IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-762

LOWER TRIBUNAL No. 89-2165

GEORGE MICHAEL HODGES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summarily denial of Mr. Hodges' successive motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850 and 3.851.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

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

"PC-R. ____" – record on appeal from initial denial of postconviction relief;

"PC-T. ____" – transcript of evidentiary hearing;

"Supp. T. ____" – supplemental transcript of evidentiary hearing;

"PC R2. ____" – record on appeal from denial of successive motion for postconviction relief;

"PC R3. ____" – record on appeal from denial of second successive motion for postconviction relief;

REQUEST FOR ORAL ARGUMENT

Mr. Hodges has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Hodges, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

INTRODUCTION

On November 30, 2009, the United States Supreme Court issued its decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009). There, the United States Supreme Court ruled that this Court's *Strickland*[1] analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." *Porter v. McCollum,* 130 S. Ct. at 455. Under the Anti-Terrorism Effective Death Penalty Act (AEDPA), the United States Supreme Court was required to give some deference to this Court's application of *Strickland*. It could not grant habeas relief from a state court judgment merely because it disagreed with the state court's application of federal constitutional law. Specifically, habeas relief could only be issued to George Porter if this Court's *Strickland* analysis was not just wrong, but clearly and unreasonably wrong. It is in this context that the United States Supreme Court's ruling in *Porter v. McCollum* must be read.

Mr. Hodges' current appeal requires this Court to engage in an introspective look at the import of the decision in *Porter v. McCollum* and consider whether its own unreasonable analysis in *Porter v. State* was merely an aberration or was it in fact indicative of a systemic failure by this Court to properly understand and apply *Strickland*.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

In the relatively recent past, this Court has on two occasions 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), and find Eighth Amendment error when a capital jury was not advised that it could and should consider non-statutory mitigating circumstances when returning an advisory verdict in a capital penalty phase proceeding.[2] In *Espinosa v. Florida*, 505 U.S. 1079 (1992), 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.[3]

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 Thompson 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").

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[2]The AEDPA was not in effect at the time of the decision in *Hitchcock v. Dugger*, so there was no need for the United States Supreme Court to determine that this Court's decision was clearly or unreasonably wrong. The United States Supreme Court's review in *Hitchcock* was *de novo*.

[3]The decision by the United States Supreme Court in *Espinosa v. Florida* was in the course of direct review of this Court's decision affirming a death sentence on direct appeal. The United States Supreme Court's decision was not through the prism of federal habeas review, and thus the United States Supreme Court employed *de novo* review.

Mr. Hodges, whose ineffective assistance of counsel claims were heard and decided by this Court before *Porter v. McCollum* was rendered, seeks in this appeal what George Porter received. Mr. Hodges seeks to have his ineffectiveness claims reheard and re-evaluated using the proper *Strickland* standard that the United States Supreme Court applied in Mr. Porter's case to find a re-sentencing was warranted.[4] Mr. Hodges seeks the benefit of the same rule of law that was applied to Mr. Porter's ineffective assistance of counsel claims. Mr. Hodges seeks the proper application of the *Strickland* standard. Mr. Hodges seeks to be treated equally and fairly.

STATEMENT OF THE CASE

On January 8, 1987, Betty Ricks was found on the ground next to her car at the Beverage Barn where she worked (R. 256-58). Ricks died the next day of gunshot wounds to her head and neck (R. 283, 287). In 1989, the police arrested George Michael Hodges, who was indicted for first degree murder (R. 806, 815). Mr. Hodges pled not guilty, and his jury trial began on July 10, 1989.

Following the conclusion of the trial, the jury convicted Mr. Hodges (R. 650). Thereafter, subsequent to a penalty phase, the jury recommended death by a vote of 10 to 2 (R. 741-4). A sentencing hearing was held on August 9, 1989 (R. 960-77), and the Court sentenced Mr. Hodges to death on August 10, 1989 (R. 893-9, 902-8).

On direct appeal, this Court affirmed Mr. Hodges' conviction and sentence. *Hodges v. State,* 595 So. 2d 929 (Fla. 1992). However, after filing a writ of certiorari to the United States Supreme Court, the Court vacated the judgment and remanded for further consideration in light of *Espinosa v. Florida,* 505 U.S. 1079 (1992). On remand, this Court again affirmed Mr. Hodges' death sentence. *Hodges v. State,* 619 So. 2d 272 (Fla. 1993).

On June 20, 1995, Mr. Hodges filed a motion under Rule 3.850, Fla. R. Crim. P. (PC-R. 14-54). The circuit court granted an evidentiary hearing on three ineffective assistance of counsel claims and a claim under *Ake v. Oklahoma,* 470 U.S. 68 (1985), and summarily

[4] When Mr. Porter's case was returned to the circuit court for a re-sentencing, a life sentence was imposed.

denied all other claims (PC-R. 210-30, 730-49). On June 6, 2001, the circuit court denied relief. Mr. Hodges appealed, and this Court affirmed. *Hodges v. State,* 885 So. 2d 338 (Fla. 2003).

In addressing Mr. Hodges' penalty phase ineffective assistance of counsel claim, this Court also gave complete deference to the circuit court's ruling. This Court stated:

> The trial court here determined that penalty phase counsel conducted a reasonable background investigation, and that the deficient results of that investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses. Ineffective assistance of counsel claims are mixed questions of law and fact, and are thus subject to plenary review based on the *Strickland* test. *See Gaskin v. State,* 822 So.2d 1243, 1246-47 (Fla. 2002). Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. *See id.; see also Ragsdale v. State,* 798 So.2d 713, 715 (Fla.2001). Employing that standard, we affirm the trial court's determination that Hodges' penalty phase counsel conducted a reasonable background investigation, and confirm that Hodges indeed had the benefit of counsel as constitutionally guaranteed. Moreover, even if we assume that counsel performed deficiently, we cannot agree that there is a reasonable probability that, but for such deficiency, Hodges would have received a life sentence.

Hodges v. State, 885 So. 2d at 346.

On April 22, 2002, Mr. Hodges filed a habeas corpus petition in this Court, which denied relief on June 19, 2003. *Hodges v. State,* 885 So. 2d 338 (Fla. 2003). On March 4, 2005, Mr. Hodges filed a second habeas corpus petition in this Court, which denied relief on June 23, 2005. *Hodges v. Crosby,* 907 So. 2d 1170 (Fla. 2005).

On January 4, 2006, Mr. Hodges filed a federal habeas corpus petition. The petition was denied by the district court on February 22, 2007. Mr. Hodges appealed to the Eleventh Circuit, which affirmed the district court's order on November 9, 2007. *Hodges v. Attorney General,* 506 F.3d 1337 (11th Cir. 2007). Mr. Hodges' petition for writ of certiorari was denied by the United States Supreme Court. *Hodges v. McNeil,* 129 S.Ct. 122 (2008).

On July 28, 2008, Mr. Hodges filed a successive postconviction motion in the circuit court based on a lethal injection issue (PC R2. 12). On February 13, 2009, the circuit court issued an order summarily denying Mr. Hodges' motion (PC R2. 64-82). Mr. Hodges appealed, and this Court affirmed. *Hodges v. State,* SC09-575 (Fla. Jan. 11, 2010).

On October 21, 2010, Mr. Hodges filed a successive Rule 3.851 motion based upon *Porter v. McCollum*, 130 S.Ct. 447 (2009). On November 9, 2010, the State responded. The circuit court held a case management conference on February 4, 2011. Thereafter, on March 4, 2011, the circuit court denied Mr. Hodges' motion. Mr. Hodges timely filed a notice of appeal. This appeal follows.

STATEMENT OF THE FACTS

The Trial

In 1987, Betty Ricks was shot and killed as she exited her car at the Beverage Barn in Plant City to begin work in the early morning hours on January 10th. In 1989, over two years after Ms. Ricks' death, the police arrested George Michael Hodges and he was indicted for first degree murder (R. 815).

Trial commenced six (6) months after Mr. Hodges' arrest, in July, 1989. The testimony presented at the guilt phase of Mr. Hodges' capital trial was entirely circumstantial.

Over defense objections, the State presented evidence that Ms. Ricks had accused Mr. Hodges of exposing himself to her in November, 1986 (R. 296), and that she was adamant about prosecuting Mr. Hodges (R. 297). Mr. Hodges was directed into an arbitration hearing and was scheduled to attend on January 8th (R. 488). That day he called the program and said there was no reason for him to go through the diversion program (R. 489).

Additionally, the State presented a witness, Janetta Hansen, who worked with Mr. Hodges at Zayre, which was located across the street from the Beverage Barn (R. 306). On the morning of the crime, while it was still dark, Ms. Hansen saw a truck that looked like Mr. Hodges' near the Beverage Barn, but she did not see the victim's car (R. 311).

The medical examiner testified that Ms. Ricks had been shot twice (R. 288). Testimony was presented that Mr. Hodges owned a shotgun, as did his step-son (R. 387).

Detective Miller testified that Mr. Hodges maintained that his step-son, Jesse Watson, drove his car to school on the morning of the crime, but returned home around 8:30 a.m. because he felt ill (R. 333).[5] Mr. Hodges also surrendered his shotgun to the police (R. 333).

[5]Peggy Lewandowski, a neighbor of the Hodges, testified that in 1988 she provided a statement to the police in which she stated that she saw a truck pull in the Hodges' driveway at approximately 8:00 a.m. (R. 353).

In order to refute Mr. Hodges' statements, the State presented testimony from Mr. Hodges' family members. Jessie Watson, Mr. Hodges' step-son, testified that he awoke at 5:30 a.m. on the morning of the crime, when he heard Mr. Hodges come home (R. 417). He testified that Mr. Hodges entered the house with his shotgun in his hands (R. 418). Mr. Watson told Mr. Hodges that he was not feeling well and Mr. Hodges told him to drive his truck to school (R. 420). Mr. Watson testified that his shotgun had scratches on it, and he identified the shotgun in evidence as his (R. 416).

Mr. Watson testified that he lied to the police when he was interviewed about the crime (R. 425). On cross examination, Mr. Watson testified that Mr. Hodges admitted that he was involved in the crime, but that Mr. Watson did not believe him (R. 428). Mr. Watson was also impeached with letters he wrote to Mr. Hodges, while he was incarcerated, admitting that he lied to the police about Mr. Hodges' alleged confession and informing Mr. Hodges that the police and prosecutors were pressuring him (R. 430). Mr. Watson also admitted that he was a drug addict and that he was undergoing treatment for his problem at the time of the trial (R. 434).

Mr. Hodges' wife, Harriet Hodges, testified that on the evening before the crime, she and Mr. Hodges stayed up late and played cards with some friends (R. 382). When she awoke the morning of the crime she heard Mr. Hodges speaking to her son, Jessie Watson (R. 383). Mr. Watson drove Mr. Hodges' truck to school that morning (R. 386). Mrs. Hodges did not know whether, on the morning of the crime, Mr. Hodges left the house or not (R. 390). Mrs. Hodges also admitted that she had made a false statement to the police in 1987 (R. 393).

Vickie Boatwright, Jesse Watson's girlfriend, testified that Mr. Hodges had told her in 1988, that he had shot a woman and she had died (R. 367). She also testified that Mr. Hodges stated that nothing happened because he gave the police Mr. Watson's gun. On cross examination, Ms. Boatwright testified that she thought Mr. Hodges was kidding (R. 387). She also admitted that she did not tell the police about this conversation until after she was questioned twice and spoke to Mr. Watson (R. 371).

The defense presented evidence that a witness saw a truck, not Mr. Hodges', in the parking lot of the Beverage Barn around 6:00 a.m., on the morning of January 8th (R. 539-1).

Further, Detective Rick Orzechowski testified that he was aware that the victim's step-father ran for a position on the city commission in order to remove the current police chief and replace him with an individual who would pursue the investigation of his step-daughter's murder (R. 299).

The jury convicted Mr. Hodges (R. 650).

On July 14, 1989, one day after the jury found George Hodges guilty of first degree murder, the jury reconvened to hear the penalty phase evidence and recommend whether Mr. Hodges should be sentenced to death or life in prison with a minimum of twenty-five years.

The penalty phase hearing lasted less than forty-five minutes. During that forty-five minutes, the State of Florida presented three witnesses: Detectives Orzechowski and Horn as well as Debra Ricks, the victim's sister. All three of the witnesses' testimony consisted of the hearsay testimony that the victim, Betty Ricks, told them that George Hodges approached her and attempted to convince her to drop the exposure charge (R. 681, 685, 689). During Debra Ricks's testimony the defense objected because she was crying before the jury (R. 688).

Mr. Hodges' trial attorney presented the testimony of two witnesses: Lula Hodges and Harold Stewart, Mr. Hodges' mother and brother-in-law, respectively. Mrs. Hodges testified while her husband sat in the courtroom. Mrs. Hodges testified that George grew up in West Virginia; the family moved around a lot; that George did not finish high school, but obtained a GED and that George's brother drowned and "[i]t seemed to change [George] completely, because they was real close." (R. 694). Mrs. Hodges' testimony is transcribed in less than three pages. Mr. Stewart testified that George was a good worker and a good father (R. 697, 698). His testimony is transcribed in less than two-and-a-half pages. No exhibits were entered.

No mental health testimony was presented to the jury.

The State argued that two aggravating factors applied: 1) the crime was committed to disrupt or hinder the lawful exercise of governmental function or the enforcement of laws; and 2) the crime was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. While the prosecutor argued that two (2) aggravating factors applied in Mr. Hodges' case, he told the jury: "The State of Florida is limited to proving ten aggravating circumstances." (R. 711).

Also, as this Court recognized on direct appeal, the prosecutor made an improper "Golden Rule" argument to the jury which was not objected to by Mr. Hodges' trial counsel. *Hodges v. State*, 595 So. 2d 929, 933-934 (1992).

> What about life in imprisonment (sic)? What can a person do in jail for life? You can cry. You can read. You can watch TV. You can listen to the radio. You can talk to people. In short, you are alive. People want to live. You are living. All right? If Betty Ricks had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would Betty Ricks have made? But, you see, Betty Ricks didn't have that choice.

(R. 716-7).

Mr. Hodges' trial attorney argued that recommending life for Mr. Hodges would mean that Mr. Hodges would serve a minimum of twenty-five (25) years in prison. Trial counsel then read the entire list of the aggravating circumstances, even those that had already been determined, and the State conceded, were inapplicable to Mr. Hodges' case (R. 722-3). Also, counsel argued that Mrs. Hodges loved her son and the jury should be compassionate (R. 723).

Following closing arguments, the jury was improperly instructed about the cold, calculated and premeditated aggravating factor (R. 726). Trial counsel failed to object to the unconstitutionally vague instruction. *Hodges v. State*, 619 So. 2d 272, 273 (Fla. 1993). As to mitigation, the jury was told that they could consider "any aspect of the defendant's character or record and any other circumstance of the offense." (R. 726-7). The jury did not hear the instructions regarding any other statutory mitigators.

During deliberation, the jury requested a list of the inadmissible aggravating circumstances (R. 731).

Also, while the jury deliberated, Mr. Hodges attempted to commit suicide by hanging himself and was taken to the hospital (R. 732). His attorneys did not request that the court inform the jury about the suicide attempt or request the assistance of a mental health expert. However, the court appointed two (2) experts to determine if Mr. Hodges was competent to be sentenced (R. 890).

After hearing almost no evidence about Mr. Hodges' background the jury recommended death by a vote of ten (10) to two (2) (R. 739).

In accordance with the jury's recommendation, the trial court sentenced Mr. Hodges to death. The court found two (2) aggravating circumstances: (1) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (2) The crime was committed in a cold, calculated and premeditated manner (R. 906-8). The court's order stated: "the Court has attempted to find mitigating circumstances sufficient in weight to offset the [] aggravating circumstances . . . Mr. Hodges' family has spoken as to his character and dedication to his family." (R. 908). The trial court found no other mitigation.

The Direct Appeal

During Mr. Hodges' direct appeal, this Court found several errors had occurred at his capital trial. This Court found that inadmissible hearsay was admitted during the guilt phase regarding the victim's statements and state of mind that she was adamant about prosecuting Mr. Hodges for the indecent exposure. *Hodges v. State*, 595 So. 2d 929, 931-932 (Fla. 1992). However, this Court found that the error was harmless. *Id.*

Further, this Court found that the prosecutor's closing argument during the penalty phase was error. *Id.* at 933-934. However, this Court found that the error was harmless and there was no objection. *Id.*

In light of the limited mitigation, this Court found Mr. Hodges' death sentence proportionate. *Id.* at 935.

This Court also found that the cold, calculated and premeditated instruction was not unconstitutional and the issue was meritless. *Hodges*, 595 So. 2d at 934. However, the United States Supreme Court vacated Mr. Hodges' sentence and remanded to this Court in light of

Espinosa v. Florida, 505 U.S. 1079. *Hodges v. Florida*, 506 U.S. 803 (1992). On remand, this Court found that the issue was procedurally barred because counsel failed to object at trial. *Hodges v. State*, 619 So. 2d 272, 273 (Fla. 1993).

The Evidentiary Hearing

At the evidentiary hearing Mr. Hodges presented several lay witnesses who provided detailed testimony regarding his troubled childhood. These witnesses included his sister Karen Sue Tucker, his brother, Robert Hodges, and family friend Cecilia Sanson. In addition, Dr. Richard Ball, a sociologist, testified regarding the detrimental effects growing up in the poverty stricken subculture of southern Appalachia where the Hodges lived. Also, Dr. Marlin Delaney, a toxicologist, testified regarding the effects of lead poisoning from the Kanawha River.

Specifically, testimony was presented about the area where Mr. Hodges was raised. Mr. Hodges' older sister, Karen Sue Tucker, testified that the family lived in a small place called Lock Seven, which was located in St. Albans, West Virginia (PC-T. 25). Cecelia Sanson testified that Lock Seven is "mainly [a] community of welfare people, drunks, druggies" (PC-T. 103). Further, Dr. Ball described the area as a "subculture of the southern Appalachian" (PC-T. 460), and he explained that a subculture consists of a "pattern of values that are somewhat different from that prevailing in the rest of the country." (PC-T. 460).

The area was populated with chemical plants and industry (PC-R. 26, 100). In fact, the chemical plants spewed pollutants into the air and river near where the Hodges lived (PC-T. 27).

Chemical wastes and pollutants were dumped into the Kanawha River by the industrial plants causing water pollution so severe that it killed or caused mutations of the fish in the river (PC-T. 109). The waste also effected the taste and created odor problems in public water supplies obtained from the river (PC-T. 38). Traces of cyanide, manganese, lead, mercury and cadmium were also found in the river (PC-T. 274-5).

The witnesses also described Mr. Hodges' dysfunctional and chaotic family life. Mrs. Tucker testified that the family moved twenty (20) to twenty-five (25) times when she and her siblings were growing up (PC-T. 30). The houses were usually two-bedroom houses, where the five (5) children shared a room and their parents had a room (PC-T. 40). In fact, the children slept in the same bed (Id.). Some of the houses did not have heat or indoor plumbing (PC-T. 39). All of the houses had rats in them (PC-T. 39).

Dr. Maher testified that the family lived in extreme impoverishment "of a nature which in the modern United States is almost unheard of except in some very isolated areas." (PC-T. 258). Dr. Ball testified that Lock Seven is 'just about at the bottom of the ladder socioeconomically' (PC-T. 474). Mrs. Tucker explained that the garbage dump was the only place the Hodges "got anything, because, you know, we didn't have a lot when we was growing up. I mean, that was just simple. You know, daddy didn't make a lot; and what he did, he drank." (PC-T. 32). Due to Mr. Hodges' father's alcohol problem, he had difficulty holding a job (PC-T. 39).

As to the amenities, the witnesses testified that the Hodges children wore feed sacks as clothes or took clothes from a local garbage dump (PC-T. 31). The dump smelled vile but the family also ate from it (PC-T. 34, 38). Mrs. Tucker testified:

> There was a dump – we lived right here, and the dump was right here. To us, that was a fortune. We went there. We took clothes out. We got toys out. You know, if there was canned food – because you wouldn't believe what people threw away. Other people's trash was your fortune.

(PC-T. 31). Mrs. Tucker and Robert Hodges also explained that the chemical plants used the dump to deposit chemical waste (PC-T. 34, 81). Ms. Sanson recalled when a dead baby was found in the dump (PC-T. 107).

As far as nutrition from sources other than the dump, the family ate mayonnaise sandwiches, contaminated fish from the contaminated Kanawha River, and potatoes and pinto beans in order to survive (PC-T. 29, 31, 60, 76). Robert Tucker, Mr. Hodges older brother, testified that the Hodges' children were often hungry because the meals at the Hodges' house included limited portions: "Well, you'd get maybe two spoonfuls of beans; a small piece of cornbread, about two inches square; and a couple of spoons of potatoes." (PC-T. 78).

Like most impoverished families, the Hodges also did not have proper medical care. There was no money for medicine or insurance (PC-T. 84). When the children needed glasses they were provided by the Lions Club through their elementary school (PC-T. 55). Living near the dump, Mr. Hodges and his siblings were often afflicted with "fall" sores and infections that took several weeks to heal (PC-T. 35-6). Mr. Hodges suffered from whooping cough throughout his childhood (PC-T. 37).

The witnesses also testified about Mr. Hodges' father. Mrs. Tucker testified:

A: My daddy drank all the time.

Q: Is your dad still alive?

A: No, he's not.

Q: So, you said he drank all the time?

A: He drank up until I was about 18 years old and then quit.

Q: I guess – could you – could you tell the judge what your dad was like when he was – had been drinking?

A: He was mean. He was mean. I mean, I loved my dad, but he was mean.

Q: Let's talk about, you know, when your dad would get drunk, would – would he do anything to [George Hodges]?

A: He got to us all.

Q: Well, could you tell me what – what kind of things did your dad do?

A: Mainly to my mother. You know, he would — he – he'd beat my mother and then [George Hodges] and then Robert (crying) – sorry.

Q: That's okay.

A: And then [George Hodges] and Robert, and Randy would try to stop him.

* * *

A: But they would try to stop him and he would just pick them up like rags and shook them up against the wall; and he'd tell us if we didn't shut up, we'd be next. And, I mean, you know, you watched him beat your mother. The blood would pour from her nose; and when he gets done, you know, she's right there with him like nothing happened.

(PC-T. 41-2). Mrs. Tucker testified that the family beatings occurred three (3) to four (4) times a week (PC-T. 43). Her mother would lie about the beatings when people asked about her bruises and marks (PC-T. 42). Robert Hodges confirmed that George Hodges witnessed the brutal beatings of his mother (PC-T. 87).

Mr. Hodges' father's brutality did not focus entirely on his wife. He beat his children with switches, belts or his bare hands when an instrument of pain was unavailable (PC-T. 87, 304). In addition, Mrs. Hodges would beat her children, especially, if they told anyone that their father beat their mother and them (PC-T. 43). Even when Mrs. Tucker called her aunt for assistance a few times, her mother would turn out the lights so that it looked like no one was home (PC-T. 43). And even when the Hodges children did what they were told, they were still beat (PC-T. 44).

Mrs. Tucker also testified about the events that occurred surrounding her parents' marriage and the exposure to her parents' sexual relationships. She testified that her parents had affairs (PC-T. 45). At one time, her father impregnated his sixteen (16) year old girlfriend and "[h]e brought her in the house. She lived with us. She had the baby. You know they stayed with us." (PC-T. 45).

In addition to his dysfunctional family life, Mr. Hodges had a difficult childhood. "He really only had one friend, and he was – he was retarded" – Raymond Riffle (PC-T. 46). Mr. Hodges also had a speech defect (PC-T. 46). The children at school teased and made fun of him about his speech and appearance (PC-T. 46-7).

Mr. Hodges was close to his brother, Randy (PC-T. 47). Randy drowned in the Kanawha River (PC-T. 49). After Randy died, Mr. Hodges "was lost" (PC-T. 49). Robert Hodges described George Hodges' reaction as: "he just withdrew off by himself, wouldn't hardly talk to anybody. He stayed by himself." (PC-T. 90).

The dysfunction and chaos of the Hodges family took a toll on all of the children: Robert has an alcohol problem, has tried to commit suicide three (3) times and has been sent to prison for a sex-crime he committed while intoxicated (PC-T. 91). While undergoing psychiatric treatment after shooting himself in the head, Robert was told that he was depressed (PC-T. 93). Randy Hodges was hyperactive and suffered from ADH which resulted in severe mood swings (PC-T. 68). He and George Hodges shared a close relationship, but an abusive one. Randy Hodges took advantage of his younger brother, engaging him in sex throughout their childhood and teenage years (Supp. T. 69). George Hodges' records illustrate three (3) clear suicide attempts. Once he drank disinfectant which caused him to lose consciousness and he was sent to the hospital. Another time he slit his wrists and again was hospitalized (PC-T. 162). On the third attempt, just after the penalty phase of his trial, he tried to hang himself (PC-T. 162). Karen Sue Tucker, like her mother, was a victim of domestic abuse (PC-T. 50). She left home at eighteen (18) in order to avoid a beating (PC-T. 61).

Dr. Ball described the Hodges' environment as an area of social disorganization (PC-T. 475). He stated:

> In an area of social disorganization, there is – that's usually indicated by such factors as low levels of home ownership, high transients in the population, people coming and going. It's usually indicated by high rates of alcoholism and drug abuse, high levels of truancy, teenage pregnancy, various indicators of social instability or what we typify as social disorganization, so that some impoverished areas at least have stability and organization and structure to them; and some impoverished areas, the socially disorganized areas, are not only poor, but they're also disorganized. They manifest all those characteristics. That was true of Lock Seven . . .

(PC-T. 475-6). In addition, Dr. Ball concluded that Mr. Hodges had no protective factors or support from his community or home (PC-T. 489).

Dr. Marlin Delaney, a toxicologist, confirmed Mrs. Tucker, Ms. Sanson and Robert Hodges' suspicions about the problems in the Kanawha River. Dr. Delaney described the area near where the Hodges lived as a "cesspool" because of the "tremendous amount of dumping" (PC-T. 128). Large volumes of hazardous wastes and other waste residuals were disposed of in landfills, dumps, and surface

impoundments that were not properly designed, constructed, or maintained to adequately contain the toxic substances present in the wastes (Id.). As a result, toxic pollutants were released to the air, to surface water, and to groundwater (PC-T. 278-80).

Also, the lead in the water would uptake in the fish and "once you consume the fish, you've taken in lead" (PC-T. 129). Dr. Delaney testified and Dr. Beaver concurred that children who ingest lead can develop neurological deficits, low IQ, behavioral problems and nervous system problems (PC-T. 131, 231).

As to Mr. Hodges' mental health, Dr. Michael Maher, M.D., a psychiatrist, testified that at the time of Mr. Hodges' trial in 1989, he was retained as a confidential expert to assess whether Mr. Hodges was competent to proceed, whether any issues in regards to sanity existed and whether any mitigation was present (PC-T. 245). At trial, Dr. Maher reviewed police reports and spoke to Mr. Hodges twice (PC-T. 246). Dr. Maher did not conduct any psychological testing (PC-T. 250). In 1989, Dr. Maher concluded that Mr. Hodges was competent to proceed, that he was suffering from depression, and that there was no evidence that he was psychotic or suffering from any major brain illness (PC-T. 251). Dr. Maher testified:

> A: What I told the attorneys at the time was that I had evaluated Mr. Hodges; that I didn't find much in the way of mitigating circumstances, that there might be some – I think what I probably – the phrase I used probably was "soft psychiatric diagnosis or limited psychiatric diagnosis," that Mr. Hodges was not a great historian, but that he had been cooperative with me; and I simply didn't have much to offer in terms of psychiatric information, opinions, evidence that I thought would be relevant or useful either in a guilt phase or a penalty phase of his trial.
>
> Q: Did you make it clear to Mr. Hodges' attorneys that those were preliminary conclusions?
>
> A: I told them, as I did anyone at that time, and continued to do that, any additional information that they might find about his background could be of considerable value to me.

(PC-T. 253-4).

In postconviction Dr. Maher re-evaluated Mr. Hodges. Postconviction counsel provided Dr. Maher with extensive background materials and neuropsychological testing (PC-T. 256-7). After reviewing these materials, Dr. Maher diagnosed Mr. Hodges with chronic

depressive disorder, that he had brain damage and that Mr. Hodges suffered from "an extreme, beyond even what would normally be considered significant or dramatic, pattern of impoverishment and abuse as a child." (PC-T. 257-8). Dr. Maher clarified that Mr. Hodges suffered from impoverishment in terms of family structure (Id.).[6]

In addition to the information regarding Mr. Hodges' family life, Dr. Maher testified that Mr. Hodges' history was filled with negative factors which impacted his mental health and behavior, including exposure to toxins in the area where he grew up (PC-T. 279), his malnutrition he suffered as a child (PC-T. 271), and his suicide attempts (PC-T. 283).

Dr. Maher also concluded that Mr. Hodges was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-T. 292). He also concluded that there was evidence to rebut the cold, calculated and premeditated aggravating factor (PC-T. 300).

As to non-statutory mitigation, Dr. Maher testified:

> Q: When we're talking about someone who suffers from extreme trauma as a child and into early adolescence, does time heal the physical and mental state that's caused by those factors?
>
> A: Certainly, time and subsequent experience can be very helpful in healing those kinds of wounds and injuries. One of the most troubling, frustrating, difficult issues clinically is that those kinds of formative early experiences – physical abuse, sexual abuse, et cetera -- tend to have lifelong effects. It's one of the justifications for removing children from a family where those things are occurring even in spite of parents who have some capacity to parent and continue to love those children.
>
> The fact that we know how damaging it is and that it produces lifelong problems at a very high incidence is one of the problems with those kind of disorders and history.

(PC-T. 298-9).

[6] Dr. Maher commented that in his capacity as someone who evaluates children for the Department of Children and Families, had he seen Mr. Hodges as a child, he would have recommended immediate removal from the family (PC-T. 297).

Dr. Maher explained that the difference in his opinion from 1989 to 2000 was that in the latter evaluation, he had substantial, both in quality and quantity, information about Mr. Hodges' history (PC-T. 302). Dr. Maher also candidly admitted that he "missed the diagnosis" of brain damage in 1989 (PC-T. 320).

Dr. Craig Beaver a forensic psychologist and neuropsychologist testified that Mr. Hodges suffers from brain dysfunction which affects him, that Mr. Hodges suffers from a verbal learning disability and that Mr. Hodges has suffered a lifelong struggle with depression (PC-T. 176-9, 180). Dr. Beaver explained: "I would view Mr. Hodges' deficits as in the mild category; but even though you put them in that category, they have a big impact on how a person operates in the world, particularly under certain circumstances." (PC-T. 179). Dr. Beaver based his opinion on neurological testing, background information and an interview with Mr. Hodges (PC-T. 140-193). Dr. Beaver also testified that individuals who suffer from depression do not handle stress well (PC-T. 181).

Considering the facts of the crime and Mr. Hodges' mental make-up, Dr. Beaver agreed with Dr. Maher and concluded that Mr. Hodges was under the influence of extreme emotional distress at the time of the crime (PC-T. 188).

Dr. Beaver believed that the background materials were necessary to conduct an adequate evaluation of Mr. Hodges because the subculture in which Mr. Hodges was raised was a "pretty impoverished culture where people kept to themselves . . ." (PC-T. 157). Throughout Mr. Hodges' background materials he identified several "red flags", including the fact that Mr. Hodges was abused and neglected and exposed to "a lot of physical violence" (PC-T. 158). He testified that the circumstances of Mr. Hodges' life "have a significant effect on an individual's personal development and emotional development." (PC-T. 158). Additionally, Mr. Hodges' poor academic history, speech deficit, IQ testing and head injuries indicated a potential problem (PC-T. 159-60). And Mr. Hodges' attempts to commit suicide were also important to Dr. Beaver's evaluation (PC-T. 159).

Both Dr. Beaver and Dr. Maher believed that while Mr. Hodges' capacity to appreciate the criminality of his conduct may have been impaired, it did not rise to the level of the statutory mitigator (PC-T. 189, 293).

All of Mr. Hodges' experts reviewed extensive background materials in coming to their conclusions (PC-T. 152). In fact, Dr. Beaver testified that he will not conduct an evaluation without background materials (PC-T. 154).

In rebuttal, the State presented the testimony of Dr. Sidney Merin. Dr. Merin concluded that Mr. Hodges suffered from an Axis I mental or emotional disorder, dysthymic disorder (Supp. T. 47). Dr. Merin explained that his diagnosis meant that Mr. Hodges suffered from a longstanding depression (Supp. T. 47). Dr. Merin stated that he diagnosed the depression in 1989 when he saw Mr. Hodges to determine his competency to be sentenced (Supp. T. 99-100). Dr. Merin also believed that Mr. Hodges suffered from a personality disorder, not otherwise specified, with borderline features (Supp. T. 87-8). Dr. Merin described the childhood of an individual with borderline features: "Usually these people have felt and, in fact, may have been abandoned when they were kids, pretty much fending for themselves . . . inadequate parenting, inadequate affection . . . (Supp. T. 89). Rather than diagnose Mr. Hodges with brain damage, Dr. Merin testified that Mr. Hodges had a learning disability (Supp. T. 117).

Dr. Merin disagreed with Mr. Hodges' doctors, in that he believed that the Mr. Hodges could act in a cold, calculated and premeditated manner (Supp. T. 126). However, when the court posed Dr. Merin with a question, the following exchange occurred:

> Q: (By the Court) In your opinion, was it inappropriate for his defense attorneys to fail to present this mental health information to the jury?
>
> A: I would say it was, yes. I think, particularly in a case this serious, I think the defense should take the opportunity to – if there's any question at all, it really ought to be explored . . .

(Supp. T. 131).

Finally, Mr. Hodges presented the testimony of his trial attorney, the Honorable Judge Daniel Perry. Judge Perry testified that he represented Mr. Hodges at the time of his capital trial and was responsible for the penalty phase (PC-T. 385). Judge Perry recalled attempting to collect some medical records and school records and speaking to Mr. Hodges' mother (PC-T. 404).

Judge Perry testified that he reviewed the depositions of the mental health experts and reports and he considered the information to be mitigating (PC-T. 392-3). Judge Perry also stated that the mitigating evidence seemed "good to great" (PC-T. 410). He stated that he would have attempted to present the evidence had he had it in 1989 (PC-T 393). Additionally, had he had more information about Mr. Hodges' background he would have provided it to his mental health experts (Id.).

Judge Perry testified that he had no strategic reason for failing to object to the cold, calculated and premeditated aggravating factor (PC-T. 387).

SUMMARY OF ARGUMENT

Mr. Hodges was deprived of the effective assistance of trial counsel at the penalty phase of his trial, in violation of *Porter v. McCollum*, 130 S.Ct. 447 (2009). The decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Hodges' ineffective assistance of counsel claims was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein, which renders Mr. Hodges' *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980).

ARGUMENT

MR. HODGES' CONVICTION AND SENTENCE OF DEATH VIOLATE THE SIXTH AND EIGHTH AMENDMENTS UNDER THE PROPER *STRICKLAND* ANALYSIS FOR THE REASONS EXPLAINED IN *PORTER V. McCOLLUM*.

A. INTRODUCTION

Mr. Hodges was deprived of the effective assistance of trial counsel at the penalty phase of his case. Mr. Hodges presented his ineffective assistance of counsel claim in a Rule 3.851 motion that was initially filed in 1995. Following an evidentiary hearing, the circuit court erroneously denied Mr. Hodges' ineffective assistance of counsel claim. When this Court heard Mr. Hodges' appeal of that decision, it failed to conduct a *de novo* review of legal questions contained within an ineffectiveness analysis and instead employed a standard of review that was highly deferential to the circuit court's erroneous legal conclusions in violation of *Porter v. McCollum*, 130 S.Ct. 447 (2009).

The decision by the United States Supreme Court in *Porter* establishes that the previous denial of Mr. Hodges' 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* was a repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in Florida law as explained herein,[7] which renders Mr. Willacy's *Porter* claim cognizable in collateral proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980); *Thompson v. Dugger*, 515 So. 2d at 175 ("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 at 669 (*Espinosa* to be applied retroactively to Mr. James because "it would not be fair to deprive him of the *Espinosa* ruling").

[7] As explained herein, *Porter v. McCollum* held that this Court had unreasonably applied clearly established federal law when rejecting George Porter's ineffective assistance of counsel claim in *Porter v. State*. Thus, Mr. Hodges does not argue that *Porter v. McCollum* announced new federal law. Instead, it announced a failure by this Court to properly understand, follow and apply the clearly established federal law. Thus, the decision is new Florida law because it is a rejection of this Court's jurisprudence. *Porter v. McCollum* was an announcement that this Court's precedential decision in *Porter v. State* was wrong, and in doing so announced new Florida law. This is identical to the rulings in *Hitchcock v. Dugger* and *Espinosa v. Florida*, in which the United States Supreme Court found that this Court had

failed to properly understand, follow and apply federal constitutional law.

Mr. Hodges presented his claim under *Porter v. McCollum* to the circuit court in a Rule 3.851 motion in light of this Court's ruling in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, should be raised in Rule 3.850 motions). At the State's urging, the circuit court refused to find that fairness principles dictated that *Porter v. McCollum* should be treated just like *Hitchcock v. Dugger* and *Espinosa v. Florida*, as new Florida law within the meaning of *Witt v. State*. Accordingly, Mr. Hodges seeks a determination by this Court that he is entitled to have his previously presented ineffective assistance of counsel claims judged by the same standard that the United States Supreme Court employed when finding George Porter's ineffectiveness claim was meritorious and warranted habeas relief.

B. *PORTER* QUALIFIES UNDER *WITT* AS A DECISION FROM THE UNITED STATES SUPREME COURT WHICH WARRANTS THIS COURT REHEARING MR. HODGES' INEFFECTIVENESS CLAIMS

1. Retroactivity under *Witt*.

It is Mr. Hodges' position that as to whether *Porter* qualifies as new law, the question is one of law. Therefore, initially, this Court must independently review that aspect of Mr. Hodges' claim, giving no deference to the circuit court's refusal to find *Porter v. McCollum* qualifies under *Witt v. State* as new Florida law.[8] Should this Court conclude that *Porter* apples retroactively, then, this Court must review the merits of Mr. Hodges' ineffective assistance of counsel claim giving only deference to historical facts. As *Porter* made clear, the reasonableness of strategic decisions including decisions concerning the scope of investigations as to both the guilt and penalty phases, are questions of law to which no deference is to be accorded to the judge who presided at evidentiary hearing. As *Porter* also makes clear, an evaluation of the evidence presented to establish prejudice under the prejudice prong of the *Strickland* standard must also be evaluated without according any deference to the presiding judge's findings as to that evidence. Absolute *de novo* review is required of evidence offered to establish prejudice under *Strickland*. The issue is not what impact the evidence of prejudice had on the judge presiding at a collateral

[8] Indeed, the State argued in Mr. Hodges' case and in others cases in which *Porter v. McCollum* claims have been presented, that only this Court can determine whether a decision from the United States Supreme Court qualifies as new law under *Witt v. State*.

evidentiary hearing, but what impact such evidence may have had upon the jury who heard the case had it been presented. *See Porter v. McCollum*, 130 S. Ct. at 454-55.[9]

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. Specifically, this Court held 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).

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), this 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.

This Court in *Witt* 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

[9]As the United States Supreme Court noted in *Kyles v. Whitley*, 514 U.S. 419 (1995), 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.

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. This 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.

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. 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 Florida law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson 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).[10]

[10]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 *Thompson* and *Downs* ordering resentencings in both

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

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

Following *Hitchcock*, this Court found that *Hitckcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits." *Delap*, 513 So. 2d at 660 (citing, *inter alia*, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs,* this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071.[11] Clearly, this Court read the opinion in *Hitchcock* and saw

[11]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

that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error should be entitled to the same relief afforded to Mr. Hitchcock.[12]

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

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> mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . ."), cert. denied, 431 U. S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in Songer v. State, 365 So. 2d 696 (1978) (per curiam), which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

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

[12]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).

subsequent decision further explaining *Porter* that issued in *Sears v. Upton*, 130 S.Ct. 3529 (2010). As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims. 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. And 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 that dates back to the issuance of *Strickland* itself.

Another decision from the United States Supreme Court finding that this Court had failed to properly apply Eighth Amendment jurisprudence was *Espinosa v. Florida*. At issue in *Espinosa* was this Court determination in *Smalley v. State*, 546 So. 2d 720 (Fla. 1989), that the United States Supreme Court decision in *Maynard v. Cartwright*, a case involving a death sentence imposed in Oklahoma, did not apply in Florida because of differences in the capital sentencing schemes the two states used:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

Smalley v. State, 546 So. 2d at 722. In *Espinosa*, the United States Supreme Court determined that *Maynard v. Cartwright* did apply in Florida and that the Florida standard jury instruction on "heinous, atrocious or cruel" aggravating circumstance violated the Eighth Amendment for the reason explained in *Maynard*.

Following the decision in *Espinosa*, this Court found that the decision qualified under *Witt v. State* as new Florida law which warranted revisiting previously rejected challenges to the "heinous, atrocious or cruel aggravating circumstance. *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").

This Court should for exactly the same reasons that it treated *Hitchcock* and *Maynard* as qualifying as new law under *Witt*, find that *Porter v. McCollum* qualifies under *Witt* and warrants reconsidering previously denied ineffective assistance of counsel claims under the proper and correct *Strickland* standard which was applied to George Porter's ineffectiveness claim and resulted in collateral relief in his case and ultimately a life sentence. Refusing to reconsider Mr. Hodges' ineffectiveness claims and apply the now recognized proper standard of review would arbitrarily deny him the benefit of the clearly established federal constitutional law which Mr. Porter received. Such a result would itself establish that Mr. Hodges' death sentence was arbitrary and violated *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *Porter v. McCollum* and review of ineffective assistance of counsel claims under *Strickland*.

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. In *Porter v. State*, this Court explained:

> 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 States'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.

This Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id.* at 451, and "either did not consider or unreasonably discounted" that evidence. *Id.* at 454. The United States Supreme Court noted that this Court's analysis was at odds with its pronouncement in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) that "the defendant's background and character [are] relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable." *Id.* at 454 (quotations omitted). The prejudice in *Porter* that this Court failed to recognize was trial counsel's presentation of "almost nothing that would humanize Porter or allow [the jury] to accurately gauge his moral culpability," *id.* at 454, even though Mr. Porter's 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). And in Mr. Hodges' case, this Court employed that same standard.[13]

[13]In Mr. Hodges' case, this Court stated: "Ineffective assistance of counsel claims are mixed questions of law and fact, and are thus subject

to plenary review based on the *Strickland* test. *See Gaskin v. State*, 822 So. 2d 1243, 1246-47 (Fla. 2002). Under this standard, the Court conducts an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. *See id.; see also Ragsdale v. State,* 798 So. 2d 713, 715 (Fla. 2001). *Hodges*, 885 So. 2d at 346.

In *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where the Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in collateral proceedings.[14] 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.[15] In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in *Rose* "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, the Court made clear that even under this less deferential standard:

> We 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, 748 So. 2d at 1034. Indeed in *Porter v. State*, the Court relied upon this very language in *Stephens* 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*, 788 So. 2d at 923.

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[14] 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 2nd DCA was in conflict with *Grossman* as to the appellate standard of review to be employed.

[15] 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); *Phillips 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 Marek v. Dugger*, 547 So. 2d 109 (Fla. 1989); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988).

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

In Mr. Hodges' case, as in *Porter*, this Court erroneously deferred to the trial court's findings to justify its decision to unreasonably "discount to irrelevance" pertinent mitigating evidence. *Id*. *Porter* makes clear that the failure to present the kind of troubled history relevant for the jury in the penalty phase to assess moral culpability 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 analysis used in this case to be in error, Mr. Hodges' claim of ineffective assistance of counsel must be readdressed in the light of *Porter*.

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 Court explained:

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

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

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

C. MR. HODGES' CASE

Porter error was committed in Mr. Hodges' case. Following the denial of Mr. Hodges' claim of ineffective assistance of counsel by the trial court, this Court affirmed the denial of relief. The circuit court "determined that penalty phase counsel conducted a reasonable

background investigation, and that the deficient results of that investigation were attributable to an uncooperative defendant and unwilling, absent, or recalcitrant witnesses." *Hodges*, 885 So. 2d at 346. This Court treated that conclusion as one of fact, when it is as explained in *Porter v. McCollum*, a question of law subject to *de novo* review. *Id.* This analysis was not *de novo* and was not the sort of probing and fact-specific analysis which *Porter* and *Sears* require. Both the trial court's findings and the cursory acceptance of those findings by this Court violate *Porter*, as a probing inquiry into the facts of this case and leads only to the conclusion that counsel prejudiced Mr. Hodges by performing deficiently.

1. Deficient Performance.

During the evidentiary hearing, Mr. Hodges' sister, Karen Sue Tucker, testified to the deplorable conditions in which Mr. Hodges was raised. The family lived in a small place called Lock Seven, which was located in St. Albans, West Virginia (PC-T. 25). Mrs. Tucker described how the Hodges children wore feed sacks for clothing and spent their days playing and scavenging for food and toys in the local garbage heap (PC-T. 32-3). Mr. Hodges and his brothers regularly consumed fish from the nearby river; fish laced with toxic chemicals and lead (PC-T. 58). Physical violence made regular appearances in the Hodges' household. Mr. Hodges' alcoholic father beat the children and their mother several times a week (PC-T. 43). Mrs. Tucker described the beatings in her testimony: "Probably three, four times a week he would beat her, and then he'd beat the boys more than he ever beat me or Cathy, because he really didn't whip us girls. He kicked me down the stairs one time; but, you know, that was because I had been out with a boy." (PC-T. 43). If the children tried to get help to stop the abuse, they were subjected to more beatings(Id).

Mrs. Tucker further testified that the family moved twenty (20) to twenty-five (25) times when she and her siblings were growing up (PC-T. 30). Some of the houses did not have heat or indoor plumbing (PC-T. 39). All of the houses had rats in them (PC-T. 39).

Additionally, Mrs. Tucker stated that Mr. Hodges' only close friends as a child were his mentally retarded neighbor, Raymond, and his brother Randy, who sexually abused Mr. Hodges throughout their childhood and drowned in a river as a teenager (PC-T. 49).

Robert Tucker, Mr. Hodges' older brother, willingly discussed his childhood with Mr. Hodges in his testimony at the evidentiary hearing. Robert described the poverty of their childhood in Lock Seven where most of the time the children went hungry. Robert described a typical meal at the Hodges house: "Well, you'd get maybe two spoonfuls of beans; a small piece of cornbread, about two inches square and a couple of spoons of potatoes." (PC-T. 78). He further stated, "You'd get out of bed and you still felt hungry when you went to bed. There wasn't much to eat." Id. Robert also explained how his father would regularly come home drunk and beat his wife, Lula, and the children (PC-T. 87-8). Robert and his siblings were not shielded from their father's drinking or his infidelities. In fact, Robert testified that he sometimes used his son as a prop: "He had girlfriends. He'd go out to a beer joint and take me with him. I guess he thought he would pick up more girls, and he did impregnate a younger girlfriend of my sister; and she had a child...The girl stayed with us while she was pregnant." (PC-T 88-9). Robert also testified about his own alcoholism and suicide attempts (PC-T. 91-3). While on the witness stand, Robert pointed out the scar from his failed attempt to shoot himself in the head (PC-T. 93).

Ms. Cecilia Sanson, a family friend, was also available and willing to talk about the environment in which Mr. Hodges and his family were raised. At the evidentiary hearing, Ms. Sanson described the Lock Seven community as mainly consisting of "welfare people, drunks, druggies. One father killed his own son..." (PC-T. 103). She described incest as common in the community (PC-T. 103-4). Ms. Sanson also recalled recent warnings against eating fish from the Kanawha River because of the toxic chemicals (PC-T. 109).

Documentation and studies of the depressed area where Mr. Hodges grew up existed at the time of trial and could have been presented through an expert witness. The social history of the extremely depressed area and subculture where Mr. Hodges grew up is important additional non-statutory mitigation that was available to trial counsel. Dr. Richard Ball, a sociologist, provided extensive information regarding the poverty and social organization of the southern Appalachian region (PC-T. 451). Dr. Ball indicated the dump where Mr. Hodges played as a child had a long, unsavory history and that Lock Seven basically "became a dumping ground for all sorts of things" including hazardous industrial waste. (PC-T. 476). Dr. Ball also testified about the subculture of social disorganization and

frustration that permeated the region (PC-T. 484-8). Dr. Ball indicated that this subculture in Mr. Hodges' case resulted in a lack of resources to cope with problems effectively and a lack of "protective factors" to insulate Mr. Hodges from the negative impact of poverty and social disorganization (PC-T. 489).

Additional substantial mitigation was available to trial counsel had he sought it. Trial counsel merely had to look to the toxic waters where Mr. Hodges fished and ate as a child to find additional evidence of the horrific environment where Mr. Hodges grew up. Dr. Marlin Delaney, a toxicologist, testified at the evidentiary hearing that there was ample evidence available to trial counsel regarding the harmful neurological and behavioral effects associated with long-term exposure to toxins such as those found in the fish of the Kanawha river where Mr. Hodges and his brothers fished and played as children (PC-T. 114). Dr. Delaney described the area near where the Hodges lived as a "cesspool" because of the "tremendous amount of dumping" (PC-T. 128). Large volumes of hazardous wastes and other waste residuals were disposed of in landfills, dumps, and other surface impoundments that were not properly designed, constructed, or maintained to adequately contain the toxic substances present in the wastes (Id.). According to Dr. Delaney, the lead in the water would uptake in the fish and "once you consume the fish, you've taken in the lead" (PC-T. 129). Dr. Delaney testified that children who ingest lead can develop neurological deficits, low IQ, behavior problems and nervous system problems (PC-T. 131, 231).

Trial counsel presented none of the aforementioned evidence during the penalty phase of Mr. Hodges' trial. As such, trial counsel failed in his "duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994).

Failure to investigate and present mitigating evidence cannot possibly be tactical where counsel is unaware of the evidence. The case of having the information and deciding not to present it is different from neglecting to gather relevant information in the first place.

In Mr. Hodges' case, trial counsel's failure to conduct a reasonable investigation of Mr. Hodges' background also led to inadequate mental health evaluations at trial.

Dr. Michael Maher, M.D., a psychiatrist, testified at the evidentiary hearing that at the time of Mr. Hodges' trial in 1989, he was retained as a confidential expert to assess whether Mr. Hodges was competent to proceed, whether any issues in regards to sanity existed and whether any mitigation was present (PC-T. 245). At trial, Dr. Maher reviewed police reports and spoke to Mr. Hodges twice (PC-T. 246). Dr. Maher did not conduct any psychological testing (PC-T. 250). In 1989, Dr. Maher concluded that Mr. Hodges was competent to proceed, that he was suffering from depression, and that there was no evidence that he was psychotic or suffering from any major brain illness (PC-T. 251). Dr. Maher testified:

> A: What I told the attorneys at the time was that I had evaluated Mr. Hodges; that I didn't find much in the way of mitigating circumstances, that there might be some – I think what I probably – the phrase I used probably was "soft psychiatric diagnosis or limited psychiatric diagnosis," that Mr. Hodges was not a great historian, but that he had been cooperative with me; and I simply didn't have much to offer in terms of psychiatric information, opinions, evidence that I thought would be relevant or useful either in a guilt phase or a penalty phase of his trial.
>
> Q: Did you make it clear to Mr. Hodges' attorneys that those were preliminary conclusions?
>
> A: I told them, as I did anyone at that time, and continued to do that, any additional information that they might find about his background could be of considerable value to me.

(PC-T. 253-4).

In postconviction Dr. Maher re-evaluated Mr. Hodges. Postconviction counsel provided Dr. Maher with extensive background materials and neuropsychological testing (PC-T. 256-7). After reviewing these materials, Dr. Maher diagnosed Mr. Hodges with chronic depressive disorder, with brain damage and opined that Mr. Hodges suffered from "an extreme, beyond even what would normally be considered significant or dramatic, pattern of impoverishment and abuse as a child." (PC-T. 257-8). Dr. Maher clarified that Mr. Hodges suffered from impoverishment in terms of family structure (Id.).[16]

[16]Dr. Maher commented that in his capacity as someone who evaluates children for the Department of Children and Families, had he seen Mr. Hodges as a child, he would have recommended immediate removal from the family (PC-T. 297).

In addition to the information regarding Mr. Hodges' family life, Dr. Maher testified that Mr. Hodges' history was filled with negative factors which impacted his mental health and behavior, including exposure to toxins in the area where he grew up (PC-T. 279), his malnutrition he suffered as a child (PC-T. 271), and his suicide attempts (PC-T. 283).

Dr. Maher also concluded that Mr. Hodges was under the influence of an extreme mental or emotional disturbance at the time of the crime (PC-T. 292). He also concluded that there was evidence to rebut the cold, calculated and premeditated aggravating factor (PC-T. 300).

As to non-statutory mitigation, Dr. Maher testified:

> Q: When we're talking about someone who suffers from extreme trauma as a child and into early adolescence, does time heal the physical and mental state that's caused by those factors?
>
> A: Certainly, time and subsequent experience can be very helpful in healing those kinds of wounds and injuries. One of the most troubling, frustrating, difficult issues clinically is that those kinds of formative early experiences – physical abuse, sexual abuse, et cetera -- tend to have lifelong effects. It's one of the justifications for removing children from a family where those things are occurring even in spite of parents who have some capacity to parent and continue to love those children.
>
> The fact that we know how damaging it is and that it produces lifelong problems at a very high incidence is one of the problems with those kind of disorders and history.

(PC-T. 298-9).

Dr. Maher explained that the difference in his opinion from 1989 to 2000 was that in the latter evaluation, he had substantial, both in quality and quantity, information about Mr. Hodges' history (PC-T. 302). Dr. Maher also candidly admitted that he "missed the diagnosis" of brain damage in 1989 (PC-T. 320).

Dr. Craig Beaver a forensic psychologist and neuropsychologist testified that Mr. Hodges suffers from brain dysfunction which affects him, that Mr. Hodges suffers from a verbal learning disability and that Mr. Hodges has suffered a lifelong struggle with depression (PC-T. 176-9, 180). Dr. Beaver explained: "I would view Mr. Hodges' deficits as in the mild category; but even though you put them in that

category, they have a big impact on how a person operates in the world, particularly under certain circumstances." (PC-T. 179). Dr. Beaver based his opinion on neurological testing, background information and an interview with Mr. Hodges (PC-T. 140-93). Dr. Beaver also testified that individuals who suffer from depression do not handle stress well (PC-T. 181).

Considering the facts of the crime and Mr. Hodges' mental make-up, Dr. Beaver agreed with Dr. Maher and concluded that Mr. Hodges was under the influence of extreme emotional distress at the time of the crime (PC-T. 188).

Dr. Beaver believed that the background materials were necessary to conduct an adequate evaluation of Mr. Hodges because the subculture in which Mr. Hodges was raised was a "pretty impoverished culture where people kept to themselves . . ." (PC-T. 157). Throughout Mr. Hodges' background materials he identified several "red flags", including the fact that Mr. Hodges was abused and neglected and exposed to "a lot of physical violence" (PC-T. 158). He testified that the circumstances of Mr. Hodges' life "have a significant effect on an individual's personal development and emotional development." (PC-T. 158). Additionally, Mr. Hodges' poor academic history, speech deficit and IQ testing and head injuries indicated a potential problem (PC-T. 159-60). And Mr. Hodges' attempts to commit suicide were also important to Dr. Beaver's evaluation (PC-T. 159).[17]

Due to trial counsel's failure to investigate, the jury was deprived of the knowledge that Mr. Hodges had a vast amount of non-statutory mitigation as well as an additional statutory mitigator. Counsel's performance was clearly deficient.

This inadequate investigation is even more egregious when it was clear to trial counsel, as in Mr. Hodges' case, that a wealth of mental health issues existed and cried out for exploration.

As Justice Pariente explained in her dissenting opinion:

> This is a particularly troubling death case. The failure to investigate and present mitigation, in conjunction with defense counsel's failure to object to a patently improper penalty-phase closing argument, in my view satisfies the first prong of

[17] Both Dr. Beaver and Dr. Maher believed that while Mr. Hodges' capacity to appreciate the criminality of his conduct may have been impaired, it did not rise to the level of the statutory mitigator (PC-T. 189, 293).

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The postconviction proceedings revealed substantial mitigation that was never presented at the original penalty phase which probably would have established that life imprisonment rather than death was the appropriate punishment for Hodges, satisfying the second prong of *Strickland.* The United States Supreme Court opinion in *Wiggins,* which was decided seven days after our initial majority opinion, provides even stronger support for Hodges' ineffective assistance of counsel claim.

The defendant, who was thirty years old, married, employed, and had no history of prior violent felonies at the time of the murder, shot and killed the victim. The apparent motive for the murder was that the victim had accused Hodges of exposing himself, after which Hodges was arrested. However, Hodges had apparently been directed into a diversion program and there was no suggestion that this prosecution for a misdemeanor would result in his incarceration.

It is clear in looking at the nature of this crime that mental mitigation could have made a difference if it had been presented. However, the defense case for mitigation was almost nonexistent. The penalty phase of the original trial lasted a total of approximately forty-five minutes, during which time the State put on three witnesses to testify to hearsay statements by the victim that Hodges had approached her in an attempt to convince her to drop the exposure charge. The defense called only two witnesses: Hodges' mother and brother-in-law. Their transcribed testimony totals less than six pages. No mental health testimony was introduced. I have appended to this dissent the sum total of the transcribed penalty-phase testimony presented by the defense.

The deficiencies in counsel's performance during the penalty phase consisted not only of what he failed to present to the jury in mitigation but also of other significant omissions. For example, defense counsel's conduct during closing argument provides additional support for a finding of deficient performance. First, defense counsel failed to object to the prosecutor's clearly improper closing argument — an argument which, if objected to, would have resulted in a reversal and a new sentencing proceeding. Second, in his closing argument defense counsel's *only argument in mitigation was that Hodges' mother loved her son and the jury should be compassionate.*

Even with the scant mitigation presented, the improper closing argument by the prosecutor, and the minimal advocacy in the defense closing argument, the jury recommendation of death was not unanimous (ten-to-two). We now know that mental health experts, when provided with proper background materials and with neuropsychological test results, diagnosed Hodges with chronic depressive disorder and brain damage or dysfunction, which in combination led to Hodges being under the influence of extreme emotional distress at the time of the crime. Thus, the experts' testimony would have allowed the jury, the trial court, and this Court to consider the statutory mitigator of extreme emotional disturbance.

In my view, Hodges has demonstrated that trial counsel was deficient in failing to conduct an adequate background investigation and in failing to present substantial mitigating evidence. In addition, Hodges has demonstrated his counsel's deficiency for failing to object to clearly improper statements in the prosecutor's closing argument of the type that this Court had specifically condemned in a written opinion one year prior to Hodges' penalty phase. These deficiencies deprived Hodges of a reliable penalty-phase proceeding and undermined confidence in the death sentence. Thus, there was ineffective assistance of penalty-phase counsel under the standard set forth in and reaffirmed in the

recent decision in *Wiggins,* entitling Hodges to the benefit of a new penalty phase to determine if death is the appropriate sentence in this case.

Hodges, 885 So. 2d at 359-60 (J. Pariente dissenting, joined by J. Anstead)(emphasis in original). Justice Pariente specifically found deficient performance in her *de novo* review of Mr. Hodges' claim:

> I first address why I conclude that Hodges has demonstrated deficient performance by counsel in failing to conduct an adequate background investigation and present substantial mitigating evidence. As noted above, the facts of the case reveal that Hodges' primary motive for murdering the victim, a woman he barely knew, was to eliminate the possibility that she would testify against him on a misdemeanor indecent exposure charge. Hodges' disproportionate reaction to the threat of testimony should have been explained to the jury, particularly considering that Hodges had little prior criminal history.
>
> However, defense counsel presented only two witnesses in mitigation — Hodges' mother and brother-in-law — who provided minimal testimony regarding Hodges' relationship with his family. Based on these two witnesses' testimony, the only mitigating circumstance found by the trial judge concerned Hodges' character and dedication to his family. *See Hodges v. State,* 595 So.2d 929, 934 (Fla.1992). None of Hodges' three siblings testified during the penalty phase.
>
> This absence of meaningful mitigation stems from trial counsel's failure to investigate Hodges' school records, military records, and social and psychological history. The mental health experts retained by trial counsel to evaluate Hodges were unable to assist in mitigation primarily because defense counsel did not provide them with this critical information. Indeed, it is undisputed that trial counsel did not give the experts the names of Hodges' schools, hospitals, and treatment centers. The only information trial counsel provided to the experts in this case consisted of the Plant City Police Department records and reports, including the autopsy reports and investigative reports. Moreover, despite the fact that trial counsel knew Hodges grew up in one of the poorest and most polluted communities in the nation, counsel failed to visit the area in order to develop a meaningful understanding of Hodges' cultural and environmental influences. As revealed in the postconviction proceedings, a competent background investigation would have led to compelling mitigating evidence and placed that evidence in a context giving it greater mitigating force.
>
> We have stated that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated — this is an integral part of a capital case." *State v. Lewis,* 838 So.2d 1102, 1113 (Fla.2002). In *Wiggins,* the United States Supreme Court readdressed the standard for assessing whether counsel is ineffective for failing to present mitigation evidence in death cases. The Court stated that
>
> > [the] principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]," is not whether counsel should have presented a mitigation case. Rather, [the] focus [is] on 362*362 whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable.* In assessing counsel's investigation, [the Court] must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a

> context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," [*Strickland*], at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").
>
> 539 U.S. at 522-23, 123 S.Ct. 2527 (some citations omitted). Relying on the American Bar Association guidelines, the Court in *Wiggins* noted that efforts should be made to discover available mitigating evidence and evidence to rebut any aggravating evidence, from such sources as "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* at 524, 123 S.Ct. 2527. (emphasis omitted)
>
> This case is substantially similar to *Wiggins*. Hodges' trial counsel failed to investigate Hodges' medical or psychological history, failed to investigate Hodges' educational history, and failed to investigate Hodges' military history. Defense counsel presented no mental health testimony in mitigation of a sentence on a seemingly irrational crime committed by a person with no significant criminal history. The only means to develop a credible explanation for Hodges' actions would have been through *a thorough mental health evaluation*. As the Supreme Court recognized in *Wiggins,*"any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in [the defendant's] background." *Id.* at 525, 123 S.Ct. 2527.
>
> Indeed, at the evidentiary hearing on this issue, Hodges' own trial counsel failed to advance *any justification* for a penalty-phase strategy that involved little meaningful investigation. The State's own expert conceded the inappropriateness of counsel's conduct. Even the majority acknowledges that "[t]he mitigating evidence presented during the postconviction proceeding ... exceed[ed] the quality and quantity of that presented at trial." Majority op. at 346. In light of the almost nonexistent mitigation presented at trial and the lack of any credible reason for this failure, that characterization is an understatement. Pursuant to *Wiggins,* the decision by trial counsel at the time of Hodges' trial not to present mitigating evidence *could not have been reasonable* because the investigation on which this decision rested fell far below prevailing professional norms.

Id. at 361-2 (J. Pariente dissenting, joined by J. Anstead) (emphasis in original).

The jury at Mr. Hodges' trial should have had the opportunity to hear the mitigation evidence. The jury should have been able to listen to and evaluate the credibility of the expert witnesses. The jury should have had the opportunity to determine whether Mr. Hodges' impaired mental health warranted a life sentence. Counsel's failure to bring these issues to the jury through a mental health expert is a clear indication of counsel's deficient performance. Had trial counsel adequately investigated Mr. Hodges' background, he could have introduced compelling evidence of mitigation to the jury.

2. Prejudice.

Had counsel discovered and presented the available mitigating circumstances, there is more than a reasonable probability that the jury would have voted for life and that the balance of aggravating and mitigating circumstances would have been different. Mr. Hodges has shown that "[the] death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

At the penalty phase, trial counsel presented only two witnesses[18], Mr. Hodges' mother Lula, and his brother-in-law, Harold Stewart. His mother testified that Mr. Hodges grew up in West Virginia; that his younger brother's death changed him; that the family moved around a lot during Mr. Hodges' youth; Mr. Hodges was unable to establish any long-term friendships; and that Mr. Hodges had a good relationship with his children (R. 693-5). Mrs. Hodges' testimony is transcribed in less than three pages. Mr. Stewart testified that Mr. Hodges was a good worker; that Mr. Hodges got along well with his children and his in-laws; and that Mr. Hodges liked to fish. (R. 697-8). His testimony is transcribed in less than two-and-a-half pages. No exhibits were entered. No mental health testimony was presented.

Absolutely none of the testimony at the trial penalty phase gave the jury any notice of the extensive statutory and non-statutory mitigation available at the time of the trial and subsequently presented during the post-conviction hearing. It is important to note that trial counsel testified that he had no tactical or strategic reason for not discovering or presenting the evidence of mitigation presented during the postconviction hearing. Judge Perry testified that he would have introduced all of this information to the jury (PC-T. 394). When asked to evaluate the quality of mitigating evidence and its usefulness to a jury, Judge Perry stated, "Well, I would say good to great, depending upon the panel; and—but it certainly is something you would present." (PC-T. 410). A jury should have been permitted to evaluate this information when considering whether to sentence Mr. Hodges to life or death. Trial counsel's failure to present this evidence clearly prejudiced Mr. Hodges.

[18]The penalty phase hearing lasted less than forty-five miutes. During that forty-five minutes, the State presented three witnesses.

At the evidentiary hearing, collateral counsel presented evidence of statutory mitigation, that at the time of the crime, Mr. Hodges acted under the influence of extreme mental and emotional disturbance (PC-T. 188, 292). Through family and expert witnesses, collateral counsel also presented abundant evidence of non-statutory mitigation. The picture of Mr. Hodges that the jury should have been given was one of a troubled man who struggled throughout his life with mental illnesses and the scars of a horrible child. Mr. Hodges suffered from: 1) extreme neglect as a child and adolescent; 2) emotional abuse as a child and adolescent; 3) longstanding, chronic depression; 4) exposure to inappropriate sexual behavior; 5) exposure to aggression, violence and physical abuse; 6) exposure to a father who was a violent alcoholic; 7) exposure to care-givers who were unstable, mentally ill, or cruel; 8) exposure to and ingestion of toxic waste/chemicals; 9) brain damage and accounts of impaired behavior; 10) extreme poverty; 11) sexual molestation; 12) lack of education; 13) malnourishment and chronic sickness as a child; 14) trauma due to his brother's drowning; 15) dull normal intelligence; 16) emotional instability; 17) history of head injury/trauma; 18) multiple suicide attempts and 19) stunted personal and emotional development.

The overwhelming mitigation developed and presented by postconviction counsel could not and would not have been ignored had it been presented to the sentencing judge and jury.[19]

Prejudice is established under such circumstances.

3. Analysis under *Porter*.

[19]Further illustrating the fact that additional mitigation could have indeed made a difference, in *Hodges v. State*, 595 So.2d 929 (Fla. 1992), Justice Barkett raised the following in dissent: "Despite the fact that very little mitigation was presented, the trial judge found that Hodges was a contributing member of society, a good employee, and a good and caring husband and father to his four children. The death penalty is not to be applied to all murderers, but is supposed to be reserved only for the most egregious and heinous of criminals. Hodges did not have a criminal record and, despite his terrible crime, he does not fit that description." *Hodges*, 595 So. 2d at 935. Justice Barkett also stated in a footnote, "I believe more mitigation could and should have been presented. However, Hodges' mental condition culminating in his suicide attempt truncated the penalty phase." Id.

This Court's previous opinion merely accepts the circuit court's faulty determinations, which are not supported by the record. Neither the circuit court order nor this Court's opinion properly considered the record before it when finding that Mr. Hodges was not prejudiced by trial counsel's deficient performance. The findings in this case violate *Porter*.

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

Mr. Hodges' substantial claims of ineffective assistance of counsel have not been given serious consideration as required by *Porter*. Mr. Hodges requests that this Court perform the analysis of his claims which has as of yet been lacking and examine the significant, exculpatory evidence and mitigating personal history that is present in this case but as yet unrecognized or unreasonably discounted.

CONCLUSION

In light of the foregoing arguments, Mr. Hodges requests that this Court grant him a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Katherine Blanco, Assistant Attorney General, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, Florida 33607, on this 16th day of August, 2011.

CERTIFICATE OF FONT

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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