IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-473

NORMAN PARKER,

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

RACHEL L. DAY
Assistant CCRC
Florida Bar #00668535

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. PARKER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

Mr. Parker appeals the circuit court's denial of his successive motion for postconviction relief. In response to Mr. Parker'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. Parker's postconviction claims, the circuit court ruled that Porter does not represent a change in the law (R. 76), that if it did the change would nevertheless not be retroactive (R. 76), and that even if *Porter* represented a retroactive change in law it would not merit relief in this case (Order at 6). Below, Mr. Parker 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: "R" – the record on direct appeal; "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. Parker respectfully moves this Court for oral argument on his appeal.

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. Parker 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. Parker 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 whether it was 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

Mr. Parker was indicted in the Circuit Court of the Eleventh Judicial Circuit, Case No. F78-11151, for the first degree murder of Julio Cesar Chavez, armed robbery, sexual battery and possession of a weapon during a criminal offense, and the possession of a weapon by a convicted felon. Mr. Parker was convicted as charged September 18, 1981. On November 18, 1981, the Circuit Court, Hon.

Fredricka Smith, J., sentenced Mr. Parker to death for the murder of Julio Cesar Chavez.

Mr. Parker raised the following issues on direct appeal: the trial court erred in denying the motion to suppress statements; Mr. Parker's right to a venire drawn from a fair cross section of the community was violated; the trial court abused its discretion in refusing Mr. Parker's request for additional peremptory challenges and in denying his challenges for cause; the confession to the D.C. murder was not supported by a corpus delicti; the evidence was insufficient to support conviction; evidence that Mr. Parker used aliases in D.C. was improperly admitted; there was a break in the chain of custody of evidence; the State made improper comments during its penalty phase closing argument; erroneous jury instructions during the penalty phase; and the death sentence was disproportionate. The Florida Supreme Court upheld the death sentence on direct appeal. *Parker v. State*, 456 So. 2d 436 (Fla. 1984).

On January 2, 1987, Mr. Parker filed a Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850, raising thirteen claims. On December 23, 1988, Mr. Parker supplemented his original motion. During the pendency of the motion for post conviction relief in the trial court, on May 23, 1988, Mr. Parker filed a Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution, and Application for Stay of Execution

Pending Disposition of Petition for Writ of Certiorari. On December 1, 1988, this Court denied the petition. *Parker v. Dugger*, 537 So. 2d 969 (Fla. 1988). On February 7, 1989, the circuit court denied Mr. Parker's postconviction motion. This Court affirmed the denial of Mr. Parker's motion for post conviction relief on October 15, 1992. *Parker v. State*, 611 So. 2d 1224 (Fla. 1992).

On June 7, 1993, Mr. Parker filed a second motion for post conviction relief in the circuit court raising claims regarding the propriety of the instructions on the aggravating circumstances and consideration of mitigation. The circuit court denied this motion and the Florida Supreme Court affirmed. *Parker v. State*, 718 So. 2d 744 (Fla. 1998). Mr. Parker petitioned the United States Supreme Court for certiorari review, which was denied. *Parker v. Florida*, 526 U.S. 1101 (1999).

On September 4, 2002, Mr. Parker filed a motion for post conviction relief pursuant to the United States Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). The circuit court denied the motion and this Court affirmed.

Facts relevant to the underlying *Strickland* claim

Porter error was committed in Mr. Parker's case. This Court ruled as follows:

> After the December 1988 evidentiary hearing, the trial court denied relief on Parker's claims that trial counsel was ineffective in the penalty phase. Here too we agree with the trial judge's conclusion that Parker failed to meet the *Strickland* test. She found, in response to claims that family members should have been called in the penalty phase, that in these postconviction proceedings, three cousins, a sister and an aunt were called. However, because [Parker] had spent more than ten years in prison for a prior murder, these witnesses had had

little contact with [him] in the years immediately before the crimes were committed. Their statements had little impact, and, at times, supported the view that [Parker] appeared normal, rather than brain-damaged and impaired.

The trial court also rejected the claim that counsel was ineffective for failing to present the testimony of Dr. Stillman, a psychiatrist, in the penalty phase. The court explained:

> Dr. Stillman's testimony is wholly unpersuasive. His conclusion that [Parker] is brain-damaged rests on the relatives' postsentencing report of [Parker's] brief loss of consciousness in two childhood accidents. Significantly, [Parker] himself denied any accidents in his 1980 interview with Dr. Stillman and [Parker] presents no medical record of any kind to substantiate these alleged injuries. In fact, his IQ, as tested by Dr. Stillman, is slightly higher than average, and there is no objective indication of [Parker's] compromised intellectual functioning. Dr. Stillman's opinion is simply that brain damage invariably results from loss of consciousness, no matter how brief the period of unconsciousness.
>
> Moreover, Dr. Stillman's conclusions that [Parker] was incompetent to stand trial and insane at the time of the offense-neither conclusion being urged by [Parker] in these proceedings, and both conclusions being contradicted by the overwhelming evidence in the case-undermine the credibility of his further opinion that [Parker's] capacity to conform his conduct to law was impaired.
>
> The court cannot conclude that the jury likely would have been persuaded by such testimony to recommend a sentence other than death, especially in light of the compelling aggravating circumstance that [Parker] had been convicted of murder on *two* prior and separate occasions.

We find no error in the trial court's conclusions.

Parker v. State, 611 So. 2d 1224, 1228 (Fla. 1992).

The testimony and evidence presented in the trial court also established that trial counsel's failures prejudiced Mr. Parker. The evidence established numerous significant mitigating factors, both statutory and nonstatutory, and certainly undermines confidence in the outcome of Mr. Parker's penalty proceedings.

Members of Mr. Parker's family testified at the evidentiary hearing regarding his deprived and miserable childhood, the head injuries he suffered as a child and his serious drug and alcohol abuse problems. James Parker Jr., Mr. Parker's cousin (PC-R. 1715), testified that Norman was not raised by his own parents because Norman's own father spent little time with him (PC-R. 1720), and his mother had a drinking problem (PC-R. 1712). After Norman came back from being in the Army, he was "disappointed" with the way he had been treated (PC-R. 1722). Norman began using heroin and barbiturates (PC-R. 1723), which changed him into being a person "under pressure" (PC-R. 1724). When Norman used drugs, he was "confused" and "[f]rustrated" (PC-R. 1735), and was "like a Dr. Jekyll/Mr. Hyde" (PC-R. 1736). Norman, however, had concerns for his younger brother. He would warn James not to use drugs because they would "destroy his life just like his." *Id*. Norman was using drugs until he left for Washington, D.C., in 1978 (PC-R. 1725).

Doris Rozier, another cousin (PC-R. 1741), testified she had known Norman

since childhood and that she and Norman were raised together by their grandmother (PC-R. 1744). Ms. Rozier described two serious accidents Norman had as a child. Once, when Norman was about two, some adults were throwing him up in the air and dropped him. Norman "went unconscious" (PC-R. 1744). When Norman was 12 or 13, a train hit him while he was riding his bicycle. *Id*. After that accident, Norman was "[d]efinitely" different: "The guy kind of acted weird-like, and all of a sudden, sometimes he'll be okay and sometimes he just was like spaced out, you know. We all assumed it was from the accident from the train" (PC-R. 1745).

Ms. Rozier also testified how Norman's parents neglected due to his mother's alcoholism and father's womanizing (PC-R. 1746-47), and also about his drug use and how it affected him. (PC-R. 1747-49).

Ms Rozier also testified how Norman was also strongly affected by his military service.

> And when he went in the army and came out of the army, he just seemed different. He wasn't the same person anymore. He was totally different then. His moods had changed. He didn't hardly talk much. Didn't talk too much to the family. He stayed to himself for awhile, and then he would come around. He just always would hold his head down in his hands all the time. I never know why. I would ask him. He just nod his head and say there is nothing wrong, cuz, and nod his head and something like that.

(PC-R. 1751).

Patricia Ann Hacker, also a cousin (PC-R. 1770), testified that she had known Norman all her life and had known him well since 1965 (*Id*.). Norman was raised by his grandmother and uncle, and loved his family very much (PC-R. 1770-71). Norman used to talk to the kids in the neighborhood about the importance of going to school and staying away from drugs (PC-R. 1771).

Jacquelyn Parker, Norman's sister (PC-R. 1861), testified that she and her two sisters were raised in Liberty City by their grandmother, while Norman was raised in Opa-Locka by his grandmother (PC-R. 1862). Their mother did not raise the children because "she had a problem drinking." *Id*. The children saw their father "very seldom" (PC-R. 1863).

Inell Parker, also a cousin (PC-R. 1882), testified that Norman's mother drank a lot when Norman was growing up (PC-R. 1883-84). Norman was raised by his grandmother and uncle (PC-R. 1884). Inell Parker left the area, and when she came back in 1965, Norman was just getting out of the military to get a job (PC-R. 1884-85). In the subsequent years, Norman hung around with people in the neighborhood who were known to use drugs (PC-R. 1885-87).

In addition to the family members' testimony presented at the evidentiary hearing, numerous affidavits of family members and friends were presented which also described Mr. Parker's abysmal childhood and his drug addiction (PC-R. 278-330). None of this information made its way to Mr. Parker's sentencing jury or

judge because defense counsel failed to look for it. This history establishes valid mitigation. It also should have been provided to a mental health expert.

Dr. Stillman's initial impression of Mr. Parker, after evaluating him, included significant mitigating information which a capital sentencing jury should be allowed to consider:

> I had the impression that Mr. Parker was an addicted person who had misused substances, and that the substances had been related to what one might refer to anti-social acts that invariably somehow that was a connection between substance abuse and things that he got involved with. Even if there was just a couple of beers, that would be enough for certain people to set them off. It just seems some there was something wrong with the way he presented material, its fragmented nature, its disconnection. There just seemed to be something wrong.
>
> As I said, I could not delineate exactly, because that comes out of experience. From the experience, I know that there was something wrong with this man, that one had to look into his drug and alcohol abuse, because it might lead us to other conclusions, which would be important.
>
> Back in '81, we were seeing then the beginnings of the cocaine holocaust in Miami, and I was already familiar with other substances. And as it turns out, Mr. Parker didn't always report things too well for various reasons, which I can go into later. And that tended to play down things, even though he was arrested for drunkenness and so on, all apparently part of the record.
>
> So it just became evident in my examination of him, which took, I believe, longer because of the length of this report and the density of it. I know that I took a lot of

> time with him, and it just seemed to me there was more to this case that met the eye.
>
> And I was trying to flag the idea that there should be more investigation into his condition with regard to drug and alcohol abuse and possible therefore leading to other findings which eventually became evident with error.

(PC-R. 1638-39). If Mr. Roffino and Mr. Velayos had followed up on the requests for information flagged in the letter from Dr. Stillman, they would have uncovered vital mitigating information. However Dr. Stillman was careful to note that he did not believe that Mr. Parker suffered from Anti Social Personality Disorder (PC-R. 1639-40). Dr. Stillman explained that he requested additional information in two or three different ways in his report because of "the way Mr. Parker conducted himself, his fragmentation of thinking" during the examination; "[t]here was a scattering of material that didn't follow exactly. It's called fragmentation. There was some fragmentation of thoughts and ideas. I couldn't quite grasp the continuity one would expect with that intellectual ability" (PC-R. 1641).

Dr. Stillman also had the impression from his initial evaluation that Mr. Parker suffered from brain damage (PC-R. 1645). This was another reason why he requested additional information (PC-R. 1642-43).

Dr. Stillman was not provided with the information he requested until post-conviction proceedings were initiated. The history that was provided (also introduced at the hearing) included sworn statements from family members that

Mr. Parker was thrown in the air as an infant and dropped on his head, resulting in profuse bleeding and unconsciousness (PC-R. 1644). At a later date, Mr. Parker was hit by a train and again rendered unconscious (PC-R. 1644). His school records demonstrate "a declining record of CDF, and gradual withdrawal from school in the tenth grade. He didn't like school. I guess he didn't like school, because he didn't do well in school" (PC-R. 1644-45). Mr. Parker's impulsivity had worsened by the time he came back from service in Korea, where he used intoxicating substances, mainly heroin (PC-R. 1645). Dr. Stillman summarized:

> There just was -- there just was a lot of information which pointed in one direction, and that is he really has brain damage. And that brain damage, although suspicious in the beginning, with additional information became obvious and this should have lead to other investigations.

(PC-R. 1646). Dr. Stillman did not receive this vital information until after the sentencing jury had made their recommendation and the judge had sentenced Mr. Parker. (PC-R. 1646-48). Dr. Stillman explained further that this information strengthened and corroborated his original impressions:

> Q. You've had a recent opportunity to see Mr. Parker?
>
> A. Yes.
>
> Q. Anything in that recent examination that undermines what is reflected in the records that you've been provided with or, that is, doesn't fit with your original examination?

> A. Well, no. I think my recent examination corroborates what I have found that he still is a little fellow and tries to make a good impression and tries to appear outgoing, but underneath it he has many serious problems, including brain damage.
>
> Q. Now, had you been provided with this information in 1980/81, would you have been able to formulate an opinion as to whether Mr. Parker suffered from extreme emotional disturbances at the time of the offense, assuming, in fact, he was guilty?
>
> A. Yes. I believe that would have been far more definitive in my statements concerning the fact that he had organic brain syndrome and my request would have been for further investigation of another kind.

(PC-R. 1648-49).

Dr. Stillman's testimony would have been very important at the penalty phase of Mr. Parker's trial. Had the attorneys provided him with the information he sought at the time, he would have testified to a number of statutory and nonstatutory mitigating circumstances, including organic brain syndrome. Under the influence of the substances, even of a small quantity, this condition would have rendered him "insane and incompetent in as far as a space of time," to the extent that his capacity to conform his conduct to the requirements of law had been substantially impaired and that he was under extreme emotional disturbance at the time of the crime (PC-R. 1649).

Dr. Stillman would also have provided information to the jury that

Mr. Parker was not capable of forming the mental state necessary to commit a cold, calculated or premeditated offense (PC-R. 1666-67).

To rebut Dr. Stillman's testimony, the State called Dr. Leonard Haber, a psychologist. However, in many respects, Dr. Haber corroborated Dr. Stillman's diagnosis that Mr. Parker suffered and suffers from brain damage, and that Mr. Parker could not validly be diagnosed as an antisocial personality. If anything, the account of Dr. Haber demonstrated why this case does involve important mental health mitigation which the sentencing jury should have heard.

Dr. Haber testified that he administered the Bender Gestalt Visual Test to Norman Parker and that the test, which is a screening test for brain damage, indeed **did show signs of brain damage** (PC-R. 1917;1923; 1925-26;1962). Further, Dr. Haber testified that the history of head injuries suffered by Mr. Parker and related by his family could be the cause of the brain damage, as could his abuse of drugs (PC-R. 1914-17). Dr. Haber noted in his testimony that Mr. Parker's family had related that Mr. Parker had suffered from two head injuries, and that these types of head injuries "could lead to brain damage" (PC-R. 1919, (PC-R. 1925-27).

Dr. Haber explained on cross examination that his use of the Bender Gestalt test showed soft signs of brain damage (PC-R. 1962-66). Despite all the signs of brain damage, as indicated by Mr. Parker's history of head injuries and as reflected by a psychological test designed to screen for brain damage, and despite the fact

that Dr. Haber was examining Mr. Parker specifically for the purpose of testifying with regard to Dr. Stillman's findings, Dr. Haber did not conduct further tests to determine the extent of the brain damage (PC-R. 1969-79; *see also* PC-R. 1976-77). Dr. Haber also explained at the evidentiary hearing that the functioning of the brain was not his specialty, and indicated that he could only give general answers to questions about the brain (PC-R. 2013-14).

Dr. Haber then stated that Mr. Parker suffers from an anti-social personality disorder (PC-R. 1949; 1978). On cross-examination, however, Dr. Haber explained that this diagnosis was the result of a mere single question asked during the entire examination, and not the result of any psychological testing. The statement, as he admitted, could be supported by none of the requisite facts (PC-R. 1978-79). Dr. Haber admitted that he had not found information to substantiate the criteria for a diagnosis of an anti-social personality disorder as required by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IIIR)[1] (PC-R. 1982-95) and that the criteria in the DSM-IIIR had to be affirmatively found before such a diagnosis could be made (PC-R. 2009). Instead, Dr. Haber relied on the 1981 general statement in Dr. Stillman's report (PC-R. 1990). Dr. Haber did concede that Dr. Stillman did not state that the criteria for making this diagnosis were met (PC-R.

[1]Dr. Haber explained that the DSM-IIIR is "a Diagnostic and Statistical Manual put forth by psychologists and psychiatrists . . . to standardize the diagnostic techniques in the field, to give some criteria" (R. 2010).

1993), and noted that he did not rely on any conclusions that Dr. Stillman may have reached (PC-R. 2013). Dr. Stillman, as he had earlier testified, had never found that Mr. Parker had an antisocial personality disorder, but no one asked him the needed questions at the time of trial or sentencing.

Dr. Haber's testimony only serves to substantiate what Dr. Stillman would have testified to at Mr. Parker's original trial, had he been provided with information that he requested. Mr. Parker suffers from brain damage as a result of an abysmal childhood, several severe head injuries, and substantial drug and alcohol abuse. The sentencing jury heard none of this, due to the ineffective assistance of counsel at trial.

Norman Parker served in the military—the jury never heard this. Norman Parker had a family—the jury never learned this. Norman Parker is emotionally and mentally impaired—the jury never saw this. Norman Parker grew up in an abysmal environment, an environment plagued by racism and poverty—the jury was never informed of this. That upbringing affected his later conduct—no one explained this. Counsel did not even pursue readily available mental health mitigating information, although the expert wrote to counsel requesting information. Counsel did not seek a report from Dr. Stillman until the guilt phase had begun, and even after they received Dr. Stillman's letter, they ignored the red flags in the report and never even discussed Mr. Parker with Dr. Stillman. This

case truly fell through the cracks.

Trial counsel's delegation of preparation and abrogation of his independent duty to assure adequate investigation of penalty phase mitigation was professionally unreasonable. Had trial counsel conducted a thorough investigation, he would have discovered evidence which could have been presented at the penalty phase of Mr. Parker's trial.

This Court's ruling with respect to Mr. Parker's ineffective assistance of counsel claim merely accepts the circuit court's inexplicable findings that trial counsel, despite doing basically nothing, provided constitutionally sound and effective assistance to Mr. Parker in his penalty phase. The findings in this case are starkly in violation of *Porter*.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. 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. 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." *Id*. That

admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage 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, is the requirement that courts in turn must engage with that evidence to form an image of each defendant's humanity. *See id.* at 454. 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 the Florida Supreme 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)). Such information was simply not provided to the jury.

Current proceedings

On November 23rd, 2010, Mr. Parker 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. 12-32). The State responded (R3. 46-65) and the circuit court entered an order denying relief on February 14th, 2011 (R3. 73-77). Mr. Parker 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. Parker'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 Parker 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. Parker's case, a determination for which deference is given findings of historical fact. All other facts must be viewed in relation to how Mr. Parker's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009); *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. PARKER'S SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*

Mr. Parker was deprived of the effective assistance of trial counsel at the resentencing. This Court denied Mr. Parker'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. Parker'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. Parker'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. Parker'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. Parker, 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. Parker 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. Parker seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Parker seeks the proper application of the *Strickland* standard. Mr. Parker 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. Parker'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 Parker 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]

[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.

Thus, we are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Parker 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 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); *Parker 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 *Parker* and *Downs* ordering resentencings in both cases. In *Parker*, 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

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; *Parker 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

---

change in law that potentially affects a class of petitioners, including Parker, 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.

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 *Hitchcock* "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).

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 *Parker* 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]

> Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in *Songer v. State*, 365 So. 2d 696 (1978) (per curiam), which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

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

[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).

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, *Porter* also 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 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

---

[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.

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 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

[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); *Parker 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).

Rose, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*.[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.

[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.

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. 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

[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.

actually went through in Korea." *See id*. That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage 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. Parker 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. Parker 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. Parker'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. Parker's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

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

Mr. Parker was deprived of the effective assistance of counsel during his penalty phase and this Court committed *Porter* error in denying his claim.

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. Parker's substantial claim of ineffective assistance of counsel has not been given the consideration required by *Porter*. Mr. Parker 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.

RACHEL L. DAY
Assistant CCRC
Florida Bar #0068535

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 11th day of July 2011.

RACHEL L. DAY
Assistant CCRC
Florida Bar #0068535

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. PARKER

Copies furnished to:

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