IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-725

RICHARD BARRY RANDOLPH,

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND PUTNAM COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Randolph appeals the circuit court's denial of his successive motion for postconviction relief. In response to Mr. Randolph's argument that the decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) created a change in Florida's *Strickland* jurisprudence that requires consideration and granting of Mr. Randolph's postconviction claims, the circuit court ruled that *Porter* does not represent a change in the law (Order at 2) and Mr. Randolph's motion was thus procedurally barred (Order at 2). Below, Mr. Randolph identifies errors in those rulings.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record in this appeal: "PCR" refers to the record on the prior postconviction proceeding in this case, during which an evidentiary hearing was conducted; "R" refers to the record on the instant appeal. All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

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

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INTRODUCTION

In *Porter v. McCollum*, the United States Supreme Court ruled that this Court's *Strickland* analysis in *Porter v. State*, 788 So. 2d 917 (Fla. 2001) was "an unreasonable application of our clearly established law." 130 S. Ct. 447, 455 (2009). The United States Supreme Court made that determination pursuant to the standard established by the Anti-Terrorism Effective Death Penalty Act ("AEDPA"), which does not permit a federal court to reverse a state court ruling on constitutional grounds simply because the federal court disagrees or the federal court thinks the state court was wrong, but rather requires what is treated as an extremely high level of deference to state court rulings, prohibiting federal courts from altering state court judgments and sentences unless the application of federal law by the state court, which in the *Porter* case was *Strickland*, was unreasonable, meaning not even supported by reason or a rationale. It is in this context that the United States Supreme Court's ruling in *Porter* must be read. When asking whether *Porter* requires a change in this Court's jurisprudence going forward, it must be considered that the United States Supreme Court in *Porter* found this Court's application of *Strickland* to be so unreasonable that the United States Supreme Court found it appropriate to reach past its concerns of federalism and deference to state courts and respect for state sovereignty to correct the unconstitutional ruling.

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

STATEMENT OF CASE AND FACTS

Mr. Randolph raised an ineffective assistance of counsel claim in his initial postconviction proceedings, on which an evidentiary hearing was conducted. During Mr. Randolph's evidentiary hearing, his trial counsel testified. Trial counsel made it clear that he conducted no investigation into Mr. Randolph's background in preparation for Mr. Randolph's penalty phase. Rather, trial counsel explained that his approach to the penalty phase investigation was to leave it to Dr. Krop, his mental health expert, to be the judge of what was relevant and to conduct

any investigation. (PCR. 3181, 3193). Dr. Krop was the only witness presented by the defense during the penalty phase. Trial counsel testified that he left it to Dr. Krop to be the judge of what was relevant in Mr. Randolph's life to his mitigation case. (PCR. 3191-92). Dr. Krop testified that none of the statutory mitigators existed. *Randolph v. State*, 562 So. 2d 331, 334 (1990).

Even under those circumstances, with trial counsel doing nothing to organize a mitigation case, the jury recommended death by a narrow margin of eight-to-four.

At the postconviction evidentiary hearing, counsel presented numerous family and friends that testified with first hand, emotionally-charged accounts of Mr. Randolph's childhood abuse, including being shut in a closet for days, emotional problems and drug abuse. Counsel also presented neuro-psychologist Dr. Hyman Eisenstein, who found the existence of statutory mitigation and addiction expert Dr. Milton Burglass.

Mr. Randolph's family and friends testified in striking detail about Mr. Randolph's drug problems, emotional problems, child abuse and personal history, including how his adoption made him feel like he was not a real boy, how he was at times locked in a closet for days at a time as punishment, and how he smoked a huge amount of crack cocaine the day before the offense. Witnesses were not

contacted by the trial team and the many mitigators their testimony would have offered went unutilized.

Mr. Randolph's father, Timothy Randolph, testified that in 1969 or 1970, the school, concerned about Mr. Randolph's behavior, recommended that Timothy and his wife—Mr. Randolph's adoptive mother—Pearl Randolph take Mr. Randolph to a psychiatrist for medication to control his behavior. (PCR. 3624). Mr. Randolph was medicated for over two years, and it seemed to help. (PCR. 3624-25). Timothy explained that to attempt to control Mr. Randolph's disruptive behavior he would punish and beat Mr. Randolph. (PCR. 3642-45). Timothy explained that his wife Pearl loved Mr. Randolph until she lost control when Mr. Randolph was a little boy. (PCR. 3645).

Timothy and Pearl divorced in 1972, when Mr. Randolph was 10, because of Pearl's drinking problem and resulting behavior. (PCR. 3619-20). When Pearl was intoxicated she would frequently burn meals and engage in bouts of uncontrollable behavior. (PCR. 3620). Timothy explained that they frequently argued in front of Mr. Randolph. (PCR. 3622).

When Mr. Randolph was older, Timothy came to understand that Mr. Randolph was using drugs. One day he found Mr. Randolph in his car sleeping and suspected drug use. (PCR. 3635-36). Timothy would see Mr. Randolph and urge him to get his life together. When Mr. Randolph was arrested for murder in

Palatka, Timothy regretted that he had never provided help after learning Mr. Randolph had a drug problem. (PCR. 3637).

Timothy was contacted to attend the judge sentencing after Mr. Randolph was convicted. Timothy explained that had he been asked to testify, he would have done so very willingly. (PCR. 3640).

Regarding Mr. Randolph's adoptive mother, Pearl Randolph, trial counsel testified he would have wanted Dr. Krop to inquire of Randolph's parents, whether he, as counsel, had the information or not. Trial counsel said if Dr. Krop had had the information provided by Pearl Randolph, he would have elicited the information during Dr. Krop's testimony. (PCR. 3197).

During the evidentiary hearing, Pearl Randolph testified that Timothy had suggested they adopt a child. (PCR. 3660). Having never heard of adoption, Pearl was initially not agreeable, but eventually agreed. (PCR. 3660). Pearl explained that she went to an agency and after two years was told the agency had a boy child for her. They named the child Richard Barry Randolph. (PCR. 3661). During the first two years, Pearl noticed Mr. Randolph not acting normally. He cried such that Pearl believed something was out of the ordinary. (PCR. 3662-63). Mr. Randolph would have tantrums, grit his teeth and do unusual things. (PCR. 3663). Pearl noticed that neither his hands nor feet developed normally. (PCR. 3663). Pearl came to believe that the adoption agency knew something was wrong with the

infant or the mother but had not told her. (PCR. 3663). Mr. Randolph's unusual behavior continued as he grew up.

When Mr. Randolph was told of his adoption, he was extremely upset, screaming and crying, and could not accept the news; he was four- or five-years-old at the time (PCR. 3664-65).

Concerning her marriage to Timothy, Pearl explained that it was Mr. Randolph who learned that Timothy was talking on the phone to other women and Mr. Randolph who eventually told Pearl. (PCR. 3665). Mr. Randolph told Pearl that when she went to work, women called Timothy and that Mr. Randolph had listened in on the phone. (PCR. 3665). After he told her, Pearl realized that the knowledge upset Mr. Randolph very much. (PCR. 3666). Once Pearl learned of Timothy's infidelities, their marriage fell apart. (PCR. 3668). Thus, it was Mr. Randolph's disclosure of his father's infidelity that led to the separation of his parents. Later, after Timothy left Pearl, she witnessed him beat Mr. Randolph harshly. (PCR. 3667). Pearl told Timothy to hit her instead and explained that Timothy had once beaten her badly with a broom, requiring that she call the police. (PCR. 3668). Pearl had to get psychological help when she learned that Timothy was going to remarry. (PCR. 3671). Pearl relieved her emotional pain usually by drinking beer. (PCR. 3671).

Mr. Randolph came to live with her for a summer and his senior year of high school. (PCR. 3672). During his senior year, Pearl noticed he was still having tantrums and still gritting his teeth, as he had always done before. (PCR. 3675). No one from Mr. Randolph's defense team ever attempted to contact Pearl by telephone or letter. Pearl explained that she would have certainly testified on her son's behalf if asked. (PCR. 3676).

Mr. Randolph's stepmother, Shirley Randolph, also testified at the evidentiary hearing. Shirley explained how Mr. Randolph came to live with her and Timothy shortly after they were married and stayed until his senior year. Shirley described their relationship as not the best, but not terrible, (PCR. 3649), and explained that Mr. Randolph had a good relationship with Jermaine, his young stepbrother. (PCR. 3649). Shirley explained that Mr. Randolph did not speak about Pearl or express much emotion, (PCR. 3649), and he never saw Pearl while living with her and Timothy. To her recollection, Pearl never called, sent for him, came to visit, sent him birthday cards or called him on his birthday. (PCR. 3650-51). Shirley also explained however that neither she nor Timothy ever celebrated Mr. Randolph's birthday. (PCR. 3655). Shirley was never contacted by trial counsel or any other member of Mr. Randolph's trial defense team but would have testified had she been asked. (PCR. 3654).

In addition to family members, collateral counsel presented the testimony of other witnesses who had not been contacted by trial counsel. Janene Betts's mother, Verna Whitney Betts (PCR. 3297), testified at the lower court evidentiary hearing. Mrs. Betts met Mr. Randolph Randolph in Fairfield, North Carolina in 1986 when he was Janene's boyfriend. (PCR. 3298). He called Verna "mama" and wanted her to be his mother because she did not use punishment in the unusual and severe way his father had. (PCR. 3336, 3339). Betts and Mr. Randolph became close. Mr. Randolph had suffered severe punishment for minor things during his childhood. (PCR. 3318).

His parents put him in a room or closet for two to three days in the dark and forced him to eat alone. (PCR. 3318, 3339). Mr. Randolph was required to be an A student by his father and tried and tried to get good grades to avoid punishment. Mr. Randolph felt badly because he saw Mrs. Betts's treatment of her children and it hurt him that he was not treated as a "real" child of his father's or as well as his father's natural son. (PCR. 3319, 3324). Mr. Randolph felt like an outcast in his own family. (PCR. 3325). Betts explained that when she saw Mr. Randolph get angry, many times she noticed he would bite himself on the arm, hand, and fingers. (PCR. 3321-22). Janene and Mr. Randolph's daughter displays similar behavior. (PCR. 3322). Mr. Randolph would also do things to harm himself when he was frustrated. (PCR. 3326). Betts was aware of Mr. Randolph's drug use because he

would have red eyes and be different at times. While she found it difficult to tell exactly the difference between when he was on drugs and when he was not, she thought she could tell the difference. (PCR. 3334). Betts observed Mr. Randolph walk the floors and talk to himself many times at the house as well as walk the floors and bite himself. (PCR. 3327). Betts did not recall anyone from Randolph's defense team interviewing her. (PCR. 3302). She would have shared what she knew about Mr. Randolph or testified if asked. (PCR. 3302).

Ronzial Williams testified at the evidentiary hearing as to the extent of Mr. Randolph's chronic use of crack cocaine and his very large crack cocaine use the night before the offense. According to Williams, Randolph would smoke $300-$400 worth of crack cocaine any chance he could get it. (PCR. 3705-06). The effect of the crack cocaine on Mr. Randolph was that it would cause Mr. Randolph to have mood swings, to talk to himself, and to get anxious when he wanted more crack and could not get more. (PCR. 3706). Mr. Randolph would want to do something to make money so he could get more crack cocaine. They would drive people places and sell things for money. (PCR. 3106). Williams was with Randolph the night before he was arrested. They did the same thing they did every night they were together: Williams smoked marijuana and Mr. Randolph smoked crack cocaine. (PCR. 3109). Williams explained that on the day before Randolph was arrested, Mr. Randolph smoked crack cocaine the entire time. (PCR. 3720).

Mr. Randolph smoked from a $100 rock of crack cocaine given to him by Elijah, a friend of Williams, in the car on the way to Weleka. (PCR. 3723-24). Neither Williams nor his girlfriend smoked any of that crack cocaine, as they were not in the habit of smoking cocaine. (PCR. 3725). In Weleka, Mr. Randolph finished the $100 rock. (PCR. 3725). Back in Palatka, Mr. Randolph got another $200 rock of crack cocaine. (PCR. 3725). Mr. Randolph smoked off that rock of crack cocaine when they drove to the country. (PCR. 3725). Later that night, different guys they gave a ride to gave Mr. Randolph additional crack cocaine. (PCR. 3726-27). Williams also saw Mr. Randolph smoke crack cocaine on Lemon Street. (PCR. 3719-20, 3726). From around 1:00 in the afternoon, until around 11:00 p.m. or midnight, except for the short time they were apart in the afternoon, Williams witnessed Randolph's crack cocaine consumption. (PCR. 3720). Because he saw the many pieces Randolph smoked, his estimation was that Mr. Randolph smoked about $300 worth. (PCR. 3720). Williams explained that no one from Randolph's defense team ever spoke with him about Mr. Randolph's drug use, but he would have testified at trial as to the same information had he been asked. (PCR. 3710).

Trial counsel failed to call any of the aforementioned people. Trial counsel testified that had he known of them, he would have told Dr. Krop because the information might have satisfied Dr. Krop that there was a mitigator or other

evidence to rebut intent. (PCR. 3186-88). Trial counsel testified that he did not call or contact these witnesses because he did not know they existed. (PCR. 3260).

In addition to failing to conduct an adequate investigation, counsel failed to ensure that Mr. Randolph was provided adequate mental health expert assistance. During the evidentiary hearing, counsel presented neuro-psychologist Hyman H. Eisenstein, Ph.D. (PCR. 807-09, 3365-3516). Dr. Eisenstein, conducted the Halstead-Reitan neuro-psychological battery on Mr. Randolph twice and found significant organic brain damage. (PCR. 3391-3402). Together with the background materials, head traumas, cognitive impairment due to chronic drug use and, learning disabilities and emotional trauma, Dr. Eisenstein found that the two mental health statutory mitigating circumstances existed at the time of the offense as well as a plethora of non-statutory mitigation. (PCR. 3417-19).

Dr. Milton Burglass, an expert in addiction medicine, also testified at the state court evidentiary hearing. Burglass described the effects of Randolph's drug use generally and at the time of the offense. (PCR. 3546-56). Further, as detailed in his report, Burglass noted that Randolph suffered from uncinate fits in childhood characterized by sudden onset, brief duration, sudden resolution, subjective feelings of rage, expression of physical violence usually directed at the environment (punching walls or breaking things), the concurrent overwhelming urge to bite or chew on anything (he has scars on both thumbs from having bitten

and chewed himself over the years), the concurrent perception of an acrid smell (something like a burning tire or like burning metal), and the concurrent coloring of the entire visual field (red, for Mr. Randolph). (PCR. 2677-78). Mr. Randolph continued to suffer from uncinate fits as an adult and the use of cocaine and other drugs would have exacerbated Mr. Randolph's neurological disease. Other history with neuro-psychiatric implication found by Burglass include: A) Randolph's 1979 closed head injury with brief loss of consciousness; B) Randolph's bed-wetting that continues to the present (even in prison); C) Randolph's sleep-walking and sleep-talking; D) Randolph's breath-holding when angry as a child; E) Randolph's multiple allergies and frequent nosebleeds (unrelated to cocaine); and F) Randolph's drug treatment in grade school which "calmed him down and made him sleepy," suggesting the use of a psychostimulant (Dexedrine or Ritalin) for a likely diagnosis of hyperactivity or minimal brain dysfunction. (PCR. 2671-79).

On those facts, the ruling of this Court that Mr. Randolph challenges here is as follows:

> After considering all of the evidence, the postconviction court concluded that none of the witnesses at the evidentiary hearing offered any mitigation testimony in addition to that presented by Dr. Krop at the penalty phase. We find this conclusion is supported by competent, substantial evidence in the record.

The instant case is remarkably similar to *Robinson v. State*, 707 So. 2d 688 (Fla.1998), and *Breedlove v. State*, 692 So. 2d 874 (Fla.1997). In both cases, the defendants claimed that defense counsel was ineffective for failing to investigate each defendant's background, failing to furnish mental health experts with relevant information which would have supported their testimony about mitigating factors, and failing to call family members and friends who would have testified about each defendant's childhood abuse, mental instability, and addiction to drugs and alcohol. *See Robinson*, 707 So. 2d at 695; *Breedlove*, 692 So. 2d at 877. However, we found that neither Robinson nor Breedlove demonstrated the prejudice necessary to mandate relief under *Strickland* because the mitigation overlooked by defense counsel would not have changed the outcome of the defendant's sentence in light of the evidence. *See Robinson*, 707 So. 2d at 697; *Breedlove*, 692 So. 2d at 878; *see also Tompkins v. Dugger*, 549 So. 2d 1370, 1373 (Fla.1989) (finding the mitigating evidence overlooked by defense counsel would not have changed the outcome and therefore did not demonstrate prejudice under the *Strickland* test). We reach the same conclusion in this case.

Even if Pearl's decision to solely rely on Dr. Krop's testimony was deficient, Randolph has not demonstrated error in the postconviction court's conclusion that no prejudice resulted from Pearl's performance. Considering the four valid aggravators and the cumulative nature of the testimony from the evidentiary hearing, we find no error in the postconviction court's finding that Randolph has not demonstrated the prejudice necessary to mandate relief. *Robinson*, 707 So.2d at 697; *see also Routly v. State*, 590 So.2d 397, 401 (Fla.1991) (finding that defendant did not demonstrate reasonable probability that sentence would have been different had trial counsel presented proffered mitigating evidence where much of the evidence was already before the judge and jury in a different form).

Randolph v. State, 853 So. 2d 1051, 1060-61 (Fla. 2003).

On November 29, 2010, Mr. Randolph filed a successive motion to vacate judgments of conviction and sentence pursuant to 3.851 alleging that this Court failed to properly analyze prejudice based on clearly established federal law as set forth in *Porter v. McCollum* and *Strickland v. Washington*. (R. 1-26). The State responded (R3. 38-55) and the circuit court entered an order denying relief on March 7, 2011 (R. 142-151). Mr. Randolph timely filed a notice of appeal, and the present appeal follows.

SUMMARY OF THE ARGUMENTS

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

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

STANDARD OF REVIEW

The issues presented in this appeal consist of two parts: the first is the determination of whether the *Porter* claim is cognizable, meaning whether it creates a change in Florida law and is retroactive in nature. That issue is a question of law that must be reviewed de novo. *See Randolph v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993). The second is the

application of *Porter* to Mr. Randolph's case, a determination for which deference is given findings of historical fact. All other facts must be viewed in relation to how Mr. Randolph's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009); *see Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995).

Further, the lower court's findings of fact are owed no deference by this Court when they are tainted by legal error. Factual determinations "induced by an erroneous view of the law" should be set aside. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956); *see also Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000).

ARGUMENT

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

Mr. Randolph was deprived of the effective assistance of trial counsel at his penalty phase. This Court denied Mr. Randolph's claim of ineffective assistance of counsel in a manner found unconstitutional in *Porter v. McCollum*, 130 S. Ct. 447 (2009). The recent decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Randolph's ineffective assistance of counsel claim was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this

Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Randolph's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Randolph's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

Mr. Randolph, whose ineffective assistance of penalty phase counsel claim was heard and decided by this Court before *Porter* was rendered, seeks in this appeal what George Porter received. Mr. Randolph seeks to have his ineffectiveness claim reheard and re-evaluated using the proper *Strickland* standard that United States Supreme Court applied in Mr. Porter's case to find a re-sentencing was warranted. Mr. Randolph seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Randolph seeks the proper application of the *Strickland* standard. Mr. Randolph seeks to be treated equally and fairly.

The preliminary question that must be addressed is whether the United States Supreme Court's decision in *Porter* represents a fundamental repudiation of

this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Randolph's *Porter* claim cognizable in Rule 3.851 proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . .").

I. *Porter* constitutes a change in Florida *Strickland* jurisprudence that is retroactive and thus creates a successive claim for relief

There are two recent occasions upon which this Court has assessed the effect to be accorded to a decision by the United States Supreme Court finding that this Court had misapprehended and misapplied United States Supreme Court precedent.

In *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the United States Supreme Court granted federal habeas relief because this Court had failed to properly apply *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Hitchcock*, this Court had failed to find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances while deliberating in a capital penalty phase proceeding on whether to recommend a death sentence.

The other United States Supreme Court case finding that this Court had failed to properly apply federal constitutional law was *Espinosa v. Florida*, 505 U.S. 1079 (1992). There, the United States Supreme Court summarily reversed a

decision by this Court which found that *Maynard v. Cartwright*, 486 U.S. 356 (1988), was not applicable in Florida because the jury's verdict in a Florida capital penalty phase proceedings was merely advisory.

Following the decisions in *Hitchcock v. Dugger* and *Espinosa v. Florida*, this Court was called upon to address whether other death sentenced individuals whose death sentences had also been affirmed by this Court due to the same misapprehension of federal law should arbitrarily be denied the benefit of the proper construction and application of federal constitutional law. On both occasions, this Court determined that fairness dictated that those, who had not received from this Court the benefit of the proper application of federal constitutional law, should be allowed to re-present their claims and have those claims judged under the proper constitutional standards. *See Randolph v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) ("We hold we are required by this *Hitchcock* decision to re-examine this matter as a new issue of law"); *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

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

In *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. The Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id*. (quotations omitted). A court's inherent equitable powers were recently reaffirmed in *Holland v. Florida*, 130 S. Ct. 2549 (2010), where the United States Supreme Court explained:

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

> equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Ibid*.

Holland, 130 S. Ct. at 2563.

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," 387 So. 2d at 925, the *Witt* Court declined to follow the line of United States Supreme Court cases addressing the issue, characterizing those cases as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).[1]

Thus, we are not concerned here with *Porter's* effect on federal law, or whether *Porter* changed anything about the *Strickland* analysis generally. Mr. Randolph does not allege that *Porter* changes *Strickland*. Rather, our question is

[1] At issue in *Danforth* was the retroactive application of a United States Supreme Court decision that was in different posture than the one at issue here. In *Danforth*, the United States Supreme Court had issued an opinion which overturned its own prior precedent. In *Porter*, the United States Supreme Court addressed a decision from this Court and concluded that this Court's decision was premised upon an unreasonable application of clearly established law. Thus for federal retroactivity purposes, the decision in *Porter* is not an announcement of a new federal law, but instead an announcement that this Court has unreasonably failed to follow clearly established federal law.

whether this Court believes that *Porter* strikes at a problem in this Court's jurisprudence that goes beyond the *Porter* case. Since this Court can identify a federal precedent as a change in Florida law and extend it however it sees fit, the question is whether this Court recognizes *Porter* error in other opinions such as this one and believes that other defendants should get the same correction of unconstitutional error that Mr. Porter received.

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

The *Witt* Court recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which

are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." *Id*. at 929. The Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967) and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

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

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

Here, we see our issue hinge on the third consideration, as *Porter* emanates from the United States Supreme Court and is clearly constitutional in nature as a Sixth Amendment *Strickland* case. Thus we can look to the *Linkletter* considerations and consider that: the purpose to be served by the new rule would be to provide the same constitutional protection to Florida death-sentenced defendants as was provided to Mr. Porter, or to correct the same constitutional

error that was corrected in *Porter*; the extent of reliance on the old rule is not presently knowable until reviewing *Porter* claims, however, if *Porter* error is found to be extensive, there is a compelling reason to correct the constitutional violation because it is great, and if *Porter* error is found to be extremely limited, the constitutional error must nevertheless be corrected; and, if *Porter* error is very limited, the effect on the administration of justice will be to correct a constitutional wrong without expending great resources, and if *Porter* error is extensive, the effect will be to justifiably use whatever resources are necessary to correct a far-reaching constitutional problem in death cases.

While the result of the *Linkletter* analysis is not certainly conclusive, the *Hitchcock* example provides further guidance. After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence

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

[2] The decision from the United States Supreme Court in *Hitchcock* issued on April 21, 1987. Because of the pendency of death warrants in a number of cases, this Court was soon thereafter called upon to resolve the ramifications of *Hitchcock*. On September 3, 1987, the decision in *Riley* issued granting a resentencing. Therein, this Court noted that *Hitchcock v. Dugger* constituted a clear rejection of the "mere presentation" standard which it had previously held was sufficient to satisfy the Eighth Amendment principle recognized in *Lockett v. Ohio*, 438 U.S. 586 (1978). Then on September 9, 1987, this Court issued its opinions in *Randolph* and *Downs* ordering resentencings in both cases. In *Randolph*, 515 So. 2d at 175, this Court stated: "We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in law that potentially affects a class of petitioners, including Randolph, to defeat the claim of a procedural default." In *Downs*, this Court explained: "We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." Then on October 8, 1987, this Court issued its opinion in *Delap* in which it considered the merits of Delap's *Hitchcock* claim, but ruled that the *Hitchcock* error that was present was harmless. And on October 30, 1987, this Court issued its opinion in *Demps*, and thereto addressed the merits

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

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

present, whether or not the particular mitigating circumstance had been statutorily identified. *See id*. at 1071.

Following *Hitchcock*, this Court found that *Hitckcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[3] Clearly, this Court read the opinion in *Hitchcock* and

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

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

saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Randolph* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.[4]

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so to *Porter* reached the United States Supreme Court on a

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> Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

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

[4] Because the result in *Hitchcock* was dictated by *Lockett* as the United States Supreme Court made clear in its opinion, there really can be no argument that the decision was new law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). Since the decision was not a break with prior United States Supreme Court precedent, *Hitchcock* was to be applied to every Florida death sentence that became final following the issuance of *Lockett*. Certainly, no federal court found that *Hitchcock* should not be given retroactive application. *See Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

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

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

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

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

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

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

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. . . . Yet neither the postconviction trial court nor

> the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

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

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

[5] The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard which is identical to the prejudice prong of the *Strickland* standard, the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result. In *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995), the majority in responding to a dissenting opinion explained:

> Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 1583-1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Thus, it was made clear in *Kyles* that the presiding judge's credibility findings did not control.

Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Id*. at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id*. at 454, even though Mr. Porter's personal history represented "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id*. (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

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

same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

Indeed in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings.[6] In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996) were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision.[7] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*,

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[6] It is important to note that *Stephens* was a non-capital case in which this Court granted discretionary review because the decision in *Stephens* by the Second District Court of Appeals was in conflict with *Grossman* as to the appellate standard of review to be employed.

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

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

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

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

From an examination of this Court's case law in this area, it is clear that *Porter v. McCollum* was a rejection of not just the deferential standard from

[8] The majority opinion in *Stephens* receding from *Grossman* prompted Justice Overton, joined by Justice Wells, to write: "I emphatically dissent from the analysis because I believe the majority opinion substantially confuses the responsibility of trial courts and fails to emphasize a major factor of discretionary authority the trial courts have in determining whether defective conduct adversely affects the jury." *Stephens v. State*, 748 So. 2d at 1035. Justice Overton explained: "My very deep concern is that the majority of this Court in overruling *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997), has determined that it no longer trusts trial judges to exercise proper judgment in weighing conflicting evidence and applying existing legal principles." *Id*. at 1036.

Grossman that was finally discarded in *Stephens*, but even of the less deferential standard adopted in *Stephens* and applied in *Porter v. State*. According to United States Supreme Court, the *Stephens* standard which was employed in *Porter v. State* and used to justify this Court's decision to discount and discard Dr. Dee's testimony was "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455.[9]

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

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

[9] As the United States Supreme Court noted in *Kyles*, the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or the defense attorney unreasonably failed to discover or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute her credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the state. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The constitution protects the right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

less than a meaningful engagement with mitigating evidence, be it heroic military service, a traumatic childhood, substance abuse or any other mitigating consideration, will pass for a constitutionally adequate *Strickland* analysis. To engage is to embrace, connect with, internalize–to glean and intuit from mitigating evidence the reality of the experiences and conditions that make up a defendant's humanity. Implicit in the requirement that trial counsel must present mitigating evidence to "humanize" capital defendants, *id.* at 454, is the requirement that courts in turn must engage with that evidence to form an image of each defendant's humanity. It stands to reason that nothing less than a profound appreciation for an individual's humanity would sufficiently inform a judge or jury deciding whether to end that individual's life. And it is that requirement–the requirement that Florida courts *engage with humanizing evidence*--that is at the heart of the *Porter* error inherent in this Court's prejudice analysis and *Stephens* deference. The United States Supreme Court has recognized that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence . . . ." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

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

If a person is presented with a batch of apples and asked if it is reasonably probable that there are more red apples than green, and he rummages through the top of the batch, sees mostly green apples, and responds that it is reasonably possible that more are green, he has not answered the question he was asked. Whether there is a reasonable possibility that more are green does not tell us whether there is a reasonable probability that more are red. The conclusions are not determinative of one another and in fact have very little or nothing to do with one another, since, to put figures to it for the sake of conceptualizing the fallacy, a 51% probability that more are red still allows for a 49% possibility that more are green. By treating the two conclusions as mutually exclusive, the apple inspector committed the logical fallacy of creating a false dilemma, i.e. *there is either a reasonable possibility that more are green or a reasonable probability that more are red so that finding the former precludes the latter*. The problem with the apple inspector's method is that it reverses the standard of his inquiry. If a reasonable probability of more red apples represents a problem for which the apple inspector is requested to inspect batches of apples, his fallacy would result in him determining that there is not a problem when in fact there is. The apple inspector's

method permits him to base his conclusion on an assumption that saves him from having to dig to the bottom of every batch, i.e. *if most of the apples I notice on the surface are green I can assume that there is not a reasonable probability that digging into the batch would reveal more are red.* That method reverses the standard of inquiry because a negative response—*no, there is not a reasonable probability of more red apples*—comes not from finding that probability does not exist but from finding that an opposing possibility does exist. By attempting to prove a negative, the method places the focus of the inspector's inquiry on green apples instead of on red.

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

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

To prove prejudice under the *Strickland* test, "[t]he defendant must show

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

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

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to *engage with* mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of

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

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

The Sixth Amendment vests a right to effective assistance of counsel in capital defendants such that when it is reasonably probable that a trial attorney's deficient performance changed the outcome of a case a constitutional violation occurs. It does not matter whether it is also reasonably possible that the deficient performance did not change the outcome. That is a different inquiry and a contrary standard. The insidiousness of the error is its subtlety because the conclusions seem to have a tendency to negate or at least cut against one another. But since the standard is to look for a reasonable probability of a changed outcome, while it seems to tip the scale of the *Strickland* prejudice inquiry that the jury might have taken some of the non-presented evidence to cut against the defendant, that consideration has no place on the scale. The *Strickland* inquiry being applied by the Florida Supreme Court, by its very terms, regardless of the fact that it may also quote the correct *Strickland* prejudice standard, is as follows: relief should be granted if there is a reasonable possibility that the non-presented evidence would not have mattered. But the proper inquiry is about looking for any way a constitutional violation might have occurred, meaning we err on the side of finding one, rather than permitting an execution despite a constitutional violation because there is some speculative explanation for how that violation might reasonably not have actually occurred. Both conclusions can be true, but *Strickland* is only concerned with one, so that if both are true, a constitutional violation must be

found. If a violation might with reasonable probability have occurred, it did occur, regardless of whether it might with reasonable possibility have not.

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

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

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

562 U. S. ____ (November 29, 2010) (citations omitted). Like the California courts, Florida courts must not violate *Kyles* by, rather than taking painstaking care in scrutinizing a postconviction record for anything and everything that might add up to something that probably would have made a difference, rummaging through

the top of the batch looking for green apples that support the conclusion that there are no red apples to be found below.

In *Sears v. Upton*, the United States Supreme Court expounded on its *Porter* analysis, finding that a Georgia postconviction court failed to apply the proper prejudice inquiry under *Strickland*. 130 S. Ct. at 3266. The state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears" and unable to "speculate as to what the effect of additional evidence would have been" because "Sears' counsel did present some mitigation evidence during Sears' penalty phase." *Id*. at 3261. The United States Supreme Court found that "[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the circumstances of this case." *Id*. at 3264. The United States Supreme Court explained the state court's reasoning as follows:

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

Id. at 3264 (citations omitted).

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

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. We did so most recently in *Porter v. McCollum*, where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief. Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U.S.C. § 2254(d)(1)—we also concluded the state court had unreasonably applied *Strickland's* prejudice prong when it analyzed *Porter's* claim.
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> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. . . . And, in Porter, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." 558 U.S., at ----[,

> 130 S.Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

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

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

Porter makes clear that the failure to present critical evidence to the jury prejudices a defendant Here, that prejudice is glaringly apparent. After *Porter*, it

is necessary to conduct a new prejudice analysis in this case, guided by *Porter* and compliant with *Strickland*. Because the United States Supreme Court has found this Court's prejudice analysis used in this case to be in error, Mr. Randolph's claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

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

Mr. Randolph was deprived of the effective assistance of counsel during his penalty phase, and this Court committed *Porter* error in denying his claim.

As an initial note, it must be pointed out that the lower court erred in relying on the fact that "no deficiency was found in the case at bar" to distinguish this case from *Porter*. (R. 143). This Court ruled that "[e]ven if Pearl's decision to solely rely on Dr. Krop's testimony was deficient, Randolph has not demonstrated error in the postconviction court's conclusion that no prejudice resulted from Pearl's performance." *Randolph*, 853 So. 2d at 1060-61. Thus, we cannot assume that there was no deficiency here; rather, we must assume that there was, because that is what this Court did when it made the ruling at issue here.

This Court found that

> [a]fter considering all of the evidence, the postconviction court concluded that none of the witnesses at the evidentiary hearing offered any mitigation testimony in addition to that presented by Dr. Krop at the penalty phase. We find this conclusion is supported by competent, substantial evidence in the record.

> The instant case is remarkably similar to *Robinson v. State*, 707 So. 2d 688 (Fla.1998), and *Breedlove v. State*, 692 So. 2d 874 (Fla.1997). In both cases, the defendants claimed that defense counsel was ineffective for failing to investigate each defendant's background, failing to furnish mental health experts with relevant information which would have supported their testimony about mitigating factors, and failing to call family members and friends who would have testified about each defendant's childhood abuse, mental instability, and addiction to drugs and alcohol. *See Robinson*, 707 So. 2d at 695; *Breedlove*, 692 So. 2d at 877. However, we found that neither Robinson nor Breedlove demonstrated the prejudice necessary to mandate relief under *Strickland* because the mitigation overlooked by defense counsel would not have changed the outcome of the defendant's sentence in light of the evidence. *See Robinson*, 707 So. 2d at 697; *Breedlove*, 692 So. 2d at 878; *see also Tompkins v. Dugger*, 549 So. 2d 1370, 1373 (Fla.1989) (finding the mitigating evidence overlooked by defense counsel would not have changed the outcome and therefore did not demonstrate prejudice under the *Strickland* test). We reach the same conclusion in this case.
>
> . . . Considering the four valid aggravators and the cumulative nature of the testimony from the evidentiary hearing, we find no error in the postconviction court's finding that Randolph has not demonstrated the prejudice necessary to mandate relief. *Robinson*, 707 So.2d at 697; *see also Routly v. State*, 590 So.2d 397, 401 (Fla.1991) (finding that defendant did not demonstrate reasonable probability that sentence would have been different had trial counsel presented proffered mitigating evidence where much of the evidence was already before the judge and jury in a different form).

Randolph, 853 So. 2d at 1060-61.

This Court found that the evidence from the evidentiary hearing was cumulative to that presented at trial; however, Dr. Eisenstein found that statutory mitigators were present, and Dr. Krop found that there were no statutory mitigators present. How can those findings be cumulative? As no statutory mitigators were found, it is quite easy to believe that expert testimony in support of statutory mitigation might have tipped the scales in favor of life the slight amount necessary to sway two more jurors. Dismissing mitigation for unreasonable reasons, such as being cumulative to testimony that is diametrically opposed to it, is a quintessential example of *Porter* error.

Further, this Court relied on the four aggravators to dismiss the importance of the postconviction evidence. However, those four aggravators were already contemplated and accounted for in the eight-to-four jury recommendation. The non-presented evidence cannot be balanced out by counting aggravators twice.

The United States Supreme Court made clear in *Porter* that this Court's prejudice analysis was insufficient to satisfy the mandate of *Strickland*. In the present case as in *Porter*, this Court did not address or meaningfully consider the facts attendant to the *Strickland* claim. It failed to perform the probing, fact-specific inquiry which *Sears* explains *Strickland* requires and *Porter* makes clear that this Court fails to do under its current analysis.

CONCLUSION

Mr. Randolph's substantial claim of ineffective assistance of counsel has not been given the consideration required by *Porter*. Mr. Randolph requests that this court perform that analysis and grant relief.

CERTIFICATE OF FONT

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

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CERTIFICATE OF SERVICE

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

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