IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-428

PAUL C. HILDWIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on direct appeal to this Court from the 1986 trial;

"PC-R. ___" - Record on appeal to this Court from the Rule 3.851 proceedings in which an evidentiary hearing was conducted in 1992;

"R2. ___" - Record on direct appeal to this Court following the 1996 re-sentencing;

"PC-R2. ___" - Record on appeal to this Court from the Rule 3.851 proceedings in Case No. SC04-1264;

"PC-R3. ___" - Record on appeal to this Court from the Rule 3.851 proceedings in Case No. SC09-1417;

"All Writs ___" - Record after this Court's relinquishment in Case No. SC10-1082;

"PC-R4. ___ " - Record in this pending appeal from the Rule 3.851 proceedings in Case No. SC11-428.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

Mr. Hildwin has been sentenced to death. Mr. Hildwin's appeal raisees the issue of whether *Porter v. McCollum*, 130 S. Ct. 447 (2009), qualifies as new Florida law under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and whether it requires this Court to revisit Mr. Hildwin's guilt phase ineffective assistance of counsel claim and his *Brady* claim which were denied by this Court in 1995. In prior instances in which the U.S. Supreme Court found that this Court had failed to properly understand, construe and apply federal constitutional law in a Florida capital case, this Court has not only granted oral argument to consider whether the new U.S. Supreme Court decision qualified under *Witt*, but after hearing oral argument has found that the decisions did indeed qualify under *Witt* as new law. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987), which was found to qualify as new Florida law under *Witt* in *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987); and *Espinosa v. Florida*, 505 U.S. 1079 (1992), which was found to qualify as new Florida law under *Witt* in *James v. State*, 615 So. 2d 668 (Fla. 1993).

The resolution of the issues involved in this action will therefore determine whether or not just Mr. Hildwin lives or dies, but whether guilt phase ineffective assistance of counsel and *Brady* claims were properly analyzed by this Court when this

Court had misconstrued the *Strickland* prejudice prong standard and gave too much deference to rulings made by the judge presiding at a post-conviction evidentiary hearing. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Hildwin, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

The issues presented in this appeal consist of two parts: the first is the determination of whether *Porter* must be applied retroactively. That issue is a question of law and must be reviewed *de novo*. *See 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 second is the application of *Porter* to Mr. Hildwin's case. In that regard, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Hildwin's jury would have

viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009).

INTRODUCTION

On November 30, 2009, the U.S. Supreme Court issued its decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009).[1] There, the U.S. Supreme Court ruled that this Court's *Strickland*[2] analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S. Ct. at 455. Under the Anti-Terrorism Effective Death Penalty Act (AEDPA), the U.S. Supreme Court was required to give deference to this Court's application of *Strickland*. It could not grant habeas relief from a state court judgment merely because it disagreed with the state court's application of federal constitutional law. Specifically, habeas relief could only be issued to George Porter if this Court's *Strickland* analysis was not just wrong, but clearly and unreasonably wrong. It is in this context that the U.S. Supreme Court's ruling in *Porter v. McCollum* must be read.

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[1]On November 29, 2010, Mr. Hildwin filed the Rule 3.851 that is the subject of this appeal. In that motion, Mr. Hildwin relied upon *Porter v. McCollum* and argued that it qualified under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), as new law which warranted revisiting Mr. Hildwin's previously presented guilt phase *Strickland* and *Brady* claims.

[2]*Strickland v. Washington*, 466 U.S. 668 (1984).

Though *Porter v. McCollum* specifically dealt with an ineffective assistance of penalty phase counsel claim, the defect in this Court's *Strickland* analysis that was identified by the U.S. Supreme Court is equally applicable to guilt phase ineffective assistance of counsel claims and the materiality prong of *Brady* claims.[3] This Court has made clear that its prejudice prong analysis of a guilt phase ineffective assistance claims and its materiality prong analysis under *Brady* are fungible and indistinguishable from each other.

In *Rivera v. State*, 995 So. 2d 191, 205 (Fla. 2008), this Court recognized that "the materiality prong of *Brady* has been equated with the *Strickland* prejudice prong." Accordingly, an analysis of the *Strickland* prejudice prong precluded the need to perform an identical analysis for the materiality prong of *Brady* and vice-a-versa. *See Derrick v. State*, 983 So. 2d 443 (Fla. 2008). Indeed, in *United States v. Bagley*, 473 U.S. 667 (1985), the U.S. Supreme Court expressly adopted the *Strickland* prejudice prong standard, *i.e.* "reasonable probability of a different outcome", as the standard to be used when conducting the materiality analysis of undisclosed favorable information in *Brady* cases. Thus, the U.S. Supreme Court's rejection in *Porter*

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

v. McCollum of this Court's *Strickland* prejudice prong analysis as too deferential to the lower court considering a penalty phase ineffectiveness claim applies with equal force where this Court has been inappropriately deferential to a lower's court rejection of guilt phase ineffective assistance claims and *Brady* claims for either a want of prejudice or materiality.

Mr. Hildwin's current appeal requires this Court to engage in an introspective look at the import of the decision in *Porter v. McCollum* in the context of guilt ineffective assistance of counsel claims and *Brady* claims. This Court must consider whether its own unreasonable analysis in *Porter v. State* was merely an aberration limited solely to the penalty phase ineffectiveness claim in that case or was it in fact indicative of a systemic failure by this Court to properly understand and apply *Strickland*.[4]

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[4]The question that must be addressed is whether the U.S. 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 as explained herein, which renders Mr. Hildwin'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 States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . .") *Id*. at 931.

In the relatively recent past, this Court has on two occasions assessed the effect to be accorded to a decision by the U.S. Supreme Court finding that this Court had misapprehended and misapplied U.S. Supreme Court precedent. In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the U.S. Supreme Court granted federal habeas relief because this Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Hitchcock*, this Court had 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.[5]

The other U.S. Supreme Court case finding that this Court had failed to properly apply federal constitutional law was *Espinosa v. Florida*, 505 U.S. 1079 (1992). There, the U.S. Supreme Court summarily reversed a decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not

[5]The AEDPA was not in effect at the time of the decision in *Hitchcock v. Dugger*, so there was no need for the U.S. Supreme Court to determine that this Court's decision was clearly or unreasonably wrong. The U.S. Supreme Court's review in *Hitchcock* was *de novo*.

applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.[6]

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death sentenced individuals whose death sentences had also been affirmed by this Court due to the same misapprehension of federal law should arbitrarily be denied the benefit of the proper construction and application of federal constitutional law. On both occasions, this Court determined that fairness dictated that those, who had not received from this Court the benefit of the proper application of federal constitutional law, should be allowed to re-present their claims and have those claims judged under the proper constitutional standards. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987)("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr.

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[6]The decision by the U.S. Supreme Court in *Espinosa v. Florida* was in the course of direct review of this Court's decision affirming a death sentence on direct appeal. The U.S. Supreme Court's decision was not through the prism of federal habeas review, and thus the U.S. Supreme Court employed *de novo* review.

James because "it would not be fair to deprive him of the *Espinosa* ruling").

Mr. Hildwin, whose ineffective assistance of guilt phase counsel claim and guilt phase *Brady* claim were heard and decided by this Court before *Porter v. McCollum* was rendered, seeks in this appeal what George Porter received. Mr. Hildwin seeks to have his *Brady* and ineffectiveness claims reheard and re-evaluated using the proper *Strickland* standard that U.S. Supreme Court applied in Mr. Porter's case to find a re-sentencing was warranted.[7] Mr. Hildwin seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Hildwin seeks the proper application of the *Strickland* standard. Mr. Hildwin seeks to be treated equally and fairly.

STATEMENT OF THE CASE

On September 21, 1985, Mr. Hildwin was arrested on charges of uttering a forged instrument in Hernando County, Florida. On November 22, 1985, Mr. Hildwin was indicted for the first degree

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

murder of Vronzettie Cox.[8] On April 22, 1986, the public defender's office withdrew as Mr. Hildwin's counsel due to a conflict. As a result, Daniel Lewan was appointed to represent Mr. Hildwin.[9]

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[8]On the evening of September 12, 1985, Bernice Moore reported her sister, Vronzettie Cox, as missing to law enforcement. Law enforcement began trying to trace Cox's last known activities the next day, September 13, 1985. Coincidently, sometime on September 13th, two men riding motorcycles through the woods discovered a 1984 brown Chevrolet stuck in the mud at the edge of a lake (R. 235-41). The men later notified law enforcement. After the Hernando County Sheriff's Office learned that a car had been seen stuck in the mud at the edge of a lake, deputies responded. Cox's nude body was found in the vehicle's trunk (R. 248-50). A pathologist examining the body concluded that death was a result of strangulation (R. 298).

A laundry bag full of clothes was also found in the car. The State suggested that the clothes on top of the laundry bag were the clothes that Cox must have had contact with right before her death. The State presented forensic evidence that a pair of women's panties found on top of the laundry bag were semen stained, and that a wash rag also located on top of the laundry bag was saliva stained.

Law enforcement discovered that the last check cashed on Cox's checking account was made out to Mr. Hildwin. When the check was cashed at around 12:30 PM on September 9, 1985, the teller wrote information taken from Mr. Hildwin's driver's license on the back of the check (R. 406). As a result, law enforcement contacted Mr. Hildwin. After he was interviewed, he was charged with uttering a forged instrument. Subsequently, he was indicted for the murder on the theory that Cox was murdered by Mr. Hildwin before he cashed the check at round 12:30 PM on September 9th.

[9]At an evidentiary hearing in 1992, Mr. Lewan testified that he had no prior experience with capital cases (PC-R. 3048, 3123-24). Mr. Hildwin's case was the first time that he had been

Four months after Mr. Lewan was first appointed to represent Mr. Hildwin in his first capital case, the case went to trial on August 25, 1986.[10] Mr. Lewan testified in 1992 that

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appointed to represent someone in which the State was seeking a death sentence. Besides having no capital experience, Mr. Lewan had no one to assist him in the case. A second chair was not appointed.

[10]Mr. Lewan graduated from law school in December 1982 and was admitted to the Florida Bar the following year (PC-R. 3046). In his first three years as an attorney leading up to the 1986 jury trial in Paul Hildwin's capital case, Mr. Lewan had handled "about six jury trials" which he recalled were "A couple of DUI's, drug possession &, AG assaults, things of that nature" (PC-R. 3048). Mr. Hildwin was the first death penalty client Mr. Lewan had represented after his admission to the Florida Bar (PC-R. 3123). Mr. Lewan represented Mr. Hildwin as a result of his contract with the public defender's office to handle all conflict cases for a year from July 1, 1985, until June 30, 1986 (PC-R. 3050). The contract paid a flat $12,000 for the one year period covered by the contract (PC-R. 3051). To the best of Mr. Lewan's recall, the contract was not renewed (PC-R. 3051). Pursuant to the provisions of the contract, Mr. Lewan was appointed to represent Mr. Hildwin on April 22, 1986 (PC-R. 3052). Mr. Lewan was provided no additional assistance by another attorney (PC-R. 3048, 3051). He had his office secretary to help (PC-R. 3054). He was also able to get an investigator with Global Security to provide some assistance (PC-R. 3055). Because of difficulty he had in getting police reports, he filed a motion requesting the State to supply all police reports (PC-R. 3057). Mr. Lewan testified in 1992 that he believed he had some police reports, but he did not believe that he had them all. His motion was dated August 7, 1986, just weeks before trial commenced on August 25, 1986 (PC-R. 3058). Trial counsel entered the case "approximately four months prior to trial" (PC-R. 3121), and had to complete all his preparation in that period. Counsel had no meaningful experience with death penalty litigation (PC-R. 3123-24). Counsel did not seek the advice of anyone who had experience conducting a capital penalty phase, had never observed a penalty phase, and had never read

the theory of defense at the 1986 trial was innocence. The window of opportunity for Mr. Hildwin to have committed the murder was narrow (an hour and a half period of time on the morning of September 9, 1985) (PC-R. 3060).[11] In that vein, Mr. Lewan looked for ways to shift the time frame.[12] He also was looking for other suspects who committed the murder, primarily William Haverty, the victim's live-in boyfriend.[13]

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the penalty phase testimony of a mental health expert (PC-R. 3135).

[11]Mr. Lewan testified in 1992 that he believed that evidence showing that the victim was alive after the one and a half window of time that closed at about noon on September 9th "would have effectively destroyed the State's case" (PC-R. 3060). With that in my mind, such evidence that the victim was alive the night of September 9th or the afternoon of September 10th or even later, Mr. Lewan would have seized upon and presented had he been aware of it.

[12]At the 1992 post-conviction evidentiary hearing, it was established that the victim's niece, Terry Moore told the police that he spent several hours with the victim at a bar on the night of September 9, 1985 (PC-R. 3367-92). In 2001, Laura Say Harrison told Mr. Hildwin's collateral counsel that she knew the victim and saw her at a bar one afternoon later in the week, a couple of days before her body was found on Friday, September 13th. However, Mr. Lewan was unaware of either Mr. Moore or Ms. Harrison and called neither to testify at Mr. Hildwin's trial.

[13]In his opening statement, Mr. Lewan told the jury:

> Now, we're not going to present all the evidence, the volume of evidence the state has presented. We don't have that []...We're going to show that the victim was a 42 year old female. She was living with a 23 year old man. We're going to show that he [Haverty] had

Though the State had not formally charged Mr. Hildwin with sexual assault, it was the State's contention that the murder was committed by Mr. Hildwin either in the course of or following a sexual assault on the victim.[14] In the prosecutor's opening statement, he informed the jury that Paul Hildwin's semen and saliva matched the semen and saliva found on the victim's panties and washcloth located at the crime scene:

> just as equal an opportunity as my client to have committed this crime.

(R. 731-32).

[14]The state explained that it intended to argue that the evidence would provide the State with a basis for arguing that the victim was sexually assaulted by Mr. Hildwin at a side bar:

> Judge, first of all, I feel that the evidence that's going to come out in this case showing this victim unclothed with a ligature around her neck, with her legs bent over her head and forced into the trunk of a car, her clothes found in various areas in the county, a reasonable inference can be made that a sexual assault occurred and we certainly intend to argue that if the evidence supports it.

(R. 1181). Subsequently, the prosecutor elaborated:

> I don't anticipate standing up or Mr. Cole standing up and screaming sexual battery. But when we get to the point in the trial where enough evidence has been put before the jury within a reasonable inference that a sexual battery occurred, we intend to refer to it.

(R. 1185).

> Finally taken from that laundry bag was a pair of women's clothing sitting on top of the laundry bag, a pair of women's panties and a wash rag. Now, on those panties was some semen and it has the same blood characteristics that the defendant has. And there will be an expert from the FBI to testify to you about that. On the wash rag there are characteristics of human sweat that is consistent with this defendant.

(R. 223-4).[15]

During the State's case, it introduced the semen-stained women's panties and a sweat/saliva stained wash rag found on top of the laundry bag in the victim's car (R. 697-99).[16] Evidence was introduced that forensic analysis had determined that the semen and sweat/saliva found on these items came from a nonsecretor (i.e., an individual who does not secrete blood

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[15]In testimony presented to the jury by the State, it was advised that the biological evidence matched only 11% of the male population that included Paul Hildwin due to Mr. Hildwin's unique status as a non-secretor.

[16]The State also introduced a brassiere that was found inside the victim's purse (R. 546-48). Evidence was presented that the purse had been found discarded in some brush approximately a quarter of a mile from Mr. Hildwin's home (R. 536). Based upon the condition of the brassiere inside the purse the State asserted that it had been violently ripped off of the victim in the course of a sexual assault by Mr. Hildwin.

typing into other bodily fluids). Evidence was also introduced to show that Mr. Hildwin was a nonsecretor. This meant that the forensic finding was consistent with Mr. Hildwin having been the source of the semen and saliva. Testimony was presented that white male nonsecretors "probably" make up only eleven percent of the population. The prosecution used this evidence in closing argument at the original trial to argue that Mr. Hildwin raped and then killed the victim:[17]

> Inside that purse was a lady's brassiere. There's something very interesting about this, and I want you folks to examine this item. This was not taken off. This was not taken off by anyone during a consensual sex act that involved choking. This is not a consensual sex act. Look at the brassiere. This thing has been literally ripped off. There is nothing consensual about this. This is in shreds. You can still see where one of the hooks is still in the eyelet and the other one is torn completely out and the other one is ripped off. This is not a consensual act. This is one of those arrows that Mr. Lewan threw up in the air.
>
> Agent Reem testified about the blood test, the serology test, the secretor/non-secretor evidence, and he told you that some people are what he calls secretors, meaning that they secrete ABO or ABH factors into their other bodily fluids and others don't. Eleven percent-only eleven percent of the white

[17]However, DNA testing in 2003 established that Mr. Hildwin was not the source of the bodily fluids found on the panties and the wash rag. The DNA testing did establish that the male DNA in the panties and on the wash rag match and was from one single source. However at this time in 2011, the contributor of the male DNA has not been identified.

> male population are secretors, meaning eighty-nine percent are not. Bill Haverty is a secretor. In other words, his semen and his saliva would exhibit the ABH factors. The defendant, Paul Hildwin, is not a secretor. His saliva and semen would not exhibit the ABH factors. You'll have the little chart that he made and you can look at it.
>
> What's interesting about that is that on these panties were found-these panties were found in the car on top of the laundry, Sergeant Haygood testified to, not in the laundry, on top of the laundry. These panties contained semen that is consistent with the non-secretor 11 percent of the white male population, consistent with the defendant in this case and not consistent with Bill Haverty. This wash rag had saliva from a non-secretor consistent with Paul Hildwin, the defendant, not consistent with Bill Haverty.
>
> And before we go any further, remember the statement that the defendant made to Investigator Phifer that after-after Vronzettie Cox was choked to death, the man that did it washed his face with a white rag.

(R. 971-2).[18]

In its closing argument, the State admitted that its case against Paul Hildwin was circumstantial:

> ...you all agreed that circumstantial evidence is good evidence... Circumstantial evidence is good evidence.
>
> Circumstantial evidence can prove a case beyond a

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[18]The State did introduce statements made by Mr. Hildwin to law enforcement. However, these statements were not "confessions." Rather, the State argued that Mr. Hildwin's statements were argued as demonstrating that he knew too much and that thus he must have been the one who sexually assaulted the victim and then killer her, in essence since he stole the checks and cashed them, he must have raped and killed her too.

reasonable doubt, and in this case we have a lot of circumstantial evidence and it is good evidence... that circumstantial evidence buries him.

(R. 933). Later, the State asserted:

> The only issue that's come up in this case was one that came up in the opening statement in the case the defense made. Mr. Lewan stood at this podium and told you ladies and gentlemen, he said, 'Bill Haverty had an equal opportunity to kill Vronzettie Cox.' ...Now, when he gets up here to do his closing argument, ask him, Did you prove Bill Haverty did this?' And if you folks think that Bill Haverty did this first degree murder, strangled this woman, then you come back with not guilty. You come back and tell me and Mr. Cole and you tell the judge that he's not guilty, and he'll get up and walk out that back door of the courtroom with all of us.

(R. 937).[19]

The jury found Mr. Hildwin guilty of first degree murder when it returned its verdict on September 4, 1986. The next

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[19]As was noted in 2011 in the years since 1986 when he was 23 years old (R. 319), William Haverty has become a multi-convicted sex offender (PC-R4. 131). This contrasts with the testimony elicited by the State from Haverty in the State's rebuttal case that his only trouble with the law had been when he was "arrested three times for driving with a suspended license" (R. 837).

day, the jury recommended a death sentence. The judge imposed a death sentence on September 17, 1986. On direct appeal, this Court affirmed. *Hildwin v. State*, 531 So. 2d 124 (Fla. 1988).

On May 17, 1990, a death warrant was signed scheduling Mr. Hildwin's execution for July 17, 1990. Due to the crisis condition then facing the Office of the Capital Collateral Representative (hereinafter CCR) and its inability to handle Mr. Hildwin's case under the exigencies of an active death warrant, this Court issued a stay of execution on June 21, 1990, and it directed CCR to file the appropriate post-conviction pleadings challenging Mr. Hildwin's conviction and sentence of death on or before October 19, 1990. Subsequently, this Court granted an extension to file a 3.850 until October 24, 1990.[20]

In conformity with this Court's directive, CCR on behalf of Mr. Hildwin filed a timely Rule 3.850 motion (PC-R. 1612). Later, CCR was permitted to amend the motion (PC-R. 1855-2090). On February 24, 1992, an evidentiary hearing commenced on three of Mr. Hildwin's claims for relief (PC-R. 3032-3883).

At the 1992 evidentiary hearing, Mr. Hildwin presented evidence in support of his *Strickland* and *Brady* claims. During

the evidentiary hearing, he argued that the evidence that the jury did not hear showed that he was innocent of the murder for which he had been convicted. Mr. Lewan testified that the State's case against Mr. Hildwin allowed for only an hour or hour and a half window during which Mr. Hildwin could have committed the murder and that any information indicating the victim was alive after this time period "would have effectively destroyed the State's case" (PC-R. 3060). Mr. Lewan testified that his theory of defense at trial was that either the victim's live-in boyfriend, William Haverty, or someone else was the actual killer and that Mr. Hildwin was innocent of the murder (PC-R. 3063-64).

At the 1992 evidentiary hearing, Mr. Lewan was shown the documents that Mr. Hildwin had alleged in his Rule 3.850 motion contained a wealth of exculpatory information that had either not been disclosed by the State to Mr. Hildwin's trial counsel, or that Mr. Hildwin's trial counsel unreasonably failed to discover and present at Mr. Hilwin's trial (PC-R. 3061-3118).[21]

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[20]At that time, Rule 3.850 applied to both capital and non-capital defendants. Rule 3.851, which applied only to capital defendants, was not adopted until 1993.

[21]Mr. Hildwin's collateral counsel had pled that either the State failed to disclose the favorable information, or

Mr. Lewan testified that he had not been provided with the exculpatory information that had been in the State's possession.

The wealth of favorable and exculpatory evidence that was not heard by Mr. Hildwin's jury included information appearing in police reports reflecting that the victim's nephew, Terry Moore, had seen the victim alive on the afternoon of September 10, 1985 (Exhibits 18 and 21 from the February 24, 1992, evidentiary hearing). In an interview with law enforcement, the victim's nephew, Terry Moore, was "sure" he had seen the victim at a bar about 11:15 p.m. on September 9, 1985 (Exhibit 18 from the February 24, 1992, evidentiary hearing), more than twelve hours after the time period in which the State contended that the victim had been murdered by Mr. Hildwin.[22] Mr. Moore told

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alternatively, Mr. Lewan unreasonably failed to discover this readily available favorable evidence. Collateral counsel argued that either way, Mr. Hildwin was deprived of a constitutionally adequate adversarial testing when the favorable information/evidence was not heard by Mr. Hildwin's jury.

[22]Besides Mr. Moore, Laura Say Harrison also recalls seeing the victim alive and speaking with her long after the State maintains that Mr. Hildwin had murdered her. In 1985, Ms. Harrison, who was first located by Mr. Hildwin's collateral counsel in 2001, was acquainted with the victim from seeing her in bars that both frequented. She has been located again in 2011, and Ms. Harrison is positive that she saw the victim within three to four days, on either a Tuesday or a Wednesday, prior to the day the victim's body was discovered. She recalls seeing the victim sitting alone at a bar on Highway 50 having a draft beer. Ms. Harrison recalls that this was a weekday

law enforcement that he had spoken with the victim for 3 or 4 hours at the bar, and then the victim left in her car with her boyfriend. During his conversation with the victim, Mr. Moore observed that her boyfriend "appeared not to be too happy" (Exhibit 18 from the February 24, 1992, evidentiary hearing). A few days earlier before their conversation late at night on September 9, 1985, the victim had asked Moore "to fix a unknown enemy's car so that it didn't run" (Exhibit 18 from the February 24, 1992, evidentiary hearing). According to Mr. Moore, the "unknown enemy" was someone who had lived with the victim.

Mr. Moore was called by Mr. Hildwin to testify at the 1992 evidentiary hearing (PC-R. 3367). Mr. Moore identified the police continuation report dated September 16, 1985, as containing a summary of what he had advised the police about his last conversation with the victim which the report indicated was the night of Monday, September 9th (PC-R. 3368). In 1992, Mr. Moore was unable to recall whether his interview was before or after the victim's body was discovered (PC-R. 3368). However, Mr. Moore was sure that he told the police accurate information

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because this particular bar did not open until three or four pm in the afternoon. Ms. Harrison did not stay to have a drink because it was a weekday and she did not drink during the week because of work. Ms. Harrison recalls saying "hello" to the

to the best of his ability (PC-R. 3369, 3375, 3384). Mr. Moore also testified in 1992 that the victim was going through a divorce at the time of her death (PC-R. 3371). Her estranged husband lived in Ohio. Mr. Moore recalled that the divorce was not friendly. After the victim's death, he understood that there was a fight over the insurance proceeds which he understood involved a "fair amount of money" (PC-R. 3373). Mr. Moore had no memory of being interviewed by Mr. Hildwin's trial attorney (PC-R. 3371). He was not contacted by anyone on Mr. Hildwin's behalf until 1990 when an investigator for CCR, Jeff Walsh, located him in Geneva, Ohio and spoke with him there (PC-R. 3370).

Mr. Lewan testified at the 1992 evidentiary hearing that he had not seen the report until long after Mr. Hildwin's 1986 trial, and that it contained details regarding what Moore had advised the police about his three or four hour conversation with the victim on the night of September 9th which was significant information that would have been extremely helpful to the defense in 1986 (PC-R. 3083-85). Moore's account showed that the victim was alive twelve hours after the State alleged

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victim. *See* Attachment to Petition for Writ of Habeas Corpus which accompanies this brief.

that Mr. Hildwin had murdered her.[23] Further, Moore's statement demonstrated that the victim was feuding with someone who lived with her and was trying to hire someone to destroy her antagonist's car (PC-R 3083-84).[24] This supported Mr. Lewan's theory of defense that Mr. Hildwin did not commit the murder and that Haverty or someone else had done it.[25]

Additional exculpatory information, which was not heard by Mr. Hildwin's jury and appeared in yet another police report,

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[23]This was 12 hours after Mr. Hildwin had cashed a check drawn on the victim's account.

[24]Mr. Lewan testified that the information set forth in the police report concerning Moore's statement was so significant that he would have remembered if he had possessed it and he undoubtedly would have undoubtedly called Moore as a witness at Mr. Hildwin's trial. Mr. Lewan explained:

> A. I know that the contents of this report was not disclosed to me. Something of that significance, that is, the victim being in a bar 12 hours after she was allegedly killed by my client, would have been something I would recall. Especially considering Mr. Moore is apparently related to the victim, he would have personal knowledge of her and be very difficult for him to be mistaken, I would expect.

(PC-R. 3087). Mr. Lewan would have used the information in the report because "this goes directly to the State's case and this elaborate time table that they developed" (PC-R. 3088).

[25]And because Mr. Lewan did not speak to Mr. Moore, he was unaware of the unfriendly divorce that the victim was in the midst of at the time of her death, or the dispute over insurance proceeds that her death engendered.

was an unsourced representation that the last time the victim was seen alive was when she was observed in a bar at 2 p.m. on September 10 (Ex. 21 from the February 24, 1992, evidentiary hearing).[26] Mr. Lewan testified that the unsourced representation in the police report "was exactly the kind of information I needed to refute the State's case" (PC-R. 3081). However, he testified that he was unaware of the police report and/or its contents at the time of Mr. Hildwin's 1986 trial, and he felt the information contained therein had he known could have been used to effectively destroyed the State's case (PC-R. 3082).

More favorable evidence not heard by Mr. Hildwin's jury appeared in police reports about suspicious behavior by the victim's live-in boyfriend, William Haverty, after her disappearance (Exhibits 16, 20, and 41 from the February 24, 1992, evidentiary hearing). There were two police reports that discussed Haverty's suspicious conduct at the time the victim was reported missing and when her body was located. When she was reported missing, Haverty "did not appear upset, but tried

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[26]This matches with Laura Say Harrison's recollection set forth in the 2001 Rule 3.851 motion. Ms. Harrison's maiden name does appear in a police report showing that she had been talked

to act important by demanding we check our tow log, the hospital, F.H.P., but said don't bother with city P.D. because she would not be in thier [sic] area" (Exhibit 16 from the February 24, 1992, evidentiary hearing). Mr. Lewan testified that this was very helpful information which he would have been pursued and used at trial had he been aware of the report (PC-R. 3063-65).

When the victim's body was located, police noted in a separate report:

> [Haverty] became somewhat theatrical in his motions temporarily and then appeared to show no remorse or concern whatsoever. During this interview whatever mood everybody else went was the mood that he went to, if you were serious he was serious, if you cracked a joke he laughed along with you. When relating his story in his sequence of times, Mr. Haverty was very quick in his responses almost as though his story had been
> rehearsed. IT SHOULD ALSO BE NOTED that initially when Mr. Haverty was questioned about Monday morning prior to Ronnie leaving the residence to go to the bank and do the laundry he did not mention anything about having sex with her prior to her leaving however, at the and of this interview when he was requested to give hair standards, at that time he made the remark that he had sex with her prior to her leaving therefore teh (sic)
> hair standards would not help. IT SHOULD ALSO BE NOTED
>
> when Mr. Haverty was advisd (sic) that on Friday night
>
> everybody was looking for him in the Bars in an

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to during the investigation. However, no representation is made as to what she said.

> attempt to talk to him, he spontaneously started to make the remark, "I knew you would be" and then he caught himself and stopped making the remark. Mr. Haverty's body language portrayed him to be very nervous from time to time and then he would mellow out, however he kept wanting to know where the vehicle was found and how she was killed. No mention of this was made to him. Every time you would refer to him being in the area north of Hexam Road, he was very emphatic he would take a short cut to go across to the trailer. The only place he has been in the area out there would be to Took behind Camp a Whyle where he would fish.

(Exhibit 41 from the February 24, 1992, evidentiary hearing). Mr. Lewan testified that this report contained “significant” information which would have been very helpful at Mr. Hildwin’s 1986 trial, but he was not aware of it at the time (PC-R. 3065-67). Had he been aware of the report, he would have investigated further, and presented the information to the jury.

Still more favorable information appearing in another police report, which noted observations made by the victim’s sister of suspicious activity within the victim's trailer in the

days after September 9th, the day on which the State alleged the homicide occurred:

> Writer called Mrs. Moore [the victim's sister) and was advised that she went to the victim's trailer on 9/12/85 to look for victim and on 9/13/85 around 11:00 a.m, she went back to the victim's trailer and noticed the victim's watch on a sink. The watch was not on the sink on 9/12/85 according to Moore. She also noticed a knife in a sheath on the kitchen table that she says was not there on 9/12/85. She stated that she believed (sic) Bill Haverty was headed to Ohio. Also stated that victim went fishing often at the lake where her body was found.

(Exhibit 17 from the February 24, 1992, evidentiary hearing). Mr. Lewan testified in 1992 that this report contained “helpful” information which supported his argument at trial that the homicide did not occur on Monday, September 9, 1985, but in fact occurred a day or two later (PC-R. 3068-69). Mr. Lewan also testified that the report contained evidence of Haverty's desire to leave the area which may have been used as evidence of flight and hence Haverty's guilt (PC-R. 3069-70). Mr. Lewan testified

that had he been aware of this favorable information that he would have presented it to Mr. Hildwin's jury in the 1986 trial.

Police reports also contained even more favorable information that did not reach Mr. Hildwin's jury. A handwritten note had been found by the police in the victim's trailer which she shared with her boyfriend, Haverty. The handwritten note told the recipient to "[f]uck off and die" and that if the recipient "didn't like it at the house", the recipient "could leave" (State's Exhibit 2 from the February 24, 1992, evidentiary hearing). Because the victim shared the trailer with Mr. Haverty, the note seemingly was a correspondence between the two of them. A deputy testified at the 1992 evidentiary hearing that Haverty had told the police that he had been the one who wrote the note, meaning that the victim was the recipient of the note (PC-R. 3727-28). Mr. Lewan testified that he had been unaware that the police had found such a note and that the note would have been useful to Mr. Hildwin's defense at the 1986 trial and would have been presented:

> A. As I testified before, we were trying to set up a defense that Mr. Haverty and the victim's relationship

was deteriorating. I think this would be very good evidence of that.

(PC-R. 3858-59). At the 1992 evidentiary hearing, Mr. Lewan testified that he had not seen the note "before just now" (PC-R. 3856). He further testified that he had "no question" that he would have introduced the note at Mr. Hildwin's 1986 trial had he known of its existence (PC-R. 3858-59).

Still more favorable information appeared in a pretrial interview of Tracy George by the prosecutor. The notes from this interview bearing a June of 1986 date (PC-R. 3078),[27] reflect Mr. George's observations of the volatile relationship that the victim had with Haverty.[28] It also included Mr. George's observation of Haverty's suspicious behavior. Mr. Lewan testified at the 1992 evidentiary hearing that he believed that the notes contained discoverable information that he did

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[27]Presumably, these notes are from an interview conducted by the State Attorney's Office pursuant to a State Attorney subpoena.

[28]Tracy George was called by Mr. Hildwin to testify at the 1992 evidentiary hearing (PC-R. 3514). He confirmed that the information contained the notes would have been accurate to the best of his ability. He also specifically recalled the date of his arrest, September 2, 1985 (PC-R. 3521), which would have been the date that the grass was cut and that Haverty was at the house (PC-R. 3522). Mr. George also recalled seeing scratch

not recall being provided (PC-R. 3078-79). Had he been aware of the information related by Mr. George to the State, he would have presented it at trial because it was consistent with the defense he presented on Mr. Hildwin's behalf at the 1986 trial (PC-R. 3079).

The notes from Mr. George's statement to the State also contained favorable information showing that Mr. George possessed information put the testimony of James Weeks who the State called at Mr. Hildwin's trial to corroborate Haverty's claim as to his whereabouts on the morning of September 9th in a whole new light, which was favorable to the defense and unfavorable to the State.[29] After Haverty testified at the 1986 trial that Mr. Weeks mowed the lawn at the trailer he shared with the victim on the morning of September 9th (R. 840), Mr. Weeks was called and testified that Haverty was at the trailer when Mr. Weeks mowed the lawn (R. 848-49). However according to

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marks on Haverty's face and arms. And he saw a lady's stockings hanging out of Haverty's right back pants' pocket.

[29]Mr. Hildwin testified that the victim and Haverty stopped to pick him up when his car broke down and he was walking to his father's residence on the morning of September 9th (R. 757). The State presented Haverty's testimony that he was not with the victim on the morning of September 9th in order to refute Mr. Hildwin's testimony that after the victim and Haverty picked him up, they began to argue and fight. According to Mr. Hildwin as

Mr. George, who was Mr. Weeks' nephew, Mr. Weeks actually mowed the lawn on September 2nd, not on September 9th (PC-R. 3516).[30] Mr. George's parents owned the trailer in which the victim and Haverty lived (PC-R. 3851). Mr. George was at the trailer on the Thursday or Friday before Labor Day, 1985 (PC-R. 3517). The victim and Haverty were moving in on that day (PC-R. 3518, 3853). Mr. George remembered the time the victim and Haverty moved into the trailer because Mr. George was arrested and put in jail on Labor Day, September 2, 1985 (PC-R. 3520-21).[31] According to Mr. Weeks' trial testimony, he cut the grass at the trailer on the Monday after the victim and Haverty moved in (PC-R. 3647), which was September 2, 1985. Thus, according to this information in the State's possession (the notes from Mr. George's pretrial interview), Haverty did not have an alibi for the morning of September 9th.

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the fighting escalated, he got out of the car taking the victim's checkbook with him (R. 758-62).

[30]Mr. George was called by Mr. Hildwin at the 1992 evidentiary hearing and testified as to this information which was favorable to Mr. Hildwin and which was not heard by the jury at the 1986 trial.

[31]In his 1992 testimony, Mr. George recalled that the rent for the house was $200 a month which the victim was going to pay with the proceeds from her social security check which she was expecting to arrive shortly after moving in (PC-R. 3851).

Mr. Lewan testified at the 1992 evidentiary hearing that all of this favorable information of which he had been unaware, had a synergistic effect. Each piece of information amplified and supported the significance of each other:

> I think what you're talking about is weaving a fabric of a defense as opposed to just using individual threads, and each one of these taken individually would be more of a thread of a defense. But put together and woven correctly, I think, yes, you're talking about a bona fide defense theory here that could have been used.

(PC-R. 3079-80). Had he been aware of the police reports and notes, Mr. Lewan testified that he would have presented the information contained in them to the jury.

Still more favorable information was presented at the 1992 hearing which had not been heard by Mr. Hildwin's jury. Impeachment of Robert Worgess' trial testimony was not heard by Mr. Hildwin's jury. Mr. Worgess, a jailhouse informant, testified at the 1986 trial that Mr. Hildwin had made inculpatory statements while in jail. What the jury did not learn was that Worgess had reason to curry favor with the State

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Accordingly, she and Haverty were allowed to move in before the rent had been paid.

by assisting the State. Indeed, Worgess received benefit from his testimony, and the jury did not know about it. The undisclosed impeachment evidence included the fact that Worgess had been charged with lying to his probation officer (PC-R. 3096). Though Mr. Lewan knew that Worgess had a pending VOP, he did not know that one of the allegations was that Worgess had lied to his probation officer. However, Worgess had also been charged with grand theft (PC-R. 3091-94). Mr. Lewan knew nothing about the pending grand theft charge (PC-R. 3094). The proceedings against Worgess were continued until after Mr. Hildwin's trial. Mr. Lewan was not only unaware of the grand theft charge, he was unaware that it and the sentencing on the VOP was postponed until after Mr. Hildwin's trial (PC-R. 3097). Mr. Lewan was further unaware that at the hearing on Worgess' pending charges, the prosecutor from Mr. Hildwin's trial would appear and request Worgess' immediate release (Exhibits 22, 23, and 42-48 from the February, 1992, evidentiary hearing). Mr. Lewan after reviewing the exhibits testified that the documentation showed "that the State had some understanding with Mr. Worgess. And Mr. Worgess, if he gave his testimony at Mr. Hildwin's trial, then would receive favorable treat to be released" (PC-R. 3098). Had he been aware of the information

contained in the documentation, he would have presented it Mr. Hildwin's trial in order to impeach Worgess.

At the 1992 evidentiary hearing, Mr. Hildwin's trial attorney, Mr. Lewan, testified when shown all of the unpresented exculpatory evidence, that he would have presented the favorable information had he known of it because it was consistent with his theory of defense, *i.e.* the victim's boyfriend, Haverty, or someone else, not Mr. Hildwin, was the actual killer, and that the murder did not occur at the time alleged by the State (PC-R. 3059-60, 3064-73, 3080-88). However according to Mr. Lewan, the documents that he was shown in 1992 were not disclosed to him by the State prior to or during Mr. Hildwin's 1986 trial (PC-R. 3061, 3066, 3068, 3071, 3080, 3083, 3094).

According to the testimony from members of the prosecutorial team, Mr. Lewan was given access to all of the documents and information in the State's possession at a pre-trial meeting in the State Attorney's Office (PC-R. 3597, 3661, 3724, 3797, 3815). These prosecutorial team members testified that Mr. Lewan only conducted a "limited" review of the materials in which he did not spend much time conducting the "limited" review, but merely "flipped through" the materials (PC-R. 3599, 3626, 3816).

Tom Hogan, the lead prosecutor at Mr. Hildwin's trial, testified that he "didn't feel that Mr. Lewan was being very aggressive in his discovery" (PC-R. 3663). As a result, Jane Phifer, an investigator with the State Attorney's Office, arranged the entire prosecutor's file on a table in the State Attorney's Office and had Mr. Lewan come to the office so that he could inspect the documents spread out on the table (PC-R. 3597-99). Employees of the prosecutor's office were available to make copies of any documents that Mr. Lewan wanted a copy of, but he took only "limited" advantage of this opportunity (PC-R. 3599).

Following the conclusion of the 1992 evidentiary hearing, the circuit court denied Mr. Hildwin's Rule 3.850 motion. As to Mr. Hildwin's *Brady* claim, the presiding judge ruled: "There is no indication, based on the evidence presented at the 3.850 hearing, that any evidence was withheld from the Defendant; and certainly no evidence was presented at the 3.850 hearing that any evidence Defense counsel claimed he did not receive and did not otherwise have access to, would have with 'reasonable probability' changed the result." (PC-R. 4567).

As to the guilt phase *Strickland* claim, the presiding judge ruled: "The trial, during the guilt phase, was a reliable

adversarial testing process. This Court can't say, based on the evidence presented at the 3.850 hearing and otherwise, that Defense counsel's performance during the guilt phase was deficient, or that there exists a reasonable probability that the result of the proceedings would have been different absent the allegedly deficient performance of Defense counsel." (PC-R. 4567).

In contrast to this superficial analysis of counsel's guilt phase performance, the presiding judge found that trial counsel's performance at the penalty phase of the trial was deficient: "the finds that the Defense counsel was ineffective on a factual level in the penalty phase by failing to investigate adequately the possibility of mental health mitigating evidence, by failing to obtain the enormous amount of readily available mental health history documents and records, by failure to even ask the Court for permission to hire a mental health expert, and by failing to recognize the available mental health mitigation." (PC-R. 4568).[32] However, the presiding judge

[32]In addition to these findings, the presiding judge also set forth additional factual findings that supported his conclusion that Mr. Lewan rendered deficient performance:

then proceeded to deny the penalty phase ineffective assistance claim because Mr. Hildwin failed to prove that the result of the proceeding would have been different, but for trial counsel's deficient performance (PC-R. 4572-75).[33]

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1. The State prosecution was led by an experienced aggressive prosecutor, equipped with an active investigator and several assistants.
2. This was Defense counsel's first death case (3.850 transcript at page 86.
3. The Defense counsel had no assistance. (3.850 transcript page 86).
4. Defense counsel had never previously observed a penalty phase proceeding. (3.850 transcript at page 98).
5. Defense counsel had never read direct testimony of a penalty phase proceeding (3.850 transcript at page 98).

These observations applied equally to the guilt phase of Mr. Hildwin's trial with the additional fact that the trial prosecutor, Tom Hogan, specifically testified that he 'didn't feel that Mr. Lewan was being very aggressive in his discovery" (PC-R. 3663). As a result, Jane Phifer, an investigator with the State Attorney's Office, arranged the entire prosecutor's file on a table in the State Attorney's Office and had Mr. Lewan come to the office so that he could inspect the documents spread out on the table smorgasbord style (PC-R. 3597-99). Though employees of the prosecutor's office were available to make copies of any documents that Mr. Lewan wanted a copy of, the prosecutorial team testified in 1992 that Mr. Lewan remained lackadaisical taking only "limited" advantage of this opportunity (PC-R. 3599).

[33]Of course, the trial judge's analysis failed to recognize that it isn't a Rule 3.850 movant's burden under *Strickland* to prove that more likely than not the result would have been different. Presumably, the presiding judge employed the same erroneous standard when considering the guilt phase *Strickland* and *Brady* claims.

Mr. Hildwin then appealed to this Court. As to the guilt phase *Strickland* and *Brady* claims, this Court wrote:

> In order to establish a *Brady* violation, Hildwin would have to prove: (1) that the State possessed evidence favorable to him; (2) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (3) that the State suppressed the favorable evidence; and (4) that had the evidence been disclosed to Hildwin, a reasonable probability exists that the outcome of the proceedings would have been different. *See Hegwood v. State*, 575 So.2d 170, 172 (Fla.1991). In denying Hildwin's *Brady* claim, the trial court concluded:
>
> > There is no indication, based on the evidence presented at the 3.850 hearing, that any evidence was withheld from the Defendant; and certainly no evidence was presented at the 3.850 hearing that any evidence Defense counsel claimed he did not receive and did not otherwise have access to, would have with "reasonable probability" changed the result.
>
> We agree. In fact, five witnesses testified that the State's entire file was made available to defense counsel. The record simply does not support Hildwin's *Brady* claim.
>
> Hildwin's *Brady* claim is no more persuasive recast as an ineffective assistance of counsel claim. In order to prevail on his ineffective assistance of counsel claim, Hildwin must demonstrate that his trial counsel's performance was deficient and "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v.*

> *Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). There was overwhelming evidence of Hildwin's guilt presented at the trial. Therefore, assuming without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence, we do not believe Hildwin has demonstrated a reasonable probability that the outcome of the trial proceedings would have been different had this evidence been presented.

Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995).

Though this Court affirmed the denial of guilt phase relief, it concluded that relief was warranted on Mr. Hildwin's penalty phase ineffective assistance of counsel claim. This Court explained:

> The trial court found, and we conclude, that trial counsel's performance at sentencing was deficient. Trial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. For example, trial counsel was not even aware of Hildwin's psychiatric hospitalizations and suicide attempts.

Hildwin v. Dugger, 654 So. 2d at 109.

After the case was remanded, a new penalty phase took place September 23-26, 1996. The jury recommended a death sentence by a vote of eight to four (R2. 264). The presiding judge reimposed a sentence of death on December 4, 1996 (R2. 463).

Thereafter, Mr. Hildwin's second direct appeal was heard by this Court. Following briefing and oral argument, this Court affirmed the imposition of a death sentence. *Hildwin v. State*, 727 So. 2d 193 (Fla. 1998).

Mr. Hildwin's collateral counsel, CCRC-Middle, filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend on January 16, 2001 (hereinafter the "January 16, 2001 Motion"), which sought to collaterally attack the results of the re-sentencing. Collateral counsel also filed a Successive Motion to Vacate Judgment and Sentence and Consolidated Motion for DNA Testing on June 29, 2001 (hereinafter the "June 29, 2001 Motion"), which sought to collaterally attack the guilt phase determination. In the Rule 3.851 motion, the results of an interview with Laura Say Harrison were pled as part of Claim III of the motion:[34]

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[34]The caption for Claim III identified the claim in the following fashion: "NEWLY DISCOVERED EVIDENCE SHOWS THAT HILDWIN

IS ACTUALLY INNOCENT AND INNOCENT OF THE DEATH PENALTY, AND THAT THE CONVICTION RESTS ON CONSTITUTIONAL VIOLATIONS" (June 28, 2001, Motion to Vacate at 24).

B. Laura Say Harrison; 383-B Big Hill Ave. Richmond, Kentucky, 40475.

In 1985, Ms. Harrison was acquainted with the victim from seeing her in bars that both frequented. Ms. Harrison is positive that she saw the victim within three to four days, on either a Tuesday or a Wednesday, prior to the day the victim's body was discovered. She recalls seeing the victim sitting alone at a bar on Highway 50 having a draft beer. Ms. Harrison recalls that this was a weeknight because this particular bar did not open until three or four pm in the afternoon. Ms. Harrison did not stay to have a drink because it was a week night and she did not drink on week nights because of work. Ms. Harrison recalls saying "hello" to the victim.

Ms. Harrison was listed briefly in a police interview of the "Hansons" as a person who might have knowledge about the crime because she was a close friend of the victim. No police interviews have been produced through either the pretrial discovery or postconviction disclosure. Ms. Harrison recalls receiving an investigative subpoena from the State Attorney's Office. Ms. Harrison responded and told a group of uniformed and civilian clothed individuals the foregoing information. The group of people thanked her and she was never spoken to again by anyone.

(June 29, 2001, Motion to Vacate at 25-26). Because of the issuance of a State Attorney subpoena which Ms. Harrison

honored, the State was apprised of the favorable information that Ms. Harrison possessed. Not only did this information show that Mr. Hildwin did not commit the murder, because it was known by the State and not disclosed, it constituted *Brady* material. Alternatively, trial counsel's woefully inadequate investigation constituted deficient performance because he failed to "aggressively" investigate (in the words of the trial prosecutor) and learn of what Ms. Harrison had to say.[35]

At a case management hearing held on August 1, 2001, Mr. Hildwin's collateral counsel at that time, Mark Gruber, argued that an evidentiary hearing should be held on Claim III of the Rule 3.851 which included the results of the 2001 interview with Laura Harrison ("We have investigated and we have developed a number of witnesses which would provide theories of what occurred that are alternative or challenged in the arguments advanced by the State, and those are detailed in the motion")

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[35]The information that Ms. Harrison provided to Mr. Hildwin's collateral counsel in 2001 under Florida law should have been evaluated cumulatively with the exculpatory evidence presented at the 1992 evidentiary hearing. In particular, Ms. Harrison information corroborated Terry Moore's statement to the police that the victim was alive on the night of September 9th, approximately 12 hours after the State maintained that she had been murdered by Mr. Hildwin. *See Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999).

(August 1, 2001, transcript at 40).[36] In 2001, Claim III was denied without the benefit of an evidentiary hearing, and Mr.

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[36]In response to Mr. Gruber's argument on behalf of Mr. Hildwin, the presiding judge inquired: "Before I hear from the State, do you think it makes any difference what the Florida Supreme Court has ruled in this case previously, does that matter today?" (August 1, 2001, transcript at 41). In fact, counsel for the State argued that the guilt phase issues set forth in Claim III which included the information obtained from Laura Harrison in 2001 were procedural barred:

> MR. NUNNELLEY: Your Honor, Claim III, despite Mr. Gruber's argument that it is really a penalty phase issue is, in fact, nothing more than an effort to get this Court to go behind the Florida Supreme Court and rule on the guilt phase. Your Honor decided the guilt phase issues in the prior postconviction proceeding. The guilt phase is not at issue here. The guilt phase is over no matter how much Mr. Hildwin doesn't like that.

At the conclusion of the arguments pertaining to Claim III, which included the information obtained in 2001 from Laura Harrison, the presiding judge ruled:

> All right. Let me quote, this is from the state's response, but let me quote because I think it says it better than I can say it. The claim contained - - and this is referring to Claim III - - the claim contained in Hildwin's motion is nothing more than an attempt to relitigate the guilt phase under the guise of a penalty phase ineffective assistance of counsel claim, such is improper and there's no basis for relief.

Well, I completely agree. I adopt that, I accept that, I agree with that and that's the court's finding and therefore the Court denies as to Claim III that there's an evidentiary - - right to an evidentiary hearing on any attempt that can be classified as an attempt to relitigate the guilt phase of this

Hildwin was precluded from calling Ms. Harrison as a witness and present her testimony in support of his request for a new trial (August 1, 2001, transcript at 47-48).

On November 2, 2001, Mr. Hildwin filed a Motion for DNA Testing pursuant to the newly adopted Fla. R. Crim. P. 3.853. DNA testing was performed. The results from the DNA testing excluded Mr. Hildwin as the donor of the semen and saliva found on the clothing on top of the laundry bag which had been introduced at trial as having been deposited by the individual who committed the murder.[37] After the circuit court denied Mr. Hildwin's motion seeking a new trial, Mr. Hildwin appealed. This Court heard the appeal and ultimately issued an opinion affirming the denial of a new trial over the dissent of three justices, saying "Although the newly discovered DNA evidence is

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proceeding. I mean that's been addressed twice by the Florida Supreme Court and twice by the United States Supreme Court and at some point it needs to be final. Okay?

(August 1, 2001, transcript at 47-48).

[37]This Court explained in its subsequent opinion that:

> In January 2003, Orchid Cellmark, a laboratory certified by the American Society of Crime Laboratory Directors, issued a report excluding Hildwin as the source of the DNA obtained from the underpants and wash cloth.

Hildwin v. State, 951 So. 2d 784, 787 (Fla. 2006).

significant, this evidence is not 'of such nature that it would probably produce an acquittal on retrial.'" *Hildwin v. State*, 951 So.2d at 789. In reaching this conclusion, the majority indicated "[o]ur review of the guilt-phase trial record supports the trial court's conclusion [denying a new trial]." *Id*.[38]

After this Court's 2006 decision, Mr. Hildwin's collateral counsel filed a motion for an evidentiary hearing in the circuit court on behalf of Mr. Hildwin on September 21, 2007 (PC-R3. 1761).[39] On February 20, 2008, a status hearing was held on the motion for an evidentiary hearing, and the parties were directed to file a memoranda of law addressing whether the motion should

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[38]The majority opinion did not mention, let alone consider and assess, the wealth of exculpatory evidence and information that was in the State's possession at the time of trial and that was presented at the 1992 evidentiary hearing and pled in the 2001 motion to vacate. The majority opinion did not engage in the cumulative analysis that this Court in other cases has indicated that is required in cases involving a combination of newly discovered evidence of innocence and favorable evidence not presented at trial due to either ineffective assistance of counsel or a *Brady* violation by the State. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 191 (Fla. 2004).

[39]This motion was premised upon the unresolved penalty phase ineffective assistance of counsel claim. At a February 4, 2003, status conference regarding a request that the penalty phase ineffectiveness claims, the issue was apparently held in abeyance pending resolution of the DNA issues which concerned whether Mr. Hildwin should receive a new trial. The circuit

be granted (PC-R3. 1819). On August 21, 2008, over the State's objection, the circuit court issued an order granting the motion and ordering an evidentiary hearing on Claims II and VII of the January 16, 2001 Motion and Claim II of the June 29, 2001 Motion (PC-R3. 2035). Subsequently, the evidentiary hearing was held on January 20-21, 2009.

Mr. Hildwin then filed a notice of appeal on July 29, 2009 (PC-R3. 2273). On June 2, 2011, this Court issued an opinion affirming the denial of the penalty phase ineffective assistance of counsel claim presented in that case as to the 1996 penalty phase proceedings. *Hildwin v. State*, – So. 2d – , Case No. SC09-1417 (Fla. June 2, 2011). Nothing in that opinion concerned or addressed the issues presented herein regarding Mr. Hildwin's guilt phase *Strickland* and *Brady* claims.

On June 9, 2010, Mr. Hildwin filed an All Writs Petition with this Court in Case No. SC10-1082. The issue present in that proceeding concerned whether the unknown DNA profile found on the victim's panties and the wash rag in the back seat of her car should be uploaded into the CODIS database. This Court remanded for an evidentiary hearing which was conducted on February 9-10, 2011. Briefing has been completed in that case

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court had indicated at the February 4th status that it seemed an

and the matter has been taken under advisement by this Court. The issues presented in that case are separate and distinct from the issues presented herein regarding Mr. Hildwin's guilt phase *Strickland* and *Brady* claims.

On November 29, 2010, while his case was pending in the circuit court following this Court's November 10, 2010, order relinquishing jurisdiction for an evidentiary hearing to be conducted on the All Writs Petition, Mr. Hildwin filed the Rule 3.851 motion that is the subject of this appeal (PC-R4. 1-29). The State filed its answer on December 6, 2010 (PC-R4. 30-64). A case management hearing was conducted on January 18, 2011 (PC-R. 80). On January 31, 2011, the circuit court entered an order denying the Rule 3.851 motion (PC-R4. 67-71). In this order, the circuit court found that *Porter v. McCollum* did not:

> represent[] "a repudiation of *Strickland* jurisprudence" that constitutes a significant change in law to be applied retroactively. The *Porter* Court merely held that the Florida Supreme Court had erred in holding that Defendant's counsel during the sentencing phase was not ineffective for failing to introduce certain mitigating factors that could have

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evidentiary hearing would be warranted.

> altered the sentencing verdict the Defendant. An objective reading of *Porter* indicates that its holding stems from and is confined to the specific facts of the *Porter* case itself.

(PC-R4. 69).

On February 28, 2011, Mr. Hildwin filed a timely notice of appeal to this Court (PC-R4. 72).

SUMMARY OF THE ARGUMENT

Following his conviction of first degree murder, Mr. Hildwin presented a Rule 3.850 motion in which he argued that a wealth of favorable evidence known to the State was not heard by his jury because either the State unreasonably failed to disclose or defense counsel unreasonably failed to discover and present the exculpatory evidence. Following an evidentiary hearing, the circuit court found that Mr. Hildwin's inexperienced court-appointed counsel conducted a woefully inadequate investigation as to the penalty phase, but inexplicably failed to find an inadequate investigation as to the guilt phase. As to the prejudice prong of the *Strickland* standard, the circuit court imposed upon Mr. Hildwin the burden to prove that the result of the proceeding would have been different, but for counsel's deficient performance. On appeal,

this Court reversed the denial of penalty phase relief. As to the guilt phase ineffective assistance of counsel claim, this Court assumed without deciding that trial counsel's guilt phase performance was deficient, but deferred to the circuit court's finding that Mr. Hildwin had failed to prove that the result of the trial would have been different, but for counsel's deficient performance. This Court did not engage in the proper cumulative analysis of the specific bits of exculpatory evidence not heard by the jury and consider how reasonably effective defense counsel would have used the evidence and how the jury may have viewed evidence, not just impeaching the State's case, but demonstrating that the victim was not killed during the one and a half hour window in which the State maintained that Mr. Hildwin committed the murder.

This Court's analysis of the guilt phase issues presented by Mr. Hildwin did not comport the proper *Strickland* analysis for the reasons explained in *Porter v. McCollum*, 130 S.Ct. 447 (2009). The decision by the U.S. Supreme Court in *Porter* establishes that the previous denial of Mr. Hildwin's ineffective assistance of counsel claims was premised upon this Court's jurisprudence misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The U.S. 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 as explained herein, which renders Mr. Hildwin's *Porter* claim cognizable in these postconviction proceedings, and requires this Court to revisit Mr. Hildwin's claim and conduct the proper cumulative analysis the prejudice flowing from either the unreasonable failure to disclose or the unreasonable to discover and present the exculpatory evidence at Mr. Hildwin's 1986 trial. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

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

A. INTRODUCTION

Mr. Hildwin was deprived of the effective assistance of trial counsel at the guilt phase of his case and/or the State withheld exculpatory evidence within its possession. Mr. Hildwin presented his ineffective assistance of counsel and/or *Brady* claims in a Rule 3.850 motion that was initially filed in 1991. Following an evidentiary hearing, the circuit court denied Mr. Hildwin's guilt phase ineffective assistance of counsel and *Brady* claims.

As to Mr. Hildwin's *Brady* claim, the presiding judge ruled: "There is no indication, based on the evidence presented at the 3.850 hearing, that any evidence was withheld from the Defendant; and certainly no evidence was presented at the 3.850 hearing that any evidence Defense counsel claimed he did not receive and did not otherwise have access to, would have with 'reasonable probability' changed the result." (PC-R. 4567).[40]

As to the guilt phase *Strickland* claim, the presiding judge ruled: "The trial, during the guilt phase, was a reliable adversarial testing process. This Court can't say, based on the evidence presented at the 3.850 hearing and otherwise, that Defense counsel's performance during the guilt phase was deficient, or that there exists a reasonable probability that the result of the proceedings would have been different absent the allegedly deficient performance of Defense counsel." (PC-R. 4567).[41]

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[40]The presiding judge simply ignored and did not address the testimony of defense counsel, Mr. Lewan, who definitively stated that the favorable information that had been in the State's possession was not disclosed to him.

[41]The presiding judge ignored and did not address the testimony of the trial prosecutor, Tom Hogan, that he "didn't feel that Mr. Lewan was being very aggressive in his discovery" (PC-R. 3663). According to members of the State Attorney's Office, even when the discovery was laid out before Mr. Lewan

On appeal, this Court affirmed the denial of Mr. Hildwin's guilt phase claims saying:

> Hildwin's *Brady* claim is no more persuasive recast as an ineffective assistance of counsel claim. In order to prevail on his ineffective assistance of counsel claim, Hildwin must demonstrate that his trial counsel's performance was deficient and "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). There was overwhelming evidence of Hildwin's guilt presented at the trial. Therefore, assuming without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence, we do not believe Hildwin has demonstrated a reasonable probability that the outcome of the trial proceedings would have been different had this evidence been presented.

Hildwin v. Dugger, 654 So. 2d at 109.

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smorgasbord style, he showed little interest in studying it or obtaining copies (PC-R. 3599, 3626, 3816).

The decision by the U.S. Supreme Court in *Porter* establishes that this Court's affirmance of the circuit court's denial of Mr. Hildwin's guilt phase ineffective assistance of counsel and/or *Brady* claims was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The U.S. Supreme Court's decision in *Porter* was a repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein,[42] which renders Mr. Hildwin's *Porter* claim cognizable in collateral proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d at

[42]As explained herein, *Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance claim in *Porter v. State*. Thus, Mr. Hildwin does not argue that *Porter v. McCollum* announced new federal law. Instead, it announced a failure by this Court to properly understand, follow and apply the clearly established federal law. Thus, the decision is new Florida law because it is a rejection of this Court's jurisprudence misconstruing *Strickland*. *Porter v. McCollum* was an announcement that this Court's precedential decision in *Porter v. State* was wrong, and in doing so announced new Florida law. This is identical to the rulings in *Hitchcock v. Dugger* and *Espinosa v. Florida*, which both found that this Court had failed to properly understand, follow and apply federal constitutional law.

669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

Mr. Hildwin presented his *Porter v. McCollum* claim to the circuit court in a Rule 3.851 motion in light of this Court's ruling in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, in which the U.S. Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, should be raised in Rule 3.850 motions). At the State's urging, the circuit court refused to find that fairness principles dictated that *Porter v. McCollum* should be treated just like *Hitchcock v. Dugger* and *Espinosa v. Florida*, as new Florida law within the meaning of *Witt v. State*. Accordingly, Mr. Hildwin seeks a determination by this Court that he is entitled to have his previously presented guilt phase ineffective assistance of counsel and/or *Brady* claims judged by the same standard that the U.S. Supreme Court employed when finding that this Court's *Strickland* analysis in *Porter v. State* was an unreasonable application of well-established federal constitutional law.

B. *PORTER* QUALIFIES UNDER *WITT* AS A DECISION FROM THE U.S. SUPREME COURT WHICH WARRANTS THIS COURT REHEARING MR. HILDWIN'S INEFFECTIVENESS CLAIMS

It is Mr. Hildwin's position that as to whether *Porter* qualifies as new law, the question is one of law. Therefore, initially, this Court must independently review that aspect of Mr. Hildwin's claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law. Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Hildwin's guilt phase ineffective assistance of counsel and/or *Brady* claims, giving only deference to specific findings of historical facts supported by competent and substantive evidence. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations as to both the guilt and penalty phases, are questions of law to which no deference is to be accorded to the judge who presided at evidentiary hearing. As *Porter* also makes clear, an evaluation of the evidence presented to establish prejudice under the prejudice prong of the *Strickland* standard or the materiality prong of the *Brady* standard must also be evaluated without according any deference to the presiding judge's findings as to that evidence. Absolute *de novo* review is required of evidence offered to establish prejudice under *Strickland* or materiality under *Brady*. The issue is not what

impact the evidence of prejudice had on the judge presiding at a collateral evidentiary hearing, but what impact such evidence may have had upon the jury who heard the case had it been presented. *See Porter v. McCollum*, 130 S. Ct. at 454-55.[43]

In *Witt*, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictated. Specifically, this Court held that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. The Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid

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[43]As the U.S. Supreme Court noted in *Kyles v. Whitley*, 514 U.S. 419 (1995), the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute her credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the state. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The

individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id*. (quotations omitted).

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the U.S. Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926.

This Court in *Witt* recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive

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constitution protects the right to a trial by jury, and it is

application as ascertained by the three-fold test of Stovall and Linkletter." *Id*. at 929. This Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

This Court summarized its holding in *Witt* to be that a change in law can be raised in post-conviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931.

After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the U.S. Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the U.S. Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under

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that right which *Brady* and *Strickland* serve to vindicate.

a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the U.S. Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the U.S. Supreme Court issued its decision in *Hitchcock,* death sentenced individuals with an active death warrants argued to this Court that they were 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).[44]

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[44]The decision from the U.S. Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon thereafter called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. Therein, this Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). Then on September 9, 1987, this Court

In *Lockett v. Ohio*, the U.S. Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. *See Downs*, 514 So. 2d at 1071; *Thompson*, 515 So. 2d at 175. In *Hitchcock*, the U.S. Supreme Court held that this Court

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issued its opinions in *Thompson* and *Downs* ordering resentencings in both cases. In *Thompson*, 515 So. 2d at 175, this Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default." In *Downs*, this Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, this Court issued its opinion in *Demps*, and thereto addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the U.S. Supreme Court held that this Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. at 1071.

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 post-conviction *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.[45]

[45]The U.S. 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 U.S. Supreme Court expressly stated:

Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness and due process dictated that everyone who had

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> 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.

raised the *Lockett* issue and lost because of its error should be entitled to the same relief afforded to Mr. Hitchcock.[46]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the U.S. Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the U.S. Supreme Court found that this Court's decision affirming the death sentence was contrary to *Lockett*, a prior decision from the U.S. Supreme Court, here in *Porter* the U.S. 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 U.S. Supreme Court. As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims. Just as this Court found

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Hitchcock, 481 U.S. at 396-97.

[46]Because the result in *Hitchcock* was dictated by *Lockett* as the U.S. 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 U.S. 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).

that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received. And just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, this Court's misreading of *Strickland* that the U.S. Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

Another decision from the U.S. Supreme Court finding that this Court had failed to properly apply Eighth Amendment jurisprudence was *Espinosa v. Florida*. At issue in *Espinosa* was this Court determination in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), that the U.S. Supreme Court decision in *Maynard v. Cartwright*, a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory

> opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

Smalley v. State, 546 So. 2d at 722. In *Espinosa*, the U.S. Supreme Court determined that *Maynard v. Cartwright* did apply in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in *Maynard*.

Following the decision in *Espinosa*, this Court found that the decision qualified under *Witt v. State* as new Florida law which warranted revisiting previously rejected challenges to the "heinous, atrocious or cruel aggravating circumstance. *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling"). As a result, *Espinosa* was found to qualify as new Florida law under *Witt*.

This Court should for exactly the same reasons that it treated *Hitchcock* and *Maynard* as qualifying as new law under *Witt*, find that *Porter v. McCollum* qualifies under *Witt* and warrants reconsidering previously denied ineffective assistance of counsel and/or *Brady* claims under the proper and correct *Strickland* standard which was applied by the U.S. Supreme Court

to George Porter's penalty phase ineffectiveness claim and resulted in collateral relief in his case and ultimately a life sentence. Refusing to reconsider Mr. Hildwin's guilt phase ineffectiveness and/or *Brady* claims and apply the now recognized proper standard of review would arbitrarily deny him the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would itself establish that Mr. Hildwin's death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

C. PORTER V. MCCOLLUM AND THE PREJUDICE PRONG OF MR. HILDWIN'S GUILT PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND THE MATERIALITY PRONG OF HIS GUILT PHASE BRADY CLAIM.

In *Porter v. McCollum*, the U.S. Supreme Court found this Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S.Ct. at 455. In *Porter v. State*, this Court had explained the *Strickland* analysis that it used:

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. Based upon our case law, it was then for the trial court to resolve the conflict by the weight the trial court afforded one expert's opinion as compared to the other. The trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the States's expert. **We**

> **accept this finding by the trial court** because it was based upon competent, substantial evidence.

Porter v. State, 788 So. 2d at 923 (emphasis added). The 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.

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id*. at 451, and "either did not consider or unreasonably discounted" that evidence. *Id*. at 454. This Court deferred to the post-conviction judge's findings without considering how the jury may have been affected by the unpresented evidence. The

U.S. Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Id*. at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id*. at 454, even though Mr. Porter's personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id*. (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court, just as this Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that Court relied upon the language in *Porter* to justify its rejection of the mitigating evidence presented by

the defense's mental health expert at a postconviction evidentiary hearing without considering how it may have affected the penalty phase jury. 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 inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings.[47] In *Stephens*, this Court observed that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent

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[47]It should be noted that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the 2nd DCA was in conflict with *Grossman* as to the appellate standard of review to be employed.

substantial evidence" supported the trial court's decision.[48] 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*. However, the Court made clear that even under this less deferential standard:

> We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is in an important principle of appellate review.

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[48]This Court acknowledged that there were numerous cases in which it had applied the deferential standard employed in *Grossman.* As examples, the court cited *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998); *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993); *Hudson v. State*, 614 So. 2d 482, 483 (Fla. 1993); *Phillips v. State*, 608 So. 2d 778, 782 (Fla. 1992); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). However, the list included in *Stephens* was hardly exhaustive in this regard. *See Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

Stephens, 748 So. 2d at 1034. Indeed in *Porter v. State*, the Court relied upon this very language in *Stephens* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing in deference to the presiding post-conviction judge's credibility determination without consideration of how the jury may have considered the unpresented evidence. *Porter*, 788 So. 2d at 923.

From an examination of this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was explicitly discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to the U.S. Supreme Court, the *Stephens* standard which was employed in *Porter v. State* and used to justify this Court's decision to discount and discard Dr. Dee's testimony was "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455.

In Mr. Hildwin's case, as in *Porter*, this Court erroneously deferred to the trial court's findings without engaging in its own analysis of the exculpatory evidence and information that was shown to have been in the State's possession when it was

introduced into evidence at the 1992 evidentiary hearing. As to the guilt phase *Strickland* and *Brady* claims, this Court wrote:

> In order to establish a *Brady* violation, Hildwin would have to prove: (1) that the State possessed evidence favorable to him; (2) that he did not possess the favorable evidence nor could he obtain it with any reasonable diligence; (3) that the State suppressed the favorable evidence; and (4) that had the evidence been disclosed to Hildwin, a reasonable probability exists that the outcome of the proceedings would have been different. *See Hegwood v. State*, 575 So.2d 170, 172 (Fla.1991). In denying Hildwin's *Brady* claim, the trial court concluded:
>
> > There is no indication, based on the evidence presented at the 3.850 hearing, that any evidence was withheld from the Defendant; and certainly no evidence was presented at the 3.850 hearing that any evidence Defense counsel claimed he did not receive and did not otherwise have access to, would have with "reasonable probability" changed the result.
>
> We agree. In fact, five witnesses testified that the State's entire file was made available to defense counsel. The record simply does not support Hildwin's *Brady* claim.
>
> Hildwin's *Brady* claim is no more persuasive recast as an ineffective assistance of counsel claim. In order to prevail on his ineffective assistance of counsel claim, Hildwin must demonstrate that his trial counsel's performance was deficient **and "but for counsel's unprofessional errors, the result of the proceeding would have been different."** *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). There was overwhelming evidence of Hildwin's guilt presented at the trial. Therefore, assuming without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence, we do not believe Hildwin has demonstrated a reasonable probability that

> the outcome of the trial proceedings would have been different had this evidence been presented.

Hildwin v. Dugger, 654 So. 2d at 109 (emphasis added).

This Court did not discuss the favorable evidence and/or information that the jury did not hear at all. There is absolutely no reference to the fact that the victim's nephew, Mr. Moore, reported speaking with her for several hours at a local bar some 12 hours after the State maintained she had been murdered by Mr. Hildwin.[49] Mr. Moore's statement demonstrated that the victim was feuding with someone who lived with her and was trying to hire someone to damage her antagonist's car (PC-R 3083-84). There was also no reference in this Court's analysis to nephew's observation of tension between the victim and her live-in boyfriend, William Haverty, which contradicted evidence present by the State, primarily through Haverty's testimony that the relationship was tension free.[50]

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[49]This would have provided corroboration to Mr. Hildwin's testimony at the trial that the victim was alive after he took a check from her possession and left to go cash it.

[50]According to Mr. Moore, the victim was feuding with the man who lived with her and was looking for someone to sabotage his car (PC-R 3083-84). This contradict Haverty's testimony in the State's case in chief that "we got along real good" (R. 322). It also contradicted Haverty's testimony when called in the State's rebuttal case that "We had a good relationship" (R. 840). And it contradicted the prosecutor's closing argument

This Court did not acknowledge, let alone discuss the handwritten note had been found by the police in the victim's trailer which she shared with her boyfriend, Haverty. The handwritten note told the recipient to "[f]uck off and die" and that if the recipient "didn't like it at the house", the recipient "could leave" (State's Exhibit 2 from the February 24, 1992, evidentiary hearing). Because the victim shared the trailer with Mr. Haverty, the note was obviously correspondence between the two of them. A deputy testified at the 1992 evidentiary hearing that Haverty had told the police that he had been the one who wrote the note to the victim, who was the intended recipient of the note (PC-R. 3727-28). Again, this note was inconsistent with Haverty's testimony in the State's case in chief. It was inconsistent with the testimony he gave when he was recalled in the State's rebuttal case in response to Mr. Hildwin's testimony. And, it was inconsistent with the prosecutor's closing argument vouching for Haverty.[51]

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when he vouched for Haverty: "Haverty, whatever else he is, is not a violent person. He has a prior conviction for no valid driver's license. He had no reason to kill Vronzettie Cox, let alone start hiding evidence all around the area in the woods up there. He had no reason to hide the car or hide the purse. He lived with the woman." (R. 938).

[51]This Court completely ignored Mr. Lewan's testimony about the significance of Mr. Moore's statement to the police and that

This Court did not address an unsourced representation in a police report that the last time the victim was seen alive was when she was observed in a bar at 2 p.m. on September 10 (Ex. 21 from the February 24, 1992, evidentiary hearing).[52] Mr. Lewan testified that the unsourced representation in the police report "was exactly the kind of information I needed to refute the State's case" (PC-R. 3081). He felt the information contained therein had he known could have been used to effectively destroyed the State's case (PC-R. 3082); yet, this Court did not address this information which corroborated Mr. Moore's statement that the victim was alive late on September 9th, and

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had he been aware of it and he undoubtedly would have undoubtedly called Moore as a witness at Mr. Hildwin's trial. Mr. Lewan explained:

> A. I know that the contents of this report was not disclosed to me. Something of that significance, that is, the victim being in a bar 12 hours after she was allegedly killed by my client, would have been something I would recall. Especially considering Mr. Moore is apparently related to the victim, he would have personal knowledge of her and be very difficult for him to be mistaken, I would expect.

(PC-R. 3087). Mr. Lewan would have used the information in the report because "this goes directly to the State's case and this elaborate time table that they developed" (PC-R. 3088).

[52]This matches with Laura Say Harrison's recollection set forth in the 2001 Rule 3.851 motion. Ms. Harrison's maiden name does appear in police reports showing that she had been talked

which refuted the State's case that the victim was killed before noon on September 9th.

This Court did not address the police report that noted:

> [Haverty] became somewhat theatrical in his motions temporarily and then appeared to show no remorse or concern whatsoever. During this interview whatever mood everybody else went was the mood that he went to, if you were serious he was serious, if you cracked a joke he laughed along with you. When relating his story in his sequence of times, Mr. Haverty was very quick in his responses almost as though his story had been
> rehearsed. IT SHOULD ALSO BE NOTED that initially when Mr. Haverty was questioned about Monday morning prior to Ronnie leaving the residence to go to the bank and do the laundry he did not mention anything about having sex with her prior to her leaving however, at the and of this interview when he was requested to give hair standards, at that time he made the remark that he had sex with her prior to her leaving therefore teh (sic)
> hair standards would not help. IT SHOULD ALSO BE NOTED when Mr. Haverty was advisd (sic) that on Friday night everybody was looking for him in the Bars in an attempt to talk to him, he spontaneously started to make the remark, "I knew you would be" and then he caught himself and stopped making the remark. Mr. Haverty's body language portrayed him to be very nervous from time to time and then he would mellow out, however he kept wanting to know where the vehicle was found and how she was killed. No mention of this was made to him. Every time you would refer to him being in the area north of Hexam Road, he was very emphatic he would take a short cut to go across to the trailer. The only place he has been in the area out there would be to Took behind Camp a Whyle where he would fish.

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to during the investigation. However, no representation is made as to what she said.

(Exhibit 41 from the February 24, 1992, evidentiary hearing). This Court also did not address still more favorable information appearing in another police report, which noted observations made by the victim's sister of suspicious activity within the victim's trailer in the days after September 9th, the day on which the State alleged the homicide occurred:

> Writer called Mrs. Moore [the victim's sister) and was advised that she went to the victim's trailer on 9/12/85 to look for victim and on 9/13/85 around 11:00 a.m, she went back to the victim's trailer and noticed the victim's watch on a sink. The watch was not on the sink on 9/12/85 according to Moore. She also noticed a knife in a sheath on the kitchen table that she says was not there on 9/12/85. She stated that she belived (sic) Bill Haverty was headed to Ohio. Also stated that victim went fishing often at the lake where her body was found.

(Exhibit 17 from the February 24, 1992, evidentiary hearing).

This Court also failed to address favorable information that appeared in notes of the State's pretrial interview of Tracy George. The notes from this interview bearing a June of 1986 date (PC-R. 3078),[53] reflect Mr. George's observations of the volatile relationship that the victim had with Haverty.[54] It

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[53]Presumably, these notes are from an interview conducted by the State Attorney's Office pursuant to a State Attorney subpoena.

[54]Tracy George was called by Mr. Hildwin to testify at the 1992 evidentiary hearing (PC-R. 3514). He confirmed that the

also included Mr. George's observation of Haverty's suspicious behavior. According to Mr. George, the grass was cut at the victim's residence on September 2nd and not on September 9th. Mr. George's testimony would have provided corroboration for Mr. Hildwin's testimony that the victim and Haverty had stopped and picked him as he was walking on the side of the road on the morning of September 9th. According to Mr. Hildwin, the victim and Haverty began to argue and fight while he was in her car, and that he decide to leave them to their fight taking her checkbook as he left. Mr. George, not only provided corroboration for Mr. Hildwin's testimony, he would have impeached Haverty's claim that he was home when the grass was being cut and not with the victim on the morning of September 9th.[55]

This Court also failed to address the unpresented impeachment of Robert Worgess. Mr. Worgess, a jailhouse

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information contained the notes would have been accurate to the best of his ability. He also specifically recalled the date of his arrest, September 2, 1985 (PC-R. 3521), which would have been the date that the grass was cut and that Haverty was at the house (PC-R. 3522). Mr. George also recalled seeing scratch marks on Haverty's face and arms. And he saw a lady's stockings hanging out of Haverty's right back pants' pocket.

[55]In impeaching Haverty, this would have corroborated Mr. Hildwin's testimony that Haverty was with the victim on the

informant, testified at the 1986 trial that Mr. Hildwin had made inculpatory statements while in jail. What the jury did not learn was that Worgess had reason to curry favor with the State by assisting the State. Mr. Worgess received benefit from his testimony, and the jury did not know about it.[56]

This Court also failed to address Mr. Lewan's testimony at the 1992 evidentiary hearing that all of this favorable information of which he had been unaware, had a synergistic effect. Each piece of information amplified and supported the significance of each other:

> I think what you're talking about is weaving a fabric of a defense as opposed to just using individual threads, and each one of these taken individually would be more of a thread of a defense. But put together and woven correctly, I think, yes, you're talking about a bona fide defense theory here that could have been used.

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morning of September 9th when he took a checkbook from the victim (R. 760-62).

[56]The undisclosed impeachment evidence included the fact that Worgess had been charged with lying to his probation officer (PC-R. 3096). The jury did not learn that Worgess had a pending VOP, or that one of the allegations was that Worgess had lied to his probation officer. It did not learn that Worgess had also been charged with grand theft (PC-R. 3091-94). The jury did not know that the proceedings against Worgess were continued until after Mr. Hildwin's trial (PC-R. 3097).

(PC-R. 3079-80). Not only did this Court failed to address this testimony, this Court engaged in absolutely no cumulative analysis of the wealth of unpresented favorable evidence and/or information. *See Kyles v. Whitley*, 514 U.S. 419 (1995).[57]

This Court's analysis in its 1995 opinion denying Mr. Hildwin's guilt phase ineffective assistance of counsel claim and its *Brady* claim failed to conduct the rigorous prejudice prong (or materiality analysis when the claim presented is under *Brady*) required by *Strickland* as explained in *Porter v. McCollum*. The failure to engage in rigorous analysis required by *Strickland* was prejudicial to Mr. Hildwin.

In light of *Porter*, it is necessary to conduct a new, more rigorous prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the U.S. Supreme Court has found this Court's analysis used in this case to be in error, Mr. Hildwin's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

In *Sears v. Upton*, 130 S. Ct. 3259 (2010), the U.S. Supreme Court expounded on its *Porter* opinion and what the proper

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[57]The U.S. Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." *Kyles*, 514 U.S. at 436.

Strickland analysis required, finding that a Georgia post-conviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The U.S. 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 U.S. Supreme Court in *Sears*, as it did in *Porter*, held that *Strickland* requires in all cases a "probing and fact-specific analysis" of prejudice. *Id*. at 3266. A truncated, cursory analysis of prejudice will not satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Hildwin's guilt phase ineffective assistance of counsel and *Brady* claims must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate.

Sears teaches that postconviction courts must speculate as to the effect of non-presented evidence in order to make a *Strickland* prejudice determination. 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." Moreover, "[t]he question is not whether the defendant

would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. at 434. 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 and/or present it. Credibility findings by the judge presiding at the post-conviction hearing cannot be substituted for a jury's findings anymore that the trial judge direct a verdict based on his or her credibility findings and weighing of the evidence. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate. And it was Mr. Hildwin's constitutional right to a jury's determination of his guilt following an adequate adversarily testing that was taken from him by this Court's failure to conduct a proper *Strickland* analysis in its 1995 opinion denying

Mr. Hildwin's guilt phase ineffective assistance and *Brady* claims.

D. THIS COURT'S 2006 OPINION CONSIDERING MR. HILDWIN'S NEWLY DISCOVERED EVIDENCE CLAIM BASED UPON DNA TESTING DID NOT ADDRESS THE EXCULPATORY EVIDENCE AND INFORMATION PRESENTED IN THE 1992 EVIDENTIARY HEARING, AND/OR PLED IN THE 2001 MOTION TO VACATE, LET ALONE CURE THIS COURT'S 1995 DEFECTIVE *STRICKLAND* ANALYSIS.

In this Court's 2006 opinion affirming the circuit court's denial of a new trial on the basis of the DNA results, this Court completely ignored the wealth of favorable evidence and/or information presented at the 1992 evidentiary hearing which Mr. Hildwin's 1986 jury did not hear. There, this Court was presented with the fact that

> In January 2003, Orchid Cellmark, a laboratory certified by the American Society of Crime Laboratory Directors, issued a report excluding Hildwin as the source of the DNA obtained from the underpants and wash cloth.

Hildwin v. State, 951 So. 2d at 787. Yet at the 1986 trial, the State introduced the semen-stained underpants and the sweat or saliva stained wash cloth found on top of the laundry bag in the victim's car and linked them to Mr. Hildwin (R. 697-99). Evidence was introduced that forensic analysis had determined that the semen and sweat/saliva found on these items came from a

nonsecretor (i.e., an individual who does not secrete blood typing into other bodily fluids). Evidence was also introduced to show that Mr. Hildwin was a nonsecretor and to show that William Haverty was a secretor.[58] This meant that the forensic finding was consistent with Mr. Hildwin having been the source of the semen and saliva. Testimony was presented that white male nonsecretors "probably" make up only eleven percent of the population. The prosecution used this evidence in closing argument at the original trial to argue that Mr. Hildwin raped and then killed the victim (R. 971-2).

A majority of this Court, though describing "the newly discovered DNA evidence [a]s significant," said "[o]ur review of the guilt-phase trial record supports the trial court's conclusion [denying a new trial]." *Hildwin v. State*, 951 So.2d at 789. The majority completely ignored the exculpatory evidence presented at the 1992 evidentiary hearing. It also ignored the factual allegations set forth in the 2001 motion to vacate that was at issue in the 2006 appeal. In the 2001 motion

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[58]This evidence was used to exclude Haverty as the source of the semen and/or sweat/saliva. Thus, the semen present on the panties was not a result of consentual sexual activity between Haverty and the victim that Haverty said occurred on the morning of September 9th. Haverty testified at trial case that the

to vacate, the results of an interview with Laura Say Harrison were pled as part of Claim III of the motion:[59]

> B. Laura Say Harrison; 383-B Big Hill Ave. Richmond, Kentucky, 40475.
>
> In 1985, Ms. Harrison was acquainted with the victim from seeing her in bars that both frequented. Ms. Harrison is positive that she saw the victim within three to four days, on either a Tuesday or a Wednesday, prior to the day the victim's body was discovered. She recalls seeing the victim sitting alone at a bar on Highway 50 having a draft beer. Ms. Harrison recalls that this was a weeknight because this particular bar did not open until three or four pm in the afternoon. Ms. Harrison did not stay to have a drink because it was a week night and she did not drink on week nights because of work. Ms. Harrison recalls saying "hello" to the victim.
>
> Ms. Harrison was listed briefly in a police interview of the "Hansons" as a person who might have knowledge about the crime because she was a close friend of the victim. No police interviews have been produced through either the pretrial discovery or postconviction disclosure. Ms. Harrison recalls receiving an investigative subpoena from the State Attorney's Office. Ms. Harrison responded and told a group of uniformed and civilian clothed individuals the foregoing information. The group of people thanked her and she was never spoken to again by anyone.

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victim had not "went out with somebody else" in the month to three weeks before her disappearance (R. 326, 840).

[59]The caption for Claim III identified the claim in the following fashion: "NEWLY DISCOVERED EVIDENCE SHOWS THAT HILDWIN IS ACTUALLY INNOCENT AND INNOCENT OF THE DEATH PENALTY, AND THAT THE CONVICTION RESTS ON CONSTITUTIONAL VIOLATIONS" (June 28, 2001, Motion to Vacate at 24).

(June 29, 2001, Motion to Vacate at 25-26).

In its 2006 opinion, this Court failed to engage in a full-throated and probing prejudice analysis of Mr. Hildwin's guilt phase ineffective assistance of counsel and *Brady* claims as the U.S. Supreme Court in *Porter v. McCollum* and *Sears v. Upton* indicated was required by *Strickland*. The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate. And it was Mr. Hildwin's constitutional right to a jury's determination of his guilt following an adequate adversarily testing that was taken from him by this Court's failure to conduct a proper cumulative *Strickland* analysis in its 2006 opinion denying Mr. Hildwin's newly discovered evidence of innocence, guilt phase ineffective assistance of counsel and *Brady* claims. Cumulative analysis is in fact legally required where a *Brady* claim, an ineffective assistance claim, and/or a *Jones v. State*, 591 So. 2d 911 (Fla. 1991) claim are presented in a 3.850 motion. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). When the proper analysis is conducted of Mr. Hildwin's claims, it is clear that his conviction cannot stand. Rule 3.851 relief must issue.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the circuit court's order denying Mr. Hildwin's Rule 3.851 motion, vacate his conviction, and remand for a new trial and/or the entry of a judgment of acquittal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118, on June 8, 2011.

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This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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