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.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

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*.

Appellee argues *Porter* did not change the law, i.e., *Stickland v. Washington*, and, even if it did the alleged change is not retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* Answer Brief at 34, 36-8, 45 (hereinafter "AB at ____"). However, under *Witt* it is clear that *Porter* is a decision from the United States Supreme Court that changed **Florida** law.[1]

What the State steadfastly refuses to discuss in its brief is the precise question to be answered under *Witt*, *i.e.* whether the United States Supreme Court's holding in *Porter v. McCollum* changed Florida law, just as *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Espinosa v. Florida*, 505 U.S. 1079 (1992), changed Florida law. In *Espinosa v. Florida*, the United States Supreme Court explained the issue presented therein:

> Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. *See Stringer, supra*, at 235. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See *Shell v. Mississippi*, 498 U. S. 1 (1990); *Maynard v. Cartwright*, 486 U. S. 356 (1988); *Godfrey v. Georgia*, 446 U. S. 420 (1980).
>
> The State here does not argue that the "especially wicked, evil, atrocious or cruel" instruction given in this case was any less vague than the instructions we found lacking in *Shell*, *Cartwright*, or *Godfrey*. Instead, echoing the State Supreme Court's reasoning *in Smalley v. State*, 546 So. 2d, at 722, the State argues that there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not "the sentencer" for Eighth Amendment purposes.

Espinosa v. Florida, 505 U.S. at 1081. The United States Supreme Court proceeded to reject this Court's decision in *Smalley v. State*, and

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[1] The real question is: does *Porter v. McCollum* change Florida law? In neither *Hitchcock v. Dugger*, 481 U.S. 393 (1987), nor *Espinosa v. Florida*, 505 U.S. 1079 (1992), did the United States Supreme Court hold that those decisions established a new constitutional right. In fact, in both cases the United States Supreme Court found that this Court had failed to properly follow and/or apply already existing federal constitutional precedent. Yet, this Court subsequently determined that both *Hitchcock* and *Espinosa* were to be given retroactive application under *Witt v. State*.

held:

> We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

Id. at 1082.

No new federal constitutional principle was announced when the U.S. Supreme Court found the heinous, atrocious or cruel aggravating circumstance employed in Florida was unconstitutionally vague. Indeed, identical worded aggravators were found unconstitutionally vague in *Maynard v. Cartwright* and *Shell v. Mississippi*. What the United States Supreme Court announced in *Espinosa* was that this Court reached an erroneous decision in *Smalley v. State* when it refused to find the decision in *Maynard v. Cartwright* applicable in Florida. Thereafter, this Court ruled in *James v. State*, 615 So. 2d 668 (Fla. 1993), that the United States Supreme Court's decision in *Espinosa v. Florida* qualified under *Witt* as new Florida law.[2]

[2]Justice Grimes was the lone dissenter in *James v. State*. He premised his dissent on his view that the error identified in *Espinosa* was "much different from that pronounced in *Hitchcock [].*" *James v. State*, 615 So. 2d at 670. His argument, which the rest of this Court rejected was the inverse of the argument advanced in the State's Answer Brief in Mr. Davis' appeal. Justice Grimes argued that *Hitchcock* warranted retroactive application because it was of "significant magnitude to require retroactive application," and of much greater significance than presented by the decision in *Espinosa*. He relied upon the fact that *Hitchcock* was about more than mere jury instructional error which was at issue in *Espinosa*. According to Justice Grimes, *Hitchcock* went to what mitigating evidence was admissible.

In its answer brief, the State completely ignores Mr. Davis' reliance upon this Court's decision in *James v. State*, 615 So. 2d 668, 669 (Fla. 1993), in which this Court ruled that the decision in *Espinosa v. Florida* was new Florida law within the meaning of *Witt* and that it should be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling."[3] Of course, the State must ignore this Court's ruling in *James v. State* because it demonstrates, contrary to the State's argument, the question presented by Mr. Davis' claim is whether the new decision from the United States Supreme Court changed the **Florida** law within the meaning of *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *See* AB at 34, 36-8, 45.[4]

Similarly, the United States Supreme Court in *Hitchcock* did not create new federal constitutional law. Indeed, the specific holding there was:

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U. S. 1 (1986), *Eddings v. Oklahoma*, 455 U. S. 104 (1982), and *Lockett v. Ohio*, 438 U. S. 586 (1978) (plurality opinion).

Hitchcock, 481 U.S. at 398-99. Clearly, the United States Supreme Court broke no new federal constitutional ground; it merely found that the death sentence violated the Eighth Amendment principle set forth in *Lockett*, and followed in *Eddings* and *Skipper*.

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[3]The State failed to discuss *James v. State*, *Espinosa v. Florida*, or *Maynard v. Cartwright*, 486 U.S. 356 (1988), in its Answer Brief.

[4]Again as the United States Supreme Court noted in *Espinosa*, it had already ruled that the jury instruction at issue there was unconstitutionally vague in *Maynard v. Cartwright*. What the United States Supreme Court held in *Espinosa* was that this Court erred in *Smalley v. State* when it refused to apply *Maynard v. Cartwright* to Florida capital sentencing proceedings. *Espinosa* was a change in Florida law.

While the State does reference *Hitchcock* in its Answer Brief, it fails to address the fact that the United States Supreme Court did not announce new federal constitutional law in its decision.[5] Instead, the United States Supreme Court found that this Court had failed to recognize that the jury instructions at issue violated the Eighth Amendment principle enunciated in *Lockett* and followed in *Eddings* and *Skipper*.[6] The State never once recognizes in its Answer Brief that, while *Hitchcock* did not announce new federal constitutional law, it was found by this Court to have announced new Florida law. *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987). And by failing to recognize that *Hitchcock* was new Florida law, the State sidesteps the actual issue raised by Mr. Davis' claim that *Porter v. McCollum* is new law within the meaning of *Witt v. State* because the United States Supreme Court found that this Court had failed to properly apply *Strickland v. Washington*, 466 U.S. 668 (1984).

Instead of recognizing that *Hitchcock*, like *Porter v. McCollum*, was a rejection of this Court's jurisprudence as erroneous and thus a change in Florida law, the State attempts to distinguish *Hitchcock* as small refinement in law that *Hitchcock* error was insular and easily reviewable. In its Answer Brief, the State disingenuously argued:

> However, the mere fact that this Court found a change in the law based on a determination that this Court had made an error to meet the *Witt* standard in one case does not dictate that a finding that this Court committed a different error in a different case would constitute a change in the law that satisfies *Witt* in a different case. This is particularly true when one considers the difference in errors found in *Hitchcock* and *Porter* and the relationship between those errors and the *Witt* standard.
>
> In *Hitchcock v. Dugger*, 481 U.S. at 398-99, the Court found that the giving of a jury instruction that told the jury not to consider nonstatutory mitigation was improper. As such, the purpose of finding this error was to permit a

[5] If the wording set forth in the State's Summary of Argument were the controlling test, *Hitchcock* would have failed the test advanced by the State in its Answer Brief ("*Porter* did not change the law, and even if it had, that change would not be retroactive")(AB at 31). The United States Supreme Court made clear that its decision was not new, but dictated by *Hitchcock*, *Eddings* and *Skipper*.

[6] The decision in *Hitchcock* had been foreshadowed by the United States Supreme Court's action following its decision in *Skipper v. South Carolina*. Shortly after that decision, the United States Supreme Court vacated this Court's affirmance of a death sentence in *Valle v. State*, 474 So. 2d 796 (Fla. 1985), and remanded to this Court for reconsideration. *Valle v. Florida*, 476 U.S. 1102 (1986). On remand, this Court found that the exclusion of evidence considering Mr. Valle's good prison record violated *Lockett* and *Skipper*, vacated the sentence of death and ordered a new penalty phase to be conducted. *Valle v. State*, 502 So. 2d 1225 (Fla. 1987).

> jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phaseand could only have harmed a defendant if he was sentenced to death, the number of cases in which there had been an error that would need retroactive correction was limited. Further, **because the error was a jury instruction, determining whether that error occurred in a particular case was simple**. All one needed to do was review the jury instructions that had been given in a particular case to see if it was the offending instruction. Courts were not required to comb through stale records looking for errors.

(AB at 46-7)(emphasis added).

Indeed an examination of this Court's decision discussing the legal significance of *Hitchcock v. Dugger* within the State of Florida demonstrates that the State's sudden minimalization of the significance of *Hitchcock* has no basis in fact. This Court immediately recognized that *Hitchcock* was not merely about a jury instruction. In *Downs v. Dugger*, 514 So. 2d 1069, 1071 (Fla. 1987), this Court said:

> We thus can think of no clearer rejections of the "mere presentation" standard reflected in the prior opinions of this Court, and conclude that this standard no longer can be considered controlling law. Under *Hitchcock*, the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of that evidence may not be weighed during the formulation of an advisory opinion or during sentencing.

This Court found that *Hitchcock* was about much more than an erroneous jury instruction. This Court specifically found that it rejected this Court's jurisprudence that a mere opportunity to present mitigating evidence satisfied the Eighth Amendment principle recognized in *Lockett*.

This Court made it absolutely clear that consideration of *Hitchcock* error was not limited to examination of a jury instruction. In *Cooper v. State*, 526 So. 2d 900, 901 (Fla. 1988), this Court held that *Hitchcock* error occurred "when the judge and the jury's *consideration* of mitigating circumstances is limited to statutory factors." (Emphasis in original).[7] Indeed, this Court in *Cooper* proceeded to address the

[7]This Court noted at the outset:

> As a threshold matter, we reject the state's argument that petitioner's claim is procedurally barred. There is no procedural bar to *Lockett/Hitchcock* claims in light of the substantial change in the law that has occurred with respect to the **introduction and consideration** of nonstatutory mitigating evidence in capital sentencing hearings.

nonstatutory mitigating evidence that the defense had been precluded from presenting and the exclusion of which had been upheld by this Court in Mr. Cooper's direct appeal:

> During petitioner's sentencing proceeding, held on June 24, 1974, he sought to introduce, among other things, the testimony of family and friends regarding his employment history and his attempts to rehabilitate himself since his release from a prior incarceration; the testimony of his girl friend regarding their relationship and defendant's character; and the testimony of several witnesses concerning his relationship with his accomplice in the crime, Stephen Ellis. The trial judge repeatedly sustained the prosecutor's objections to this evidence as irrelevant to the statutory mitigating factors.

Id.

This Court found *Hitchcock* error occurred and explained:

> Conceding that the trial judge in this case operated under a mistaken belief that Florida law required exclusion of nonstatutory mitigating evidence, the state argues that the exclusion of petitioner's proffered testimony was not erroneous because the evidence was irrelevant, cumulative, or incompetent. We have carefully examined the record in this case and find this argument meritless. It is abundantly clear that the trial judge excluded any testimony outside the parameters of the statutorily enumerated factors and that even *defense counsel's proffers* were so limited.

Cooper v. State, 526 So. 2d at 901 (Emphasis added).

Id. at 902 (emphasis added).[8]

This Court in *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1988), also held that *Hitchcock* required consideration of mitigating evidence that was not in the record on direct appeal because the trial attorney had been constrained by Florida law at the time that he or she was limited to presenting statutory mitigation at the penalty phase proceeding:

> Turning to the merits of Hall's *Hitchcock* claim, we agree that the trial court limited the jury's and its own consideration to the statutorily enumerated mitigating circumstances. *Hall VI.* Furthermore, it is clear from the record that the trial court's express orders in Hall's trial and his accomplice's trial **effectively precluded Hall's counsel from investigating, developing, and presenting** possible nonstatutory mitigating circumstances. Because *Hitchcock* error has occurred, we must determine whether that error was harmless.

Hall v. State, 541 So. 2d at 1126 (emphasis added). Indeed in addressing the harmlessness of the error, this Court then considered affidavits of experts and family members who had not testified at the penalty phase because the defense attorney understood he was precluded from presenting nonstatutory mitigating. This Court concluded: "All of this expert and lay evidence proves or tends to prove a host of nonstatutory mitigating circumstances." *Id.* at 1128. Accordingly, the death sentence was vacated and matter remand for a new penalty phase proceeding.

This Court's analysis in *Hall* belies the State's argument that the retroactive application of *Hitchcock* only required this Court to examine the jury instruction for *Hitchcock* error and then determine whether based upon the direct appeal record it was harmless. *Hall* makes clear that consideration of *Hitchcock* error required considering exactly the same type of evidence involved in an ineffective assistance of counsel claim, the mitigating evidence not heard by a jury because the trial attorney was constrained by the then controlling case law

[8]The *Cooper* opinion belies the State's assertion that "... determining whether that error occurred in a particular case was simple. All one needed to do was review the jury instructions that had been given . . ." (AB at 47). Consideration of *Hitchcock* claims required consideration of not just what mitigating evidence that the jury did not consider because of an erroneous instruction, it also required consideration of what evidence was excluded from the penalty phase proceedings before the jury by the judge, what evidence was not investigated and presented by the defense attorney because of this Court's historic failure to properly apply *Lockett*, and it required consideration of whether the judge in imposing sentencing limited his consideration of nonstatutory mitigation.

precluding the presentation of nonstatutory mitigating evidence.

The State's argument that Mr. Davis' *Witt* argument is meritless because "no court has held that *Porter* is retroactive, and instead this Court and the federal courts, including the United States Supreme Court, have uniformly reinforced the application of *Strickland* to claims of ineffective assistance of counsel" (AB at 34), is specious. Prior this Court's decision as discussed in *Downs*, no court had held *Hitchcock* retroactive under *Witt*. And even to this day, no court, not even this one, has held that *Hitchcock* established a new fundamental constitutional right. Instead, it was repeatedly categorized by this Court as a significant change in Florida law because it rejected this Court's longstanding jurisprudence misconstruing *Lockett*.

Similarly, prior to *James v. State*, no court had held that *Espinosa* established a new fundamental constitutional right. Instead, *Espinosa* clearly rejected this Court's decision in *Smalley v. State* that *Maynard v. Cartwright* did apply to Florida's capital sentencing scheme.

The State's argument that because Mr. Davis "did not file this motion until 2010, this motion was time barred. Florida Rule of Criminal Procedure 3.851(d)(1)(B)" (AB at 33), simply ignores the fact that this Court has long held that a new decision qualifying under *Witt v. State* as new law is an exception which defeats all procedural bars. *Downs v. Dugger*; *Cooper v. State*; *Hall v. State*.

In addition, the State repeatedly argues that *Porter* did not change the analysis to be conducted for ineffective assistance of counsel claims as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (AB at 36-8). While the legal standards for determining deficient performance and prejudice have not changed (just as *Hitchcock* did not change *Lockett* and *Espinosa* did not change *Maynard v. Cartwright*), the decision in *Porter v. McCollum* found this Court unreasonably applied *Strickland* (just as this Court had unreasonably applied *Lockett* and had unreasonably found *Maynard v. Cartwright* did not apply in Florida).

As a result, this Court's case law on which it relied in rejecting Mr. Porter's ineffective assistance of counsel claim must be abandoned and Florida jurisprudence must change in conformity with *Porter v. McCollum*. The United States Supreme Court has

determined that this Court applied an incorrect standard in reviewing the evidence presented to support Mr. Porter's ineffective assistance of counsel claim. The United States Supreme Court's rejection of this Court's jurisprudence is a change in Florida law. This Court used the exact same incorrect standard that had been used in *Porter v. State* when it reviewed Mr. Davis' ineffective assistance of counsel claims. Fairness dictates that Mr. Davis should be treated the same as Mr. Porter and receive the benefit of *Porter v. McCollum* and the change it has brought to Florida law as to how this Court conducts a *Strickland* analysis of the evidence presented in support of an ineffective assistance of counsel claim.

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. 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. In finding that both *Hitchcock* and *Espinosa* qualified as new Florida law under *Witt*, this Court noted that fairness dictated that others situated similarly to Mr. Hitchcock and Mr. Espinosa should receive the benefit of the decisions from the United States Supreme Court which found their sentences of death constitutionally defective.

In Mr. Davis' case the change in Florida law was identified by the United States Supreme Court in *Porter*. So, the first requirement is clearly met. Because the analysis of a ineffective assistance of counsel claim is based on the Sixth Amendment to the United States Constitution, the second criteria is also clearly met. As to the third criteria, there can be no doubt that the standard of review used to analyze an ineffective assistance of counsel claim is fundamentally significant, particularly as to the penalty phase in a capital case where the issue is literally a matter of life and death. The significance of the decision in *Porter v. McCollum* parallels the significance of the decision in *Hitchcock v. Dugger* as this Court's analysis of *Hitchcock* error in *Cooper v. State* and *Hall v. State* clearly demonstrates.

The State also argues that *Porter* should not be held to be retroactive because when this Court changed the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), this Court declined to apply the new standard retroactively (AB at 49, *citing Johnston v. Moore*,

789 So. 2d 262 (Fla. 2001). However, the State fails to acknowledge the obvious critical distinction between *Porter v. McCollum* and *Stephens v. State* - *Porter v. McCollum* was a decision by the United States Supreme Court finding that this Court was not properly applying *Strickland*, *Stephens v. State* was not a decision emanating from the United States Supreme Court. *Stephens* was a less significant decision from a lesser court. In *Stephens*, this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings and decided to clarify that standard.[9] However, in *Porter v. McCollum*, the highest court in the country and the final arbiter as to the requirements of the United States Constitution found that this Court's analysis of Mr. Porter's ineffective assistance of counsel claim, including the standard of review employed, was contrary to and an unreasonable application of *Strickland*. Thus, the United States Supreme Court specifically identified a flaw in this court's reasoning in *Porter v. State*, which this Court had specifically stated in *Porter v. State* was dictated by Florida case law construing the requirements of *Strickland*.

The State's scatter shot arguments also includes the suggestion that "applying the alleged change in law in *Porter* retroactively would be to bring the courts of Florida to a screeching halt as they combed through stale records to re-evaluate the merits of every claim of ineffective assistance of counsel that had ever been denied in Florida." (AB at 48). However, as the State has repeatedly notified this Court that there are approximately "41 capital cases" where capital postconviction defendants have requested the same benefit that Mr. Porter was granted. Thus, it would appear that the effect on the administration of justice would be approximately "41 capital cases". And, while according to the State, forty-one (41) capital postconviction defendants have sought the state courts to review their cases for *Porter* error, it is more than likely that some will still not be entitled to relief after a proper review of their postconviction claims. Thus, the State's "the sky is falling" argument is refuted by its own admission that, at most, "41 capital cases" will be effected.

Certainly, a finding that fairness requires that *Porter v. McCollum* qualifies for retroactive application under *Witt v. State* would be

[9]This Court's ruling in *Stephens* was much more akin to a refinement in the law which as explained by Justice Grimes' dissent in *James v. State,* 615 So. 2d at 670, would not qualify for retroactive application under *Witt v. State*

no more taxing than this Court's conclusion that *Hitchcock v. Dugger* qualified under *Witt*. It is clear from this Court's opinions in *Cooper v. State* and *Hall v. State* that the review of *Hitchcock* error for harmlessness was no less stringent than the review of an ineffective assistance of counsel claim. The harmless error analysis of *Hitchcock* error required consideration of what mitigating evidence was not investigated and presented by trial counsel because of this Court's erroneous construction of *Lockett*. The issue under *Witt* is one of fairness, not sloth.

The State's attempt to distinguish the proceedings that occurred after *Hitchcock v. Dugger*, with the circumstances surrounding *Porter v. McCollum*, by arguing that because *Hitchcock* involved a jury instruction and *Porter* should nor be applied retroactively cannot withstand any scrutiny (AB at 46-7). As this Court made clear in *Downs v. Dugger*, *Cooper v. State* and *Hall v. State*, *Hitchcock* error was not just instructional error. It required consideration of whether nonstatutory mitigating evidence did not reach either the jury or the judge and/or was not considered by either the jury or the judge because of case law from this Court misconstruing *Lockett*.

Here, the issue presented by claims of error under *Porter v. McCollum* is strikingly similar to the issue presented by *Hitchcock* error as this Court's analysis of the *Hitchcock* error in *Hall v. State* demonstrates. Just as in *Hall v. State*, what is required is consideration of the mitigation that trial counsel failed to investigate and/or present and how the undiscovered and/or unpresented mitigating evidence may have impacted the jury and/or the judge. An appellate court reviewing *Porter* error should analyze all of the evidence presented by the capital defendant in postconviction proceedings, and not disregard evidence because the judge presiding at the evidentiary hearing discounted it. Just as *Hitchcock* required Florida courts to revisit claims of *Lockett* error in the guise of *Hitchcock* error, *Porter v. McCollum* should require Florida courts to revisit claims of *Strickland* error in the guise of *Porter* error. Claims of ineffective assistance of penalty phase counsel should be reheard and re-evaluated employing the standard set forth in *Porter v. McCollum*.

The State's reliance on *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), is also misplaced (AB at 50). In *Marek*, Mr. Marek through counsel, raised a claim that the ABA report constituted newly discovered evidence that entitled Mr. Marek to relief. *Marek v. State*, 8 So. 3d at 1126 ("In his second claim, Marek argued generally that his death sentence was imposed arbitrarily and capriciously thus violating *Furman v.*

Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which held that the death penalty must be imposed fairly and consistently. Marek based this claim on the American Bar Association's September 17, 2006, report, *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report* (ABA Report), which criticizes Florida's death penalty scheme and clemency process. Marek asserted that the ABA Report constitutes newly discovered evidence demonstrating that his death sentence is unconstitutionally arbitrary and capricious."). Thus, Mr. Marek did not, as the State falsely asserts, "argue[] that his previously rejected claim of ineffective assistance of counsel at the penalty phase had to be re-evaluated under the standards enunciated in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), because they changed the standard of review for claims of ineffective assistance of counsel under *Strickland*." (AB at 50).

The ABA report had criticized this Court's failure to apply all capital decisions retroactively. Mr. Marek filed his claim relying on this criticism contained in the ABA report in May of 2007, which issued in the fall of 2006. In relying on the criticism set forth in the ABA report, Mr. Marek noted three decisions from the U.S. Supreme Court that he contended would have resulted in sentencing relief had they been applied retroactively as the ABA Report suggested they should. These three decisions were *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005). Mr. Marek advanced no argument that these three decisions qualified under *Witt v. State* as new Florida law.[10] And the reason for that was that the United States Supreme Court in *Williams v. Taylor* addressed the Virginia Supreme Court's unreasonable application of *Strickland*, in *Wiggins v. Smith* it addressed the Maryland Court of Appeals' unreasonable application of *Strickland*, and in *Rompilla v. Beard* it addressed the Pennsylvania Supreme Court's unreasonable application of *Strickland*. In not one of the three cases did the United States Supreme Court purport to change the *Strickland* standard. In each instance, the United States Supreme Court found that the highest court of those three states had unreasonably applied well-established

[10]Nor did Mr. Marek argue that he was presenting a Rule 3.851 motion based upon those decision within one year of those decisions. Indeed, the Rule 3.851 motion was filed more than two years after *Rompilla*, more than four years after *Wiggins*, and more than seven years after *Williams*.

federal law. Thus, there was no basis to argue that any one of the three decisions changed Florida law.

It should go without saying that a decision from the United States Supreme Court finding that this Court, the Florida Supreme Court, has unreasonably applied federal law is qualitatively different and/or greater significance within the State of Florida than a United States Supreme Court decision finding that the highest court of some other state has unreasonably applied federal law. Yet, the State's argument that this Court's decision in *Marek* fails to recognize the obvious, *i.e. Williams v. Taylor*, *Wiggins v. Smith*, nor *Rompilla v. Beard* changed Florida law. The fact that Virginia Supreme Court, the Maryland Court of Appeals, and the Pennsylvania Supreme Court had failed to properly apply *Strickland* simply did not change Florida law.[11] The State also asserts that the Supreme Court's opinion in *Porter* was "limited to the facts in that case" (AB at 38). The State's argument is refuted by simply noting that the United States Supreme Court as well as other courts have relied on the principles set forth in *Porter*. *See Sears v. Upton*, 130 S. Ct. 3529 (2010); *Johnson v. Buss*, ("'The major requirement of the penalty phase of a trial is that the sentence be individualized by focusing on the particularized characteristics of the individual.' *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987). For that reason, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter*, ____ U.S. at ____, 130 S.Ct. at 455. '[E]vidence about the defendant's background and character is 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 than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989) (quotation marks omitted)".

[11]The only truly analogous situations are those involving a decision by the United States Supreme Court that this Court, the Florida Supreme Court, has failed to reasonably apply federal law. And in those analogous situations, *i.e. Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court has recognized that United States Supreme Court's repudiation of this Court's jurisprudence constitutes a change in Florida law.

Furthermore, as the Eleventh Circuit Court of Appeals' opinion in *Johnson v. Buss*, makes clear, the principles set forth in *Porter* are not confined to postconviction defendants who have presented military history in mitigation. *Id.*[12]

[12]It should have also been clear from the United States Supreme Court's reliance upon *Porter v. McCollum* in *Sears v. Upton*, a case from the Georgia Supreme Court in which the capital defendant did not have a military background.

The State also argues that *Porter* does not require a change to the analysis to be conducted in postconviction after an evidentiary hearing has been conducted (AB at 39). Contrary to the State's argument, the United States Supreme Court specifically criticized the analysis of the evidence that was presented in Mr. Porter's case: "The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing." *Porter v. McCollum,* 130 S. Ct. at 454. The mitigation was not considered or unreasonably discounted due to the flawed standard of review that was used in reviewing Mr. Porter's claim.[13] The same flawed standard was used in Mr. Davis' case which led this Court to similarly fail to consider or unreasonably discount recognized mitigation.

[13]In *Porter v. State*, this Court explained why it had discounted the mitigating evidence presented at the evidentiary hearing:

> 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.

The same erroneous standard of review was applied to the deficient performance prong of Mr. Davis' ineffective assistance of counsel claim. Indeed, the United States Supreme Court in *Porter v. McCollum* found that Mr. Porter's trial attorney had rendered deficient performance. In doing so, consideration was given to the value of the mitigating evidence that had been denigrated by the judge presiding at the evidentiary hearing. The *Porter* error is not exclusive to cases where there was either a finding of deficient performance, or the Court did not reach the issue; this is particularly true where the failure to investigate is excused because the evidentiary hearing court discounted the value of the mitigation that had not been investigated and this Court deferred to the denigration of the unpresented mitigating evidence. The standard of review and analysis of evidence that is mandated in *Porter* applies to all of a postconviction defendant's claims where evidence has been presented to support the claims. Thus, based on *Porter*, Mr. Davis' claims of ineffective assistance of counsel require further review, using the standard set forth in *Porter*.[14]

[14]Mr. Davis is not arguing, as the State suggests, that "*Porter* requires a court to grant relief on an ineffective assistance of counsel claim based solely on a finding that some evidence to support prejudice was presented at a post conviction hearing regardless of what mitigation was presented at trial, how incredible the new evidence was, how much negative information the new evidence would have caused to be presented at trial or how aggravated the case was." Rather, Mr. Davis is arguing that *Porter* means that this Court cannot disregard or ignore mitigation. That is exactly what happened in Mr. Davis' case. Nor, as the State erroneously indicates, did Mr. Davis rely on an analogy about quarters and pennies in indicating the correct prejudice analysis that must be conducted. *See* at 45, n3.

The State's final argument concerns whether collateral counsel was authorized to file Mr. Davis' successive motion to vacate based on *Porter v. McCollum* (AB at 54). Here, the State weakly relies on Florida Statute §§ 27.702 and 27.711 (*Id.*).[15] Based on the statutes, the State argues that ". . . CCRC-S was not authorized to file this patently frivolous, repetitive and successive motion." (AB at 54). Assuming that the State meant to say "Mr. Davis' registry counsel"[16] was not authorized to file his successive motion, the State fails to cite any of the longstanding rules or law from this Court that are clearly contrary to such an argument. First, since Florida Statute §§ 27.702 and 27.711 were promulgated more than eight years ago, registry counsel have filed numerous successive motions to vacate and petitions for writ of habeas corpus. The claims and issues presented range from newly discovered factual claims, lethal injection claims, claims regarding the ABA Report of 2005, to claims based on opinions from the United States Supreme Court, including *Deck v. Missouri*, 544 U.S. 622 (2005); *Roper v. Simmons*, 543 U.S. 551 (2005); *Bradshaw v. Stumpf*, 545 U.S. 175 (2005); *Crawford v. Washington*, 541 U.S. 36 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Atkins v. Virginia*, 536 U.S. 304 (2002). And, during all of the successive litigation since Florida Statute §§ 27.702 and 27.711 were promulgated, not once has the State complained or argued that the statutes prohibited the filing of such pleadings. Rather, the courts have addressed the claims and issues presented.

Furthermore, the State fails to acknowledge that this Court has promulgated rules that specifically authorize successive motions to vacate and petitions for writ of habeas corpus. *See* Rule 3.851(e)(2).

[15]The State did not make such an argument during the case management conference.

[16]Mr. Davis is represented by registry counsel, and undersigned does not believe he was ever represented by CCRC-S.

Finally, in *Olive v. Maas*, 811 So. 2d 644, 654 (Fla. 2002), registry counsel challenged Florida Statute §27.711, based on the claim that the restrictions about counsel's ability to file successive motions to vacate violated his ethical obligations to his client. In addressing this issue, this Court interpreted the legislature's use of the term "successive" not to mean a second or third motion, but rather a motion attempting to litigate the same claim. *Id.* This Court also specifically stated that the claims Olive referred to, like Mr. Davis' *Porter* claim "are not claims which would be deemed frivolous, successive or repetitive." *Id.* Thus this Court has already addressed the issue of registry counsel's authority to file successive motions to vacate and has rejected the State's argument.[17]

CONCLUSION

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

[17]The State's complete lack of candor as to the history of successive litigation, including death warrant litigation which by its very nature is "successive", and the clear rule and law that refute its position is outrageous.

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 5th day of August, 2011.

CERTIFICATE OF FONT

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

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