not speak to any other mitigation witness (PC-R. 4282, 4339).

Mr. White did not travel to Pekin, Illinois to interview Mr. Davis' family (PC-R. 4269), but he was interested in information about Mr. Davis' upbringing (PC-R. 4279). Mr. White did not obtain any background records himself (PC-R. 4334).

Mr. White wanted information to rebut the cold, calculated and premeditated aggravator (PC-R. 4306), but he also felt that he had enough evidence about intoxication (PC-R. 4307).

In regards to Dr. Diffendale, Mr. White could not recall when the doctor was appointed or when he received his report:

> Q: If the record reflected that on January 8, 1987 that you filed a motion for appointment –
>
> A: Okay.
>
> Q: – of the doctor, would that –
>
> A: That's probably –
>
> Q: – be consistent with your recollection?

A: No really, I'll buy into that.

MR. MARTIN: Excuse me, what? January 8 of '87? We're talking four days before trial. I don't understand.

* * *

MR. MARTIN: . . . It's still four days before, for the doctor to do that. I'm concerned that we might be misreading that.

(PC-R. 4317-8). Like the Assistant State Attorney, Mr. White did not think it was good practice to obtain an expert's opinion the day before trial (PC-R. 4506).

Mr. White also did not believe that there was anything useful in Mr. Davis' background records that were collected by the Public Defender's Office (PC-R. 4327). But, Mr. White conceded that drug overdoses and suicide attempts at a young age may be mitigating (PC-R. 4327), because they would indicate that something was wrong (PC-R. 4329). Mr. White also believed that the economic status of the family and the fact that Mr. Davis suffered from physical and emotional abuse by his father would be mitigating evidence (PC-R. 4329). Additionally, Mr. White testified that Mr. Davis' history of drug and alcohol abuse, and his drinking on the day of the crime could constitute mitigation (PC-R. 4498).

Further, contrary to Betty Davis' testimony, Mr. White testified that Mrs. Davis was worried that she may say something that would cause her son to receive the death penalty, therefore she did not want to testify (PC-R. 4331). Mr. White stated that he and Mr. Davis decided that Mr. Davis would testify instead (PC-R. 4331), despite the fact that he believed that this idea would result in a death sentence (PC-R. 4332). Nonetheless, Mr. White proposed this idea (PC-R. 4336). Mr. White claimed:

> I mean it was his choice. We discussed it together. That's the direction he wanted to go. I already told you, you know, his position was I'm going to get death. That's fine. I'm going to do 10 or 11 years. That's all I want. I mean, that's almost his exact words.

(PC-R. 4333). Mr. White was also asked:

> Q: And if there were witnesses with mitigation, other relatives, that could have – that had more information on Mr. Davis that the mother had and they had been in town, would you have wanted to use them?
>
> A: Probably yes.
>
> Q: You certainly weren't locked in to just using Mark Davis if there were other witnesses available?
>
> A: Correct.

(PC-R. 4358).

Mr. White acknowledged that he had made a statement following the jury's recommendation of death:

> Juries may decide guilt and recommend punishment but sentencings are done before judges, there's no sense in putting on "the dog and pony show."

(Def. Ex. 35). Additionally, Mr. White stated: "This was a guy who nothing nice could be said about him. He didn't fall off a swing when he was a kid, he had no history of mental problems and he had spent 13 years in juvenile halls or prison." (Def. Ex. 35).

Mr. White did not think that Dr. Diffendale's report was favorable; he believed that the report showed Mr. Davis in a negative light (PC-R. 4337). But Mr. White admitted that the information in the report "seemed to dove tail with the facts in this case" (PC-R. 4432-3). Mr. White could not recall if he asked Dr. Diffendale to render an opinion regarding the statutory mental health mitigators (PC-R. 4496). However, Mr. White later conceded that the information about Mr. Davis "losing it" could be mitigating (PC-R. 4503).

Mr. White did not put on any evidence or submit any memorandum for the sentencing hearing (PC-R. 4517).

As to guilt phase, Mr. White testified that he generally just relied on arguing that the State had not met its burden (PC-R. 4291). Mr. White testified that he did not think that the case was complex (PC-R. 4394). Specifically, Mr. White testified:

> A: One thing that I tried to do or I did was bring out the fact that the victim had semen in his anus. The reason for that was to sort or maybe reduce to a small degree sympathy or compassion that perhaps the jury might otherwise have had for the victim.
>
> Q: You felt that the victim should somehow – they should have less compassion for the victim?
>
> A: Well, just, you know, showing that he wasn't this perfect person. That he was, you know, he had been drinking hard. He had moved into this sleazy apartment complex. He may have had a homosexual relationship with somebody . . .

(PC-R. 4296).

After an evening of reflection, Mr. White amended his theory of the case and testified that he wanted to make Mr. Davis' confession believable (PC-R. 4312).[11]

While Mr. White wanted intoxication to be in evidence (PC-R. 4297), and he believed it was a "very viable defense" (PC-R. 4313), he believed that he "significantly developed" issues relating to intoxication with the State's witnesses and that he did not want to give up the last closing argument (PC-R. 4294). However, Mr. White admitted that he did not speak to several witnesses (PC-R. 4295).

Regarding intoxication, Rieck's pre-trial statements contradicted her trial testimony. In her initial statement, taken by Det. Rhodes at the crime scene, Rieck reported that Mr. Davis drank heavily the day of the crime(Def. Ex. 5). More importantly, during her taped statement Rieck admitted that when Mr. Davis entered her apartment between eleven-thirty and midnight she thought he was drunk (Def. Ex. 4).

[11]However, it was impossible to make the confession "believable" when trial counsel abandoned self defense. See R. 1431.

Castle also gave several pre-trial statements which were not utilized at trial, all of which contradicted her trial testimony. The State described Castle's statement in a summary:

> [S]he also observed defendant go to the bar next door on foot at about 4:00, he was gone several hours. He went alone. When he got back at about 6-6:30, he wanted more beer, he appeared hyper, his eyes were glassy and glared, he stared, she believed he was drunk."

(Def. Ex. 13). Furthermore, Castle also told the State that she saw Mr. Davis at 10:30 p.m. and she described Mr. Davis as acting "real drunk" (Def. Ex. 13).

Police reports and notes produced by the State were also introduced at the evidentiary hearing. Glenda South was interviewed several times by law enforcement. Each time she maintained that Mr. Davis was intoxicated throughout the day of the crime. South provided a taped statement in which she told the investigator ("RR"):

> RR: Okay, were they drinking at this time?
> GS: They were drunk.
> RR: They were drunk? Had you seen them drinking any at all during the day?
> GS: I didn't see them drinking, but they could barely walk, they were so drunk.
> RR: Okay, when you say they were drunk, were, was his speech slurred or something that indicated to you that he was drunk, couldn't stand up, they were staggering?
> GS: Ah, they just couldn't walk . . .

(Def. Ex. 2). Additionally, George Lee and Jean Born saw Mr. Davis during the evening hours of July 1st. Both witnesses told the detectives that Mr. Davis drank quite a few drinks while at the bar and he appeared to be drunk (Def. Exs. 5 & 6).

Carl Kearney, Rieck's boyfriend, also made a statement contradicting Rieck's trial testimony, when he told the police that when Mr. Davis entered his room around eleven-thirty or midnight, Mr. Davis was drunk (Def. Ex. 11).

As to the Diffendale report, Mr. White did not think the report would be helpful at the guilt phase, but he did acknowledge that "I get the impression that the doctor felt that maybe indeed this was not premeditated . . . " (PC-R. 4450-1).

Mr. White also testified that he would have wanted facts of any deals with the witnesses (PC-R. 4344). In that regard, Stevens testified at the hearing that he met with the State about Mr. Davis' case (PC-R. 4545), and at that time, he was trying to get out of jail (PC-R. 4552).

Prior to testifying, Stevens spoke to the State about helping him reinstate his gain time (PC-R. 4548), and the State told Stevens that "they would see what they could do" (PC-R. 4550). In fact, following the trial, the State sent a letter, dated January 29, 1987, to the Adult Services Program Director:

> Shannon Stevens was recently sentenced in our Circuit to a year and a day in the Department of Corrections for an escape from the Department of Corrections in May of 1986. While he was being held in the Pinellas County Jail, he obtained

information about two other County Jail Inmates who were charged with first degree murder. Mr. Stevens contacted our Office, cooperated fully, and ultimately testified in both murder trials. The information he provided was very beneficial to these cases.

In speaking with Shannon Stevens, he indicated that because of this escape charge he will lose any gain time he may have accumulated on his former DOC sentence. In light of his cooperation, I told Mr. Stevens our Office would request the Department of Corrections to retain, if at all possible, any gain time he has accrued. We would appreciate any consideration you can give in this matter.

(Def. Ex. 17).

Gary Dolan and Kenneth Gardner were also willing to provide information to the State in return for benefits.

Dolan was incarcerated with Mr. Davis at the jail for a few months in 1986 (PC-R. 3855). Mr. Davis discussed his case with Dolan, but he always maintained that the victim made a sexual advance to him (PC-R. 3857). Mr. Davis also always told Dolan that he and the victim were drinking (PC-R. 3857).

Dolan was told by the State that the State was interested in information about Mr. Davis' case (PC-R. 3859). Dolan testified that the State implied that he would be rewarded for information that was helpful to the State's cause (PC-R. 3863). Additionally, after speaking to the State about Mr. Davis' case, Dolan knew that the State wanted "certain things brought out" (PC-R. 3863), and believed that the State wanted information about a robbery (PC-R. 3864). Dolan was moved out of Mr. Davis' cell and was unable to gain any more information from him (PC-R. 3865).

Dolan testified that Mr. Davis never discussed escape attempts with him, but was present when Dolan informed others of his plans to escape (PC-R. 3868-9). Dolan also explained that Mr. Davis got upset when inmates referred to them as their "boy", because it implied a homosexual relationship (PC-R. 3870).

Gardner also met Mr. Davis when Gardner received a new trial and was sent back to the jail (PC-R. 4035). Mr. Davis discussed his case (PC-R. 4036), but he was always consistent about the fact that the victim made a sexual advance. Gardner met with the State and he asked if he knew anything about Mr. Davis' case (PC-R. 4029). The State asked him if he could find out more (PC-R. 4040).

Gardner did not want to go back to death row and he was willing to do anything to make sure that he would receive a life sentence (PC-R. 4038). He lied during the deposition in Mr. Davis' case and testified to what the State wanted him to say (PC-R. 4046, Def. Ex. 15).

Gardner testified that Stevens told Gardner that he was going to testify against Mr. Davis in order to get a deal (PC-R. 4048).

C. SUCCESSIVE POSTCONVICTION PROCEEDINGS

In his successive postconviction motion, Mr. Davis alleged newly discovered evidence that witnesses Rieck and Castle did indeed lie, minimize or shade their testimony. On November 9, 2007, Rieck signed a declaration stating:

COMES NOW, the declarant, Kimberly Rieck Kearney, and declares under penalty of perjury all as follows:

1. My name is Kimberly Rieck Kearney and I reside in Pekin, Illinois. In 1987, I testified at the trial of Mark Davis in Pinellas County, Florida.

2. When Mark made statements about "playing the man for his money", I thought only that he planned to get some free stuff from him, not that he was going to commit any crime against him. I never heard Mark make any statement about "doing away with" anybody.

3. Mark was quite drunk the day the man was killed; he had been drinking all day. When I saw him later that night, when he came to ask for socks, he had to have been very drunk.

4. My boyfriend, Carl Kearney, was arrested before the trial as a hostile witness; the police came and got him in Virginia in the middle of the night. I was told that if I didn't come to Florida to testify that Carl would sit in jail. I didn't want to testify but felt I had no choice. I was uncomfortable with my testimony because I was uncertain of the facts and circumstances.

(PC-R2. Vol. 1, 35).

In a sworn affidavit dated November 9, 2007, Beverly Castle stated:

I, Beverly Castle, having been duly sworn or affirmed, do hereby depose and say:

1. My name is Beverly Castle and I reside in Pekin, Illinois. In 1987, I testified at the trial of Marl Davis in Pinellas County, Florida. I am now concerned that my testimony at trial was less than accurate.

2. When Mark made statements about "playing the man for his money" and "ripping him off", I took that to mean that he would get him to bankroll their party by buying cigarettes and booze. I never thought that Mark intended to rob him or commit any actual crime against him.

3. Mark never said that he planned to "do away with" the man. I felt a great deal of pressure while being questioned by the police: they wanted something tangible and I knew I wasn't getting out of there until I gave it to them. As soon as I did, saying Mark said he would "do away with" the man, I was out the door.

4. During the questioning, I was physically and emotionally worn out, and just tired of the whole shebang. If Mark had really threatened to "do away with" the man, I would have gone straight to my daughter Kim and said, "This guys in danger." I'm not the type of person who would just slough off a statement like that.

5. I had worked the day the man was killed, and didn't see all the drinking, but Mark did seem drunk to me. At the trial, when I said I didn't know how drunk Mark was, I was just trying not to make a guess. If I had been asked my opinion, I would have said that Mark was probably very drunk, especially because they were drinking in the heat, and Mark was not used to the Florida heat.

SUMMARY OF ARGUMENT

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

ARGUMENT

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

A. INTRODUCTION

Mr. Davis was deprived of the effective assistance of trial counsel at the guilt and penalty phase of his case. Mr. Davis presented his ineffective assistance of counsel claims in a Rule 3.851 motion that was initially filed in 1995 and amended in 2000. Following an evidentiary hearing, the circuit court erroneously denied Mr. Davis' ineffective assistance of counsel claims. When this Court heard Mr. Davis' 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. Davis' ineffective assistance of counsel claims 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,[12] which renders Mr. Davis' *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").

Mr. Davis 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

[12] 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. Davis 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.

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. Davis 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. DAVIS' INEFFECTIVENESS CLAIMS

1. Retroactivity under *Witt*.

It is Mr. Davis' 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. Davis' claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law.[13] Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Davis' ineffective assistance of counsel claims, both at the guilt and penalty phases, 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.[14]

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[13] Indeed, the State argued in Mr. Davis' case and in others cases in which *Porter v. McCollum* claims have been presented, that only this Court can determine whether a decision from the United States Supreme Court qualifies as new law under *Witt v. State*.

[14] 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.

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 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).[15]

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.

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[15]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.

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.[16] Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error should be entitled to the same relief afforded to Mr. Hitchcock.[17]

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

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[16]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 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.

[17]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).

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 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. Davis' 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. Davis' 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).

Indeed, 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 postconviction proceedings.[18] In *Stephens*, the Florida Supreme 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.[19] 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*.[20] 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.

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[18]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.

[19]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).

[20]The majority opinion in *Stephens* receding from *Grossman* prompted Justice Overton, joined by Justice Wells, to write: "I emphatically dissent from the analysis because I believe the majority opinion substantially confuses the responsibility of trial courts and fails to emphasize a major factor of discretionary authority the trial courts have in determining whether defective conduct adversely affects the jury." *Stephens*, 748 So. 2d at 1035. Justice Overton explained: "My very deep concern is that the majority of this Court in overruling *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), has determined that it no longer trusts trial judges to exercise proper judgment in weighing conflicting evidence and applying existing legal principles." *Id.* at 1036.

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*.[21] 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.

[21]The standard adopted in *Stephens* was also applied to Mr. Davis' case:

> The alleged ineffective assistance of counsel claim is a mixed question of law and fact, subject to plenary review based on *Strickland. See Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999).* Under this standard, we conduct an independent review of the trial court's legal conclusions, while giving deference to the factual findings. *See id. at 1032-33.*

Davis, 928 So. 2d at 1105.

In Mr. Davis' 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.[22] 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. Davis' 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. ...

[22] As the United States Supreme Court noted in *Kyles*, 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. The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

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. Davis' ineffective assistance of counsel claim 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. DAVIS' CASE

Porter error was committed in Mr. Davis' case. As to the guilt phase, trial counsel failed to discover or present a plethora of exculpatory evidence. Evidence was available to corroborate Mr. Davis' statement to law enforcement. In addition, trial counsel failed to present impeachment evidence of the State's witnesses and the evidence that Mr. Davis was intoxicated at the time of the crime. This Court's analysis and determination that Mr. Davis was entitled to no relief as to his guilt phase ineffectiveness of counsel claim was *Porter* error.

> As to the penalty phase, in addition to finding that trial counsel's performance was not deficient, this Court stated:
> Even if we were to conclude that White's penalty phase performance, in its totality, was deficient, which we do not, Davis has failed to demonstrate that he was prejudiced by that performance. Given the significant aggravating circumstances and the **complete lack of mitigation**, White's performance did not so affect the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See Maxwell, 490 So. 2d at 932* (citing *Strickland, 466 U.S. at 668*).

Davis, 928 So. 2d at 1112-13 (emphasis added). 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. Davis by performing deficiently.

In Mr. Davis' case, trial counsel failed in his duty to conduct a reasonable investigation, including an investigation of Mr. Davis' background, for possible mitigating evidence. It was not until six days before trial, on January 7, 1987, that a psychologist, Dr. Diffendale, was appointed by the Court to evaluate Mr. Davis (R. 182).[23] On January 12, 1987, the day before Mr. Davis' trial commenced, Dr. Diffendale

[23]Dr. Diffendale was never asked to evaluate Mr. Davis for potential mitigating evidence, nor was he provided any pertinent background information by trial counsel (Def. Ex. 1).

issued his report, which noted the following characteristics about Mr. Davis: "impulsivity, low frustration tolerance, lack of trust in others, and deep belief that he is his only protector". Dr. Diffendale went on to state:

> The defendant's mental state at the time of the offense was influenced by many factors.
>
> A. He admits to "drinking all day" and was reportedly seen drinking by witnesses. . . . The first factor then is he had some degree of alcohol intoxication.
>
> B. . . . The first is his explosive, impulsive anger. He has a history of over-responding with violent anger when sexually approached by males in jail. When asked, he reported continuing to beat others who had approached him long after they had ceased struggling. He reports "loosing (sic) it" when he feels threatened. This mode of behavior may explain the excessive stab wounds.
>
> C. His slight stature, lack of traditional male success, and alcoholic father all would tend to make him insecure in his role as a man. . . . His psychological test results also suggest severe anxiety over his sexuality. The above would combine to make sexual interaction with another male a threat to his core identity.
>
> D. The final set of factors likely to effect his mental state at the time of the offense is his feelings of inadequacy, anger against authority, and anger against older men. From the defendant's early childhood, the defendant's father was an alcoholic who regularly abused his wife and children. Children of such families grow up with lower self-esteem and feelings of inadequacy. Amphetamine and alcohol, his drugs of choice, both serve to enhance the user's feelings of power and effectiveness. . .
>
> His rage at authority and older men began with his alcoholic, abusive father and was nurtured by his spending nearly three quarters of his life past the age of 13, in penal institutions. Such institutions are controlled by males, older than he, who he saw as threatening him in abusive and arbitrary ways. As with his father, he was helpless to defend himself against them except possible by use of excessive force.
>
> * * *
>
> The above factors combined make it quite possible that the defendant did "loose it" (sic) once in a scuffle with the victim, especially if the victim picked up the larger knife as the defendant claims.

(Def. Ex. 1). Dr. Diffendale concluded: Mr. Davis' "response to the situation leading to the victim's death is understandable given the defendant's family history, jail experiences, psychological make-up and intoxication" (Def. Ex. 1).[24]

After the State rested it's case at the guilt phase, trial counsel, John Thor White, indicated that he would be resting without putting on any evidence (R. 1312). On the afternoon before the penalty phase was to begin, trial counsel informed the Court that Dr. Diffendale, Mrs. Davis and Mr. Davis were all penalty phase witnesses (Jan. 22, 1987 transcript, p.6).

[24]Dr. Diffendale also stated: "He is smart enough to know that he would be blamed. He did nothing to cover himself or throw suspicion away from himself. **If this act had been premeditated, he is bright enough and has had enough criminal exposure to do a better job**" (Def. Ex. 1)(emphasis added).

However, when the penalty phase was actually conducted, trial counsel presented one witness: Mark Davis. Mr. Davis testified that he was 23 years old and was from Pekin, Illinois (R. 1517-18). He told the jury that he had two brothers and two sisters (R. 1518), and that his mother and cousin were in the hall (R. 1519). Mr. Davis also testified that he wished the murder never happened; that he had the will to live under the circumstances of confinement that would be the conditions of a life sentence; that he had spent considerable time in prison during his formative years and had adjusted to that lifestyle; and that he didn't want his mother to testify because she had been through a lot already (R. 1519-22).

> On the day that the jury recommended that Mr. Davis be sentenced to death, trial counsel remarked:
> Juries may decide guilt and recommend punishment but sentencings are done before judges, **there's no sense in putting on "the dog and pony show."**

(Def. Ex. 35)(emphasis added). Despite counsel's statement, no additional evidence was presented to the sentencing judge on behalf of Mr. Davis. Predictably, in sentencing Mr. Davis to death, the trial court found no mitigation (PC-R. 2900).

During the postconviction evidentiary hearing, trial counsel acknowledged that the only time assigned to penalty phase investigation occurred the night before the penalty phase (PC-R. 4274-75). Trial counsel's billing records reflect that, at a maximum, he spent less than 11 hours preparing for the penalty phase (Def. Ex. 32). Aside from speaking to his client, trial counsel's "investigation" was limited to interviewing his client's mother and meeting with Dr. Diffendale, both the day before the penalty phase commenced (Def. Ex. 32).

Trial counsel testified at the evidentiary hearing that he focused his energies on Mr. Davis' guilt phase (PC-R. 4263). As for the penalty phase, trial counsel testified: "I can tell you the intention was to call the defendant's mother as our penalty phase witness. I don't recall any other individual being contemplated on behalf of the defendant" (PC-R. 4274).[25]

The mitigation presented at Mr. Davis' postconviction evidentiary hearing was qualitatively and quantitatively different from that presented at trial.

[25]The fact is that trial counsel did not speak to any other mitigation witnesses (PC-R. 4282, 4339). Each of the witnesses who testified at Mr. Davis' postconviction evidentiary hearing confirmed that they were not contacted by trial counsel or asked to testify at Mr. Davis' capital trial (PC-R. 3795, 3808, 3835, 3930, 3961, 3975, 3995, 4024, 4533). Further, trial counsel did not have an investigator assisting him (PC-R. 4279). And while trial counsel's files contained some records that had been initially obtained by the public defender's office, trial counsel did not obtain any background records himself (PC-R. 4334).

The testimony and exhibits evidenced that Mr. Davis was raised in a poor town where "you had to be tough" and "had to have some type of name" (PC-R. 3814, 3964). Pekin, Illinois, was a haven for gangs, drug manufacturing and drug dealing (PC-R. 3815-16, 3788). Mark's brother, Tracy testified that the town was known for manufacturing crystal meth (PC-R. 3815-16).

Mark's father John admitted that he has been a heavy drinker and an alcoholic all of his life (PC-R. 3803, 4098). Most of the time when he came home at night he was drunk (PC-R. 3803, 3973). Mark's sister, Shari testified that her father started drinking in the morning and drank throughout the day and night (PC-R. 3986).

John's alcoholism impacted every aspect of the Davis' environment: Money was spent on alcohol and gambling instead of food and rent; John physically, mentally and emotionally abused his wife and children when he was drunk; John would desert the family and have affairs with other women (PC-R. 3805, 3819, 3971, 3975, 4109); and John's alcoholism caused him to be unpredictable (PC-R. 3987, 3989, 4017, 4099, 4110), "If J[ohn] didn't come directly home from work, it was like walking on eggs" (PC-R. 4110).

John worked as a roofer for many years, but could not make money due to the seasonal nature of his job (PC-R. 3804, 3965, 4095). But, even when he had a dependable source of income, his money was still spent on gambling and drinking (PC-R. 3806, 3819, 3965-66, 3985, 4015). When it was payday, Mark's brother, Mike would get sent to the tavern to try to get money from his father so that the family could buy food (PC-R. 3966). The Davis' were considered the "low class poor people" (PC-R. 3814), and "didn't have much of anything" (PC-R. 3964, 4016).[26]

There were times when the family did not have food (PC-R. 3819). The family relied on government commodities and tabs at local grocery stores (PC-R. 3966-67). The family's diet consisted of "potatoes and lots of Spam", beans and rice and for something sweet the kids would eat mayonnaise and sugar sandwiches (PC-R. 3984, 4016). At times the family was homeless because they would be evicted for not paying rent (PC-R. 3951). During one of these periods the family moved into Betty's sister's house, where 9 to 11 people lived in a one bedroom house (PC-R. 3951). Needless to say the family moved several times (PC-R. 3955, 3967, 4016). Even when the family did have a roof over it's head, sometimes it would not have heat or gas (PC-R. 3985, 4016).

[26]John's alcoholism forced Betty to work while caring for her children (PC-R. 3956). The family few clothes (PC-R. 3984), and Mike dropped out of school so that he could help financially (PC-R. 3968).

John was violent and abusive (PC-R. 3820, 3956, 3971). He beat his children and his wife (PC-R. 3820). The children would witness their mother's beatings (PC-R. 3971, 4021). Shari testified that she and Mark "witnesse[d] him throwing my mother down the hall" (PC-R. 3991). Even Mark's father admitted that he struck his children and wife when he was drunk (PC-R. 3804). The younger children, Mark and Shari, received the worst abuse (PC-R. 3974).[27]

[27]John was also verbally abusive with his wife and children (PC-R. 3821, 3957, 3971, 4023, 4102). "[Mark's father] put him down. I mean, he put him down and he made him feel like sometimes he was worthless, you know" (PC-R. 4106).

At one point, the State of Illinois forced Betty to choose between her husband and her children due to the abusive home environment (PC-R. 4017, 4107).[28] John moved out of the house for approximately 1 year (PC-R. 4019). Mark's sister, Candy testified:

> That was the best year I ever remember and the best part was – we didn't have any more money. Mom worked, but she stretched and we made it. But didn't have fear.
>
> I didn't have to go to bed and hear them hollering or screaming or hitting one of the others and it was a great time . . . . It was great until he came back later and –

(PC-R. 4019).

John also mistreated his children in other ways. Johnsie Haynes described John filling Mark's baby bottle with beer when Mark was still in diapers (PC-R. 3958).

Mark idolized his brother Tracy who "had a big influence on Mark" (PC-R. 3922, 3795, 3959-60, 3992, 4012). Mark was a follower (PC-R. 4012). Tracy admitted that he was a founding member of a gang in town (PC-R 3817), and described himself as a drug addict who was in and out of jail (PC-R. 3823). Tracy has always felt responsible for Mark's crimes, "I felt like I pulled him into my world and my world was filled with drugs, robbery crime, a fake life." (PC-R. 3834-35).

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[28] According to records, on September 19, 1967, when Mr. Davis was nearly four years old, his mother attempted to divorce his father because the State of Illinois instructed Mrs. Davis that if she did not seek a divorce and remove her children from her husband's custody, the children would be taken into custody by the State (Def. Ex. 9F). The complaint alleged:

> 7a. That subsequent to the marriage, Defendant, disregarding his marriage vows, commenced the excessive use of intoxicating liquors, and has since, and just prior to the commencement of this action, been guilty of habitual drunkenness for more than two years, and because of this conduct on the Part of Defendant, Plaintiff has ceased to live with Defendant as his wife.
>
> 7b. That Defendant has been guilty of extreme and repeated mental cruelty without cause or provocation . . . that on numerous and diverse occasions Defendant, while in an intoxicated condition, has struck the minor children of the parties hereto in the presence of their mother, without cause or provocation on the part of said children or Plaintiff, causing said children marks and bruises and pain and suffering by Defendant's continued course of abusive conduct toward Plaintiff and the four minor children of the parties hereto whereby she has suffered loss of weight, mental agitation and impairment of health; that on or about the 15th day of September, 1967, Defendant admitted to Plaintiff that he committed adultery . . .

(Def. Ex. 9F). An injunction was issued which prevented John from residing with his family (*Id.*).

Tracy also testified that he anally raped his little brother Mark when he was 15 or 16 years old and Mark was 6 (PC-R. 3826).[29] Tracy testified that the rape occurred when he and Mark were taking a bath together (PC-R. 3825). Tracy testified:

> Q: When he was a child, did [Mark] ever come to you and ask you if you wanted him to do that again for you?
>
> A: It was shortly after that.
>
> Q: What did he say to you, Tracy?
>
> A: He said hey, would you like to try that again?
>
> Q: Okay. Did he tell you that he wanted to make you happy?
>
> A: Yes.
>
> * * *
>
> Q: Okay. Tracy, what happened during that exchange?
>
> A: Well, during that there, I knew that that was wrong and that's when I started rejecting my little brother. Avoiding him and staying away from him because I knew it was wrong.
>
> * * *
>
> A: Then when Mark got in trouble it ate at me more. The more I've learned about what happened the more it ate at me. It's ate at me so much that I believe that it ruined my first marriage, because I was so filled with guilt blaming myself thinking I got my little brother in trouble. I got him started in some field that's not right. . . .

(PC-R. 3833-34).

Mark's siblings described him as a "bubbly" "on the go" kid (PC-R. 3974). Candy told the court that her brother was always fun as a child (PC-R. 4011). As he got older, Mark was protective of his younger sister, Shari, and worried about her (PC-R. 3982). Mark was also a talented artist who mastered inks, oils, chalks and pastels (PC-R. 3982). Mark's mother told the Court that when Mark was 10 he saved a little boy from drowning in the lake (PC-R. 4112). Betty would not have known about the incident, but she saw a note that Mark received from the boy's mother (PC-R. 4113).

[29] Tracy had been molested as a child by a neighbor (PC-R. 3826).

However, Marks' abusive, chaotic home environment soon took its toll. Mark stayed away from home as much as he could (PC-R. 3959). Likewise, Mark's friends knew that Mark had a serious drug problem (PC-R. 3923). Mark used crystal meth, cocaine, crank, marijuana and pills (PC-R. 3923). He used drugs every day (PC-R. 3924). Mark also drank alcohol on a daily basis (PC-R. 3924-25). Marks' drug and alcohol use started when he was only 11 (PC-R. 3959).[30]

Indeed, Rick Hall met Mark when they were about 13 years old (PC-R. 3789). Rick testified about Mark's drug habit and how he used drugs and alcohol daily (PC-R. 3790, 3792). He described Mark's habit as progressing to stronger drugs and more frequent use over the time he knew Mark (PC-R. 3791).

[30]Mr. Davis' medical records illustrated that at the ages of 12 and 13 he overdosed on drugs and was taken to the emergency room for treatment (Def. Ex. 9A). Around this age he also complained of severe left-side headaches (Def. Ex. 9A).

In addition to lay witnesses, Dr. Michael Maher, M.D., testified at the evidentiary hearing. Dr. Maher concluded that Mr. Davis suffers from polysubstance abuse and chronic posttraumatic stress disorder (PC-R. 4169).[31] Dr. Maher identified the primary trauma for Mr. Davis as the anal rape by his brother (PC-R. 4175). Additionally, Mr. Davis' abusive environment contributed to causing the mental illness (PC-R. 4176). Dr. Maher explained that the trauma of the anal rape was compounded and intensified by Tracy Davis' rejection of Mr. Davis following the event (PC-R. 4180-1). Dr. Maher indicated that the background records supported his identification of Mr. Davis' fears.[32]

The fact that Mr. Davis believed that the victim was homosexual "would have raised his general level of tension and anxiety" (PC-R. 4195). Dr. Maher testified that Mr. Davis is exceptionally sensitive to issues of being seen as the target of homosexual interest (PC-R. 4198).

Dr. Maher also explained that polysubstance abuse meant that as a kid, Mr. Davis used a lot of different drugs and developed a psychological and physiological dependence on them, including alcohol (PC-R. 4172-73). Dr. Maher concluded that Mr. Davis was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-R. 4186). Dr. Maher also found that Mr. Davis' capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law was substantially impaired (PC-R. 4186).

[31]Dr. Maher also found that Mr. Davis suffers from depression (PC-R. 4169).

[32]During his testimony at the postconviction evidentiary hearing, Mr. Hall described an incident when Mark "snapped" when someone implied that he had engaged in homosexual sex (PC-R. 3794).

Additionally, Dr. Maher did not believe that the cold, calculated and premeditated aggravator was established in this case because the PTSD and chronic substance dependence, "separately and independently had an affect to diminish and impair" his capacity to premeditate (PC-R. 4193-94). In fact, Dr. Maher testified that Mr. Davis did not have the capacity to premeditate the murder at all (PC-R. 4194). Dr. Maher also found that Dr. Diffendale's report contained valuable evidence (PC-R. 4234). Dr. Maher testified that the Diffendale report supported his conclusions (PC-R. 4235).[33]

[33]During the evidentiary hearing, the State presented the testimony of Dr. Sidney Merin as a rebuttal witness. Dr. Merin also found mitigation present, including the fact that Mr. Davis suffered from an axis one disorder of polysubstance abuse (PC-R. 4656), depression and anxiety (PC-R. 4628), and that the rage at the time of the killing represented the cumulative affects of years of abuse, drinking and drug use (PC-R. 4728, 4797). However, Dr. Merin did not believe that the anal rape was an adequate enough trauma to support a PTSD diagnosis (PC-R. 4781, 4784). Rather, Dr. Merin believed that for Mark Davis being anally raped by his brother when he was 6 years old "was another day at the ranch" (PC-R. 4796).

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Davis had a vast amount of non-statutory mitigation as well as two statutory mitigators. Counsel's performance was clearly deficient, and Mr. Davis was prejudiced. It is inconceivable that Mr. Davis' case is less egregious than *Porter*.[34] The mitigating evidence brought out in postconviction was riveting and compelling and would have resulted in a life recommendation.

3. Analysis under *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. Davis 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* 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.

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[34] As in *Porter*, 130 S.Ct. at 454, this Court either did not consider or unreasonably discounted the mitigating evidence adduced in the postconviction hearing. For example, with regard to mental health mitigation, this Court recognized that the report from trial counsel's mental health expert "contain[ed] some potentially mitigating evidence regarding Davis's troubled upbringing and his father's abusive behavior," yet the Court discounted it on the basis that "trial counsel's strategy of not presenting the report to the jury was reasonable given the highly negative information that was also contained in the report." *Davis*, 928 So. 2d at 1112. This is the same analysis which this Court applied in *Porter v. State* and which was subsequently rejected by the Supreme Court as unreasonable: "[N]either 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 that his testimony might have had on the jury or the sentencing judge." *Porter,* 130 S.Ct. at 455.

Additionally, in addressing trial counsel's failure to present evidence of Mr. Davis' drug and alcohol abuse, this Court stated that: "Davis's trial counsel was not ineffective in exercising his decision to discontinue further investigation into matters that were already known to him and that he had strategically determined should not be presented to the jury." *Davis*, 928 So. 2d at 1109. Such an analysis is again contrary to *Porter*, where the United States Supreme Court found that this Court failed to recognize that Porter was prejudiced by 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)).

Mr. Davis' substantial claims of ineffective assistance of counsel have not been given serious consideration as required by *Porter*. Mr. Davis 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. Davis 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 Candance Sabella, Senior Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Rd., Suite 200, Tampa, FL 33607-7013, on this 16th day of May, 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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