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

REPLY BRIEF OF APPELLANT

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MR. FINNEY'S SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. McCOLLUM.*

The State argues that Mr. Finney's motion is untimely because it was filed more than one year after his conviction and sentence became final in 1996. The State argues that Mr. Finney makes no effort to satisfy any of the exceptions in Fla. R. Crim. P. 3.851 (d)(1) for filing a motion beyond the one year deadline (Answer Brief at 7-8).

The State is wrong. This Court has promulgated rules that specifically authorize successive motions to vacate and petitions for writ of habeas corpus. See, Fla. R. Crim. P. 3.851 (e)(2), Successive Motion. Successive litigation, including death warrant litigation, is by its very nature "successive."

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

authority to file successive motions to vacate and has rejected the State's argument.

The State next argues that *Porter* did not create any new constitutional right and has not been held retroactive. The State argues that *Porter* merely applied *Strickland* to the facts of that particular case (Answer Brief at 11).

The United States Supreme Court's holding in *Porter v. McCollum* changed Florida law, just as *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Espinosa v. Florida*, 505 U.S. 1079 (1992), changed Florida law. In *Espinosa v. Florida*, the U.S. Supreme Court explained the issue presented:

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

Espinosa v. Florida, 505 U.S. at 1081. The United States Supreme Court rejected this Court's decision in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), and held:

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

Id. at 1082.

No new federal constitutional principle was announced when the U.S. Supreme Court found the heinous, atrocious or cruel aggravating circumstance used in Florida was unconstitutionally vague. Identically worded aggravators were found unconstitutionally vague in *Maynard v. Cartwright* and *Shell v. Mississippi*. What the United States Supreme Court announced in *Espinosa* was that this Court reached an erroneous decision in *Smalley v. State* when it refused to find the decision in *Maynard v. Cartwright* applicable in Florida. Thereafter, this Court ruled in *James v. State,* 615 So. 2d 668 (Fla. 1993), that the United States Supreme Court's decision in *Espinosa v. Florida* qualified under *Witt* as new Florida law.[1]

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

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

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

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

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[2]The table of contents contained in the State's Answer Brief does not show that any citation in the Answer Brief was made to *James v. State*, *Espinosa v. Florida*, or *Maynard v. Cartwright*, 486 U.S. 356 (1988).

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

> *Lockett v. Ohio*, 438 U. S. 586 (1978) (plurality opinion).

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

While the State does mention *Hitchcock* in its Answer Brief, it fails to address the fact that the United States Supreme Court did not announce new federal constitutional law in its decision.[4] Instead, the United States Supreme Court found that this Court had failed to recognize that the jury instructions at issue violated the Eighth Amendment principle enunciated in *Lockett* and followed in *Eddings* and *Skipper*.[5] The State never once recognizes in its Answer Brief that, while *Hitchcock* did not announce new federal constitutional law, it was found by this Court to have announced new Florida law. *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987). And by failing to recognize that *Hitchcock* was new Florida law, the State sidesteps the actual issue raised by Mr. Finney's claim that *Porter*

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[4]The United States Supreme Court made clear that its decision was not new, but dictated by *Hitchcock*, *Eddings* and *Skipper*.

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

v. McCollum is new law within the meaning of *Witt v. State* because the United States Supreme Court found that this Court had failed to properly apply *Strickland v. Washington*, 466 U.S. 668 (1984).

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

> In Hitchcock, 481 U.S. at 398-399 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.

(Answer Brief at 12-13).

In contrast, the State argues that 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" (Answer Brief at 13).

A review of this Court's decision discussing the legal significance of *Hitchcock v. Dugger* within the State of Florida shows that the State's minimizing *Hitchcock*'s significance is not based

in fact. This Court recognized that *Hitchcock* was not merely about a jury instruction. In *Downs v. Dugger*, 514 So. 2d 1069, 1071 (Fla. 1987), this Court said:

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

This Court found that *Hitchcock* was about much more than an erroneous jury instruction. This Court made it clear that consideration of *Hitchcock* error was not limited to an examination of a jury instruction. In *Cooper v. State*, 526 So. 2d 900, 901 (Fla. 1988), this Court held that *Hitchcock* error occurred "when the judge and the jury's *consideration* of mitigating circumstances is limited to statutory factors." (Emphasis in original).[6] Indeed, this Court in *Cooper* proceeded to address the nonstatutory mitigating evidence that the defense had been precluded from presenting and the exclusion of which had been upheld by this Court in Mr. Cooper's direct appeal:

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[6]This Court noted at the outset:

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

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

Id.

This Court found *Hitchcock* error occurred and explained:

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

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

Id. at 902 (emphasis added).[7]

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

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

Hall v. State, 541 So. 2d at 1126 (emphasis added). In addressing the harmlessness of the error, this Court considered affidavits of experts and family members who had not testified at the penalty phase because the defense attorney understood he was precluded from presenting nonstatutory mitigating. This Court concluded: "All of

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[7]The *Cooper* opinion belies the State's assertion that *Hitchcock* error could be determined by simply reviewing the jury instructions (Answer Brief at 13). Consideration of *Hitchcock* claims required consideration of not just what mitigating evidence that the jury did not consider because of an erroneous instruction. It also required consideration of what evidence was excluded from the penalty phase jury by the judge, and what evidence was not investigated and presented by the defense because of this Court's historic failure to properly apply *Lockett*. And, it required consideration of whether the judge in imposing sentencing limited his consideration of nonstatutory mitigation.

this expert and lay evidence proves or tends to prove a host of nonstatutory mitigating circumstances." *Id*. at 1128. Accordingly, the death sentence was vacated and the cases was remanded for a new penalty phase proceeding.

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

Before this Court's opinion in *Downs*, no court had held *Hitchcock* retroactive under *Witt*. And to this day, no court, not even this one, has held that *Hitchcock* established a new fundamental constitutional right. Instead, it was repeatedly categorized by this Court as a significant change in Florida law because it rejected this Court's longstanding jurisprudence misconstruing *Lockett*.

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

The State's argument that Mr. Finney's successive Rule 3.851 motion to vacate was time-barred and did not meet any exception under Rule 3.851(d)(2)(B)" (Answer Brief at 7-8), simply ignores the fact that this Court has long held that a new decision qualifying under *Witt v. State* as new law is an exception that defeats all procedural bars. *Downs v. Dugger*; *Cooper v. State*; *Hall v. State*.

In addition, the State repeatedly argues that *Porter* did not change the analysis to be conducted for ineffective assistance of counsel claims as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

While the legal standards for determining deficient performance and prejudice have not changed (just as *Hitchcock* did not change *Lockett* and *Espinosa* did not change *Maynard v. Cartwright*), the decision in *Porter v. McCollum* found this Court unreasonably applied *Strickland* (just as this Court had unreasonably applied *Lockett* and had unreasonably found *Maynard v. Cartwright* did not apply in Florida).

As a result, this Court's case law on which it relied in rejecting Mr. Porter's ineffective assistance of counsel claim must be abandoned and Florida jurisprudence must change in conformity with *Porter v. McCollum*. The United States Supreme Court has determined that this Court applied an incorrect standard in reviewing the evidence presented to support Mr. Porter's ineffective assistance of counsel claim. The United States Supreme Court's rejection of this Court's jurisprudence is a change in Florida law. This Court used the exact

same incorrect standard that had been used in *Porter v. State,* 788 So. 2d 917 (Fla. 2001), when it reviewed Mr. Finney's ineffective assistance of counsel claims. Fairness dictates that Mr. Finney should be treated the same as Mr. Porter and receive the benefit of *Porter v. McCollum* and the change it has brought to Florida law as to how this Court conducts a *Strickland* analysis of the evidence presented in support of an ineffective assistance of counsel claim.

In *Witt*, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictated. This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931. In finding that both *Hitchcock* and *Espinosa* qualified as new Florida law under *Witt*, this Court noted that fairness dictated that others situated similarly to Mr. Hitchcock and Mr. Espinosa should receive the benefit of the decisions from the United States Supreme Court which found their sentences of death constitutionally defective.

In Mr. Finney's case the change in Florida law was identified by the United States Supreme Court in *Porter*. So, the first requirement is clearly met. Because the analysis of a ineffective assistance of counsel claim is based on the Sixth Amendment to the United States Constitution, the second criteria also is met. As

to the third criteria, there can be no doubt that the standard of review used to analyze an ineffective assistance of counsel claim is fundamentally significant, particularly as to the penalty phase in a capital case where the issue is literally a matter of life and death. The significance of the decision in *Porter v. McCollum* parallels the significance of the decision in *Hitchcock v. Dugger* as this Court's analysis of *Hitchcock* error in *Cooper v. State* and *Hall v. State* clearly demonstrates.

The State also argues that *Porter* should not be held retroactive because when this Court changed the standard of review in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), this Court declined to apply the new standard retroactively (Answer Brief at 14-15, *citing Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001). However, the State fails to acknowledge the obvious critical distinction between *Porter v. McCollum* and *Stephens v. State* - *Porter v. McCollum* was a decision by the United States Supreme Court finding that this Court did not properly apply *Strickland*. *Stephens v. State* was not a decision emanating from the United States Supreme Court. *Stephens* was a less significant decision from a lesser court. In *Stephens*, this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings and decided to clarify that standard.[8] However, in

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

Porter v. McCollum, the highest court in the country and the final arbiter as to the requirements of the United States Constitution found that this Court's analysis of Mr. Porter's ineffective assistance of counsel claim, including the standard of review employed, was contrary to and an unreasonable application of *Strickland*. Thus, the United States Supreme Court specifically identified a flaw in this Court's reasoning in *Porter v. State*, which this Court had specifically stated in *Porter v. State* was dictated by Florida case law construing the requirements of *Strickland*.

The State's attempt to distinguish the proceedings that occurred after *Hitchcock v. Dugger*, with the circumstances surrounding *Porter v. McCollum*, by arguing that because *Hitchcock* involved a jury instruction and *Porter* should not be applied retroactively cannot withstand scrutiny. As this Court made clear in *Downs v. Dugger*, *Cooper v. State* and *Hall v. State*, *Hitchcock* error was not just instructional error. It required consideration of whether nonstatutory mitigating evidence did not reach either the jury or the judge and/or was not considered by either the jury or the judge because of case law from this Court misconstruing *Lockett*.

Here, the issue presented by claims of error under *Porter v. McCollum* is strikingly similar to the issue presented by *Hitchcock* error as this Court's analysis of the *Hitchcock* error in *Hall v. State* demonstrates. Just as in *Hall v. State*, what is required is consideration of the mitigation that trial counsel failed to investigate and/or present and how the undiscovered and/or

unpresented mitigating evidence may have impacted the jury and/or the judge. An appellate court reviewing *Porter* error should analyze all of the evidence presented by the capital defendant in postconviction proceedings, and not disregard evidence because the judge presiding at the evidentiary hearing discounted it. Just as *Hitchcock* required Florida courts to revisit claims of *Lockett* error in the guise of *Hitchcock* error, *Porter v. McCollum* should require Florida courts to revisit claims of *Strickland* error in the guise of *Porter* error. Claims of ineffective assistance of penalty phase counsel should be reheard and re-evaluated employing the standard set forth in *Porter v. McCollum*.

The State's reliance on *Marek v. State*, 8 So. 3d 1123 (Fla. 2009), also is misplaced (Answer Brief at 10). Mr. Marek raised a claim that the ABA report constituted newly discovered evidence that entitled him to relief. *Marek v. State*, 8 So. 3d at 1126. Marek argued that his death sentence was imposed arbitrarily and capriciously, violating *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which held that the death penalty must be imposed fairly and consistently. Marek based this claim on the American Bar Association's September 17, 2006, report, *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report* (ABA Report), which criticized Florida's death penalty scheme and clemency process. Marek argued that the ABA Report constituted newly discovered evidence

demonstrating that his death sentence is unconstitutionally arbitrary and capricious.

The ABA report had criticized this Court's failure to apply all capital decisions retroactively. Mr. Marek filed his claim relying on this criticism contained in the ABA report in May, 2007, which issued in the fall of 2006. In relying on the criticism set forth in the ABA report, Mr. Marek noted three decisions from the U.S. Supreme Court that he argued would have resulted in sentencing relief had they been applied retroactively as the ABA Report suggested. These three decisions were *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005). Mr. Marek advanced no argument that these three decisions qualified under *Witt v. State* as new Florida law.[9] In none of those three cases did the United States Supreme Court purport to change the *Strickland* standard. In each instance, the United States Supreme Court found that the highest court of those three states had unreasonably applied well-established federal law. Thus, there was no basis to argue that any one of the three decisions changed Florida law.

A decision from the United States Supreme Court finding that this Court, the Florida Supreme Court, has unreasonably applied federal law is qualitatively different and/or greater significance

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

within Florida than a United States Supreme Court decision finding that the highest court of some other state has unreasonably applied federal law. Yet, the State's argument that this Court's decision in *Marek* fails to recognize the obvious, *i.e. Williams v. Taylor*, *Wiggins v. Smith*, nor *Rompilla v. Beard* changed Florida law. The fact that the Virginia Supreme Court, the Maryland Court of Appeals, and the Pennsylvania Supreme Court had failed to properly apply *Strickland* simply did not change Florida law.[10]

The State also asserts that *Porter v. McCollum* was "nothing more than to correct an error in the application of the law to facts of a particular case." (Answer Brief at 13-14).

The State's argument is refuted by the fact that the United States Supreme Court as well as other courts have relied on the principles set forth in *Porter*. *See Sears v. Upton*, 130 S. Ct. 3529 (2010); *Johnson v. Buss*, 643 F.3d 907 (11th Cir. 2011) ("'The major requirement of the penalty phase of a trial is that the sentence be individualized by focusing on the particularized characteristics of the individual.' *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987). For that reason, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter*, ___ U.S. at ___, 130 S.Ct. at 455. '[E]vidence about the defendant's background and character is relevant because of the

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

belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989) (quotation marks omitted)."

Furthermore, as the Eleventh Circuit Court of Appeals' opinion makes clear in *Johnson v. Buss*, the principles set forth in *Porter* are not confined to post-conviction defendants who have presented military history in mitigation. *Id*.[11] See also, *Cooper v. Secretary, Department of Corrections*, 646 F. 3d 1328, 1354 (11th Cir. 2011)("In the penalty phase of a trial, "[t]he major requirement...is that the sentence be individualized by focusing on the particularized characteristics of the individual." *Armstrong v. Dugger*, 833 F. 2d 1430, 1433 (11th Cir. 1987). Therefore, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's abusive childhood." *Porter v. McCollum*, ----U.S.. — 130 S. Ct. 447, 455, 175 L.Ed 2d 398 (2009). Background and character evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse." *Johnson*, 643 F.3d 907, 936, 2011 WL 2419885, at 27 (collecting cases)." See also, *Farrell*

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

v. Hall, 640 F.3d 199 (11th Cir. 2011)("Yet the range of relevant mitigation evidence is far wider than reputation. See, *Brownlee v. Haley*,306 F.3d 1043, 1070 (11th Cir. 2001)(mitigating evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L.Ed2d 973 (1978))); see also *Porter v. McCollum*, ——-- U.S. ----130 S. Ct. 447, 452-53, 175 L.Ed 2d 398 (2009)(holding --in a case in which the penalty phase took place in 1988, the same year as Ferrell's – that "[i]t is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an obligation to conduct a thorough investigation of the defendant's background'").

The United States Supreme Court specifically criticized the analysis of the evidence that was presented in Mr. Porter's case: "The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing." *Porter v. McCollum,* 130 S. Ct. at 454. The mitigation was not considered or unreasonably discounted due to the flawed standard of review that was used in reviewing Mr. Porter's claim.[12] The same flawed standard

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

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. **Based upon our case law**, it was then for the

was used in Mr. Finney's case which led this Court to similarly fail to consider or unreasonably discount recognized mitigation.

The same erroneous standard of review was applied to the deficient performance prong of Mr. Finney's ineffective assistance of counsel claim. Indeed, the United States Supreme Court in *Porter v. McCollum* found that Mr. Porter's trial attorney had rendered deficient performance. In doing so, consideration was given to the value of the mitigating evidence that had been denigrated by the judge presiding at the evidentiary hearing.

> trial court to resolve the conflict by the weight the trial court afforded one expert's opinion as compared to the other. The trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the States's expert. We accept this finding by the trial court because it was based upon competent, substantial evidence.

Porter v. State, 788 So. 2d at 923 (emphasis added). The U.S. Supreme Court rejected this analysis (and implicitly this Court's case law on which it was premised) as an unreasonable application of *Strickland*:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. * * * Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

Porter v. McCollum, 130 S. Ct. at 454-55.

The *Porter* error is not exclusive to cases where there was either a finding of deficient performance, or the Court did not reach the issue; this is particularly true where the failure to investigate is excused because the evidentiary hearing court discounted the value of the mitigation that had not been investigated and this Court deferred to the denigration of the unpresented mitigating evidence. The standard of review and analysis of evidence that is mandated in *Porter* applies to all of a postconviction defendant's claims where evidence has been presented to support the claims. Thus, based on *Porter*, Mr. Finney's claims of ineffective assistance of counsel require further review, using the standard set forth in *Porter*.

CONCLUSION

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

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 6TH day of September, 2011.

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