IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-426

CHARLES WILLIAM FINNEY

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Charles William Finney appeals the circuit court's denial of his successive motion for post-conviction relief. In response to Mr. Finney's argument that the decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) created a change in Florida *Strickland* jurisprudence that requires consideration and granting of Mr. Finney's post-conviction claims, the circuit court ruled that *Porter* does not establish a new fundamental constitutional right. The circuit court found that the Florida Supreme Court has already addressed this issue, and that Mr. Finney's argument is untimely and successive. Mr. Finney identifies errors in each of those rulings.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record:

(R. ___) - Record on direct appeal;

(PC-R. ___) - Record in this instant appeal.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Finney respectfully moves this Court for oral argument on his appeal.

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INTRODUCTION

Charles Finney was deprived of a reliable sentencing proceeding due to the ineffective assistance of trial counsel at the penalty phase in violation of the Sixth Amendment to the U.S. Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). In *Porter v. McCollum*, 130 S. Ct. 447 (2009), the United States Supreme Court found this Court's prejudice analysis 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 conducted the following prejudice analysis:

> 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 State'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. 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 this 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.

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> 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 *Porter* decision establishes that the previous denial of Mr. Finney's claims that he did not receive a reliable sentencing proceeding was premised on this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1994). 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 state law as it has been routinely applied. Mr. Finney's *Porter* claim is cognizable in these post-conviction proceedings. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

In *Sears v. Upton*, 130 S. Ct. 3266 (2010), the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia post-conviction court failed to apply the proper prejudice inquiry under *Strickland*. The Georgia 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 United States Supreme Court explained the state court's reasoning as follows:

> Because Sears' counsel did present some mitigation evidence during his penalty phase, the court concluded that "[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." The court explained that "it is impossible to know what effect [a different mitigation theory] would have had on the jury]." "Because counsel put forth a reasonable theory with supporting evidence, " the court reasoned, "[Sears] ...failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced.

Id.

After *Porter*, it is necessary to conduct a new analysis in Mr. Finney's case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's prejudice analysis to be in error, Mr. Finney's claims that he was deprived of an individualized and reliable sentencing proceeding must be readdressed in light of *Porter*. The judge and jury at Mr. Finney's trial "heard almost nothing that would humanize [him] or allow them to

accurately gauge his moral culpability. Id. at 454. A truncated, cursory analysis of prejudice does not satisfy *Strickland*. In Mr. Finney's case, this is precisely the sort of analysis that was conducted. *Sears* held that post-conviction courts must speculate as to the effect of unpresented 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."

STATEMENT OF THE CASE AND FACTS

On the afternoon of January 16, 1991, Sandra Sutherland was found dead in her Tampa apartment. She had been stabbed 13 times (R. 376-377). Two weeks later, Charles Finney came to the attention of police after it was discovered that he had pawned a VCR at a local pawn shop that apparently belonged to Sandra Sutherland. Charles Finney said he found the VCR in a dumpster at his apartment complex and took it to a pawnshop. He denied killing Sandra Sutherland (R. 415)

Mr. Finney was indicted for first-degree murder, robbery, sexual battery and trafficking in stolen property (R. at 14-18). The sexual battery was nolle prossed before jury selection began.

Mr. Finney went to trial on September 14, 1992. The State's theory of the case was that Mr. Finney killed Sandra Sutherland in the course of a robbery. On the same day as her death, Mr. Finney pawned her VCR at a Tampa pawnshop. The State said that two fingerprints were found in her apartment on a piece of paper and on a jar of cold cream near her bed that purportedly belonged to Mr. Finney. The only other evidence linking Mr. Finney to the murder was the pawnshop receipt of the VCR that Mr. Finney admitted he pawned.

Of the 50 latent prints found in Sandra Sutherland's apartment, 18 were of no value, seven were identified, presumably two of these were Mr. Finney's. However, 25 prints of value remained unidentified (R. 354).

Ruth Sutherland, the mother of Sandy Sutherland, testified that she spoke with her daughter on the telephone on January 16, 1991, when her daughter called to wish her a happy wedding anniversary. As she was on the telephone, Sandy said, "Someone is here....and I'll call you back." She never did. Mrs. Sutherland testified that she did not know if her daughter was dating anyone (R. 275).

After Ruth Sutherland got a phone call from her daughter's employer telling her that her daughter had not shown up for work that day, Ruth Sutherland sent one of her employees to Sandy's house to check on her.

Allen Lette had worked with the Sutherland family and had known Sandy for seven years and had helped her move into her apartment one month earlier (R.

281-284). He arrived at her apartment at about 2 p.m. He found the sliding glass door opened and a man working in the back of her apartment. He saw her lying naked in bed, tied up, and face down. He called for help (R. 276-281).

On the afternoon of January 16, 1991, Charles Finney took a VCR to a pawn shop on Nebraska Avenue in Tampa. He presented identification and provided a local address, both in his own name (R. at 280).

Evidence also was presented that on January 15, 1991, the day before Ms. Sutherland was murdered, Mr. Finney, as was his habit, had pawned a television set at the same pawn shop. The television was not stolen (R. at 423). In fact, Mr. Finney frequently pawned items he found in his maintenance job. None of the items were stolen (R. 536-550).

During the defense case, Sydney Lewis Bayles, Jr. testified that he lived in the same apartment complex as Mr. Finney and Sandra Sutherland. On January 15,1991, he saw Ms. Sutherland arguing with a white man. Mr. Finney is African-American. He described the man as a big guy, 6'1" inches, 220-230 pounds, mustache and heavy set. Mr. Bayles said the two were screaming at each other in loud voices. He had not seen the man before (R. 446-448). When he approached the two, the man said to him, “What the fuck are you looking at?” (R. 457). Mr. Bayles said nothing and left.

Medical Examiner Charles Diggs testified that he found no evidence of a struggle at the scene (R. 490-493). No negroid hairs were found in the apartment (R. 520).

Brad Ganka, a self-employed painting contractor, who painted the apartments where Ms. Sutherland lived, testified that on January 16, 1991, he saw a man at her apartment at 10 a.m. He knew the man as Bill Kunkle, a carpenter. Mr. Ganka testified that he saw Mr. Kunkle standing in a doorway and the door was opened. As soon as Mr. Kunkle saw Mr. Ganka, he locked the door and walked around the corner (R. 503).

Bernice Phipps, who was with Mr. Ganka on January 16, 1991 at the same apartment complex, corroborated Mr. Ganka's testimony. She also testified that she saw Bill Kunkle at 10 a.m. locking the door to Ms. Sutherland's apartment and leaving, "walking pretty fast" (R. 512).

Mr. Finney testified in his own defense. He said that he knew Sandra Sutherland because they were neighbors. He also had worked maintenance at the apartment complex and went inside her apartment on several occasions. He testified that she had asked him to screen her porch and she asked him to write the measurements down on a piece of paper. He also helped her move boxes (R. 532-536). Mr. Finney denied killing Sandra Sutherland.

After the jury deliberated for eight hours, it returned a verdict of guilty of murder, armed robbery, and stolen property (R. 756-758).

Mr. Finney's sentencing phase began September 18, 1992. The jury returned an advisory sentence of death that day with a vote of 9-3 (R. 921). Mr. Finney was sentenced to death on November 10, 1992 (R. 941-952).

The trial court found the aggravating factors of previous conviction of a felony involving the use or threat of violence; the capital felony was committed for financial gain; and the crime was especially heinous, atrocious or cruel. (R. 941-952). The trial court found several non-statutory mitigating circumstances, including that Mr. Finney had a good work and military history; that he had positive character traits; there was potential for rehabilitation; that he enlisted in the service; and was honorably discharged (R. 948-950).

On direct appeal, this court affirmed the conviction and death sentence. *Finney v. State*, 660 So. 2d 674 (Fla. 1995), *cert. denied*, 116 S. Ct. 823 (1996).

Mr. Finney sought post-conviction relief pursuant to Fla. R. Crim. P. 3.850/3.851. His attorney filed a 30-page boilerplate Rule 3.850 motion that raised five issues: the trial counsel was ineffective at the guilt and penalty phases of trial; that the jury instructions were unconstitutional; that newly-discovered evidence showed that the conviction and sentence were unreliable; that Mr.

Finney's death sentence rests on an automatic aggravating factor; and Florida's capital sentencing scheme is unconstitutional.

Mr. Finney was granted an evidentiary hearing on his claim of newly-discovered evidence about semen and hair found at the crime scene. At a court hearing, his attorney told the trial court that the evidence was "Missing. We're trying to locate it. It may have been destroyed by the medical examiner's office; we're not sure." The trial court then summarily denied Mr. Finney's motion on May 4, 2000. No evidentiary hearing was held in circuit court. This Court upheld the summary denial of Mr. Finney's post-conviction motion. *Finney v. State*, 831 So. 2d 651 (Fla. 2002).

Mr. Finney filed various *pro se* motions to dismiss his post-conviction attorneys and a *pro se* motion for rehearing in the Florida Supreme Court, but was denied. The mandate from the Florida Supreme Court was issued on December 23, 2002.

On January 14, 2003, Mr. Finney filed a Petition for Writ of Habeas Corpus and it was amended on July 21, 2003. On July 8, 2003, Mr. Finney filed a Motion to Vacate Judgment of Conviction and Sentence in circuit court raising two claims, a *Brady*[1] claim, and a claim alleging a conflict of interest with his post-conviction counsel.

In the *Brady* claim, Mr. Finney argued that the State withheld undisclosed and exculpatory evidence. That evidence was a love letter Sandra Sutherland wrote three days before her murder to a man named Robert. "Dear

[1]*Brady v. Maryland*, 373 U.S. 83 (1963)

Robert," the letter dated January 13, 1991 said. "....I miss your hugs. I miss other things, too." Sandra Sutherland obviously had a romantic relationship with a man named Robert. In the same letter, she wrote, "I spent time today dreaming of you." In this letter, Sandra Sutherland detailed how she spent her days, including that she picked up a job application for him, and that she hoped he didn't mind. She also said she hoped she did not "disappoint him." She signed the 10-page letter, "Love, Sandy." At no time was trial counsel ever provided with information that Sandra Sutherland had a lover or boyfriend at the time of her death, who could have a potential witness at his trial. At no time was trial counsel provided with this handwritten letter that was found in the State Attorney file.[2]

This information was crucial for the defense. Mr. Finney was initially charged with sexual battery, but that charge was nolle prossed before jury selection began (R. 3). The medical examiner testified at trial that he found semen in the body of Sandra Sutherland, and in his view, the type of wounds she suffered were "passionate" (R. 394). However, he found no sign of trauma.

In a proffer outside the presence of the jury, Dr. Diggs testified that Sandra Sutherland's feet and hands were tied, as if in bondage. The trial court refused to allow the medical examiner to testify that Sandra Sutherland may have been involved in sadomasochism (R. 475). Had this information about Robert been provided to the defense before trial, counsel for Mr. Finney could have attempted to investigate "Robert." Counsel could have investigated the nature of their relationship. And more importantly, if counsel had this information, they could have determined if Robert had anything to do with the death of Sandra Sutherland. Crime scene technicians found 50 latent fingerprints in Ms. Sutherland's apartment. Seven of those prints were identified, but 25 remained unidentified.

Had defense counsel known about "Robert," they could have looked for him, found him and tried to match his fingerprints with those found in her apartment. Additionally, friends of Ms. Sutherland could have been questioned about her relationship with Robert. Neighbors of Ms. Sutherland could have been questioned about Robert and if he had spent time with Ms. Sutherland at her apartment.

The day before her murder, Sandra Sutherland was seen arguing with a white man outside her apartment. She and the man were cussing and screaming at each other in "very loud" voices, according to witness Sydney

[2]Mr. Finney participated in discovery at trial. When defense attorney Richard Escobar entered his appearance on January 13, 1992, he filed a notice of appearance, a written plea of not guilty and a demand for discovery (R. 6).

Lewis Bayles, Jr. He had never seen that man before (R. 446-447). When he stopped the car to glance over at them, the man calmly asked him, "What the fuck are you looking at?" Mr. Bayles replied "nothing," and went on his way (R. 449).

The next day, Mr. Bayles told police what he saw. A police officer took down his information, but he never was shown any photographs or was ever contacted again by police (R. 450). Mr. Bayles described the man he saw as a large white male, 6'1" tall, 220-230 pounds with a mustache (R. 452).

In addition to the love letter that was undisclosed to defense counsel, information found in the State Attorney file indicated that a person named Alice had been stealing from Sandra Sutherland. Handwritten notes in the State Attorney file show that a woman named Alice Rabidue had been stealing from Sandy Sutherland. This information was known by Ruth Sutherland, the mother of Sandra Sutherland. She told prosecutors, yet prosecutors failed to inform defense counsel of this exculpatory and impeaching information. Police also were made aware of this information because the notes in the State Attorney file indicate that Detective Bell of the Tampa Police Department was notified of it.

Trial counsel, however, was not notified nor given access to this information at trial. Had defense counsel been provided with it, they would have investigated Alice Rabidue, looked into her relationship with Ms. Sutherland, and presented it to the jury to rebut the aggravating circumstances. Additional impeachment information found in the State Attorney file indicated that Dr. Diggs, the medical examiner, was unable to tell if Sandra Sutherland had been sexually assaulted before or after death. Handwritten notes in the State Attorney file indicate that "Diggs will go along with the FDLE. This is unusual. Has already spoken with Billie about discrepancy."

At no point was defense counsel made aware that "Diggs will go along with FDLE." The prosecutor's concern about the discrepancy was never passed on to the defense, who had no reason to suspect that the prosecutor was trying to influence the testimony of the medical examiner. Defense counsel was not made aware of any discrepancy in the evidence or that the medical examiner was changing his testimony to fit the case. This information was exculpatory and should have been turned over to the defense.

Mr. Finney was never given the opportunity to question or impeach Dr. Diggs about the need or his willingness to go along with the FDLE. Nor could Mr. Finney question Dr. Diggs to determine if he was willing to change his opinion based on an alleged discrepancy, or to learn what the discrepancy actually was.[3]

The fact that this information was never passed on to the defense demonstrates the State's intent to influence the testimony of the medical examiner and hide evidence that was favorable to Mr. Finney. This information was exculpatory and should have been turned over to the defense. Dr. Diggs was never questioned about any discrepancies in his findings, because defense counsel was not made aware of any discrepancies.

Mr. Finney was never given an evidentiary hearing on his claims. This Court denied Mr. Finney relief without a written opinion in *Finney v. State*, 907 So. 2d 1170 (Fla. 2005).

The United States District Court denied all claims on July 5, 2006. An Amended Order denying relief was filed on July 17, 2006. *Finney v. McDonough*, 2006 WL 2024456 (M.D. Fla. July 17, 2006).

Mr. Finney filed a timely Notice of Appeal and Application for a Certificate of Appealability on August 3, 2006. The District Court denied the application on August 14, 2006. On August 18, 2006, Mr. Finney submitted an Application for Certificate of Appealability to the Eleventh Circuit Court of Appeals. Judge William H. Pryor, Jr. denied Mr. Finney's Application without comment on September 13, 2006. Mr. Finney filed a Motion for Reconsideration for Certificate of Appealability, which was denied by a three-judge panel on November 9, 2006.

A petition for certiorari to the United States Supreme Court was filed on February 5, 2007 and denied on June 11, 2007.

Mr. Finney also filed a post-conviction motion arguing that lethal injection violated his rights against cruel and unusual punishment. This motion was denied by the this Court on September 3, 2009. *Finney v. State*, 18 So. 3d 527 (Fla. 2009).

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[3]Detective Bell testified that Mr. Kunkle's blood was sent to the FDLE for testing to see if it matched the stains on Ms. Sutherland's sheets. (R. 627).

At trial, there was a stipulation that:

- A small semen stain was found on the bed sheet of Ms. Sutherland;
- The FDLE could not date the semen stain;
- The FDLE had a blood sample from William Kunkle; and
- The semen stain was insufficient for an analysis (R. 636).

Current proceedings

On November 29, 2010, Mr. Finney filed the present successive post-conviction motion, arguing that *Porter* requires this Court to reassess his ineffective assistance of counsel claim applying a standard compliant with *Strickland* (PC-R at 42-62) . The State responded on December 17, 2010 (PC-R at 63-74). A *Huff* hearing was held on January 21, 2011.

The circuit court entered an order on January 27, 2011 denying Mr. Finney's *Porter* claim (PC-R at 80-82). Mr. Finney timely appealed (PC-R at 83).

SUMMARY OF THE ARGUMENTS

XIV. *Porter* represents a change in the *Strickland* jurisprudence of this Court that creates a claim cognizable in a successive 3.851 motion because it applies retroactively.

XIV. Applying *Porter* to the facts of Mr. Finney's case demonstrates that relief is warranted under *Strickland*.

STANDARD OF REVIEW

Mr. Finney was deprived of the effective assistance of trial counsel at the capital trial. This Court denied Mr. Finney's claim of ineffective assistance of counsel in a manner found unconstitutional in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The United States Supreme Court decision in *Porter* establishes that the previous denial of Mr. Finney's ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such, *Porter* constitutes a change in law, which renders Mr. Finney's *Porter* claim cognizable in these post-conviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

A Rule 3.851 motion is the appropriate vehicle to present Mr. Finney's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court

found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

The issues presented in this appeal consist of two parts: the first is the determination of whether the *Porter* claim is cognizable, and whether it creates a change in Florida law and is retroactive in nature. That issue is a question of law that must be reviewed *de novo*. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993).

The second is the application of *Porter* to Mr. Finney's case, a determination for which deference is given to findings of historical fact. All other facts must be viewed in relation to how Mr. Finney's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009); *see Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995).

Further, the lower court's findings of fact are owed no deference by this Court when they are tainted by legal error. Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000).

ARGUMENT

MR. FINNEY'S SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*

Mr. Finney's ineffective assistance of penalty phase counsel claim was heard and decided by this Court before *Porter* was rendered. *Finney v. State*, 831 So. 2d 651 (Fla. 2002). Mr. Finney seeks in this appeal what George Porter received – to have his ineffectiveness claim reheard and re-evaluated using the proper *Strickland* standard that United States Supreme Court applied in Mr. Porter's case to find a new sentencing was warranted.[4] Mr. Finney seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Finney seeks the proper application of the *Strickland* standard. Mr. Finney seeks to be treated equally and fairly.

The preliminary question that must be addressed is whether the United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and whether *Porter* constitutes a change in law which renders Mr. Finney's *Porter* claim cognizable in Rule 3.851 proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United

[4]When Mr. Porter's case was returned to the circuit court for resentencing, he received a life sentence.

States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . .").

I. *Porter* constitutes a change in Florida *Strickland* jurisprudence that is retroactive and creates a successive claim for relief

In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court granted federal habeas relief because this Court failed to properly apply *Lockett v. Ohio,* 438 U.S. 586 (1978). In *Hitchcock*, this Court failed to find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances while deliberating in a capital penalty phase proceeding on whether to recommend a death sentence.

This Court also failed to properly apply federal constitutional law in *Espinosa v. Florida*, 505 U.S. 1079 (1992). There, the United States Supreme Court summarily reversed a decision by this Court, which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988) did not apply in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death-sentenced individuals should 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 death sentenced inmates should be allowed to represent 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").

The *Hitchcock/Espinoza* approach to determining what constitutes a retroactive change in the law provides the best guidance to make that determination in the present case.

In *Witt v. State*, this Court determined when changes in the law could be raised retroactively in post-conviction proceedings, finding 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). A court's inherent equitable powers were recently reaffirmed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the United States Supreme Court explained:

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). In emphasizing the need for "flexibility," for avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 360, 375 (1946), we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944). The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid*.

Holland, 130 S. Ct. at 2563.

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," *id*. at 928, the *Witt* Court declined to follow the line of United States Supreme Court cases addressing the issue, characterizing those cases as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted).

The United States Supreme Court held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).[5]

5

We are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Finney does not allege that *Porter* changes *Strickland*. Rather, the question is whether this Court believes that *Porter* strikes at a problem in this Court's jurisprudence that goes beyond the *Porter* case. Since this Court can identify a federal precedent as a change in Florida law and extend it however it sees fit, the question is whether this Court recognizes *Porter* error in other opinions such as this one, and believes that other defendants should get the same correction of unconstitutional error that Mr. Porter received.

The *Witt* Court recognized two "broad categories" of cases that 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. Under *Stovall v. Denno*, 388

At issue in *Danforth* was the retroactive application of a United States Supreme Court decision that was in different posture than the one at issue here. In *Danforth*, the United States Supreme Court had issued an opinion which overturned its own prior precedent. In *Porter*, the United States Supreme Court addressed a decision from this Court and concluded that this Court's decision was premised upon an unreasonable application of clearly established law. Thus, for federal retroactivity purposes, the decision in *Porter* is not an announcement of a new federal law, but instead an announcement that this Court has unreasonably failed to follow clearly established federal law.

U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court identified 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.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to this Court and the United States Supreme Court. *Id*. at 930.

This Court summarized its holding in *Witt* 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.

Here, the issue hinges on the third consideration, as *Porter* emanates from the United States Supreme Court and is clearly constitutional in nature as a Sixth Amendment *Strickland* case. Thus, we look to the *Linkletter* considerations and consider: the purpose to be served by the new rule would be to provide the same constitutional protection to Florida death-sentenced defendants as was provided to Mr. Porter, or to correct the same constitutional error that was corrected in *Porter*; the extent of reliance on the old rule is not presently knowable until reviewing *Porter* claims. However, if *Porter* error is found to be extensive, there is a compelling reason to correct the constitutional violation because it is great. If

Porter error is found to be extremely limited, the constitutional error must nevertheless be corrected. If *Porter* error is very limited, the effect on the administration of justice will be to correct a constitutional wrong without expending great resources. If *Porter* error is extensive, the effect will be to justifiably use whatever resources are necessary to correct a far-reaching constitutional problem in death cases.

While the *Linkletter* analysis is not conclusive, *Hitchcock* provides further guidance. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court demonstrated how the *Witt* standard was to be applied. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court 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 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 was 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 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).[6]

In *Lockett v. Ohio*, the United States Supreme Court 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

[6] 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 called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. 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). 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." 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 was harmless. On October 30, 1987, this Court issued its opinion in *Demps*, and addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error was harmless.

interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court held that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances when deciding whether to recommend a sentence of death. *See Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175.

In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood *Lockett*. The United States Supreme Court held that this Court had violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. at 1071.

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

Downs, 514 So. 2d at 1071.[7] Clearly, this Court saw that it had misread *Lockett* in a whole series of cases. This Court's decision in *Hitchcock* was not some rogue decision, but reflected the erroneous construction of *Lockett* that had been applied by this Court consistently in virtually every case in which the *Lockett* issue had been raised. In *Thompson* and *Downs*, this Court acknowledged that fairness

[7] 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.

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.[8]

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 too *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. In *Hitchcock,* the United States Supreme Court found that this Court's decision affirming the death sentence was inconsistent with *Lockett*, a prior decision from the United States Supreme Court. 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 in *Sears* that explained *Porter.*

As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland*. Just as this Court found that others who had raised

[8] 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).

the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis, so too those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and lost should receive the same relief from that erroneous legal analysis.

The fact that *Porter* error is more elusive, or difficult to identify, than *Hitchcock* error, does not mean that *Porter* is any less of a repudiation of this Court's *Strickland* analysis, than *Hitchcock* was of this Court's former *Lockett* analysis.

Mr. Hitchcock's *Lockett* claim was not a decision that was simply an anomaly. This Court's misreading of *Strickland* that the United States Supreme Court found unreasonable, appears in a line of cases.

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. This Court's *Strickland* analysis in *Porter v. State* was as follows:

> 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 State'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.[9]

[9] The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard which is identical to the prejudice prong of the *Strickland* standard, the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result. In *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995), the majority in responding to a dissenting opinion explained:

> Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a post-conviction 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).

> find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post,* at 1583-1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Thus, it was made clear in *Kyles* that the presiding judge's credibility findings did not control.

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis used in *Porter v. State* was not an aberration, but 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 is evident in this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that court relied on the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a post-conviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d *1040*, 1049-51 (Fla. 2001).

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted inconsistencies in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in post-conviction proceedings.[10] In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996) were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a post-conviction evidentiary hearing. In *Grossman*, this Court affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because

[10] *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the Second District Court of Appeals was in conflict with *Grossman* as to the appellate standard of review to be used.

"competent substantial evidence" supported the trial court's decision.[11] 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*.[12] However, the court made clear that even under this less deferential standard

> [w]e 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.

[11] This Court acknowledged that there were numerous cases in which it had applied the deferential standard used 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); and *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). However, the list included in *Stephens* was hardly exhaustive in this regard. *See, e.g*, *Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

[12] 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 v. State*, 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 v. State, 748 So. 2d at 1034. In *Porter v. State*, the court relied upon this very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the post-conviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923.

From an review of this Court's case law, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard that was used 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.[13]

[13] 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 post-conviction 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 U.S. Constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

But, it is critical to recognize that *Porter* error runs deeper than that, and the issue of the *Stephens* standard is but one manifestation of the underlying *Strickland* problem that can pervade a *Strickland* analysis.

At the heart of *Porter* error is "a failure to engage with [mitigating evidence]." *Porter*, 130 S. Ct. at 454. The United States Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually went through in Korea." *See id*. That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse, or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis.

To engage with the mitigating evidence is to embrace, connect with, internalize–to glean and intuit from mitigating facts the reality of the experiences and conditions that make up a defendant's humanity. Implicit in the requirement that trial counsel must present mitigating evidence to "humanize" capital defendants, *id*. at 454, is the requirement that courts in turn must engage with that evidence to form an image of each defendant's humanity. It stands to reason that nothing less than a profound appreciation for an individual's humanity would sufficiently inform a judge or jury deciding whether to end that individual's life. And it is the requirement that Florida courts *engage with humanizing*

evidence--that is at the heart of the *Porter* error inherent in this Court's prejudice analysis and *Stephens* deference.

The United States Supreme Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . ." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

The crux of the *Porter* problem is in figuring out *how* this Court failed to engage with the evidence, and *how to* engage with evidence as *Strickland* envisions. An analogy can help.

A person is presented with a bushel of apples and is asked if it is reasonably probable that there are more red apples than green. He rummages through the surface of the basket, seeing mostly green apples. He responds that it is reasonably possible that more are green apples in the bushel. But, he has not answered the question.

Whether there is a reasonable possibility that more are green apples does not tell us whether there is a reasonable probability that more are red. The conclusions are not determinative of one another. In fact, they have very little or nothing to do with one another since a 51% probability that more apples are red still allows for a 49% possibility that more are green. By treating the two

conclusions as mutually exclusive, the apple inspector created a false dilemma, i.e. *there is either a reasonable possibility that more are green or a reasonable probability that more are red so that finding the former precludes the latter*.

The problem with the apple inspector's method of skimming the surface is that it reverses the standard of his inquiry. If a reasonable probability of more red apples represents a problem for which the apple inspector must inspect bushels of apples, his mistake in skimming the surface would result in him determining that there is not a problem, when in fact there is. The apple inspector's method permits him to base his conclusion on an assumption that saves him from having to dig to the bottom of every basket, i.e. *if most of the apples I notice on the surface are green I can assume that there is not a reasonable probability that digging into the bushel would reveal more are red*. That incomplete method reverses the standard of inquiry and becomes a negative response—*no, there is not a reasonable probability of more red apples.* The conclusion comes not from finding that the probability does not exist, but from a finding that an opposing possibility does exist. By attempting to prove a negative, the method places the focus of the inspector's inquiry on green apples instead of on red.

This Court has on many occasions addressed the manner in which lower courts should apply *Strickland v. Washington*, 466 U.S. 668 (1984), but a fundamental error persists in Florida jurisprudence, which was evident in *Porter*,

and in this case, and is as simple as pointing out green apples when asked to find red.

Mr. Finney does not suggest that non-mitigating evidence cannot be considered. "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland,* 466 U.S. at 695. Mr. Finney does not suggest that non-mitigating evidence should be ignored.

To prove prejudice under the *Strickland* test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v.*

Kemp, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to *try to find a constitutional violation*. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must *search* for it carefully, not dismiss the *possibility* of it with a glancing blow based on information that suggests it may not be there. Looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the unpresented evidence might reasonably have been discounted, it is not answering the question of whether it reasonably **may have mattered** to the jurors. If a court simply speculates as to how a constitutional violation might <u>not</u> have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation **might have** occurred.

The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry is to *try to find prejudice* by aggregating all the pieces of mitigating evidence, engaging with them and painstakingly speculating as to whether the State is poised to execute an individual whose trial attorney failed to present evidence that might have resulted in a life sentence. It is the focus on non-mitigating evidence to support a reverse-*Strickland* inquiry that runs afoul of and unreasonable misapplies *Strickland*.

The Sixth Amendment vests a right to effective assistance of counsel in capital defendants such that when it is reasonably probable that a trial attorney's deficient performance changed the outcome of a case, a constitutional violation occurs. It does not matter whether it is also reasonably possible that the deficient performance did not change the outcome. That is a different inquiry and a contrary standard. The insidiousness of the error is its subtlety because the conclusions seem to have a tendency to negate or, at least, cut against one another. But since the standard is to look for a reasonable probability of a changed outcome, while it seems to tip the scale of the *Strickland* prejudice inquiry that the jury might have taken some of the unpresented evidence to cut against the defendant, that consideration has no place on the scale.

The *Strickland* inquiry being applied by this Court is that relief should be granted if there is a reasonable possibility that the unpresented evidence would not

have mattered. But the proper inquiry is to look for any way a constitutional violation might have occurred. This means the Court should err on the side of finding a constitutional violation, rather than permitting an execution despite a violation because it could create a speculative explanation for how a violation might not have occurred. Both conclusions can be true, but *Strickland* is only concerned with one, so that if both are true, a constitutional violation must be found. If a violation might with reasonable probability have occurred, it did occur. This is true, regardless of whether the violation might with reasonable possibility have not occurred.

Courts cannot focus on green apples from the top of the bushel to answer whether any are red. By rummaging on the surface and pointing out green apples, by focusing on non-mitigating evidence and asking whether that evidence would have tended to support the outcome, the courts fail to respond to the *Strickland* prejudice inquiry which is to focus on the opposite.

Reversing the *Strickland* standard to ask whether there is a reasonable possibility that unpresented evidence would not have changed the outcome, reverses the standard of the inquiry and thus the burden on the defendant to made a claim under the standard. Dissenting in the denial for a writ of certiorari in *Gamache v. California*, Justice Sotomayor wrote:

> With all that is at stake in capital cases, *cf. Kyles v. Whitley*, 514 U. S. 419, 422 (1995) ("'[O]ur duty to

> search for constitutional error with painstaking care is never more exacting than it is in a capital case'" (quoting Burger v. Kemp, 483 U. S. 776, 785 (1987)), in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*.

131 S. Ct. 591, 593 (2010) (citations omitted). Like the California courts, Florida courts must not violate *Kyles* by failing to take painstaking care in scrutinizing a post-conviction record for everything mitigating that could have made a difference.

II. *Porter* error was committed in Mr. Finney's case

Mr. Finney was deprived of the effective assistance of counsel during his trial. In his amended initial brief to this Court in post-conviction, Mr. Finney alleged that as child, he suffered from head injuries to the extent that he has a five-inch scar on his head. Mr. Finney was anemic and often lost consciousness. He had learning disabilities in school. As a child, his best friend drowned. He witnessed his cousin shot in the abdomen and saw the hit-and-run death of a cousin. Amid those losses, Mr. Finney enlisted in the military where he developed a heroin problem and was required to enter a rehabilitation program. Although he developed a chronic heroin problem, he never received any professional counseling for his addiction. *Finney v. State,* 831 So.2d 651, 659 (Fla. 2002).

In denying those allegations, this Court said:

> In light of the mitigating testimony that was presented at trial, and considering the aggravated nature of the murder in this case, we concluded 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. According, we find no merit to this claim.

Id. at 661.

This analysis is not the sort of probing and fact-specific analysis which *Porter* and *Sears* require, especially in light of the *Brady* claim that was never put before a judge or jury. This Court did not address what a jury may have thought compelling about such mitigation. Both the trial court's findings and the cursory acceptance of those findings by the this Court violate *Porter*, as a probing inquiry into the facts of this case leads only to the conclusion that counsel prejudiced Mr. Finney by performing deficiently. As in *Porter*, this Court discounts to irrelevance Mr. Finney's mitigation.

At trial, the defense only presented evidence that Mr. Finney was a "good guy." The defense presented evidence that he was a caring and gentle man who supported his common-law wife emotionally and financially as she pursued her education and gave birth to their daughter. She testified that he was a hard worker, and was devoted to his daughter. A friend of Mr. Finney testified that he was honest, trustworthy, and a dependable and enthusiastic employee. Psychologist Gamache found that Mr. Finney was a good employee and that he had a close and loving relationship with his daughter and wife. Yet, this was

inconsistent with guilt phase testimony that showed Mr. Finney was not that same "good guy" at the time of the crime. Defense counsel did not investigate Mr. Finney's background thoroughly or provide Dr. Gamache with detailed and independent accounts of what his life was truly like.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In this case, as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis. It failed to conduct any analysis of what competent trial counsel could have done with the mitigation available. As it was presented, the jury had no idea of Mr. Finney's struggles. These things could have humanized their client beyond the "good guy" evidence that may not have been contemporaneous at the time of the crime. It is not what the trial judge would have been persuaded by, but what the jurors would have thought. See, *Light v. State*, 796 So. 2d 610 (Fla. 2d DCA 2001).

Mr. Finney's claim of ineffective assistance of counsel has not been given serious consideration as required by *Porter*. Mr. Finney requests that this Court perform the analysis of this claim which has been lacking and examine the mitigating personal history that is present in this case but has gone unrecognized.

This Court failed to conduct a proper *Strickland* analysis on Mr. Finney's claim. While the errors committed by counsel are of varying severity—some relatively minor and some hugely prejudicial—it was incumbent on the court to take a thoughtful look and envision how those errors piled one on top of another might cumulatively prejudice Mr. Finney. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different. The findings in this case are starkly in violation of *Porter*.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. This Court failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires. *Porter* makes clear that this Court fails to do under its current analysis.

Mr. Finney's claim of ineffective assistance of counsel has not been given serious consideration in the context of the facts of his case as is required by *Porter*. Mr. Finney requests that this court perform the analysis of this claim which has yet to be done.

CONCLUSION

Based on the foregoing, Mr. Finney respectfully requests that this Honorable Court find that the *Porter* claim is properly before this Court, and grant Mr. Finney a new penalty phase based on the deprivation of the effective assistance of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that counsel has furnished true and correct copy of the foregoing via U.S. Mail, first class postage prepaid, to opposing counsel this 8th day of July, 2011.

_____

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CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

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