IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-428

PAUL CHRISTOPHER 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**

REPLY BRIEF OF APPELLANT

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REPLY TO STATEMENT OF THE CASE AND FACTS

In its Statement of the Case and Facts, the State excerpts a nearly six page quote from this Court's opinion in *Hildwin v. State, 36 Fla. L.Weekly S234 (Fla. June 2, 2011)*. This Court's opinion there addressed Mr. Hildwin's claim of ineffective assistance of counsel at his 1996 resentencing. The issue presented by Mr. Hildwin in his current appeal concerns his *Brady* and ineffective assistance of counsel claims regarding the guilt phase portion of his 1986 trial. The 1996 penalty phase proceeding has little in common with the 1986 guilt phase trial. The State was represented by different prosecutors.[1] Mr. Hildwin was represented by different counsel.[2] Different witnesses

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[1] Tom Hogan, the lead prosecutor at Mr. Hildwin's 1986 trial in Hernando County, was also the prosecutor at Derrick Smith's 1983 trial in Pinellas County, and took the position there that a prosecutor's obligation under *Brady* was limited to only disclosing verbatim statements of witnesses that appeared in police reports. In other words, he believed and testified at the 2002 evidentiary hearing in Mr. Smith's case that *Miller v. State, 360 So. 2d 46 (Fla. 2d DCA 1978)*, had limited the scope of *Brady v. Maryland, 373 U.S. 83 (1963)*. *See Smith v. Secretary, 572 F.3d 1327 (11th Cir. 2009)*. *See also Floyd v. State, 902 So. 2d 775, 782 n. 5 (Fla. 2005)*(in a case involving the same state attorney's office that prosecuted Derrick Smith, this Court rejected the prosecutor's understanding that *Miller* defined the scope of a prosecutor's obligation to disclose and granted a new trial). Mr. Hogan did not represent the State at Mr. Hildwin's 1996 penalty phase.

[2] Daniel Lewan was Mr. Hildwin's court appointed counsel at his 1986 trial. 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

testified. Different evidence was presented. Different juries heard the cases. Different judges presided at the two proceedings. And the proceedings involved different questions of fact. At issue in 1986 was the question of Mr. Hildwin's guilt or innocence. At the 1996 resentencing, Mr. Hildwin was precluded from contesting his guilt.

The facts underpinning Mr. Hildwin's *Brady* and guilt phase ineffective assistance of counsel claims are entirely different than the facts underlying his penalty phase ineffective assistance of counsel claim. An evidentiary hearing was held on the *Brady* and guilt phase ineffectiveness claims in 1992. Mr. Hogan, the 1986 lead prosecutor, Mr. Lewan, the 1986 defense attorney, and others involved in the 1986 trial testified at the 1992 evidentiary hearing. It is the evidence and testimony presented at the 1992 evidentiary hearing in conjunction with the record from the 1986 trial that provides the factual basis for the *Brady* and guilt phase ineffective assistance of counsel claims. The guilt phase portion of the 1992 evidentiary hearing had virtually nothing to do with the penalty phase

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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 and all the cases handled during that one year period (PC-R. 3051). To the best of Mr. Lewan's recall, the contract was not renewed, but Mr. Lewan was required to remain as Mr. Hildwin's counsel after the contract's expiration (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. Hildwin's case went to trial on August 25, 1986. Mr. Lewan was not involved in any capacity at the 1996 penalty phase.

ineffectiveness claim at issue before this Court in *Hildwin v. State, 36 Fla. L.Weekly S234 (Fla. June 2, 2011)*.[3]

The pertinent facts from the 1986 trial and the 1992 evidentiary hearing are simply not discussed in the State's Statement of the Case and Facts. There is a three-page excerpt from the circuit court's January 31, 2011, order denying Mr. Hildwin's *Brady* and guilt phase ineffectiveness claims included in the State's Statement of the Case and Facts. However, the excerpted order only discussed the legal issue of whether *Porter v. McCollum, 130 S. Ct. 447 (2009)*, qualified under *Witt v. State, 387 So. 2d 922 (Fla. 1980)*, as new Florida law. The circuit court's order did not address the facts from the 1986 trial and the evidence presented at the 1992 evidentiary hearing which provide basis for Mr. Hildwin's *Brady* and guilt phase

[3] There was mental health testimony at the 1992 evidentiary hearing that caused this Court to vacate Mr. Hildwin's death sentence and which in turn led to the 1996 resentencing. *Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)*. This mental health testimony that only went to sentencing issues was part of Mr. Hildwin's penalty phase ineffective assistance of counsel that was decided adversely to Mr. Hildwin in *Hildwin v. State, 36 Fla. L.Weekly S234 (Fla. June 2, 2011)*. However, it was not and is not part of Mr. Hildwin's *Brady* and guilt phase ineffective assistance of counsel claims at issue in the present appeal.

ineffective assistance of counsel claims.

Because the facts from the 1986 trial and the evidence from the 1992 evidentiary hearing are ignored by the State and were not addressed by the circuit court, the State completely sidesteps the simple fact that this Court's analysis of Mr. Hildwin's *Brady* and guilt phase ineffective assistance of counsel claims in its 1995 opinion vacating Mr. Hildwin's sentence of death denied those claims in complete deference to the circuit court without conducting any independent analysis.[4] This Court "assum[ed] without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence," but proceeded to summarily find no prejudice without addressing any of the unpresented exculpatory evidence, *e.g.* that the victim was scene by witnesses alive hours and days after the State convinced the jury that Mr. Hildwin had killed her. *Hildwin v. Dugger, 654 So. 2d at 109*.

REPLY TO THE STANDARD OF REVIEW

[4] Mr. Hildwin set forth the facts from the guilt phase portion of the 1986 trial and the evidence from the 1992 evidentiary hearing in considerable detail in his Initial Brief, and does not repeat them here since the State by ignoring those facts and the 1992 testimony obviously does not contest the accuracy of Mr. Hildwin's statement of those facts and the evidence presented at the 1992 evidentiary hearing. The State's failure to contest any of the facts from trial and/or evidence from the 1992 hearing is in keeping with its acknowledgment in its statement of the Standards of Review that this Court should review the circuit court's order *de novo*, "accepting the movant's factual allegations as true to the extent that they are not refuted by the record". Answer Brief at 10.

In its recitation of the standard of review, the State asserts that this Court reviews the circuit court order *de novo*, "accepting the movant's factual allegations as true to the extent that they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." Answer Brief at 10. Mr. Hildwin wholly concurs with this statement of the controlling standard of review and wishes to incorporate into the Standard of Review section of his Initial Brief.

REPLY TO ARGUMENT

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

The State begins its Argument by mischaracterizing Mr. Hildwin's argument in this appeal. The State erroneously claims that Mr. Hildwin is asserting "an entitlement to relitigate his guilt phase ineffective assistance of counsel claims and/or *Brady* claim on the grounds that *Porter v. McCollum, 558 U.S. – , 130 S. Ct. 447 (2009)*, allegedly changed the *Strickland* prejudice analysis". Answer Brief at 11.

First, Mr. Hildwin is not seeking to relitigate his *Brady* and guilt phase ineffectiveness claims. He is seeking to have the law as set forth by the U.S. Supreme Court in *Strickland v. Washington, 466 U.S. 668 (1984)*, followed by this Court and properly applied to the evidence developed at an evidentiary hearing in 1992. He is seeking to correct this Court's failure to understand and properly apply *Strickland* when in 1995 it

denied his *Brady* and ineffectiveness claims and failed to grant him a new trial. *See 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").

Second, the State insists on misrepresenting, or perhaps misperceiving, Mr. Hildwin's argument that *Porter v. McCollum* qualifies under *Witt v. State* as new **Florida** law which warrants reconsidering his *Brady* and guilt phase ineffectiveness claims and properly applying U.S. Supreme Court case law when evaluating the evidence presented in the 1992 hearing and deciding whether a constitutional deprivation occurred at the 1986 trial. Mr. Hildwin wishes to be very clear here; **he is not arguing that *Porter v. McCollum* changed the *Strickland* standard**. The State's continuous effort to convince the circuit court and this Court that he is arguing that *Porter* changed *Strickland* is false.[5]

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[5] Mr. Hildwin repeatedly asserted in circuit court and in his Initial Brief filed in this Court that *Porter* is to *Strickland* what *Hitchcock v. Dugger, 481 U.S. 393 (1987)* was to *Lockett v. Ohio, 438 U.S. 586 (1978)*. *Hitchcock* did not change *Lockett*. After the decision in *Hitchcock* issued this Court in *Riley v. Wainwright, 517 So. 2d 656, 660 (Fla. 1987),* held that *Hitchcock v. Dugger* constituted a clear rejection of this Court's "mere presentation" standard which this Court had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*. What changed after *Hitchcock* was not *Lockett;* what changed was this Court's understanding of *Lockett*. What changed was Florida law when this Court was bound to correct its previous and prevailing misreading of *Lockett* and its resulting approval of the "mere presentation" standard, which this Court found under the reasoning *Hitchcock* to in fact violate *Lockett*. In another words, this Court's jurisprudence finding the "mere presentation" standard comported with *Lockett* had to be tossed and overturned. *Hitchcock* did not change *Lockett*; it changed Florida law, *i.e.* this Court's application of *Lockett*.

After misrepresenting Mr. Hildwin's argument, the State then asserts that there are only two questions "properly before this Court" 1) whether *Porter* changed the law, and 2) if so, has the alleged change in law been held to apply retroactively under *Witt v. State, 387 So. 2d 922 (Fla. 1980)*. *See* Answer Brief at 11.[6] By characterizing Mr. Hildwin's claim in this fashion and breaking the retroactivity question into two separate pieces, the State engages in an old sleight of hand technique to gloss over the fact that the question under *Witt* is whether a decision from either the U.S. Supreme Court or from this Court has changed **Florida** law.[7]

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[6] Mr. Hildwin believes that the actual questions before this Court are: 1) Should the change in Florida law, as to the standard to be applied in analyzing and reviewing ineffective assistance of counsel claims, as set forth by *Porter v. McCollum*, be applied equally and fairly to Mr. Hildwin's case? 2) Was *Porter* error committed in Mr. Hildwin's case? And, 3) When analyzed in accordance with *Porter*, is Mr. Hildwin entitled to a new trial?

[7] The State's effort to misdirect this Court away from the real question (does *Porter v. McCollum* change Florida law?) to the non-issue of whether *Porter* announced a new federal constitutional right can be seen in its Summary of the Argument. There, the State with a proverbial drum roll asserts: "The Supreme Court did not hold that the *Porter* decision established a new constitutional right that is to apply retroactively." (Answer Brief at 10) (emphasis in original). In neither *Hitchcock v. Dugger, 481 U.S. 393 (1987)*, nor *Espinosa v. Florida, 505 U.S. 1079 (1992)*, did the U.S. Supreme Court hold that those decisions established a new constitutional right. In fact, in both cases the U.S. Supreme Court found that this Court had failed to properly follow and/or apply already existing federal constitutional precedent. Yet, this Court subsequently found that both *Hitchcock* and *Espinosa* were to be given retroactive application under *Witt v. State*.

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

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

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

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

Id. at 1082.

No new federal constitutional principle was announced when the U.S. Supreme Court found the heinous, atrocious or cruel aggravating circumstance employed in Florida was unconstitutionally vague. Indeed, identical worded aggravators were found unconstitutionally vague in *Maynard v. Cartwright* and *Shell v. Mississippi*. What the U.S. Supreme Court announced in *Espinosa* was that this Court reached an erroneous decision in *Smalley v. State* when it refused to find the decision in *Maynard v. Cartwright* applicable in Florida. Thereafter, this Court ruled in *James v. State, 615 So. 2d 668 (Fla. 1993)*, that the U.S. Supreme Court's decision in *Espinosa v. Florida* qualified under *Witt* as new Florida law.[8]

In its answer brief, the State completely ignores Mr. Hildwin's reliance upon this Court's decision in *James v. State, 615 So. 2d 668, 669 (Fla. 1993)*, in which this Court ruled that the decision in *Espinosa v. Florida* was new Florida law within the meaning of *Witt* and that it should be applied retroactively

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

to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling."[9] Of course, the State must ignore this Court's ruling in *James v. State* because it demonstrates, contrary to the State's argument, the question presented by Mr. Hildwin's claim is whether the new decision from the U.S. Supreme Court changed the **Florida** law within the meaning of *Witt v. State*, 387 So. 2d 922 (Fla. 1980).[10]

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

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

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

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

Hitchcock, 481 U.S. at 398-99. Clearly, the U.S. Supreme Court broke no new federal constitutional ground; it merely found that the death sentence violated the Eighth Amendment principle set forth in *Lockett*, and followed in *Eddings* and *Skipper*.[11]

While the State does reference *Hitchcock* in its Answer Brief, it fails to address the fact that the U.S. Supreme Court did not announce new federal constitutional law in its decision.[12] Instead, the U.S. Supreme Court found that this Court had failed to recognize that the jury instructions at issue violated the Eighth Amendment principle enunciated in *Lockett* and followed in *Eddings* and *Skipper*.[13] The State never once

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[11] To this day, no court, not even this one, has held that *Hitchcock* established a new fundamental constitutional right. Obviously, the establishment of a new fundamental right was not the test this Court employed when finding *Hitchcock* qualified as new law under *Witt v. State*. Similarly, prior to *James v. State*, no court had held that *Espinosa* established a new fundamental constitutional right. Instead, *Espinosa* clearly rejected this Court's decision in *Smalley v. State* that *Maynard v. Cartwright* did not apply to Florida's capital sentencing scheme.

[12] If the wording set forth in the State's Summary of Argument were the controlling test, *Hitchcock* would have failed the test advanced by the State in its Answer Brief ("The Supreme Court did not hold that the *Porter* decision established a new fundamental constitutional right that is to apply retroactively")(Answer Brief at 10). The U.S. Supreme Court made clear that its decision was not new, but dictated by *Hitchcock*, *Eddings* and *Skipper*.

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

recognizes in its Answer Brief that, while *Hitchcock* did not announce new federal constitutional law, it was found by this Court to have announced new Florida law.[14] *Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)*. And by failing to recognize that *Hitchcock* was new Florida law, the State sidesteps the actual issue raised by Mr. Hildwin's claim that *Porter v. McCollum* is new law within the meaning of *Witt v. State* because the U.S. Supreme Court found that this Court had failed to properly understand and apply *Strickland v. Washington, 466 U.S. 668 (1984).*

Skipper, vacated the sentence of death and ordered a new penalty phase to be conducted. *Valle v. State, 502 So. 2d 1225 (Fla. 1987).*

[14] Ignoring this Court's determination in *Riley v. Wainwright, Thompson v. Wainwright,* and *Downs v. Dugger*, that *Hitchcock* was new Florida law within the meaning of *Witt v. State*, even though no other court anywhere had held *Hitchcock* "established a new fundamental constitutional right that is to be applied retroactively, the State tries that the failure of any other court to find "*Porter* established a new fundamental constitutional right" is somehow fatal to Mr. Hildwin's argument. Answer Brief at 12. The State endeavors to doublespeak when describing Mr. Hildwin's arguments and ignore this court's clear case law in order disguise the validity of Mr. Hildwin's arguments. Clearly, the State's doublespeak reflects a desperate effort to keep Mr. Hildwin's conviction intact despite the fact that he is a condemned man with strong evidence of his innocence which has not ever been addressed by this Court. The State in its Answer Brief refuses to actually address the fact that witnesses have given sworn testimony which the jury did not hear that the victim was alive long after Mr. Hildwin cashed the checks on her account. According to the State's trial case, the victim was dead before the checks were cashed. These observations of the victim are clear evidence that Mr. Hildwin did not commit the murder.

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

In making this comparison, Hildwin ignores the difference between the law the change *Hitchcock* made and the alleged change here. In *Hitchcock*, the Court invalidated a jury instruction finding that it unconstitutionally precluded consideration of mitigation. *Id*. at 398-99. A determination of whether *Hitchcock* error had occurred was easily made by simply reviewing the jury instructions and was limited to only those cases in which a defendant had been sentenced to death. In contrast, the change in law that Hildwin asserts occurred here involves reviewing fact-specific claims of ineffective assistance of counsel to determine if an error even occurred and doing so in all criminal cases. Given this difference in the application of the *Witt* factors, the mere fact that *Hitchcock* was found to be retroactive does not mean that *Porter* is also retroactive. Hildwin's reliance on *Hitchcock* to support his retroactivity argument is misplaced. It is an attempt to put a square peg in a round hole.

(Answer Brief at 19).

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

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

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

This Court made it absolutely clear that consideration of *Hitchcock* error was not limited to examination of a jury instruction. In *Cooper v. State, 526 So. 2d 900, 901 (Fla. 1988)*, this Court held that *Hitchcock* error occurred "when the judge and the jury's *consideration* of mitigating circumstances is limited to statutory factors" (emphasis in original).[15] Indeed, this Court in *Cooper* proceeded to address the nonstatutory mitigating evidence that the defense had been precluded from presenting and the exclusion of which had been upheld by this Court in Mr. Cooper's direct appeal:

> During petitioner's sentencing proceeding, held on June 24, 1974, he sought to introduce, among other things, the testimony of family and friends regarding his employment history and his attempts to rehabilitate himself since his release from a prior incarceration; the testimony of his girl friend regarding their relationship and defendant's character; and the testimony of several witnesses concerning his

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[15] This Court noted at the outset:

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

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

> relationship with his accomplice in the crime, Stephen Ellis. The trial judge repeatedly sustained the prosecutor's objections to this evidence as irrelevant to the statutory mitigating factors.

Id. This Court found *Hitchcock* error occurred in *Cooper* and explained:

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

Id. at 902 (emphasis added).[16]

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

> Turning to the merits of Hall's *Hitchcock* claim, we agree that the trial court limited the jury's and its

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[16] The *Cooper* opinion belies the State's assertion that "a determination of whether *Hitchcock* error had occurred was easily made by simply reviewing the jury instructions" (Answer Brief at 19). Consideration of *Hitchcock* claims required consideration of not just what mitigating evidence that the jury did not consider because of an erroneous instruction, it also required consideration of what evidence was excluded from the penalty phase proceedings before the jury by the judge, what evidence was not investigated and presented by the defense attorney because of this Court's historic failure to properly apply *Lockett*, and it required consideration of whether the judge in imposing sentencing limited his consideration of nonstatutory mitigation.

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

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

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

investigate and present nonstatutory mitigating evidence (in the guilt phase context, exculpatory evidence).

The State's argument that Mr. Hildwin's motion to vacate was time-barred and procedurally and did not meet any exception under Rule 3.851(d)(2)(B), simply ignores the fact that this Court has long held that a new decision qualifying under *Witt v. State* as new law is an exception which defeats all procedural bars as long as it is filed within one year from the date of the decision constituting new law. *Downs v. Dugger*; *Cooper v. State*; *Hall v. State*.

In addition, the State repeatedly argues that *Porter* did not change the analysis to be conducted for ineffective assistance of counsel claims as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (AB at 17, 18, 23-4). While the legal standards for determining deficient performance and prejudice have not changed (just as *Hitchcock* did not change *Lockett* and *Espinosa* did not change *Maynard v. Cartwright*), the decision in *Porter v. McCollum* found this Court unreasonably applied *Strickland* (just as this Court had unreasonably applied *Lockett* and had unreasonably found *Maynard v. Cartwright* did not apply in Florida).

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

of this Court's jurisprudence is a change in Florida law. Fairness dictates that Mr. Hildwin should be treated the same as Mr. Porter and receive the benefit of *Porter v. McCollum* and the change it has brought to Florida law as to how this Court conducts a *Strickland* analysis of the evidence presented in support of an ineffectiveness claim and/or a *Brady* claim.

The State also argues that *Porter* should not be held to be retroactive because when this Court changed the standard of review in *Stephens v. State, 748 So. 2d 1028 (Fla. 1999)*, this Court declined to apply the new standard retroactively (Answer Brief at 17, *citing Johnston v. Moore, 789 So. 2d 262 (Fla. 2001)*. However, the State fails to acknowledge the obvious critical distinction between *Porter v. McCollum* and *Stephens v. State* - *Porter v. McCollum* was a decision by the U.S. Supreme Court finding that this Court was not properly applying *Strickland*, *Stephens v. State* was not a decision emanating from the U.S. Supreme Court. *Stephens* was a less significant decision from a lesser court. In *Stephens*, this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings and decided to clarify that standard.[17] However, in *Porter v. McCollum*, the highest court in the country and the final arbiter as to the requirements of the U.S. Constitution found that this

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

Court's analysis of Mr. Porter's ineffective assistance of counsel claim, including the standard of review employed, was contrary to and an unreasonable application of *Strickland*. Thus, the U.S. Supreme Court specifically identified a flaw in this court's reasoning in *Porter v. State*, which this Court had specifically stated in *Porter v. State* was dictated by Florida case law construing the requirements of *Strickland*.

The State's scatter shot arguments also includes the suggestion that the "effect on the administration of justice would be overwhelming" (Answer Brief at 17, n. 5), threatening that "[i]f *Porter* is ruled retroactive, defendants will file untimely and successive motion for post conviction relief seeking to relitigate claims of ineffective assistance. The courts of this State would be required to review stale records to reconsider these claims." (Answer Brief at 18). However as was noted in the circuit court, the State in *Coleman v. State* filed a pleading entitled "Notice of Similar Cases." That notice list 39 capital cases where capital postconviction defendants had requested the same benefit that Mr. Porter was granted. Thus, it would appear that the effect on the administration of justice would be limited to those approximately 40 capital cases. And, while according to the State, approximately forty capital postconviction defendants have sought the state courts to review their cases for *Porter* error, it is more than likely that some will not be entitled to relief after a proper review of their postconviction claims. Thus, the State's "the sky is falling" argument is refuted by its own notice to this Court in *Coleman v.*

State that, at most, approximately 40 capital cases may be effected.

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

The State's reliance on *Marek v. State, 8 So. 3d 1123 (Fla. 2009)*, is also misplaced (Answer Brief at 21). In *Marek*, Mr. Marek through counsel, raised a claim that the ABA report constituted newly discovered evidence that entitled Mr. Marek to relief. *Marek v. State, 8 So. 3d at 1126* ("In his second claim, Marek argued generally that his death sentence was imposed arbitrarily and capriciously thus violating *Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)*, which held that the death penalty must be imposed fairly and consistently. Marek based this claim on the American Bar Association's September 17, 2006, report, *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report* (ABA Report), which criticizes Florida's death

penalty scheme and clemency process. Marek asserted that the ABA Report constitutes newly discovered evidence demonstrating that his death sentence is unconstitutionally arbitrary and capricious."). Thus, Mr. Marek did not, as the State falsely asserts, "argue[] that these cases modified the standard of review for claims of ineffective assistance of counsel under *Strickland*" (Answer Brief at 21-22).

The ABA report had criticized this Court's failure to apply all capital decisions retroactively. Mr. Marek filed his claim relying on this criticism contained in the ABA report in May of 2007, which issued in the fall of 2006. In relying on the criticism set forth in the ABA report, Mr. Marek noted three decisions from the U.S. Supreme Court that he contended would have resulted in sentencing relief had they been applied retroactively as the ABA Report suggested they should. These three decisions were *Williams v. Taylor, 529 U.S. 362 (2000)*; *Wiggins v. Smith, 539 U.S. 510 (2003)*; and *Rompilla v. Beard, 545 U.S. 374 (2005)*. Mr. Marek advanced no argument that these three decisions qualified under *Witt v. State* as new Florida law.[18] And the reason for that was that the U.S. Supreme Court in *Williams v. Taylor* addressed the Virginia Supreme Court's unreasonable application of *Strickland*, in *Wiggins v. Smith* it addressed the Maryland Court of Appeals' unreasonable application

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

of *Strickland*, and in *Rompilla v. Beard* it addressed the Pennsylvania Supreme Court's unreasonable application of *Strickland*. In not one of the three cases did the U.S. Supreme Court purport to change the *Strickland* standard. In each instance, the U.S. Supreme Court found that the highest court of those three states had unreasonably applied well-established federal law. Thus, there was no basis to argue that any one of the three decisions changed Florida law.

It should go without saying that a decision from the U.S. Supreme Court finding that this Court, the Florida Supreme Court, has unreasonably applied federal law is qualitatively different and/or greater significance within the State of Florida than a U.S. Supreme Court decision finding that the highest court of some other state has unreasonably applied federal law. Yet, the State's argument that this Court's decision in *Marek* fails to recognize the obvious, *i.e. Williams v. Taylor*, *Wiggins v. Smith*, nor *Rompilla v. Beard* changed Florida law. The fact that Virginia Supreme Court, the Maryland Court of Appeals, and the Pennsylvania Supreme Court had failed to properly apply *Strickland* simply did not change Florida law.[19]

The State also seeks to rely upon *Reed v. Secretary, 593 F.3d 1217 (11th Cir. 2009)*, as in some way limiting *Porter v.*

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

McCollum. Besides the fact that it is not for the Eleventh Circuit to limit U.S. Supreme Court decisions, recent decisions by the Eleventh Circuit have in fact recognized that this Court has been unreasonably applying *Strickland*. *See Johnson v. Secretary, – F.3d – , Case No. 09-15344 (11th Circuit June 14, 2011)*; *Cooper v. Secretary, – F. 3d – , Case No. 09-12977 (11th Cir. July 21, 2011)*.

Finally, when the State gets around to addressing the merits of Mr. Hildwin's claim under *Porter v. McCollum*, it erroneously asserts:

> However, Hildwin fails to explain how the *Porter* prejudice analysis applies to claims where this Court held **the issues had no merit (which disposed of the prejudice prong and counsel was not deficient**. [sic] further, Hildwin fails to explain how, since counsel was not **deficient**, any "misapplication" of the *Strickland* **prejudice** standard would impact his case.

Answer Brief at 29 (emphasis in original). Overlooked by the State in its zeal to keep Mr. Hildwin's conviction intact is the fact that this Court in denying Mr. Hildwin's guilt phase ineffectiveness claim specifically stated:

> 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. As a result, the whole premise of the State's argument on the merits[20] is erroneous. A

[20] The State clearly argues that Mr. Hildwin's claim must fail because "[h]ere, as outlined above, the state courts found no

new trial was denied by this Court solely on the basis of an inadequate and unconstitutionally defective prejudice prong analysis which ignored the fact that witnesses were available to testify that the victim was seen alive many hours and even days after Mr. Hildwin cashed a stolen check on her account.

CONCLUSION

Based upon the record and the arguments presented herein and in the Initial Brief, Mr. Hildwin respectfully urges the Court to reverse the lower court and vacate the denial of Rule 3.851 relief, and grant him a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on September 1, 2011.

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deficient performance of Hildwin's counsel after a thorough analysis of the facts and law." Answer Brief at 30.

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

MARTIN J. MCCLAIN