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.

REPLY BRIEF OF APPELLANT

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The State argues that Porter did not change the law under Strickland v. Washington, 466 U.S. 668 (1984) and, even if it did the alleged change is not retroactive under Witt v. State, 387 So. 2d 922 (Fla. 1980). (AB at 20, 22). However, under Witt it is clear that Porter v.McCollum, 130 S. Ct. 447 (2009) is a decision from the United States Supreme Court that changed Florida law.

A. THE UNITED STATES SUPREME COURT DECISION IN PORTER CHANGED FLORIDA LAW.

In its answer, the States argues that a new constitutional right has not been established in Porter and therefore Mr. Bell's claim does not fall within the exception provided in Fla. R. Crim. Pro 3.851(d); however, the Supreme Court did not find it necessary to hold in either Hitchcock v. Dugger, 481 U.S. 393 (1987), nor Espinosa v. Florida, 505 U.S. 1079 (1992), that those decisions established a new constitutional right. In both cases, the United States Supreme Court found that this Court had failed to properly apply *already-existing* federal constitutional precedent. This Court subsequently determined that both cases should be applied retroactively under Witt.

The issue, therefore, is whether the United States Supreme Court's holding in Porter *changed Florida law*, just as Hitchcock and Espinosa changed Florida law. In Espinosa v. Florida, no new federal constitutional principle was announced when the Court found the HAC aggravating circumstance used in Florida to be unconstitutionally vague. However, this Court ruled in James v. State, 615 So. 2d 668 (Fla. 1993), that the United States Supreme Court's decision in Espinosa constituted new Florida law under Witt and should therefore apply retroactively when it adopted the defendant's argument that "it would not be fair to deprive [the defendant] of the Espinosa ruling. James at 669.

Similarly, as discussed in greater detail in Appellant's Initial Brief, the United States Supreme Court in Hitchcock did not create new federal constitutional law. It merely found that the defendant's death sentence violated the Eighth Amendment principle set forth in Locket v. Ohio, 438 U.S. 586 (1978) and followed in Eddings v. Oklahoma, 455 U.S. 104 (1982) and Skipper v. South Carolina, 476 U.S. 1 (1986).

B. THIS COURT'S DECISION IN PORTER SHOULD BE APPLIED RETROACTIVELY.

The State argues that Mr. Bell's Witt argument fails because he cannot show that Porter had already been held retroactive to cases final at the time Porter was decided. (AB at 21). The State provides a detailed semantic analysis of the term

"has been held" and a description of the correct use of the past tense. (AB at 21). However, the State fails to realize that prior to this Court's decision in Downs v. Duggar, 514 So.2d 1069 (Fla. 1987), no court had held Hitchcock retroactive under Witt. And even to this day, no court has held that Hitchcock established a new fundamental constitutional right. Instead, it was repeatedly categorized by this Court as a significant change in Florida law because it rejected this Court's longstanding jurisprudence misconstruing Lockett.

Similarly, prior to James v. State, no court had held that Espinosa established a new fundamental constitutional right. Instead, Espinosa clearly rejected this Court's decision in Smalley v. State, 546 So.2d 720 (Fla. 1989) that Maynard v. Cartwright, 486 U.S. 356 (1988) did apply to Florida's capital sentencing scheme.

As a result, the case law on which this Court relied in rejecting Mr. Porter's ineffective assistance of counsel claim must be abandoned and Florida jurisprudence must change in conformity with Porter v. McCollum. The United States Supreme Court has determined that this Court applied an incorrect standard in reviewing the evidence presented to support Mr. Porter's ineffective assistance of counsel claim. The United States Supreme Court's rejection of this Court's jurisprudence is a change in Florida law. This Court used the same incorrect

standard that had been used in Porter v. State when it reviewed Mr. Bell's ineffective assistance of counsel claims.

III. THE UNITED STATES SUPREME COURT'S DECISION IN PORTER APPLIES TO ALL CASES IN WHICH THIS COURT APPLIED AN INCORRECT STRICKLAND ANALYSIS.

The State argues that the United States Supreme Court's decision in Porter is a narrow one, based on Porter's compelling military history. (AB at 24) The State then outlines, in four pages, Porter's military history, and compares it to the mitigation presented in Mr. Bell's case, that he was "nice," to finally draw the conclusion that "Bell's case in mitigation is not in the slightest bit like the mitigation present in the Porter case." (AB at 24-28). The State's argument insinuates that the Porter decision applies to Porter's case alone.

This argument is refuted by simply noting that the United States Supreme Court, as well Florida courts, have relied on the principles set forth in Porter. See Sears v. Upton, 130 S. Ct. 3529 (2010); Johnson v. Sec. of D.O.C., 643 F.3d 907 (11th Cir. 2011); Cullen v. Pinholster, 131 S. Ct. 1388 (2011); Cooper v. Sec. of D.O.C., 646 F.3d 1328 (11th Cir. 2011).

Furthermore, as the Eleventh Circuit Court of Appeals opinion in Johnson v. Sec. of D.O.C., makes clear, the principles set forth in Porter are not confined to postconviction defendants who have presented military history in mitigation. Id. It is also clear from the United States Supreme Court's reliance on Porter v.

McCollum in Sears v. Upton, a case from the Georgia Supreme Court in which the capital defendant did not have a military background.

The State's argument likens the United States Supreme Court's decision in Porter to a Korean War Veterans relief act. The State summarily dismisses Mr. Bell's extensive mitigation that was presented in Mr. Bell's initial brief. Although he did not serve as a soldier in the Korean War, Mr. Bell has extensive statutory and non-statutory mitigation that was not presented during his penalty phase.

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.)

At Michael Bell's 3.850 evidentiary hearing, his brother, 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," and 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. 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 possibility of organic brain impairment; or the possible need for a MRI, CT Scan or EEG. (7 PCR 1270-93.) Likewise, neither the report nor testimony indicated that Dr. Miller evaluated Bell for the existence of statutory mitigators of age and extreme mental nor 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.)

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 that were never 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, as well as this Court, disregarded Mr. Bell's substantial mitigation and improperly curtailed the Strickland analysis. Mr. Bell is therefore entitled to a new penalty phase to be given the opportunity to present this mitigation.

IV. THE STATE'S ANSWER DISREGARDS THIS COURT'S ESTABLISHED PRECEDENT AS WELL AS THE FAIRNESS PRINCIPAL ESTABLISHED IN JAMES.

The State's Answer fails to discuss Espinosa, Hitchcock, Ferrell, James, Locket, and other cases on which Mr. Bell's argument relies. Instead, the State

cites one case, Marek v. State, 8 So.3d 1123 (Fla. 2009) that it relies upon for the contention that this Court has rejected a claim similar to Mr. Bell's. (AB at 23)

The State's reliance on Marek v. State, 8 So. 3d 1123 (Fla. 2009), misstates the argument in Marek, a case that is not procedurally similar to the instant case. (AB at 23). Mr. Marek raised a claim that the ABA report constituted newly discovered evidence that entitled Mr. Marek to relief. Id. at 1126 ("In his second claim, Marek argued generally that his death sentence was imposed arbitrarily and capriciously thus violating Furman v. Georgia, 408 U.S. 238, (1972), which held that the death penalty must be imposed fairly and consistently. Marek based this claim on the American Bar Association's September 17, 2006, report, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report (ABA Report), which criticizes Florida's death penalty scheme and clemency process. Marek asserted that the ABA Report constitutes newly discovered evidence demonstrating that his death sentence is unconstitutionally arbitrary and capricious."). Thus, Mr. Marek did not, as the State falsely asserts, "attempt to re-litigate his ineffective assistance of counsel claim . . . "in light of several recent decisions from the United States Supreme Court." (Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000)). (AB at 22-23).

The ABA report criticized this Court's failure to apply all capital decisions retroactively. Mr. Marek filed his claim relying on this criticism contained in the ABA report in May of 2007, which was issued in the fall of 2006. In relying on the criticism set forth in the ABA report, Mr. Marek noted three decisions from the U.S. Supreme Court that he contended would have resulted in sentencing relief had they been applied retroactively as the ABA Report suggested they should. These three decisions were Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); and Rompilla v. Beard, 545 U.S. 374 (2005). Mr. Marek advanced no argument that these three decisions qualified under Witt v. State as new Florida law because in those cases, the Supreme Court of the United States addressed the unreasonable application of Strickland in the Virginia Supreme Court (Williams v. Taylor), the Maryland Court of Appeals (Wiggins v. Smith) and the Pennsylvania Supreme Court (Rompilla v. Beard).

The Florida Supreme Court did not purport to change Strickland in Williams, Wiggins, or Rompilla. In each instance, the United States Supreme Court found that the highest court of those three states had unreasonably applied well-established federal law. Thus, there was no basis to argue that any one of the three decisions changed Florida law.

A decision from the United States Supreme Court finding that this Court has unreasonably applied federal law is qualitatively different and of greater

significance within the State of Florida than a United States Supreme Court decision finding that the highest court of another state has unreasonably applied federal law. Yet, the State's argument that this Court's decision in Marek fails to recognize the obvious—that neither Williams, Wiggins, nor Rompilla changed Florida law. The fact that the Virginia Supreme Court, the Maryland Court of Appeals, and the Pennsylvania Supreme Court had failed to properly apply Strickland simply did not change Florida law.

The only truly analogous situations are those involving a decision by the United States Supreme Court that this Court has failed to reasonably apply federal law. In those analogous situations, i.e. Hitchcock v. Dugger and Espinosa v. Florida, this Court has recognized that United States Supreme Court's repudiation of this Court's jurisprudence constitutes a change in Florida law.

Additionally, fairness dictates that Mr. Bell should be treated the same as Mr. Porter and receive the benefit of Porter v. McCollum and the change it has brought to Florida law as to how this Court conducts a Strickland analysis of the evidence presented in support of an ineffective assistance of counsel claim. James v. State, 615 So.2d 662 (Fla. 1993)

In Witt, this Court held that changes in the law could be raised retroactively in postconviction proceedings when the need for fairness and uniformity dictated. Witt, 387 So.2d 922. 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. In finding that both Hitchcock and Espinosa qualified as new Florida law under Witt, this Court noted that fairness dictated that others situated similarly to Mr. Hitchcock and Mr. Espinosa should receive the benefit of the decisions from the United States Supreme Court which found their sentences of death constitutionally defective. Id.

In Mr. Bell’s case the change in Florida law was identified by the United States Supreme Court in Porter. So, the first requirement is clearly met. Because the analysis of an ineffective assistance of counsel claim is based on the Sixth Amendment to the United States Constitution, the second criteria is also clearly met. As to the third criteria, there can be no doubt that the standard of review used to analyze an ineffective assistance of counsel claim is fundamentally significant, particularly as to the penalty phase in a capital case where the issue is literally a matter of life and death. The significance of the decision in Porter v. McCollum parallels the significance of the decision in Hitchcock v. Dugger as this Court's analysis of Hitchcock error in Cooper v. State and Hall v. State clearly demonstrates.

Here, the issue presented by claims of error under Porter v. McCollum is similar to the issue presented by Hitchcock error as this Court's analysis of the

Hitchcock error in Hall v. State demonstrates. Just as in Hall v. State, what is required is consideration of the mitigation that trial counsel failed to investigate or present and how the undiscovered or unpresented mitigating evidence may have impacted the jury and/or the judge. An appellate court reviewing Porter error should analyze all of the evidence presented by the capital defendant in postconviction proceedings, and not disregard evidence because the judge presiding at the evidentiary hearing discounted it or was not presented with it because of ineffective assistance of counsel. Just as Hitchcock required Florida courts to revisit claims of Lockett error in the guise of Hitchcock error, Porter v. McCollum requires Florida courts to revisit claims of Strickland error in the guise of Porter error. Claims of ineffective assistance of penalty phase counsel should be reheard and re-evaluated employing the standard set forth in Porter v. McCollum.

This Court in Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1988), also held that Hitchcock required consideration of mitigating evidence that was not in the record on direct appeal because the trial attorney had been constrained by Florida law at the time that he or she was limited to presenting statutory mitigation at the penalty phase proceeding. In addressing whether the error was harmless, this Court considered affidavits of experts and family members who had not testified at the penalty phase because the defense attorney understood he was precluded from presenting nonstatutory mitigating. Id. This Court concluded that all of this expert

and lay evidence proved or tended to prove a host of nonstatutory mitigating circumstances. Id. at 1128. Accordingly, the death sentence was vacated and matter remand for a new penalty phase proceeding. Id.

Hall makes clear that consideration of Hitchcock error required considering exactly the same type of evidence involved in an ineffective assistance of counsel claim, the mitigating evidence not heard by a jury because the trial attorney was constrained by the then controlling case law precluding the presentation of nonstatutory mitigating evidence.

Contrary to the State's contention that Mr. Bell is attempting to re-litigate his prior appeal, Mr. Bell is simply requesting a fair review of his claims under the appropriate Strickland standard—a review that this Court failed to conduct when it merely deferred to the trial court's decision without considering Mr. Bell's claims. Therefore, based on Porter, Mr. Bell's claims of ineffective assistance of counsel require further review, using the standard set forth therein.

CONCLUSION

Based upon the contents of Mr. Bell's Initial Brief and the argument contained herein, Mr. Bell respectfully requests that this court find that trial counsel was deficient in failing to adequately investigate, prepare, and present mitigation in the penalty phase of his trial, that Mr. Bell was prejudiced by the

deficiencies of his counsel, and that Mr. Bell's death sentence be reversed and remanded for a new penalty phase.

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. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

___/s/ Frank Tassone_____
A T T O R N E Y

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 _17th__ day of October, 2011.

___/s/ Frank Tassone_____
A T T O R N E Y