IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-493

WILLIAM THOMPSON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Thompson appeals the circuit court's denial of his successive motion for postconviction relief. In response to Mr. Thompson's argument that the decision in Porter v. McCollum, 130 S. Ct. 447 (2009) created a change in Florida Strickland jurisprudence that requires consideration and granting of Mr. Thompson's postconviction claims, the circuit court ruled that Porter does not represent a change in the law (Order at 5-9), that if it did, the change would nevertheless not be retroactive (Order at 9-12), and that even if Porter represented a retroactive change in law it would not merit relief in this case (Order at 12). Below, Mr. Thompson identifies errors in each of those rulings.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "R1" refers to the record on direct appeal to this Court from the 1976 sentencing; "R2" refers to the record on direct appeal to this Court from the 1978 sentencing; "R3" refers to the record on direct appeal to this Court from the 1989 resentencing; "PCR-I" refers to the first postconviction record on appeal to this Court from the denial of the 3.850 motion; "PCR-II" refers to the second postconviction record on 3.850 appeal to this Court; "PCR-III" refers to the record on the third successive postconviction motion; "PCR-IV" refers to the record on the present successive postconviction motion. All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

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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. Thompson 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. Mr. Thompson 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 Mr. Porter's penalty phase ineffectiveness claim and wholly different and separate from other *Strickland* analyses by this Court, or whether it is indicative of a global conceptual issue in this Court's traditional approach to analyzing *Strickland* that it also used in Mr. Thompson's case.

STATEMENT OF CASE AND FACTS

Case history

On April 14, 1976, Mr. Thompson and codefendant Rocco James Surace were charged by grand jury indictment in Dade County, Florida with the first degree murder, kidnapping and involuntary sexual battery of Sally Ivester (R1. 845-46). Mr. Thompson pled guilty to the charges (R1. 854). The jury recommended a sentence of death (R1. 886). The trial court sentenced Mr. Thompson to death on June 24, 1976 (R1. 887-89). Mr. Thompson was also sentenced to life imprisonment on the remaining charges, to run concurrent to his death sentence (R1. 887).

On direct appeal, this Court allowed Mr. Thompson to withdraw his plea and remanded the case for a new trial because Mr. Thompson was prejudiced by an "honest misunderstanding which contaminated the voluntariness of the pleas." *Thompson v. State*, 351 So. 2d 701 (Fla. 1977), *cert. denied*, 435 U.S. 998 (1978).

After remand, Mr. Thompson again pled guilty to the charges against him on September 18, 1978 (R2. 39-57). The jury recommended a death sentence on September 20, 1978 (R2. 198a, 562-64). The trial court imposed a sentence of death, and Mr. Thompson was sentenced to life imprisonment for the remaining charges, with the sentences to run concurrently (R2. 199a, 567-73).

Mr. Thompson's guilty plea and death sentence were affirmed on direct appeal to this Court. *Thompson v. State*, 389 So. 2d 197 (Fla. 1980). Mr. Thompson then filed a motion under Florida Rule of Criminal Procedure 3.850, which was denied by the trial court. The denial was affirmed by this Court. *Thompson v. State*, 410 So. 2d 500 (Fla. 1982).

After the denial of his 3.850 motion, Mr. Thompson sought federal habeas corpus relief. The United States District Court denied relief and the Eleventh Circuit Court of Appeals affirmed the denial. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987).

Mr. Thompson then filed a second Rule 3.850 motion, asserting the failure of the sentencing judge to allow presentation and jury consideration of non-

statutory mitigating circumstances in the penalty phase. The trial court denied relief, but this Court reversed under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and remanded for resentencing. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987), cert. denied, 484 U.S. 960 (1988).

At the resentencing, the State said in its opening statement, with no objection from defense counsel: "If I asked all of you to imagine the most horrible kind of death that you could imagine, Sally Ivestor suffered" (R3. 1602). During closing, the State vilified Mr. Thompson and incited the jury's political biases in a course of argument that was unrelated to the facts of the case:

> He's an anti-social personality, mean, bad, evil. That's all he is. He does what he wants, when he wants, how he wants and he just don't care, just don't care . . . .
>
> But what I suggest to you is that some day, if this nation ever has a great debate as to whether or not to keep capital punishment, this case will be discussed because this is the worst case. You could come down here for 100 years. I don't think you will hear of another case like this.

(R3. 3071, 3076).

During trial, the State called Mr. Thompson a "retarded bump-on-a-log" and accused him of "fooling 13 good Americans" when he lied at co-defendant Rocco Surace's trial (3R. 3082-84). The State urged the jury to consider Mr. Thompson's testimony at Mr. Surace's trial as nonstatutory aggravation (R3. 3085).

The State told the jury in his closing statement that they "would have nightmares" about this case (R3. 3052). The State urged the jury to sentence Mr. Thompson to death because that sentence had been previously imposed (R3. 3038). In addition to arguing nonstatutory aggravation, the State diminished the mitigating evidence presented by the defense, stating "[t]hey want you to consider minuscule, meaningless things" (R3. 3087; 3082).

The State misrepresented the mental health testimony and told the jury that Mr. Thompson is "of average intelligence" (R3. 3072), despite testimony that he was mentally retarded.

The State's mental health expert testified inappropriately about uncharged crimes that were used by the court to reject the presence of a mitigating factor (R3. 2825-26). The medical examiner testified that although he had performed over 10,000 autopsies, "This is one of the cases that I'll never forget . . . . I can't compare it with any case I have done" (R3. 2055-56).

The State asked misleading questions regarding the possibility of Mr. Thompson's release in thirteen years; and Mr. Thompson's counsel then failed to conduct an effective redirect examination of the witness to clarify that Mr. Thompson would never be released from prison (R3. 2360).

Cumulative and gory autopsy photographs were presented to the jury during the trial.

Defense counsel during her closing argument told the jury that the all-inclusive mitigating factor ("any other aspect of the defendant's character or record, and any other circumstance of the offense") had been limited by case law to a few enumerated examples (R3. 3102).

Defense counsel conceded without Mr. Thompson's consent that the heinous, atrocious, or cruel aggravating factor applied and that the State had proven three aggravating factors beyond a reasonable doubt (R3. 3093; 3095; 3107). Trial counsel failed to secure Mr. Thompson's presence during critical stages of the proceedings (R3. 796, 879, 1665-76, 1824) and to ensure that all proceedings occurred in the presence of a court reporter. As a result, no accurate transcript of Mr. Thompson's sentencing proceedings exists.

The court gave the following jury instruction, which suggests that it is the jury's decision whether a particular witness is qualified as an expert rather than the judge:

> Expert witnesses are like other witnesses, with one exception: The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R3. 3121-22).

During voir dire at the 1989 resentencing, the jury inquired about the possibility that if Mr. Thompson received a life sentence he could be released after as little as twelve years. This inquiry came about because Mr. Thompson had already been incarcerated for thirteen years (since 1976) at the time of his resentencing. Defense counsel requested individual voir dire to explore the jurors' bias towards the death penalty because of this expressed concern. Defense counsel also moved to strike the panel. After these requests were denied, defense counsel accepted the court's jury instruction which avoided the issue altogether. But the jury instruction was insufficient to cure the prejudice which infected the entire resentencing proceeding. Mr. Thompson's trial counsel failed to request that the court inform the jury why Mr. Thompson was being resentenced twelve years after the crime; the jury was simply told: "You are not to concern yourself, or yourselves, with the passage of time, since the 1976 arrest and incarceration of the defendant on those charges" (R3. 1004). Mr. Thompson's counsel did not present evidence that Mr. Thompson would not be eligible for parole if sentenced to life in prison. During voir dire, venireperson Garson expressed this concern: ". . . so in other words, he only has to go for twelve? . . . is he actually getting twenty-five years or twelve, the thirteen years he's been on the cooker?" (R3. 1361).

Defense counsel noted that other potential jurors were laughing and expressed his fear that the jury possessed a bias against returning a life

recommendation because of the mistaken belief that Mr. Thompson would only serve twelve years. Defense counsel requested individual voir dire on this issue, moved to strike Mr. Garson for cause, and moved to strike the entire panel (R3. 1369-75). The court denied all motions and simply instructed the jury that Mr. Garson's question "is irrelevant to your consideration . . . . The parole consequences, if any, are not for your consideration" (R3. 1389).

However, Mr. Garson made repeated expressions of concern. After receiving the instruction, he stated: "I still feel that I'm asked to judge the two scales of justice and I have to know what's on those scales. Now, with all due respect, his answer did not answer my question" (R3. 1399). Mr. Garson continued:

> MR. GARSON: Again, I go back to my question, which was never answered, that is: is a twenty-five years from the point retroactive on the point he went in or is it retroactive from when he will be--
>
> STATE: We can't answer that question.
>
> MR. GARSON: In other words, is it conceivable, is it possible he could go in twelve years and be out in twelve years?

(R3. 1399-1400).

Defense counsel renewed his request for individual voir dire, moved to strike Mr. Garson, and moved to strike the entire panel because "his comments

contaminated everybody in this room" (R3. 1401-03). The motions were denied (R3. 1406). However, defense counsel failed to quell the jury's fears that a life sentence would mean Mr. Thompson's early release.

Defense counsel failed to tell the jury that Mr. Thompson pled guilty and was sentenced to two life sentences for kidnapping and sexual battery. The jury should have been instructed or received expert testimony that those sentences, with a life sentence without parole for twenty-five years, would have been considered by the parole commission as life without parole. Because Mr. Thompson's two life sentences are consecutive to each other, the prospect of his release even after twenty-five years is nonexistent. Defense counsel was ineffective for failing to present this evidence to the jury.

The circuit court admitted the prior testimony of the witness Barbara Savage from the prior sentencing proceeding and denied the defense an opportunity to ascertain her whereabouts and the reason for her unavailability by denying a motion for a continuance. Counsel was also denied the appointment of appellate counsel to file an interlocutory appeal of the circuit court's adverse ruling.

At the resentencing, the trial court excluded the testimony of defense witnesses who would have testified that Mr. Thompson should not be sentenced to death, including the judge who sentenced Mr. Thompson to death in 1976 (R3. 2153, 2161, 2192, 2211, 2225, 2434, 2616, 2659). The trial court declined to

disqualify Assistant State Attorney David Waksman, who was a material witness due to his involvement in the unavailability of Ms. Savage (R3. 153-56).

On June 6, 1989, Mr. Thompson's jury recommended death by a vote of seven-to-five (R3. 3192-94). Since there was only a general verdict form, there was no indication of which aggravators the jury found. Following the jury's recommendation, the trial court imposed a sentence of death on August 25, 1989 (R3. 3336). Mr. Thompson received life sentences for the remaining counts of the indictment, to run consecutive to each other (R3. 3336). *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).

On direct appeal, this Court struck the "cold, calculated and premeditated" aggravating factor but found the error to be harmless, found that any error in the "heinous, atrocious and cruel" jury instruction was also harmless, found that the trial judge's failure to find any mitigation despite the previous judge's finding of two statutory mitigators was harmless, and affirmed Mr. Thompson's death sentence from his resentencing. *Thompson v. State*, 619 So. 2d 261 (Fla. 1993).[1]

[1] The issues raised on direct appeal were as follows: (1) the trial court erred in ruling the State's chief witness was unavailable; (2) the trial court erred by failing to grant Mr. Thompson's motion to strike the jury panel and failing to conduct individual voir dire; (3) the trial court erred by permitting the State to introduce Mr. Thomson's prior inconsistent testimony; (4) the trial court erred in allowing the State to introduce gruesome photographs; (5) the trial court erred in unfairly limiting the testimony of defense witnesses; and, (6) the trial court erred in sentencing Mr. Thompson to death in violation of his due process and equal protection rights.

Mr. Thompson timely filed a petition for writ of certiorari, which the United States Supreme Court denied on November 8, 1993. *Thompson v. Florida*, 510 U.S. 966 (1993).

On November 8, 1995, Mr. Thompson timely filed a Rule 3.850 motion. This motion was summarily denied on December 12, 1995 because the trial court mistakenly believed that Mr. Thompson had not verified the pleading as required by Rule 3.850. Mr. Thompson appealed. On August 19, 1996, this Court relinquished jurisdiction on the State's motion back to the trial court in order to hold a *Huff* hearing.[2]

On March 6, 1997, following the *Huff* hearing, circuit court Judge Robbie Barr summarily denied Mr. Thompson's motion.[3] This Court affirmed the lower court's denial. *Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

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[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993) requires hearings to determine whether Rule 3.850 claimants will receive evidentiary hearings on certain claims.

[3] Mr. Thompson raised the following claims: (1) denial of his rights under *Spalding v. Dugger*; (2) denial of access to public records; (3) lack of reliable transcript of his appeal; (4) denial of proper direct appeal due to omissions in the record; (5) guilty plea was not knowing, intelligent and voluntary; (6) no competent mental health expert was appointed; (7) failure to conduct an adequate competency evaluation; (8) Mr. Thompson was incompetent during his plea, sentencing and direct appeal; (9) a *Lackey* claim; (10) Mr. Thompson did not make a knowing, intelligent and voluntary waiver of any rights; (11) counsel had a conflict of interest and violated Mr. Thompson's Sixth Amendment right; (12) Mr. Thompson was denied adversarial testing on his first trial; (13) Mr. Thompson was denied adversarial testing on his second trial and penalty phase; (14) gruesome photographs prevented a fair trial; (15) newly discovered evidence; (16) a *Brady*

Mr. Thompson filed a petition for writ of habeas corpus on June 14, 2001. On December 14, 2001, the district court dismissed the petition as mixed because Mr. Thompson had raised issues regarding *Atkins v. Virginia*, 536 U.S. 304 (2002), which had been recently granted certiorari and which directly applied to Mr. Thompson.

An appeal was taken to the Eleventh Circuit Court of Appeals, which affirmed the lower court. *Thompson v. Moore*, 320 F.3d 1228 (11th Cir. 2003). On August 4, 2003, Mr. Thompson filed a petition for writ of certiorari in the United States Supreme Court and on April 4, 2005, the petition was granted. The

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claim; (17) trial counsel was ineffective; (18) impermissible burden shifting; (19) failure to find mitigation in the record; (20) prosecutorial misconduct; (21) failure of Florida's capital sentencing statute to prevent arbitrary and capricious imposition of the death penalty; (22) erroneous failure to disqualify assistant state attorney; (23) improper automatic aggravating circumstance; (24) ineffective assistance of counsel at the guilt phase of Mr. Thompson's trial; (25) ineffective assistance of counsel at penalty phase; (26) an *Ake v. Oklahoma* claim; (27) a *Caldwell v. Mississippi* claim; (28) cold, calculated and premeditated aggravating circumstance is unconstitutionally vague; (29) constitutionally inadequate harmless error analysis; (30) no limiting construction on the heinous, atrocious, or cruel aggravating circumstance; (31) overbroad and vague aggravating circumstances; (32) failure to find statutory mitigating circumstances; (33) non-statutory aggravating circumstances; (34) improper doubling of aggravating circumstances; (35) cumulative error occurred; (36) failure by the court to define "reasonable doubt;" (37) failure to request instruction regarding length of life sentence; (38) inability to interview jurors; (39) juror misconduct; (40) failure by the trial court to strike the jury panel; (41) misleading of jury as to reasons for resentencing; (42) erroneous introduction of previous testimony by chief state witness; (43) invalid jury instruction on expert testimony; and, (44) failure by the trial court to allow testimony of prior judge at resentencing.

United States Supreme Court vacated the judgment and remanded the case to the Eleventh Circuit. *Thompson v. Crosby*, 544 U.S. 957 (2005). On September 26, 2005, the Eleventh Circuit vacated the dismissal of the petition and remanded to the district court. *Thompson v. Secretary for Dep't. of Corrections*, 425 F.3d 1364 (11th Cir. 2005).

On November 18, 2005, the district court denied Mr. Thompson's request for a stay to pursue his *Atkins* claim in state court. On December 19, 2005, Mr. Thompson elected to dismiss his unexhausted claims and proceed with his exhausted claims. On December 5, 2005, the district court issued an order reopening the case. On July 21, 2006, the district court denied the petition.

On November 15, 2001, Mr. Thompson filed a Rule 3.850 motion shortly after the enactment of Florida Statute § 921.137, which was signed into law by Governor Bush on June 12, 2001, one day before Mr. Thompson's federal habeas petition was due. Section 921.137 prohibits the execution of mentally retarded individuals. An amended Rule 3.850 motion was filed on June 18, 2003 and was dismissed by the circuit court. The circuit court requested that the State prepare an order dismissing Mr. Thompson's Amended Rule 3.850 motion. This was done without notice to Mr. Thompson or his counsel by *ex parte* hearings before the circuit court.

As a result, Mr. Thompson filed a motion to disqualify the judge on August 8, 2003. The first time Mr. Thompson's counsel was noticed and appeared before the court was after the motion to disqualify had been filed. During the disqualification hearing, the circuit court acknowledged that the clerk had noticed a defense attorney who was deceased. The circuit court denied Mr. Thompson's motion to disqualify on September 4, 2003. At no time was counsel given an opportunity to argue the propriety of dismissing the Rule 3.851 motion or that the amended motion was improperly dismissed based on the State's erroneous interpretation of the Florida Rule of Criminal Procedure 3.851.

Mr. Thompson filed a notice of appeal to this Court. The State then moved to dismiss the appeal, stating that the order of the circuit court was not final and that it had ruled that Mr. Thompson could re-file. That information had not been communicated to Mr. Thompson or his counsel.

Mr. Thompson argued to this Court in his response that his amended motion had been properly filed under the rule. He argued that he should not have been required to re-file a motion within a 25-page limit, which is a requirement under Rule 3.851 for successive petitions. The State conceded that Mr. Thompson's initial November 15, 2001 motion did not exceed 25 pages. The State had never responded to that motion, though under Rule 3.851, it was required to do so within 20 days. Fla. R. Crim. P. 3.851(f)(3)(B). The June 18, 2003 amended motion was

an additional 10 pages, which was acceptable because under Rule 3.851(4), there is no page requirement for amendments to an initial motion.

This Court issued an order on July 9, 2004, ruling that the June 18, 2003 amended 3.851 motion be stricken without prejudice. This Court gave Mr. Thompson 30 days to re-file an amended motion that complied with the page limitation of Rule 3.851. It also treated Mr. Thompson's motion for disqualification as a writ of prohibition and denied the petition on the merits.

Although Mr. Thompson maintained that he did not violate the rule in the additional 10-page amendment, he complied with this Court's order, cut the motion to 25 pages and timely filed the amendment on August 9, 2004. The State filed a response on August 30, 2004. A *Huff* hearing was conducted on October 27, 2004. On December 17, 2004, the circuit court denied the amended motion. Mr. Thompson filed a motion for rehearing on December 30, 2004. The motion was denied on January 5, 2005. On February 15, 2005, Mr. Thompson filed a Notice of Appeal to this Court.

On July 9, 2007, this Court reversed the trial court's summary denial and remanded to the circuit court "in order to allow Thompson to plead and prove the elements necessary to establish mental retardation, specifically including the threshold requirements set forth in *Cherry v. State*, 32 Fla. L. Weekly S151 (Fla. April 12, 2007)." The order stated, "[t]he trial court determined that Thompson's

claim was procedurally barred because the issue of mental retardation was raised as mitigation and litigated in Thompson's 1989 resentencing proceeding. We conclude this determination was error because the evidence in this case was presented for mitigation, not as evidence of mental retardation as a bar to execution."

On August 8, 2007, Mr. Thompson filed a Rule 3.851 motion alleging that his execution was constitutionally prohibited due to the fact that he is mentally retarded.[4] On August 27, 2007, the circuit court denied the postconviction motion without a hearing on the claim of mental retardation on the grounds that Mr. Thompson is not entitled to a hearing under Florida Rule of Criminal Procedure 3.203(e) because he did not properly plead mental retardation. According to the circuit court order, under *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) Mr. Thompson was required to allege in his postconviction motion that his IQ is under 70. Mr. Thompson's motion for rehearing was denied on September 19, 2007. Mr. Thompson filed a timely notice of appeal to this Court.

[4] The motion raised the following claims: (CLAIM I) the death sentence imposed upon Mr. Thompson, a MR person, violates the Florida and United States constitutions; (CLAIMS II) because Mr. Thompson has been on death row for 31 years, executing him violates the Eighth and Fourteenth amendments to the United States Constitution and corresponding provisions of the Florida Constitution; (CLAIM III) Florida's lethal injection procedure is unconstitutional; (CLAIM IV) newly discovered evidence shows Mr. Thompson's sentence is unconstitutional.

On February 25, 2008, the United States Court of Appeals for the Eleventh Circuit denied Mr. Thompson's appeal of the district court's denial of his federal habeas petition.

On March 9, 2009, the United States Supreme Court denied cert, with Justice Breyer dissenting.

On February 27, 2009, this Court remanded Mr. Thompson's case, again ordering the circuit court to conduct a hearing on Mr. Thompson's mental retardation claim.

The evidentiary hearing took place April 13, 2009 and April 27, 2009. Even though Mr. Thompson scored a 71 on his WAIS IV IQ test, the circuit court quickly issued an order denying Mr. Thompson's postconviction motion on May 21, 2009. The May 21, 2009 order found Mr. Thompson's IQ was not below the rigid cutoff of 70, that he did not have deficits in adaptive functioning and he failed to show onset before the age of 18. This Court affirmed that ruling on appeal.

Current proceedings

On November 29, 2010, Mr. Thompson timely filed the present successive postconviction motion, arguing that *Porter* requires this Court to reassess his ineffective assistance of counsel claim applying a standard compliant with *Strickland*. The State responded on December 13, 2010, and a *Huff* hearing was conducted on April 12, 2011.

At the hearing, as counsel were driving to the hearing, they were contacted by a judicial assistant who informed them that the hearing had been relocated to a different courtroom and that the time of the hearing was changed. Counsel arrived to find that an arrangement had been made to hold several hearings on *Porter* motions in the same courtroom so that the judges on the several cases, who sat together on and around the bench, could hear the many arguments on *Porter* that would be offered by the several attorneys. To the extent that the judges were attempting to better inform themselves of what is certainly a complex and challenging issue, counsel approves of the group hearing. However, a discussion was had in which counsel objected to consolidation for fear that it would lead to confusion among the judges as to which attorney, in representation of which client, was offering which argument (as the many arguments surrounding *Porter* are nuanced and not identical). That discussion does not appear in the transcript of the hearing, which begins after Mr. Thompson's case was called and after the initial discussion about the group nature of the hearing.

Following the hearing, the circuit court on February 7, 2011 issued an order denying Mr. Thompson's *Porter* claim. It is not clear whether the judge consulted with the other judges in the courtroom in arriving at her decision in Mr. Thompson's case. Mr. Thompson timely appealed.

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. Thompson's case demonstrates that relief is warranted under *Strickland*.

STANDARD OF REVIEW

Mr. Thompson was deprived of the effective assistance of trial counsel at the resentencing. This Court denied Mr. Thompson'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. Thompson'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. Thompson'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. Thompson'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).

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

Mr. Thompson, 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. Thompson 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. Thompson seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Thompson seeks the proper application of the *Strickland* standard. Mr. Thompson 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 which renders Mr. Thompson'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 Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

The *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," *Witt*, 387 So. 2d at 928, 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).[5]

Thus, we are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Thompson 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

[5] 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.

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[6] until reviewing *Porter* claims, however, if *Porter* error is

[6] This raises a problem in the circuit court's order, which stated that "[a]t the *Huff* hearing, Defendant stated that the Florida Supreme Court has been incorrectly applying the principles of *Strickland* . . . since 1984" (Order at 5). That statement was not made at the hearing, however, Mr. Thompson argued in his motion that *Porter* error dates back to the *Strickland* opinion. But it is critical not to mistake that argument for a contention that *every Strickland* opinion this Court has ever decided is in error. **That is not Mr. Thompson's contention**. The extent of *Porter* error in Florida cannot be known without looking at the cases in which *Porter* error has been alleged and determining whether *Porter* error is present in

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

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those cases. At present, it cannot be known how extensive *Porter* reaches, but the court should not have imposed the false dichotomy of all-or-none on Mr. Thompson's claim. Clearly it is possible that *Porter* could not be limited to *Porter* alone and also not present in every *Strickland* decision of this Court.

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); *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).[7]

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

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; *Thompson v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the United States Supreme Court held that this Court had violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it

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of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. *Downs*, 514 So. 2d at 1071.

Following *Hitchcock*, this Court found that *Hitckcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[8] Clearly, this Court read the opinion in *Hitchcock* and

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

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

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 reflected the erroneous construction of *Lockett* that had been applied by this Court consistently in virtually every case in which the *Lockett* issue had been raised. 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.[9]

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

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> 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.

[9] 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).

writ of certiorari issued to the Eleventh Circuit. 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 in *Sears* that explained *Porter*.

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, so too those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and lost should receive the same relief from that erroneous legal analysis.

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

Mr. Hitchcock's *Lockett* claim was not a decision that was simply an anomaly. This Court's misreading of *Strickland,* that the United States Supreme Court found unreasonable, appears in a 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.[10]

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id*. at 451, and "either did not consider or unreasonably discounted" that evidence. *Id*. at 454. The United States Supreme

[10] 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.

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 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 is evident in 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).

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted inconsistencies in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings.[11] 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.[12] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032.

[11] 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.

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

This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*.[13] 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. In *Porter v. State*, the court relied upon this very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923.

From an examination of this Court's case law, 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

[13] 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.

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.[14]

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

At the heart of *Porter* error is "a failure to engage with [mitigating evidence]." *Porter*, 130 S. Ct. at 454. The United States Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually went through in Korea." *See id*. That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military

[14] 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.

service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis.

To engage with the mitigating evidence is to embrace, connect with, internalize–to glean and intuit from mitigating facts 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 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 conceptualizing the answer:

If a person is presented with a bushel of apples and is asked if it is reasonably probable that there are more red apples than green, and he rummages through the surface of the basket, 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 apples does not tell us whether there is a reasonable probability that more are red. The conclusions are not determinative of one another. In fact. they have very little or nothing to do with one another since a 51% probability that more apples are red still allows for a 49% possibility that more are green. By treating the two conclusions as mutually exclusive, the apple inspector created 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 of skimming the surface 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 must inspect bushels of apples, his mistake in skimming the surface 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 basket, 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 bushel would reveal more are red. That incomplete method reverses the standard of inquiry and becomes a negative response—*no, there is not a reasonable probability of more red apples.* The conclusion comes not from finding that the probability does not exist, but from a 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*, and in this case, and is as simple as pointing out green apples when asked to find red.

Mr. Thompson does not 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. Thompson does not 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 with a glancing blow based on information that suggests it may not be there. 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 unpresented evidence might reasonably have been discounted, it is not answering the question of whether it reasonably may have mattered to the jurors. 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 unpresented evidence to cut against the defendant, that consideration has no place on the scale.

The *Strickland* inquiry being applied by this Court is that: relief should be granted if there is a reasonable possibility that the unpresented evidence would not have mattered. But the proper inquiry is to look for any way a constitutional violation might have occurred. This means the Court should err on the side of finding a constitutional violation, rather than permitting an execution despite a violation because it could create a speculative explanation for how a violation might not have 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. This is true, regardless of whether the violation might with reasonable possibility have not occurred.

Courts cannot focus on green apples from the top of the bushel to answer

whether any are red. By rummaging on the surface 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 which is to focus on the opposite.

Reversing the *Strickland* standard to ask whether there is a reasonable possibility that unpresented 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, failing to take painstaking care in scrutinizing a postconviction record for everything mitigating that could have made a difference.

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 7-5 death recommendation case, that is precisely the sort of analysis that was conducted. Mr. Thompson'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 unpresented 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 prsobing, 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. Thompson's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

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

Mr. Thompson was deprived of the effective assistance of counsel during his resentencing at which the jury sentenced him to death by the narrowest margin, 7 to 5, This Court committed *Porter* error in denying his claim.

As is evident from the statement of facts, Mr. Thompson's counsel failed to act as a zealous advocate; he did not conduct an adequate investigation and ensure that his client received a fair adversarial testing. The actions of the State Attorney and the circuit court also rendered Mr. Thompson's counsel ineffective.

Trial counsel was ineffective when he failed to object to state misconduct which occurred throughout Mr. Thompson's trial. The State inflamed the jury's emotions by making an improper opening statement: "If I asked all of you to imagine the most horrible kind of death that you could imagine, Sally Ivestor suffered" (R3. 1602). The State vilified Mr. Thompson during his closing statement:

> He's an anti-social personality, mean, bad, evil. That's all he is. He does what he wants, when he wants, how he wants and he just don't care, just don't care . . . .
>
> But what I suggest to you is that some day, if this nation ever has a great debate as to whether or not to keep capital punishment, this case will be discussed because this is the worst case. You could come down here for 100 years. I don't think you will hear of another case like this.

(R3. 3071, 3076).

Trial counsel also failed to object when the State directly attacked Mr. Thompson's credibility and character. The State called Mr. Thompson a "retarded bump-on-a-log" and accused him of "fooling 13 good Americans" when he lied at co-defendant Rocco Surace's trial (R3. 3082-84). Trial counsel never presented evidence that Surace was the more dominant of the two men and that he had manipulated Mr. Thompson, the "retarded-bump-on-a-log" into taking the blame for the entire incident. Trial counsel also failed to object when the State urged the jury to consider Mr. Thompson's testimony at Mr. Surace's trial as nonstatutory aggravation (R3. 3085). No one told the jury that Mr. Thompson had two consecutive life sentences and would never be eligible for parole.

Counsel failed to object when the prosecutor told the jury in his closing statement that they "would have nightmares" about this case (R3. 3052). Trial counsel also failed to object when the State urged the jury to sentence Mr. Thompson to death because that sentence had been previously imposed (R3. 3038). In addition to arguing nonstatutory aggravation, the State diminished the mitigating evidence presented by the defense: "They want you to consider minuscule, meaningless things" (R3. 3087; 3082).

In its affirmance of the summary denial, this Court asserted that "none of these prosecutorial comments would have constituted reversible error" *Thompson*, 759 So. 2d at 662. This Court's analysis of these misstatements was clearly

predicated on analyzing each individual remark in a vacuum. The Court failed to conducted the probing analysis found in *Porter* to be required by *Strickland* but lacking this Court's jurisprudence.

The prosecutor also misrepresented the mental health testimony and told the jury that Mr. Thompson is "of average intelligence" (R3. 3072), despite testimony that he was mentally retarded. Again, trial counsel failed to object. Trial counsel also failed to object to victim impact evidence presented through the emotional testimony of the victim's mother (R3. 1982). Trial counsel failed to object to improper testimony from one of the State's mental health experts about uncharged crimes that were used by the court to reject the presence of a mitigating factor (R3. 2825-26).

Trial counsel also failed to object to the prejudicial opinion and personal testimony of the medical examiner, unrelated to his expert opinion, that although he had performed over 10,000 autopsies, "This is one of the cases that I'll never forget . . . . I can't compare it with any case I have done" (R3. 2055-56). Trial counsel was also ineffective for failing to object when the State asked misleading questions regarding the possibility of Mr. Thompson's release in thirteen years; this error was compounded when Mr. Thompson's counsel then failed to conduct an effective redirect examination of the witness to clarify that Mr. Thompson would never be released from prison (R3. 2360). Counsel failed to allay the jury's

concerns about the true length of a life sentence for Mr. Thompson and failed to correct the false impression created by the State's questions. Counsel was also ineffective for mentioning in the jury's presence that he was a court-appointed attorney and that Mr. Thompson is indigent (R3. 2987).

Trial counsel also failed to strenuously object to the introduction of cumulative and gory autopsy photographs that impermissibly inflamed the jury. Mr. Thompson's rights to due process and to a fair trial were undermined and violated by the State's improper arguments and by his trial counsel's failure to object. Trial counsel failed to object to any of these improper and highly prejudicial comments.

In addition, trial counsel was ineffective during her own closing argument when she again committed *Hitchcock* error by telling the jury that the all-inclusive mitigating factor ("any other aspect of the defendant's character or record, and any other circumstance of the offense") had been limited by case law to a few enumerated examples (R. 3102). Counsel was also ineffective when she conceded that the heinous, atrocious, or cruel aggravating factor applied and admitted that the prosecutor had proved three aggravating factors beyond a reasonable doubt (R3. 3093; 3095; 3107). Trial counsel failed to secure Mr. Thompson's presence during critical stages of the proceedings (R3. 796, 879, 1665-76, 1824) and to

ensure that all proceedings occurred in the presence of a court reporter. As a result, no accurate transcript of Mr. Thompson's sentencing proceedings exists.

Mr. Thompson's trial counsel also failed to object when the court gave erroneous jury instructions regarding expert testimony. The jury was given the following instruction:

> Expert witnesses are like other witnesses, with one exception: The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R3. 3121-22). The court's instruction was an erroneous statement of law; the decision whether a particular witness is qualified as an expert is to be made by the judge alone. *Ramirez v. State*, 651 So. 2d 1164, 1167 (Fla. 1995). By permitting the jury to accept or reject an expert's qualification in a field, a question of law reserved exclusively for the court, the instruction at issue here allowed the jury to reject the experts' opinions without a legal basis for doing so. *See Strickland v. Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984). The court violated Mr. Thompson's Sixth Amendment right to present a defense because the expert testimony was the key evidence presented by the defense to establish the presence of mitigating factors. Because the jury was free to reject this mitigating evidence,

the instruction violated Mr. Thompson's Eighth Amendment rights. Counsel also failed to object that the jury instructions failed to define reasonable doubt; this error, combined with other erroneous instructions and the State's improper argument, impeded Mr. Thompson's efforts to persuade the jury to recommend a life sentence. Mr. Thompson's counsel failed to object to these erroneous instructions.

During voir dire in 1989, the jury inquired about the possibility that if Mr. Thompson received a life sentence he could be released after as little as twelve years. This inquiry came about because Mr. Thompson had already been incarcerated for thirteen years (since 1976). Defense counsel requested individual voir dire to explore the existence of the jurors' bias towards the death penalty because of this expressed concern. Defense counsel also moved to strike the panel. After these requests were denied, defense counsel accepted the court's jury instruction which avoided the issue altogether. But the jury instruction was insufficient to cure the prejudice which infected the entire resentencing proceeding.

Mr. Thompson's trial counsel failed to request that the court inform the jury why Mr. Thompson was being resentenced twelve years after the crime; the jury was simply told: "You are not to concern yourself, or yourselves, with the passage of time, since the 1976 arrest and incarceration of the defendant on those charges" (R3. 1004). Mr. Thompson's counsel was also ineffective for failing to present

evidence to the jury that Mr. Thompson would not be eligible for parole if sentenced to life in prison. During voir dire, juror Garson expressed this concern: ". . . so in other words, he only has to go for twelve? . . . is he actually getting twenty-five years or twelve, the thirteen years he's been on the cooker?" (R3. 1361).

Defense counsel noted that other potential jurors were laughing and expressed his fear that the jury possessed a bias against returning a life recommendation because of the mistaken belief that Mr. Thompson would only serve twelve years. Defense counsel requested individual voir dire on this issue, moved to strike Mr. Garson for cause, and moved to strike the entire panel (R3. 1369-75). The court denied all motions and simply instructed the jury that Mr. Garson's question "is irrelevant to your consideration . . . . The parole consequences, if any, are not for your consideration" (R3. 1389). The inadequacy of the court's instruction is revealed in Mr. Garson's repeated expressions of concern. After receiving the instruction, he stated: "I still feel that I'm asked to judge the two scales of justice and I have to know what's on those scales. Now, with all due respect, his answer did not answer my question" (R3. 1399). Mr. Garson continued:

> MR. GARSON: Again, I go back to my question, which was never answered, that is: is a twenty-five years from the point retroactive on the point he went in or

	is it retroactive from when he will be- -
STATE:	We can't answer that question.
MR. GARSON:	In other words, is it conceivable, is it possible he could go in twelve years and be out in twelve years?

(3R. 1399-1400).

Defense counsel renewed his request for individual voir dire, moved to strike Mr. Garson, and moved to strike the entire panel because "his comments contaminated everybody in this room" (R3. 1401-03). The motions were denied (R3. 1406). The circuit court denied Mr. Thompson his fundamental right to a fair and impartial trial because his jury was not correctly and accurately instructed on the law. *Simmons v. South Carolina*, 512 U.S. 154 (1994); *California v. Ramos*, 463 U.S. 992 (1983); *Lockett v. Ohio*, 438 U.S. 586 (1978); *McClesky v. Kemp*, 481 U.S. 279 (1987). Defense counsel was also ineffective for failing to tell the jury that Mr. Thompson pled guilty and was sentenced to two life sentences for kidnapping and sexual battery. The jury should have been instructed or received expert testimony that those sentences, with a life sentence without parole for twenty-five years, would have been considered by the parole commission as life without parole. Because Mr. Thompson's two life sentences are consecutive to each other, the prospect of his release even after twenty-five years is nonexistent. Defense counsel was ineffective for failing to present this evidence to the jury.

The circuit court rendered Mr. Thompson's counsel ineffective by admitting the prior testimony of Barbara Savage. The defense was denied the means and opportunity to ascertain her whereabouts and the reason for her unavailability when the circuit court denied the defense motion for a continuance. Counsel was also denied the appointment of appellate counsel to file an interlocutory appeal of the circuit court's adverse ruling. Ms. Savage was never competently cross-examined by Mr. Thompson's counsel in 1978; the *Hitchcock* error that mandated reversal of that sentence was repeated in 1989 due to the circuit court and State's actions.

The trial court also limited and impeded Mr. Thompson's trial counsel's representation during the 1989 penalty phase. The trial court excluded the testimony of defense witnesses who would have testified that Mr. Thompson should not be sentenced to death, including the judge who sentenced Mr. Thompson to death in 1976 (R3. 2153, 2161, 2192, 2211, 2225, 2434, 2616, 2659). The trial court also erred in failing to disqualify Assistant State Attorney David Waksman who was a material witness due to his involvement in the unavailability of Ms. Savage (R3. 153-56). The trial court refused to conduct individual voir dire and to strike the jury panel after several jurors expressed concern that Mr. Thompson could be released on parole in twelve years. The trial court also refused to sequester a material witness, Betty Ivestor, the victim's mother (R3. 1663-94).

The trial court also failed to control audience members who distracted the jury during the trial (R3. 1909). The trial court rendered defense counsel ineffective and denied Mr. Thompson his right to a fair adversarial testing.

This Court failed to conduct a proper *Strickland* analysis on Mr. Thompson's claim. While the errors committed by counsel are of varying severity—some relatively minor and some hugely prejudicial—it was incumbent on the court to take a thoughtful look and envision how those errors piled one on top of another might cumulatively prejudice Mr. Thompson. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different. The findings in this case are starkly in violation of *Porter*.

Justices Stevens and Breyer recognized the danger in the failure to engage with the facts of this case on certiorari review when they addressed whether the Eighth Amendment's prohibition against cruel and unusual punishment precluded the execution of a prisoner who had spent 30 (now 35) years on death row. See, *e.g. Lackey v. Texas*, 514 U.S. 1045 (1995); *Foster v. Florida*, 537 U.S. 990 (1999). Justice Breyer dissented from the denial of certiorari stating:

…the delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible (citation omitted). In particular, the delay was partly caused by the sentencing judge's failure to allow the presentation and jury consideration of nonstatutory mitigating

circumstances, an approach which we have unamimously held constitutionally forbidden. See *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987). As a result of this error the Florida Supreme Court remanded for a resentencing. See *Thompson v. Dugger*, 515 So. 2d 173 (1987).

At petitioner's resentencing, he presented substantial mitigating evidence, not previously presented, that suggested that he may be significantly less culpable than his codefendant, who did not receive the death penalty. Petitioner, for example, introduced an affidavit of Barbara Garritz, who witnessed the crime for which petitioner was sentenced to death. She described petitioner's co-defendant Rocco Surace as "an evil man" and "the devil, himself" and explained that he "manipulate[d] people…[into]follow[ing] his orders." (Tr. 2473 (May 31, 1989)). By contrast, she described petitioner as "a big, easy-going child who would do just about anything to please" and who "never seemed to have an idea of his own." (Tr. 2473); see also *ibid*. ("He would do just about anything he was told"). She described the relationship between petitioner and Rocky as follows: "Bill was completely under Rocky's spell. He hung on every word Rocky said and would do and say everything Rocky did and said. He was like Rocky's dog. Rocky would give an order and Bill would do it, no questions asked." (Tr. 2475). With respect to the night in question, she explained that, "Everything Bill did, he did at Rocky's

direction, just like he always did when I was around the two. I saw what happened and I know that Rocky started and finished the whole thing." *Ibid.*

Garritz's testimony was consistent with the picture of petitioner painted by other witnesses. For example, one of petitioner's teachers testified that while in elementary school petitioner consistently scored in the mid-70s on IQ tests; those scores qualified him for classes for the educable mentally retarded. *Id*.,at 2178 (May 30, 1989). His teachers also described him as "slow," a "follower" who was "always…eager to please." *Id*., at 2185, 2186; see also *id*., at 2191-2192. A psychologist and psychiatrist who examined him both described him as showing signs of brain damage. *Id*., at 2510, 2513, 2516, 2523 (June 1, 1989); see also *id.*, at 2570-2571, 2577, and a psychiatrist testified that "the kind of disorder [petitioner] has, he's easily led and felt very threatened by the co-defendant," *id* at 2564; see also *id*., at 2602 ("There is no doubt in the world that this man basically appeared to be a rather—rather dependent person who tends to follow the leader. He is not a leader himself. So, whatever Mr. Surace says, he probably goes along with it"). After hearing this evidence, the jury recommended a death sentence by a vote of 7 to 5.

I refer to the evidence only to point out that it is fair, not unfair, to take account of the delay the State caused when it initially refused to allow Thompson to present it at the punishment phase of his trial. I would add that it is the

punishment, not the gruesome nature of the crime, which is at issue. Reasonable jurors might, and did, disagree about the appropriateness of executing Thompson for his role in the crime. The question here, however, is whether the Constitution permits that execution after a delay of 32 years—a delay for which the State is in significant part responsible. I believe we should grant the writ to consider that question. *Thompson v. McNeil*, 556 U.S. ___(2009) (Stevens, J and Breyer J. dissenting).

Two years later, the United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. Here, the Court did not address or meaningfully consider the facts attendant to the *Strickland* claim—another State error that is no fault of Mr. Thompson. As Justice Breyer states, it is "fair not unfair" to reconsider errors in the past like the flawed prejudice analysis done years ago. The Court failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires. *Porter* makes clear that this Court fails to do under its current analysis.

It failed to engage as a juror might with the evidence and to imagine how, absent counsel's deficient performance for failing to object when necessary, that evidence impacted the result. Mr. Thompson's substantial claim of ineffective assistance of counsel has not been given serious consideration in the context of the

facts of his case as is required by *Porter*. Mr. Thompson requests that this court perform the analysis of this claim which has yet to be done.

CERTIFICATE OF FONT

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

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CERTIFICATE OF SERVICE

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

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