IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-616

MATTHEW MARSHALL,

Appellant,
v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Marshall appeals the circuit court's denial of his successive motion for postconviction relief. In response to Mr. Marshall's argument that the decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) created a change in Florida's *Strickland* jurisprudence that requires consideration and granting of Mr. Marshall's postconviction claims, the circuit court ruled that *Porter* does not represent a change in the law that creates a successive postconviction claim and that regardless the Florida Supreme Court's ruling in this case that trial counsel was not deficient bars relief (R. 160). Below, Mr. Marshall identifies errors in those rulings.

CITATIONS TO THE RECORD

The format "R. #" will be used to refer to the present record on appeal. All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure, Mr. Marshall 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. Marshall asks this Court to consider *Porter* introspectively, looking past the first blush language of the opinion, and inquiring into whether or not *Porter* forbids something that this Court has done in the present case. In other words, giving *Porter* a read-through and asking if this case is distinguishable may be insufficient to identify the underlying constitutional problem; Mr. Marshall asks this Court to attain a sense for the problem in conceptual approach that *Porter* identifies and then ask if something similar happened here. This Court must consider whether the unreasonable analysis in *Porter* was merely an aberration, limited solely to the penalty phase ineffectiveness claim in that case and wholly different and separate from other *Strickland* analyses by this Court, or was it in fact indicative of a non-isolated conceptual problem in this Court's approach to *Strickland* issues that occurred also in the present case.

STATEMENT OF CASE AND FACTS

The underlying facts relevant to the present claims were summarized by this Court in denying Mr. Marshall's *Brady/Giglio* and *Strickland* claims. This Court's statements not only contain the underlying facts needed to demonstrate the *Porter* error committed in this case but themselves form part of the basis of the instant *Porter* claims, and thus must be reviewed here in there entirety. In reviewing the facts of this case, it must be kept in mind that Mr. Marshall's jury recommended that he be sentenced to life and the trial judge overrode that recommendation and

imposed death. While the case law tends to contemplate the effect on a jury of unpresented evidence, that analysis is somewhat strained here, as the jury thought Mr. Marshall deserved to live. Since Florida does not count death sentences among the matters that must be determined by a jury, we must ask here how the unpresented evidence would have affected the ultimate sentencer: the judge, or how the judge might have conceived differently of the jury's recommendation had it been supported by the unpresented evidence described below.

In denying Mr. Marshall's *Brady* claim, this Court summarized the facts relevant to the present claim, and explained its conclusion as follows:

> Marshall also argues that the trial court erred in denying his claim that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the State presented false testimony in violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In particular, Marshall alleges that the State withheld evidence that inmates George Mendoza and David Marshall were promised to be housed together in the prison system in exchange for their testimony against Marshall. Marshall contends that had the jury learned of this promise the credibility of Mendoza's testimony at trial would have been severely undermined. As such, Marshall argues that there is a reasonable probability that the jury would have found him not guilty, or guilty of a lesser offense than first-degree murder.
>
> To support this claim, Marshall called as witnesses at the postconviction evidentiary hearing inmates George Mendoza and David Marshall. Mendoza and David Marshall both testified that they were promised by Inspectors Sobach and Riggins and Assistant State

Attorney Spiller that they would be housed together in the prison system at an institution closer to home for their safety and protection in exchange for their testimony. According to Mendoza and David Marshall, the initial promise was made by investigator Riggins and later reiterated at a meeting following their grand jury testimony where Sobach, Riggins, and Spiller were present. Mendoza noted that they were informed their protection and safety were the reasons that they would continue to be housed together. Mendoza also indicated that Assistant State Attorney Spiller advised him that it was normal procedure in the courtroom to state that he was promised nothing in exchange for his testimony if asked by defense counsel. On cross-examination, however, both Mendoza and David Marshall acknowledged writing letters to Assistant State Attorney Spiller wherein they indicated that they understood no promises could be made. Mendoza and David Marshall also reiterated on cross-examination that their prior statements and testimony in the case were truthful.

FN11. Marshall also attached to his postconviction motion a copy of a civil rights action Mendoza filed against numerous correctional officials, in which Mendoza reiterated that an oral contract/agreement was made to house him and David Marshall together for their protection at an institution close to home for being State witnesses in Matthew Marshall's case.

Marshall also called Kerry Flack, formerly with the Department of Corrections, as a witness at the postconviction evidentiary hearing. Flack testified that she became involved when inspector Sobach requested that she review files concerning Mendoza and David Marshall. According to Flack, Sobach indicated that Mendoza and David Marshall had been transferred to different institutions and he did not know whether or not they should have been permitted to remain at the same location. After reviewing the files and speaking with the classifications office and Inspector Sobach, Flack

testified that she decided that they had agreed that the inmates could move together in order to watch out for each other. Accordingly, she stated that she requested a transfer back to the same institution for Mendoza and David Marshall. Ms. Flack acknowledged at the evidentiary hearing upon viewing a print-out of the prison housing history for Mendoza and David Marshall that it was unusual for inmates to be transferred twice to the same location at the same time.

In rebuttal, the State called Inspectors Sobach and Riggins and Assistant State Attorney Spiller as witnesses during the postconviction evidentiary hearing. Sobach, Riggins, and Spiller each denied making or having any knowledge of any promises being made to Mendoza and David Marshall in exchange for their testimony. Sobach indicated that initial transfers of inmate witnesses are for their protection, but noted that any kind of commitment to keep two individuals together forever is totally impracticable. He also indicated that he would not have the authority to keep Mendoza and David Marshall housed together. Inspector Riggins similarly testified that he did not have transfer authority. On cross-examination, Inspector Sobach acknowledged that it was kind of unique that Mendoza and David Marshall were able to stay together. However, he denied telling Kerry Flack that Mendoza and David Marshall were promised to be kept together. Rather, he testified that he contacted Flack because he was concerned as to whether or not the special review against Mendoza and David Marshall, causing their separation, was appropriate or whether it may have been retaliation of some sort.

Assistant State Attorney Spiller similarly testified that no promises were made to Mendoza and David Marshall in exchange for their testimony, although he and Inspector Riggins both acknowledged that Mendoza and David Marshall were reassured that everything possible would be done to protect them from retribution. Spiller stated that Mendoza and David Marshall on two occasions prior

> to trial requested that they be assured that they would be housed together. However, Spiller testified that he informed them on both occasions that he had no authority over housing and would not make any promises that could jeopardize the case. Although Spiller admitted writing a letter to the Department of Corrections denoting Mendoza's and David Marshall's cooperation in the case, he denied ever requesting that the department house the two inmates together. Lastly, Assistant State Attorney Spiller denied instructing Mendoza that it is normal procedure for witnesses to deny that promises were made in exchange for their testimony when asked at trial.
>
> The trial court denied Marshall's claim, concluding that Marshall had failed to prove either a Brady or a Giglio violation. In so doing, the trial court noted that there was no knowing presentation of false testimony by the State since Mendoza himself acknowledged that he understood that the State could make no promises and had made no promises to induce his testimony. For the following reasons, it does not appear that the trial court erred in denying Marshall's Brady/Giglio claim."

Marshall v. State, 854 So. 2d 1235, 1248-50 (Fla. 2003).

In denying Mr. Marshall's *Strickland* claim, this Court discussed the evidence presented at the postconviction evidentiary hearing, none of which was ever discovered or attempted to be discovered by trial counsel as follows:

> At the postconviction evidentiary hearing, Marshall called three of his brothers to testify, Brindley Marshall, Percival Marshall, Jr., and Marvin Marshall. Each of Marshall's brothers testified that their father was extremely abusive while they were growing up. In particular, Marshall's brothers testified that their father would beat them with extension cords, tree branches, and electrical wire. Sometimes the beatings would last upward of thirty to forty-five minutes. In addition,

Brindley and Percival each testified that their father would bind their hands and feet with duct tape, take off all of their clothes, and beat them. Brindley and Percival also testified that they, along with Marshall, would sometimes sleep in the toolshed in the backyard, on the roof of the health clinic behind their house, or at their aunt's house to avoid the abuse. They also indicated that their father abused alcohol. Marshall's brothers further testified that their father abused their mother, and allegedly stabbed her on one occasion. However, the brothers acknowledged that they did not call the police to report the abuse. All three brothers testified that they were not contacted by trial counsel. Brindley and Marvin were in prison at the time of trial.

Marshall also presented testimony from five of his cousins at the evidentiary hearing, Medwer Moultrie, Samuel Whymns, Lisa Laing Forbes, Jacqueline Laing, and Philencia Dames. Samuel Whymns, Lisa Laing Forbes, Jacqueline Laing, and Philencia Dames lived in the Bahamas, but testified that they visited and stayed at Marshall's home for varying amounts of time while growing up. Medwer Moultrie, on the other hand, testified that he lived with Marshall's family for two years at the request of his mother, who asked him to keep an eye on his aunt (Marshall's mother) because his uncle (Marshall's father) was being abusive. Marshall's cousins each testified in varying degrees as to the physical abuse Marshall and his mother suffered. All of Marshall's five cousins indicated that they were not contacted by trial counsel. Marshall's four cousins who lived in the Bahamas at the time of the trial also indicated that their relatives in Miami knew how to contact them.

At the evidentiary hearing, trial counsel testified that he conducted a thorough interview with Marshall prior to trial during which he tried to obtain a life history. Trial counsel acknowledged that his notes from this interview indicated that Marshall did not want to involve his brothers and sisters, although trial counsel said he would

have disregarded this request due to his duty to investigate. During this interview, Marshall told trial counsel that he completed tenth grade and started eleventh, that he was very fortunate to have two parents who motivated and encouraged him to succeed, and that there was so much love in his family. Marshall also denied being neglected or abused. Marshall described discipline at home as 75% verbal and 25% physical, although he did not characterize the physical discipline as abusive. Marshall did not relate any physical or mental health problems to trial counsel, and denied having suffered any serious head injuries. Defense counsel also indicated that he reviewed Marshall's school, prison, and mental health records.

In addition to speaking with Marshall, trial counsel indicated that he made efforts to speak with family members. Marshall provided trial counsel with his aunt's name, and trial counsel indicated that he wrote two letters to her requesting that she contact him because Marshall had indicated that she could put him in touch with Marshall's father and other relatives. Marshall's aunt never responded to trial counsel's inquiries. Trial counsel, however, did eventually speak with Marshall's father. According to trial counsel, Marshall's father indicated that Marshall had a good upbringing, although he and his brothers were always getting into trouble. Although trial counsel acknowledged that Marshall's father's comments about him having good grades were at odds with Marshall's school records, he indicated that he would not have made a different proffer by editing what the father would have said had he testified. Marshall's father also provided trial counsel with the names and ages of Marshall's brothers, but claimed not to know where they were living because he had disowned them due to their behavior. Trial counsel conceded during the evidentiary hearing that he did not file a motion for an investigator, nor did he request the assistance of either of the investigators working with the public defender's office at the time. Trial counsel explained that he would not have

> sent a female investigator into urban Dade County looking for witnesses because it would not have been safe. He also indicated that he would not have sent the other investigator, an elderly man, into Dade County either. Although trial counsel stated that he thought about driving into Liberty City himself, he chose not to do so. Trial counsel further explained that he had no information leading him to Liberty City. Trial counsel also testified that he would not have called Marshall's brother Brindley as a witness no matter what he had to offer, because he had previously tried to help Marshall escape. Trial counsel also noted that Marshall's father led him to believe that he was going to bring as many family members as possible with him to the penalty phase. Trial counsel acknowledged that had he possessed information concerning child abuse, he would have presented it at the penalty phase. However, trial counsel testified the problem in this case was that the information Marshall relayed to him coincided with what his father had said. Thus, it does not appear that the trial court erred in concluding that trial counsel conducted a reasonable investigation.

Marshall v. State, 854 So. 2d 1235, 1245-47 (Fla. 2003).

Current proceedings

On November 29, 2010, Mr. Marshall filed a successive motion to vacate judgments of conviction and sentence pursuant to 3.851 alleging that this Court failed to properly analyze prejudice based on clearly established federal law as set forth in *Porter v. McCollum* and *Strickland v. Washington*. (R3. 41-89). The State responded (R. 98-120) and the circuit court entered an order denying relief on February 21, 2011 (R. 159-161). The entirety of the trial court's analysis is as follows:

> The court finds the motion procedurally barred and without merit for the following reasons. First, Marshall does not cite to any Florida Supreme Court or United States Supreme Court authority holding that *Porter* established a new fundamental constitutional right that is to apply retroactively. *See Witt v. State*, 387 So. 2d 922, 930 (Fla. 1980). And Marshall fails to otherwise allege a bonafide exception to the one-year time limitation for filing a motion seeking collateral review after a death sentence has been imposed. Fla. R. Crim. P. 3.851(d)(1) & (2).
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> In addition, Marshall does not cite to any authority holding that *Porter* changed the standard of review announced in *Strickland*. Thus, Marshall fails to demonstrate unknown grounds for relief required to relitigate prior claims in a successive postconviction motion. *See Wright v. State*, 857 So. 2d 861, 868 (Fla. 2003).
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> And even if the motion was not procedurally barred, in Marshall's case, unlike *Porter*, the state courts addressed trial counsel's performance in investigating and presenting mitigating evidence at the penalty phase, and found that counsel's performance was not deficient. *Marshall v. State*, 854 So. 2d 1235, 1244-1248 (Fla. 2003). Therefore, Marshall is not entitled to relief.

(R. 160).

Mr. Marshall timely filed a notice of appeal, and the present appeal follows.

SUMMARY OF THE ARGUMENTS

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

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

STANDARD OF REVIEW

The issues presented in this appeal consist of two parts: the first is the determination of whether the *Porter* claim is cognizable, meaning whether it creates a change in Florida law and is retroactive in nature. That issue is a question of law that must be reviewed de novo. *See Marshall 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. Marshall's case, a determination for which deference is given findings of historical fact. All other facts must be viewed in relation to how Mr. Marshall'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. MARSHALL'S SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *PORTER V. MCCOLLUM*

Mr. Marshall was deprived of the effective assistance of trial counsel. This Court denied Mr. Marshall'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. Marshall'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. Marshall'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. Marshall's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

Mr. Marshall, 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. Marshall 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. Marshall seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Marshall seeks the proper application of the *Strickland* standard. Mr. Marshall seeks to be treated equally and fairly.

The preliminary question that must be addressed is whether the United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Marshall'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 Marshall v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

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

In *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. The Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id*.

(quotations omitted). A court's inherent equitable powers were recently reaffirmed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the United States Supreme Court explained:

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

Holland, 130 S. Ct. at 2563.

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

than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).[1]

Thus, we are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Marshall does not allege that *Porter* changes *Strickland*. Rather, our question is whether this Court believes that *Porter* strikes at a problem in this Court's jurisprudence that goes beyond the *Porter* case. Since this Court can identify a federal precedent as a change in Florida law and extend it however it sees fit, the question is whether this Court recognizes *Porter* error in other opinions such as this one and believes that other defendants should get the same correction of unconstitutional error that Mr. Porter received.

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the United States Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court

[1] 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.

found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926. So as this Court reviews this issue, it should keep in mind the heightened need for fairness in the treatment of each death-sentenced defendant.

The *Witt* Court recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." *Id*. at 929. The Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

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

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

Here, we see our issue hinge on the third consideration, as *Porter* emanates from the United States Supreme Court and is clearly constitutional in nature as a Sixth Amendment *Strickland* case. Thus we can look to the *Linkletter* considerations and consider that: the purpose to be served by the new rule would be to provide the same constitutional protection to Florida death-sentenced defendants as was provided to Mr. Porter, or to correct the same constitutional error that was corrected in *Porter*; the extent of reliance on the old rule is not presently knowable until reviewing *Porter* claims, however, if *Porter* error is found to be extensive, there is a compelling reason to correct the constitutional violation because it is great, and if *Porter* error is found to be extremely limited, the constitutional error must nevertheless be corrected; and, if *Porter* error is very limited, the effect on the administration of justice will be to correct a constitutional wrong without expending great resources, and if *Porter* error is extensive, the effect will be to justifiably use whatever resources are necessary to correct a far-reaching constitutional problem in death cases.

While the result of the *Linkletter* analysis is not certainly conclusive, the *Hitchcock* example provides further guidance. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock*, a death-sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Marshall 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).[2]

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

[2] 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 *Marshall* and *Downs* ordering resentencings in both cases. In *Marshall*, 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 Marshall, to defeat the claim of a procedural default." In *Downs*, this Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, this Court issued its opinion in *Demps*, and thereto addressed the merits of the *Hitchcock* claim, but concluded that the *Hitchcock* error that was present was harmless.

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; *Marshall v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the United States Supreme Court held that this Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. at 1071.

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

Downs, 514 So. 2d at 1071.[3] 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

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

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

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

case in which the *Lockett* issue had been raised. And in *Marshall* 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.[4]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death sentence was inconsistent with *Lockett*, a prior decision from the United States Supreme Court, here in *Porter* the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears*. As *Hitchcock*

[4] 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).

rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland*. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so to those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received.

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

Just as this Court's treatment of Mr. Hitchcock's *Lockett* claim was not some decision that was simply an anomaly, this Court's misreading of *Strickland* that the United States Supreme Court found unreasonable appears in a whole line of cases.

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

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two

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

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

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

Porter v. McCollum, 130 S. Ct. at 454-55.[5]

[5] 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

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id*. at 451, and "either did not consider or unreasonably discounted" that evidence. *Id*. at 454. The United States Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that 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

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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.

personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id*. (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court, just as this Court's *Lockett* analysis in *Hitchcock* was premised upon a line of cases. This can be seen from this Court's decision in *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004), where that court relied upon the language in *Porter* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

Indeed in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings.[6] In *Stephens*, this Court noted that its

[6] 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.

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.[7] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*.[8] However, the court made clear that even under this less deferential standard

[7] 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); *Marshall 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).

[8] 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:

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

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, the court relied upon this very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923.

From an examination of this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from *Grossman* that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard which was employed in *Porter v. 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.[9]

"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.

[9] 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

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

At the heart of *Porter* error is "a failure to engage with [mitigating evidence]." *Porter*, 130 S. Ct. at 454. The United States Supreme Court found in *Porter* that this Court violated *Strickland* by "fail[ing] to engage with what Porter actually went through in Korea." *See id*. That admonition by the United States Supreme Court is the new state of *Strickland* jurisprudence in Florida. Nothing less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage is to embrace, connect with, internalize–to glean and intuit from mitigating evidence the reality of the experiences and conditions that make up a defendant's humanity. Implicit in the requirement that trial counsel must present mitigating evidence to "humanize" capital defendants, *id.* at 454, is the requirement that

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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.

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

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

If a person is presented with a batch of apples and asked if it is reasonably probable that there are more red apples than green, and he rummages through the top of the batch, sees mostly green apples, and responds that it is reasonably possible that more are green, he has not answered the question he was asked. Whether there is a reasonable possibility that more are green does not tell us whether there is a reasonable probability that more are red. The conclusions are

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

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

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

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

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

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that

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

a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

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

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

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

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

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

wrote that

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

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

In *Sears v. Upton*, the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears" and unable to "speculate as to what the effect of additional evidence would have been" because "Sears' counsel did present some mitigation evidence during Sears' penalty phase." *Id*. at 3261. The United States Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the

circumstances of this case." *Id*. at 3264. The United States Supreme Court explained the state court's reasoning as follows:

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

Id. at 3264 (citations omitted).

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

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. §

> 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. . . . And, in Porter, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[, 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). *Sears*, as *Porter*, requires in all cases a "probing and fact-specific analysis" of prejudice. *Id.* at 3266. A truncated, cursory analysis of prejudice will not satisfy *Strickland*. In this case, that is precisely the sort of analysis that was conducted. Mr. Marshall's ineffective assistance of counsel claim must be reassessed with a full-throated and probing prejudice analysis, mindful of the facts and the *Porter* mandate that the

failure to present the sort of troubled past relevant to assessing moral culpability causes prejudice.

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

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

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

Mr. Marshall was deprived of the effective assistance of counsel and his rights under *Brady* and *Giglio*. An analysis of this Court's reasoning regarding Mr. Marshall's claims demonstrates *Porter* error.

Brady/Giglio

From the description of the facts provided by this Court as to the situation with Mendoza and David Marshall, *Porter* error is evident. From those statements by this Court we see opposing stories regarding the *Brady* allegations.

On one hand, according to Mendoza and David Marshall, they were promised by Sobach, Riggins and Spiller that they would be housed together for reasons of protection and safety, and Spiller instructed them to state in court that they were not promised anything. Strongly supporting this story is Kerry Flack, a corrections officer with no conceivable interest in being untruthful to support Mendoza and David Marshall's story, who testified that Sobach contacted her about Mendoza and David Marshall being transferred separately, and she determined that there was an agreement among Mendoza, David Marshall and the State that Mendoza and David Marshall be transferred together. She took the affirmative action of requesting that they be returned to one another's company, and explained that it was out of the ordinary that inmates be repeatedly transferred together as Mendoza and David Marshall had been. Sobach similarly testified that it was unique for Mendoza and David Marshall to have been kept together. Spiller admitted that he and Riggins assured Mendoza and David Marshall that everything possible would be done to protect them. Spiller testified that while Mendoza and David Marshall requested assurance that they be housed together, Spiller told them he could make no promises and did not have that authority.

On the other hand, the letters written by Mendoza and David Marshall indicate that they understood no promises could be made, and Sobach, Riggins and Spiller testified that no promises had been made. Sobach and Riggins further testified that they would not have the authority to keep inmates together. Sobach denied telling Flack that there was a promise. Spiller denied instructing Mendoza and David Marshall to say no promises were made to them.

This Court reviewed those opposing stories under its pre-*Porter* analysis and determined that there was no *Brady/Giglio* violation. However, a post-*Porter* analysis yields a different result, as the opposing stories certainly demonstrate a constitutional violation if one does not view the stories in a posture of attempting to disprove a violation.

Mendoza and David Marshall say there was a promise and the law enforcement officers, except for Flack, say there was not. Of course, we know that *Giglio* does not require a firm promise, or guarantee:

> *Giglio* and *Napue* set a clear precedent, establishing that where a key witness has received consideration or potential favors in exchange for testimony and lies about those favors, the trial is not fair. Although *Giglio* and *Napue* use the term "promise" in referring to covered-up deals, they establish that the crux of a Fourteenth Amendment violation is deception. A promise is unnecessary. Where, as here, the witness's credibility "was . . . an important issue in the case . . . evidence of *any understanding or agreement as to a future prosecution* would be relevant to his credibility and the jury was entitled to know of it." As the Court held in

United States v. Bagley, a case that informed the district court's decision,

> Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to [the witnesses] if the information they supplied led to "the accomplishment of the objective sought to be obtained . . . to the satisfaction of [the Government]." This possibility of a reward gave [the witnesses] a direct, personal stake in respondent's conviction. The fact that the *stake was not guaranteed through a promise or binding contract*, but was expressly contingent on the Government's satisfaction with the end result, *served only to strengthen any incentive to testify falsely* in order to secure a conviction.

The Supreme Court emphasized in *Giglio* that "this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" and that "'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'"

Tassin v. Cain, 517 F.3d 770, 778-79 (5th Cir. 2008) (footnotes omitted) (emphasis in original).[10]

[10] In anticipation of the State attempting to argue that *Tassin* is a case from another circuit pre-dating *Porter* and thus is inapplicable, Mr. Marshall notes that the case is not cited as the source of the principle asserted by Mr. Marshall but as a good articulation of the pre-existing principle from *Giglio* and *Bagly* that a firm promise is not required for there to be a constitutional violation.

In denying Mr. Marshall's *Giglio* claim this Court cited extensively the fact that State actors testified that no promise was made and no promise could have been made because authority did not exist to make the promise. However, it is thus quite clear that this Court could not constitutionally rule on the basis of distinguishing between the State making representations of non-guaranteed assistance to Mendoza and David Marshall and a firm promise to them, because that distinction has no bearing on the *Giglio* inquiry. The fact that Sobach and Riggins did not have authority to require the transfers, and may have told Mendoza and David Marshall as much, is immaterial. In fact, we know that Sobach was able to make a phone call to Flack that ultimately resulted in Mendoza and David Marshall being given the consideration of being returned to one another. Just because Sobach was not able to order that transfer, but rather had to request it, does not mean that his action could not serve as consideration for testimony. If one approaches the question as *Porter* requires, not looking for some illegitimate basis to dismiss the possibility of a violation, but rather engaging with the facts to seek out a violation, the conclusion is inescapable that a *Giglio* violation occurred. Take away from the calculus the constitutionally immaterial consideration of whether there was a firm promise based on an official authority to require that Mendoza and David Marshall be transferred together, and you are left with the plain fact that Flack determined there was an agreement to transfer them together

and Sobach was able to call and get a transfer effected. How can it possibly be concluded from these facts that there was not consideration provided by the State to Mendoza and David Marshall? There testimony or letters otherwise are simply not believable in light of the facts and can be explained a number of ways, most likely as having been effected under the direction of the State. In other words, we need not play he-said-she-said, because we know what the result was: ***Sobach made a call and they were transferred together based on a DOC officer finding that there was an agreement made to do so***. Any focus on whether or not Sobach had authority to require the transfer is misdirection and of no moment. There is no way to approach this claim in a *Porter*-compliant standpoint and find that no *Giglio* violation occurred. The only way to make such a finding is to violate *Porter* by focusing on inappropriate considerations in order to explain away a constitutional violation.

For the State to say that Mr. Marshall is trying to get a second bite at the *Gilgio* apple by raising this claim ignores the fact that the United States Supreme Court found that this Court committed a unreasonable constitutional error in *Porter*, and if a similar error occurred in this case, similar relief, correction of the error, is called for.

Strickland

Similar error was made with regard to the *Strickland* claim. Regarding the *Strickland* claim, this Court described the facts that Mr. Marshall's three brothers testified regarding the hideous abuse and torture they suffered at the hands of their father, his abusing and even stabbing their mother and his abuse of alcohol, that Mr. Marshall's five cousins corroborated the story of the brothers concerning the abuse and that all of the brothers and cousins testified that they were not contacted by trial counsel.

However, this Court then explained that trial counsel testified that Mr. Marshall did not want to involve those family members, though trial counsel acknowledged his duty to investigate would require him to ignore that request, and that trial counsel testified that the rest of Mr. Marshall's self-report about his childhood was glowing: no abuse, loving parents, no mental heath problems or serious physical injuries. This Court noted that trial counsel made attempts to contact Mr. Marshall's aunt but failed, but did speak to Mr. Marshall's father, who also gave a glowing report: good upbringing, good grades (though the school records told a different story, such that trial counsel had reason to believe Mr. Marshall's father was not telling the truth). This Court acknowledged that trial counsel did not get an investigator, testified that he would not have sent a female or elderly investigator into Mr. Marshall's childhood neighborhood anyway

because it would not have been safe and testified that he had no information suggesting to him that he should go there anyway.

These facts, recounted by this Court in support of its denial of Mr. Marshall's *Strickland* claim (quoted in the fact section above), represent a *Strickland* violation if viewed through a *Porter* analysis. Trial counsel did not investigate Mr. Marshall's childhood by going to Liberty City or talking to family members because ***Mr. Marshall and his abuser said he was not abused***. We know that trial counsel failed to uncover the facts of the abuse. And by his own words, he failed to do so because he simply took the word of an abused child and a child abuser that there was no abuse. That should be the end of the story. If a capital defense attorney fails to uncover horrific abuse, a quintessential mitigating factor, which was available for discovery if he just asked someone, because he chose rather to simply ask the abused child or the child abuser, then unconstitutional ineffective assistance has occurred. Surely *Strickland* does not condone such failure. Surely we require more of capital defense attorneys. So let us ask how this Court managed not to find a constitutional violation under these circumstances.

To do that, we can look to the facts cited by this Court seemingly because they weigh against finding a constitutional violation. We must do so because by way of analysis this Court merely concluded that "trial counsel testified the

problem in this case was that the information Marshall relayed to him coincided with what his father had said. Thus, it does not appear that the trial court erred in concluding that trial counsel conducted a reasonable investigation." *Marshall*, 854 So. 2d at 1247.

This Court seemed not to rely on the fact that trial counsel said Mr. Marshall did not want to involve his family members because trial counsel also acknowledged his obligation to speak with them anyway as part of his mitigation investigation, so while this Court nevertheless recounted those facts, they will be disregarded here as immaterial and we will assume this Court did not rely on them. This Court related Mr. Marshall and Mr. Marshall's father's glowing reports about Mr. Marshall's childhood. However, the testimony of eight individuals about the father's abuse, including three of his sons who were among the abused, put up against the abused child and child abuser's denial is no contest. Knowing now that there was abuse, we have to assume that this Court cited those facts merely to explain why counsel failed to uncover the abuse, but not to excuse the failure. Otherwise, the *Porter* error is obvious. Explaining away a failure to uncover child abuse that we now know was easy enough to uncover by saying that the abused and the abuser led trial counsel astray, or failed to confess, is just the sort of inappropriate consideration that *Porter* prohibits. The tendency of abused children and child abusers to deny the abuse is axiomatic, especially when trial counsel

knew that Mr. Marshall's father was being untruthful about the grades, suggesting that the flowery picture he was painting about Mr. Marshall's childhood might be false in other ways.

This Court's acknowledgment that trial counsel attempted to speak with Mr. Marshall's aunt but failed seems to have no bearing. This Court did not expressly rely on it, and it is difficult to imagine how sending a couple letters and not receiving a reply could satisfy trial counsel's obligation to conduct a thorough investigation.

As for this Court's attention to the facts surrounding trial counsel's decision not to send an investigator to Liberty City because Liberty City was dangerous, any reliance on those facts would clearly be in error, as the fact that Liberty City is an unsafe place is ***precisely the reason that trial counsel had to go there.*** Mitigation investigators do not have the luxury of declining to expose themselves to the bad places of the world because those places can be a major part of the make up of their clients. In fact, the fact that trial counsel did not want to go there is evidence of the fact that it was an essential part of the mitigation case.

The fact cited by this Court that trial counsel would not have called one of the brothers because that brother was involved in an escape attempt with Mr. Marshall does little to subtract from the testimony of the other seven family members or the fact that child abuse is now known to have occurred.

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* or *Brady/Giglio* claims. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis.

CONCLUSION

Mr. Marshall's substantial claim of ineffective assistance of counsel and *Brady/Giglio* violations have not been given the consideration required by *Porter*. Mr. Marshall requests that this court perform that analysis and grant relief in a case where the sentencing jury believed Mr. Marshall deserved to live and it took a strained and unconstitutional analysis replete with Porter error to find otherwise.

Respectfully submitted:

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CERTIFICATE OF FONT

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

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 6th day of July 2011.

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