IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-843

PATRICK HANNON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Hannon's successive motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R."—record on direct appeal to this Court;

"PC-R."—record on 3.850 appeal to this Court following the 1999 evidentiary hearing;

"PCR2."—record on 3.851 appeal to this Court following the circuit court's denial of Mr. Hannon's successive rule 3.851 motion;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Hannon requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar 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.

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STATEMENT OF CASE AND FACTS

A. Procedural History

Mr. Hannon was charged by indictment on February 13, 1991, with two counts of first degree murder in the Thirteenth Judicial Circuit, Hillsborough County (R. 1672-74). A superseding indictment was filed on March 27, 1991 charging Mr. Hannon and co-defendant, Ronald Richardson, with the same premeditated murders (R. 1683-85). By executive order the governor assigned the State Attorney for the Sixth Judicial Circuit to prosecute the case in place of the State Attorney for the Thirteenth Judicial Circuit because of a conflict of interest (R. 1678-80). The change of State Attorney was granted because one of the State's witnesses, who was also the sister of co-defendant James Acker, was employed by the Hillsborough County State Attorney's Office (R. 1046, 1678-80, 1686-87, 1831-32).

Mr. Hannon's trial began on July 15, 1991. On July 23, 1991, the jury found Mr. Hannon guilty of two counts of first-degree premeditated murder (R. 1577, 1781-82). The entire penalty phase was held on July 24, 2991 and lasted less than thirty (30) minutes.

The jury recommended death sentences for both murder counts (R. 1587-1634, 1783-84, 1792). On August 5, 1991, the circuit court sentenced Mr. Hannon to death for both counts of murder (R. 1642, 1806-16). The trial court found three

aggravating circumstances with regard to victim Brandon Snider: 1) previous conviction of another capital felony, 2) the capital felony was committed while the defendant was engaged in the commission of the crime of burglary, and 3) the capital felony was heinous, atrocious and cruel (R. 1806). With regard to victim Robbie Carter the court found the same three aggravators and additionally found that the capital murder was committed to avoid arrest (R. 1807-8).

The trial court found only two mitigating circumstances: 1) Mr. Hannon had never been a violent person, had never tried to harm anyone and had never hurt anyone, and 2) the plea agreement between co-defendant Richardson and the State in which his murder charges were reduced to one count of accessory after the fact (R. 1807, 1809). The court rejected defense counsel's argument of residual or lingering doubt as a mitigating circumstance (Id.).

On direct appeal, this Court affirmed the conviction and sentences.[1] *Hannon v. State*, 638 So. 2d 39 (Fla. 1994). Mr. Hannon timely petitioned the United States

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[1] Mr. Hannon raised the following claims on direct appeal: (I) the trial court erred by striking prospective jurors Ling and Troxler for cause in violation of the Sixth and Fourteenth Amendments; (II) the State was improperly permitted to invade the province of the jury on the ultimate issue in this case by suggesting that State witness Toni Acker believed that Appellant might have been involved in the instant homicides; (III) the court below erred in permitting the State to introduce into evidence at Appellant's trial physical evidence and testimony that was irrelevant, prejudicial, and cumulative; (IV) Appellant's death sentences violate the Eighth and Fourteenth Amendments because the especially heinous, atrocious, or cruel aggravating circumstances is vague, is applied arbitrarily and capriciously, and does not genuinely narrow the class of persons eligible for the death penalty;

Supreme Court for writ of certiorari. The petition was denied on February 21, 1995. *Hannon v. Florida*, 115 S. Ct. 1118 (1995).

On March 17, 1997, Mr. Hannon filed his initial Fla. R. Crim. P. 3.850 motion. Mr. Hannon filed his final amended Rule 3.850 motion on April 10, 2000.[2]

(V) Appellant's sentence of death cannot stand because they are predicated, at least in part, on tainted jury recommendations, as Appellant's jury was given an unconstitutionally vague instruction on the especially heinous, atrocious, or cruel aggravating circumstance; (VI) the trial court erred in instructing the jury on and finding aggravation that the instant homicides were especially wicked, evil, atrocious, or cruel; (VII) the trial court erred in instructing Appellant's jury at penalty phase on, and finding the existence of, the aggravating circumstance that the homicide of Robbie Carter was committed for the purpose of avoiding or preventing a lawful arrest; (VIII) the trial court erred in instructin Appellant's jury at penalty phase on and finding in aggravation that Appellant was previously convicted of another capital felony based upon his contemporaneous convictions for the other homicide; (IX) the trial court's sentencing order contains insufficient factual basis and analysis to support Appellant's sentences of death; and (X) Appellant's sentences of death deny him equal justice under the law, as neither of the other participants in the events at the Cambridge Woods Apartments was sentenced to death.

[2] Mr. Hannon raised the following claims: These claims included: (I) the lack of funding to investigate postconviction claims violated Hannon's constitutional rights and the dictates of *Spalding v. Dugger*, 526 So. 2d 71 (Fla.1988); (II) requiring Hannon to file a motion under Rule of Criminal Procedure 3.851 one year after his conviction had become final violated his due process and equal protection rights; (III) Hannon was deprived of his due process rights and rights under the Fifth, Sixth, and Eighth Amendments because the State withheld evidence that was material and exculpatory or presented misleading evidence or both; (IV) Hannon was denied effective assistance of counsel pretrial and at the guilt phase in violation of his Sixth, Eighth, and Fourteenth Amendment rights; (V) Hannon was deprived of his due process rights when unreliable and nonscientific evidence was presented at his trial in violation of the Sixth and Fourteenth Amendments and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); (VI) Hannon's trial counsel was operating under a conflict of interest which violated

The circuit court held an evidentiary hearing on some of Mr. Hannon's claims on February 18, 2002 and June 21, 2002 and thereafter denied Mr. Hannon's motion on February 4, 2003.

Hannon's Fifth, Sixth, and Fourteenth Amendment rights; (VII) the State's use of jailhouse informants violated Hannon's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; (VIII) the State's use of misleading testimony and improper argument undermined the reliability of Hannon's trial; (IX) Hannon was denied effective assistance of counsel at the penalty phase and during sentencing in violation of his Sixth, Eighth, and Fourteenth Amendment rights; (X) Hannon was denied his rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), when counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health experts; (XI) Hannon's sentencing jury was misled by comments, questions, and instructions that unconstitutionally diluted the jury's sense of responsibility; (XII) the trial court erroneously found one of the aggravators to be that the murder occurred during the commission of a felony, and that finding was an automatic aggravating factor; (XIII) the avoiding or preventing a lawful arrest aggravator is unconstitutionally vague, was improperly applied, and the jury received inadequate instructions; (XIV) the trial court committed fundamental error by instructing the jury regarding the HAC aggravator when the factor did not apply, and the jury instruction was unconstitutionally vague; (XV) the jury's death recommendation was tainted by consideration of invalid aggravating circumstances; (XVI) Hannon is "innocent of the death penalty"; (XVII) the rules prohibiting Hannon's postconviction counsel from interviewing jurors to determine if constitutional error was present during his trial violated Hannon's constitutional rights; (XVIII) Florida's capital sentencing law is unconstitutional on its face and as applied because it fails to prevent the arbitrary and capricious imposition of the death penalty and violates the due process and cruel and unusual punishment clauses; (XIX) newly discovered evidence demonstrates that Hannon's convictions and sentences are constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments; (XX) Hannon's death sentences violate the Fifth, Sixth, Eighth and Fourteenth Amendments because the law shifted the burden of proof to Hannon to prove that death was inappropriate, and the trial judge used that presumption in rendering a sentence; and (XXI) the cumulative effect of the procedural and substantive errors during the trial court proceedings denied Hannon of his right to a fair trial.

On August 31, 2006, this Court issued its decision affirming the circuit court's denial of postconviction relief and denying his state petition for writ of habeas corpus in this matter. *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006).

On November 22, 2006, Mr. Hannon filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. On October 23, 2007, the United States District Court for the Middle District of Florida entered its order denying Mr. Hannon's petition.

On May 27, 2009, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Mr. Hannon's habeas petition. *Hannon v. Sec'y, Dept. of Corr.*, 562 F.3d 1146 (11th Cir. 2009). The United States Supreme Court denied his timely filed petition for writ of certiorari on November 2, 2009. *Hannon v. McNeil*, 130 S. Ct. 504 (2009).

On November 24, 2011, Mr. Hannon filed a successive Rule 3.851 motion based on the recent United States Supreme Court opinion in *Porter v. McCollum*, 130 S. Ct. 447 (2009). PCR2 140-72. The circuit court held a case management conference on February 25, 2011, and thereafter summarily denied Mr. Hannon's motion on March 23, 2011. Mr. Hannon timely filed a notice of appeal, PCR2. 292-93, and this appeal follows.

B. Trial and Sentencing

Brandon Snider and Robbie Carter lived in the Cambridge Woods Apartments (R. 373-74, 377, 398, 1838-39). On January 10, 1991, several neighbors of Snider and Carter heard and saw what they termed as unusual events. Neighbors heard crashing, breaking glass and loud voices around 10:00 p.m. (R. 270-71, 289-290, 316-17). At least one neighbor saw into the apartment and noticed an individual covered with blood (R. 272-73). A downstairs window was broken and covered with blood and an upstairs window was broken and had blood on it (R. 272, 277-78). There also appeared to be blood on the outside of the open apartment door (R. 277, 323-25). Neighbors described three unclean or unkempt men who were leaving the victims' apartment (R. 296-96, 302-3, 307, 349, 344, 348). The police arrived shortly after the three individuals were seen leaving.

Mr. Hannon was arrested on February 6, 1991 (R. 980-81, 989). According to the detective arresting Mr. Hannon, he did not know whay he was being arrested and stated that he was not guilty (R. 993). The State presented several witnesses at trial to testify about statements allegedly made by Mr. Hannon while he was in jail pending trial (R. 866-69; 876-78; 880-87; 889-90; 892-905).

Ron Richardson, Mr. Hannon's co-defendant, was arrested on March 19, 1991 (R. 999, 1014). He was expected to be a defense witness at Mr. Hannon's trial, but initially invoked his Fifth Amendment privilege not to incriminate

himself (R. 985-989). Richardson ultimately testified as a witness for the prosecution, after he entered a negotiated plea to one count of accessory after the fact and a sentence of five years in prison in return for his testimony against Mr. Hannon (R. 1139-1218). During his direct examination, Richardson implicated both Mr. Hannon and Jim Acker, a third co-defendant. On cross-examination, Richardson acknowledged that he lied to Mr. Hannon's attorney during his statement prior to trial (R. 1193-94). Richardson had told defense counsel that he and Mr. Hannon had nothing to do with the murders (R. 1194). He further told Mr. Hannon's attorney that he and Mr. Hannon played quarters, a drinking game, on the night in question until 10:00 p.m., when Mr. Hannon went to sleep (R. 1194-95).

The State also called Judith Bunker, a forensic consultant in blood stain pattern analysis and crime scene reconstruction. Trial counsel did not cross examine this witness on her supposed expertise, her methodology, and the bases for her opinion.

At the penalty phase, the State presented no additional evidence. The defense presented Toni Acker, a friend and sister of co-defendant Acker, to testify that she didn't believe Mr. Hannon was capable of murder (R. 1598). Trial counsel also presented Mr. Hannon's mother and father (R. 1599-1600). The trial court found three aggravating circumstances with regard to victim Brandon Snider: 1)

previous conviction of another capital felony, 2) the capital felony was committed while the defendant was engaged in the commission of the crime of burglary, and 3) the capital felony was heinous, atrocious and cruel (R. 1806). With regard to victim Robbie Carter the court found the same three aggravators and additionally found that the capital murder was committed to avoid arrest (R. 1807-8).

The trial court found only two mitigating circumstances: 1) Mr. Hannon had never been a violent person, had never tried to harm anyone and had never hurt anyone, and 2) the plea agreement between co-defendant Richardson and the State in which his murder charges were reduced to one count of accessory after the fact (R. 1807, 1809). The court rejected defense counsel's argument of residual or lingering doubt as a mitigating circumstance (Id.).

C. Postconviction Proceedings

The circuit court held an evidentiary hearing on Mr. Hannon's first Rule 3.851 motion in 2002. Mr. Hannon's trial counsel, Joe Episcopo, testified that at the time he was retained by the Hannons to represent Mr. Hannon, he had been a prosecutor for six years. Mr. Hannon's case was his first as a defense attorney and his first capital case that went to penalty phase (PC-R. 2696). Mr. Episcopo was unfamiliar with the law and the obligations of defending a capital defendant. Mr. Episcopo hired an investigator for the limited purpose of interviewing jailhouse snitches (See, Defense Exhibits 1, 2).

As for penalty phase preparation, Mr. Episcopo said he planned to establish that Mr. Hannon did not have the type of character to be involved in these crimes (PC-R. 2747). He said he had discussions with Mr. Hannon, his parents and his sister about what he planned to present. His discussions with Mr. and Mrs. Hannon were at the trial during breaks, and his discussion with Maureen Hannon was outside the courtroom when she was called as a defense witness at the guilt phase (PC-R. 2748).

He said his view of the penalty phase "depends on the case" (PC-R. 2749), but in Mr. Hannon's case, its purpose "was to try to save his life so that we could find the killers." When Mr. Episcopo was asked if he investigated Mr. Hannon's background, he said he knew all about his background. He knew he had a minor criminal background, which the State did not use to impeach him. (PC-R. 2749-50). He knew that Mr. Hannon had prior convictions of cocaine, burglary, and grand theft. He knew about Mr. Hannon carrying a concealed weapon (PC-R. 2750). When asked if he investigated any of Mr. Hannon's drug use, his response was "No. Of course not. It had nothing to do with our defense" (Id.). Mr. Episcopo testified that he did not obtain any of Mr. Hannon's school, military or medical records (PC-R. 2751).

Mr. Episcopo could not explain why the jury would reject Mr. Hannon's innocence defense in the guilt phase and then suddenly believe it in the penalty

phase. Mr. Episcopo said he argued lingering doubt, which he described as the "catch all." (PC-R. 2756). He said he did not consult with any attorneys experienced in death penalty litigation about what he was doing because he "didn't have a lot of confidence" in them (Id.). He was unfamiliar and never consulted the American Bar Association guidelines on how to conduct a death penalty case (PC-R. 2770). He was not familiar with *Ake v. Oklahoma* (PC-R. 2806). Mr. Episcopo specifically stated: "I don't care what the ....American Bar Association says. I don't care what anybody says. This is a decision I made. I'm the guy that makes those decisions. Not the life and death course." (PC-R. 2784).

Mr. Episcopo did not investigate Mr. Hannon's mental state or possible brain damage because he had no indication of that (PC-R. 2757). He said he spent lots of time talking with Mr. Hannon and his family and "I can determine whether somebody's whacked" (Id.). Mr. Episcopo said he questioned Mr. Hannon's parents in the hallway during trial about problems he may have had, and found no basis to investigate Mr. Hannon's mental health. "And, why would I do that anyway? We're going to get up there and say he's crazy and therefore, he shouldn't be killed? He wasn't crazy."(PC-R. 2758-59). Mr. Episcopo said he did not believe that Mr. Hannon had "a mental problem....I think I know it when I see it." (PC-R. 2759).

Likewise, Mr. Episcopo did not investigate Mr. Hannon's drug history, which he described as "standard run of the mill" (PC-R. 2760). Because he was unfamiliar with *Ake v. Oklahoma*, he did not have Mr. Hannon evaluated for any mental health issues before trial. He had no one evaluate Mr. Hannon for mitigation issues at all (Id.).

Mr. Episcopo's preparation of Mr. and Mrs. Hannon for their testimony at the penalty phase was to say, "get up there and – and remember this is our defense and basically you've just got to look at the jury and tell them what you feel from your heart. That was it" (Id.). He said the preparation did not require more than that "because they had told me he didn't do it. That was our mitigation" (Id.). Mr. Episcopo said he did not question Mr. Hannon's parents in the hallway during trial about his background because "I had no indication that it was bad" (PC-R. 2761). He didn't ask about his drug problems because he "didn't see it as relevant" (Id.). He had no indication that Mr. Hannon had been neglected.

When asked if Mr. Hannon had cocaine problems before trial, he adamantly said, "He didn't have a cocaine problem" (PC-R. 2765). He said he wasn't told by Mr. Hannon that he had had a drinking problem (PC-R. 2766). Mr. Episcopo testified that he did not know that his client began using drugs and alcohol at age 11; that he had a history of using LSD, crystal methamphetamine, hallucinogenic mushrooms, crack cocaine, and that he was paranoid when on drugs (PC-R. 2767).

He said he was never told about those drugs and “it didn’t come up because it wasn’t an issue....We weren’t exploring those things” (Id.).

Although Mr. Episcopo “expected this case to go back to trial,” and “expected that someone could come forward or there’d be a confession in jail just like you read about all the time,” (PC-R. 2786-87), he decided to present a mitigation case without having done any investigation into Mr. Hannon’s background. “So what are we going to do a background investigation for? What’s the point?” he asked (PC-R. 2805).

At the postconviction evidentiary hearing, Dr. Faye Sultan, a clinical psychologist, testified that she spent 14 hours interviewing and evaluating Mr. Hannon. She gave him an IQ test that showed him to be scattered (PC-R. 3007-8). She said she hoped to gain understanding of how Mr. Hannon, a person of normal intelligence, could behave in such a “repetitively impulsive, poorly-reasoned, self-destructive way over many years without obvious psychopathology.” (PC-R. 3009). While she found no major thought disorders, depression, or obvious mental illness, she testified that his behavior did not make sense in light of his normal intelligence. Because of the way he processed information, she suggested that Mr. Hannon be evaluated by a neuropsychologist (PC-R. 3008-9).

In her lengthy interviews with Mr. Hannon, she learned of Mr. Hannon’s illogical behaviors. She said he had a long history of fleeing his environment,

including going AWOL in the military on three separate occasions and spending six to eight years being pursued by authorities when stopping that behavior would have been a simple matter (PC-R. 3010).

She learned about Mr. Hannon's extensive drug and alcohol abuse that began at age 11 and escalated over time (PC-R. 3011). She learned that Mr. Hannon took cocaine, crystal methamphetamine, LSD, hallucinogenic mushrooms, crack, Quaaludes, and prescription drugs to stimulate himself and barbiturate for sedation purposes, in addition to alcohol and marijuana (Id.). Dr. Sultan testified that while Mr. Hannon was able to reduce his alcohol and drug consumption during the week, during the weekend, he spent an inordinate amount of time staying "very, very stoned the entire weekend." (PC-R. 3046).

Dr. Sultan also reviewed Mr. Hannon's military records, which talked about his difficulties with substance abuse and refer to his rheumatic fever; the facts of the crime; and the testimony of family members from trial. She also spoke with Mr. Hannon's parents and his two sisters, Ellen Coker and Maureen Hannon (PC-R. 3016). Dr. Sultan learned that Mr. Hannon was the youngest of four children and that his parents were distracted by illnesses and other issues. When he was 6 or 7 years old, Mr. Hannon was left for long periods of time with older sisters because his oldest sister, Stephanie, was hospitalized for scoliosis and his parents were

consumed with her illness (PC-R. 3012). During that time, there was no adult supervision in the home (Id.).

Dr. Sultan learned that Mrs. Hannon would come home from work, drink a great deal and then behave in a way that the children found "difficult, unpredictable." (PC-R. 3017-18). On one occasion, she grabbed one of her daughters by the head and smacked her head into the wall, and throwing shoes at her children was not an unusual event (PC-R. 3018). The kids lived with a great deal of uncertainty. When Patrick Hannon was himself small, the sisters recall him being pretty frightened of what was going on and coming to them for comfort or support, sometimes going to hide (Id). They remember that as he grew larger, their mother a less frightening figure physically because he grew to be a lot bigger than she was (ID.). The lack of consistency, the lack of supervision, and the lack of discipline that went on in the house greatly influenced Patrick Hannon's development. (Id.).

When Mr. Hannon was 11, his sister Maureen, the one he was closest to and dependent upon, began using drugs. Because Mr. Hannon was so dependent upon her for her approval and her company, he began using drugs with her. She introduced him to some of the drugs that he used as a young boy (PC-R. 3012). Mr. Hannon told Dr. Sultan that his parents were "chronically angry with Maureen"

since she started skipping school as a teenager and started using drugs. He recalled that it caused a great deal of stress in the home (PC-R. 3013).

Dr. Sultan learned that Mr. Hannon began to skip school around the 9th grade but when he did attend school, he had difficulty concentrating. After his family moved to Florida, he had no desire to go to school. He said he stopped learning in school in the 9th grade and then dropped out in the 10th grade. (PC-R. 3014). Dr. Sultan learned that Mr. Hannon's parents had no idea of the types of drugs he was doing when he was a teenage boy (PC-R. 3018). They did not know when he attended school, who his friends were and how he spent his time (Id.). From his children's perspective, Charles Hannon had a limited role in his children's lives. He worked all the time and appeared only one day a week, on Sunday, and that the children loved spending time with him. Patrick Hannon was eager to spend time with his father, sought his companionship and suffered because his father was not around too much. His father was also the last resort disciplinarian in the family (PC-R. 3019).

According to Dr. Sultan, Mr. Hannon's parents were so involved in Maureen Hannon's substance abuse problems that they failed to take time to notice Mr. Hannon's deteriorating condition. His parents were unaware of any of his difficulties with drugs or alcohol while he lived at home (PC-R. 3050). According

to Dr. Sultan, his parents "didn't have any idea what was happening with him." (Id.).

Dr. Sultan learned of the relationship between Patrick and Maureen and although Maureen is three years older than he is, she knew from a early age that he was not an independent thinker; that he relied on her and her friends, and relied on her judgment. Maureen felt responsible for Mr. Hannon's heavy drug use, for introducing him to destructive people who were a bad influence and who sat around and got high (PC-R. 3021). The relationship between Mr. Hannon and his sister Maureen got stronger as they got older. When Mr. Hannon went AWOL from the military, he always returned to Maureen (Id.). She became his home base. During the weeks and months leading up to the crime, Maureen did not know all the drugs that Mr. Hannon was using, but she knew that he was using a great deal of cocaine, drinking large quantities of alcohol and smoking a lot of marijuana. "She described his usage as becoming quite out of control" (PC-R. 3022). "She talked about having to call the police at some point because her brother's response to cocaine use was to become quite unreasonable, very paranoid in his thinking, irritable, difficult to deal with" (Id.).

At the time of the crimes in January, 1991, Mr. Hannon was experiencing personal and professional failures, according to Dr. Sultan. He had worked at several jobs and had been unsuccessful in the military. He relied on his sister,

Maureen and other people to structure his day for him. Dr. Sultan described him as having had “very poor skills in living” (PC-R. 3023). Mr. Hannon had used vast amounts of substances over a long period of time and his ability to reason, to use good judgment, to logically and sequentially plan something was compromised (Id.). What also was compromised was his ability under stress to think clearly and rationally. He was irritable. He was unable to focus on anything for long periods of time. He wandered from one drug experience to the next, went long periods without sleep, worked long hours and then took drugs to stay awake and put himself to sleep and then to wake up again. He wasn’t thinking too much about what he was doing (PC-R. 3023-24).

And because Mr. Hannon had been neglected as a child, without discipline, structure, and support in his early life, “he made some choices that had terrible consequences for him long-term. His early beginning of substance abuse then led him down a path through the years of not thinking clearly, of not making plans, of not formulating an adult existence. He continued to live like an adolescent right up until the point that he was arrested for this offense.” (PC-R. 3024). Dr. Sultan testified that his parents loved him, but their lack of parenting skills “had some serious consequences” (Id.). There was inadequate attention provided to the children in the family and as a consequence, “there have been some terrible life histories for those children” (PC-R. 3035-36).

Dr. Sultan found the non-statutory mitigating factors of parental neglect, lack of structure, lack of discipline, lack of guidance in his early environment, very serious childhood history of illness that interfered with his school life (PC-R. 3025). He was extremely dependent on others to help him in basic living skills, including his sister, Maureen. He was dependent on Ron Richardson for employment and supplying him drugs. (Id.). She also found that Mr. Hannon was an "extreme follower" (Id.), had severe and chronic substance abuse over a long period of time; was extraordinarily impulsive; lacked concentration; was unable to formulate goal-directed behaviors; was unable to live as an adult and had personality changes from consuming large amounts of cocaine. These personality changes—irritability, impulsivity, difficulty concentrating, and paranoid thinking impacted on Mr. Hannon's daily life. (PC-R. 3025-26).

As a final result, Dr. Sultan said that Mr. Hannon's upbringing and lack of parental involvement contributed to him making bad decisions in his life. As for his parents, "I don't think they had a clue what young Patrick Hannon's life was like, what he was doing, what he was learning, who was around him, and he wasn't able to provide that guidance himself." (PC-R. 3051-52).

Dr. Barry Crown, a clinical and forensic neuropsychologist, testified that he evaluated Mr. Hannon in 1999 and conducted a neuropsychological exam (PC-R. 2962). In addition to conducting his own psychological tests, he also reviewed the

cognitive and intellectual testing conducted by Dr. Sultan (PC-R. 2964). While he found that Mr. Hannon had average intelligence, he found what he described as "scatter" (Id.).

On the test that is most sensitive to brain damage, Mr. Hannon scored extremely low (PC-R. 2965). That meant that Mr. Hannon is having difficulty with cognitive processing. "He's having difficulty with the processing of information and with the rapid processing of information. He's pretty good when it comes to stored information, but when he has to take that information out of the storage and rapidly apply it in a new situation in a sense he falls apart." (PC-R. 2965-66).

Dr. Crown said he learned from Mr. Hannon and his records that he had been involved in various accidents and had received head trauma from those accidents. He also learned of extensive substance abuse that went back to Mr. Hannon's developmental period in his life before he was physically developed and before his brain was fully developed (PC-R. 2966). In Mr. Hannon's case, there was a significant history of consuming substances to the point of blacking and passing out before the age of 13, which is when the brain becomes fully developed. (Id.).

Dr. Crown obtained information that Mr. Hannon was using cocaine and drinking alcohol over a considerable period of time (PC-R. 2969). That combination can aggravate fibers of the brain and impact the control areas of the

brain (PC-R. 2971). Dr. Crown also learned that Mr. Hannon suffered from rheumatic fever when he was 7 years old (Id.). The fever was so severe that it impacted on his health and schooling (PC-R. 2971-72). He missed an entire year of school, and that illness can impact the functioning integrity of the brain (PC-R. 2972). In addition to the rheumatic fever at 7, Mr. Hannon began his drug history at age 11, before his adolescent growth spurt (Id.). He also consumed alcohol and drug on a continuing basis. Dr. Crown learned that Mr. Hannon lost consciousness on several occasions, including being kicked by a bull, and falling from a scaffolding. He was involved in several car accidents in which he was dazed and confused but did not lose consciousness (Id.).

Based on all of these factors, Dr. Crown opined that while Mr. Hannon's general overall cognitive processing was within the average range, it was clear that he has:

> processing deficits, meaning that when he has to deal with stored information he's pretty good at that, the stuff is in storage; but rapidly retrieving that information and applying it in a new situation is extremely difficult for him, and that's where he falls apart. He falls apart in terms of visual processing, but most particularly he falls apart in auditory processing.

(PC-R. 2974). Dr. Crown explained that when Mr. Hannon was faced with distractions, his attention became more difficult and he was unable to attend to what was happening. Dr. Crown found that these types of auditory processing and

auditory selective attention problems are related to those areas that are impaired both by drugs and by rheumatic fever. (PC-R. 2976). Dr. Crown said Mr. Hannon had difficulties arriving at logical conclusions (PC-R. 2977). He had difficulties under stress, pressure, drugs, lack of sleep, in fully comprehending information and attending to tasks (Id.). He also had difficulty picking out what to focus on (Id.). Dr. Crown testified that he would have been able to testify to his results in 1991 had he been called to do so. (PC-R. 2977-78).

Dr. Jonathan Lipman, a neuropharmacologist, also testified on behalf of Mr. Hannon. He testified that he took a detailed drug history from Mr. Hannon, that was corroborated by his sister, Maureen (PC-R. 3061). Dr. Lipman testified that he learned that Mr. Hannon had an extensive drug history that began at 11 with beer and marijuana at age 12 (PC-R. 3061-62). He described that as significant because the effects of drugs on a teenager impact their socialization, maturity and neuropsychological development (PC-R 3062). According to Dr. Lipman, it can have “some very enduring effects” (PC-R. 3062-63). For example, drinking alcohol at the age of 11 can predispose a person to alcohol abuse later on in life. The same is true of marijuana (PC-R. 3062).

In addition to alcohol and marijuana, Dr. Lipman learned that when Mr. Hannon was 13-14, he moved to Tampa (PC-R. 3064). He did well in school, but his drug use escalated. Towards the end of 9th grade, he began drinking beer,

smoking pot to excess and drinking a fortified wine called Mad Dog 20/20 (Id.). It was during this time that Mr. Hannon passed out at school drunk and was brought home by a teacher who did not notice he was drunk (Id.). At the same time, Mr. Hannon was smoking angel dust, a tranquilizer for large animals that produces dissociative anesthesia, numbness and a feeling of intoxication. It also produces a feeling of grandiosity and strength (PC-R. 3065). During the same time period, Mr. Hannon was taking hallucinogenic mushrooms and smoking up to two marijuana joints a day (PC-R. 3066-67).

At the age of 15, when he moved to Brandon, it was Mr. Hannon's practice to cruise around town, smoke marijuana and drink a six-pack of beer (PC-R. 3069). He was suspended from school for smoking marijuana, but he did not care (PC-R. 3071-72). Dr. Lipman said that sentiment of lack of concern is often found in marijuana-smoking teens (PC-R. 3072). Instead of applying himself, Mr. Hannon spent his time smoking, drinking, taking LSD and Quaaludes (Id). Dr. Lipman testified that Mr. Hannon drank a lot of vodka several nights a week when he was 16-17. While his consumption of alcohol increased, so did his use of acid. At 16-17, he used LSD 10-15 times that year, two doses at a time (PC-R. 3076-76B).

While in the military, Mr. Hannon was introduced to crystal methamphetamine, which he said he used every day for 6-7 months (PC-R. 3078). This drugs creates long-lasting highs and produces feelings of energy and elation.

It also increases anxiety and suspiciousness. Mr. Hannon used this drug for binges lasting 6 or 7 days without sleep and "that's really not good for the brain" because it causes brain damage (PC-R. 3079). Mr. Hannon would crash after 6-7 days of being high, sleep and then start the cycle over again. He snorted the drug up his nose, which produced a number of hallucinations (PC-R. 3080).

At the same time as he used this drug, Mr. Hannon also used depressants. The combination of the two drugs is called "speed balling" (PC-R. 3081). The agitation and anxiety caused by the stimulant was allayed by the tranquilizing drugs. In this combination of drugs, the depressant drug allows you take more drugs. It was at this time that Mr. Hannon also tried opium tar – raw opium (PC-R. 3082).

While AWOL from the military and working at Guantanamo Bay, Mr. Hannon moved onto cocaine, an eighth of an ounce a day, which is a significant amount. Dr. Lipman described Mr. Hannon as "high functioning." When he returned to Tampa, he began freebasing cocaine, which is much more potent and highly addictive. (PC-R. 3086). Mr. Hannon continued to use cocaine up until the time of the offense (PC-R. 3089).

Dr. Sidney Merin, a clinical psychologist, was the only witness called by the State. Dr. Merin testified that he interviewed and tested Mr. Hannon. Dr. Merin found that Mr. Hannon "was heavily into drugs, heavily into the use of alcohol.

The probabilities are he had destroyed some neurons in his brain," but not the point that it interfered with his abilities (PC-R. 3209). "We would all agree that there was drug abuse, yes" (PC-R. 3230). Dr. Merin said had he been called as a defense witness in 1991, he would have been able to take a social and drug history of Mr. Hannon and present it to the jury (PC-R. 3220).

Ellen Coker, an older sister of Mr. Hannon, testified that she and her siblings were raised in Broadalbyn, New York, a small town in upstate New York. Her father managed a grocery store and her mother worked for the phone company and did other odd jobs over the years (PC-R. 2818). Ms. Coker described the family life as "very difficult" because of catastrophic illnesses and injuries. Her oldest sister, Stephanie, suffered from a severe case of scoliosis when she was in the sixth or seventh grade. The illness lasted about two years and she was in the hospital for much of that time. "My parents were never ever home when she was in the hospital." (PC-R. 2820). She reported that her parents spent much of their time in the hospital in Schenectady, New York, a 45-minute drive from their home. While the parents were gone, the grandmother lived next door, but she never came out of her house. For the most part, Ms. Coker was responsible for watching her siblings (PC-R. 2821).

Ms. Coker described her mother as drinking a lot and every day. Both parents drank when they came home from work. She described it as "routine."

(PC-R. 2822). She described her mother's drinking as "very excessive to the point where my mother at one time admitted to me herself that she thought she had a drinking problem" (PC-R. 2851). She used the word "unpredictable" to describe her mother (Id.). Ms. Coker said the children received severe beatings on many occasions when her parents drank (PC-R. 2822). She said they were beaten for the "slightest infraction of their rules....especially my mother. My dad was like a last resort if she couldn't handle the situation. She regularly did it. That was her way of dealing with it. I mean no questions asked. Just boom. You got it." (PC-R. 2822-23). She described that her mother would "just grab you by the back of your hair and slam your head in the wall." (PC-R. 2835). Her mother did this to her "many times" (Id.). She said if she or her sisters were a few minutes late or if their mother was upset, her mother would stand at the top of the stairs and swing spiked high-heeled shoes at the girls. She said her father would beat the children with a belt, but not that often.

Ms. Coker had no memory of her parents being affectionate or telling her they loved her. "To this day I don't think I have ever heard those words from either of my parents." (PC-R. 2823). Ms. Coker testified that Mr. Hannon was closest to his sister, Maureen, and he was very protective of her. While growing up, Mr. Hannon was also very close to a cousin named Andy, a Vietnam veteran, who was

much older than Mr. Hannon. Andy committed suicide, which hurt Mr. Hannon a great deal. (PC-R. 2823-26).

During this time, Ms. Coker recalled Mr. Hannon drinking alcohol to the point that he got drunk. He was still a teenager and was supposed to be going to school but she knew that he was not. “Half a school year had passed before [Mrs. Hannon] figured out he wasn’t going to school.” (PC-R. 2830). Ms. Coker said that her mother was very upset but she “turned the other cheek” (Id.). She figured that he was old enough to do what he wanted and “she washed her hands of it.” (Id.).

Ms. Coker said she knew the type of lifestyle that her brother was living in 1990. He was drinking and using drugs “excessively” (PC-R. 2832-33). He often switched jobs, moved from place to place and lived an unstable life (PC-R. 2833). In the months leading up to the crimes, Mr. Hannon was “drinking. He was doing coke, smoking dope. At that point it was anything that I’m aware ...it was basically he was in a stage where it was, hey, anything goes, you know. I didn’t approve of that.” (PC-R. 2850).

Maureen Hannon, Patrick’s closest sibling, testified that their early home life was normal. The kids went to school, the parents worked and the kids had chores, but she said that her parents were not very involved in their lives. If the school called with a problem, it was dealt with, but generally, “everything just kind of went along.” (PC-R. 2910). She described her parents as “clueless” (PC-R. 2946).

Maureen recalled when her sister, Stephanie, was sick in the hospital. She and her brother and Ellen were home a lot without her parents (PC-R. 2911). She has no recollection of going to the hospital to visit her sister (Id.). She said her mother drank the minute she got home from work until she went to bed (PC-R. 2913). She had little interaction with the kids unless one of them got in trouble (Id.). Maureen testified that the girls were treated differently from Patrick because he was the baby of the family and because he was a boy. In her parent's eyes, "Pat never did anything wrong...Anything he did do that he got caught doing was somebody else's fault." (Id.). Maureen said she was the one who was usually blamed for the problems.

When Maureen was in the seventh grade, she began getting in trouble in school. Her mother told her she did not hang out with the right kids and that her grades were not what they were supposed to be (PC-R. 2916). Maureen said it "got out of control," by the time she was in the 8th grade and "things were beyond repair" (PC-R. 2917). Her parents first kicked her out of the house when she was 15. She went to a nearby town where she stayed with friends, drank and did drugs (PC-R. 2917-18). She said that sometimes her brother would join her, but that her parents did not know about it. On several occasions, Maureen said she ran away to Florida, often hitchhiking. She was caught and sent back on a bus and considered an out-of-state runaway. She didn't return home when she went back, but went to

live with friends (PC-R. 2919-20). Before she turned 16, she was kicked out for good. She said she didn't even know that her parents had moved to Florida (PC-R. 2940).

When Patrick was in the 8th grade in Tampa, he and Maureen were drinking alcohol, including beer and Mad Dog 20/20 (PC-R. 2921). At that time, they also smoked pot, ate mushrooms, and took acid. Her parents never caught them taking drugs (PC-R. 2921-23). Maureen testified that she and Patrick came home drunk many times, and her parents sometimes knew what was going on. Maureen was eventually thrown out of the house again (PC-R. 2924).

It was during this time that Patrick stopped going to school. Mr. Hannon caught Patrick and learned that he had never registered in school that year (PC-R. 2924). Because it was close to his 16th birthday, his parents thought there was nothing they could do. Maureen testified that her brother began work and moved around from job to job. She said his drug use escalated over the years (PC-R. 2926). Patrick was close to Ronald Richardson, who was 20 years his senior. He helped Patrick find work at the slaughterhouse and their relationship was like that of brothers (PC-R. 2928). In 1990 and the time leading up to the murders, Patrick was drinking alcohol on a regular basis. He also was doing cocaine on a daily basis and LSD. Maureen noticed that while on cocaine, Patrick became irritated and edgy (PC-R. 2929-30).

Maureen testified that she was called as a defense witness at Mr. Hannon's guilt phase, but not asked to testify at penalty phase (PC-R. 2931). She said she spoke with Mr. Episcopo several times, but he never asked her about her brother's drug or alcohol use leading up to the murders; he never asked her about growing up in upstate New York or the relationship with her parents (PC-R. 2932).

Mr. Hannon's parents did not know too much about their son as he grew up. Charles Hannon, Mr. Hannon's father, testified that he was a store manager in a grocery store and at one time, worked three jobs at once. He only saw his children one day a week on Sundays (PC-R. 2988-89). By the time he got home each night, the children were asleep. Charles Hannon said he didn't see how the children responded to Stephanie's illness, but that they were kept from it, for the most part (PC-R. 2890). He described the difficulties he and his wife had with their daughter, Maureen. They initially learned of her problems when someone called to say that she had passed out. She was taken to the hospital and "I guess it was from alcohol" (PC-R. 2891). Maureen continued her behavior and began running away from home. She was 13 at the time and Patrick was about 9 (Id.).

Charles Hannon said he did not know that his son was doing drugs and alcohol or that his son was smoking marijuana at age 12 (PC-R. 2892). He did not know that his son was eating hallucinogenic mushrooms; that he drank a six pack each night; that he was taking LSD or crystal methamphetamine (PC-R. 2894-95).

He was not aware that his son had to repeat any grades in school, although Mr. Hannon did repeat a grade when he was seven years old (PC-R. 2895).

Charles Hannon said Patrick went to school regularly until the family moved to Florida. Charles Hannon said he learned of his son cutting school when he saw him walking the streets. Patrick told him that he didn't feel like going that day and Charles Hannon believed him and thought that he returned to school, but he later learned that he did not (PC-R. 2892-93). Charles Hannon was never told that his son did not go to school. He never asked him about homework, and didn't recall seeing report cards (PC-R. 2893). Charles Hannon said he worked from 11 a.m. until midnight and he only saw his son on Saturdays (PC-R. 2894).

Barbara Hannon, Patrick Hannon's mother, testified that her son developed rheumatic fever when he was 7 or 8 years old and he was out of school for several months. When he was 10 years old, his sister Maureen began cutting school and running away from home. Patrick took care of Maureen, even though she was 3 years older than he was. Patrick had his own friends, but eventually, he became friends with Maureen's friends (PC-R. 2859-60).

In 1978, when Patrick was 14, the family, including Patrick and Maureen, moved to Florida. Mrs. Hannon did not know that Patrick was doing drugs at the time. Her husband still worked long hours and she said no one kept an eye on Patrick. "He was, you know, right there with Maureen. That was about it." (PC-R.

2861). Mrs. Hannon knew that Maureen was doing drugs at the time because she was smoking marijuana in the house and bringing boys into the house (PC-R. 2861-62).

While the family lived in Brandon, she said they learned that Patrick was not going to school. Mr. Hannon caught him some place where he should not have been. Mr. Hannon took his son back to school, and found out he had been suspended, "which we didn't know. Well, we knew he was suspended for smoking, but we hadn't realized it was for marijuana" (PC-R. 2862). Mrs. Hannon did not know that her son was drunk at school. She did not know that he was eating hallucinogenic mushrooms or doing other drugs (PC-R. 2863). She never got a call from a guidance counselor or principal asking about her son's whereabouts (Id.). She did not notice that he wasn't bringing homework or report cards home. When he was 17, she knew that he drank alcohol and that he grew marijuana in the backyard (PC-R. 2881).

Mrs. Hannon acknowledged that she used to drink a lot of wine and that her husband drank beer, but that he was not home that much (PC-R. 2866). When she was asked on cross examination if she thought she was an alcoholic, she said no, but then added, "Of course, I could have been," (PC-R. 2868). On cross examination, she also acknowledged throwing things at her kids, mostly out of anger (PC-R. 2872-73).

SUMMARY OF THE ARGUMENT

The United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Hannon's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). *Porter* establishes that the previous denial of Mr. Hannon's claims that he did not receive a reliable sentencing proceeding was premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984).

STANDARD OF REVIEW

Mr. Hannon has presented several issues which involve mixed questions of law and fact. Thus, a de novo standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

ARGUMENT

THE U.S. SUPREME COURT'S DECISION IN *PORTER V. MCCOLLUM* DEMONSTRATES THAT THIS COURT FAILED TO CONDUCT A PROPER PREJUDICE ANALYSIS UNDER *STRICKLAND* WHEN CONSIDERING MR. HANNON'S PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A. *Porter v. McCollum*

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limiting the circumstances under which a defendant may obtain relief in federal habeas proceedings. Under the AEDPA, any claim that was adjudicated on the merits must be reviewed in accordance with certain limitations:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). It was in the context of this strict standard that the United States Supreme Court agreed with the district court's grant of relief in *Porter v. McCollum:* "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 either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter v. McCollum*, 130 S. Ct. 447, 454-55 (2009). This was not simply a case in which the high court merely disagreed with the outcome or even a case where the United States Supreme Court decided that this Court's decision in *Porter v. State* was just wrong. Rather, the United States Supreme Court held that the decision was so unreasonable that the usual concerns of federalism, as codified by the AEDPA, were not sufficient to allow the death sentence to stand.

In *Strickland v. Washington*, the United States Supreme Court found that, in order to ensure a fair trial, the Sixth Amendment requires that defense counsel provide effective assistance to defendants by "bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 685 (1984). Where defense counsel renders deficient performance, a new resentencing is required if that deficient performance prejudiced the defendant such that confidence is undermined in the outcome. *Id*. at 694. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

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

Id. at 695.

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

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

B. Mr. Hannon's *Porter* claim is cognizable under *Witt* and rule 3.851

The *Porter* decision establishes that the previous denial of Mr. Hannon's claims that he did not receive a reliable sentencing proceeding was premised upon this Court's case law which misread and misapplied *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Hannon's *Porter* claim cognizable in these postconviction proceedings. *See Witt v.*

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

The circuit court denied Mr. Hannon's *Porter* claim, finding the motion to be "untimely, successive, and procedurally barred." (PCR2. 290). However, in *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925. This Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* (quotations omitted).

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," *id*. at 928, this Court declined to follow the line of United States Supreme Court cases addressing the issue, which it characterized as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

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

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

are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Witt*, 387 So. 2d at 929. The Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to the Florida Supreme Court and the United States Supreme Court. *Id.* at 930. This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931.

After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas

relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock*, a death sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *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).

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider

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

This Court found that *Hitchcock* "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. Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's

decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every 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.

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 too did *Porter*. 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 subsequent decision further explaining *Porter* that issued in *Sears*. As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* 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.

C. *Porter* is not limited to its facts

The circuit court erred in finding that the opinion in "*Porter* merely applied the *Strickland* analysis to the particular facts of Porter's case, and found that the Florida Supreme Court was incorrect in its *Strickland* analysis as to Porter's case." (PCR2. 290). Mr. Hannon has not argued or suggested that *Porter* represents a change in the evaluation of prejudice under federal law; rather, it represents a change in how **this Court** has approached that analysis under *Strickland*. In other words, the fact that this Court cited to *Strickland's* test does not mean that the required painstaking search for constitutional error has taken place. *See, e.g., Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). In *Sears v. Upton,* the United States Supreme Court noted 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.**" *Sears,* 130 S. Ct. at 3264 (emphasis added). The finding that Mr. Hannon's claim is procedurally barred was based on the lower court's misunderstanding of the claim. (PCR-4. 70).

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. In *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004) this Court relied upon the language in *Porter v. State* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

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

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

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, this Court relied upon that very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923. *Porter v. State* was not an aberration; rather, it was based on this Court's case law. *Id.* at 923.

D. *Porter* requires a re-evaluation of Mr. Hannon's penalty phase ineffective assistance of counsel claim

The evidence presented by Mr. Hannon in postconviction established the domination of Mr. Hannon by co-defendant Ron Richardson; a history of chronic and severe drug and alcohol abuse; intoxication at the time of the crime; parental neglect; a dysfunctional family; an alcoholic mother and absentee father; and neurological impairments resulting in poor impulse control and flawed decision making. Mr. Hannon was an extreme follower and dependent on others to assist him with basic living skills. Yet this Court affirmed the circuit court's denial of

relief on the ground that trial counsel's failure to present this evidence in mitigation was the result of a reasonable strategy, i.e., following the guilt phase innocence defense by demonstrating that Mr. Hannon was not at the crime scene and did not have the type of character to commit the murders, and that Mr. Hannon suffered no prejudice from the failure to present mitigation evidence. *Hannon v. State*, 941 So. 2d 1109 (Fla. 2006).

This Court's analysis of counsel's deficient performance and prejudice was an unreasonable application of *Strickland*, in violation of *Porter*, because this Court relied on the assumption that trial counsel's strategy was reasonable, i.e., that it was reasonable not to investigate or present evidence of mitigation because it would only damage the integrity of Mr. Hannon's innocence defense. Since this Court affirmed the lower court's finding that Mr. Hannon's trial counsel's performance was not constitutionally deficient, the court has had the opportunity to address two similar cases and grant penalty phase relief in both. In *Hurst v. State*, 18 So. 3d 975 (Fla. 2009), this Court granted penalty phase relief to Hurst after finding that Hurst was denied the effective assistance of counsel at the penalty phase of his trial. Like Mr. Hannon's counsel, Hurst's trial counsel based both his guilt phase and penalty phase cases on a claim of innocence. In the penalty phase, Hurst's counsel presented Hurst's mother, sister, and father, who testified that as a child, Hurst was a good boy; he helped take care of his siblings and the house; he

attended church regularly; he was emotionally immature; and that he was slower than other children. In postconviction, Hurst alleged that his trial counsel failed to adequately investigate and present mental mitigation evidence of his low IQ, borderline intellectual functioning, and possible organic brain damage caused by fetal alcohol syndrome, and that had this mitigation evidence been presented at trial, there was a reasonable probability that the jury would have recommended a life sentence. This Court agreed, and vacated his death sentence and remanded the case for a new penalty phase.

In both Hannon's and Hurst's cases, the trial attorneys presented negligible mitigation evidence because they both labored under the misguided impression that consistency with the guilt/ innocence phase defense was more important than investigating and presenting compelling mitigation evidence. Neither trial attorney presented any mental health mitigation, despite the fact that in both cases, a great deal of compelling mental health mitigation existed. Hurst's trial counsel testified at the evidentiary hearing that he personally saw nothing that would have required a psychiatric or psychological evaluation. Likewise, Mr. Hannon's trial counsel testified that he did not seek a mental health evaluation for Mr. Hannon because he spent lots of time talking with Mr. Hannon and his family and could "determine whether somebody's whacked." (PCR. 2757).

The difference in outcome between Mr. Hannon's case and *Hurst*

emphasizes the *Porter* error in Mr. Hannon's case. In *Hannon*, this Court discounted the mitigation, failing to recognize the effect it may have had on the jury to not only find no prejudice, but to deem counsel's innocence strategy reasonable; whereas in *Hurst*, the Court relied on the significance of the mitigation to find counsel's strategy unreasonable.

In *Ferrell v. State*, this Court reiterated that "a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed." 29 So. 3d 959, 982 (Fla. 2010). In affirming the circuit court's granting of penalty phase relief on the grounds that Ferrell's waiver of mitigation was not knowing, voluntary, and intelligent, the Court relied on "the complete absence of any evidence that counsel meaningfully investigated mitigation in order to ensure that Ferrell's waiver was knowing and voluntary." *Id*. at 983. Like Ferrell's counsel, Hannon's counsel failed to conduct any mitigation investigation whatsoever and was therefore unaware of the large amount of mitigation evidence available when he limited his penalty phase case to eliciting testimony regarding residual doubt, an invalid mitigating circumstance. Like Ferrell, therefore, Hannon could not make a knowing waiver of mitigation due to his attorney's failure to conduct a reasonable investigation.

There is simply no meaningful basis upon which to distinguish Mr. Hannon's case from Ferrell's and Hurst's cases, except to find that the Court committed *Porter* error in Mr. Hannon's case. Under *Porter/Kyles/Sears*, it is clear that this Court must search with painstaking care for a constitutional violation by engaging with mitigating evidence, rather than postulating ways in which the evidence might not be mitigating.

The Court's findings with respect to deficient performance are so intertwined with its conclusions with respect to the validity of the mitigation evidence now presented that those findings necessarily fail under *Porter* as well. This Court found that "trial counsel in this case testified that his primary goal was to convince the jury that Hannon was not at the crime scene and that he was not the type of person to commit these murders, and that counsel intentionally sought to avoid contradicting that defense by presenting witnesses to testify that Hannon had used illegal drugs, was unstable, failed at school, or was abused." *Hannon v. State*, 941 So. 2d 1109, 1131 (Fla. 2006). The Court's oversimplistic characterization of the evidence in and of itself demonstrates its failure to engage with the mitigating evidence. Ultimately, in finding trial counsel's continuing innocence strategy reasonable, the Court deemed Mr. Hannon's alcohol and drug abuse lawless conduct that only "operate[s] to be aggravating in the eyes of a lay jury" *Hannon*, 941 So. 2d at 1130. This Court inappropriately discounted the mitigating evidence

in order to find that counsel's lingering doubt theory was reasonable. Furthermore, the Court viewed the mitigation presented at the postconviction evidentiary hearing through the lens of trial counsel's claimed strategy instead of in light of *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) and *Lockett v. Ohio,* 438 U.S. 586 (1978), which require the sentencing judge and jury to consider any aspect of a defendant's character or record and any of the circumstances of the offense. As a result, the court did not undertake the probing, fact-specific analysis required by *Porter*.

As in *Porter*, there simply exists too much mitigating evidence that was not presented at trial to now be ignored. As the United States Supreme Court pointed out in *Porter*, "[u]nder Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating." *Porter*, 130 S. Ct. at 454. Yet, this Court's findings in Hannon are directly contrary to Porter's dictates:

> The postconviction testimony presented failed to establish the existence of statutory mental health mitigation (and indeed underscored Hannon's average intelligence and ability to reason), no expert was able to identify any significant brain damage, and there was contrary evidence. Even Dr. Crown, who arguably provided the most favorable testimony for Hannon, could *not* translate any brain damage as having any conceptual or actual impact on Hannon's behavior, and there was no evidence to establish any nexus between Hannon's mental health and his behavior or as it related to the crimes. Therefore, portraying Hannon as a drugged-out individual who had been involved in prior bad acts would

> have been more harmful, especially considering that the mental health implications were so equivocal.

Hannon v. State, 941 So. 2d 1109, 1135 (Fla. 2006). This is precisely the type of analysis rejected in *Porter*. Even if, in Mr. Hannon's case, the mitigation presented at the evidentiary hearing may not have risen to the level of statutory mitigation, it should have been considered as nonstatutory mitigation rather than entirely discounted, especially given that the only mitigation heard by the jury at the penalty phase—a jury that already found Mr. Hannon guilty—was that Mr. Hannon was innocent and did not have the character to commit the crime for which the jury had convicted him. Instead, this Court merely rejected the evidence as not compelling, without any consideration of the impact it may have had on the jury.

The evidence presented in postconviction showed that at the time of the crime, Mr. Hannon was under the domination of co-defendant Richardson, was intoxicated, and suffered from neurological impairments resulting in poor impulse control and flawed decision-making was directly relevant to Mr. Hannon's state of mind at the time of the crime. Had this mitigation been presented to the sentencing jury, which had already rejected Mr. Hannon's innocence defense, it would have provided a reasonable explanation as to how Mr. Hannon could have ended up being involved in the crime for which they convicted him. This Court's failure to conduct the probing, fact-specific prejudice analysis was an unreasonable

application of *Strickland*, as set forth in *Porter*. The evidence must be re-evaluated in light of *Porter*.

CONCLUSION

Based on the foregoing, Mr. Hannon respectfully requests that this Honorable Court find that the *Porter* claim is properly before this Court and grant a new penalty phase based on the deprivation of the effective assistance of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Katherine V. Blanco, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33601 this __ day of August, 2011.

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