IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-512

WILLIAM REAVES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of relief on the Appellant’s successive motion for post-conviction relief filed under Fla. R. Crim. P. 3.851.

The following symbols will be used to designate references to the record in this appeal:

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

“PCR1”— record on initial postconviction appeal

“PCR2” – record on instant postconviction appeal.

“T1” - transcript of postconviction evidentiary hearing, March 4-6, 2003

“T2”- transcript of case management conference in the instant appeal.

REQUEST FOR ORAL ARGUMENT

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

INTRODUCTION

In *Porter v. McCollum*, the United States Supreme Court issued a full scale repudiation of this Court's *Strickland* jurisprudence. The Supreme Court held that this Court's application of *Strickland* in *Porter v. State*, 788 So. 2d 917 (Fla. 2001) was "an unreasonable application of our clearly established law." 130 S. Ct. 447, 455 (2009). The United States Supreme Court made that determination under the rubric of the most deferential of review standards established by the Anti-Terrorism Effective Death Penalty Act ("AEDPA"), which requires that federal courts to treat state court adjudications with an extremely high level of deference. This high level of deference requires that a federal court may only alter a state court adjudication if its application of federal law was unreasonable, meaning not even supported by reason or rationale. It is in this context that the United States Supreme Court's ruling in *Porter* must be read. When asking whether *Porter* requires a change in this Court's jurisprudence going forward, it must be considered that the United States Supreme Court in *Porter* found this Court's application of *Strickland* to be so unreasonable that it was appropriate to reach past its concerns of federalism and deference to state courts and respect for state sovereignty to correct the unconstitutional ruling.

Mr. Reaves asks this Court to consider *Porter* introspectively and deeply, looking past the first blush language of the opinion, and inquiring into whether or

not *Porter* forbids something that this Court has done in the present case. In other words, simply distinguishing *Porter* on its facts fails to identify the underlying constitutional problem; Mr. Reaves asks this Court to attain a sense for the problem in conceptual approach that *Porter* identifies and then ask if something similar happened here. This Court must consider whether the unreasonable analysis in *Porter* was merely an aberration, limited solely to the penalty phase ineffectiveness claim in that case and wholly different and separate from other *Strickland* analyses by this Court, or was it in fact indicative of a non-isolated conceptual problem in this Court's approach to *Strickland* issues that also occurred in the present case.

STATEMENT OF THE CASE AND OF THE FACTS

The Circuit Court of the Nineteenth Judicial Circuit, Indian River County, entered the judgments of conviction and the sentences of death.

Appellant, William Reaves was indicted on October 8, 1986, on one count of first-degree murder (Count I), one count of possession of a firearm by a convicted felon (Count II), and one count of trafficking in cocaine (Count III) (R2. 2051-2055). The State eventually dismissed Counts II and III of the indictment (R2. 2429, 2532).

Mr. Reaves' first trial was held in August of 1987. His conviction and sentence were reversed by this Court because his former defense counsel had

subsequently become the state attorney who ultimately prosecuted him. *Reaves v. State*, 574 So. 2d 105 (Fla. 1991). A second trial was held in February 1992. Mr. Reaves was convicted and sentenced to death following the jury's recommendation. Mr. Reaves' conviction and death sentence were affirmed by this Court. *Reaves v. State*, 639 So. 2d 1 (Fla. 1994).[1]

Mr. Reaves filed a Motion for Postconviction relief that was summarily denied on May 28, 1999. On appeal, this Court reversed that order and remanded the case for an evidentiary hearing holding,

> The postconviction court denied Reaves' allegation without an evidentiary hearing <u>despite evidence that his counsel had evidence supporting this defense which he did not present.</u>
>
> ***
>
> Voluntary intoxication was an available defense in this instance, and the record is inconclusive as to why counsel did not advance the defense. As Reaves' claim of ineffective assistance was legally sufficient and was not refuted by the record, it was error not to afford him an evidentiary hearing on this issue.

Reaves v. State, 826 So. 2d 932, 938-939 (Fla. 2002).

During that evidentiary hearing, substantial evidence of trial counsel's ineffectiveness at the guilt phase and penalty phase were demonstrated. Mr. Reaves presented the testimony of trial counsel as well as numerous expert

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1 The United States Supreme Court denied certiorari on November 7, 1994. Reaves v. State, 115 S. Ct. 488 (1994).

witnesses who presented valuable evidence the jury never considered.

Trial counsel Kirschner testified that, although he had been practicing law for eight years at the time of Mr. Reaves' trial, it was his first capital murder trial. (T. 14). Notwithstanding significant evidence of voluntary intoxication, trial counsel never discussed voluntary intoxication as a defense and unilaterally decided to pursue a defense of excusable homicide. (T. 17-18; 20; 21-24)

Trial counsel acknowledged that when Mr. Reaves was arrested in Georgia, police reports indicated he, was "complaining of head injuries, left eye, <u>and also coming down off cocaine</u>." (T. 29)(emphasis added).

Mr. Kirschner stated that he talked to Mr. Eugene Hinton in the jail and off the record during Mr. Reaves' trial in an attempt to convince him to testify. (T. 30). Trial counsel said that during the interview he never asked Hinton any questions about Mr. Reaves' drug use, about whether Hinton was using cocaine with Mr. Reaves, or to what extent Mr. Reaves was doing cocaine. (T. 31). He further testified that the excusable homicide defense that he pursued at trial did not preclude developing and using an intoxication defense. (T. 31). He agreed that a voluntary intoxication defense would have gone directly to Mr. Reaves' ability or lack thereof to form the specific intent to commit premeditated. (T. 32).

Although Mr. Kirschner testified that he interviewed family members and friends during trial preparation as "mitigation witnesses," and that those interviews

included questions about Mr. Reaves' drug use after he came back from the war in Vietnam with "a significant drug problem," he stated that he failed to talk to any of the witnesses about Mr. Reaves' drug use at or around the time of the offense (T. 37). He stated that he did not recall if he ever asked his expert, Dr. Weitz, about how "Vietnam syndrome" might interact with the use of drugs. (T. 38). He testified that he did not request funds for a neuropharmacologist or any other expert to explain how the drugs Mr. Reaves was using might have affected his behavior at the time of the offense. (T. 38).

He testified that he failed to object at trial to the State introducing 4.5 ounces of cocaine found on Mr. Reaves after his arrest in Georgia. (T. 51-52). He agreed that during the trial he had asked the undercover police officer in Georgia who had been involved in Mr. Reaves' arrest whether the defendant's appearance was consistent with him being a "crack head." (T. 53). In response to why he did these two things, he explained, "I suppose that I wanted to be able to get the instruction on voluntary intoxication and that would explain both that and the previous failure to object to the introduction of the cocaine at the point of the arrest." (T. 53). He stated that during the charge conference he requested that the jury be given the instruction of the defense of voluntary intoxication “to leave that as an option for the jury, a fall-back position if you will from my primary defense which was

excusable homicide." (T. 53).[2]

Trial counsel failed to retain an expert in substance abuse and he specifically did not hire Dr. Weitz for that purpose. (T. 80). He agreed that the jury never heard any testimony from Dr. Weitz at the guilt phase of the case and thus basically never heard anything from the defense arguing voluntary intoxication (T. 88).

At the evidentiary hearing counsel for Mr. Reaves proffered Eugene Hinton's February 11, 1999 affidavit into the record because the court denied the Defendant's February 21, 2003 Writ of Habeas Corpus Ad Testificandum, directed to transporting Mr. Hinton to testify in person at the evidentiary hearing. The affidavit was read into the record and it included Mr. Hinton's comments relevant to a potential voluntary intoxication defense:

> 3. Fat [Mr. Reaves] and I sold drugs together between Gifford and Tallahassee. On our trips, Fat would shoot up and smoke drugs. We had been to Tallahassee the weekend before this happened. I saw Fat the night this happened. He said he was going to his girlfriend's house to chill out. I believe that meant that he was going to do drugs.
>
> 4. Fat, he used drugs sometimes he would start to talk about what happened over there and would take off running.
>
> 5. Fat came to my house after the police got

[2]On redirect, after reviewing the trial record on the stand, Mr. Kirschner testified that the trial court actually brought up the possibility of an intoxication instruction, not him (T. 78-79).

> shot. He was scared and thought people wanted to kill him. Fat was all strung out. He had been smoking crack and pretty much out of his head. He was real scared. I have never seen Fat violent with anyone but that night, he would run away from a fight if he could.

(T. 425-426).

Trial counsel testified at the evidentiary hearing that information from an expert neuropharmacologist would have been helpful to him in preparing a voluntary intoxication defense. (T. 89). He agreed that Dr. Weitz's examination at trial did not rule out voluntary intoxication, but mixed apples with oranges by confusing the voluntary intoxication standard with the M'Naughten insanity standard. (T. 90-91).

Dr. William Weitz testified at the evidentiary hearing on March 4, 2003. (T. 95-158). He testified that he is a licensed psychologist in Florida, with a specialty in clinical psychology and a focus on post-traumatic stress disorder (PTSD) and military psychology. (T. 95). He stated that he worked on Mr. Reaves' case prior to the first trial in 1987, but testified only at the 1992 proceedings after being retained by Mr. Kirschner. (T. 96). He detailed what his testimony would have been if he had been asked by trial counsel to so testify:

> I would have specifically looked at the way, the type of drugs, specifically cocaine, combined with alcohol - beer is alcohol as well - beer/alcohol combined with cocaine, the way that affects human intellectual process, judgment, reasoning, perception, decision making, problem solving, the increase - I know this from interviews - the fact that cocaine increases suspiciousness

> and paranoia for the defendant, the fact that it impairs judgment and reasoning, that it certainly minimizes effective cognitive processing and problem solving, especially with the length of time both over the years and the amount of time during that day that the individual had been using the substances, that alone would traumatically affect his behavior to form intent and things of that nature. Certainly, there were critical factors, and I would have been able to discuss those as well.

(T. 104-105).

Dr. Weitz testified that based on his interviews in 1992 and before, it was his opinion that Mr. Reaves was unable to form the specific intent to kill on the night of the incident. (T. 105, 110). He further testified that his testimony about "Vietnam Syndrome" behaviors would have supplemented and completed the picture of Mr. Reaves' behavior on the night of the offense because,

> the critical factor then says, given that drugs and alcohol impact, and the fact that we know there's a co-morbidity of 80 to 90 percent between heavy drug use in combat veterans and the stress disorders they experience. One of the behaviors would typically -- Given the judgment, reasoning, perceptual distortions that take place, what behaviors typically occur, or fill the void when those functions are impaired, and in that case they are well conditioned, well learned, highly automated behaviors, survival behaviors which fill the gap and which allow veterans to survive, and that's exactly the kinds of behaviors that the defendant exhibited on that evening.
>
> Together, it would complete the process, although certainly I could describe the alcohol/drug effects independently, but here it helps to explain the kinds of behaviors that took place in addition to the impairments.

(T. 106).

Dr. Weitz testified that the altered perception and behavior that Mr. Reaves was experiencing at the time of the offense, associated with his stress syndrome, was impacted by his concurrent drug use:

> When you're talking about adding on with that reality cocaine, which impairs we know his judgment, increases his paranoia and suspiciousness, alters his clarity of perception and thinking, that intensifies exponentially the inability for him to make reasonable and rational judgments at that time, and to accurately assess the situation. It just compounds the events dramatically.
>
> ***
>
> At the time that that behavior took place, the level of his reasoning, judgment, perception was so impaired that any decision that he would make would be impacted by the conditions he was under, specifically, cocaine and beer at the time, so that there was great distortions and alterations of his judgment, perception, and reasoning. So under those conditions, whatever he decided to do was affected by those conditions.

(T. 115;121).

Dr. Weitz stated that he did have information in 1992 that would have assisted him in forming an opinion about voluntary intoxication, including family interviews and Mr. Reaves's "whole pattern of alcohol and drugs use for many years" dating back to his military service (T. 116). He also agreed that it would have been helpful to have had the assistance of a neuropharmacologist in preparing any 1992 testimony about intoxication because "it certainly helps understand the levels he was taking, the frequency, chronicity, the interaction of drug use, and just

the fact that this was the severity and complexity of the problem.” (T. 117).

Dr. Weitz stated that due to Mr. Reaves’ intoxication he was not functioning with specific intent “because of the perceptions that he had at the time, the way in which his judgment, perception, and reasoning process, that he perceived that once the officer was fearful of losing control and his life was at risk, and then he responded in a very conditioned, automated, survival means, which meant retrieving the weapon and getting off the shot before the officer did, which he believed was a threat to his own life.” (T. 135-36).

Dr. Richard Dudley, a psychiatrist, interviewed in jail and reviewed the detailed background materials concerning Mr. Reaves. (T. 162-63). Dr. Dudley testified that on the night of the crime he was intoxicated with cocaine. (T. 165-66). He also concluded that at the time of the offense Mr. Reaves was suffering from polysubstance abuse and Post Traumatic Stress Disorder. (T. 165-66).

He recalled that in the confession, Mr. Reaves "repeatedly mentioned that he was intoxicated at the time [of the offense] and that the amount of cocaine that he had taken was having an impact on his behavior, and he described that in various ways." (T. 170). He also testified that he reviewed the affidavit of Eugene Hinton and he affirmed that the information in it differed substantially from the account of Hinton's trial testimony in the appellate opinion provided:

> The difference is his affidavit is in contrast to his earlier testimony, that he indicated that Mr. Reaves' mental state

> was dramatic, and he gave very different accounts of him being high, a very different sort of mental state that was given in the testimony, and also he even, as a general matter, described Mr. Reaves differently in the affidavit that he did in the testimony.

(T. 173).

Dr. Dudley also testified that after he submitted his own report, but before his testimony at the evidentiary hearing, he had the opportunity to review the reports of Dr. Thomas Michael Hyde, Dr. Erwin R. Parson, Deborah V. Mash, Ph.D, and Barry Crown, Ph.D. (T. 174). He stated that while his opinions concerning Mr. Reaves were not changed by his review of the other expert reports, he believed that the reports supported the opinions in his own report. (T. 175).

Dr. Dudley noted that the September 25, 1986 "injured inmate report" from Georgia, written after Mr. Reaves' arrest, indicated that Mr. Reaves reported that he was “coming down off cocaine.” (T. 176). He stated that this information supported his diagnosis of chronic polysubstance abuse. (T. 177). Dr. Dudley stated that he believed that Mr. Reaves suffers from depression, associated with his PTSD, which is clinically significant and which might require medication if Mr. Reaves were a private patient (T. 180-81).

Dr. Dudley also testified that his report reflected his opinion that Mr. Reaves developed post-traumatic stress disorder as a result of his service in Vietnam (T. 187). According to Dr. Dudley it was his opinion that,

> the combination of the effect of the acute intoxication of

> cocaine on him and as it interacted with his other psychiatric difficulties [PTSD and depression], that his actions were simply reflexive [rather] than thought through decisions when he took that action.

(T. 191-92).

Dr. Barry Crown, a Board certified neuropsychologist and certified addiction specialist, testified that Mr. Reaves suffers from organic brain damage and has had a long term cocaine abuse problem. (T. 243; 246-47). As a result of Mr. Reaves' organic brain damage, "stressors such as drugs, alcohol, lack of sleep, generalized stress, depression, anxiety, and so on, will have a greater affect on him. And, in addition, as a result of the underlying condition, a smaller amount of substance has a greater affect." (T. 244-245). Additionally, in a heightened situation Mr. Reaves "would have difficulty with concentration, with attention, with understanding the long-term consequences of immediate behavior, which in a sense is forming intentionality, or direction, instead would act in a rather impulsive way." (T. 244-45). Thus, Mr. Reaves was not able to form specific intent because,

> In neuropsychological terms, he has damage in an area that relates to understanding the long-term consequences on immediate behavior that would be further aggravated by substance use and abuse, and as a result would not have been able to, his behavior would have been impulsive. Other people in their wisdom would attempt to ascribe purposefulness to that type of behavior and attentionality. That's much in the same way that we attempt to make sense out of a dog running out in the back yard to bury a bone. We do it simply by looking at it and wanting to ascribe behavior and purpose to something that is impulsive.

(T. 250).

Dr. Deborah C. Mash, Ph.D., a professor of neurology and molecular cellular pharmacology at the University of Miami School of Medicine whose “primary areas of interest is substance abuse and dealing with the affects of cocaine" (T. 273). She reviewed background materials and interviewed Mr. Reaves on November 22, 2002 for about two hours, using an instrument called Addiction Severity Index, 5th Edition (T. 274-75).

She determined that Mr. Reaves’ had a history of substance abuse from his teen years until 1986. (T. 275-85). Dr. Mash pointed out that the date of the offense in this case, 1986, had some independent historical significance:

> At 1986 is when the face of cocaine changes radically in the United States. It switches from powder, from Miami Vice where everybody is using recreational cocaine to crack cocaine abuse, which changes the entire face of this epidemic. In 1986 we see the largest number of deaths in Dade County, that's sort of the curve of the whole epidemic. We also see a large increase in violent crime related to cocaine, et cetera. So, it was very plentiful throughout.

(T. 279).

Dr. Mash testified that her source of information about Mr. Reaves' drug use at and around the time of the offense was from Mr. Reaves and the postconviction affidavit of Eugene Hinton (T. 280). She opined that at the time of the offense Mr. Reaves “<u>was definitely in the state of voluntary intoxication</u> and would not have been able to form the intent to commit murder.” (T. 293)(emphasis added).

This is because at the time of the offense Mr. Reaves was "[f]ully intoxicated, fully paranoid, fully neuroadapted to the cocaine, no frontal lobe functioning, basically shutting down the frontal lobes which would get him out of trouble, and he is now in this heightened state." (T. 292). In her evaluation she determined that Mr. Reaves,

> as described by his friends and himself, wasn't there anymore. This was the kind of person who would go and just sit for hours, after hours, after hours, hitting that pipe by himself alone, in a state of full cocaine paranoia, and this is what happens. When the brain neurons adapt you don't even get the pleasurable effects anymore, you go straight to a paranoid state of mind. In that paranoid state of mind - this is really bizarre to watch - and this is what he did every day, stayed in that state, fully hyperaroused, completely paranoid, completely wired.

(T.282-285).

This causes a "fully distorted state of reality" where the person, in this case Mr. Reaves, has "hallucinations in that state, auditory hallucinations, visual hallucinations, they hear voices, they get ringing in their ears." (T. 282-285). Such people in that state, like Mr. Reaves, are "are fully altered. It is the most intense level of cocaine dependence and altered cocaine sensorium. It is not normal perception of the universe around you." (T. 282-85).

Dr. Mash concluded that Mr. Reaves was a polysubstance abuser, that he met the clinical criteria for depression, and that at the time of the offense was intoxicated, paranoid and fully delusional, all "due to the effects of a severe

amount of cocaine abuse." (T. 285-86). Frontal lobes in such individuals fail to function and they do not have the ability to delay reaction time. That's what the frontal lobes do. (T. 289). Dr. Mash explained that,

> The frontal lobes of our brain is what we call the executive function of the brain. Those of us that function well in society, have well developed frontal lobes. It's the ability to take information from all the senses, hold it upstairs in working memory and look at it. I am not going to die. I can deal with this. But you need to be able to delay. You need to have all that information upstairs in the frontal lobes so you can evaluate that set of circumstances and not go on limbic overdrive and react.
>
> In essence, this is what happened. He didn't have a front lobe to engage. Substance abusers do not have frontal lobe functioning. This has been shown over, and over, and over again. We study it over, and over, and over again. Not only that, he has, neurologically speaking, frontal lobe dysfunction, that's documented in the here by some of your experts.

(T. 289-90).

Dr. Erwin R. Parson, Ph.D., a professor of psychology and board certified a clinical psychologist and psychoanalyst also testified for Mr. Reaves. (T. 337). In addition to his substantial professional qualifications Dr. Parson is also a Vietnam veteran, having served in Vietnam as a medic in the United States Army in 1966-67. (T. 338). At the time of the hearing he was employed as a clinical psychologist at two different Veterans Administration clinics in Maryland, where he deals with a variety of clinical problems the veterans present, including PTSD,

substance abuse, and other psychiatric disorders. (T. 340). He interviewed Mr. Reaves on three separate occasions and administered established testing instruments to him during those meetings. (T. 356-381).

Dr. Parson concluded that Mr. Reaves suffered from PTSD caused by his being in war-zone stressors in Vietnam. (T. 347-48). The primary source for finding the presence of this stressor was his in-depth interviews with Mr. Reaves and the corroboration from the testimony of other members of Mr. Reaves' platoon in a prior proceeding. (T. 349). The other stressors he found involved: Mr. Reaves' contact with a North Vietnamese enemy soldier whom he initially assumed was a "Kit Carson scout" for the American forces; Mr. Reaves' medical problems and the fact that a fellow United States soldier died in his arms. (T. 349-52). Dr. Parson testified that, pursuant to his report, in his opinion all the necessary criteria for him to diagnose Mr. Reaves with PTSD today or in 1992 are met. (T. 355).

Dr. Parson testified that he was not a lie detector, but he stated that his own Vietnam experience helps him to establish trust and rapport with Vietnam veterans like Mr. Reaves, and that his own opinion was that Mr. Reaves was telling him the truth. (T. 383-84). Dr. Parson linked Mr. Reaves' PTSD to his substance abuse. According to Dr. Parson, when people have been traumatized there is a basic change in their function, which forces them to experience hyperarousal an a regular

basis. (T. 388). Such a state leads to substance abuse because,

> [h]yperarousal contributes to the sense of being vulnerable. So anything that's going to help dampen hyperarousal, for instance substance, alcohol, drugs, avoidance, overworking, a person will do to be able to survive, to allow conscious life to go on.

(T. 388-389).

Dr. Parson stated that he had reviewed Mr. Reaves' military records (R. 404). He agreed that the records revealed that Mr. Reaves was honorably discharged and was an Air Medal Sharp Shooter qualified on the M-16 rifle. (T. 404). He acknowledged 1992 trial testimony of, Hector Caban, a man who served in Vietnam with Mr. Reaves, corroborated Mr. Reaves' accounts of a fellow soldier who died in his arms, Mr. Reaves' being trapped in a U shaped ambush, Mr. Reaves' participation in the secret incursion into Cambodia, and his involvement in numerous "firefights." (T. 406-407). According to Dr. Parson, all these stressors lead to PTSD which led to Mr. Reaves' drug addiction.

Dr. Thomas Hyde, a medical doctor specializing in behavioral neurology, interviewed and evaluated Mr. Reaves. His interview of Mr. Reaves revealed a reported closed-head injury following his arrest and polysubstance abuse, with emphasis on alcohol and cocaine abuse. (T. 461). According to Dr. Hyde Mr. Reaves' neurological problems, if not developmental, were most likely were acquired as a result of the polysubstance abuse, or as a consequence of the head

injury. (T. 462). Dr. Hyde noted that Mr. Reaves received a head injury after being arrested and determined it would have impacted his mental state during the confession. According to Dr. Hyde,

> Mr. Reaves reports that he had fairly dense amnesia for 24 hours after the beating, which would be within the time frame of his confession.
>
> The concussive injury to the brain would compromise his cognitive function, would leave him to be confused, would make any statements and reports that he would make during that time period and probably for several days after that time period, suspect as to their validity.

(T. 463-464). Dr. Hyde explained that in these circumstances, Mr. Reaves' confession could have included confabulation. (T. 470). Front lobe dysfunction would compromise an individual's reasoning, judgment, and impulse control (T. 465). He concluded, to a reasonable degree of medical certainty, that Mr. Reaves has major recurring depression, polysubstance abuse probably including cocaine and alcohol dependence, strong elements for PTSD, and a post-concussive brain injury. (T. 465). Individuals, like Mr. Reaves, "with depressive disorders are much more prone to polysubstance abuse, they often self medicate with alcohol, particularly cocaine, which has a euphoric effect." (T. 476).

Dr. Cheshire, a psychiatrist, testified as the sole rebuttal witness for the state. (T. 481-514). He stated that he had testified in 1992 in the instant case. (T. 483). He further testified that he never met or examined Mr. Reaves and that it was not

necessary for him to do so to form his opinion, because, "at the time of the commission of the crime, he knew what he was doing, he knew right from wrong, and he understood fully the responsibility of what he was doing." (T. 485).[3] Dr. Cheshire testified that he had reviewed "the testimony and examinations in depth" of the other experts, and that in his opinion, Mr. Reaves made a conscious decision to kill the deputy. (T. 485).

After the evidentiary hearing, the circuit court defied relief. On appeal, this Court affirmed. This Court held under its *Strickland* case law that Mr. Reaves was not entitled to relief because, notwithstanding the significant expert evidence to the contrary, Mr. Reaves "did not present any evidence to show his level or state of intoxication at the time of the murder." *Reaves v. State*, 942 So. 2d 874, 879 (Fla. 2006).

Mr. Reaves filed a successive Motion for Postconviction Relief arguing that the United States Supreme Court decision, *Porter v. McCollum*, requires relief in his case. Mr. Reaves argued that *Porter* requires state courts to engage in the facts developed in postconviction and not to discount to irrelevance facts in support of relief. (R2. 1-73). Specifically, Mr. Reaves argued that the jury never heard the substantial evidence of voluntary intoxication nor was it full presented with the

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[3]The State has never filed a motion requesting access to Mr. Reaves for purposes of a postconviction mental health examination by a State expert.

voluntary intoxication defense. (T2. 7). Additionally, the jury did not hear about the full effect the experience in Vietnam had on Mr. Reaves. (T2. 7). The jury never heard of the connection between Mr. Reaves' service in Vietnam, his PTSD and his chronic and prolonged substance abuse. Such factors, as argued by Mr. Reaves, combined sufficiently to prevent him from formulating specific intent and also combined to create significant mitigation evidence that, when viewed in its entirety, would likely produce a different outcome at trial. Nonetheless, the circuit court summarily denied Mr. Reaves' motion and this appeal follows.

STANDARD OF REVIEW

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

SUMMARY OF THE ARGUMENT

Mr. Reaves was deprived of the effective assistance of trial counsel. This Court denied Mr. Reaves' 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. Reaves' ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents

a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein rendering Mr. Reaves' *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. Reaves' 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. REAVES' CONVICTION AND DEATH SENTENCE VIOLATE THE CONSTITUTION WHERE THEY ARE PREDICATED UPON A TRIAL PROCEEDING THAT WAS MARRED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE FACTS DETAILING SUCH INEFFECTIVENESS HAVE NOT BEEN ADEQUATELY ANALYZED PURSUANT TO ESTABLISHED UNITED STATES SUPREME COURT'S DECISION IN *PORTER V. MCCOLLUM*.

A. *Porter v. McCollum*.

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

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

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

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

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing.

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

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

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

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

Id. at 695.

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

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

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

The *Porter* decision establishes that the previous denial of Mr. Reaves's ineffective assistance of counsel claims was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Reaves'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. Reaves's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that the Florida Supreme Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

The circuit court denied Mr. Reaves' motion finding that it was procedurally barred because *Porter* is not retroactive. (PCR2 146). However, in *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. This Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* (quotations omitted).

The "concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery." *Id*. at 928. Thus, this Court declined to follow the line of United States Supreme Court cases addressing the issue, which it characterized as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the

United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the United States Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926.

The *Witt* Court recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter.*" Id. at 929. The Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect

on the administration of justice of a retroactive application of the new rule." Id. at 926.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to the Florida Supreme Court and the United States Supreme Court. *Id.* at 930. The Florida Supreme Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931.

After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock*, a

death sentenced individual with an active death warrant argued to the Florida Supreme Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. See *Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that the Florida Supreme Court had misunderstood what *Lockett* required. By holding that the mere opportunity to

present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the United States Supreme Court held that the Florida Supreme Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. See *Id.* at 1071.

Following *Hitchcock*, this court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, inter alia, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071. Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had

raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so too *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. As in *Hitchcock,* where the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Lockett*, a prior decision from the United States Supreme Court, here in *Porter*, the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears*. As *Hitchcock* rejected the Florida Supreme Court's analysis of *Lockett*, *Porter* rejects the Florida Supreme Court's analysis of *Strickland* claims as unreasonable application of the *Strickland* standard. Again, just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from

that erroneous legal analysis that Mr. Porter received. Furthermore, just as the Florida Supreme Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, the Florida Supreme Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases that dates back to the issuance of *Strickland* itself.

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

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

Porter v. State, 788 So. 2d at 923 (emphasis added). This Court continued applying its case law and declared that,

> Having resolved the conflict of the expert opinion, the trial court concluded that the defendant failed to demonstrate the existence of the alleged mitigation. Accordingly, the trial court held that trial counsel's

> decision not to pursue mental evaluations did not exceed the bounds for competent counsel set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In view of the trial court's factual finding, **we agree that the trial court's conclusion that trial counsel was not ineffective is legally correct under *Strickland. See Stephens v. State,* 748 So.2d at 1034**.

Id., at 923-24(emphasis added).

The United States Supreme Court rejected this analysis (and implicitly this Court's case law on which it was premised) as an unreasonable application of *Strickland*:

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

Porter v. McCollum, 130 S. Ct. at 454-55.[4]

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[4] The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard which is identical to the prejudice prong of the *Strickland* standard, the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result. This is because the judges

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, and "either did not consider or unreasonably discounted" that evidence. *Id*. at 454. The United States Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Porter*, 130 S.Ct. at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *Id*. at 454, even though Mr. Porter's personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id*. (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

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

The circuit court's finding that Mr. Reaves "does not cite to any authority holding that *Porter* changed the standard of review announced in *Strickland*" (PCR2 p.146) is inapposite to the issues here. Mr. Reaves has not argued or

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

suggested that *Porter* represents a change in the evaluation of prejudice under federal law; rather, it represents a change in how this Court has approached that analysis under *Strickland*. For instance, the fact that this Court cited to *Strickland's* test does not mean that the required painstaking search for constitutional error has taken place. *See e.g. Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). Indeed, this Court accurately cited the *Strickland* standard in *Porter*, but the Supreme Court concluded it was this Court's application of that rule that was unreasonable when it granted Mr. Porter relief. Similarly, in *Sears v. Upton,* the U.S. Supreme Court noted that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Sears* at 3264 (emphasis added). The finding that Mr. Reaves' claim is procedurally barred was based on the lower court's misunderstanding of the claim.

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court, just as this court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), this Court relied upon the language in *Porter v. State* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction

evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

Indeed, in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings. In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision. *Id.* In *Rose*, the Florida Supreme Court employed a less deferential standard. As explained in *Stephens*, the Florida Supreme Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. The Florida Supreme Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the court made clear that even under this less deferential standard:

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

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, the court relied upon that very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923. *Porter v. State* was not an aberration; rather, it was based on this Court's entrenched case law. *Id.* at 923.

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

From an examination of the this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard which was employed in *Porter v. State* and used to justify the Florida Supreme Court's decision to discount and discard Dr. Dee's testimony was "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455.

The Supreme Court, in *Porter,* held that this Court was "unreasonable to discount to irrelevance" the evidence presented at an evidentiary hearing. *Id*. at 455. That, however, is exactly what this Court did in Mr. Reaves' case after the evidentiary hearing. Mr. Reaves presented the testimony of no less than six expert witnesses who all concluded that he was a polysubstance abuser, was intoxicated at the time of the offense and because of that intoxication was unable to form the necessary specific intent in order to sustain a first-degree murder conviction. There was evidence that when Mr. Reaves was arrested the Georgia police reported he was "coming down off cocaine." (T. 29; 176). There was also evidence that Mr. Reaves was arrested with 4.5 ounces of cocaine in his possession; a fact to which trial counsel failed to object. (T. 51-52). Mr. Reaves repeatedly admitted to police he was "coked up" during the offense. *See Reaves v. State*, 826 So. 2d 932, 937 (Fla. 2002)(citing to Mr. Reaves' admission to being "coked up" as evidence of voluntary intoxication). Additionally, the affidavit of Eugene Hinton, which the court refused to accept, established Mr. Reaves' intoxication at the time of the offense. Nonetheless this Court dismissed this evidence and held "Reaves did not present any evidence at the evidentiary hearing to show his level or state of intoxication at the time of the murder." *Reaves v. State*, 942 So. 2d 874, 879 (Fla. 2006). If six experts, a police report, the defendant's own statement, and the

seizure of 4.5 ounces of cocaine amount to no evidence of drug use, then one wonders what quantum of evidence would suffice.

Ironically, this Court remanded Mr. Reaves's case for an evidentiary hearing precisely because there was evidence of voluntary intoxication. *See Reaves v. State*, 826 So. 2d 932 (Fla. 2002). Specifically, this Court stated, "[t]he record shows that during the guilt phase, the State introduced Reaves' confession-evidence which could have supported a voluntary intoxication defense since Reaves claimed to be 'coked up' when he fired the gun. *Id.*, at 937. This Court also noted that during Mr. Reaves' first trial the voluntary intoxication instruction was read to the jury. *Id.* Again, this Court noted that "[d]uring the penalty phase, even more evidence was presented which would have supported a voluntary intoxication defense, including additional testimony that Reaves was on drugs at the time of the crime." *Id*. Finally, in remanding the case for an evidentiary hearing, this Court held that the "postconviction court denied Reaves' allegation without an evidentiary hearing despite evidence that his counsel had evidence supporting [the voluntary intoxication] defense which he did not present." *Id*., 938. Notwithstanding the identification of all this evidence this Court subsequently held that Mr. Reaves was not entitled to relief because he did "not present any evidence" of his intoxication. *Reaves,* 942 So. 2d at 879.

The inconsistency between these two opinions was noted by Justice Anstead in his dissent where he stated he "could not concur in the majority's approval of the conduct of counsel in failing to properly investigate or present an intoxication defense to explain Reaves' bizarre conduct that ultimately resulted in the death of a police officer when he responded to defendant's emergency 911 call for help." *Reaves v State*, 942 So. 2d at 882 (Anstead, J. dissenting in part). Justice Anstead went on to state:

> In the face of a lack of an adequate explanation of counsel, the trial court and the majority have fashioned a speculative and hypothetical explanation by pointing out the possible weaknesses in the defense of voluntary intoxication. But that is neither the trial court's nor our obligation on review of counsel's actions. Rather, we are bound by the facts, most of which were outlined in our prior opinion, and by counsel's explanations, not our own speculation or rationalization of counsel's conduct.
>
> As this Court explicitly detailed in our prior opinion, on this record, with its bizarre facts, voluntary intoxication jumps out as an explanation for the defendant's bizarre and deadly actions. And, while even that defense could not have exonerated the defendant from responsibility for the death of the officer, it could have resulted in a jury finding of guilt of a lesser degree of homicide. In a very real sense, the advancement of this defense represented a chance to save the appellant's life.

Id.

This Court's declaration that there was no evidence of Mr. Reaves' intoxication at the time of the offense is presciently *Porter*-esque. Indeed, Justice

Anstead's dissent chastising the majority for speculating about the weaknesses in the intoxication defense is the very act of discounting to irrelevance with which the Supreme Court held was unreasonable for this Court to do. *See Porter v. McCollum*, 130 S.Ct. 447, 455 (2009). In other words, as Mr. Reaves argued below, this Court set out to answer the wrong question in the context of the *Strickland* analysis.

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

It should also be noted that where a reasonable probability is the quantum

sought, it does not render the two possible outcomes mutually exclusive or render this process a zero-sum game. In other words, it could be both reasonably likely the pennies weigh more than the quarters and reasonably likely that the quarters weigh more than the pennies. If it is both reasonably probable that the non-presented evidence would have made a difference and reasonably probable that the evidence in aggravation would negate the non-presented evidence, then the defendant must be granted relief because *Strickland* is only concerned with the reasonable probability that the non-presented mitigation evidence would have changed the outcome, not the other way around.

From a *Strickland* point of view, the quarters should not be the focus of the inquiry. This does not mean the quarters are not considered, they must be. However, the inquiry is whether it is reasonably likely the pennies weigh more, which renders the focus on the pennies with the quarters only being considered in relation to the pennies. Attempting to answer the question without this careful weighing process fails the fundamental inquiry enunciated in *Strickland* and plainly re-stated in *Porter*, which mandates that "to properly asses the probability of a different outcome under *Strickland*, courts must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." *Porter,* 130 S.Ct. at 453-54, quoting *Williams v. Taylor*, 529 U.S.

362, 387-398 (2000). *See also, Sears v. Upton,* 130 S. Ct. 3266 (2010). Thus, the focus is squarely on the mitigation (or pennies). Focusing formost on the aggravation (or quarters) taints the process and tilts it unreasonably infavor of unreasonably overwighing it in relation to the mitigation (or pennies). This shifts the focus of the analysis away from the mitigation (pennies) and entices a court to dismiss into irrelelvance those mitigating factors because it is focusing on the aggravation (or quarters). Put more starkly, Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). Thus, courts must painstakingly search for all the pennies while acknowledging the existence of the quarters and not the other way around.

Furthermore, the search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of trial. It is clear that the focus of a court's prejudice inquiry must be to *try to find a*

constitutional violation. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must *search* for it carefully, not dismiss the *possibility* of it based on information that suggests it may not be there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non-presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

Therefore, Supreme Court precedent requires a court reviewing innefectiveness claims under *Stirckland* to speculate only about the new evidence in mitigation. However, this requirement is the exact opposite of the way in which Justice Anstead identified that this court speculated in Mr. Reaves' case. *Reaves v. State*, 942 So. 2d 874, 882 (Fla. 2006)(Anstead, J. dissenting in part). A proper *Strickland* analysis "will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears*, 130 S. Ct. at 3266-67.

Thus, a court is required to speculate as to how the mitigating evidence may have changed the outcome of the trial rather than speculating how the agravating evidence negates the mitigating evidence. *Porter* requires the former while this Court has, in violation of *Porter*, engaged in the latter. In other words, the *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry is to *try to find prejudice* by aggregating all the pieces of mitigating evidence, engaging with them and painstakingly speculating as to whether the State is poised to execute an individual whose trial attorney failed to present evidence that might have resulted in a life sentence. It is the focus on non-mitigating evidence to support a reverse-*Strickland* inquiry that runs afoul of and unreasonably misapplies *Strickland*.

The Sixth Amendment vests a right to effective assistance of counsel in capital defendants such that when it is reasonably probable that a trial attorney's deficient performance changed the outcome of a case a constitutional violation occurs. It does not matter whether it is also reasonably possible that the deficient performance did not change the outcome. That is a different inquiry and a contrary standard. The insidiousness of the error is its subtlety because the conclusions seem to have a tendency to negate or at least cut against one another. But since the standard is to look for a reasonable probability of a changed outcome, while it seems to tip the scale of the *Strickland* prejudice inquiry that the jury might have taken some of the non-presented evidence to cut against the defendant, that

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

Extending the illustration from above, courts must not focus on quarters to answer the question of whether there are pennies and how much they weigh. By focusing on the larger shinier coin (the non-mitigating evidence) and asking if that would support the outcome, courts fail to address the correct prejudice inquiry and actually reverse the inquiry in *Strickland*. Reversing the *Strickland* standard to ask whether there is a reasonable possibility that non-presented evidence would not have changed the outcome, reverses the standard of the inquiry and thus the burden on the defendant to make a claim under the standard. Dissenting in *Gamache v.*

California, Justice Sotomayor wrote that,

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

562 U. S. ____ (November 29, 2010) (citations omitted). Like the California courts, Florida courts must not violate *Kyles* by looking for a collection of quarters in the cup that supports the conclusion that there are no pennies to be found. Rather, Florida courts must take painstaking care in scrutinizing a postconviction record for anything and everything that might add up to something that probably would have made a difference. *See Porter v. McCollum*, 30 S. Ct. 447 (2009); *Sears v. Upton,* 130 S. Ct. 3266 (2010). Any other process is an unreasonable application of clearly established United States Supreme Court law.

In *Sears v. Upton*, the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears" and unable to "speculate as to what the effect of additional evidence would have been" because "Sears' counsel did present some mitigation evidence during Sears's penalty phase." *Id*. at 3261. The United States Supreme

Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Id*. at 3264. The United States Supreme Court explained the state court's reasoning as follows:

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

Id. at 3264 (citations omitted).

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

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's

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

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, requires in all cases a "probing and fact-specific analysis" of prejudice. *Id.* at 3266. A truncated, cursory analysis of prejudice is unreasonable and will not satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Reaves'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.

During the evidentiary hearing substantial evidence was presented that both impacts the guilt phase and the penalty phase of Mr. Reaves' trial. First, no fewer that six expert witnesses is varying mental health disciplines concluded Mr. Reaves was a chronic polysubstance abuser who suffered from PTSD and depression. Combining heavy substance abuse with his mental conditions caused Mr. Reaves to be unable to form the specific intent to kill required in first-degree murder. Failing to pursue such a defense in this case most certainly prejudiced Mr. Reaves. As Justice Anstead noted, the intoxication defense "could have resulted in a jury finding of guilt of a lesser degree of homicide." *Reaves,* 942 So. 2d. at 882 (Anstead, J. dissenting in part) In addition, the substantial mental health evidence presented at the evidentiary hearing would have been strong mitigation evidence in penalty phase as well.

Sears teaches that postconviction courts must speculate as to the effect of non-presented evidence in order to make a *Strickland* prejudice determination not only when little or no mitigation evidence was presented at trial but in all instances. As *Sears* points to *Porter* as the recent articulation of *Strickland*

prejudice correcting a misconception in state courts, the failure to conduct a probing, fact-specific prejudice analysis can be characterized as "*Porter* error."

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

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis. It failed to engage, as a juror might, with the evidence and to imagine how, absent counsel's deficient performance, that evidence impacted the result. Mr. Reaves' substantial claim of ineffective assistance of counsel has not been given serious consideration as

required by *Porter*. Mr. Reaves requests that this court perform the analysis of this claim which has as of yet been lacking in this case.

CONCLUSION

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

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Leslie Campbell, Assistant Attorney General, 1515 N. Flagler Dr., 9th Floor, West Palm Beach, FL 33401, this 14th day of June, 2011.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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