IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-472

HARRY FRANKLIN PHILLIPS,

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

WILLIAM M. HENNIS III
Litigation Director
Florida Bar #0066850

M. CHANCE MEYER
Assistant CCRC-South
Florida Bar #0056362

Capital Collateral Regional
Counsel – South
101 N.E. 3rd Avenue, Suite 400
Ft. Lauderdale, FL 33301
Tel (954) 713-1284
Fax (954) 713- 1299

COUNSEL FOR MR. PHILLIPS

PRELIMINARY STATEMENT

Mr. Phillips appeals the circuit court's denial of his successive motion for postconviction relief. In response to Mr. Phillips's argument that the decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) created a change in Florida's *Strickland* jurisprudence that requires consideration and granting of Mr. Phillips's postconviction claims, the circuit court ruled that *Porter* does not represent a change in the law (Order at 5), that if it did the change would nevertheless not be retroactive (Order at 6), and that even if *Porter* represented a retroactive change in law it would not merit relief in this case (Order at 6). Below, Mr. Phillips identifies errors in each of those rulings.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record in this appeal: "T" -- resentencing transcript; "R" -- record on resentencing; "R2" -- record on previous postconviction appeal; and "R3" -- the present postconviction record. All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

In *Porter v. McCollum*, the United States Supreme Court ruled that this Court's *Strickland* analysis in *Porter v. State*, 788 So. 2d 917 (Fla. 2001) was "an unreasonable application of our clearly established law." 130 S. Ct. 447, 455 (2009). The United States Supreme Court made that determination pursuant to the standard established by the Anti-Terrorism Effective Death Penalty Act ("AEDPA"), which does not permit a federal court to reverse a state court ruling on constitutional grounds simply because the federal court disagrees or the federal court thinks the state court was wrong, but rather requires what is treated as an extremely high level of deference to state court rulings, prohibiting federal courts from altering state court judgments and sentences unless the application of federal law by the state court, which in the *Porter* case was *Strickland*, was unreasonable, meaning not even supported by reason or a rationale. It is in this context that the United States Supreme Court's ruling in *Porter* must be read. When asking whether *Porter* requires a change in this Court's jurisprudence going forward, it must be considered that the United States Supreme Court in *Porter* found this Court's application of *Strickland* to be so unreasonable that the United States Supreme Court found it appropriate to reach past its concerns of federalism and deference to state courts and respect for state sovereignty to correct the unconstitutional ruling.

Mr. Phillips asks this Court to consider *Porter* introspectively, looking past the first blush language of the opinion, and inquiring into whether or not *Porter* forbids something that this Court has done in the present case. In other words, giving *Porter* a read-through and asking if this case is distinguishable may be insufficient to identify the underlying constitutional problem; Mr. Phillips asks this Court to attain a sense for the problem in conceptual approach that *Porter* identifies and then ask if something similar happened here. This Court must consider whether the unreasonable analysis in *Porter* was merely an aberration, limited solely to the penalty phase ineffectiveness claim in that case and wholly different and separate from other *Strickland* analyses by this Court, or was it in fact indicative of a non-isolated conceptual problem in this Court's approach to *Strickland* issues that occurred also in the present case.

STATEMENT OF CASE AND FACTS

Case history

The Circuit Court for the Eleventh Judicial Circuit, in and for Dade County, Florida, entered the judgment of conviction and sentence of death at issue in this case. Mr. Phillips was found guilty of one count of first degree murder, and the jury voted narrowly in favor of death by a vote of seven-to-five. The court followed the jury's recommendation and sentenced Mr. Phillips to death.

On direct appeal, this Court affirmed the conviction and sentence. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985).[1] Mr. Phillips filed a motion for postconviction relief which was denied by the trial court

The trial court denied Mr. Phillips motion for postconviction relief in 1988, however, this Court vacated the death sentence and remanded for resentencing. *Phillips v. State*, 608 So. 2d 778 (Fla. 1992). In 1994, Mr. Phillips was resentenced to death, again by the narrowest of margins, seven-to-five. On direct appeal, this Court affirmed the sentence imposing the death penalty. *Phillips v. State*, 705 So. 2d 1320 (Fla 1997). Mr. Phillips petitioned the United States Supreme Court for certiorari and the petition was denied on October 5, 1998. *Phillips v. Florida*, 119 S. Ct. 187 (1998).

On September 13, 1999, Mr. Phillips filed a Rule 3.850 postconviction motion challenging his death sentence, which was amended on December 2, 1999. The circuit court, in an order served on September 26, 2000, denied Mr. Phillips's motion without an evidentiary hearing. Mr. Phillips filed a Notice of Appeal on October 24, 2000. On the appeal to this Court, the order of the lower court denying an evidentiary hearing on all claims was affirmed, but Mr. Phillips was permitted to file a new Rule 3.851 motion concerning his mental retardation.

[1] A state habeas petition was also filed by CCR based on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The *Caldwell* claim was held to be procedurally barred. *Phillips v. Dugger*, 515 So. 2d 227 (Fla. 1987).

Phillips v. State, 894 So. 2d 28 (Fla. 2004). That motion was filed in circuit court on March 28, 2005.

On May 27, 2005 this Court relinquished jurisdiction back to the circuit court for the limited purpose of determination of mental retardation. A subsequent appeal from the denial of relief by the circuit court following a 2006 evidentiary hearing on mental retardation was initiated on June 12, 2006. That appeal was rejected by this Court on March 21, 2008.

Mr. Phillips had previously filed another postconviction motion in circuit court on September 23, 2004, including a judicial bias claim, based upon newly discovered evidence, pursuant to Rule 3.851(e)(2)(C), while the appeal from the denial of his previous postconviction motion was still pending in this Court. The circuit court dismissed the motion for lack or jurisdiction and Mr. Phillips thereafter filed a notice of appeal on December 21, 2004.

On June 21, 2007, this Court entered an order separating the mental retardation litigation, from the judicial bias issue that had never been litigated in the circuit court because of lack of jurisdiction.

This Court's order allowed Mr. Phillips sixty days from June 21, 2007 to refile his successive postconviction motion *nunc pro tunc* to the date his prior motion concerning this issue was filed in the trial court, September 23, 2004. The order stated that the still pending mental retardation appeal did not deprive the trial

court of jurisdiction to consider a refiled postconviction motion concerning the judicial bias claim.

Thereafter the circuit court motion was served on August 15, 2007 (R2. 59-135). Appellant also served a motion to interview jurors on that same day (R2. 55-58). The State responded to both pleadings (R2. 136-74), and a case management conference was held on September 21, 2007.

Following the case management conference, the lower court entered orders summarily denying both motions without any additional development (R2. 175-176). Mr. Phillips appealed the denial to this Court, which affirmed, finding that the state postconviction court had properly determined mental retardation on March 20, 2008. The Florida Supreme Court on September 23, 2008 issued an order affirming the denial of the motion for post conviction relief.

Facts relevant to the underlying *Strickland* claim

At Mr. Phillips's resentencing, the State referred to Mr. Phillips during the examination of Dr. Toomer as "supposedly retarded" (R. 654-56). The State made several comments in closing argument at the resentencing ridiculing the defense mitigation testimony by repeating over and over that Dr. Toomer has testified that Mr. Phillips was not "a vegetable" (R. 745, 752, 753).

For resentencing, Barry M. Wax was appointed to Mr. Phillips's case on February 26, 1993 (R. 62). He entered the appearance of his law firm, Law Offices

of Soven & Wax, as resentencing counsel for Mr. Phillips on March 2, 1993 (R. 388-89). More than seven months later, Wax filed a motion on October 18, 1993 requesting that the trial court reappoint the same two defense expert witnesses, the psychologists Toomer and Carbonell, that had testified almost six years before at the January 1988 evidentiary hearing (R. 83-84). This motion was filed only three and a half months prior to the scheduled trial date, and explained:

> In order to adequately present that [statutory] mitigating evidence, as well as other non-statutory mitigating evidence, it is essential that the Defendant utilize the services of Dr. Jethro Toomer and Dr. Joyce Carbonell. Both Dr. Toomer and Dr. Carbonell have previously been appointed by this court to testify on behalf of the Defendant, and are familiar with the facts and circumstances of this case. In fact, Dr. Toomer and Dr. Carbonell both testified at the Defendant's motion to vacate conviction and sentence held before this Honorable Court in January 1988. As a result of that hearing and appellate review of this Court's order denying the Defendant's motion, the Defendant was granted the resentencing hearing pending this Honorable Court. As such, Dr. Toomer and Dr. Carbonell are uniquely suited to testify on behalf of the Defendant.

(R. 84). Mr. Wax, the resentencing counsel, also filed a motion for a competency evaluation on October 18, 1993, in which he advised the trial court that "[s]ince the time of the [evidentiary] hearing on the Defendant's Rule 3.850 motion, he has been incarcerated on 'Death Row.' Counsel believes that the Defendant's condition has further deteriorated as a consequence of that incarceration" (R. 86). Of course since Mr. Phillips's competency had been an issue at the 1988 hearing and the

appeal from the denial of relief, with Drs. Carbonell and Toomer opining that Mr. Phillips was not competent, this was a reasonable concern. *See Phillips v. State*, 608 So. 2d 778, 782 (Fla. 1992). At the hearing on the motion for re-appointment of defense experts on October 26, 1993, resentencing counsel stated that while he had spoken to Dr. Toomer about accepting reappointment, he had not spoken with Dr. Carbonell about the case and was having trouble getting in touch with her (T. 18). In spite of this revelation, the court re-appointed Drs. Toomer and Carbonell on October 28, 1993 (R. 91-94). Based on the record Mr. Wax's problems in communicating with Dr. Carbonell continued as the resentencing drew ever closer. At a hearing on January 11, 1994, less than a month before the scheduled resentencing, counsel indicated that he still had been unable to contact Dr. Carbonell:

> Mr. WAX: We are set for February 7. I have been doing everything; everything I can to be set ready on February 7th. I got a call from Mr. Waksman saying if I will be ready for trial. The only major hurdle that I'm having is Dr. Carbonell. Apparently she has been very ill. She has been – She's one of the doctors -- one of the doctors that are familiar with the case originally. It listed her to the defense in 3.850 hearing.
>
> COURT: Lets not appoint her if she's sick. How about Miller?
>
> Mr. Wax: Miller testifies for the prosecution.

COURT: Who else?

Mr. Wax: What I have to do is find a psychiatrist or psychologist who is willing to get up to speed in the case. So, let me make some phone calls and see if I can get someone but leave Dr. Carbonell now.

COURT: I don't want any delays on this.

Mr. Wax: I understand. I don't.

COURT: This is case is six, seven years old.

Mr. Wax: Well, yes. I think you're right. Realistically I know we are looking in March. Mr. Waksman was notified to be here. He will be down here soon. What I'll do --

COURT: I have no idea about this case. This case is something that really bugs me.

Mr. Wax: A life of its own. In any rate, I'll get in touch with you and let you know who to replace her with. I'll let you know immediately.

COURT: I'll like to go on the February 7th date if at all possible.

Mr. Wax: I don't know that's realistic because you the doctor's -- I'll still endeavor to try.

(T. 24-26). So with less than a month before the scheduled resentencing hearing and the court pressing to move forward resentencing counsel Wax who had entered his appearance in the case ten months before had failed to even contact Dr.

Carbonell, the mental health expert that he considered to be "a crucial witness" (R. 121).

Following the hearing on January 11, the trial court signed an order appointing Drs. Toomer, Miller and Leonard Haber as "disinterested qualified experts" to determine the competency of Mr. Phillips (R. 96). This was done without defense objection despite the fact that all three had opined in 1988 on competency with credibility findings to the detriment of Mr. Phillips made by Judge Snyder that were affirmed by this Court on appeal (R. 96). At the time of this proceeding Florida Rule of Criminal Procedure 3.211(e) was in effect.

Dr. Toomer did a 1994 competency evaluation, finding Mr. Phillips to be competent (T. 30). Dr. Toomer did not testify about his finding of competency in 1994 but in response to a question from the State he did testify that he had previously found Mr. Phillips to be incompetent five years before (T. 638). At the State's urging, and without objection by resentencing counsel, the court specially instructed the jury after Dr. Carbonell's testimony and before Dr. Toomer's testimony that they were not to consider competency issues (T. 593). Resentencing counsel's only reaction was to say that he had no intention of arguing the question of competency to the jury (T. 586).

At some point counsel did contact Dr. Carbonell, but additional problems kept cropping up. At a hearing on March 24, 1994, eleven days before the

resentencing hearing was scheduled to start on April 4, 1994, resentencing counsel informed the court that he was having difficulty arranging to get Dr. Carbonell down from Tallahassee to Miami because of her teaching schedule (T. 35-39). He stated that his intent was to have Dr. Carbonell come to Miami to see Mr. Phillips (apparently for the first time since 1988), and to be available for deposition and testimony on the Thursday or Friday of the resentencing (T. 36). The State also indicated on the record that they had been unable to depose Dr. Carbonell (T. 36). The court indicated irritation at this plan, asking why resentencing counsel thinks the resentencing will take a week (T. 36-37). Resentencing counsel then agreed to bring Dr. Carbonell to Miami, the week before the resentencing was scheduled to begin on April 4 (T. 37). On the same date, March 24, the trial court signed another "order appointing disinterested qualified experts," appointing Dr. Miller for what prosecutor David Waksman described as "for the aggravating and mitigating. He will probably contradict he has certain mitigating factors" (T. 31, R. 97). The next day, the trial court entered an order in chambers compelling discovery by the State of any psychological testing performed by Dr. Toomer or Dr. Carbonell on Mr. Phillips (T. 99). Dr. Carbonell never saw Mr. Phillips after 1988, submitted to deposition, or testified in 1994. Resentencing counsel filed a Motion for Continuance on March 31, 1994, the Thursday before the resentencing

was set to begin on the following Monday morning, April 4 (R. 121-23). The problem was again Dr. Carbonell. The motion outlines counsels concerns:

> The penalty phase proceeding in this matter is scheduled for April 4, 1994. The Defendant is not ready to proceed to the penalty phase at this time due to the unavailability of a crucial witness, Dr. Joyce Carbonell. Dr. Joyce Carbonell will testify on behalf of the Defendant as a mitigating witness. She is a professor of psychology at Florida State University, Tallahassee, Florida. She has conducted extensive psychological testing on the defendant and obtained a psycho-social history of the Defendant that is essential to the presentation of the mitigating circumstances that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance...and the capacity of the Defendant to appreciated (sic) the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. . . . Without her testimony, it will be virtually impossible to establish those mitigating circumstances.

The motion goes on to request that Dr. Carbonell be allowed to testify on Wednesday, April 13, 1994 or on Friday, April 15, 1994, citing *Wike v. State*, 596 So. 2d 1020 (Fla. 1992), wherein the defendant was granted a new penalty phase because the trial court abused its discretion in denying a continuance (R. 122). The trial court had previously denied virtually the same ore tenus motion at the hearing noted above on March 24, 1994.

Following the selection of the jury on Monday, April 4, 1994, on the next morning, April 5, before opening statements, Mr. Wax informed the court that Dr. Carbonell would not be appearing at the resentencing:

Mr. Wax: Dr. Carbonell. Mr. Waksman and I spoke to Dr. Carbonell last night, Your Honor, and Mr. Waksman and I agreed to have a telephonic hook up to read the testimony of Dr. Carbonell from the 1988 Rule 3.850 hearing into the record. I spoke to Mr. Waksman about having my secretary coming in and reading the answers in response to the questions that were posed to her on direct and cross examination because her testimony would be consistent if she was to testify. It would be the same testimony.

COURT: Why isn't she going to be available?

Mr. Wax: Dr. Carbonell's availability was precluded by the fact as advised by the Court next to subpoena her and ensure her presence, and secondly through a miscommunication that she has scheduled matters on these dates this week. Because of that miscommunication between she and I that can not be rescheduled as such, Your Honor, this I believe is the best way to handle it.

COURT: Has your client been informed of this?

Mr. Wax: No, I have not spoken to him.

COURT: You better inform him because I don't want it to come back for another thing of incompetency of counsel.

Mr. Wax: I understand that, Judge.

COURT: Make sure you understand it and he's willing to waive anything that has to do with it.

Mr. Wax: All right. I'll talk to him on that at the break.

COURT: He's right here.

Mr. Wax: Judge, if I can talk to him later so we can get started?

COURT: Let's go ahead with opening statements.

(R. 237-238). Then, moments before the jury came into the courtroom for the opening statements, Mr. Wax discussed his plan to have Dr. Carbonell's 1988 testimony read into the record with Mr. Phillips (T. 239-40).

Before Dr. Carbonell's 1988 testimony was read to the jury, the court explained to the jury: "The next witness that the defense is going to call is a psychologist by the name of Dr. Carbonell. She is not dead but for one reason or another she's not going to be able to testify in person, so we all agreed that her testimony from the previous trial or whatever hearing it was will be read the same way we read that last thing [the testimony of the deceased teacher, Samuel Ford]. This is not as short as the other one so it will be some time" (Supp. R. at 2).

There apparently was never any additional work-up of Mr. Phillips case by Dr. Carbonell after the 1988 evidentiary hearing. The testimony of Dr. Carbonell read into the record before the 1994 jury ended up being exactly the same testimony heard and rejected by Judge Snyder alone in 1988.

The circuit court summarily denied this claim, and this Court found as follows:

> We disagree that counsel's performance was deficient. The record in this case is replete with mitigation testimony from both of Phillips's mental health experts, each of whom comprehensively evaluated Phillips and provided significant testimony concerning Phillips's possible mental retardation and organic brain damage, such that the record conclusively establishes that counsel was not ineffective in investigating and presenting evidence on this issue.
>
> Both Dr. Joyce Carbonell and Dr. Jethro Toomer testified at Phillips's initial evidentiary hearing in 1988, before we remanded for new sentencing proceedings. *See Phillips*, 608 So.2d at 778. Dr. Carbonell interviewed Phillips for 4 ½ hours and reviewed his prison records, personnel records, parole records, school records, jail records, his attorney's file, testimony and depositions, police reports, and affidavits from his family, friends and a school teacher. She even spoke personally to one of Phillips's teachers. Dr. Carbonell administered a battery of tests. . . .
>
> Although Dr. Carbonell did not testify personally at Phillips's resentencing-her testimony from the 1988 hearing was read into evidence-it was apparently not due to any lack of diligence on the part of defense counsel. . . .
>
> Dr. Jethro Toomer did testify at the resentencing. . . .
>
> The comprehensive mental mitigation investigation performed in this case is a far cry from those cases where we have found error in a trial court's failure to hold an evidentiary hearing to determine whether counsel failed to properly investigate and present evidence in mitigation. . . . Moreover, we find no error in a trial

> court's failure to hold an evidentiary hearing on a defendant's claim that defense counsel was ineffective for failing to present evidence in mitigation where the record shows similar mitigation evidence was presented through other witnesses. . . .
>
> In this case, the record is clear that each expert not only testified extensively about the battery of tests administered to Phillips, they each also testified that Phillips was borderline mentally retarded and probably brain-damaged. . . .
>
> Finally, the mere fact that the defense experts' opinions were rejected does not demonstrate that counsel was ineffective. *See Teffeteller v. Dugger*, 734 So.2d 1009, 1020 (Fla.1999). Instead, the failure can be attributed to Drs. Haber and Miller's opinions that Phillips's intelligence was between average and borderline and that Phillips exhibited no evidence of brain damage. The fact that Phillips now has new experts does not indicate that his counsel was ineffective, where counsel did investigate and present evidence on these issues. *See Cherry v. State*, 781 So.2d 1040, 1052 (Fla.2000); *Rose v. State*, 617 So.2d 291, 295 (Fla.1993).
>
> In sum, given the significant mental health investigation and testimony in the record, we hold that the trial court did not err in denying Phillips's claim without an evidentiary hearing. Given that the record reflects that two mental health experts were appointed in Phillips's defense, and each performed a comprehensive mental health evaluation of Phillips and testified thereto, we also affirm the trial court's summary denial of Phillips's *Ake* claim.

Phillips v. State, 894 So. 2d 28, 37-39 (Fla. 2004).

Current proceedings

On November 29, 2010, Mr. Phillips filed a successive motion to vacate judgments of conviction and sentence pursuant to 3.851 alleging that this Court failed to properly analyze prejudice based on clearly established federal law as set forth in *Porter v. McCollum* and *Strickland v. Washington*. (R3. 41-89). The State responded (R3. 90-113) and the circuit court entered an order denying relief on January 27, 2011 (R3. 121-127). Mr. Phillips timely filed a notice of appeal, and the present appeal follows.

SUMMARY OF THE ARGUMENTS

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

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

STANDARD OF REVIEW

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

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

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

ARGUMENT

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

Mr. Phillips was deprived of the effective assistance of trial counsel at the resentencing. This Court denied Mr. Phillips's claim of ineffective assistance of counsel in a manner found unconstitutional in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The recent decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Phillips's ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this

Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Phillips's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Phillips's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

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

The preliminary question that must be addressed is whether the United States Supreme Court's decision in *Porter* represents a fundamental repudiation of

this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Phillips'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 . . . .").

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

There are two recent occasions upon which this Court has assessed the effect to be accorded to a decision by the United States Supreme Court finding that this Court had misapprehended and misapplied United States Supreme Court precedent.

In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States 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.

The other United States 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 United States Supreme Court summarily reversed a

decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death sentenced individuals 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 Phillips v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

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

In *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. The Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id*. (quotations omitted). A court's inherent equitable powers were recently reaffirmed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the United States Supreme Court explained:

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

> equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid*.

Holland, 130 S. Ct. at 2563.

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," 387 So. 2d at 925, the *Witt* Court declined to follow the line of United States Supreme Court cases addressing the issue, characterizing those cases as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).[2]

Thus, we are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Phillips does not allege that *Porter* changes *Strickland*. Rather, our question is whether this Court believes that *Porter* strikes at a problem in this Court's

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

jurisprudence that goes beyond the *Porter* case. Since this Court can identify a federal precedent as a change in Florida law and extend it however it sees fit, the question is whether this Court recognizes *Porter* error in other opinions such as this one and believes that other defendants should get the same correction of unconstitutional error that Mr. Porter received.

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 United States 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. So as this Court reviews this issue, it should keep in mind the heightened need for fairness in the treatment of each death-sentenced defendant.

The *Witt* Court 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 application as ascertained by

the three-fold test of Stovall and Linkletter." *Id*. at 929. The 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.

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

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

Here, we see our issue hinge on the third consideration, as *Porter* emanates from the United States Supreme Court and is clearly constitutional in nature as a Sixth Amendment *Strickland* case. Thus we can look to the *Linkletter* considerations and consider that: the purpose to be served by the new rule would be to provide the same constitutional protection to Florida death-sentenced defendants as was provided to Mr. Porter, or to correct the same constitutional error that was corrected in *Porter*; the extent of reliance on the old rule is not

presently knowable until reviewing *Porter* claims, however, if *Porter* error is found to be extensive, there is a compelling reason to correct the constitutional violation because it is great, and if *Porter* error is found to be extremely limited, the constitutional error must nevertheless be corrected; and, if *Porter* error is very limited, the effect on the administration of justice will be to correct a constitutional wrong without expending great resources, and if *Porter* error is extensive, the effect will be to justifiably use whatever resources are necessary to correct a far-reaching constitutional problem in death cases.

While the result of the *Linkletter* analysis is not certainly conclusive, the *Hitchcock* example provides further guidance. 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 United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States 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 a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States

Supreme Court issued its decision in *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Phillips 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).[3]

[3] The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon 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 issued its opinions in *Phillips* and *Downs* ordering resentencings in both cases. In *Phillips*, 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 Phillips, 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.

In *Lockett v. Ohio*, the United States 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 v. Dugger*, 514 So. 2d at 1071; *Phillips v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that this Court 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 United States 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 postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[4] Clearly, this Court read the opinion in *Hitchcock* and

[4] The United States Supreme Court did not indicate in its opinion that it was addressing any other case or line of cases other than Mr. Hitchcock's case. Indeed, the United States Supreme Court expressly stated:

> Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. *See, e. g.*, *Cooper v. State*, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . ."), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in *Songer v. State*, 365 So. 2d 696 (1978) (per curiam), which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the

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 *Phillips* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.[5]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death

---

> question whether that was in fact the requirement of Florida law.

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

[5] Because the result in *Hitchcock* was dictated by *Lockett* as the United States Supreme Court made clear in its opinion, there really can be no argument that the decision was new law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). Since the decision was not a break with prior United States Supreme Court precedent, *Hitchcock* was to be applied to every Florida death sentence that became final following the issuance of *Lockett*. Certainly, no federal court found that *Hitchcock* should not be given retroactive application. *See Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

sentence was inconsistent with *Lockett*, a prior decision from the United States Supreme Court, here in *Porter* the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears*. As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland*. Just as this Court found that others who had raised 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.

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

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 United States Supreme Court found unreasonable appears in a whole line of cases.

In *Porter v. McCollum*, the United States Supreme Court found this Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455. This Court's *Strickland* analysis in *Porter v. State* was as follows:

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

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

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

> not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

Porter v. McCollum, 130 S. Ct. at 454-55.[6]

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. The United States Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that

---

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

> Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 1583-1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

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

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. 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).

Indeed in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in

its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings.[7] In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996) were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a 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 substantial evidence" supported the trial court's decision.[8] 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

[7] It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the Second District Court of Appeals was in conflict with *Grossman* as to the appellate standard of review to be employed.

[8] 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, e.g, Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

deferential standard in favor of the standard employed in *Rose*.[9] However, the court made clear that even under this less deferential standard

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

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, the court relied upon this very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 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 finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard which was employed in *Porter v.*

[9] The majority opinion in *Stephens* receding from *Grossman* prompted Justice Overton, joined by Justice Wells, to write: "I emphatically dissent from the analysis because I believe the majority opinion substantially confuses the responsibility of trial courts and fails to emphasize a major factor of discretionary authority the trial courts have in determining whether defective conduct adversely affects the jury." *Stephens v. State*, 748 So. 2d at 1035. Justice Overton explained: "My very deep concern is that the majority of this Court in overruling *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), has determined that it no longer trusts trial judges to exercise proper judgment in weighing conflicting evidence and applying existing legal principles." *Id*. at 1036.

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.[10]

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

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

[10] As the United States Supreme Court noted in *Kyles*, the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the 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 constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

engage is to embrace, connect with, internalize–to glean and intuit from mitigating evidence the reality of the experiences and conditions that make up a defendant's humanity. Implicit in the requirement that trial counsel must present mitigating evidence to "humanize" capital defendants, *id.* at 454, is the requirement that courts in turn must engage with that evidence to form an image of each defendant's humanity. It stands to reason that nothing less than a profound appreciation for an individual's humanity would sufficiently inform a judge or jury deciding whether to end that individual's life. And it is that requirement–the requirement that Florida courts *engage with humanizing evidence*--that is at the heart of the *Porter* error inherent in this Court's prejudice analysis and *Stephens* deference. The United States Supreme Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . ." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

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

If a person is presented with a batch of apples and asked if it is reasonably probable that there are more red apples than green, and he rummages through the

top of the batch, sees mostly green apples, and responds that it is reasonably possible that more are green, he has not answered the question he was asked. Whether there is a reasonable possibility that more are green does not tell us whether there is a reasonable probability that more are red. The conclusions are not determinative of one another and in fact have very little or nothing to do with one another, since, to put figures to it for the sake of conceptualizing the fallacy, a 51% probability that more are red still allows for a 49% possibility that more are green. By treating the two conclusions as mutually exclusive, the apple inspector committed the logical fallacy of creating a false dilemma, i.e. *there is either a reasonable possibility that more are green or a reasonable probability that more are red so that finding the former precludes the latter*. The problem with the apple inspector's method is that it reverses the standard of his inquiry. If a reasonable probability of more red apples represents a problem for which the apple inspector is requested to inspect batches of apples, his fallacy would result in him determining that there is not a problem when in fact there is. The apple inspector's method permits him to base his conclusion on an assumption that saves him from having to dig to the bottom of every batch, i.e. *if most of the apples I notice on the surface are green I can assume that there is not a reasonable probability that digging into the batch would reveal more are red*. That method reverses the standard of inquiry because a negative response—*no, there is not a reasonable*

probability of more red apples—comes not from finding that probability does not exist but from finding that an opposing possibility does exist. By attempting to prove a negative, the method places the focus of the inspector's inquiry on green apples instead of on red.

This Court has on many occasions addressed the manner in which lower courts should apply *Strickland v. Washington*, 466 U.S. 668 (1984), but a fundamental error persists in Florida jurisprudence, which was evident in *Porter*, which is evident in this case, and which is as simple as pointing out green apples when asked to find red.

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

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

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

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to *try to find a constitutional violation*. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must *search* for it carefully, not dismiss the *possibility* of it based on information that suggests it may not be there. And

looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non-presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

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

The Sixth Amendment vests a right to effective assistance of counsel in capital defendants such that when it is reasonably probable that a trial attorney's deficient performance changed the outcome of a case a constitutional violation occurs. It does not matter whether it is also reasonably possible that the deficient performance did not change the outcome. That is a different inquiry and a contrary standard. The insidiousness of the error is its subtlety because the conclusions

seem to have a tendency to negate or at least cut against one another. But since the standard is to look for a reasonable probability of a changed outcome, while it seems to tip the scale of the *Strickland* prejudice inquiry that the jury might have taken some of the non-presented evidence to cut against the defendant, that consideration has no place on the scale. The *Strickland* inquiry being applied by the Florida Supreme Court, by its very terms, regardless of the fact that it may also quote the correct *Strickland* prejudice standard, is as follows: relief should be granted if there is a reasonable possibility that the non-presented evidence would not have mattered. But the proper inquiry is about looking for any way a constitutional violation might have occurred, meaning we err on the side of finding one, rather than permitting an execution despite a constitutional violation because there is some speculative explanation for how that violation might reasonably not have actually occurred. Both conclusions can be true, but *Strickland* is only concerned with one, so that if both are true, a constitutional violation must be found. If a violation might with reasonable probability have occurred, it did occur, regardless of whether it might with reasonable possibility have not.

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

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

> With all that is at stake in capital cases, *cf. Kyles v. Whitley*, 514 U. S. 419, 422 (1995) ("'[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case'" (quoting Burger v. Kemp, 483 U. S. 776, 785 (1987)), in future cases the California courts should take care to ensure that their burden allocation conforms to the commands of *Chapman*.

562 U. S. ____ (November 29, 2010) (citations omitted). Like the California courts, Florida courts must not violate *Kyles* by, rather than taking painstaking care in scrutinizing a postconviction record for anything and everything that might add up to something that probably would have made a difference, rummaging through the top of the batch looking for green apples that support the conclusion that there are no red apples to be found below.

In *Sears v. Upton*, the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears" and unable to "speculate as to what the effect of additional

evidence would have been" because "Sears' counsel did present some mitigation evidence during Sears' penalty phase." *Id*. at 3261. The United States Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Id*. at 3264. The United States Supreme Court explained the state court's reasoning as follows:

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

Id. at 3264 (citations omitted).

Of the errors found by the United States Supreme Court in the state court's analysis, the Court referred to the state court's improper prejudice analysis as the "more fundamental[]" error. *Id.* at 3265. The Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.

> We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. . . . And, in Porter, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, 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. Phillips's ineffective assistance of counsel claim must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate that the failure to present the sort of troubled past relevant to assessing moral culpability causes prejudice.

Sears teaches that postconviction courts must speculate as to the effect of non-presented evidence in order to make a *Strickland* prejudice determination not only when little or no mitigation evidence was presented at trial but in all instances. As *Sears* points to *Porter* as the recent articulation of *Strickland* prejudice correcting a misconception in state courts, the failure to conduct a probing, fact-specific prejudice analysis can be characterized as "*Porter* error."

Porter makes clear that the failure to present critical evidence to the jury prejudices a defendant Here, that prejudice is glaringly apparent. After *Porter*, it is necessary to conduct a new prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's prejudice analysis used in this case to be in error, Mr. Phillips's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

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

Mr. Phillips was deprived of the effective assistance of counsel during his resentencing, and this Court committed *Porter* error in denying his claim.

Resentencing counsel was surely on notice that mental retardation could potentially be an important issue in Mr. Phillips's resentencing case.[11] And the state was certainly aware of the potential problem that could ensue if Mr. Phillips was presented to the jury as a mentally retarded person. The State referred to Mr. Phillips during the examination of Dr. Toomer as "supposedly retarded" (R. 654-56). And Mr. Waksman made several comments in closing argument at the resentencing ridiculing the defense mitigation testimony by repeating over and

[11] Mr. Phillips notes that while his claim of mental retardation under *Atkins* has thus far been denied, the analysis attendant to that claim is separate from the analysis necessary under *Strickland* to determine if counsel was ineffective for failing to present Mr. Phillips's severe mental deficiencies to the jury in the form of mitigating evidence.

In fact, it must be noted that the Florida Supreme Court cited its now overruled opinion in *Porter* in denying Mr. Phillips claim of mental retardation, engaging in the very deference to credibility findings that *Porter* prohibits:

> Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions. *See Brown v. State*, 959 So. 2d 146, 149 (Fla.2007) ("This Court does not ... second-guess the circuit court's findings as to the credibility of witnesses." (citing *Trotter v. State*, 932 So. 2d 1045, 1050 (Fla.2006))); *Bottoson v. State*, 813 So. 2d 31, 33 n. 3 (Fla.2002) ("We give deference to the trial court's credibility evaluation of Dr. Pritchard's and Dr. Dee's opinions."); ***Porter v. State***, 788 So. 2d 917, 923 (Fla.2001) ("We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.").

Phillips v. State, 984 So. 2d 503, 510 (Fla. 2008), reh'g denied (June 12, 2008) (emphasis added).

over that Dr. Toomer has testified that Mr. Phillips was not "a vegetable" (R. 745, 752, 753).

Resentencing counsel's actions following his appointment as resentencing counsel are a virtual model of how not to select and prepare mental health experts. More than seven months after his appointment, Wax filed a motion on October 18, 1993 requesting that the trial court reappoint the same two defense expert witnesses, the psychologists Toomer and Carbonell, that had testified almost six years before at the January 1988 evidentiary hearing (R. 83-84). This motion was filed only three and a half months prior to the scheduled trial date, and explained:

> In order to adequately present that [statutory] mitigating evidence, as well as other non-statutory mitigating evidence, it is essential that the Defendant utilize the services of Dr. Jethro Toomer and Dr. Joyce Carbonell. Both Dr. Toomer and Dr. Carbonell have previously been appointed by this court to testify on behalf of the Defendant, and are familiar with the facts and circumstances of this case. In fact, Dr. Toomer and Dr. Carbonell both testified at the Defendant's motion to vacate conviction and sentence held before this Honorable Court in January 1988. As a result of that hearing and appellate review of this Court's order denying the Defendant's motion, the Defendant was granted the resentencing hearing pending this Honorable Court. As such, Dr. Toomer and Dr. Carbonell are uniquely suited to testify on behalf of the Defendant.

(R. 84). Mr. Wax, the resentencing counsel, also filed a motion for a competency evaluation on October 18, 1993, in which he advised the trial court that "[s]ince the time of the [evidentiary] hearing on the Defendant's Rule 3.850 motion, he has

been incarcerated on 'Death Row.' Counsel believes that the Defendant's condition has further deteriorated as a consequence of that incarceration" (R. 86). Of course since Mr. Phillips's competency had been an issue at the 1988 hearing and the appeal from the denial of relief, with Drs. Carbonell and Toomer opining that Mr. Phillips was not competent, this was a reasonable concern. *See Phillips v. State*, 608 So. 2d 778, 782 (Fla. 1992). At the hearing on the motion for re-appointment of defense experts on October 26, 1993, resentencing counsel stated that while he had spoken to Dr. Toomer about accepting reappointment, he had not spoken with Dr. Carbonell about the case and was having trouble getting in touch with her (T. 18). In spite of this revelation, the court re-appointed Drs. Toomer and Carbonell on October 28, 1993 (R. 91-94). Based on the record Mr. Wax's problems in communicating with Dr. Carbonell continued as the resentencing drew ever closer. At a hearing on January 11, 1994, less than a month before the scheduled resentencing, counsel indicated that he still had been unable to contact Dr. Carbonell:

> Mr. WAX: We are set for February 7. I have been doing everything; everything I can to be set ready on February 7th. I got a call from Mr. Waksman saying if I will be ready for trial. The only major hurdle that I'm having is Dr. Carbonell. Apparently she has been very ill. She has been – She's one of the doctors -- one of the doctors that are familiar with the case originally. It listed her to the defense in 3.850 hearing.

COURT: Lets not appoint her if she's sick. How about Miller?

Mr. Wax: Miller testifies for the prosecution.

COURT: Who else?

Mr. Wax: What I have to do is find a psychiatrist or psychologist who is willing to get up to speed in the case. So, let me make some phone calls and see if I can get someone but leave Dr. Carbonell now.

COURT: I don't want any delays on this.

Mr. Wax: I understand. I don't.

COURT: This is case is six, seven years old.

Mr. Wax: Well, yes. I think you're right. Realistically I know we are looking in March. Mr. Waksman was notified to be here. He will be down here soon. What I'll do --

COURT: I have no idea about this case. This case is something that really bugs me.

Mr. Wax: A life of its own. In any rate, I'll get in touch with you and let you know who to replace her with. I'll let you know immediately.

COURT: I'll like to go on the February 7th date if at all possible.

Mr. Wax: I don't know that's realistic because you the doctor's -- I'll still endeavor to try.

(T. 24-26). So with less than a month before the scheduled resentencing hearing and the court pressing to move forward resentencing counsel Wax who had entered his appearance in the case ten months before had failed to even contact Dr. Carbonell, the mental health expert that he considered to be "a crucial witness" (R. 121).

Following the hearing on January 11, the trial court signed an order appointing Drs. Toomer, Miller and Leonard Haber as "disinterested qualified experts" to determine the competency of Mr. Phillips (R. 96). This was done without defense objection despite the fact that all three had opined in 1988 on competency with credibility findings to the detriment of Mr. Phillips made by Judge Snyder that were affirmed by this Court on appeal (R. 96). At the time of this proceeding Florida Rule of Criminal Procedure 3.211(e) was in effect. Defense counsel should have insisted on independent experts to be appointed to do the competency evaluation, and not the experts who had done competency evaluations in 1988 and were preparing to opine about the presence or absence of statutory and non-statutory mitigation in 1994. This mixing of competency issues with issues in mitigation became inevitable with the decision or absence of one by resentencing counsel in this regard. Dr. Toomer did a 1994 competency evaluation, finding Mr. Phillips to be competent (T. 30). Yet resentencing counsel presented the canned testimony of Dr. Carbonell that Mr. Phillips was incompetent

before the judge and jury. He never asked for a competency hearing. Dr. Toomer did not testify about his finding of competency in 1994 but in response to a question from the State he did testify that he had previously found Mr. Phillips to be incompetent five years before (T. 638). At the State's urging, and without objection by resentencing counsel, the court specially instructed the jury after Dr. Carbonell's testimony and before Dr. Toomer's testimony that they were not to consider competency issues (T. 593). Resentencing counsel's only reaction was to say that he had no intention of arguing the question of competency to the jury (T. 586). There can be no strategic reason to support such a decision. Both of his experts testified in 1994 that Mr. Phillips was incompetent at the time of their evaluations in 1987-88. Surely Dr. Toomer's credibility would have been enhanced by the admission that he now believed Mr. Phillips to be competent in 1994 as a result of his most recent evaluations. The lack of evidentiary hearing testimony on this aspect in counsel's performance provides yet another reason that the summary denial without hearing was inappropriate.

At some point counsel did contact Dr. Carbonell, but additional problems kept cropping up. At a hearing on March 24, 1994, eleven days before the resentencing hearing was scheduled to start on April 4, 1994, resentencing counsel informed the court that he was having difficulty arranging to get Dr. Carbonell down from Tallahassee to Miami because of her teaching schedule (T. 35-39). He

stated that his intent was to have Dr. Carbonell come to Miami to see Mr. Phillips (apparently for the first time since 1988), and to be available for deposition and testimony on the Thursday or Friday of the resentencing (T. 36). The State also indicates on the record that they had been unable to depose Dr. Carbonell (T. 36). The court indicates irritation at this plan, asking why resentencing counsel thinks the resentencing will take a week (T. 36-37). Resentencing counsel then agreed to bring Dr. Carbonell to Miami the week before the resentencing was scheduled to begin on April 4 (T. 37). On the same date, March 24, the trial court signed another "order appointing disinterested qualified experts," appointing Dr. Miller for what prosecutor David Waksman described as "for the aggravating and mitigating. He will probably contradict he has certain mitigating factors" (T. 31, R. 97). The next day, the trial court entered an order in chambers compelling discovery by the State of any psychological testing performed by Dr. Toomer or Dr. Carbonell on Mr. Phillips (T. 99). Dr. Carbonell never saw Mr. Phillips after 1988, submitted to deposition, or testified in 1994. Resentencing counsel filed a Motion for Continuance on March 31, 1994, the Thursday before the resentencing was set to begin on the following Monday morning, April 4 (R. 121-123). The problem was again Dr. Carbonell. The motion outlines counsels concerns:

> The penalty phase proceeding in this matter is scheduled for April 4, 1994. The Defendant is not ready to proceed to the penalty phase at this time due to the unavailability of a crucial witness, Dr. Joyce Carbonell. Dr. Joyce

> Carbonell will testify on behalf of the Defendant as a mitigating witness. She is a professor of psychology at Florida State University, Tallahassee, Florida. She has conducted extensive psychological testing on the defendant and obtained a psycho-social history of the Defendant that is essential to the presentation of the mitigating circumstances that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance...and the capacity of the Defendant to appreciated (sic) the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. . . . Without her testimony, it will be virtually impossible to establish those mitigating circumstances.

The motion goes on to request that Dr. Carbonell be allowed to testify on Wednesday, April 13, 1994 or on Friday, April 15, 1994, citing *Wike v. State*, 596 So. 2d 1020 (Fla. 1992), wherein the defendant was granted a new penalty phase because the trial court abused its discretion in denying a continuance (R. 122). The trial court had previously denied virtually the same ore tenus motion at the hearing noted above on March 24, 1994.

Following the selection of the jury on Monday, April 4, 1994, on the next morning, April 5, before opening statements, Mr. Wax informed the court that Dr. Carbonell would not be appearing at the resentencing:

> Mr. Wax: Dr. Carbonell. Mr. Waksman and I spoke to Dr. Carbonell last night, Your Honor, and Mr. Waksman and I agreed to have a telephonic hook up to read the testimony of Dr. Carbonell from the 1988 Rule 3.850 hearing into the record. I spoke to Mr. Waksman about having my secretary

coming in and reading the answers in response to the questions that were posed to her on direct and cross examination because her testimony would be consistent if she was to testify. It would be the same testimony.

COURT: Why isn't she going to be available?

Mr. Wax: Dr. Carbonell's availability was precluded by the fact as advised by the Court next to subpoena her and ensure her presence, and secondly through a miscommunication that she has scheduled matters on these dates this week. Because of that miscommunication between she and I that can not be rescheduled as such, Your Honor, this I believe is the best way to handle it.

COURT: Has your client been informed of this?

Mr. Wax: No, I have not spoken to him.

COURT: You better inform him because I don't want it to come back for another thing of incompetency of counsel.

Mr. Wax: I understand that, Judge.

COURT: Make sure you understand it and he's willing to waive anything that has to do with it.

Mr. Wax: All right. I'll talk to him on that at the break.

COURT: He's right here.

Mr. Wax: Judge, if I can talk to him later so we can get started?

COURT: Let's go ahead with opening statements.

(R. 237-238). Then, moments before the jury came into the courtroom for the opening statements, Mr. Wax discussed his plan to have Dr. Carbonell's 1988 testimony read into the record with Mr. Phillips (T. 239-40). Considering the gravity of Dr. Carbonell's potential testimony and in light of the claims in undersigned counsel's 3.850 motion as to Mr. Phillips's mental retardation and brain damage, the validity of a waiver solicited by resentencing counsel in these circumstances wherein the defendant forgoes his right to present live mitigation testimony from a mental health expert and agrees to what amounts to a proffer from a prior proceeding where no jury was present, is questionable at best. It becomes even more questionable when the expert has not re-examined the client or been deposed by the state.

Before Dr. Carbonell's 1988 testimony was read to the jury, the court explained to the jury: "The next witness that the defense is going to call is a psychologist by the name of Dr. Carbonell. She is not dead but for one reason or another she's not going to be able to testify in person, so we all agreed that her testimony from the previous trial or whatever hearing it was will be read the same way we read that last thing [the testimony of the deceased teacher, Samuel Ford]. This is not as short as the other one so it will be some time" (Supp. R. at 2).

There apparently was never any additional work-up of Mr. Phillips case by Dr. Carbonell after the 1988 evidentiary hearing. Although this is not surprising considering the communication problems Mr. Wax evidently had with Dr. Carbonell, this is no excuse for counsel's negligence. The testimony of Dr. Carbonell read into the record before the 1994 jury ended up being exactly the same testimony heard and rejected by Judge Snyder alone in 1988.

There was a confusing mixture of mental health expert testimony at the 1994 resentencing proceedings on the very different subject matters of the competency of Mr. Phillips to proceed versus the issues concerning the presence of absence of statutory and non-statutory mental health mitigation added to the reasons defense counsel's use of the experts was deficient performance. The State expressed concern after Dr. Carbonell's testimony was read into the record about the possibility that issues regarding both Mr. Phillips's competency and trial counsel's ineffectiveness in her testimony might result in the jury considering residual doubt of guilt (T. 585).

Defense counsel's last minute decision to rely on the presentation of Dr. Carbonell's 1988 testimony in 1994 only served to confuse the mental health issues in Mr. Phillips' case, not to clarify them before the jury. Aside from confusing the jury, the fact that resentencing counsel noticed that the reading of the testimony was "tedious and it was long and hard to stay focused and to stay

concentrated" only serves to highlight the point that the reading of a six year old record, by a faceless and expressionless psychologist was not what this Court envisioned when it sent this case back to the circuit court for a resentencing. As seen in the prejudice section below, it is certainly probable that at least one out of the seven jurors who recommended death would have been persuaded by an actual live witness.

In affirming the denial of this claim, this Court found:

> We disagree that counsel's performance was deficient. The record in this case is replete with mitigation testimony from both of Phillips's mental health experts, each of whom comprehensively evaluated Phillips and provided significant testimony concerning Phillips's possible mental retardation and organic brain damage, such that the record conclusively establishes that counsel was not ineffective in investigating and presenting evidence on this issue.
>
> Both Dr. Joyce Carbonell and Dr. Jethro Toomer testified at Phillips's initial evidentiary hearing in 1988, before we remanded for new sentencing proceedings. *See Phillips*, 608 So.2d at 778. Dr. Carbonell interviewed Phillips for 4 ½ hours and reviewed his prison records, personnel records, parole records, school records, jail records, his attorney's file, testimony and depositions, police reports, and affidavits from his family, friends and a school teacher. She even spoke personally to one of Phillips's teachers. Dr. Carbonell administered a battery of tests. . . .
>
> Although Dr. Carbonell did not testify personally at Phillips's resentencing-her testimony from the 1988 hearing was read into evidence-it was apparently not due

to any lack of diligence on the part of defense counsel. . . .

Dr. Jethro Toomer did testify at the resentencing. . . .

The comprehensive mental mitigation investigation performed in this case is a far cry from those cases where we have found error in a trial court's failure to hold an evidentiary hearing to determine whether counsel failed to properly investigate and present evidence in mitigation. . . . Moreover, we find no error in a trial court's failure to hold an evidentiary hearing on a defendant's claim that defense counsel was ineffective for failing to present evidence in mitigation where the record shows similar mitigation evidence was presented through other witnesses. . . .

In this case, the record is clear that each expert not only testified extensively about the battery of tests administered to Phillips, they each also testified that Phillips was borderline mentally retarded and probably brain-damaged. . . .

Finally, the mere fact that the defense experts' opinions were rejected does not demonstrate that counsel was ineffective. *See Teffeteller v. Dugger*, 734 So.2d 1009, 1020 (Fla.1999). Instead, the failure can be attributed to Drs. Haber and Miller's opinions that Phillips's intelligence was between average and borderline and that Phillips exhibited no evidence of brain damage. The fact that Phillips now has new experts does not indicate that his counsel was ineffective, where counsel did investigate and present evidence on these issues. *See Cherry v. State*, 781 So.2d 1040, 1052 (Fla.2000); *Rose v. State*, 617 So.2d 291, 295 (Fla.1993).

In sum, given the significant mental health investigation and testimony in the record, we hold that the trial court did not err in denying Phillips's claim without an evidentiary hearing. Given that the record reflects that

> two mental health experts were appointed in Phillips's defense, and each performed a comprehensive mental health evaluation of Phillips and testified thereto, we also affirm the trial court's summary denial of Phillips's *Ake* claim.

Phillips v. State, 894 So. 2d 28, 37-39 (Fla. 2004).

In considering the merits of the penalty phase ineffectiveness claim for the purpose of determining whether an evidentiary hearing was needed, this Court cited its *Strickland* standard from *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001) (affirming denial of postconviction relief), when in turn the *Valle* Court had cited to its now overruled *Porter* decision in denying habeas relief. 837 So. 2d 905, 911 (Fla. 2002). There is a direct line between now overruled *Porter* precedent and the decision in this case. The analysis here was conducted under the same authority and in the same manner as *Porter*.

The Court, in a classic *Porter* moment, found "no error in a trial court's failure to hold an evidentiary hearing on a defendant's claim that defense counsel was ineffective for failing to present evidence in mitigation where the record shows similar mitigation evidence was presented through other witnesses. . . ." 894 So. 2d at 38. This is in direct opposition to the admonition in *Sears* that the United States Supreme Court has "certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."

Sears, 130 S. Ct. at 3266-67. This Court's statement that "a" trial court's ruling on "a" defendant's claim of ineffectiveness where some, or "similar," mitigation was presented at the penalty phase, is not error, demonstrates that this Court was not making that determination based on the facts here, but a general statement about the availability of *Strickland* relief in that situation. This Court did exactly what *Porter* and *Sears* precludes—foreclosed the possibility that a *Strickland* violation can occur where something—mitigation or aggravation—can be pointed to at the penalty phase to discount the importance of the postconviction mitigation evidence.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis.

CONCLUSION

Mr. Phillips's substantial claim of ineffective assistance of counsel has not been given the consideration required by *Porter*. Mr. Phillips requests that this court perform that analysis and grant relief.

CERTIFICATE OF FONT

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

_____

WILLIAM M. HENNIS III
Litigation Director
Florida Bar #0066850

CERTIFICATE OF SERVICE

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

WILLIAM M. HENNIS III
Litigation Director
Florida Bar #0066850

M. CHANCE MEYER
Assistant CCRC-South
Florida Bar #0056362

Capital Collateral Regional
Counsel – South
101 N.E. 3rd Avenue, Suite 400
Ft. Lauderdale, FL 33301
Tel (954) 713-1284
Fax (954) 713- 1299

COUNSEL FOR MR. PHILLIPS

Copies furnished to:

Ms. Sandra Jaggard
Attorney General's Office
444 Brickell Avenue, Suite 950
Miami, FL 33131