**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC11-474**

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**VICTOR TONY JONES,**

**Appellant,**
**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jones's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" - record on direct appeal to this Court;

"RS" - resentencing record on direct appeal;

"PCR" & "PCR-2" -- records on prior 3.850 appeals to this Court;

"SuppR" – Supplemental record on relinquishment of jurisdiction

"PCR-3" - record on first successive 3.851 appeal to this Court;

"PCR-4" - record on the instant appeal.

## REQUEST FOR ORAL ARGUMENT

Mr. Jones has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jones, through counsel, accordingly urges that the Court permit oral argument.

## INTRODUCTION

In *Porter v. McCollum*, the United States Supreme Court issued a full scale repudiation of this Court's *Strickland* jurisprudence. The Supreme Court held that this Court's application of *Strickland* 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 under the rubric of the most deferential of review standards established by the Anti-Terrorism Effective Death Penalty Act ("AEDPA"), which requires that federal courts to treat state court adjudications with an extremely high level of deference. This high level of deference requires that a federal court may only alter a state court adjudication if its application of federal law was unreasonable, meaning not even supported by reason or 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 it was appropriate to reach past its concerns of federalism and deference to state courts and respect for state sovereignty to correct the unconstitutional ruling.

Mr. Jones asks this Court to consider *Porter* introspectively and deeply, 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, simply distinguishing *Porter* on its facts fails to identify the underlying constitutional problem; Mr. Jones 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 also occurred in the present case.

## STATEMENT OF THE CASE AND FACTS

### Procedural History

The Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, Florida, entered the judgments of convictions and sentences under consideration. After a jury trial, Mr. Jones was found guilty of two counts of first-degree murder and related offenses. The jury recommended death, and the trial judge imposed two death sentences. On direct appeal, this Court affirmed Mr. Jones' convictions and sentences. *Jones v. State*, 652 So. 2d 346 (Fla.), *cert. denied*, 116 S. Ct. 202 (1995). On March 24, 1997, Mr. Jones filed an initial Rule 3.850 motion. (PCR.

38-77). An amended motion was subsequently filed (PCR. 93-202), along with a motion alleging that Mr. Jones was not competent.[1] Following evaluations and an evidentiary hearing, the lower court found that Mr. Jones was competent to proceed following a bifurcated hearing that concluded on September 3, 1999. A final amended postconviction motion was thereafter filed. (PCR. 203-314). Following a *Huff*[2] hearing, the lower court granted an evidentiary limited to the issue of ineffective assistance of counsel as to voluntary intoxication and mitigation. (PCR. 365). An evidentiary hearing was conducted on various separate dates, and an order denying relief was entered. (PCR. 379-96). A timely notice of appeal was filed. (PCR. 397). The Florida Supreme Court affirmed the denial of the motion for post conviction relief. *Jones v. State*, 855 So. 2d 611 (Fla. 2003).

Two evidentiary hearings were held; one during the initial postconviction proceeding and one after this Court relinquished jurisdiction for a hearing on Mr. Jones' claim of mental retardation. The circuit court denied Mr. Jones all relief. This Court affirmed the denial of Mr. Jones's motions for postconviction relief. *Jones v. State*, 855 So. 2d 611 (Fla. 2003); *Jones v. State*, 966 So. 2d 319 (Fla. 2007).

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[1] *See Carter v. State*, 706 So. 2d 873 (Fla. 1997).

[2] *See Huff v. State*, 622 So. 2d 982 (Fla. 1993).

On November 29, 2010, Mr. Jones 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*. (PCR-4 p. 36-80). The After a case management conference on January 11, 2011, the court entered an order denying Mr. Jones relief.

**Facts Relevant To This Appeal**

During the postconviction evidentiary hearings the following evidence was presented.

Dr. Brad Fisher, a forensic psychologist, testified that trial counsel Mr. Koch retained him to evaluate Mr. Jones. (PCR. 632-635). He only conducted a general preliminary evaluation to develop a "rough sense" of Mr. Jones' mental health situation. (PCR. 657-38). He did not recall receiving materials from Koch and his file contained no records. (PCR. 639). Nor did he recall speaking with Koch about why he was not going to be called as a witness (*Id*.). Fisher was later contacted by collateral counsel, and met with and evaluated Mr. Jones again in May and June of 2000. (PCR. 640-41). He was then provided with a number of background materials, including prior testimony and mental health evaluations, school records, prison records, medical records, affidavits of family members and acquaintances, records from a Jackson Memorial Hospital hospitalization in 1975, and public

defender social worker Marlene Schwartz's investigative notes. (PCR. 641-43). He also reviewed records surrounding an arrest of Laura Long's son, Lawrence, for a 1984 murder in Georgia. (PCR. 646). Fisher also personally interviewed members of Mr. Jones' family (PCR. 647). All of this material was necessary for Fisher to form opinions and conclusions in Mr. Jones' case. (PCR. 648).

Based on his evaluation, Fisher uncovered mitigating factors that he could have explained to the jury. Specifically, he stated,

> It is my opinion that the disruptive, chaotic and troublesome in the extreme developmental background, such as, I believe he had included both his mother and Laura because he was raised by both at different times, was a significant mitigating factor. That's one.
>
> Secondly, it is my opinion that, again, with data that is, I believe, not controverted and coming from many sources, that his abuse of drugs, consistent abuse of alcohol and drugs from a very early age. I'm not talking about 15. I'm not really even talking about ten. I'm talking about younger than that, with the genetic background that includes a mother who is an alcoholic, was and is, whatever the word, a significant factor.
>
> Third, the prison records and my own interviews suggest some neurological problems. That's very hard to differentiate to what nature and extent they can be attributed specifically to the time that he was shot at the time of the crime versus existed there before.

(PCR. 649-50). According to Dr. Fisher, at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct to the requirements of the law was substantially impaired. (PCR. 652). He was also under the influence of an extreme mental or emotional disturbance at the time of the crime (*Id.*).

Dr. Fisher further discussed a report from Jackson Memorial Hospital about Mr. Jones' 1975 psychiatric admission, which indicated that an admitting diagnosis was chronic schizophrenia, borderline mental retardation and a discharge diagnosis of unsocialized aggressive reaction of adulthood. (PCR. 655) (R.2 85-94). The report also provided a history of Mr. Jones' background, including a pediatric admission in the intensive care unit for three months. (PCR. 656). This information was important to Dr. Fisher because he "saw those factors as significant to the diagnosis that [Mr. Jones] got when he was admitted, the length of stay, the double stays, meaning he's going in at 14 three or four months and again for 39 days in 1975, they play a role in the different opinions that I have expressed today." (PCR. 657). This and other reports "give consistent information about some of the troubles in his development, both in the mother and her abuse of alcohol and in the strictness of Laura, his aunt, and the problems with some of the siblings and some of his own problems at school and with drugs." (*Id*.).

Dr. Fisher testified about additional information concerning "noteworthy items" in the records he reviewed, such as prior DOC records indicating that Mr. Jones had a history of car accidents and falls resulting in his being knocked unconscious, as well as use of all types of drugs. (PCR. 689). The prior DOC records also indicated an IQ test revealing a full scale score of 76 which placed Mr. Jones in "the territory of borderline intelligence, close to retardation." (*Id*.). Fisher

noted that these records predate the crime. (PCR. 690). The 1975 JMH report also referred to borderline intelligence. (*Id*.). In 2000, Fisher re-evaluated Mr. Jones on two separate occasions and he concluded that Mr. Jones had a horrible developmental background based on his interviews with Mr. Jones and his family members. (PCR. 735-738). With regard to the 1975 JMH admission, Dr. Fisher did not know whether Mr. Jones ever received any treatment for schizophrenia, but the report suggested follow-up evaluations. (PCR. 748). He also was aware that Mr. Jones had been in and out of several drug treatment facilities. (PCR. 748).

Dr. Hyman Eisenstein also testified that trial counsel retained him to evaluate Mr. Jones and to conduct neuropsychological testing. (PCR. 787; 790). Trial counsel had provided him with limited background information. (PCR. 790). Dr. Eisenstein testified at a competency hearing conducted between the guilt and penalty phases of trial, as well as at the sentencing before the judge and opined that Mr. Jones was incompetent to proceed "based on the frontal lobe injury that he sustained and manifested by the inability to regulate and control his behavior, especially under stress." (PCR. 791-92).[3] He also evaluated Mr. Jones in

[3] Mr. Jones' competency was raised in postconviction as a due process issue and trial counsel's failure to request a competency evaluation pre-trial was raised as an ineffective assistance of counsel issue pursuant to *Strickland*. See *Jones v. State*, 855 So. 2d 611, 615 (Fla. 2003);(PCR 255-259). The evidentiary hearing included testimony from Dr. Eisenstein concerning these issues, but the lower court denied relief. A separate competency hearing was concluded on September 3, 1999, prior

postconviction. He performed another IQ test and a brief interview. (PCR. 793). When he worked with trial counsel prior to trial, Dr. Eisenstein saw Mr. Jones numerous times and conducted two comprehensive neuropsychological examinations, one in 1991 and the second in 1993. (PCR. 793). In terms of the collateral evaluation, Dr. Eisenstein was provided with and reviewed numerous background materials not provided previously. (PCR. 795-96; 802-03). At trial, Eisenstein spoke only with Mr. Jones's aunt, while in postconviction he spoke with other family members who confirmed Mr. Jones's accounts of abuse. (PCR. 797).

Dr. Eisenstein would have testified at Mr. Jones's penalty phase about past psychological and psychiatric problems, substance abuse problems, cognitive intellectual deficits, poor academic background, and family dysfunction. (PCR. 804). He also concluded, to a reasonable degree of professional certainty, that at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, even before he was shot in the head at the crime scene. (PCR. 805). Moreover, he testified that at the time of the crime, Mr. Jones was under the influence of an extreme mental or emotional disturbance and was intoxicated at the time of the crime. (PCR. 805)

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to the evidentiary hearing, after which the court found Mr. Jones competent to proceed. (PCR. 379; 388-89)

Dr. Eisenstein testified that the 1975 JMH admission report was significant because it indicated that Jones had been at different institutions and youth homes and had been labeled as borderline mentally retarded with an IQ in the 70-79 range. (PCR. 808). It also indicated that Mr. Jones was depressed, angry, exhibited looseness of talk, and his affect and mood were indicative of schizophrenia. (PCR. 809). The JMH report disclosed that Mr. Jones suffered from visual and auditory hallucinations that have content common to paranoid individuals, that the hospital recommended close observation and follow-up, and that Mr. Jones "does not remember any happy moment in his life." (PCR. 809-10). It further detailed Mr. Jones' troubles with drugs, difficulties in school, and his mother's alcoholism. (PCR. 811).

Dr. Eisenstein found the information in the JMH report consistent with his family interviews and with other records including Florida DOC testing in 1988 indicating an IQ of 76 in existence prior to the capital charges. (PCR. 811-815). Dr. Eisenstein's testing in 1991, 1993, and 1999 was corroborated by the 1975 and 1988 reports (which he did not have at trial) confirming that Mr. Jones had intellectual functioning in the borderline range. (PCR. 816-17).

Dr. Eisenstein's opinion in postconviction was that Mr. Jones had neuropsychological problems prior to sustaining the frontal lobe injury at the time of the offense. (PCR. 857). The records indicate that he was a slow learner, and

his school records revealed that he obtained approximately 80% C's when he was seven and eight, and after that they were basically all F's. (PCR 875). The records Dr. Eisenstein was not provided at trial supported borderline mental retardation. (PCR. 875). Mr. Jones also had car accidents and drug overdoses, which can create neuropsychological impairment, according to Dr. Eisenstein. (PCR. 858). Based on this new constellation of information, Eisenstein's opinion was that Mr. Jones had "a considerable amount of deficits in other areas of brain behavior activity." (PCR. 858).

Dr. Eisenstein testified that in 1992 he spoke with only one relative, Aunt Laura Long, briefly on the telephone. (PCR. 877-78). Eisenstein opined that "if resources are put into finding family members, often they can be found, but it's a very time consuming task." (PCR. 878). Presumably trial counsel did not seek to expend the resources because Dr. Eisenstein explained he was never asked to interview anyone but Laura Long, and that if had asked him to interview others, he would have. (PCR. 937). He testified that Mr. Jones' performance in school, based on records review, was very poor. (PCR. 880-83). The 1975 JMH report, along with other new information, corroborated his conclusions about Mr. Jones' intellectual functioning and he opined that the doctors at JMH would not have kept him for five weeks in the hospital if they did not believe that Mr. Jones had some type of mental disorder. (PCR. 884-88).

Dr. Eisenstein testified that Mr. Jones was not of average intellectual functioning because he "presents with severe neurological deficits," his intellectual level is in the "borderline" or "mild mental deficiency range," has "deficits in his thinking process, his abstraction, in his ability to formulate conceptual thinking." (PCR. 918).

Dr. Jethro Toomer, a forensic and clinical psychologist, testified that trial counsel asked him to determine Mr. Jones' mental status functioning and issues related to mitigation. (PCR. 1089). He acknowledged knowing that Mr. Jones had said he had been physically punished by his cousin, but denied knowing details. (PCR. 1116). Although he was told that Mr. Jones had been in the JMH psychiatric ward, he never saw any records from that admission and was told the records did not exist. (PCR. 1110; 1118). He testified that the new data reinforced his opinions with respect to Mr. Jones's overall functioning. (PCR. 1130).

At the case management conference on the instant successive 3.851 motion, counsel moved for a competency hearing because it was believed Mr. Jones was not competent given recent phone conversation and personal visits with him as well as letters Mr. Jones sent Judge Zlock, the federal district judge presiding over his federal habeas corpus petition. (PCR-4 p.84-90). It was counsel's position that Mr. Jones' lack of competence prevented him from executing the verification on the 3.851 motion. (PCR-4 p.161). The court denied the motion without prejudice and

the matter proceeded. (PCR-4 p.163). Subsequently, the circuit court denied the motion. (PCR-4 p. 118-123).

## STANDARD OF REVIEW

Mr. Jones has presented several issues which involve mixed questions of law and fact. Thus, a *de novo* standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

## SUMMARY OF THE ARGUMENT

Mr. Jones was deprived of the effective assistance of trial counsel. This Court denied Mr. Jones' 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. Jones' 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 rendering Mr. Jones' *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. Jones' 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).

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 Thompson 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. Thompson's case, a determination for which deference is given findings of historical fact. All other facts must be viewed in relation to how Mr. Thompson'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. JONES' CONVICTION AND DEATH SENTENCE VIOLATE THE CONSTITUTION WHERE THEY ARE PREDICATED UPON A TRIAL PROCEEDING THAT WAS MARRED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE FACTS DETAILING SUCH INEFFECTIVENESS HAVE NOT BEEN ADEQUATELY ANALYZED PURSUANT TO ESTABLISHED UNITED STATES SUPREME COURT'S DECISION IN PORTER V. MCCOLLUM.**

### A. *Porter v. McCollum*.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limiting the circumstances under which a defendant may obtain relief in federal habeas proceedings. Under the AEDPA, any claim that was adjudicated on the merits must be reviewed in accordance with certain limitations:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in

> light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). It was in the context of this strict standard that the U.S. Supreme Court agreed with the district court's grant of relief in *Porter v. McCollum:*

> 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 either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.

*Porter v. McCollum*, 130 S. Ct. 447, 454-55 (2009). This was not simply a case in which the high court merely disagreed with the outcome or even a case where the U.S. Supreme Court decided that this Court's decision in *Porter v. State* was just wrong. Rather, the U.S. Supreme Court held that the decision was so unreasonable that the usual concerns of federalism, as codified by the AEDPA, were not sufficient to allow the death sentence to stand.

In *Strickland v. Washington*, the U.S. Supreme Court found that, in order to ensure a fair trial, the Sixth Amendment requires that defense counsel provide effective assistance to defendants by "bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 685 (1984). Where defense counsel renders deficient performance, a new resentencing is required if that deficient performance prejudiced the defendant such that

confidence is undermined in the outcome. *Id*. at 694. To prove prejudice, "[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 Supreme Court, in *Porter* analyzed this Court's *Porter* decision under the rubric of the AEDPA. This is a critically important distinction since the AEDPA offers state courts the highest level of deference when being reviewed by a federal court. In order for a defendant to get relief in federal court under AEDPA the state court decision must amount to an "unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). In this case the established federal law as determined by the Supreme Court is the standard for ineffective assistance of counsel enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). In order for the Supreme Court to have granted Mr. Porter relief it had to look at the analysis this Court performed in *Porter v. State*, 788 So. 2d 917 (Fla. 2001). When the Supreme Court conducted

that analysis even granting this Court all due deference under AEDPA, it concluded that this Court's use and application of the *Strickland* standard was unreasonable. When the Supreme Court properly applied the *Strickland* standard it concluded that Mr. Porter was entitled to the relief this Court forbade him. Likewise, when the *Strickland* as was reaffirmed in *Porter* is properly applied to Mr. Jones' case it becomes evident that he is entitled to relief.

### B. Mr. Jones's *Porter* claim is cognizable under *Witt* and rule 3.851

The *Porter* decision establishes that the previous denial of Mr. Jones's ineffective assistance of counsel claims 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. Jones'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. Jones'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 the Florida Supreme Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

However, 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. This 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).

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," *Id*. at 928, this Court declined to follow the line of United States Supreme Court cases addressing the issue, which it characterized 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).

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.

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 the Florida Supreme Court and the United States Supreme Court. *Id.* at 930. The Florida Supreme 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.

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 the Florida Supreme 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); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).

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 the mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. See *Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that the Florida Supreme 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 the Florida Supreme 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. Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness 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.

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 too *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 sentence was contrary to or an unreasonable application of *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 the Florida Supreme Court's analysis of *Lockett*, *Porter* rejects the Florida Supreme Court's analysis of *Strickland* claims. 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.

Just as the Florida Supreme Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, the Florida Supreme

Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

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). This Court continued applying its case law and declared that,

> Having resolved the conflict of the expert opinion, the trial court concluded that the defendant failed to demonstrate the existence of the alleged mitigation. Accordingly, the trial court held that trial counsel's decision not to pursue mental evaluations did not exceed the bounds for competent counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In view of the trial court's factual finding, **we**

> **agree that the trial court's conclusion that trial counsel was not ineffective is legally correct under *Strickland. See Stephens v. State,* 748 So.2d at 1034**.

*Id*., at 923-24(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.[4]

[4] 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. This is because the judges credibility finding could not possibly have affected the jury's determination had it heard the evidence. *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995)

This Court, in its *Porter* decision failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, 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." *Porter*, 130 S.Ct. 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).

### C. *Porter* is not limited to its facts.

The circuit court erred in finding that the opinion in "*Porter* is merely the application of *Strickland* to the particular facts of that case and does not provide a basis for this court to reconsider the Defendant's postconviction claims." (PCR-4. 69). Mr. Jones has not argued or suggested that *Porter* represents a change in the

evaluation of prejudice under federal law; rather, it represents a change in how **this** Court has approached that analysis under *Strickland*. In other words, the fact that this Court cited to *Strickland's* test does not mean that the required painstaking search for constitutional error has taken place. *See e.g. Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). In *Sears v. Upton,* the U.S. Supreme Court noted 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." *Sears* at 3264 (emphasis added) . The finding that Mr. Jones' claim is procedurally barred was based on the lower court's misunderstanding of the claim. (PCR-4. 70).

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), this Court relied upon the language in *Porter v. State* 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. 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. In *Rose*, the Florida Supreme Court employed a less deferential standard. As explained in *Stephens*, the Florida Supreme 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. The Florida Supreme Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the court made clear that even under this less deferential standard:

> [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 that 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. *Porter v. State* was not an aberration; rather, it was based on this Court's entrenched case law. *Id.* at 923.

**D. *Porter* requires a re-evaluation of Mr. Jones's postconviction claims.**

From an examination of the Florida Supreme 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 the Florida Supreme 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.

Mr. Porter's troubled history, as Mr. Jones's, included childhood abuse. *Id.* at 454. The United States Supreme Court found that it was "unreasonable to discount to irrelevance the evidence of Porter's abusive childhood." *Id*. at 455. *Porter* makes clear that the failure to present the kind of troubled history relevant

for the jury in the penalty phase to assess moral culpability 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*. The Florida Supreme Court relied on *Rose* in upholding the postconviction court's conclusion that trial counsel's penalty phase investigation was reasonable and that Mr. Jones failed to establish prejudice even though the trial court found nothing in mitigation. *Jones v. State*, 855 So. 2d at 617-618. ("At the evidentiary hearing, [Mr. Jones] presented the testimony of his sister and cousin to corroborate his claim [that he was frequently beaten during his childhood]. . .[T]he court found both her testimony and that of [Mr. Jones's] cousin was not credible and was contradicted by the evidence [Mr. Jones's] trial counsel was actually able to obtain at the time of trial").[5] Because the United States Supreme Court has found the Florida Supreme Court's prejudice analysis used in

[5] Pamela Mills, Mr. Jones' older sister, testified at the evidentiary hearing (PCR. 944). She testified that her siblings included Victor, Lionel, who was killed in Miami, and brothers Frank and Michael and one sister, Valerie (PCR. 947). Their mother's name was Constance Laverne Jones, who died in 1982 (PCR. 949). Mills stated that she was born on November 10, 1957, and when she was 6 or 7 went to live with her Aunt Laura (PCR. 949). Victor and their cousin Carl were also living with Laura, as was Laura's son, Lawrence (PCR. 950). Laura's boyfriend/husband, Reverend Long, was also in the house (Id.). Laura treated them like a stepchild "with all of this abuse going on in the household, both physical and sexually" (PCR. 951). Victor was also "very slow in school" and had learning disabilities; this was one of the things that Laura "would get on us about, especially him" (PCR. 959). Mr. Jones's cousin Leon also testified at the evidentiary hearing in detail in support of child abuse and familial criminal drug abuse history.

this case to be in error, Mr. Jones's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

By way of illustration, suppose Mr. Jones' trial is represented by a cup filled with coins where there are five quarters and the rest pennies. During the postconviction evidentiary process more pennies are added to the cup. In order to find out if counsel provided effective assistance, *Strickland* asks, what is the reasonable probability that the pennies outweigh the quarters? Instead of answering that question, the circuit court and this Court looked in the cup and declared there were five quarters and that those quarters were reasonably likely to outweigh the pennies. The declaration that there were five pennies is a perfectly accurate conclusion but it is not the answer to the question *Strickland* poses. In order to answer that question, all the coins must be taken out of the cup separated into their respective piles and reweighed in light of the new pennies added during postconviction with the eye to determine if there is a reasonable probability pennies outweigh the quarters.

It should also be noted that where a reasonable probability is the quantum sought, it does not render the two possible outcomes mutually exclusive or render this process a zero-sum game. In other words, it could be both reasonably likely the pennies weigh more than the quarters and reasonably likely that the quarters weigh more than the pennies. If it is both reasonably probable that the non-

presented evidence would have made a difference and reasonably probable that the evidence in aggravation would negate the non-presented evidence, then the defendant must be granted relief because *Strickland* is only concerned with the reasonable probability that the non-presented mitigation evidence would have changed the outcome, not the other way around.

From a *Strickland* point of view, the quarters should not be the focus of the inquiry. This does not mean the quarters are not considered, they must be. However, the inquiry is whether it is reasonably likely the pennies weigh more, which renders the focus on the pennies with the quarters only being considered in relation to the pennies. Attempting to answer the question without this careful weighing process fails the fundamental inquiry enunciated in *Strickland* and plainly re-stated in *Porter*, which mandates that "to properly asses the probability of a different outcome under *Strickland*, courts must "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." *Porter*, 130 S.Ct. at 453-54, quoting *Williams v. Taylor*, 529 U.S. 362, 387-398 (2000). *See also*, *Sears v. Upton*, 130 S. Ct. 3266 (2010). Thus, the focus is squarely on the mitigation (or pennies). Focusing formost on the aggravation (or quarters) taints the process and tilts it unreasonably infavor of unreasonably overwighing it in relation to the mitigation (or pennies). This shifts

the focus of the analysis away from the mitigation (pennies) and entices a court to dismiss into irrelelvance those mitigating factors because it is focusing on the aggravation (or quarters). Put more starkly, 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)). Thus, courts must painstakingly search for all the pennies while acknowledging the existence of the quarters and not the other way around.

Furthermore, 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. 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 trial. 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.

Therefore, Supreme Court precedent requires a court reviewing innefectiveness claims under *Stirckland* to speculate only about the new evidence in mitigation. A proper *Strickland* analysis "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. Thus, a court is required to speculate as to how the mitigating evidence may have changed the outcome of the trial rather than speculating how the agravating evidence negates the mitigating evidence. *Porter* requires the former while this Court has, in violation of *Porter*, engaged in the latter. In other words, 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 unreasonably 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 correctly quote the *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.

The insidious subtlety of the above error is starkly represented by the circuit court's declaration that postconviction proceedings are "Monday-morning quarterbacking" because "an evidentiary hearing that occurred as part and parcel of an original post-conviction relief motion for ineffective assistance that presented a lot of after-the-fact Monday-morning quarterbacking." (PCR-4 p. 188). This declaration reveals a very distinct bias in the way postconviction proceedings are perceived by the bench. Implicit the court's statement is the idea that a trial court and an appellate court already reviewed the case and saw no error so there is no reason the postconviction court should, yet again, expend energy to meaningfully engage in the facts and fully review the case. (PCR-4 p. 190-191). It should be noted that in the case of Mr. Porter, the circuit court, this Court on direct appeal, the circuit court on postconviction, this Court again on the postconviction appeal, the United States District Court presiding over a habeas corpus petition and the

Eleventh Circuit Court of Appeal on habeas review all reviewed his case. Only after the United States Supreme Court reviewed Mr. Porter's was he granted relief.

It is seriously doubtful that the efforts of the United States Supreme Court are given sufficient respect by referring to them as "Monday-morning quarterbacks." Indeed, it is the engagement in the facts that so concerned the Supreme Court in granting Porter relief. Sloughing off the facts as another attempt at an inmate's lawyer playing Monday-morning quarterback is the exact reason Mr. Porter's case was reviewed and dismissed so many times. In fact, such a jaundiced eye discounts the entire postconviction process to irrelevance in violation of *Porter*. The insidiousness of this error is even more apparent in the fact that the so-called Monday-morning quarterbacking conducted by the United States Supreme Court in *Porter,* quite emphatically, determined that trial counsel's, and this Court's, Sunday-afternoon performance was so unreasonable as to be constitutionally defective.

Extending the illustration from above, courts must not focus on quarters to answer the question of whether there are pennies and how much they weigh. By focusing on the larger shinier coin (the non-mitigating evidence) and asking if that would support the outcome, courts fail to address the correct prejudice inquiry and actually reverse the inquiry in *Strickland*. 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 make 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 looking for a collection of quarters in the cup that supports the conclusion that there are no pennies to be found. Rather, Florida courts must take painstaking care in scrutinizing a postconviction record for anything and everything that might add up to something that probably would have made a difference. *See Porter v. McCollum*, 30 S. Ct. 447 (2009); *Sears v. Upton*, 130 S. Ct. 3266 (2010). Any other process is an unreasonable application of clearly established United States Supreme Court law.

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's 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's 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 committed by the Georgia Supreme Court, the United States Supreme 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 is unreasonable and will not

satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Jones' 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.

*Porter* error was committed in Mr. Jones's case. Contrary this Court's opinion, the testimony presented at Mr. Jones's postconviction evidentiary hearing concerning the investigation of the guilt phase and penalty phase and the case in mitigation was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase," *State v. Lara*, 581 So. 2d 1288, 1290 (Fla. 1991), was in no way controverted by the limited evidence presented by the State and, in any event, "'might well have influenced the jury's appraisal' of [Mr. Jones's] moral culpability," *Wiggins v. Smith*, 539 U.S. 510, 525 (2003), had the jury been afforded the opportunity to hear it.

Substantial mitigation evidence was presented at the postconviction evidentiary hearings. For instance, Dr. Brad Fisher that he merely conducted a general preliminary evaluation to develop a "rough sense" of Mr. Jones' mental health situation. (PCR. 657-38). Subsequently Fisher was contacted by collateral counsel, and he saw Mr. Jones again in May and June of 2000. (PCR. 640-41). Dr. Fisher was provided with a number of background materials not previously

provided to him by trail counsel, including prior testimony and mental health evaluations, school records, prison records, medical records, affidavits of family members and acquaintances, records from a Jackson Memorial Hospital hospitalization in 1975, and public defender social worker Marlene Schwartz's investigative notes. (PCR. 641-43). He also reviewed records surrounding an arrest of Laura Long's son, Lawrence, for a 1984 murder in Georgia (PCR. 646). Fisher interviewed members of Mr. Jones' family (PCR. 647). All of this material was necessary for Fisher to form opinions and conclusions in Mr. Jones' case. (PCR. 648).

Based on his evaluation, Fisher opined that there was mitigation that he could have testified to:

> It is my opinion that the disruptive, chaotic and troublesome in the extreme developmental background, such as, I believe he had included both his mother and Laura because he was raised by both at different times, was a significant mitigating factor. That's one.
>
> Secondly, it is my opinion that, again, with data that is, I believe, not controverted and coming from many sources, that his abuse of drugs, consistent abuse of alcohol and drugs from a very early age. I'm not talking about 15. I'm not really even talking about ten. I'm talking about younger than that, with the genetic background that includes a mother who is an alcoholic, was and is, whatever the word, a significant factor.
>
> Third, the prison records and my own interviews suggest some neurological problems. That's very hard to differentiate to what nature and extent they can be

> attributed specifically to the time that he was shot at the time of the crime versus existed there before.

(PCR. 649-50). Dr. Fisher concluded that, at the time of the crime, Mr. Jones' capacity to appreciate the criminality of his conduct to the requirements of the law was substantially impaired. (PCR. 652). He was also under the influence of an extreme mental or emotional disturbance at the time of the crime. (*Id.*).

Dr. Fisher noted that a report from Jackson Memorial Hospital from 1975 indicated that Mr. Jones was psychiatrically admitted to the hospital being diagnosed with chronic schizophrenia, borderline mental retardation and a discharge diagnosis of unsocialized aggressive reaction of adulthood. (PCR. 655) (R.2 85-94). The report provided a history of Mr. Jones' background, including a pediatric admission in the intensive care unit for three months. (PCR. 656). This information was significant to Fisher's ultimate opinion because he "saw those factors as significant to the diagnosis that he got when he was admitted, the length of stay, the double stays, meaning he's going in at 14 three or four months and again for 39 days in 1975, they play a role in the different opinions that I have expressed today." (PCR. 657). This and other reports "give consistent information about some of the troubles in his development, both in the mother and her abuse of alcohol and in the strictness of Laura, his aunt, and the problems with some of the siblings and some of his own problems at school and with drugs." (*Id.*).

Dr. Fisher testified about additional information concerning "noteworthy items" in the records he reviewed, such as prior DOC records indicating that Mr. Jones had a history of car accidents and falls resulting in his being knocked unconscious, as well as use of all types of drugs. (PCR. 689). The prior DOC records also indicated an IQ test revealing a full scale score of 76 which placed Mr. Jones in "the territory of borderline intelligence, close to retardation" (*Id*.). Fisher noted that these records predate the crime (PCR. 690). The 1975 JMH report also referred to borderline intelligence. With regard to the 1975 JMH admission, Dr. Fisher did not know whether Mr. Jones ever received any treatment for schizophrenia, but the report recommended follow-up evaluations. (PCR. 748). He was aware that Mr. Jones had been in and out of several drug treatment facilities (PCR. 748). In 2000, Dr. Fisher re-evaluated Mr. Jones on two separate occasions and he concluded that Mr. Jones had a horrible developmental background based on his interviews with Mr. Jones and his family members. (PCR. 735-738).

Dr. Hyman Eisenstein testified that trial counsel retained him to evaluate Mr. Jones and to conduct neuropsychological testing. (PCR. 790). He was provided with limited background information. (PCR. 790). Dr. Eisenstein testified at a competency hearing conducted between the guilt and penalty phases of trial, as well as at the sentencing before the judge and opined that Mr. Jones was incompetent to proceed "based on the frontal lobe injury that he sustained and

manifested by the inability to regulate and control his behavior, especially under stress." (PCR. 791-92). He also evaluated Mr. Jones in postconviction. He performed another IQ test and a brief interview. (PCR. 793). When he worked with trial counsel prior to trial, Dr. Eisenstein saw Mr. Jones numerous times and conducted two comprehensive neuropsychological examinations, one in 1991 and the second in 1993. (PCR. 793). In terms of the collateral evaluation, Eisenstein was provided with and reviewed numerous background materials not provided to him previously by trial counsel. (PCR. 795-96; 802-03). At trial, Eisenstein spoke with Mr. Jones's aunt, while in postconviction he spoke with other family members who confirmed Mr. Jones's accounts of abuse. (PCR. 797).

Given the opportunity, Dr. Eisenstein would have testified at Mr. Jones's penalty phase about past psychological and psychiatric problems, substance abuse problems, cognitive intellectual deficits, poor academic background, and family dysfunction. (PCR. 804). He also opined that to a reasonable degree of professional certainty, at the time of the crime, Mr. Jones's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, even before he was shot in the head at the crime scene. (PCR. 805). Moreover, he testified that at the time of the crime, Mr. Jones was under the influence of an extreme mental or emotional disturbance and was intoxicated at the time of the crime. (PCR. 805).

According to Dr. Eisenstein the 1975 JMH admission report was significant because it indicated that Jones had been at different institutions and youth homes and had been labeled as borderline mentally retarded with an IQ in the 70-79 range. (PCR. 808). It also indicated that Mr. Jones was depressed, angry, exhibited looseness of talk, and his affect and mood were indicative of schizophrenia. (PCR. 809). The report also indicated that there were visual and auditory hallucinations that have content common to paranoid individuals, that the hospital recommended close observation and follow-up, and that Mr. Jones "does not remember any happy moment in his life." (PCR. 809-10). It further detailed Mr. Jones' troubles with drugs, difficulties in school, and his mother's alcoholism. (PCR. 811). Dr. Eisenstein found the information was consistent with his family interviews and with other records including Florida DOC testing in 1988 indicating an IQ of 76 in existence prior to the capital charges. (PCR. 811-815). His testing in 1991, 1993, and 1999 was corroborated by the 1975 and 1988 reports (which he did not have at trial) confirming that Mr. Jones had intellectual functioning in the borderline range. (PCR. 816-17).

Dr. Eisenstein's opinion in postconviction was that Mr. Jones had neuropsychological problems prior to sustaining the frontal lobe injury at the time of the offense. (PCR. 857). The records indicate that he was a slow learner, and his school records revealed that he obtained approximately 80% C's when he was

seven and eight, and after that they were basically all F's. (PCR 875). The records Eisenstein was not provided at trial supported borderline mental retardation. (PCR. 875). Mr. Jones also had car accidents and drug overdoses, which can create neuropsychological impairment (PCR. 858). Based on this new constellation of information, Eisenstein's opinion was that Mr. Jones had "a considerable amount of deficits in other areas of brain behavior activity." (PCR. 858).

Dr. Eisenstein further testified that in 1992 he spoke with only one relative, Aunt Laura Long, briefly on the telephone. (PCR. 877-78). He opined that "if resources are put into finding family members, often they can be found, but it's a very time consuming task." (PCR. 878). Apparently trial counsel refused to expend the effort finding relatives because, Dr. Eisenstein was never asked to interview anyone but Laura Long. (PCR. 937) Had Dr. Eisenstein been asked to interview others he certainly would have. (PCR. 937). He testified that Mr. Jones' performance in school, based on records review, was very poor. (PCR. 880-83). He said the 1975 JMH report, along with other new information, corroborated his conclusions about Mr. Jones' intellectual functioning and he opined that the doctors at JMH would not have kept him for five weeks in the hospital if they did not believe that Mr. Jones had some type of mental disorder. (PCR. 884-88).

According to Dr. Eisenstein, Mr. Jones was below average intellectual functioning because he "presents with severe neurological deficits," his intellectual

level is in the "borderline" or "mild mental deficiency range," has "deficits in his thinking process, his abstraction, in his ability to formulate conceptual thinking." (PCR. 918).

Dr. Jethro Toomer, a forensic and clinical psychologist, that trial counsel asked him to determine Mr. Jones' mental status functioning and issues related to mitigation. (PCR. 1089). He met with Mr. Jones on three occasions. (PCR. 1090).

He acknowledged knowing that Mr. Jones had said he had been physically punished by his cousin, but denied knowing details. (PCR. 1116). Although he was told that Mr. Jones had been in the JMH psychiatric ward, he never saw any records and was told, by trial counsel, they did not exist. (PCR. 1110; 1118). He testified that the new data reinforced his opinions with respect to Mr. Jones's overall functioning. (PCR. 1130).

The jury in Mr. Jones's case never heard the substantial mitigation evidence outlined above. There was both deficient performance by trial counsel and prejudice resulting from that deficient performance pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). The Florida Supreme Court held in Mr. Jones's case that "defense counsel's decisions regarding which experts should testify was both reasonable and strategic in nature, and he cannot now be deemed ineffective for failing to call additional mental health witnesses to testify." *Jones* 855 So. 2d. at 618. The Court also found that the experts presented by the defendant at the

evidentiary hearing had contrary opinions. *Id*. at 618. Experts may disagree as to the presence or absence of statutory or non-statutory mitigation based on their own understanding of the law in Florida. This in no way supports a finding that their diagnostic impressions or mental health findings were contrary to one another or incredible. The very errors committed in *Porter* and described above were committed by the Florida Supreme Court in Mr. Jones's postconviction appeal.

Under *Porter*, the prejudice resulting from counsel's deficient performance is manifest. The issue here is whether the significant additional evidence in mitigation presented at the evidentiary hearing, evidence that would have influenced the jury's appraisal of Mr. Jones's moral culpability, would have made a difference where death was recommended by a vote of 12 to 0 and 11 to 1. It should be noted that the jury recommendation in *Porter* was 12 to 0 for death. Mr. Jones's unpresented mitigation mirrors that in *Sears*: (1) his caregivers had a physically abusive relationship; (2) he was a victim of child abuse; (3) familial verbal abuse; (4) behavior problems in school; (5) severe learning disabilities; (6) frontal lobe abnormalities; (7) head injuries; (8) drug/alcohol abuse; and (9) familial criminal history. All these factors were present in the postconviction presentation in the instant case.

Mr. Jones's case is one where the state courts found, as in *Sears*, that "counsel presented what could be described as a superficially reasonable

mitigation theory during the penalty phase." *Sears*, 130 S.Ct. at 3266. The circuit court's order in Mr. Jones's case failed 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. *Id*.

There was a reasonable likelihood that the trial court would have imposed a life sentence if the jury below had heard all the evidence, in spite of their recommendation for death at trial and the unrebutted evidence presented for the first time at the postconviction evidentiary hearing supporting Mr. Jones's border-line IQ, frontal lobe dysfunction, and family history of abuse and neglect. The Florida Supreme Court's analysis in this case is not the sort of probing and fact-specific analysis which *Porter* and *Sears* require.

Mr. Jones was sentenced to death by a judge who heard little and a jury who heard nothing of the available mitigation which would have allowed an individualized capital sentencing determination. Because counsel failed to pursue, develop, and present mitigation, confidence is undermined in the outcome of the sentencing proceeding. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different.

The Florida Supreme Court's ruling with respect to Mr. Jones's ineffective assistance of counsel claim merely accepts the circuit court's inexplicable findings that trial counsel provided constitutionally sound and effective assistance to Mr.

Jones in his penalty phase. The findings in this case discount to irrelevance the substantial mitigating facts presented in postconviction and are in violation of *Porter*.

The United States Supreme Court made clear in *Porter* that the Florida Supreme Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, the Florida Supreme 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 the Florida Supreme 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 the Florida Supreme 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 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 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 in this case and Mr. Jones is entitled to relief.

## CONCLUSION

Based on the foregoing arguments and authorities, Appellant, Victor Tony Jones requests this Honorable Court to reverse the circuit court's order and enter an order vacating his conviction and sentence and remanding this case for a new trial.

## CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, Sandra Jaggard, Capital Appeals Division, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, FL 33131-2407 this 14th day of June, 2011.

The undersigned counsel further CERTIFIES that this INITIAL BRIEF was typed using Times New Roman 14 Point font.


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