IN THE SUPREME COURT OF FLORIDA

CHARLES WILLIAM FINNEY,

Appellant,

v. **Case No. SC11-426**
Lower Tribunal No. 91-1611

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This appeal presents the denial of a successive motion for postconviction relief seeking further review of this case in light of the United States Supreme Court opinion in Porter v. McCollum, 130 S. Ct. 447 (2009). The appellant, Charles Finney, was convicted of the 1991 robbery and murder of Sandra Sutherland and sentenced to death. This Court upheld his convictions and sentences on direct appeal. Finney v. State, 660 So. 2d 674, 678-79 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996):

> According to the testimony at trial, Sandra Sutherland was discovered stabbed to death in her apartment shortly after 2 p.m. on January 16, 1991. The victim was found lying face down on her bed. Her ankles and wrists were tied and she had been gagged. On a nightstand near the bed was an open jar of face cream. The lid was lying next to the jar. The victim's bedroom had been ransacked, the contents of her purse had been dumped on the floor, and her VCR was missing.
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> According to the medical examiner the cause of death was multiple stab wounds to the back. Of the thirteen stab wounds, all but one penetrated the lungs causing bleeding and loss of oxygen, ultimately resulting in death. No bruises or other trauma was observed.
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> Numerous fingerprints were gathered from the victim's apartment, including prints from a piece of paper with German writing and from the jar on the nightstand. Fingerprints also were taken from the missing VCR, which was located at a local pawn shop. Pawn shop records indicated that the VCR was brought in on January 16 at 1:42 p.m. by Charles W. Finney for a loan of thirty dollars. Finney's fingerprints matched prints taken from the pawn ticket, the VCR, the jar lid, and the paper with German writing.

After it was determined that Finney had pawned the victim's VCR, Detective Bell of the Tampa Police Department interviewed Finney on the afternoon of January 30, 1991. Finney told Bell that he knew the victim due to the fact that they had lived near each other in the same apartment complex. Finney told Bell that he had seen the victim twice since she moved to another apartment in the complex. Once, he had talked to her about putting a screened porch on the back of her new apartment and then about two months prior to the murder he talked to her by the mailboxes at the complex. When asked about his whereabouts on the day of the murder, Finney told Detective Bell that he was home sick all day and never left his apartment. Upon being confronted with the fact that he had pawned the victim's VCR, Finney told the detective he found it near the dumpster when he took out the garbage and then pawned it.

Finney called a witness who testified that the day before the murder he saw the victim arguing with a white male near the mailboxes at the apartment complex. Another defense witness testified that around 10 a.m. on the day of the murder, he saw William Kunkle, who worked as a carpenter at the apartment complex, come out of the victim's apartment. According to the witness, when Kunkle saw him, Kunkle came out of the door very quickly, locked the door with a key, and walked around the corner. The witness's girlfriend offered similar testimony as to Kunkle's conduct. In rebuttal, Kunkle testified that on January 16 he worked in the building next door to Ms. Sutherland's apartment, but had not been in her apartment that day. He denied ever having any conversation or interaction with the victim. The fingerprint examiner also testified during rebuttal that Kunkle's fingerprints did not match those found in the victim's apartment.

The defense sought to recall the medical examiner, Dr. Diggs, to testify that the crime scene was consistent with both a consensual sexual bondage situation and a situation where the victim consented to being bound and gagged out of fear. The State objected to the testimony as speculative. During proffer, Dr. Diggs told the court that whether a bondage situation was consensual was not something that a medical examiner would typically testify about

> or try to determine. The trial judge disallowed any testimony about the circumstances being consistent with sexual bondage, but allowed Dr. Diggs to testify concerning the probable positions of the victim and of the attacker and about the fact that there were no defensive wounds or other signs of a struggle.
>
> Finney took the stand in his own defense. He testified that he had lived near Ms. Sutherland in the same apartment complex until she moved about eight months prior to the murder. A couple of months after she moved, Ms. Sutherland talked to him about screening in the patio of her new apartment. At that time, she handed him a piece of paper to write down measurements but took the paper back. Finney testified that he returned about a week or two later but Ms. Sutherland had decided not to screen the patio. On that occasion he was in the victim's apartment, helped her move boxes and took various items out of the boxes. According to Finney the last time he saw Ms. Sutherland was a day or two before the murder. She was coming out of her apartment early one morning. She came over to his car and they talked. He further testified that he found the VCR near the dumpsters at the complex and had pawned it the same day for pocket cash. He stated that he did not steal the VCR and that he did not kill Ms. Sutherland.

Finney was convicted of first degree murder, armed robbery, and dealing in stolen property (DA. V5/758). At sentencing, the State presented the testimony of Judy Baker, the victim of Finney's prior violent felony conviction (DA. V6/820-839). The defense presented the testimony of Finney's common law wife, Tammy Gallimore (DA. V6/839-859); a close friend and co-worker, Joseph Williams (DA. V6/860-869); and a forensic psychologist, Dr. Michael Gamache (DA. V6/869-892).

The jury recommended death by a vote of nine to three (DA. V6/921). The trial judge followed the recommendation, finding

three aggravating factors: 1) Finney previously had been convicted of a violent felony; 2) the murder was committed for pecuniary gain; and 3) the murder was especially heinous, atrocious or cruel; and five nonstatutory mitigating factors: 1) Finney's contributions to the community as evidenced by his work and military history; 2) Finney's positive character traits; 3) Finney would adjust well to a prison setting and had potential for rehabilitation; 4) Finney had a deprived childhood; and 5) Finney's bonding with and love for his daughter (DA. V1/153-57).

Following this Court's affirmance, Finney sought certiorari review in the United States Supreme Court, challenging this Court's finding of a procedural bar on his claim of improper shackling. Review was denied on January 22, 1996. Finney v. Florida, 516 U.S. 1096, 116 S. Ct. 823 (1996).

Finney's initial motion for postconviction relief, which included a claim of ineffective assistance of trial counsel, was summarily denied. This Court affirmed that ruling in October, 2002. Finney v. State, 831 So. 2d 651 (Fla. 2002). Successive postconviction motions have also been summarily rejected. See Finney v. State, 18 So. 3d 527 (Fla. 2009) (lethal injection claim); Finney v. State, 907 So. 2d 1170 (Fla. 2005) (claim under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), as well as a renewed claim of ineffective assistance of collateral

counsel). Federal courts have also denied relief. See Finney v. McDonough, 2006 WL 2024456 (M.D. Fla. July 17, 2006) (denying federal habeas petition); Finney v. McDonough, 551 U.S. 1118, 127 S. Ct. 2944 (2007) (denying certiorari review of the denial of a certificate of appealability by the Eleventh Circuit Court of Appeals).

On November 29, 2010, Finney filed another successive motion for postconviction relief, seeking relief pursuant to Porter (V1/42-61). The State filed a Response (V1/63-74), and a case management conference was held on January 21, 2011 (V2/112-114). The trial court thereafter summarily denied the motion as both untimely and successive (V1/80-82). This appeal follows.

SUMMARY OF THE ARGUMENT

The court below properly denied Finney's motion as untimely and successive. Finney's motion did not meet the requirements for an exception to the one year limitation as provided in Florida Rule of Criminal Procedure 3.851(d)(2)(B). The lower court held that Porter did not establish a new fundamental constitutional right and that this Court has already thoroughly addressed Finney's claim of ineffective assistance of counsel. Even if cognizable, Finney's Porter claim offers no basis for a finding of error in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING FINNEY'S POSTCONVICTION MOTION AS UNTIMELY AND SUCCESSIVE.

Finney challenges the trial court's summary denial of his claim that prior litigation of his ineffective assistance of counsel claim must be revisited in light of Porter v. McCollum, 130 S. Ct. 447 (2009). This issue presents a legal ruling, subject to *de novo* review. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*). Finney has failed to demonstrate any error in the ruling below to deny his motion.

Finney's motion was filed pursuant to Florida Rule of Criminal Procedure 3.851, which provides that motions for postconviction relief must be brought within one year of the conviction and sentence becoming final unless the motion meets one of the exceptions outlined in the rule. Fla. R. Crim. P. 3.851(d)(1). Because Finney's convictions and sentence became final in 1996, his motion was properly rejected as untimely.

Finney does not acknowledge the time limitations of Rule 3.851, and accordingly he makes no effort to demonstrate that he can satisfy any of the exceptions noted in that rule for the

filing of a motion beyond the one year deadline. Instead, he asserts that Porter is subject to retroactive application under Witt v. State, 387 So. 2d 922 (Fla. 1980), rendering his claim cognizable in postconviction. However, his analysis is irrelevant; even satisfaction of the Witt retroactivity principles does not excuse a failure to comply with the procedural requirements in presenting a claim for relief. See Mills v. Dugger, 574 So. 2d 63 (Fla. 1990) (Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987) claim subject to time bar); Clark v. Dugger, 559 So. 2d 192, 194 (Fla. 1990) (Hitchcock claim procedurally barred where previously considered and rejected in state and federal court). Thus, before considering Witt, this Court must assess the propriety of the trial court's finding this motion to be untimely and successive.

Rule 3.851(d)(2) makes no exception to the time bar for consideration of cases to be applied retroactively under Witt. Rather, the rule only permits consideration of a new constitutional right which "has been held to apply retroactively." Rule 3.851(d)(2)(B). Finney does not identify any new constitutional right created by Porter nor has he alleged that Porter has been held to apply retroactively by any court. In fact, Porter did not create any new constitutional right and it has not been held to be retroactive; his motion was

therefore untimely and properly denied.

In addition, Finney's motion was barred as it raised an improper successive claim. In this case, the state courts have already considered and rejected the ineffective assistance of counsel claim Finney presents. Finney, 831 So. 2d at 659-61. Moreover, the state court rejection of Finney's claim has already been reviewed for "Porter" error, since the federal courts expressly found that the state court application of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) here was reasonable. Finney, 2006 WL 2024456 at *33 ("The Florida courts did not misapply Strickland or any other relevant decision in denying Finney's claim that trial counsel was ineffective in presenting mitigating evidence") (footnote omitted). Because Finney's ineffective assistance of counsel claim has previously been rejected, his current claim is procedurally barred. Pope v. State, 702 So. 2d 221, 223 (Fla. 1997); Clark, 559 So. 2d at 194. Piecemeal litigation of claims of ineffective assistance of counsel is clearly prohibited. Pope, 702 So. 2d at 223; Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996). Thus, Finney's claim is procedurally barred and precluded by the law of the case doctrine and *res judicata*. See Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on

the merits); State v. McBride, 848 So. 2d 287, 289-90 (Fla. 2003) (law of the case doctrine precludes relitigation of claim denied by trial court and affirmed on appeal).

In fact, this Court has rejected attempts to relitigate ineffective assistance claims simply because the United States Supreme Court issued opinions indicating that state courts have erred in rejecting claims of ineffective assistance of counsel. Marek v. State, 8 So. 3d 1123 (Fla. 2009). Marek argued 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, 125 S. Ct. 2456 (2005), Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), and Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), because they had changed the standard of review for claims of ineffective assistance of counsel under Strickland. This Court decisively rejected the claim, stating "the United States Supreme Court in these cases did not change the standard of review for claims of ineffective assistance of counsel under Strickland." Marek, 8 So. 3d at 1128. This Court did so even though the United States Supreme Court had found that state courts had improperly rejected these claims. As in Marek, Finney's claim was barred and was properly denied.

Even if this Court were to disregard the procedural

obstacles and consider whether Witt requires retroactive application in an untimely motion, Finney has not demonstrated this claim is cognizable. He asserts that the Porter decision constitutes a change in state law, as the United States Supreme Court "repudiated" this Court's jurisprudence in resolving ineffective assistance of counsel claims under Strickland. To the contrary, as the court below found, Porter merely determined that this Court unreasonably applied Strickland on the facts of that particular case (V1/81).

Pursuant to Witt, retroactive application is only available where: (1) the change in law emanated from this Court or the United States Supreme Court; (2) was constitutional in nature; and (3) was of fundamental significance. Witt, 387 So. 2d at 929-30. To meet the third element of this test, the change in law must (1) place the power to regulate certain conduct or impose certain penalties beyond the authority of the state; or (2) be of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." Id. at 929. Application of that three prong test requires consideration of the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001).

Here, while Finney admits that a change in law is not retroactive under Witt unless this standard is met, he makes no attempt to show how the change in law that he alleges occurred meets this standard. In fact, he never clearly identifies what change Porter made, offers no purpose behind that change in law and does not mention how extensive the reliance on the allegedly old law was or what the effect on the administration of justice would be.

Instead of attempting to show that the change in law he alleges occurred meets Witt, Finney offers an analogy with the Hitchcock line of cases, suggesting that because both Hitchcock and Porter involved findings of error in Florida cases, the change in law he asserts occurred in Porter should be treated similarly. However, the mere fact that this Court found a change in law based on a determination that this Court had made an error to meet the Witt standard in one case does not dictate a finding that this Court's commission of a different error in a different case would constitute a change in law that satisfies Witt in a different case. This is particularly true when one considers the difference in the errors found in Hitchcock and Porter and the relationship between those errors and the Witt standard.

In Hitchcock, 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 jury to consider evidence the defendant had a constitutional right to have considered. Moreover, because the jury instruction was only given in the penalty phase and 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 in 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. See State v. Glenn, 558 So. 2d 4, 8 (Fla. 1990) (refusing to apply Carawan v. State, 515 So. 2d 161 (Fla. 1987), retroactively). Thus, the purpose of the new rule, extent of reliance on the old rule and effect on the administration of justice in Hitchcock militated in favor of retroactivity.

In contrast, Porter involved nothing more than determining that this Court had unreasonably applied a correctly stated rule of law to the facts of a particular case, as noted above. Thus, the purpose of Porter was nothing more than to correct an error

in the application of the law to facts of a particular case. Finney asserts that Porter did more, alleging Porter rejected the standard of review in Stephens v. State, 748 So. 2d 1028 (2001). However, Florida courts have extensively relied on this standard of review, which is consistent with Strickland, and the effect on the administration of justice from applying this 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.

The differences in the analysis of changes in law in Porter and Hitchcock and their relationship to the Witt factors render Finney's reliance on Hitchcock unpersuasive. In fact, the more apt analogy regarding a change in law would be the change in law that this Court recognized in Stephens itself, as both changes in law concerned the same legal issue. In Johnston v. Moore, 789 So. 2d 262 (Fla. 2001), this Court held the change in law in Stephens was not retroactive under Witt. Given the fact that Porter would fail the Witt test even if it had changed the law as this Court has already determined that changing the standard of review for ineffective assistance of counsel claims does not meet Witt, Finney is not entitled to relief.

Moreover, Porter did not reject the Stephens standard of review, which compels deference to the lower courts' findings of fact. That standard is expressly sanctioned in Strickland, which specifically acknowledges that factual findings made in the course of assessing a claim of ineffectiveness are entitled to deference. Strickland, 466 U.S. at 698. Finney acknowledges that Porter did not change the law of Strickland, and his claim that Porter's finding of an unreasonable application of federal law was based on use of Stephens' standard of deference is without merit. In fact, if the United States Supreme Court determined that this Court applied an incorrect legal standard, it would not have found this Court's decision in Porter to be an "unreasonable application" of Strickland, it would have instead found that this Court ruled "contrary to" Strickland as the basis for granting habeas relief. See Williams v. Taylor, 529 U.S. 362, 412-13 (2000) (explaining a state court decision is "contrary to" established federal law when the state court got the legal standard for the claim wrong or reached the opposite conclusion from the United States Supreme Court on "materially indistinguishable" facts, whereas the state court decision is an "unreasonable application" of established federal law when "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that

principle to the facts of the prisoner's case").

In Porter, the Court never mentioned this portion of Strickland and made no suggestion that it was improper for a reviewing court to defer to factual findings made in resolving an ineffective assistance claim. Porter, 130 S. Ct. at 448-56. Instead, it characterized the opinion of the state trial court and this Court as having found there was no statutory mitigation established and there was no prejudice from the failure to present nonstatutory mitigation. Id. at 451. Under the standard of review authorized by Strickland and followed by this Court, the first of these findings was a factual finding but the second was not. Strickland, 466 U.S. at 698. Rather than determine that this Court's factual finding was not binding, the Court seems to have accepted it and found this Court had acted unreasonably by not making factual findings about *nonstatutory* mental health mitigation and making an unreasonable conclusion on the mixed question of fact and law regarding prejudice. Porter, 130 S. Ct. at 454-56. Thus, to find that Porter overruled Stephens and its progeny, this Court would have to find that the United States Supreme Court overruled itself *sub silencio* in a case where the Court appears to have applied the allegedly overruled law. However, this Court is not even empowered to make such a finding, as this Court has itself

recognized. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S. Ct. 1917, 1922 (1989); Bottoson v. Moore, 833 So. 2d 693, 694 (Fla. 2002).

Finney further asserts that Porter not only rejected the Stephens' standard, but repudiated this Court's analysis of prejudice under Strickland because it found that this Court failed to adequately "engage" with the mitigation presented in postconviction proceedings. On this point, Finney claims that this Court disregarded its obligation to determine whether the collateral mitigation evidence demonstrated a reasonable probability of a different outcome, and instead looked to whether there was any reasonable possibility of that the same sentence would be imposed even if the collateral evidence had been presented to the jury. By way of explanation, Finney offers a red apple/green apple analogy which grossly oversimplifies the analysis and accordingly misses the mark.

In Finney's analogy, baskets with green apples (representing "non-mitigating" evidence) and red apples (representing truly mitigating evidence) are inspected to determine whether there are more red apples than green apples. In Finney's view, an apple inspector who makes the determination by glancing at the surface of the basket will improperly focus on the likelihood that most apples are green, rather than

digging through the basket to actually count the number of red apples. Thus, Finney suggests that a court analyzing whether new collateral mitigation evidence demonstrated a reasonable probability of a different outcome need not worry about anything other than the absolute number of red apples present; in other words, any collateral mitigation which was not presented at trial will satisfy the prejudice standard, as courts must "err on the side of finding a constitutional violation" (Appellant's Initial Brief, p. 41). Collateral mitigation evidence which might be discounted due to a conflict in the evidence or as a "double-edged sword," (such as substance abuse or a sociopathic diagnosis) may be discounted, turning those apples green, but as long as sufficient red apples (that is, truly mitigating evidence) were offered collaterally, prejudice has been demonstrated.

Finney's analogy is flawed in several respects. Most glaringly, there is no legal authority to support Finney's assertion that Strickland's second prong is satisfied whenever unpresented mitigation is developed in postconviction proceedings. Porter does not support such an analysis. To the contrary, Porter states that determining prejudice requires a court to "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.'" Porter, 130 S. Ct. at 453-54 (quoting Williams, 536 U.S. at 397-98). In Finney's view, this mandated reweighing amounts to no more than a postconviction or reviewing court substituting its credibility findings for that of a jury that never had the opportunity to count the apples itself. Yet, that is clearly what the law requires.

Finney's apple basket example of sentencing fails to acknowledge that aggravating factors are also part of the relevant analysis. It also fails to recognize that mitigation is not simply as black and white - or, in his eyes, as red and green - as suggested. The fact of the matter is that some jurors will look at the same apple and where some see red, some will see green, and others may see yellow. Despite the indisputable fact that the only way to adequately assess whether a new jury would make a different sentencing recommendation is to "speculate" on what a jury might find truly persuasive and what a jury might discount as unsupported or simply irrelevant to a defendant's moral culpability, that is what Strickland requires. See Sears v. Upton, 130 S. Ct. 3259, 3261 (2010) (reversing state court's refusal to "speculate" about the effect the collateral mitigation might have had at trial).

Thus, Finney's suggestion 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 postconviction 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, is not well taken.

The United States Supreme Court has addressed prejudice analyses under Strickland on many occasions. In Wong v. Belmontes, 130 S. Ct. 383, 386-91 (2009), the Court reversed the Ninth Circuit for finding prejudice by ignoring the mitigation evidence already presented, the cumulative nature of the new evidence, the negative information that would have been presented had the new evidence been presented and the aggravated nature of the crime. The Court noted that this error was probably caused by the Ninth Circuit's failure to require that the defendant meet his burden of affirmatively proving prejudice. Id. at 390-91. Similarly, in Bobby v. Van Hook, 130 S. Ct. 13, 19-20 (2009), the Court reversed the Sixth Circuit for finding prejudice without considering the mitigation already presented at trial, the cumulative nature of the evidence presented in postconviction and the aggravated nature of the crime. Given what Porter actually says about proving prejudice

and Belmontes and Van Hook, Finney's suggestion that Porter requires a finding of prejudice anytime a defendant presents new mitigating evidence at a postconviction hearing is without merit. Porter did not change the law which requires that a defendant actually prove there is a reasonable probability of a different result.

Finally, there is no support for Finney's suggestion that, rather than apply the correct prejudice standard from Strickland, this Court has systematically reviewed ineffectiveness claims to determine whether there was any reasonable possibility that the same outcome could have been obtained had counsel performed differently. Finney has not cited any cases where this Court expressly or implicitly applied this standard of reasonable possibility. To the contrary, the cases he cites reflect that this Court applied the proper standard of review, granting deference to factual findings in accordance with Stephens, as well as the proper prejudice inquiry, assessing whether there was any reasonable probability of a different outcome had counsel performed differently. See Sochor v. State, 883 So. 2d 766, 771-72, 774 (Fla. 2004); Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2001).

Accordingly, the court below properly found that Porter did not compel reconsideration of Finney's prior claim of

ineffective assistance of counsel. The ruling to deny Finney's motion as untimely and successive was correct and must be affirmed.

ISSUE II

WHETHER FINNEY IS ENTITLED TO RELIEF ON ASSERTED "PORTER ERROR."

Finney's second issue asserts that the same impropriety which resulted in the United States Supreme Court reversing this Court in Porter occurred in his case. Even if Finney could establish that his case was properly subject to additional review for Porter error, he has failed to offer any reasonable basis for the granting of relief.

To the extent Finney asserts that Porter mandates a different standard of review than that identified in Stephens, this principle would have no application in the instant case, since Finney's claim of ineffective assistance of counsel was summarily denied. Therefore, both this Court and the trial court necessarily accepted the truth of Finney's allegations as to mitigation available which was not presented at trial. Finney, 831 So. 2d at 656 ("Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record"). The purported mitigation was not rejected or discounted in any manner, and no possible "Porter" error, as defined by Finney, could have occurred.

To the extent that Finney asserts that Porter mandates a

"meaningful engagement" with the mitigation offered, this Court satisfied the necessary standard by extensively reviewing the mitigation submitted. A review of this Court's opinion confirms that this Court conducted the probing, fact-specific analysis consistent with Strickland, Porter, and numerous other cases discussing a proper prejudice analysis on a claim of ineffective assistance of counsel.

Factually, Finney's case is easily distinguished from Porter. The defense in Porter hardly even presented a case in mitigation, offering only the testimony of Porter's ex-wife and the partial reading of a deposition. As a result, "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." Porter, 130 S. Ct. at 454. To the contrary, Finney's counsel "presented substantial mitigating evidence during the penalty phase." Finney, 831 So. 2d at 559. In fact, this substantial mitigation was recounted and outlined *as part of this Court's determination* that the mitigation alleged in postconviction was not sufficiently compelling to provide any basis for a finding of prejudice on an IAC/penalty phase claim:

> Finney now alleges that his prior postconviction counsel should have asserted that trial counsel failed to present specific witnesses who "could have strengthened the story of appellant's upbringing,

childhood and teen years through independent sources, perhaps more persuasively than the appellant himself." Finney contends that these witnesses could have attested to the following: as a child, Finney fell from his rocking chair and hit his head; as a child, he was anemic and often fainted; he had trouble reading and was stubborn in school; his best friend drowned; his cousin shot him in the abdomen; he witnessed the hit-and-run death of a cousin; he developed a drug problem in the military and entered a rehabilitation program. We disagree.

The record shows that trial counsel presented substantial mitigating evidence during the penalty phase. Finney's common law wife, Tammy Gallimore, testified at length about his positive character traits, describing him as gentle, kind, and caring and relating how he had supported her emotionally and financially as she pursued her education and as she progressed through the pregnancy and birth of their daughter. She testified that he was a hard worker, taking a second job when they lived in Georgia in order to make voluntary child support payments to his ex-wife and again when they lived in Florida to help their own financial situation. She described his devotion to their daughter, even throughout his incarceration, and extensively discussed his artistic talents. She noted that everyone liked Finney and that he always had stable employment and helped around the house.

Joseph Williams also testified during the penalty phase. He was a friend of Finney's who helped him get a job at University Community Hospital shortly after Finney moved to Florida. Williams testified that he loved Finney like a son, that Williams's two sons, ex-wife, and mother all liked Finney. He said that Finney was honest, appreciative, completely trustworthy, very spiritual, and crazy about his (i.e., Finney's) family. He testified that Finney had been honorably discharged from the military and that Finney was "the best working man" Williams had ever met; he would do anything that anyone asked of him and was a dependable, enthusiastic employee.

Dr. Michael Gamache, a forensic psychologist, also testified on Finney's behalf during the penalty phase. He stated that he conducted two clinical examinations of Finney, spending a total of five and

one-half hours with him. He described Finney's background in detail. Finney was born in Macon, Georgia, where his family lived at or near the poverty level. His mother was a dietitian; his father was a carpenter. His father was a very heavy drinker; he abandoned the family when Finney was about three years old. Finney was the youngest of three children. Gamache described Finney as an average or better student who got along well with teachers and other students. He noted that Finney enlisted in the Army after graduation, serving two years in the First Airborne Ranger Division before being honorably discharged. Upon returning to Macon, he used his military benefits to pursue his educational and career goals. He had gotten married while in the military, and a son was born in 1973, while Finney still was in the Army. In Macon, Finney maintained stable employment and provided for his family, ultimately landing a "plum" job at a power plant that had excellent job security and benefits. He and his wife were both religious, but they grew apart and started losing interest in each other; they were separated and then divorced. Finney later met Tammy and they became close friends; he was willing to give up his secure job to come with her to Florida, where she wanted to continue her education.

Dr. Gamache noted that Finney had been a very good employee his entire adult life; there never was any difficulty or dissatisfaction with his work habits. Gamache had spoken with Tammy at length and she had corroborated Finney's description of the ending of his first marriage and the strength of their relationship, as well as Finney's very close bond with his daughter. He noted that Finney, Tammy, and their daughter Shannon were a very close, loving family, and that the family relationships were very strong and positive, without any serious problems.

The record shows that the mitigating evidence that was presented during the penalty phase was sufficiently compelling to convince the circuit court to find and give weight to five nonstatutory mitigating factors: Finney's contribution to the community and society as evidenced by his exemplary work and military history; his positive character traits; his ability to adjust well to prison life and his excellent potential for rehabilitation; his

> deprived childhood; and his continued contribution to his family through the bonding and love he showed for this daughter during frequent visitations and contacts.
>
> In light of the mitigating testimony that was presented at trial, and considering the aggravated nature of the murder in this case, we conclude that the newly proffered evidence is not sufficiently compelling to have changed the outcome of the penalty phase proceeding. As noted above, there was testimony presented during the penalty phase concerning Finney's military service, which took place in 1972-74, and the fact that he may have used drugs nearly twenty years before the murder. We do not find this sufficiently compelling to warrant relief at this stage of the proceedings. Nor is the fact that he may have experienced several childhood falls, bumps, and traumas. Accordingly, we find no merit to this claim.

Finney, 831 So. 2d at 659-61.

By outlining the mitigation that was presented, considering the postconviction mitigation that could have been offered, and contrasting the aggravated nature of the murder in this case, this Court undertook the exact prejudice analysis required by Porter: "To assess that probability, 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." Porter, 130 S. Ct. at 453-54, citing Williams v. Taylor, 529 U.S. 362, 397-398 (2000). Remarkably, Finney has not identified even a single new mitigating factor, statutory or nonstatutory, that could have been established by "better" counsel and might have impacted the jury recommendation or the sentencing outcome.

As this Court noted, evidence of Finney's history of drug use and military service was presented to the jury in the penalty phase. In addition, Finney's current claim that his attorney presented only "good guy" mitigation and failed to provide the jury with information about Finney's background and struggles in order to humanize him in the jury's eyes is refuted by the record. In sentencing Finney to death, the trial court specifically weighed his deprived childhood as nonstatutory mitigation, along with Finney's contributions to the community as evidenced by his work and military history, positive character traits, ability to adjust well to a prison setting and potential for rehabilitation, and bonding with and love for his daughter. Finney, 660 So. 2d at 679. Whatever minimal weight may have been added by the fact Finney bears a scar from a head injury, was anemic, had learning disabilities in school and witnessed other trauma in his childhood years is clearly insufficient to demonstrate any reasonable probability of a different outcome had trial counsel offered this evidence to the jury, as this Court properly concluded.

In this case, Finney's postconviction allegations were taken to be true, contrasted with the mitigation actually offered to the jury, and weighed against the aggravated nature of the crime. Only after this careful analysis did this Court

conclude that the additional mitigation was not compelling enough to have made any difference to the outcome of this case. Even if Porter did what Finney claims, which it does not, there would be no reasonable basis for the granting of any relief. This Court must affirm the summary denial of his Porter motion filed below.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order rendered below summarily denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Pamela Izakowitz, Backhus & Izakowitz, P.A., 13014 N. Dale Mabry Hwy., Suite 746, Tampa, Florida, 33618, this 28th day of July, 2011.

_/s/ Carol M. Dittmar_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Carol M. Dittmar_____
COUNSEL FOR APPELLEE