IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-694

LOWER TRIBUNAL NO. 94-CF-9776

MICHAEL BERNARD BELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Bell's successive motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. Pro. 3.850 and 3.851.

Michael Bell will be referred to as "Bell" or "Appellant." Frank J. Tassone and Susanne K. Sichta will be referred to as "undersigned counsel."

Citations to the record on appeal from the direct appeal will be designated with the Volume number, "R" and the appropriate page number, e.g. (1 R 1.) Citations to the record on appeal from the initial 3.851 will be designated with the Volume number "PCR" and the appropriate page number, e.g. (1 PCR 1.) Citations to record on appeal generated for review of the instant successive 3.851 will be designated as the successive post-conviction record with the appropriate page number, e.g. (1 S-PCR 1.) Citations to the one-volume *supplemental* record for the instant successive 3.851 will be designated (Supp. S-PCR 1.)

REQUEST FOR ORAL ARGUMENT

Michael Bell is a death sentenced individual. The resolution of the issues involved in this action will determine, in part, whether this man lives or dies. This Court customarily grants oral argument in capital cases in a similar procedural posture pursuant to Fla. R. App. Pro. 9.142(a)(4). Mr. Bell requests from this court the opportunity to discuss the issues contained in this brief in oral argument.

STANDARD OF REVIEW

The legal issues presented in this appeal consist of two-parts: The first is the determination of whether Porter must be applied retroactively. That issue is a question of law which must be reviewed *de novo*. Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). The second is the application of Porter to Michael Bell's case. In that regard, deference is given only to historical facts. All other facts must be viewed as Mr. Bell's jury would have viewed them. Porter v. McCollum, 130 S. Ct. 447 (2009).

STATEMENT OF THE CASE

In September, 1994, Michael Bell was charged with two counts of first-degree murder. He was tried before a jury and convicted on March 9, 1995. Bell's penalty phase occurred on March 17, 1995. On June 2, 1995 Bell was sentenced to death for each count upon the jury's recommendations. This Court affirmed the conviction(s) and sentence(s) in Bell v. State, 699 So.2d 674 (Fla. 1997) on October 22, 1997. Bell filed a Writ of Certiorari with the United States Supreme Court, which was denied on February 23, 1998. Bell v. Florida, 522 U.S. 1123 (1998)(S-PCR 27). On June 25, 1998, this Court tolled Bell's time to file a 3.851 motion until October 1, 1998. (S-PCR 27.)

On May 27, 1999, Mr. Bell filed a motion for post-conviction relief that the circuit court summarily denied. State v. Bell, No. 94-9776 CF (Fla. 4th Cir. Ct. order filed Jan. 13, 2000). Following oral argument, this Court reversed the trial court's summary denial and remanded the case for evidentiary hearing. Bell v. State, 790 So. 2d 1101 (2001).

On October 3, 2001, the circuit court granted Bell's motion to proceed *pro se* in postconviction proceedings. The circuit court appointed counsel to serve in a stand-by capacity. Bell then filed an amended *pro se* motion for post-conviction relief, raising twenty-nine claims.

The circuit court held evidentiary hearings on fourteen of the claims raised

in Bell's 3.850 motions on April 8 - 10, 2002. Bell called 36 witnesses to testify in support of his claims. Bell v. State, 965 So. 2d 48, 54 (Fla. 2007). Bell requested the appointment of a mental health expert for this hearing, but was denied this opportunity by the trial court. (3 PCR 567.)

The circuit court denied Mr. Bell's postconviction motion. Id. at 55. Bell appealed to this Court, raising twenty-four issues argued below.[1] Bell also

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[1] (1) Bell's trial counsel was ineffective for failing to object to the State's comments that Dale George pled guilty to being an accessory to this crime; (2) counsel was ineffective for improperly questioning Margo Bell at the penalty phase regarding the defendant's prior conviction for robbery; (3) counsel was ineffective for advising Bell not to testify; (4) counsel was ineffective in connection with the prosecutor's comments that the State does not seek the death penalty in every first-degree murder case; (5) counsel was ineffective for failing to adequately investigate and obtain the recorded statement of Ericka Williams; (6) counsel was ineffective for failing to produce Andre Mayes as a defense witness; (7) counsel was ineffective for failing to investigate and present a credible defense; (8) counsel was ineffective for making improper closing arguments; (9) counsel was ineffective for allowing the defendant to be shackled in front of jurors; (10) counsel was ineffective in connection with the mental health experts' failure to address all mental competency considerations required by the Florida Rules of Criminal Procedure and in connection with the lack of expert assistance with mental health mitigation issues; (11) counsel was ineffective for conceding guilt and CCP; (12) counsel was ineffective for failing to object to the prosecutor's improper remarks to jurors; (13) counsel was ineffective for failing to object and request a curative jury instruction for the State's incorrect statement of the advisory sentencing procedure; (14) counsel was ineffective for failing to object to comments that diminished the jury's sentencing responsibility, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985); (15) counsel was ineffective for failing to object to the prosecutor's peremptory strike of a prospective juror who had conscientious objections to the death penalty; (16) the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not disclosing prison and law enforcement records of the victim; (17) counsel was ineffective for failing to investigate and prepare for the testimony of Mark Richardson; (18) counsel was ineffective for

petitioned this Court for a writ of habeas corpus, raising eight issues.[2] This Court affirmed the trial court's determinations on post-conviction appeal and denied Bell's petition for writ of habeas corpus. Id. at 80. On June 22, 2007, Bell filed a *pro se* motion for rehearing. On August 29, 2007, this Court struck his *pro se* pleading as unauthorized because Bell was represented by counsel. On September 5, 2007, Bell filed a petition for writ of certiorari in the United States Supreme Court. This petition was denied on November 5, 2007. Bell v. Florida, 552 U.S. 1011 (2007).

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failing to investigate and prepare for the testimony of Charles Jones; (19) counsel was ineffective for failing to call Andre Mayes to impeach the testimony of Charles Jones; (20) counsel was ineffective for failing to prepare for the testimony of Dale George and Ericka Williams; (21) counsel was ineffective for failing to present any penalty-phase evidence other than the testimony of defendant's mother; (22) counsel was ineffective for failing to ensure that the prospective jurors were sworn; (23) counsel was ineffective for a number of cumulative errors; and (24) the circuit court erred in finding a number of issues to be procedurally barred. (1 R 111-2 R 405.) Bell, 965 So. 2d at 54 n. 5.

[2] (1) appellate counsel was ineffective for improperly arguing Bell's claim on direct appeal that Bell should have been permitted to represent himself at trial; (2) appellate counsel was ineffective for failing to raise on direct appeal the erroneous excusal for cause of a prospective juror by the trial court; (3) appellate counsel was ineffective for failing to raise on direct appeal the trial court's error in permitting Bell to wear his jail uniform in front of the jury; (4) appellate counsel had a conflict of interest which rendered his assistance ineffective; (5) appellate counsel was ineffective for failing to raise on direct appeal the issue of the trial court's jury instructions; (6) appellate counsel was ineffective for failing to argue on direct appeal that comments made in voir dire were reversible error; (7) Bell's death sentence is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); and (8) the trial court gave unconstitutional jury instructions. Id. at 54, n. 6

Bell submitted a *pro se* Successive Motion to Vacate Judgment and Sentence under Fla. R. Crim. Pro. 3.851 with the trial court on December 2, 2010, alleging that he was denied the effective assistance of counsel in the penalty phase of his trial "in light of the change of law in Porter v. McCollum, 130 S. Ct. 447." (1 PCR 1-9.) On January 5, 2011, the trial court ordered the state to respond. (1 PCR 10-11.) The state responded on January 14, 2011. (1 PCR 18-38.) The trial court held a case management conference on January 24, 2011. (S-PCR 68.) The trial court filed a March 7, 2011 Order (S-PCR 41-58) and March 23, 2011 Amended Order summarily denying Bell's Successive Motion to Vacate Judgments of Conviction and Sentence (S-PCR 59-77.)

Undersigned was appointed to represent Mr. Bell on the appeal of the trial court's denial of his Successive Motion to Vacate Judgments of Conviction and Sentence on March 23, 2011. (S-PCR 76.) This appeal follows.

Mr. Bell is currently incarcerated in Union Correctional Institution in Raiford, Florida.

STATEMENT OF THE FACTS

The underlying facts of the crime in this case are set forth in two prior opinions of this Court. See Bell, 965 So. 2d at 52; Bell, 699 So. 2d at 675-76.

Michael Bell was represented by Richard Nichols at trial. Although Mr. Bell underwent a court ordered, non-confidential evaluation by Dr. Miller for

competency purposes, Mr. Nichols did not seek the appointment of an expert to assist Mr. Bell in his penalty phase proceedings. Nichols never consulted a mental health expert regarding the development of mitigation and/or whether Bell had any mental disorders, organic brain damage, or any other mental or physical deficiencies that would be relevant to a possible penalty phase statutory and non-statutory mitigation. Nichols did retain a mitigation specialist to assist with Bell's penalty phase. Nichols did not request that the court appoint co- counsel although penalty phase counsel is routinely appointed in capital cases.

During Mr. Bell's penalty phase, the state called John Lipsey, a security guard at the lounge where the crime occurred, to testify that the masked gunman, (Mr. Bell), also shot at the lounge building and into a house next door to the lounge. (S-PCR 60.) The state introduced a copy of Bell's judgment and sentence for a prior armed robbery from May 7, 1990. (S-PCR 61.) The state rested.

In penalty phase Mr. Nichols called Margo Bell, Bell's mother, who testified that she was aware of a feud between Michael Bell and Theodore Wright and that because of the feud she remained at home because there were threats on her life over the span of a year. (S-PCR 61.) She also testified that West and Wright threatened to kill Bell and that they had once shot at Bell but killed a bystander by accident. (S-PCR 61.) Nichols did not ask Ms. Bell any questions related to her son's upbringing or background. (S-PCR 61.) On cross examination by the state,

Bell's mother stated that he was a good man, mature, and responsible, but a victim of circumstance. (S-PCR 61.) Mr. Nichols did not present any additional witnesses.

Bell, in his October 1, 2001 *pro se* Amended 3.850 Motion, raised several ineffective assistance of counsel claims relating to the failure of counsel to investigate and present evidence in penalty phase in support of statutory and non-statutory mitigation. Bell stated that counsel was ineffective in failing to request and present the "age" statutory mitigator; Bell stated that counsel was ineffective in failing to request and present evidence in support of the "extreme emotional disturbance" statutory mitigator; Bell stated that counsel failed to effectively utilize a mental health expert in his case. (1 PCR 119, 140-142, 152-156.)

In an effort to substantiate the various ineffective assistance of counsel claims for failure to find and present statutory and non-statutory mental mitigation, Bell filed a motion with the trial court to enlist the assistance of a mental health expert for post-conviction proceedings, stating, in relevant part:

> (4) The primary issues set for an Evidentiary Hearing, before this court, is the CLAIM I (N) that trial counsel rendered ineffective assistance by failing to provide Defendant mental health evaluation [sic] and CLAIM XI – that trial [counsel] provided ineffective assistance when he failed to adequately investigate the case and prepare defendant's case, for failing to sufficiently challenge the state's case at trial, and for neglecting to present further mitigation evidence on Defendant's behalf.
>
> (5) … Mr. Nichols did not give Dr. Miller any information about my

> childhood abuse, drug usage [sic] parents, poverty, educational deficiency, psychological evaluation as a child, did not ask for an independent mental evaluation, or request to look for mitigate[ing] factors, thereby material[ly] depriving me of a complete evaluation.
>
> With the appointment of this expert, he will be able to properly evaluate as required in Fla. Rule C.P. 3.211 and evaluate me on mitigating circumstances. An adequate evaluation would include the following: (1) Assessment by a psychiatrist who had reviewed in advance records of depositions, sworn statements, and DOC records, and family interviews. (2) Organic brain impairment should be screened by a neuropsychologist. Standard psychological testing should be performed as well as neuropsychological evaluation. (3) MRI, CT Scan and EEG if recommended.
>
> With the appointment of this expert, he will be able to conduct a[n] evaluation and/or tests as followed to support my evidentiary hearing issues of the trial counsel failure to investigate mitigating circumstances: WAIS, MRI, CT Scan, EEG, neuropsychological evaluation for potential organic brain impairment, determine my IQ performance…

(3 PCR 530-31.) The trial court issued a three-sentence Order denying Bell's request for a mental health expert:

> This matter is before the Court on defendant's "Motion to Appointment of Expert Witness" filed on January 31, 2002.
>
> In the instant Motion, defendant requests that an expert be appointed to conduct an evaluation of him "to support [his] evidentiary hearing issues of the trial counsel'[s] failure to investigate mitigating circumstances…" This Court declines to provide defendant with an expert witness for the evidentiary hearing in that the results of the evaluation would not be relevant to the issues defendant has presented in his 3.850 Motion.

(3 PCR 567)(insertions original to Order.)

At the April 8th-10th 2002 postconviction evidentiary hearing, Mr. Bell

presented evidence challenging, among other things, his sentence in light of alleged failures of Mr. Nichols to investigate or present significant, available mitigation and utilize a mental health expert.

Testimony at Michael Bell's 3.850 evidentiary hearing revealed that he presented Nichols with a witness list, yet Nichols did not contact most of these proposed witnesses prior to trial. (8 PCR 1537-1538.)

Nichols did not contact Anthony Ammons for the penalty phase of Michael Bell's trial. (6 PCR 1108.) Bell, in his evidentiary hearing, called Mr. Ammons, a Jacksonville community leader who owns a successful mortgage company; is a board member at The Help Center, a nonprofit organization which assists homeless individuals; coaches basketball and baseball; served as deacon for the First Baptist Church of Mandarin for eight years; serves in the prison ministry; and is the vice president of the alumni association at Morehouse College. (6 PCR 1103-04.) Mr. Ammons stated that he has known Michael Bell all of Bell's life. Both men were born in Joliet Illinois—Ammons babysat Bell. (6 PCR 1105.) Ammons testified that it was difficult for him to witness Bell's childhood because, among other things, Bell's father had a substance abuse problem, was abusive to Bell's mother and "quite abusive to [Bell] and [Bell's] brother Gregory." (6 PCR 1105-06.) Ammons stated that he ended up with better "morals and values" than Bell, because:

> I think that by the grace of God I've had a better environment, in my opinion, than [Michael Bell] had. Both my parents were around me until I was a grown man, and I had boundaries, I had direction, I had discipline. And I think that those are some of the things that, quite honestly, I don't think [Bell] had.

(6 R 1106-07.) Ammons stated he would have testified on Bell's behalf had Nichols contacted him at the time of trial. (6 PCR 1108.)

Mr. Nichols did not contact Michael Bell's brother, Gregory Bell, for penalty phase. (6 PCR 1135.) At Michael Bell's 3.850 evidentiary hearing Gregory Bell testified that Michael Bell witnessed the shooting death of their younger brother, Lamar "Peewee" Bell, and that this event was devastating to Michael. (6 PCR 1126-1127.) Gregory Bell, who was raised in the same household as Michael Bell, also testified that their father was physically abusive to their mother, Margo Bell, and physically "disciplined" his children. (6 PCR 1134-1135). Gregory Bell testified that when Bell was a child, he suffered a traumatic head injury resulting in black and blue bruising across his entire forehead, memory loss, and apparent loss of consciousness. (6 PCR 1125-1126.) Additionally, Gregory Bell testified that his brother was a "helpful," "giving," and "open-hearted" person. (6 PCR. 1126). Gregory Bell stated that had Nichols contacted at the time of Bell's trial, he would have provided the same information. (6 PCR 1135.)

Margo Bell, Michael Bell's mother, also testified at his evidentiary hearing.

(6 PCR 1139.) Bell's mother testified that attorney Nichols never contacted her prior to her appearance at her son's penalty phase. (6 PCR 1148 - 1150.) At evidentiary hearing, Bell's mother testified that he had a difficult time coping with his brother, "Peewee's" death. (6 PCR 1146.) She testified that Bell was examined by a psychologist as a child to find out what could be done to help with his difficulties at school. (6 PCR 1146-47.) She stated that Bell suffered from a concussion while playing football when he was 12 or 13 years old. (6 PCR 1147.)

Additionally, Mr. Bell's mother provided insight into his home life as a child. She testified that Bell's father was a heroin addict. (6 PCR 1148.) She indicated that she and Bell's father "had a few, a lot of problems, physical and mentally," that Bell's father was "very" abusive to her when Bell was a child. (6 PCR. 1148.) The physical abuse was so severe that she received medical treatment for her injuries on at least one occasion, though she tried to hide the abuse from people. (6 PCR 1148.) She said that her children witnessed the abuse. (6 PCR 1160.) She further testified that after she left Bell's father, she had a "rough" time raising three boys by herself, and that she was rarely home, sometimes working two jobs to support her family. (6 PCR 1148-49.) Ms. Bell admitted that she moved Bell and his brothers from "place to place" and "school to school," and exposed her children to a "drug environment." (6 PCR. 1149.) Bell's mother informed the court that Bell had to "raise himself." (6 PCR 1149.)

Despite Bell's difficult childhood and circumstances, his mom described him as somebody who was "very considerate," helpful to others, and "very good" and "very loving" to his daughter. (6 PCR 1147.) She stated that he was involved with the Bethel Baptist Church in Jacksonville. (6 PCR 1149-50.)

Dr. Miller, the psychiatric expert who was appointed in Michael Bell's pre-trial proceedings for competency purposes only, testified at evidentiary hearing. Through Dr. Miller's testimony it was revealed that Nichols did not obtain Dr. Miller's hand-written notes regarding Dr. Miller's competency evaluation prior to trial. (7 PCR 1272.) Dr. Miller stated that he believes he "conferred" with Nichols some four months after his competence evaluation and admitted that Nichols did not provide him with any background information or collateral documentation for use in Bell's mental health evaluation. (7 PCR 1272-73.) Dr. Miller did not, nor was he asked to evaluate Mr. Bell for mitigation purposes. Dr. Miller conceded that information he collected to determine whether Bell was competent to proceed pertaining to Bell's history, family and social background, alcohol and drug use, psychiatric record, and his juvenile and adult criminal record, were gleaned only from Bell's self-reports. (7 PCR 1282-83; 7 PCR 1273; 5 PCR 829.) Dr. Miller admitted that it would have been "logical" for Nichols to provide background information about Michael Bell's life. (7 PCR 1272.) Dr. Miller stated that "normally," "Family members might call me and hope to supply information or try

to supply information, detectives, investigators in the cases sometimes have contact with me, attorney's offices sometimes contact me." (7 PCR 1272-73.) However, Dr. Miller did not gather information from any of these sources in Mr. Bell's case.[3]

Dr. Miller's report, which was admitted as a state exhibit in Mr. Bell's evidentiary hearing, revealed that Dr. Miller did not evaluate anything other than a police report and Mr. Bell's self-reports for his competency determination. (5 PCR 829.) Based on this information, Dr. Miller diagnosed Bell with an adjustment disorder and a depressed and anxious mood disorder, both likely results of stress and anxiety related to Bell's inability to cope with his younger brother's traumatic death. (7 PCR 1275, 1283.) Neither Dr. Miller's report nor his testimony at the evidentiary hearing indicated that Nichols directed him to investigate Bell's case for mental mitigation and the possibility of post-traumatic stress disorder arising from childhood abuse and the death of his brother; the possibility of head injury and frontal lobe disorder as a result of his head trauma as a child; to screen for the

[3] Although testimony of Gregory and Margo Bell at evidentiary hearing revealed that the Bell lived in Illinois, Louisiana, and Jacksonville as a child, Nichols did not gather records from schools or other organizations in these locations for Dr. Miller to use in his competency evaluation of Bell. It appears from Dr. Miller's report that he was unaware that Bell's childhood was divided between three states. (6 PCR 1125, 1129) (7 PCR 1271-73.) Additionally, although it was revealed at evidentiary hearing that Bell suffered at least two serious head injuries as a child, Nichols was unaware of these events and thus did not gather medical records to substantiate or provide this critical information to Dr. Miller.

possibility of organic brain impairment; or the possible need for a MRI, CT Scan or EEG. (7 PCR 1270-93.) Likewise, neither the report or testimony indicated that Dr. Miller evaluated Bell for the existence of statutory mitigators of age and extreme mental or emotional disturbance. The only test Dr. Miller conducted in evaluating Bell was the Rapid Approximate Intelligence Test (RAIT), which takes between two and three minutes to perform and measures arithmetical ability only. (5 PCR 830.)

Michael Bell presented the testimony of his trial counsel, Mr. Nichols at evidentiary hearing. When asked how many times he had been reprimanded by the Florida Bar or disciplined, Nichols responded, "I was reprimanded once for not filing a response to a complaint." (8 PCR 1495.) When questioned further, Mr. Nichols stated that although there may have been other complaints, "the only complaint that was made public was the one that I just mentioned." (8 PCR 1495.)

Nichols' evidentiary hearing testimony revealed that he did not consider evidence of self-defense mitigating. Nichols did not believe evidence that Bell was a hard worker was mitigating. Nichols did not believe that Bell's involvement in church was a mitigating factor. Nichols did not think it was worthwhile to attempt to humanize a defendant in penalty phase. (9 PCR 1587-88.) Mr. Nichols did not think that he could have done anything different in his representation of Bell. (9 PCR 1599.) Mr. Nichols said he believed that Dr. Miller's "psychiatric

examination [if presented at Bell's penalty phase] would probably hurt more than help in that he thought [Mr. Bell] [was] probably sociopathic and narcissistic and just part of the - - of the mind-set that led to these kind of events." (9 PCR 1607-1608.) Nichols admitted that he did not provide Dr. Miller with any collateral records regarding Mr. Bell or Bell's background. (9 PCR 1609.)

Nichols also failed to present the following witnesses at penalty phase, all of whom testified at evidentiary hearing: Amy Blount, an acquaintance that Bell had known for several years (7 PCR 1187); Thosha Mingo, Bell's ex-girlfriend and friend 12 years (7 PCR 1182); and Charae Davis, Bell's ex-girlfriend and friend of 13 years (7 PCR 1195.) Blount testified at Bell's 3.850 hearing that he was a friend, loyal, dependent, honest, "nice," "funny," "quiet," and had helped her sister through a difficult point in her life. (7 PCR 1186-1187.) Blount stated she would have testified to these things at trial had Nichols called her. (7 PCR 1187.) Mingo testified that Mr. Bell was respectful, generous, kind, "good people," "never showed any bad side" to her, and had tried to talk her children into staying in school. (7 PCR 1180.) Mingo stated she would have testified to these things at Bell's trial if Nichols had summoned her. (7 PCR 1184.) Davis testified at Bell's 3.850 hearing that he was "very nice and loving," and recalled that she would see him at church with his brothers "all the time." (7 PCR 1193.) Davis also testified that she would have provided this information if Nichols had summoned her at

trial. (7 PCR 1195.)

Mr. Bell entered numerous documents into evidence at his evidentiary hearing which were never gathered by Nichols nor presented to a mental health expert for use in an evaluation (Supp. S-PCR 17-20): Bell's 1983 Stanford Achievement Test Scores which revealed that Bell scored significantly below average in most areas of testing at the age of 13 (Supp. S-PCR 23); 1986 Duval County School Board Student Withdrawal Form which showed that Bell failed all of his classes that year (Supp. S-PCR 25); 1990 Reception Center Educational Status Report indicating that Bell's Reading "vocab/comprehension" was at a 5.7 grade level, his Mathematics "comput/concepts [sic] and applications" ability was at a 6.8 grade level, and his Language "mechanics/express" was at a 4.8 grade level when Bell was 20 years old (Supp. S-PCR 27); a teacher/counsel comment sheet which indicated that in 1983 a Mr. or Ms. Williford stated that Bell was "below average academically, unstable emotionally, hot tempered, not trust worthy" (Supp. S-PCR 29.)

The trial court denied Mr. Bell's postconviction motion(s) and this decision was affirmed on appeal.

STATEMENT OF THE ISSUE

WHETHER UNDER THE PROPER STRICKLAND ANALYSIS MANDATED BY PORTER V. MCCOLLUM, MR. BELL'S CONVICTION AND SENTENCE OF DEATH VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION?

SUMMARY OF THE ARGUMENT

MR. BELL'S CONVICTION AND SENTENCE OF DEATH VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION UPON PROPER STRICKLAND ANALYSIS FOR THE REASONS EXPLAINED IN PORTER V. McCOLLUM

Michael Bell was deprived of the effective assistance of trial counsel in the penalty phase of his trial, in violation of Porter, 130 S. Ct. 447. The decision by the United States Supreme Court (USSC) in Porter established that the previous denial by this Court of Mr. Bell's ineffective assistance of counsel claim was premised upon the Florida Supreme Court's misunderstanding and resultant misapplication of Strickland v. Washington, 466 U.S. 668 (1984). The USSC's decision in Porter represents a fundamental repudiation of this Court's Strickland jurisprudence, and as such, Porter constitutes a change in Florida law as explained herein, which renders Mr. Bell's Porter claim cognizable on a successive post-conviction motion. See Witt v. State, 387, So. 2d 922, 925 (Fla. 1980).

ARGUMENT

MR. BELL'S CONVICTION AND SENTENCE OF DEATH VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION UPON PROPER STRICKLAND ANALYSIS FOR THE REASONS EXPLAINED IN PORTER V. McCOLLUM

A. Introduction

Michael Bell was deprived of the effective assistance of counsel at the penalty phase of his case. Mr. Bell presented his ineffective assistance of counsel claims in a Motion to Vacate Conviction and Sentence pursuant to Fla. R. Crim. Pro. 3.851 on May 27, 1999. The trial court summarily denied the motion – a determination which was reversed by this court in Bell, 790 So. 2d 1101. Upon reassignment to the trial court, Bell submitted a *pro se* Amended Motion to Vacate Judgment of Conviction and Sentence on October 3, 2011. The circuit court held evidentiary hearings on fourteen of Bell's claims on April 8-10, 2002 and denied them all.

When this Court heard Mr. Bell's appeal of the trial court's decision, it failed to conduct a *de novo* review of legal questions contained within an ineffectiveness analysis and instead employed a standard of review that was highly deferential to the circuit court's erroneous legal conclusions in violation of Porter, 130 S.Ct. 447. This Court failed to independently review the mitigating evidence presented in evidentiary hearing to determine if the outcome of Bell's penalty phase was undermined by counsel's deficient penalty phase performance as

required in Porter. Id. at 453-54.

The decision by the USSC in Porter establishes that the previous denial of Mr. Bell's ineffective assistance of counsel claims was premised upon this Court's misreading and misapplication of Strickland, 466 U.S. 668. The USSC's decision in Porter was a repudiation of this Court's Strickland jurisprudence, and as such Porter constitutes a change in Florida law as explained herein, which renders Mr. Bell's Porter claim cognizable in collateral proceedings. See Witt, 387 So. 2d at 925; Thompson v. Dugger, 515 So. 2d 173, 175 (1987); James v. State, 615 So. 2d 668, 669 (Fla. 1993)(Espinosa v. Florida, 505 U.S. 1079 (1972) to be applied retroactively to Mr. James because "it would not be fair to deprive him of the Espinosa ruling.")

Mr. Bell presented his Porter v. McCollum claim to the trial court in a Rule 3.851 motion in light of this Court's ruling in Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under Hitchcock v. Dugger, 481 U.S. 393 (1987) in which the USSC found that this Court had misread and misapplied Lockett v. Ohio, 438 U.S. 586 (1978) should be raised in Rule 3.850 motions). Based on the state's argument, the circuit court refused to find that fairness principles dictate that Porter v. McCollum should be treated like Hitchcock v. Dugger and Espinosa v. Florida, as new Florida law within the meaning of Witt v. State. Accordingly, Mr. Bell now requests this Court find that the previously presented 3.850 claims

relating to counsel's ineffectiveness in penalty phase should be judged by the same standard that the USSC employed when determining that this Court misapplied Strickland and that Porter's ineffective assistance of counsel claim was meritorious and warranted habeas relief.

B. Mr. Bell's Case

Although Mr. Bell presented numerous claims in his 3.850 Motion for Post-conviction Relief, he challenges this Court's review and conclusion with respect to only one category of those claims in his successive 3.850 Porter motion: Mr. Bell was prejudiced by trial counsel's ineffective assistance in failing to investigate and present mitigation (including testimony of a mental health expert) in his penalty phase and this Court improperly curtailed its Strickland analysis in upholding the trial court's rejection of this claim, deferring totally to trial court's faulty ruling. After the trial court summarily denied Bell's 3.850, he proceeded *pro se* in filing a subsequent amended 3.850 motion and carried out his evidentiary hearing with standby counsel only. Bell presented the testimony of 36 witnesses at evidentiary hearing and produced nearly 1000 pages of transcripts. The evidentiary hearing was conducted in a less formal and organized manner than usual due to his lack of counsel; however, Mr. Bell managed to present an abundance of information.

Although *pro se* motions and proceedings are "traditionally accorded liberal interpretation to effect justice and afford the movant the advantage denied him by

lack of legal training"[4] the trial court in Bell's case did not afford Bell liberal interpretation in addressing his claims. The trial court denied Bell's request for the assistance of a mental health expert for post-conviction proceedings to help establish statutory and non-statutory mitigation. (3 PCR 567.) The trial court, in denying Bell's postconviction motion(s), did not consider the abundance of information presented in Bell's evidentiary hearing. Furthermore, the trial court did not consider any of the exhibits presented by Bell, such as the Stanford Achievement Test conducted on May 2, 1986; Bell's withdrawal form from school; Teacher/counselor remarks from Bell's schooling; the investigative reports and notes of Don Marks, trial counsel' investigator, and other documents submitted into evidence at his evidentiary hearing. (Supp. S-PCR 17-45.)

In denying Bell's penalty phase 3.850 claims, the trial court relied heavily on the fact that Mr. Bell waived additional penalty phase witnesses after his mother, Margo Bell, testified on his behalf. (4 PCR 750.)

In his case, like Porter, this Court upheld the trial court's faulty Strickland determination without itself conducting a proper, reasoned *de novo* analysis. Rather than identifying, discussing, and reweighing all of the evidence presented

[4] Gust v. State, 558 So. 2d 450 (Fla. 1st DCA 1990); see also Seccia v. State, 487 So. 2d 1156, 1157 (Fla. 1st DCA 1986)("Florida courts should extend considerable latitude in pleading to a prisoner seeking the issuance of the writ of habeas corpus, give the petitioner the benefit of the doubt, and overlook technical inadequacies in his petition") citing Wood v. Cochran, 118 So. 2d 193 (Fla. 1960).

for the first time at evidentiary hearing, this Court found:

> Bell did not present evidence at the postconviction evidentiary hearing that demonstrated that any mitigating evidence existed that would have outweighed the state's evidence in aggravation. Accordingly our confidence in the outcome is not undermined. We do not find error in the circuit court's determination that Bell failed to establish the necessary prejudice to be entitled to relief.

Bell, 965 So. 2d at 74. This analysis does not constitute a *de novo* review and was not the sort of probing and fact-specific analysis which Porter and Sears require.

1. Mr. Bell's trial counsel was deficient in failing to investigate and present statutory and non-statutory mental mitigation in the penalty phase of Mr. Bell's trial

A. Mr. Nichols did not conduct a mitigation investigation in Bell's case

Mr. Nichols did not conduct any mitigation investigation in preparation for Mr. Bell's penalty phase. Mr. Nichols did not interview Bell's family members to determine Bell's background and childhood environment (8 R 1537); Mr. Nichols did not request basic mitigation tools such as school records, employment records, health records, records from the Department of Corrections, etc., from the various cities and states where Bell lived; Nichol's investigator did not look for mitigation in Bell's case. (8 R 1434.) When asked during evidentiary hearing whether Nichols personally investigated anything in Bell's case, Nichols stated, "Not when I have an investigator." (9 R 1567.)

Mr. Nichols did not seek the assistance of a mental health expert to prepare for Bell's penalty phase. Because Mr. Nichols did not investigate Bell's case for

mitigation, he could not provide any such information or supporting documentation to a mental health expert in preparation for Bell's penalty phase. Nichols attempted to excuse this failure by stating that Dr. Miller, the expert for the court-ordered competency determination, did not uncover anything helpful. (9PCR 1607-08.)

However, Dr. Miller and his opinions are irrelevant to Bell's penalty phase and Bell's contention that Nichols was ineffective in Bell's penalty phase. Dr. Miller performed a competency assessment of Bell only, early in the pre-trial proceedings, and was not provided with **any** collateral information about Mr. Bell. Dr. Miller never evaluated Bell for mitigation purposes. Even had Dr. Miller been asked to provide his opinion about mitigation, he was unable to do so without being provided collateral information from Mr. Nichols, his investigator, or third-parties. As such, Dr. Miller's appointment to Mr. Bell's case and subsequent conclusions, opinions, or lack thereof, does nothing to demonstrate adequate representation.

B. Mr. Nichols presented virtually nothing at Bell's penalty phase

Mr. Nichols presented only one witness at Bell's penalty phase—Bell's mother, Margo Bell. Nichols did not speak with Ms. Bell prior to her testimony at trial. (6 PCR 1139.) As discussed in the factual background, Nichols questioned Ms. Bell only in reference to a feud between her son and Theodore Wright. (S-

PCR 61.) Even Nichols agreed in evidentiary hearing that Ms. Bell was not particularly helpful in Bell's penalty phase (9 PCR 1585), although, as demonstrated in evidentiary hearing, there was a bounty of enlightening mitigation information that she could have provided. (6 PCR 1139-1150.)

Despite the fact that Ms. Bell provided virtually nothing helpful at penalty phase, Nichols informed Bell and the trial court that any additional presentation of witnesses was unnecessary because, "the testimony of his mother covered the subject that would be covered by those others and it would not be prudent to do it again." (5 PCR 812.)

C. Bell's waiver of additional penalty phase witnesses not preclude relief on his claim that Mr. Nichols was ineffective in penalty phase

Because of Nichols' failure to conduct any investigation into mitigating circumstances in Bell's case, Bell's waiver of the presentation of additional witnesses at his penalty phase does not excuse Nichols's deficient performance.(9 PCR 1666); See e.g. Grim v. State, 971 So. 2d 85, 99-100 (Fla. 2007), Dobbs v. Turpin, 142 F.3d 1383, 1388 (11th Cir. 1998); Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003). The Eleventh Circuit Court in Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991) held that a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial. Id. at 1502. In so finding the Court stated: "The reason lawyers may not blindly follow such commands is that although the decision

whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit." Id. (citing Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir.1986). An attorney must be fully apprised of the available mitigating evidence after a reasonable investigation and inform a client of the same before the defendant can legitimately waive mitigation.

This is not a case where the defendant refused to allow his trial attorney to investigate and present mitigation. Conversely, the same failure to mitigate that occurred in Ferrell also occurred with Bell under the guidance of the same trial attorney. In both cases, the defendant waived his right to present penalty phase witnesses at the suggestion of attorney Nichols without being fully apprised of available mitigation after a reasonable investigation. Ferrell v. State, 29 So. 3d 959, 981 (Fla. 2010).

D. Mr. Nichols's penalty phase performance was not strategic

Mr. Nichols claimed at Bell's evidentiary hearing that the manner in which he conducted Bell's penalty phase was "strategic." However, this premise cannot stand because he did not, as mandated by this Court, conduct an investigation and make a meaningful choice between well-reasoned alternatives. Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996)("Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived"); Horton v.

Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), cert. denied, 503 U.S. 952 (1992). In fact, much of the mitigation that Bell presented at evidentiary hearing would have strengthened Nichols' theory that Bell lived in a harsh environment that most people would not understand. (8 PCR 1527.)

It is apparent from Mr. Nichols testimony in evidentiary hearing that he did not properly investigate mitigation for Bell's trial – Nichols did not even know what mitigation is:

> Mr. Bell: Would - - would - - would you say - - would you say the threats of me and my family members and other occasions where Mr. West tried to - - tried to kill me, would you say them [sic] could be considered as mitigating circumstances?
>
> Mr. Nichols: No.
>
> Mr. Bell: Okay. As - - would you consider me being a hard worker, is that a mitigating circumstance?
>
> Mr. Nichols: No.
>
> Mr. Bell: What about nonstatutory mitigating circumstances, all of what's just been mentioned?
>
> Mr. Nichols: Well, there is a catch all mitigating circumstance which is nonstatutory mitigating circumstances which would allow you to say anything you want to say about anything, and you can claim it's mitigating, but within the context of this case somebody coming in saying you worked hard, I

did not think a jury would find that very probative.

Mr. Bell: Okay. But what about attending church?

Mr. Nichols: Same answer.

(9 PCR 1587-88.) When Bell asked Nichols why he did not attempt to humanize Bell for the jury, Nichols replied, "[B]eing a human being is not a mitigation circumstance." (9 PCR 1586.)

This Court's jurisprudence proves Mr. Nichols wrong. This Court has held that a defendant's propensity for hard work, regular church attendance, and other humanizing qualities are all mitigating factors, and appropriate to be presented as penalty phase evidence before a jury. See Smalley v. State, 546 So. 2d 720 (Fla. 1989); See Walker v. State, 707 So. 2d 300 (Fla. 1988); See e.g. Card v. State, 992 So. 2d 810, 815-16 (Fla. 2008)(This Court found counsel's penalty phase performance reasonable where, "[C]ounsel decided on a strategy to humanize Card to the jury"); see also Rutherford v. State, 727 So. 2d 216, 220 (Fla. 1998).

Not only did Mr. Nichols refuse to acknowledge that information he could have presented in Bell's penalty phase was mitigating, but Mr. Nichols refused to acknowledge that he could have done anything different in Bell's penalty phase despite that his penalty phase was an utter failure:

Mr. Bell: Mr. Nichols, in your arguments I understand the message you was bringing, but would you - - would you feel it would have been more effective if you would have tried to bring - - bring

> mitigating circumstances or state anyway of showing that I am a human being in your arguments, would that help - - would that be more effective?
>
> Mr. Nichols: There was nothing in my opinion that could have been done different than what was done.

(9 PCR 1599.)

E. Mr. Nichols has a long history of ineffective assistance and bar complaints

Despite Mr. Nichols's attempt at Bell's evidentiary hearing to downplay his poor legal performances, history confirms Mr. Nichols's disappointing work: See e.g. Ferrell, 29 So. 3d at 981(This court upheld the circuit court's reversal for a new penalty phase, stating: "There is simply no indication in the record that [Nichols] performed any investigation into the penalty phase"); The Florida Bar v. Richard D. Nichols, case no.: 93, 177 (Ordering a public reprimand on Mr. Richard D. Nichols in reference to his failure to act in three separate cases in which he was counsel. The court noted that counsel filed no responses to the complaints despite being served requests to respond, failed to act on behalf of his client, failed to return telephone calls to the client, and failed to provide his client with requested information. The court also noted that Mr. Nichols was given a private reprimand by the Bar in 1991); [5] Stephens v. State, 975 So. 2d 405, 418 (Fla. 2007)(This

[5] When asked about his history of bar complaints at evidentiary hearing, Mr. Nichols misstated the facts in informing the trial court that he had been

court stated that Nichols' failure to attend depositions in a criminal case where the state is seeking the death penalty "very disturbing"); State v. Brooks,762 So. 2d 879, 895 (Fla. 2000)(This court, in determining the direct appeal claims were not preserved by trial counsel, Nichols, stated: "the limited, boilerplate motions for judgment of acquittal which were of a technical and pro-forma nature…were totally inadequate to preserve a sufficiency of the evidence claim for appellate review...").

The performance of Nichols in Bell's case is nearly identical to his performance when representing Ronnie Ferrell. In Ferrell v. State, where it was proven that Nichols failed to investigate and prepare for the penalty phase of Ferrell's capital trial, the trial court determined, with the approval of this Court, that the deficiency and resulting prejudice warranted a new penalty phase. 29 So. 3d at 980-81. The circumstances in Ferrell are analogous to Bell, except that Ferrell was represented by counsel in postconviction proceedings and was thus better equipped to present his claims. Like Bell, Ferrell waived penalty phase representation. Despite this waiver, the trial court reversed his penalty phase and this Court found, "there is simply no indication in the record that trial counsel

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reprimanded once "for not filing a response to a complaint"; in truth, he was reprimanded once, for his conduct in three cases. Florida Bar Cases: 97-00973-04D, 97-00981-04D, and 98-00360-04D.[5] SC93,177, Public Reprimand, see also, The Florida Bar v. Nichols, 732 So. 2d 329 (8 PCR 1495.)

performed *any investigation into the penalty phase so that a knowing and voluntary waiver could take place*." Id. at 984 (emphases added). This Court, in Ferrell, summarized the trial court's findings:

> In support of his penalty phase claims, at the evidentiary hearing, Ferrell presented the testimony of his mother, sisters, brother, longtime friend, and ex-wife and mother of his children. Each of these witnesses also testified that they made repeated attempts to contact Ferrell's trial counsel, Richard Nichols, to no avail, or that they were never contacted by Nichols. These witnesses testified that Ferrell, his mother, and his siblings suffered and witnessed extensive abuse from Ferrell's father and were forced to move out of the family home when Ferrell was eleven years old. Ferrell grew up in a crime-ridden and drug-infested neighborhood and developed a drug and alcohol problem himself. These witnesses also testified that Ferrell was a regular churchgoer and he loved his children, family, and friends dearly and spent a lot of time with them.
>
> Ferrell also presented the testimony of three doctors at the evidentiary hearing regarding mental health mitigation. Dr. Ernest Miller, an expert in forensic psychiatry, testified that he conducted a court-ordered psychiatric evaluation of Ferrell in September 1991, which revealed no evidence of mental illness or mental retardation. He was never contacted by Nichols to perform a mitigation evaluation.

Id. The scenario described above from Ferrell mirrors Bell's case, yet the trial court in Bell did not properly evaluate the information presented in Bell's evidentiary hearing and did not allow Bell the opportunity to present the testimony of a mental health expert on his behalf. Where the quality of Nichols' representation and performance in penalty phase was nearly identical in Michael Bell and Ronnie Ferrell's cases, it is inconsistent that Nichol's representation in Bell was deemed "reasonable" where the performance in Ferrell was found to be

deficient.

2. Mr. Bell was prejudiced by Mr. Nichol's deficient performance in the penalty phase proceedings of his capital case

A. Mr. Nichols presented virtually nothing at penalty phase

The mitigating evidence presented in Mr. Bell's penalty phase was insignificant. Defense counsel presented only the testimony of Bell's Mother, Margo Bell who, in counsel's own words, did not provide any mitigating information. (9 PCR 1585.) The trial court found only one mitigator – that Bell was under extreme mental or emotional distress at the time of his crime based on the recent death of his brother. Bell v. State, 699 So. 2d 674, 676 (Fla. 1997). However, the court gave this mitigator nominal weight because defense counsel did not present the testimony of a mental health expert, or a single lay witness, to establish it. No additional statutory mitigators were sought and no non-statutory mitigation requested or found.

B. Evidence was presented at postconviction evidentiary hearing which should have been presented by Mr. Nichols at penalty phase

The mitigation presented by Mr. Bell in post-conviction was qualitatively and quantitatively different from that presented at trial. Mr. Bell presented significant mitigating evidence at evidentiary hearing which humanized Bell and illustrated the pronounced difficulties that he experienced both environmentally and personally up to the time that he committed the instant crime(s) at the young

age of 24. This mitigation established by Bell in his evidentiary hearing (in an admittedly choppy and disorganized manner) explained, to some degree, why he committed the crime(s) of which he was convicted. Due to counsel's deficient investigation of Bell's case, counsel was unaware, and thus did not present evidence to the jury concerning any relevant mitigating evidence.

Because Nichols failed to conduct an adequate mitigation investigation, he did not know of, present at penalty phase, or provide his mental health expert with the following information which was presented at evidentiary hearing: Bell witnessed the abuse of his mother and experienced excessive corporal punishment at the hands of his father. (6 PCR 1135.) Bell's brother, Gregory Bell testified that their father was "very physical." (6 PCR 1135.) Mr. Ammons testified that Bell's father abused him. (6 PCR 1105-06.) Margo Bell testified that Bell's father was "all right" with the children, but that she and Bell's father had "a lot of problems physically and mentally." (6 PCR 1148.) She characterized Bell's father as "very" abusive. (6 PCR 1148.) Ms. Bell went to the hospital for the injuries she sustained as a result of this domestic battery at least once, though she is "pretty strong" and "tried to keep it from people" (6 PCR 1148). Bell's father was a heroin addict. (6 PCR 1148). Ms. Bell cited Bell's father's heroin addiction and abuse as reasons for leaving the relationship and moving from Joliet, Illinois, to Florida. (6 PCR 1135.)

Bell's home-life did not improve when the family left his father. As a single mother, Ms. Bell moved her boys from place to place and from school to school. (6 PCR 1149.) Bell raised himself because she worked all day, and sometimes held down two jobs at a time. (6 PCR 1149.) Ms. Bell stated in evidentiary hearing that she "blame[s] herself" for Bell's situation:

> [B]ecause the environments that "I have taken you in[:] my second husband, moving to Illinois, I mean, Louisiana and back, and I was in a drug environment at one time in my life and y'all peer pressure in schools and stuff, being going away from your life, you raised yourself.

(6 PCR 1149.) Additionally, Ms. Bell stated that the death of her son, Bell's brother, Lamar "Peewee" Bell took a "tragic toll" on Bell and the rest of the family. (6 PCR 1146).

Ms. Bell shed light on Bell's mental state as a child. She stated that Bell was seen by a psychologist when he was a child because he was having problems at school; he did "little," "mischievous things" such as throwing paper planes in the light fixture, tuning out the teacher, and putting his raincoat then running down the hall. (6 PCR 1146-47).

Both Gregory and Ms. Bell testified with respect to a possible brain injuries stating that Bell suffered severe head injuries, one resulting in a concussion (6 PCR 1147) and another resulting in a blackout, "off and on dizzy spells" and black and blue eyes. (6 PCR 1126.)

Anthony Ammons and Gregory Bell both affirmed that if Nichols had contacted them and requested their presence as a witness at Bell's penalty phase they would have provided the same testimony. (6 PCR 1108, 1135.) Ms. Bell did not know what Mr. Nichols wanted her to testify about until she arrived at Bell's penalty phase. As aptly worded by Ms. Bell, "the prosecutor asked me more questions than Mr. Nichols." (6 PCR 1150.)

At evidentiary hearing it was also revealed that Bell attended church (6 PCR 1149-50); Bell was a good father (6 PCR 1147); a good friend (7 PCR 1180, 1184, 1186-87, 1193); Bell scored significantly below average in most areas of testing at the age of 13 (Supp. S-PCR 23); Bell failed all of his classes in 1986 (Supp. S-PCR 25); when Bell was 20 years old, his Reading "vocab/comprehension" was at a 5.7 grade level, his Mathematics "comput/concepts and applications" ability was at a 6.8 grade level, and his Language "mechanics/express" was at a 4.8 grade level (Supp. S-PCR 27); in 1983, a teacher/counsel commented that Bell was "below average academically, unstable emotionally, hot tempered, not trust worthy" (Supp. S-PCR 29.)

C. The trial court prevented Bell from utilizing a mental health expert in postconviction proceedings

Unfortunately, the true prejudice of Mr. Nichols' deficient performance in Michael Bell's penalty phase cannot be accurately weighed because the trial court denied Mr. Bell's well-reasoned, sufficiently pleaded request for a mental health

expert in collateral proceedings. A mental health expert would have evaluated Bell and likely found an abundance of new mitigating evidence, related the mitigation presented during evidentiary hearing to the facts of the crime, and used the information (both that which would have been found during evaluation and that which was presented at evidentiary hearing) to substantiate statutory mental mitigators—specifically Bell's age at the time of the crime and extreme mental or emotional distress.

Although Bell stated in a Motion to Appoint Mental Health Expert that it was necessary to undergo a proper evaluation by a mental health expert for mitigation purposes to determine what might have been found had Nichols conducted an adequate mitigation investigation, the court stated that such an expert would not be helpful in Bell's case. (3 PCR 567.) The trial court stated, and this Court agreed on appeal, that Bell did not present any mitigation which would have changed the outcome of the penalty phase proceedings. Unfortunately, Bell was accused of failing to present significant mitigation in postconviction by the court that prevented him from doing so.

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The 12 – 0 death recommendations of the jury were unsurprising in light of the failure of trial counsel to present **any mitigation** on Bell's behalf at penalty phase. Had counsel presented the above information and the testimony of a mental

health expert who had reviewed all relevant collateral information about Bell and conducted a thorough investigation and undertaken all necessary testing, there is a reasonable probably that enough statutory and non-statutory mitigation would have been established to undermine the confidence of the outcome.

C. Porter v. McCollum qualifies under Witt as a decision from the United States Supreme Court that warrants this Court's reconsideration Mr. Bell's ineffectiveness claims[6]

1. Retroactivity under Witt

In Witt, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictate. Specifically, this Court held, "the doctrine of finality would 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

[6] Undersigned counsel acknowledges that the contents of subsection "C" are substantially similar to that presented in Willacy v. State, 11SC-99, upon permission from Linda McDermott, collateral counsel for Mr. Willacy.

omitted). This Court found that while there is a need for finality in capital cases, such punishment also "connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." Witt, 387 So. 2d at 926.

In sum, this Court in Witt held that a change in law can be raised in postconviction only if it: "(a) emanates from this Court of the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance…" Id. at 931.

This Court has had the opportunity to apply Witt in several instances since its inception. Florida caselaw following Hitchcock v. Dugger and Espinosa v. Florida is particularly instructive to the instant situation in Bell.

In Hitchcock, 481 U.S. 393, the United States Supreme Court issued a writ of certiorari to the Eleventh Circuit of Appeals to review its decision denying federal habeas relief to a death-sentenced Florida inmate. In its decision reversing the Eleventh Circuit's denial of habeas relief, the USSC 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 USSC 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 Florida 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, 515 So. 2d at 175; 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 USSC held 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. at 604. 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 instructed that it could consider nonstatutory mitigating circumstances presented by the defense in rendering its life or death recommendation. The USSC in Hitchcock clarified that the mere opportunity to present mitigation did not satisfy the Eighth Amendment requirement – it was necessary for the capital jury to understand that it could consider and give weight to nonstatutory mitigating factors. Downs , 514 So. 2d at 1071. The USSC in Hitchcock held that this Court violated Lockett and its underlying principle that a capital sentence must be free to consider and give effect to any mitigating circumstance that it found present, whether or not the particular mitigating circumstance had been statutorily recognized. Id.

This Court held that that Hitchcock represented 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 Downs, 514 So. 2d 109. In Downs, this Court determined that defendants could present postconviction Hitchcock claims in successive 3.850 motions because Hitchcock rejected a prior line of FSC cases. Downs, 514 So. 2d at 1071. Although the USSC did not expressly reverse any Florida Lockett case but Hitchcock, this Court determined that an entire body of its caselaw had been rejected. Hitchcock, 418 U.S. at 396-97. This Court understood that it had misread and misapplied Lockett in a series of cases – that the misapplication of Lockett had occurred continuously and consistently in virtually every case where Lockett had been raised. Thompson and Downs are examples of this Court's recognition that fairness dictated that everyone who 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. Porter reached the USSC in a writ of certiorari issued to the Eleventh Circuit just like Hitchcock. Just as the USSC found that this Court's decision in Hitchcock was contrary to or an unreasonable application of the USSC opinion in Lockett, it found in Porter that this Court's decision affirming the death sentence was contrary to or an unreasonable application of the USSC opinion in Strickland. The USSC

rejected this Court's faulty analysis of Lockett in Hitchcock; it rejected this Court's improper analysis of Strickland in Porter. Just as the death row inmates who raised the same Lockett issue as Mr. Hitchcock and lost were afforded similar relief as Mr. Hitchcock, so too must the individuals who raised the same Strickland issue as Porter be afforded the same relief as Mr. Porter. This Court's treatment of Mr. Hitchcock's Lockett claim was not an anomaly just as this Court's treatment of Porter's Strickland claim was not an anomaly. This Court has repeatedly and consistently been misapplying Strickland since Strickland was issued and Porter, while not establishing a change to Strickland, forever changes **Florida** law, as Florida courts have been consistently misapplying federal law since Strickland's inception.

A similar situation occurred following the USSC's decision in Espinosa v. Florida. At issue in Espinosa, was this Court's ruling in Smalley, that the USSC decision in Maynard v. Cartwright (a case originating in Oklahoma), did not apply in Florida because of the differences in the capital sentencing schemes between the two states. Smalley, 546 So. 2d at 722. In Espinosa, the USSC found that Maynard v. Cartwright applied in Florida and that Florida's "heinous, atrocious, and cruel" (HAC) aggravating circumstance violated the Eighth Amendment for exactly the same reason as Oklahoma's HAC aggravator violated the Eighth Amendment. Espinosa, 505 U.S. 1079. Following Espinosa, this Court found that

it was a new Florida law under Witt that necessitated revisiting previously rejected challenges to the HAC aggravating factor. James, 615 So. 2d at 669 (James should not be deprived of the Espinosa ruling, thus Espinosa is applied retroactively).

Like James, Thompson, and Down, this court must afford Bell the same consideration as Mr. Porter received. If this Court refuses to rehear Bell's ineffective assistance claims and apply the proper Strickland analysis Bell will be denied the clearly established federal law that Porter received. This result would constitute arbitrary and capricious application of the death penalty and violate Furman v. Georgia, 408 U.S. 238 (1972).

2. Porter v. McCollum and Florida's Strickland jurisprudence

The USSC in Porter v. McCollum found that this court's Strickland analysis applied in Porter v State, 788 So. 2d. 917 (Fla. 2001) was "an unreasonable application of our clearly established law." Porter, 130 S. Ct. at 455. The determination at odds in Porter v. State was the following finding of this Court:

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinion 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 to the State's expert. We accept this finding by the trial court because it was based upon competent, substantial evidence.

788 So. 2d 917, 923 (Fla. 2001). The USSC in Porter criticized this analysis (and

the case law upon 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 in unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the post-conviction 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 [defense expert] 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 conclusion 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, 130 S. Ct. at 454-55. This Court improperly applied Strickland's prejudice prong by conducting a truncated analysis and summarily rejecting – either failing to consider or unreasonably discounting – mitigating evidence that was presented in Porter's case for the first time at 3.850 evidentiary hearing. Id. at 454. The USSC found that this Court's Strickland analysis was at odds with Penry v. Lynaugh, 492 U.S. 302, 319 (1989), which held that, "the defendant's background and character are relevant because of the belief, long held by this society, that defendants who commit acts that are attributable to a disadvantaged background…may be less culpable." Id. at 454 (quotations omitted). This Court failed to recognized that trial counsel (like Bell's counsel), presented "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his

moral culpability," and that Mr. Porter's personal background 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)(internal citations omitted).

In examining this Court's Strickland case law, it is apparent that the improper-Strickland analysis employed by this Court in Porter was not a one-time aberration, but merely one example in a long line of Florida cases where the improper application of Strickland has occurred. This can be seen from this Court's decision in Sochor, 883 So. 2d at 782-83. This Court in Sochor stated that its Strickland analysis was the same as that employed in Porter v. State and Cherry v. State, 781 So. 2d 1040, 1049-51 (Fla. 2001).

In Porter v. State, this Court referenced its decision in Stephens v. State, 748 So. 2d 1028 (Fla. 1999), where the FSC noted some inconsistency in its jurisprudence as to the standard by which it reviewed a Strickland claim presented in collateral proceedings. Porter, 788 So. 2d 917 (Fla. 2001). In Stephens, this Court stated that its decisions in Grossman v. Dugger, 708 So. 2d 249 (Fla. 1997), and Rose, 675 So. 2d 567, 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. Stephens, 748 So. 2d 1028. In Grossman, this Court affirmed the trial court's rejection of Grossmans' penalty phase ineffective assistance of

counsel claim because "competent substantial evidence" supported the trial court's decision. 708 So. 2d 249. 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. However, the Court made clear that even under this less deferential standard, "the deference that appellate courts afford findings of fact based on competent substantial evidence is an important principle of appellate review." Stephens, 748 So. 2d at 1034.

In Sears v. Upton, the USSC expounded on its Porter analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under Strickland. 130 S.Ct. 3254, 3266 (2010). The court explained:

> We 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 proceedings – and reweigh it against the evidence in aggravation." 558 U.S. at - - - - [, 130 S. Ct., at 453-540].
>
> 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 was presented during the initial penalty phase.

Id. (footnotes and internal citations omitted). Sears, as Porter, requires in all cases, as "probing and fact-specific analysis" of prejudice. Id. A cursory, boiled-down Strickland analysis, as utilized by this court repeatedly (including in Mr. Bell's case), does not satisfy Strickland. Although the court in Sears explained that a prejudice inquiry is necessary even where there was a superficially reasonable mitigating theory presented at trial and where the defense attorney presented some mitigating evidence, such is not the case here. Mr. Bell's case is one where virtually no mitigating evidence was presented at the penalty phase. As such, it is especially important that Mr. Bell's ineffective assistance of counsel claims be reassessed under a proper Strickland analysis that fully considers the weight of the evidence presented in postconviction along to determine whether the outcome of

the proceedings have been undermined.

D. Analysis of Bell's case under Porter

This Court's previous opinion rendered on appeal of the trial court denial of Bell's 3.850 merely accepts as true the circuit court's faulty determinations, which as demonstrated in the preceding sections, are not supported by the record. Neither the circuit court order nor this Court's opinion properly considered the record before it when finding that Mr. Bell was not prejudiced by a deficient performance of Mr. Nichol. The findings in this case violate Porter.

The United States Supreme Court made clear in Porter that this Court's 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 claims. It failed to perform the probing, fact-specific inquiry which Sears explains Strickland requires and Porter makes clear that this Court failed to do under its current analysis.

Mr. Bell's substantial claims of ineffective assistance of counsel in his penalty phase and the significant evidence in support of statutory and non-statutory mitigation presented at evidentiary hearing has not been given serious consideration by this Court or the trial court as required by Porter. Given the trial court's failure to properly address Michael Bell's claims of ineffective assistance of counsel in penalty phase, and this Court's summary dismissal of the claims in

favor of the trial court's insufficient order, Bell will suffer irreversible injustice and perhaps death if he is not afforded the same constitutional safeguards that Porter was.

CONCLUSION

In light of the preceding arguments, Mr. Bell requests that this Court grant a new penalty phase in the instant case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to Assistant Attorney General, Meredith Charbula, Esq. at PL-01, The Capitol, Tallahassee FL 32399 on this 15th day of August, 2011.

/ss/ Frank Tassone
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